

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

MANUEL J. POMBO,
Plaintiff

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v.

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C.A. NO. 15-

CITY OF PROVIDENCE, by and
through its Treasurer, James J.
Lombardi, III,
Defendant

}

}

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. Introduction

1. This civil action seeking declaratory and injunctive relief is brought by Manuel Pombo, a street musician, or “busker.” He has played saxophone on sidewalks and street corners throughout Providence, Rhode Island and neighboring cities since 1979. Beginning in approximately 1991 through the present, Plaintiff has been bound by the Defendant's unconstitutional permitting scheme and subject to arrest and threats of arrest by Providence Police officers, in violation of his rights under the First and Fourteenth Amendments of the United States Constitution. Plaintiff seeks to exercise his right to perform on public property free from police harassment or unconstitutional permitting requirements.
2. Although no formal city ordinance or regulation sets forth a licensing process for buskers, much less requires them to obtain permits, the City of Providence Board of Licenses has

issued Plaintiff a document titled “Permission to Perform.” The document forbids its bearer from soliciting donations, and subjects the individual's ability to perform to the unbridled “discretion of the local Police authority (PROVIDENCE),” (sic). [“Permission to Perform,” EXHIBIT A, attached hereto].

3. Further chilling his exercise of free speech, Plaintiff was arrested for playing his saxophone on a public sidewalk on July 28, 2013, creating a very real fear of arrest every time he is told by Providence police officers to stop playing music in public spaces.
4. Since his arrest in 2013, Plaintiff Pombo has been subject to repeated harassment and intimidation by various Providence police officers while playing music on public sidewalks at locations throughout the city, forcing him to stop playing.

II. The Parties

5. Plaintiff Manuel Pombo is an adult resident of Rhode Island. He is a retired laborer suffering from multiple health problems who plays saxophone in public venues throughout Providence and neighboring cities, and receives cash tips from passersby.
6. Defendant City of Providence, Rhode Island, is a Municipal Corporation and political subdivision of the State of Rhode Island.

III. Jurisdiction and Venue

7. Jurisdiction exists in this Court pursuant to 28 U.S.C. §§1331 and 1343(a)(3).
8. In addition, this Court has jurisdiction to grant declaratory and ancillary relief, pursuant to 28 U.S.C. §§ 2201 and Section 2202.

9. Venue is proper in this Court since, on information and belief, all of the Defendants reside or may be found in the District of Rhode Island in compliance with the requirements set forth in 28 U.S.C. §1391.

IV. Factual Background

10. Plaintiff Manuel Pombo is a resident of Providence, Rhode Island. He started playing saxophone as a young man and began playing outdoors as an accommodation to tight living quarters in his Fox Point neighborhood in the city of Providence, and to experiment with the sound effects produced in different settings.
11. Plaintiff Pombo began busking in 1979 after seeing a street performer playing jazz and collecting tips in New York City.
12. Playing music became a third job for Plaintiff Pombo in the 1990's in addition to his full time employment as the Manager of Building and Grounds at the Providence Atheneum and a part-time job with a children's birthday party enterprise.
13. Plaintiff Pombo has performed regularly at WaterFire at a location on the public sidewalk since the project's founding in 1994, with the support of the project's founder and director.
14. Throughout the 1990's and 2000's, Plaintiff Pombo played saxophone and received tips at numerous locations in Providence, including public sidewalks outside the Providence Civic Center (now Dunkin Donuts Center), the Providence Performing Arts Center, and outside the University Heights shopping center on North Main Street.

15. Plaintiff's repertoire includes selections from composers such as Coltrane and Souza, rock bands, and often requested favorites, including Ode to Joy, Adagio for Strings, and theme songs from the Titanic and the Godfather.
16. On April 16, 2007, a photograph of Plaintiff Pombo playing his saxophone outside the Dunkin Donuts Center was published on the front page of the *Providence Journal*.
[EXHIBIT B, attached hereto].
17. In or around 1991 Plaintiff Pombo was informed by another busker, a guitar player, that the City of Providence had a process to issue permits for street performers, and that the procedure involved appearing before the Board of Licenses and submitting a letter requesting permission to perform.
18. Shortly thereafter Plaintiff Pombo presented a letter and made an appearance in front of the City of Providence Board of Licenses.
19. The Board of Licenses approved Plaintiff's application and provided him with the Letter of Permission described above (EXHIBIT A). The Board instructed Plaintiff verbally and in the letter itself that he was not permitted to solicit donations, but could passively accept donations if offered.
20. In 2006, Plaintiff misplaced his Letter of Permission. He returned to the Board of Licenses, whose staff found a record confirming that he had been granted permission to perform, and printed a new copy without requiring that Mr. Pombo appear in front of the Board.

21. On occasion during the 1990's and early 2000's, Plaintiff Pombo was approached by Providence Police officers while performing at various locations in the city, and told to stop playing or to leave the location. Each time he moved in order to avoid arrest.
22. On Sunday afternoon, July 28, 2013, Plaintiff was playing saxophone on the public sidewalk in front of 601 North Main Street, Providence. He was not blocking any pedestrians or vehicles or interfering with safety or traffic in any way.
23. Providence Police officer W. Dickie asked Plaintiff for his identification. Plaintiff Pombo explained to Officer Dickie that he did not have identification with him at that moment.
24. Officer Dickie gave Plaintiff Pombo no instruction to move nor any warning that he would be arrested. Instead, he told Plaintiff to hand over his saxophone. Officer Dickie immediately handcuffed Plaintiff Pombo and transported him to the Public Safety Complex, where Plaintiff was held overnight in a cell, in isolation.
25. Plaintiff's chronic arthritis was severely aggravated by spending the night on a hard bench in a cold cell. He was sixty years old at the time and suffered from heart disease.
26. Plaintiff Pombo was charged with a violation of §16-3(a) of the City of Providence Code of Ordinances, Disorderly and indecent conduct, which prohibits any person from acting "...in a threatening, violent or tumultuous manner toward another whereby any person is placed in fear of safety of his life, limb or health or the property of any person is placed in danger of being destroyed or damaged." [EXHIBIT C, attached hereto].
27. Plaintiff Pombo was also charged with a violation of §14-175 of the City of Providence Code of Ordinances, "Refusal to exhibit license and badge." [EXHIBIT D, attached

hereto]. The ordinance, which applies to “hawkers” and “peddlers,” states in pertinent part that: “Any person who shall refuse, after lawful demand by any police officer, to exhibit to him or her his/her license and/or badge, shall be deemed for the purposes of this article to be unlicensed.”

28. The following morning, July 29, 2013, Plaintiff Pombo was brought handcuffed into Providence Municipal Court. Without counsel, he received a disposition of “NFTD”¹ (No Further Trouble Dismissal) for a six month period, and the disorderly conduct charge was dismissed on January 31, 2014. The Municipal Court record does not indicate any disposition for the charge for “Refusal to exhibit license and badge.” [EXHIBIT E, Mun. Ct. record, attached hereto]
29. In November 2013, Plaintiff Pombo was performing on West River Road, Providence, on the public sidewalk, when he was approached and told to move by a Providence Police officer. Plaintiff presented his Permission to Perform letter to the officer, and the officer mistakenly told Plaintiff that the letter was expired. Plaintiff pointed to the text and explained to the officer that the date on the letter was the date of issue and not expiration. However, the officer did not accept Plaintiff's explanation, and insisted that Plaintiff move from the location. Fearing arrest, Plaintiff Pombo complied with the officer's order and left the area.
30. On November 14, 2013, Plaintiff returned to the Board of Licenses and requested a revised copy of the Letter of Permission that would include language clarifying that the

¹ NFTD is an acronym used for dispositions of juveniles in Rhode Island Family Court to indicate “No Further Trouble – Dismissal,” essentially a not guilty filing, per R.I.G.L. §14-1-32(4). It is occasionally used in Providence Municipal Court.

document had not expired. A staff person at the Board of Licenses provided Plaintiff with the copy he currently has in his possession which states, “[T]his does not expire.” (EXHIBIT A).

31. During the summer of 2014, a uniformed Providence Police officer (hereinafter referred to as “Officer Doe”) stopped Plaintiff Pombo at least five (5) times when he was busking on public property at various locations near Smith Street, Charles Street, and surrounding areas in Providence. Officer Doe ordered Plaintiff Pombo to move from his location or be arrested. Each time, Plaintiff responded by stopping his performance abruptly and moving from the location rather than risking arrest.
32. During one encounter with Officer Doe, Plaintiff was performing on Orms Street, in Providence, in front of the offices of ABC 6 television station. Officer Doe, in his police vehicle, slowed down and flashed the vehicle lights. Plaintiff Pombo displayed his Permission to Perform letter from the Board of Licenses. Officer Doe responded by saying, “I don't care; it's still begging.”
33. Officer Doe also successfully ordered Plaintiff to move from a public sidewalk on Charles Street in Providence on three or four separate occasions. On the last occasion, Officer Doe asked Plaintiff Pombo for his identification. Plaintiff provided Officer Doe with his identification, and the officer copied down Plaintiff's personal data.
34. The discretion referred to in Defendant's permitting scheme leads to unpredictable results. In the fall of 2014, Plaintiff Pombo was busking in front of the Fire Station on North Main Street, Providence. A Providence Police officer known to Plaintiff as “Frank” said to Plaintiff, “I'm giving you a pass,” and did not order Plaintiff to move.

35. On another occasion when Plaintiff Pombo was performing on a public sidewalk outside of the Dunkin Donuts Center in downtown Providence, a Providence Police officer donated five dollars to Plaintiff.
36. On March 20, 2015, Plaintiff Pombo was busking on the sidewalk outside of the Dunkin Donuts Center. A Providence Police officer told Plaintiff, “Get your shit and get out of here.” Plaintiff explained that he had a permit, as well as permission from the management of the Dunkin Donuts Center. Nonetheless, the officer told Plaintiff to move down the street. Once again, Plaintiff Pombo complied in order to avoid arrest.
37. On March 21, 2015, Plaintiff Pombo was walking on the sidewalk outside of the Providence Performing Arts Center (PPAC) towards the specific location where he planned to play that night. Before Plaintiff Pombo even reached his location, a Providence Police officer told Plaintiff, “They don't want you here. Don't play here – and not across the street either.” Again, Plaintiff Pombo complied.
38. On April 24, 2015, Plaintiff Pombo was performing on Orms Street in Providence. A Providence Police vehicle approached, and the officer told him to get off the corner. Fearing arrest, Plaintiff complied with the officer's order to leave.

V. **Legal Framework: Ordinances**

39. The permitting scheme described in Article IX of Chapter 14 of the City of Providence Code of Ordinances, under which Plaintiff Pombo was charged with refusal to show a license and badge, refers to Peddlers and Hawkers. [See EXHIBIT D].

40. A “hawker” is defined by the ordinance as “any person, licensed in accordance with this article, who is selling or offering for sale any goods, wares or merchandise, including any food or beverage, on any public street, highway or public right-of-way in the city from a designated vending site. A hawker sells from a stationary location.” (City of Providence Code of Ordinances, §14-170(3)) [See EXHIBIT D].
41. A “peddler” is defined under the ordinance as “any person, licensed in accordance with this article, who is selling or offering for sale any goods, wares or merchandise, including any food or beverage, from a vehicle, cart, on foot, or any other conveyance or other means which is not stationary.” (City of Providence Code of Ordinances, §14-170(5)). [See EXHIBIT D].
42. Plaintiff Pombo does not sell any goods, wares or merchandise.
43. Under the First Amendment, Plaintiff Pombo is entitled to perform without permission from the City, regardless of whether he requests or accepts donations.
44. The Board of Licenses has not cited any statutory authority nor other legal justification for its permitting scheme to Plaintiff Pombo via verbal communication, in the permission to perform letter or by any other means. [See EXHIBIT A].

VI. Legal Claims

COUNT ONE

First Amendment: Defendant's policy and custom requiring permission to perform constitute prior restraint of protected speech.

45. Plaintiff incorporates the allegations of paragraphs 1- 44 of this Complaint.

46. Defendants, acting under the color of state law, by their individual and/or concerted acts and/or omissions, including but not limited to those described herein, violate Plaintiff Pombo's rights under the First Amendment.
47. By requiring Plaintiff to seek permission from the Board of Licenses before performing in public spaces, Defendant's permitting scheme constitutes a prior restraint on speech and effectively forbids Plaintiff from engaging in expressive activity protected by the First Amendment, giving rise to this cause of action under 42 U.S.C. §1983.

COUNT TWO

First Amendment: The policy and custom giving rise to Defendant's permitting scheme violates the First Amendment by barring the solicitation of donations.

48. Plaintiff incorporates the allegations of paragraphs 1- 47 of this Complaint.
49. Defendants, acting under the color of state law, by their individual and/or concerted acts and/or omissions, including but not limited to those described herein, violate Plaintiff Pombo's rights under the First Amendment.
50. By forbidding Plaintiff to solicit donations when performing in public spaces, Defendant has violated Plaintiff Pombo's rights under the First Amendment, giving rise to this cause of action under 42 U.S.C. §1983.

COUNT THREE

First Amendment: Defendant's permitting scheme gives unbridled discretion to police to determine when and where musicians may perform, and is thereby unconstitutional on its face.

51. Plaintiff incorporates the allegations of paragraphs 1- 50 of this Complaint.
52. Defendants, acting under the color of state law, by their individual and/or concerted acts and/or omissions, including but not limited to those described herein, violate Plaintiff Pombo's rights under the First Amendment.
53. The very wording of the permission letter Defendant issued to Plaintiff Pombo grants unbridled discretion to police to determine when and where Plaintiff can or cannot engage in protected speech, thereby justifying a facial challenge to Defendant's permitting scheme through this cause of action under 42 U.S.C. §1983.

COUNT FOUR

First Amendment: Defendant's policy and custom requiring all street performers to seek permission is overbroad, and thereby unconstitutional on its face.

54. Plaintiff incorporates the allegations of paragraphs 1- 53 of this Complaint.
55. Defendants, acting under the color of state law, by their individual and/or concerted acts and/or omissions, including but not limited to those described herein, violate Plaintiff Pombo's rights under the First Amendment.
56. Defendant's permitting scheme requires all street performers to seek permission for all performance, including musical performance such as Plaintiff's, carried out in a public forum. This approach provides for a substantial number of applications restricting protected speech, in addition to whatever legitimate application may be included in its sweep. Thus, Defendant's permitting scheme is overbroad and as such unconstitutional

on its face under the First Amendment, giving rise to this cause of action under 42 U.S.C. §1983.

COUNT FIVE

Fourteenth Amendment: Defendant's policy and custom allowing total discretion to police violates the Due Process Clause of the Fourteenth Amendment.

57. Plaintiff incorporates the allegations of paragraphs 1- 56 of this Complaint.
58. Defendants, acting under the color of state law, by their individual and/or concerted acts and/or omissions, including but not limited to those described herein, violate Plaintiff Pombo's rights under the Due Process Clause of the Fourteenth Amendment.
59. Defendant's delegation of complete discretion to police fails to provide any guidelines whatsoever to govern law enforcement. This lack of clarity means that the ordinary person who is busking or considering busking does not have adequate notice of what conduct is prohibited and what is permitted. The potential for the City to arrest anyone, while leaving it for the courts to decide what is and is not prohibited, violates the Due Process Clause of the Fourteenth Amendment, giving rise to this cause of action under 42 U.S.C. §1983.

Wherefore, Plaintiff requests that this Court :

- 1) Assume jurisdiction over this matter;
- 2) Grant permanent and preliminary injunctive relief, enjoining defendant from requiring or issuing "Permission to Perform" letters or any other form of permitting or licensing for

street performers whether actively soliciting tips, passively accepting same, or not receiving money at all.

- 3) Grant permanent and preliminary injunctive relief ordering Defendant to permit Plaintiff to enjoy his rights under the First Amendment to perform on public property, free from harassment or orders to move by police;
- 4) Declare the existing permitting and enforcement scheme and practices in violation of established interpretation of the First Amendment.
- 5) Grant to Plaintiff his costs, reasonable attorney's fees pursuant to 42 U.S.C. §1988, and such other relief as this Court deems just or necessary.

Plaintiff
Manuel J. Pombo
By his Attorneys:

/s/ Shannah Kurland
Shannah Kurland, Esq. #9186
Cooperating Attorney
American Civil Liberties Union of Rhode Island
149 Lenox Avenue
Providence, RI 02907
Tel. (401)439-0518
skurland.esq@gmail.com

/s/ John W. Dineen
John W. Dineen, Esq. #2346
Cooperating Attorney
American Civil Liberties Union of
Rhode Island
305 South Main Street
Providence, RI 02903
Tel. (401)223-2397
Fax (401)223-2399
jwdineen1@yahoo.com