IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NORTHEAST OHIO COALITION FOR THE HOMELESS, et al., Plaintiffs, v. CITY OF CLEVELAND, Defendant.	CIVIL ACTION NO. 1:94 CV 2008 JUDGE JUDGE ALDRICH

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM OF LAW

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NORTHEAST OHIO COALITION FOR THE HOMELESS, et al.,	)	
Plaintiffs,	)	CIVIL ACTION NO. _____
v.	)	JUDGE _____
CITY OF CLEVELAND,	)	
Defendant.	)	

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, Plaintiffs move this Court for a preliminary injunction enjoining the Defendant City of Cleveland from enforcing its peddler's license fee against two groups of newspaper street vendors: those who distribute The Homeless Grapevine and those who sell a Nation of Islam publication known as The Final Call. A supporting memorandum of law is attached.

Pursuant to Rule 65(c), Plaintiffs request that security for this injunction be set at a minimal rate of $50.00.

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION[1]

Plaintiffs submit this memorandum of law in support of their motion for a preliminary injunction barring the Defendant City of Cleveland from enforcing its peddler's license fee against street vendors of The Homeless Grapevine and a Nation of Islam publication known as The Final Call. Despite 51 years of judicial precedent barring the application of such license fees against newspaper street vendors, and despite being apprised of the governing case law, the City persists in enforcing its ordinance against homeless and/or destitute individuals who distribute the Grapevine and

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[1] In preparing this brief, invaluable legal and historical research were furnished, respectively, by ACLU Law Clerk Robin Bruckmann and ACLU Intern Ted Folkman.

against Nation of Islam members who sell The Final Call. Given the City's wanton disregard of controlling Supreme Court precedent, Plaintiffs are left with no choice but to seek injunctive relief.

II. FACTUAL BACKGROUND

A. Parties

Plaintiff Northeast Ohio Coalition for the Homeless ("NEOCH") is a non-profit advocacy group for the homeless. NEOCH publishes a newspaper known as The Homeless Grapevine.

Plaintiff Richard Clements is a resident of Cleveland who, over the past several years, has frequently been homeless. Mr. Clements often distributes The Homeless Grapevine -- and, for distributing that newspaper, he has been ticketed and prosecuted by the City of Cleveland for "peddling without a license."

Plaintiff Fruit of Islam of Muhammad's Mosque No. 18 ("Fruit of Islam") is a non-profit membership organization that is affiliated with the Nation of Islam. Fruit of Islam members disseminate the Nation of Islam's political and religious message by selling a variety of publications -- including a newspaper known as The Final Call -- and also by selling audio and video tapes of speeches by Nation of Islam leaders, primarily Minister Louis Farrakhan.

Plaintiff Steven D. Hill is a Fruit of Islam member. For selling The Final Call, he has frequently been ticketed and

prosecuted by the City of Cleveland for "peddling without a license."

Defendant City of Cleveland ("the City") is a charter municipality organized pursuant to the Home Rule provisions of Article XVIII, Section 7 of the Ohio Constitution.

B. The Homeless Grapevine

The Homeless Grapevine is distributed exclusively by homeless and/or destitute individuals. NEOCH's purpose in publishing the Grapevine is twofold: to publicize the plight of the homeless, and to provide homeless persons with a vehicle for soliciting charitable donations by which to maintain their individual sustenance.[2]

Those who distribute the Grapevine obtain copies from NEOCH for 10 cents apiece. They distribute the newspaper on public sidewalks, offering it to passers-by in exchange for charitable donations. The Grapevine bears no sale price; instead, each issue contains the following language in the upper right-hand corner of its cover page: "Donations Only[;] $1.00 Suggested."[3] All such donations remain with the homeless individual. They are not to be returned to NEOCH.[4]

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[2] Affidavit of Bryan Gillooly, NEOCH's Executive Director, at ¶ 3. The Gillooly Affidavit is attached to the Complaint as Exhibit A.

[3] The cover of a recent Grapevine issue is attached to the Complaint as Exhibit B.

[4] Gillooly Affidavit, ¶¶ 4, 6.

Over the past few months, Grapevine distributors have notified NEOCH that Cleveland police officers are requiring them to produce a peddler's license. When the distributor acknowledges that he does not have such a license, the officer orders him to cease distributing the Grapevine. Some have received tickets for peddling without a license.[5]

The $50.00 fee for obtaining a peddler's license (Cleveland Municipal Code § 675.03(f)) is far beyond the means of most, if not all, Grapevine distributors. Moreover, such a fee would destroy any economic incentive that a homeless and/or destitute person would have for distributing the Grapevine in the first place.[6] NEOCH is financially incapable of purchasing a peddler's license for each of the individuals who distribute the Grapevine.[7]

Third District Police Commander Martin Flask, who oversees Cleveland's downtown area, has acknowledged that his officers are enforcing the peddler's license fee against Grapevine distributors.[8]

On May 17, 1994, Plaintiff Clements was distributing copies of the Grapevine when he received a ticket for peddling without a

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[5] Gillooly Affidavit, ¶ 7.

[6] Gillooly Affidavit, ¶ 8.

[7] Gillooly Affidavit, ¶ 9.

[8] Vendor Law Hurts Paper, [Cleveland] Plain Dealer, June 22, 1994 -- attached to the Complaint as Exhibit C.

license. His lawyers moved to dismiss the prosecution and, on August 8, City prosecutors voluntarily dropped the charges.[9]

Despite the dismissal of those charges, Cleveland Safety Director William Denihan asserted only seven days later that police will continue enforcing the peddler's license fee against Grapevine distributors.[10]

Two days after Mr. Denihan's assertion, undersigned counsel sent a demand letter to City officials. The letter enclosed a legal brief demonstrating that enforcement of the peddler's license fee against Grapevine distributors is barred by both the First Amendment to the U.S. Constitution and Article I, § 11 of the Ohio Constitution. The letter urged City officials to cease enforcement of the peddler's license fee against Grapevine distributors.[11]

Seven days after her office received the demand letter, Chief Assistant City Law Director Kathleen Martin asserted that Grapevine distributors still face prosecution for peddling without a license.[12]

If the City continues to enforce its peddler's license fee against Grapevine distributors, publication and distribution of the

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[9] Cleveland Ducks Ruling on Homeless Peddlers, [Cleveland] Plain Dealer, Aug. 9, 1994 -- attached to the Complaint as Exhibit D.

[10] Grapevine Pressed for Cash, Like Homeless, [Cleveland] Plain Dealer, Aug. 16, 1994 -- attached to the Complaint as Exhibit E.

[11] A copy of the demand letter, dated August 17, 1994, is attached to the Complaint as Exhibit F.

[12] Man Says He Was "Dumped" by Police, [Cleveland] Plain Dealer, Aug. 25, 1994 -- attached to the Complaint as Exhibit G.

newspaper will be forced to cease. The costs imposed by such regulation will be so prohibitive -- both to NEOCH and to the homeless individuals who distribute the Grapevine -- that NEOCH will have no choice but to abandon the enterprise.[13]

C. The Final Call

The Final Call is one of the primary means by which the Nation of Islam disseminates its religious and political message. Here in Cleveland, The Final Call is sold on public streets and sidewalks by Fruit of Islam members.[14]

Final Call vendors keep only a fraction of their sales proceeds, delivering the remainder to Mosque No. 18. Though the newspaper is sold for $1.00, vendors earn only 30 cents for each copy they sell. Moreover, Fruit of Islam members are expected to donate $50.00 per week to the Mosque. Under these arrangements, Final Call vendors are able to maintain only a subsistence living. Accordingly, the $50.00 that the City requires for a peddler's license is beyond the means of most, if not all, Final Call vendors.[15]

Plaintiff Steven D. Hill is a Fruit of Islam member who regularly sells The Final Call on the public streets and sidewalks

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[13] Gillooly Affidavit, ¶ 10.

[14] The front cover of a recent Final Call issue is attached to the Complaint as Exhibit H.

[15] Affidavit of Steven D. Hill, ¶ 6. The Hill Affidavit is attached to the Complaint as Exhibit I.

of Cleveland. He does not have a peddler's license. He cannot afford the $50.00 fee that the City requires for such a license.[16]

Over the past three years, Plaintiff Hill has been ticketed and prosecuted numerous times for "peddling without a license." At the moment, at least two such prosecutions are pending against him.[17] Both of those prosecutions stem from tickets issued after undersigned counsel's August 17, 1994 demand letter to City officials. That demand letter specifically referred not only to The Homeless Grapevine, but also to "Nation of Islam publications."[18]

Whenever Plaintiff Hill has received a ticket for peddling without a license, the only items he was offering for sale were The Final Call and/or audio and video tapes of speeches by Nation of Islam leaders, primarily Minister Louis Farrakhan.[19] Plaintiff Hill's experience is hardly unique; his brethren in the Fruit of Islam are likewise frequently ticketed and prosecuted for peddling without a license.

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[16] Hill Affidavit, ¶¶ 3-4.

[17] Hill Affidavit, ¶ 4.

[18] See page 1 of the demand letter, attached to the Complaint as Exhibit F.

[19] Hill Affidavit, ¶ 5.

III. STANDARDS FOR GRANTING A PRELIMINARY INJUNCTION

In this Circuit, four factors must be considered and "carefully balanced" in determining whether a preliminary injunction should be issued:

> (1) the likelihood of plaintiff's success on the merits;
>
> (2) whether the injunction will save the plaintiff from irreparable injury;
>
> (3) whether the injunction would harm others; and
>
> (4) whether the public interest would be served by issuing the injunction.

Frisch's Restaurant, Inc. v. Shoney's, Inc., 759 F.2d 1261, 1263 (6th Cir. 1985); In re DeLorean Motor Co., 755 F.2d 1223, 1228, 1229 (6th Cir. 1985)(upholding grant of preliminary injunction); Cripps v. Seneca County Board of Elections, 629 F. Supp. 1335, 1340 (N.D. Ohio)(granting preliminary injunction). As the Sixth Circuit has observed:

> The varying language applied to the likelihood of success factor can best be reconciled by recognizing that the four considerations applicable to preliminary injunction decisions are factors to be balanced, not prerequisites that must be met. Accordingly, the degree of likelihood of success required may depend on the other factors.

DeLorean, 755 F.2d at 1229 (emphasis added). Accord: Frisch's Restaurant, 759 F.2d at 1263 (balancing the factors); Cripps, 629 F. Supp. at 1340 (balancing the factors).

This memorandum will now address each of the four factors to be balanced in determining whether a preliminary injunction may be granted. We will begin with a discussion of the constitutional merits of this case, and proceed to demonstrate that our likelihood of success is extremely high -- indeed, 51 years of judicial precedent dictate such a result. We will go on to demonstrate that the remaining factors likewise weigh in favor of granting the requested injunction.

IV. FIFTY-ONE YEARS OF JUDICIAL PRECEDENT AFFORD PLAINTIFFS AN OVERWHELMING LIKELIHOOD OF SUCCESS ON THE MERITS.

This case presents a constitutional question that is hardly novel; indeed, it was decided 51 years ago by the U.S. Supreme Court.[20] The question is whether a city can impose a license fee as a precondition for exercising the First Amendment right to disseminate ideas on public streets and sidewalks. Time and time again in American history, municipalities have employed such license fees to discourage sidewalk sales of newspapers, books, and pamphlets by a veritable Who's Who of unpopular groups: Jehovah's Witnesses,[21] Black Panthers,[22] anti-war activists,[23]

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[20] Murdock v. Pennsylvania, 319 U.S. 105 (1943)(rejecting -- under the First Amendment -- the application of a peddler's license fee to sidewalk and house-to-house sales of religious literature by Jehovah's Witnesses).

[21] Murdock v. Pennsylvania, 319 U.S. 105 (1943); Follett v. Town of McCormick, South Carolina, 321 U.S. 573 (1944)(rejecting -- under the First Amendment -- the application of a license fee to sidewalk and house-to-house sales of religious literature by a Jehovah's Witness); Zimmerman v. Village of London, 38 F. Supp. 582 (S.D. Ohio 1941)(rejecting -- under the First Amendment -- the

Socialists,[24] and Christian Fundamentalists.[25] Time and time again over the past five decades, courts have declared these enforcement efforts unconstitutional.[26]

This case is no different than the foregoing disputes; only the unpopular groups have changed. Targeted for suppression here are the twin pariahs of the Nineties: the homeless and the Nation of Islam. This brief will demonstrate that the City's enforcement of its peddler's license fee against those who distribute The

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application of a peddler's license fee to door-to-door sales of religious literature by Jehovah's Witnesses).

[22] Hull v. Petrillo, 439 F.2d 1184 (2d Cir. 1971)(recognizing that city could not constitutionally apply its peddler's license fee to sidewalk sales of the Black Panther Party's newspaper -- to do so would offend the First Amendment).

[23] Gall v. Lawler, 322 F. Supp. 1223 (E.D. Wis. 1971) (rejecting -- under the First Amendment -- the application of a peddler's license fee to sidewalk sales of an "underground" newspaper).

[24] City of Bowling Green v. Lodico, 11 Ohio St. 2d 135 (1967)(rejecting -- under both the First Amendment and Article I, § 11 of the Ohio Constitution -- the application of a peddler's license fee to sidewalk sales of Young Socialist Magazine).

[25] City of Cincinnati v. Mosier, 61 Ohio App. 81 (Hamilton Cty. 1939)(rejecting -- under both the First Amendment and Article I, § 11 of the Ohio Constitution -- the application of a peddler's license fee to sidewalk sales of religious literature). Accord: Holy Spirit Association for the Unification of World Christianity v. Hodge, 582 F. Supp. 592 (N.D. Tex. 1984)(invoking the First Amendment to strike down, on its face, an ordinance requiring a fee before one could engage in a charitable solicitation campaign).

[26] See supra notes 20-25.

Homeless Grapevine and The Final Call is barred by the free speech clauses of the U.S. and Ohio[27] Constitutions.

We assert two distinct arguments here:

(1) Subjecting any publication to this type of licensing scheme violates long-standing principles of free speech and press.

(2) Subjecting these particular newspapers to such a licensing scheme poses insuperable barriers to their distribution -- it creates, in effect, a prior restraint, and thus offends our oldest traditions of free speech.

So compelling are the constitutional grounds for protecting the Grapevine and The Final Call from this regulatory scheme that we will begin with a brief examination of history -- specifically,

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[27] For the sake of convenience, this brief will refer primarily to the free speech guarantee of the U.S. Constitution. But our references to the federal First Amendment are not meant to exclude reliance upon Article I, § 11 of the Ohio Constitution, which contains an independent source of protection for free speech and press. Indeed, Count II of our Complaint expressly asserts a pendent claim under the Ohio Constitution. Article I, § 11 reads, in pertinent part:

> Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press....

Ohio Const., Art. I, § 11 (1851). Ohio courts have invoked Article I, § 11 in rejecting, as unconstitutional, the application of a peddler's licensing fee to sidewalk sales of literature and periodicals. City of Bowling Green v. Lodico, 11 Ohio St. 2d 135 (1967)(Young Socialist Magazine); City of Cincinnati v. Mosier, 61 Ohio App. 81 (Hamilton Cty. 1939)(religious literature). Accordingly, when this brief invokes the federal First Amendment, we mean to include as well a reliance on the free speech guarantee of the Ohio Constitution.

the well-established traditions against press licensing and prior restraint -- before proceeding to the case law.

A. History

The licensing of the press was one of the primary evils at which the First Amendment was aimed.[28] The licensing of presses and individual works had commenced in England by 1520; it was initially carried out by the Church, with a view toward suppressing the appearance of heretical books.[29] This licensing power was subsequently assumed by the monarchy; starting with Henry VIII in 1538 and continuing late into the 17th century, the licensing of printed matter became more and more pervasive. By the reign of Charles I, books and printing presses were licensed by three bodies: the Stationers' Company, the Court of High Commission, and the Court of Star Chamber.[30] In 1641, when the Long Parliament assumed power, it continued to exercise licensing authority. It renewed this authority by statute in 1643, 1647, 1649, and 1652, but in 1694 Parliament allowed the power to expire unrenewed, over the objections of the monarchy.[31]

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[28] Lovell v. City of Griffin, 303 U.S. 444, 451-52 (1938) (invoking the First Amendment to strike down, on its face, a licensing scheme that required written permission from the city manager before distributing literature in public places).

[29] Thomas L. Tedford, Freedom of Speech in the United States 14 (2d ed. 1992).

[30] 4 Sir William Blackstone, Commentaries on the Laws of England 152 (Philadelphia: Robert Bell, 1772).

[31] Id; Leonard W. Levy, Emergence of a Free Press 6 (1985).

Licensing was a governmental power in the American colonies as well. Until the 1720s, each colony licensed books in a manner similar to the old English system. Even after the abolition of formal licensing, colonial legislatures continued to exercise the power to license the printing and publication of their own proceedings and votes. This practice continued until the time of the Revolution.[32]

The U.S. Supreme Court has observed that:

> The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his Appeal for the Liberty of Unlicensed Printing. And the liberty of the press became initially a right to publish "without a license what formally could be published only with one." While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the [First Amendment].

Lovell v. City of Griffin, 303 U.S. 444, 451-52 (1938).

According to the Analysis and Interpretation of the Constitution published by the U.S. Senate in 1987, the Founders and the members of the First Congress likely shared a consensus view of the First Amendment as prohibiting -- at the very least -- the licensing of the press.[33] This echoed the view of Sir William

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[32] Levy at 16-61.

[33] The Constitution of the United States of America: Analysis and Interpretation, S. Rep. No. 16, 99th Cong., 1st Sess. 1000 (1987).

Blackstone, codifier of English common law.[34] In his Commentaries on the Laws of England, Blackstone wrote:

> To subject the press to the restrictive power of a licenser, as was formally done, both before and since the [Glorious Revolution of 1688], is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.[35]

The evidence for this consensus view is strengthened by the works of the Founders themselves. One finds it, for example, in the writings of Benjamin Franklin[36] and James Madison.[37]

The Founders were concerned not only with licensing itself, but with the taxing of newspapers and other printed material. As Alexander Hamilton remarks in The Federalist, such taxation has the potential to act as a de facto prior restraint on publication.[38] This governmental tactic was first used in England in 1712, nearly

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[34] Id.

[35] Blackstone, volume 4, at 152.

[36] Benjamin Franklin, "Statement of Editorial Policy," Philadelphia Gazette, 12 June 1740, in Writings 284 (Library of America 1987)("Englishmen thought it an intolerable Hardship, when (tho' by an Act of their own Parliament) thoughts, which should be free, were fetter'd and confin'd, and an Officer was erected over the Nation, call'd a Licenser of the Press, without whose Consent no Writing could be publish'd.")(emphasis in original).

[37] Madison, in his Virginia Report of 1799, claimed that the common law view of Blackstone, which prohibited licensing and other forms of prior restraint, was in fact too limited a view of freedom for America. Vincent Blasi, "The Checking Value in First Amendment Theory," 1977 A.B.F. Res. J. 521, in The First Amendment: A Reader 6 (Garvey & Schauer eds. 1992).

[38] The Federalist Papers, No. 84 (Roy Fairfield ed. 1981).

20 years after the end of formal licensing.[39] It was extended to the colonies by means of the Stamp Act in 1765. The Act taxed every imaginable printed document, and imposed duties to be paid for newspapers, pamphlets, and other publications.[40] Though Americans, in defiant reaction to the Stamp Act, focused primarily on the question of taxation without representation, they also expressed concern, even then, with the Act's impact on the free press. John Adams, for example, wrote that the Act was "a design ... to strip us, in great measure, of the means of knowledge, by loading the press, the colleges, and even an almanac and a newspaper, with restraints and duties."[41]

Americans never forgot their opposition to the Stamp Act. When Massachusetts, in 1787, attempted to enforce a stamp tax on newspapers, a popular outcry forced it to repeal the legislation.[42] Anti-Federalists, in their ultimately successful battle to include a Bill of Rights in the new Constitution, argued that the Stamp Act provided an example of what a government might do if unrestrained by constitutional guarantees of a free press.[43] Melancton Smith of New York wrote in his Address to the People of New York: "We contend, that by the indefinite powers granted to

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[39] Eric Niesser, Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas, 74 Georgetown L.J. 257, 263 (1985).

[40] Id.

[41] Id. at 263.

[42] Id. at 264.

[43] Id. at 264 & n.40.

the general government, the liberty of the press may be restricted by duties, &c. and therefore the constitution ought to have stipulated for its freedom."[44] Another Anti-Federalist observed:

> All parties apparently agree, that the freedom of the press is a fundamental right, and ought not to be restrained by any taxes, duties, or in any manner whatever. ... Printing, like all other business, must cease when taxed beyond its profits; and it appears to me, that a power to tax the press at discretion, is a power to destroy or restrain the freedom of it.[45]

These historical materials demonstrate that the licensing of the press offends long-standing traditions of free speech in this country, and is certainly anathema to the First Amendment.

B. Law

1. Subjecting *any* publication to this type of licensing scheme violates long-standing principles of free speech and press.

Courts have consistently rejected -- as offensive to the First Amendment -- the application of peddler's licensing fees to sidewalk sales of newspapers, pamphlets, and other literature. Murdock v. Pennsylvania, 319 U.S. 105 (1943)(rejecting -- under the First Amendment -- the application of a peddler's license fee to sidewalk and house-to-house sales of religious literature by

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[44] Id. at 265.

[45] Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention [The Federal Farmer] XVI, in The Anti-Federalist 85-86 (Herbert Storing ed. 1985).

Jehovah's Witnesses); Follett v. Town of McCormick, South Carolina, 321 U.S. 573 (1944)(rejecting -- under the First Amendment -- the application of a license fee to sidewalk and house-to-house sales or religious literature by a Jehovah's Witness); City of Bowling Green v. Lodico, 11 Ohio St. 2d 135 (1967)(rejecting -- under both the First Amendment and Article I, § 11 of the Ohio Constitution -- the application of a peddler's licensing fee to sidewalk sales of Young Socialist Magazine); City of Cincinnati v. Mosier, 61 Ohio App. 81 (Hamilton Cty. 1939)(rejecting -- under both the First Amendment and Article I, § 11 of the Ohio Constitution -- the application of a peddler's licensing fee to sidewalk sales of religious literature); Gall v. Lawler, 322 F. Supp. 1223 (E.D. Wis. 1971)(rejecting, under the First Amendment, the application of a peddler's ordinance to sidewalk sales of an "underground" newspaper); Zimmerman v. Village of London, 38 F. Supp. 582 (S.D. Ohio 1941)(rejecting -- under the First Amendment -- the application of a peddler's licensing fee to door-to-door sales of religious literature by Jehovah's Witnesses). Accord: Hull v. Petrillo, 439 F.2d 1184 (2d Cir. 1971)(recognizing that city could not constitutionally apply its peddler's licensing fee to sidewalk sales of the Black Panther Party's newspaper -- to do so would offend the First Amendment). See also: Lovell v. City of Griffin, 303 U.S. 444 (1938)(invoking the First Amendment to strike down, on its face, a licensing scheme requiring written permission from the city manager before the distribution of literature in public places); Holy Spirit Association for the Unification of World

Christianity v. Hodge, 582 F. Supp. 592 (N.D. Tex. 1984)(invoking the First Amendment to strike down, on its face, an ordinance requiring a fee before one could engage in a charitable solicitation campaign).[46]

The state may not impose a charge for the enjoyment of a right granted by the Constitution. Murdock v. Pennsylvania, 319 U.S. 105, 113 (1943); Follett v. Town of McCormick, South Carolina, 321 U.S. 573, 575 (1944); Hull v. Petrillo, 439 F.2d 1184, 1185-86 (2d Cir. 1971). Nor can the state render the exercise of a constitutional right contingent on one's ability to pay. Murdock, 319 U.S. at 111; Hull, 439 F.2d at 1186; Holy Spirit, 582 F. Supp. at 604.

Courts have consistently recognized that:

> [a]ny fee imposed as a prerequisite to the exercise of First Amendment rights is an unconstitutional prior restraint upon freedom of expression.

Hull v. Petrillo, 439 F.2d 1184, 1186 (2d Cir. 1971)(recognizing that the First Amendment bars a city from applying its peddler's licensing fee to sidewalk sales of the Black Panther Party's

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[46] In our case, those who distribute the Grapevine are simultaneously disseminating a newspaper and soliciting charitable donations. Appeals for charity, like the distribution of printed matter, enjoy the protection of the First Amendment. Holy Spirit, 582 F. Supp. at 596. Accord: Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980)("[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests -- communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes -- that are within the protection of the First Amendment.").

newspaper). Accord: Murdock v. Pennsylvania, 319 U.S. 105, 113 (1943); Follett v. Town of McCormick, South Carolina, 321 U.S. 573, 575 (1944); Lovell v. City of Griffin, 303 U.S. 444, 451-52 (1938); City of Bowling Green v. Lodico, 11 Ohio St. 2d 135, 138 (1967); Holy Spirit Association for the Unification of World Christianity v. Hodge, 582 F. Supp. 592, 604 (N.D. Tex. 1984); Gall v. Lawler, 322 F. Supp. 1223, 1225 (E.D. Wis. 1971); Zimmerman v. Village of London, 38 F. Supp. 582, 584 (S.D. Ohio 1941).

Rejecting the application of a peddler's licensing fee to sidewalk and house-to-house sales of religious literature by Jehovah's Witnesses, the U.S. Supreme Court observed:

> The power to impose a license tax on the exercise of [First Amendment] freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down.

Murdock v. Pennsylvania, 319 U.S. 105, 113 (1943). Accord: Follett, 321 U.S. at 577 ("The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint.")(citations omitted).

Murdock specifically held that subjecting this activity to the peddler's licensing fee was, in effect, the imposition of "a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges." Id. at 112. Such a regulatory scheme restrains First Amendment freedoms in advance and "inevitably tends to suppress their exercise." Id. at 114. Therefore, when applied to speech activities, a peddler's license

requirement violates the First Amendment. Id. Indeed, it offends one of the core purposes of the First Amendment:

> The taxes imposed by this ordinance can hardly help but be as severe and telling in their impact on the freedom of the press ... as the "taxes on knowledge" at which the First Amendment was partly aimed.

Id. at 114-15.

Whether or not the instant newspapers are "sold" to passers-by is irrelevant for First Amendment purposes. The fact that a publication is sold rather than given away does not diminish its First Amendment protection. Murdock, 319 U.S. at 111; City of Bowling Green v. Lodico, 11 Ohio St. 2d 135, 138, 140 (1967); Gall v. Lawler, 322 F. Supp. 1223, 1225 (E.D. Wis. 1971). "It should be remembered," observed the U.S. Supreme Court, "that the pamphlets of Thomas Paine were not distributed free of charge." Murdock, 319 U.S. at 111.

Nor is the constitutionality of the ordinance saved by the fact that it regulates hot dog vendors and newspaper distributors alike. Murdock, 319 U.S. at 115; Gall v. Lawler, 322 F. Supp. 1223, 1225 (E.D. Wis. 1971)(rejecting -- under the First Amendment -- the application of a peddler's ordinance to sidewalk sales of an "underground" newspaper). As the Gall court observed:

> Insofar as the ordinance applies to First Amendment rights, it is fatally overbroad. The licensing provision of the ordinance which might properly apply to a transient vacuum cleaner salesman becomes constitutionally offensive when it is applied to the distribution of ideas.

322 F. Supp. at 1225. Accord: Murdock, 319 U.S. at 115.[47]

The foregoing authorities demonstrate that subjecting any publication to this type of licensing scheme violates long-standing principles of free speech and press.

2. Subjecting *these particular* newspapers to such a licensing scheme poses insuperable barriers to their distribution -- it creates, in effect, a prior restraint, and thus offends our oldest traditions of free speech.

Though the First Amendment forbids subjecting any newspaper to a license fee, applying the instant fee to these particular newspapers is especially offensive to free speech principles because it effectively creates a prior restraint. This is because the Grapevine is distributed exclusively by homeless and/or destitute individuals;[48] when directed at them, the $50.00 fee

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[47] On this point, the Murdock Court was emphatic:

> The fact that the ordinance is "nondiscriminatory" is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.

319 U.S. at 115.

[48] Gillooly Affidavit, ¶ 3.

might just as well be a flat prohibition against distributing the newspaper at all.[49] Likewise, The Final Call is distributed exclusively by young Nation of Islam members,[50] who, just like the Jehovah's Witnesses in Murdock,[51] keep only a fraction of their sales proceeds, turn over most of their money to the Nation, and therefore maintain only a subsistence living.[52] Since a peddler's license is beyond the reach of the very people who distribute these newspapers, their circulation is gravely threatened by the continued enforcement of this licensing scheme.[53]

From a First Amendment perspective, thwarting a paper's distribution is no different than halting its publication:

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[49] See Gillooly Affidavit, ¶ 8 (attesting that the $50.00 fee is far beyond the means of most, if not all, of the homeless individuals with whom he works).

[50] Hill Affidavit, ¶ 6.

[51] 319 U.S. at 107 n.2 & 109 n.7 (noting that "colporteurs" of the Jehovah's Witness faith must purchase the books and pamphlets they sell, may retain only half of their sales proceeds, and must pay all of their traveling and living expenses with the funds they are permitted to retain).

[52] Hill Affidavit, ¶ 6. Accord: Patrice M. Jones, One Nation, [Cleveland] Plain Dealer Sunday Magazine, Aug. 21, 1994, at 10 (feature story on the Nation of Islam and Mosque No. 18 in Cleveland).

[53] NEOCH is financially incapable of purchasing a peddler's license for each of the homeless individuals who distribute the Grapevine. Gillooly Affidavit, ¶ 9. If a peddler's license is actually required of those who distribute the Grapevine, Mr. Gillooly predicts that publication and distribution of the newspaper will be forced to cease. Gillooly Affidavit, ¶ 10. The costs imposed by such regulation will be so prohibitive -- both to NEOCH and to the homeless individuals who distribute the Grapevine -- that they will have no choice but to abandon the enterprise. Id.

> [An] ordinance cannot be saved because it relates to distribution and not to publication. Liberty of circulating is as essential to [First Amendment] freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.

Lovell v. City of Griffin, 303 U.S. 444, 452 (1938). Accord: Zimmerman v. Village of London, 38 F. Supp. 582, 584 (S.D. Ohio 1941).

Since applying the instant licensing scheme to these particular publications effectively creates a prior restraint, and since prior restraints are anathema to the First Amendment,[54] this Court should hold that the Constitution bars the City of Cleveland from enforcing its peddler's license fee against those who distribute The Homeless Grapevine and The Final Call.

V. PLAINTIFFS FACE IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF.

This brief has already demonstrated that the City has committed, and is continuing to commit, violations of Plaintiffs' First Amendment rights. Since "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,"[55] and since Plaintiffs' First

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[54] See, e.g., Near v. Minnesota, 283 U.S. 697, 716 (1931) ("[L]iberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.").

[55] Elrod v. Burns, 427 U.S. 347, 373 (1976)(citing New York Times Co. v. United States, 403 U.S. 713 (1971)).

Amendment rights are being subjected to an ongoing pattern of violations by the City, this case presents exactly the type of irreparable harm that justifies injunctive relief.

VI. THE REQUESTED INJUNCTION WILL NOT CAUSE HARM TO OTHERS; INSTEAD, IT WILL HAVE THE BENEFICIAL EFFECT OF CURTAILING WIDESPREAD CONSTITUTIONAL VIOLATIONS.

The requested injunction will not cause harm to others; instead, it will have the beneficial effect of curtailing widespread constitutional violations. The City can hardly assert that it will be harmed by the relief we seek -- all we are requesting is that the City be ordered to obey 51 years of judicial precedent. Accordingly, this factor weighs heavily in favor of granting the injunction.

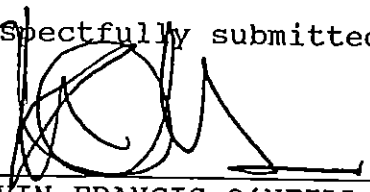
VII. THE PUBLIC INTEREST WILL BE SERVED BY GRANTING THIS INJUNCTION.

The public interest will be served by granting this injunction because the public interest is always served when government officials are made to obey the decisions of the U.S. Supreme Court. Since the requested injunction merely seeks to rectify the City's willful disregard of controlling Supreme Court precedent, this factor weighs heavily in favor of granting the injunction.

VIII. CONCLUSION

For all of the foregoing reasons, this Court should grant Plaintiffs' request for a preliminary and permanent injunction barring the City of Cleveland from enforcing its peddler's license fee against street vendors of The Homeless Grapevine and The Final Call.

Respectfully submitted,



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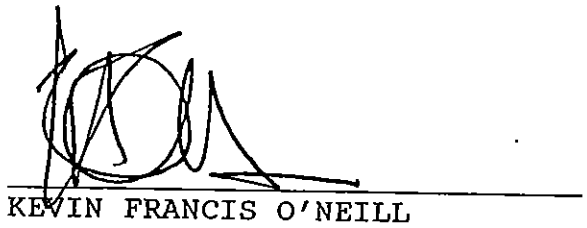
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Preliminary Injunction and Supporting Memorandum of Law, along with the Complaint in this action, were served by hand-delivery on the City of Cleveland -- specifically, its Law Director, Sharon Sobol-Jordan, City Hall, 601 Lakeside Avenue, Cleveland, Ohio 44114 -- this 27th day of September, 1994.



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