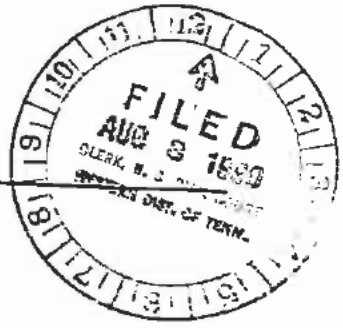
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION



ROBERT EUGENE CRAIN, ET AL.,

Plaintiffs,

VS.

No. 90-2292-TUB

CITY OF MEMPHIS, ET AL.,

Defendants.

AMERICAN CIVIL LIBERTIES
UNION OF TENNESSEE, ET AL.,

Plaintiffs,

VS.

No. 90-2315-TUB

RICHARD C. HACKETT, ET AL.,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
OF PLAINTIFFS AMERICAN CIVIL LIBERTIES UNION
OF TENNESSEE AND LARRY MCDANIEL

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF TENNESSEE

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and Larry McDaniel

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COME NOW the Plaintiffs American Civil Liberties Union of Tennessee and Larry McDaniel (hereinafter "Plaintiffs"), pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 8, and submit this Memorandum of Law in Support of their Motion for Summary Judgment based upon their assertion that Ordinance No. 3957 to Amend Chapter 20 Code of Ordinances, City of Memphis, to Establish a New Division 4 under Article IV Concerning Performances Harmful to Minors, violates on its face the Constitutions of the

United States and Tennessee and is therefore void and unenforceable.

STATEMENT OF THE CASE

This is a civil action challenging the facial validity of Memphis City Ordinance No. 3957 signed by the Mayor of the City of Memphis, Richard C. Hackett, on April 19, 1990.

There are no issues of material fact in dispute.

The Memphis City Council convened on April 10, 1990, to hear the third and final discussion concerning Ordinance 3957 before voting on its adoption. On that date, the City Council heard the opinion of Dr. Leon Lebowitz, a psychologist with the Southeast Mental Health Center, as well as comments from several members of the community and the City Attorney. After a motion to close the debate, the Ordinance was passed by a 8-3 vote. The Ordinance became effective on April 19, 1900, when it was signed by Richard C. Hackett, Mayor of the City of Memphis. (A copy of the Ordinance is attached as Exhibit 1.)

Plaintiffs Robert Eugene Crain, Glenda Destefanis and Chris Destefanis, a minor, filed a Complaint in the United States District Court for the Western District of Tennessee, Western Division, No. 90-2292, on May 4, 1990, seeking declaratory and

injunctive relief against the Defendants for committing acts under color of State Law which acted to deprive Plaintiffs of their rights under the Constitution of the United States.

The American Civil Liberties Union of Tennessee along with Larry McDaniel, an adult resident of Memphis, Shelby County, Tennessee, who has three minor children, filed a Complaint in the United States District Court for the Western District of Tennessee, Western Division, No. 90-2315, on May 10, 1990, asserting that the Plaintiffs are deprived of rights, privileges, and immunities secured by the United States Constitution and the Constitution of the State of Tennessee.

These cases were consolidated for all purposes by Order of United States District Court Judge Jerome Turner on May 17, 1990. On this date, a Scheduling Conference was held in Chambers to establish deadlines for the parties to file statements of legal and factual issues and motions for summary judgment.

A second Preliminary Conference was held in Chambers on July 3, 1990, at which time the schedule for submitting memoranda and reply briefs was adjusted.

The Court has jurisdiction to hear this case pursuant to 28 U.S.C. §1339, 28 U.S.C. §1343, 28 U.S.C. §2201 and §2202.

Venue in the Western District of Tennessee is proper; all claims arose in Memphis, Shelby County, Tennessee, and the Defendants are residents and officials of Memphis, Shelby County, Tennessee.

LEGAL ARGUMENT

I.

ORDINANCE 3957 IS UNCONSTITUTIONALLY OVERBROAD ON ITS FACE FOR FIRST AMENDMENT PURPOSES BECAUSE IT MAY BE APPLIED TO PROTECTED AS WELL AS UNPROTECTED SPEECH.

A. Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.

The Supreme Court has reiterated in countless cases that the constitutional guaranties of freedom of speech forbid the states from "punishing the use of words or language not within narrowly limited classes of speech, and even as to such a class, the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." Gooding v. Wilson, 405 U.S. 518, 522, 92 S.Ct. 1103 (1972). See also, Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286 (1972); Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780 (1971).

The line between speech constitutionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. Gooding, 405 U.S. at 522. A statute (or ordinance) that is susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments cannot withstand an attack upon its facial constitutionality.

Cohen, 403 U.S. at 18-22. The Supreme Court in Cohen reversed the conviction of a young man who was prosecuted for disturbing the peace by a California Municipal Court for wearing a jacket bearing the words "Fuck the Draft". The Court reviewed those categories of expression not protected by the First and Fourteenth Amendments: 1) obscene expression, which must be in some significant way, erotic, 2) fighting words, which when addressed to the ordinary citizen are inherently likely to provoke violent reaction, and 3) distasteful expressions thrust upon unwilling or unsuspecting viewers.....Id. The Cohen Court concluded that:

> ...surely the state has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result...for, while the particular four letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric.

Id. at 22. See also, Cohen, Free Speech and Political Extremes: How Nasty Are We Free To Be? 7 Law and Phil. 263-279 (1989).

The doctrine of unprotected speech was first developed in cases involving abusive epithets and insults, but the Supreme Court in Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827 (1969) held that advocacy of any idea can be prohibited only when it is both intended to and likely to incite "imminent lawless action". Apparently, the Defendants here do not contend that the forbidden "conduct" (.... speech) will create a clear and present danger of violence, riot or other disorders. See, Collin v. Smith, 447

F.Supp. 676-686 (D.C. Ill. 1978).

First Amendment protection is not limited to political speech. The Supreme Court reversed a lower Court's denial of injunctive relief to promoters of the musical production "Hair" in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239 (1975). The Court stated definitively that: "By its nature, theater usually is the acting out - or singing out - of the written word, and frequently mixes speech with live action or conduct. But that is no reason to hold theater subject to a drastically different standard." Id. at 557-558. See also, Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 101 S.Ct. 2176 (1981); Reed v. Village of Shorewood, 704 F.2d 943 (7th Cir. 1983).

It is significant to note that the District Court in Southeastern Promotions had reached its decision based on an advisory jury verdict finding "Hair" to be obscene, after hearing evidence from the script and from witnesses who had seen the production. The District Court concluded that conduct in the production - group nudity and simulated sex - would violate city ordinances and state statutes, and was not entitled to First Amendment protection. Id. at 550-551.

Recently, the U.S. Supreme Court recognized that music is one of the oldest forms of human expression, and held that "music as a form of communication and expression is protected under the First Amendment". Ward v. Rock Against Racism, 109 S.Ct. 2746, 2753, 105

L.Ed.2d 661 (1989). The Court went on to uphold the ordinance at issue; (city retaining sound system control at public performances); however, this holding was defined as a "reasonable regulation of the place and manner of protected speech". Id. at 2748. The ordinance did not prohibit or otherwise regulate the content of performances or speech but merely regulated the decibel level at which the message could be disseminated.

Ordinance 3957 attempts to regulate by prohibiting expression clearly falling in the protected province of the First Amendment.

B. Ordinance 3957 discriminates on the basis of the "content" of the performance.

Recognizing that the First and Fourteenth Amendments have never provided absolute protection to every individual to speak whenever or wherever he or she pleases, the Federal Courts have been called on repeatedly to evaluate ordinances and statutes that threaten arbitrary governmental interference.

A reading of the transcript of the April 10, 1990, City Council Meeting (attached to Defendant's Answer) provides an enlightening example of just the type of content-based determination that was condemned by the Court of Appeals in Cinevision Corp. v. City of Burbank, 745 F.2d 560 (9th Cir. 1984) cert. denied, 477 U.S. 1054, 105 S.Ct. 2115 (1985). The Burbank City Council was found to have employed no

consistent content-neutral standards to evaluate entertainers allowed to perform in the city's amphitheater. Rather, that city council excluded performers because of political views, lifestyle, or the race of the crowd that performers would attract. Id. at 577. Similarly, the Memphis City Council members expressed concern that Ordinance 3957 might be applied to country and western music or professional wrestling, which was not the "intent" of the ordinance. These comments are not only indicative of the preconceived notions of city council members, but are illustrative of the fatal defects in the ordinance itself.

In cases where the government has regulated expression because of its content, the Supreme Court has applied the most "exacting scrutiny", Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269 (1981), to determine whether there is any method of achieving the state's nondiscriminatory purposes (such as protection of public safety) which has a lesser effect on protected expression. Tacynec v. City of Philadelphia, 687 F.2d 793 (3rd Cir. 1982) cert. denied, 459 U.S. 1172, 103 S.Ct. 819 (1983).

To justify the infringement on constitutionally protected expression, the Defendants cite a "compelling state interest" in the protection of minors from material considered by some to be harmful to them. While such a governmental interest may arguably be valid, it does not provide a carte blanche for the implementation of overly broad, unconstitutional government

regulations. As the Court of Appeals in Cinevision concluded, "Subjective assertions about 'proper' community values and amorphous concerns over intangible harms caused by hard rock music could not justify city's engaging in content-based decision making". Cinevision, 745 F.2d at 575.

C. Minors as well as adults are protected by the Bill of Rights.

Although it is well settled that a state or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults, minors are nevertheless entitled to a significant measure of First Amendment protection. Tinker v. Des Moines School District, 393 U.S. 503, 89 S.Ct. 733 (1969). Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images a legislative body thinks unsuitable for them. Erznoznik v. City of Jacksonville, 422 U.S. 205, 212, 95 S.Ct. 2268 (1975). Only through very narrow and well-defined circumstances may government bar public dissemination of protected materials to minors. Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 68 S.Ct. 1298 (1968).

Several federal courts have weighed the rights of minors against the interest of the city in enacting curfew ordinances and

concluded that such ordinances directed at juveniles burden their constitutionally protected rights, including the right of association. Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981); Waters v. Barry, 711 F.Supp. 1125 (D.D.C. 1989). The Court in Barry analyzed the facial validity of a curfew act with the stated objectives of reducing juvenile violence and aiding parents in carrying out their supervisory obligations. The Court found that the Act "so egregiously intrudes upon constitutional interests that it is impossible to segregate permissible applications from impermissible applications". Id. at 1133. The Barry Court went so far as to describe the curfew act as - "a bull in a china shop of constitutional values". Id. at 1134.

Although Ginsberg v. State of New York, 390 U.S. 629, 88 S.Ct. 1274 reh'g denied, 391 U.S. 971, 99 S.Ct. 2029 (1968) relied on heavily by the Defendants, acknowledged the state's right to deny juvenile access to material that could not be denied to adults, the statute at issue in Ginsberg proscribed only the sale of specified pornography to minors. See also, Note, Restricting Adult Access to Material Obscene as to Juveniles, 85 Mich. L.Rev. 1681-1698 (1987). Ordinance 3957 is vastly broader in comparison, subjecting the minors themselves, as well as their parents, the promoters and the performers to penalty for "unlawful" behavior. Such an ordinance goes considerably beyond the narrowly defined guidelines essential to a restraint of constitutional freedoms.

The Supreme Court in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973) reh'g denied, 414 U.S. 881, 94 S.Ct. 26 (1973) established a three part standard to determine if material is obscene:

> a)...the average person applying ~~contemporary community~~ standards would find that the work, taken as a whole, appeals to the prurient interest, b) the work depicts or described in a patently offensive way sexual conduct specifically defined by the applicable state law, and c) the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Id. at 26.

"Live performances" should be viewed no differently than printed material or motion pictures, therefore, the basic principles developed in Miller provide the standard for judicial review. Under that standard, Ordinance 3957 is unconstitutionally over broad and unenforceable.

Defendants argue that the Miller standard defining what may be barred as obscene as to minors was "succinctly disposed of" in New York v. Ferber, 458 U.S. 747, 761, 102 S.Ct. 3348 (1982):

> We therefore cannot conclude that the Miller standard is a satisfactory solution to the child pornography problem.

Memorandum of Defendants, May 8, 1990, p.8.

Defendants' reliance on Ferber is misplaced. Ferber as well as Osborne v. Ohio, 58 U.S.L.W. 4467 (April 18, 1990) (also relied on by the Defendants) dealt with the sexual exploitation of children through child pornography. Commercially distributing a film displaying young children engaged in sexual activity (Ferber)

does warrant the application of a different standard than does attending a rock concert, presumably with (but even without) parental approval.

D. The Constitution of the State of Tennessee assures protection of speech at least as broadly as the First Amendment of the United States Constitution.

It is well settled constitutional law that state supreme courts may not restrict the protection afforded by the federal constitution, as interpreted by the United States Supreme Court, although they may expand constitutional protections. The Tennessee Supreme Court has held in Leech v. American Booksellers Ass'n., 582 S.W.2d 738-745 (Tenn. 1979) that the Tennessee constitutional provision assuring protection of speech and press, Tenn. Const. Art. 1, §19 should be construed to have a scope at least as broad as that afforded by the United States Constitution.

> That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. But in prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libel, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other criminal cases.

Tenn. Const. Art. 1, §19.

As the Tennessee Supreme Court firmly stated in the Leech opinion:

> We cannot encroach one step farther than the United States Supreme Court in restricting speech and press, and therefore cannot give constitutional approval to any law expanding the standards for adjudicating obscenity, vel non, beyond the dictates of Miller and its progeny.

Id. at 745.

Ordinance 3957 on its face goes well beyond the dictates of Miller and its progeny in attempting to expand the definition of "harmful to minors" to include terms not contemplated by interpretations of constitutional freedoms by the Supreme Courts of Tennessee and the United States.

II.

THE DETERRENT EFFECT OF ORDINANCE 3957 IS BOTH REAL AND SUBSTANTIAL, CHILLING EXPRESSIVE ACTIVITY PROTECTED UNDER THE FIRST AMENDMENT.

A. Ordinance 3957 reduces the adult population of Memphis to attending only live performances "fit for children".

In the First Amendment context, litigants are permitted to challenge a statute not only because their own rights of free expression are violated, but because of a judicial assumption that the statute's very existence may cause others not before the court

to refrain from constitutionally protected speech or expression. Virginia v. American Booksellers Ass'n., 484 U.S. 383, 108 S.Ct. 636 (1988); Secretary of State of Maryland v. J.H. Munson Co., 467 U.S. 947, 104 S.Ct. 2839 (1989); Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908 (1973).

In the process of drafting obscenity statutes to protect minors, a state also faces a challenge in drafting the regulation narrowly enough so that an adult's right to receive information is not restricted. Holt, Protecting America's Youth: Can Rock Music Lyrics Be Constitutionally Regulated? 16 J.of Cont.Law (1990). Justice Frankfurter, writing for the majority in Butler v. Michigan, 352 U.S. 380, 77 S.Ct. 524 (1957), commented on the state's insistence on quarantining books to shield juvenile innocence, "Surely, this is to burn the house to roast the pig." Id. at 383. The Butler Court concluded that the legislation before it was not reasonably restricted to the evil with which it was said to deal. "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children." Id. at 383-384.

Ordinance 3957 restricts adult access to music or other live performances which are surely not obscene as to adults even if they arguably are as to minors. Many promoters and performers will inevitably forego performances in Memphis to avoid the potential of prosecution or economic loss from half-empty auditoriums, decimated

by the uncertainty of wary ticket purchasers. Clearly, this Ordinance affects both the range and number of performances available to the adult public, a result that the Supreme Court has repeatedly held is prohibited by the First Amendment. Virginia v. American Booksellers Ass'n., 484 U.S. at 389.

B. Deterrence, even though it might not result in total suppression, is an impermissible restraint on free expression.

The Supreme Court was not persuaded by the City of Jacksonville's argument that its city ordinance prohibiting drive-in theaters from showing films containing nudity was a reasonable means of protecting minors from unsuitable visual influence. The Court reasoned that, not only did the ordinance sweepingly forbid display of nudity irrespective of its obscenity even as to minors, but that its effect was to deter drive-in theaters from showing movies containing any nudity, however innocent, and could not be justified. This deterrent effect was found to be both "real and substantial", because it required the expense of building a fence to avoid prosecution. Erznoznik, 422 U.S. at 217.

In the present case, the chilling deterrent effect of Ordinance 3957 is both "real and substantial" as there are no legitimate mechanisms for avoiding the effect completely. Performances that bypass Memphis entirely are not available even to adults.

III.

ORDINANCE 3957 IS VOID FOR VAGUENESS IN VIOLATION OF THE FOURTEENTH AMENDMENT.

A. The void-for-vagueness doctrine holds that an enactment will be void if its prohibitions are not clearly defined.

It is a constitutional imperative that laws provide a person of ordinary intelligence a reasonable opportunity to know what is prohibited. "Vague laws may trap the innocent by not providing fair warning." Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294 (1972); See also, Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242 (1974). The doctrine requires legislative bodies to set reasonably clear guidelines for law enforcement officials and triers of fact. Thus, a statute or ordinance must contain narrow, objective and definite standards to guide those who exercise the authority to restrict protected constitutional rights. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 89 S.Ct. 935 (1969). The standards must be susceptible to objective measurement and the terms of the regulation should be precisely defined. Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675 (1967).

Ordinance 3957 does not give fair notice of what is prohibited. Ordinance 3957 does not set clear guidelines for law enforcement officials. Moreover, Ordinance 3957 provides no objective standards unless "common limits of custom and candor" can be said to constitute an objective yardstick.

B. An ordinance that is otherwise unconstitutionally vague cannot be saved because it was adopted for the salutary purpose of protecting children.

The United States Supreme Court reviewed a Dallas City Ordinance used to classify a motion picture named "Viva Maria" as "not suitable for young persons". Much of the language of that ordinance was similar to Ordinance 3957, particularly regarding violence. The Court found the ordinance unconstitutionally vague.

> Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children.
>
> It is...essential that legislation aimed at protecting children from allegedly harmful expression - no less than legislation enacted with respect to adults - be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application.

Interstate Circuit v. City of Dallas, 390 U.S. 676 at 689, 68 S.Ct. 1298 (1968) [quoting People v. Kahan, 206 N.E.2d 333, 335 (1965)].

Here, the absence of narrowly drawn, reasonable and definite standards renders Ordinance 3957 fatally vague and unenforceable, despite the City's strong and abiding interest in youth.

C. The term "excess violence" is so vague and indefinite that people with common intelligence must necessarily guess at its meaning.

Violence per se has not reached the taboo of obscenity. Although it may be salutary to shield minors from violent depictions, the City Council has no authority to expand censorship into non-sexual themes. Violence does not enjoy the historical taboo sexual content has achieved. In Winters v. New York, 333 U.S. 507, 68 S.Ct. 665 (1948) the United States Supreme Court struck down as vague and indefinite a statutory standard pertaining to "criminal news and stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes". Id. at 518.

Non-sexual themes also do not come within the scope of the Miller test for obscenity. Holt, Supra at 67. Recognizing this, the Tennessee Supreme Court declared the Tennessee Obscenity Act of 1978 unconstitutional because the Act had, inter alia, added terms and standards that encroached upon federal and state freedoms.

> It follows that any definition that is at variance with, or in any way expands, the meaning of obscene material, as it "has been written into the Constitution" by the Supreme Court, is constitutionally impermissible.

Leech v. American Booksellers Ass'n., 582 S.W.2d at 745.

Another city ordinance that attempted to expand the unprotected areas of speech was found unconstitutional by the Seventh Circuit Court of Appeals in American Booksellers Ass'n. v. Hudnut, 771 F.2d 323 (7th Cir. 1985) aff'd, 475 U.S. 1001, 106 S.Ct. 1172 (1986). This Indianapolis ordinance sought to prohibit

the depiction of women as subordinate regardless as to whether the work taken as a whole had serious literary, artistic, political or scientific value. The Court of Appeals held that "The State may not ordain preferred viewpoints in this way. The Constitution forbids the State to declare one perspective right and silence opponents." Id. at 325.

In prohibiting the following:

> (1) "Excess Violence": the depiction of acts of violence in such a graphic and/or bloody manner as to exceed common limits of custom and candor, or in such a manner that it is apparent that the predominant appeal of the material is portrayal of violence for the sake of violence.

Ordinance 3957, §20.125(1),

the ordinance focuses attention on particular depictions, not to the work judged as a whole. This flaw was found to be fatal in Hudnut as subsequently affirmed by the United States Supreme Court, and Plaintiffs assert that it is equally fatal as written into Ordinance 3957. The ordinary person would find it impossible to determine the point at which violent content become "violence for its own sake". This term could be applied to professional wrestling, plays or operas with violent themes and virtually any musical with violent themes.

D. Ordinance 3957 is unconstitutionally vague on its face, creating the opportunity for arbitrary, capricious and discriminatory enforcement.

In referring to a Massachusetts statute which imposed criminal liability on anyone who publicly "treats contemptuously" the United States flag, the United States Supreme Court stated that:

> Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections...where inherently vague statutory language permits such selective law enforcement, there is a denial of due process.

Smith v. Goguen, 415 U.S. at 575.

Since a vague statute which covers speech related activities may be enforced selectively against unpopular ideas, it becomes a device for censorship. Grayned, 408 U.S. at 230. See also, Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734 (1965). Inevitably, the nature of Ordinance 3957 requires a determination of violation of the ordinance by law enforcement officers present at the performance. Given the confusion evidenced by the City Council as to whether the ordinance would subject country and western performers or professional wrestling audiences to penalties, it should be apparent that individual tastes and cultural biases would interfere with enforcement of the ordinance. "Rap" music and the message of Rap may be highly offensive to the community standards of "white" Memphis, while operatic orgies may be considered extremely "harmful to minors" by those less focused on the music presented. Although it is unlikely, there is the potential that some zealous law enforcement official could enforce the Ordinance against some wrestler for being "too violent" or a

country and western singer for extolling the virtues of adultery and whiskey! Literally, the "ear", "eye" and "mind" of the listener/viewer may determine the lawfulness of the live performance.

Accordingly, Ordinance 3957 violates the due process protection afforded in the Fourteenth Amendment.

IV.

ORDINANCE 3957 IMPROPERLY INTERFERES WITH PARENTAL RIGHTS.

A. The right of parents to the care, custody and nurture of their children is a liberty interest protected by the Fourteenth Amendment.

The Supreme Court has long recognized the primary role of the parents in the upbringing of their children. See, Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571 (1925); Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438 (1944). The Sixth Circuit Court of Appeals reviewed the basis of parental rights in Doe v. Irwin, 615 F.2d 1162 (6th Cir. 1980):

> The child is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce, 268 U.S. at 535.

It is cardinal with us that the custody, care and nurture

> of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder.
>
> ...and it is in recognition of this that these decisions have respected the private realm of family life which the State cannot enter.

Prince, 321 U.S. at 166.

The state's interest in universal education was found not to be absolute when the Supreme Court held that the Wisconsin compulsory formal education requirement after the eighth grade infringed upon the free exercise of the Amish religion, and "intruded on the fundamental interest of parents...to guide the religious future and education of their children. Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526 (1972).

The Supreme Court has recently emphasized appropriately the parental interest in shaping their children's values and lifestyles in upholding a two-parent abortion notification statute (dependent on judicial bypass):

> A natural parent who has demonstrated sufficient commitment to his or her children is thereafter entitled to raise the children free from undue state interference.

Hodgson v. Minnesota, S.Ct. 58 U.S.L.W. 4957, 4965 (U.S. Jun 25, 1990). See also, Bellotti v. Baird, 443 U.S. 622, 99 S.Ct. 3035 (1979), reh'g denied, 444 U.S. 887, 100 S.Ct. 165 (1979).

B. Ordinance 3957 totally eliminates the parental role in determining what "live performances" their children may attend and substitutes the State for the Parent.

Recognizing that parental autonomy to direct the education of one's children is not beyond limitation, the state's interests must be balanced against the traditional interest of the parent. Arnold v. Board of Educ. of Escambia County, Alabama, 880 F.2d 305 (11th Cir. 1989). Where there have been parent-state conflicts, the courts have struggled to accommodate the rights of both, (as well as the minors themselves). In analyzing an ordinance that prohibits the sale of material harmful to minors, the Supreme Court in Ginsberg stated that:

> Constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic to the structure of our society...moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.

Ginsberg, 390 U.S. at 639.

Similarly, T.C.A. §39-17-911(c) provides an affirmative defense to prosecution for sale, loan or exhibition of material harmful to minors where the minor is accompanied by a parent or legal guardian. Under Ordinance 3957, §20.127 however, not only is parental accompaniment not a defense, but even parental knowledge that minor children will attend a prohibited performance is unlawful.

The natural and inevitable reaction for parents under penalty of violating the Ordinance would be to avoid allowing their children to attend live performances of all kinds. The Ordinance replaces the parents' decision with that of the state. This

usurpation of parental decision-making drastically interferes with the parents' constitutional right to direct the upbringing of their minor children.

C. Ordinance 3957 provides no compelling state interest in substituting the state's judgment for that of the parent or legal guardian.

The question of the extent of state power to regulate conduct of minors not constitutionally regulatable when committed by adults is a vexing one, perhaps not susceptible of precise answer. Carey v. Population Services International, 431 U.S. 678, 97 S.Ct. 2010 (1977). See also, Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831 (1976). The Supreme Court in Carey, however, did not agree that New York had a significant state interest in furtherance of its policy against promiscuous sexual intercourse among the young sufficient to warrant the prohibition of contraceptives to minors under 16. The Court came to this conclusion after noting Ginsberg v. New York did indicate that the scope of permissible state regulation is broader as to minors than as to adults. Id. at 695, n.17.

Similarly, the Fifth Circuit Court of Appeals evaluated a juvenile curfew ordinance in Johnson v. City of Opelousas, 658 F.2d 1065, (5th Cir. 1981), and held that the curfew ordinance:

> ...inhibits rather than promotes the parental role in childrearing, the third listed justification for greater

> restrictions on the rights of minors...regardless of the legitimacy of Opelousas' stated purposes of protecting youths, reducing nocturnal crime and promoting parental control over their children, less drastic means are available for achieving these goals.

Id. at 1074.

In the case at hand, it is not even clear what is the stated purpose of Ordinance 3957. The second paragraph refers to legislation "aimed at controlling dissemination of pornography to minors". But clearly, the Ordinance sweeps drastically broader than pornography. Plaintiffs assert that Ordinance 3957 does not represent the "relatively narrow and well-defined circumstances where government may bar public dissemination of protected materials to minors". Erznoznik, 422 U.S. at 213.

V.

ORDINANCE 3957 VIOLATES THE FOURTEENTH AMENDMENT'S GUARANTEE AGAINST THE DEPRIVATION OF LIBERTY WITHOUT DUE PROCESS BY SUBJECTING MINORS TO JUVENILE COURT PROCEEDINGS FOR EXERCISING CONSTITUTIONALLY PROTECTED RIGHTS.

Although the totality of the relationship between the juvenile and state is undefined, it is clear that minors as well as adults are protected by the Bill of Rights and the Fourteenth Amendment. In re Application of Gault, 387 U.S. 1, 13, 87 S.Ct. 1428 (1967). It has been often said that "due process of law is the primary and indispensable foundation of individual freedom". Id. at 20. The

sentiment expressed by the United States Supreme Court in Gault, the landmark juvenile rights decision is as relevant today as it was in 1967.

> ...Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is - to say the least - debatable.

Id. at 17.

As the Court in Gault recognized, a Juvenile Court experience may have serious, traumatic and permanent effects on the social and long term professional lives of minors. The claim of secrecy regarding the records is "more rhetoric than reality". Id. at 24. In subjecting minors to Juvenile Court proceedings for "purchasing or attempting to purchase a ticket or attempting to gain admission to, or attend a live performance...." §20.128(a), Ordinance 3957, is clearly not drafted to accomplish the prevention of harm to minors. Furthermore, the penalty for violation of the Ordinance by a minor is inherently irrational when an underlying basis for the Ordinance is that minors are incapable of making choices given their age and maturity.

The penalty directed at minors under §20.128(1) of Ordinance 3957 does not represent appropriate police power of the state as parens patriae to deny to the child procedural rights available to adults. As such, Ordinance 3957 violates the Fourteenth

Amendment's guarantee against the deprivation of liberty without due process.

CONCLUSION

Ordinance 3957 on its face violates the First Amendment to the United States Constitution and Article 1, §19 of the Tennessee Constitution. The Ordinance discriminates on the basis of the content of protected speech, affecting the rights of adults as well as the category of persons, minors, it is purportedly drafted to protect.

Ordinance 3957 is unconstitutionally void as it is overbroad and encompasses within its prohibitions protected thought, expression and conduct.

Ordinance 3957 is unconstitutionally void for vagueness, according to standards that apply to all regulations directed at restricting freedoms of all citizens regardless of age.

Ordinance 3957 violates the Fourteenth Amendment's protection of the liberty interest of parents to care for their children as well as the protection of the liberty interest of the minors themselves to attend live performances without fear of arrest.

For all of the foregoing reasons, Plaintiffs respectfully submit that Ordinance 3957 is unconstitutional and therefore, move this Court for entry of an Order granting Summary Judgment in their favor, with costs assessed against the Defendants.

Respectfully submitted,

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