

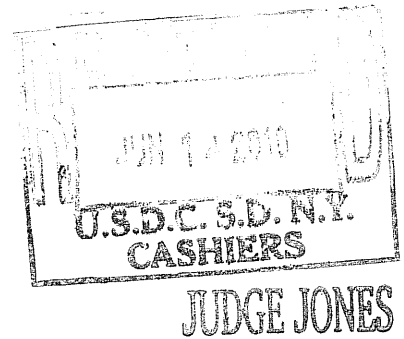
**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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JAY LEVY,  
DIANE LEVY,  
BLACK RADIO NETWORK, INC.,  
  
Plaintiffs,

v.

THE CITY OF NEW YORK; RAYMOND KELLY, Police  
Commissioner, New York City Police Department, Lt.  
Eugene J. Whyte, Commanding Officer Public Information  
Division of the New York City Police Department  
  
Defendants.



**COMPLAINT**

**10 CV 4605**  
NO. 4605

**JURY TRIAL  
DEMANDED**

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**PRELIMINARY STATEMENT**

1. Plaintiffs Jay Levy, Diane Levy, and Black Radio Network, Inc. (collectively, "Plaintiffs") bring this civil rights action for damages, injunctive and declaratory relief against current policies, practices, customs and usages of the City of New York, Raymond Kelly and Lt. Eugene J. Whyte (collectively, "Defendants") which have resulted in an unconstitutional infringement on the coverage and dissemination of news geared towards the minority community.

2. Plaintiff Jay Levy and Diane Levy are the owners, editors, and writers for Black Radio Network, Inc. ("BRN") a long-standing news organization that was developed to gather and transmit daily actualities or sound clips of minority interest to black-oriented stations around the country, including WWRL and WLIB in New York.

3. Black Radio Network, Inc., and its predecessor Black Audio Network, Inc., have been in existence since 1962 and since then have operated with full working press credentials.

4. Black Radio Network, Inc. has recently developed Minority News, a daily minority-oriented report offering specific news of interests to Blacks, Latinos, Native Americans, Asian Americans, and Women. Minority News is a web based news provider.

5. In order to deliver the news to their mostly minority constituents, plaintiffs require press credentials issued by the defendants to fulfill their responsibility. In past years, plaintiffs have used press credentials issued by defendants to cross police lines and to cover breaking news.

6. In prior years, whenever plaintiffs had applied for press credentials, they had received them within a very short time. Indeed, plaintiffs had been provided with press credentials from the New York Police Department for over 40 years. In 2009, however, plaintiffs' application for press credentials were denied. Plaintiffs met the requirements for press credentials in 2009 and should have received such credentials.

7. Defendants infringed upon plaintiffs' First Amendment rights by denying plaintiffs press credentials, specifically, Working Press Cards and Reserve Working Press Cards, which plaintiffs had sought and had obtained in prior years.

8. Defendants denied plaintiffs their press credentials on the grounds that they had not met certain requirements that are set forth in Rules promulgated by the City of New York. However, and upon information and belief, Defendants year after year grant press

credentials to many other journalists and news people who submitted the same or similar information as that provided by plaintiffs.

9. A review of past records shows that when prominent reporters or news people or reporters affiliated with the large media outlets submit their applications for press credentials their applications are routinely approved. This notwithstanding that their applications may not be in compliance with the Rules.

10. Defendants claim that its rules allow Working Press Cards to be issued only to those individuals who are full-time, news staff employees, whose routine duties require them to cross police and fire lines and are regularly involved in spot emergency news coverage, i.e. shootings, fires, homicides, etc. Yet employees of large, recognized, or “established” news organizations are issued press cards without regard to the Rules. Thus, for example, the defendants have issued a Working Press Card to Roger Ailes, the Chairman of the Fox Television Stations Group. Clearly, his routine duties do not require him to cross police lines and fire lines. Nor does the routine duties of WABC meteorologist Lee Goldberg require him to cross police lines. Yet in years past he has received a Working Press Card. Similarly, defendants have issued a Working Press Card to WCBS political correspondent Marcia Kramer when no demonstration of the need to cross police lines was presented in her application. The instances of defendants issuing press cards to prominent reporters who have no need cross police lines are too numerous to detail in this complaint. Simply put, the rules the defendants purport to follow are ignored when large or well-established media organizations are involved. When a smaller or less prominent news organization or newsperson applies for a Working Press Card defendants invoke the Rules to restrict access to press credentials

11. Plaintiffs' attempts to avail themselves of the Defendants' administrative process have been unsuccessful.

12. As a result of defendants' conduct, plaintiffs have been denied access to news events and have been unable to write and publish with regard to such events. Without current press credentials, plaintiffs cannot do their jobs effectively and are substantially burdened in reporting and communicating the news. Defendants' unconstitutional and unlawful denial prevented plaintiffs from communicating with the people who count on them for their unique perspectives on New York City news.

13. Plaintiffs, therefore, bring this action under 42 U.S.C. § 1983 for damages and permanent injunctive and declaratory relief to vindicate their First Amendment rights and to challenge the Defendants' conduct which runs afoul of First Amendment Rights under the U.S. Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution in that the regulations governing the issuance of Press Credentials are unconstitutionally vague on their face, and as applied to the plaintiffs herein, and that the denials of Plaintiffs' applications for press credentials while other journalists received their press credentials constitutes an equal protection of the law violation of the plaintiffs' rights to report and communicate the news as well as a violation of their rights under Article I, Sec. 8 of the New York State Constitution.

### **JURISDICTION AND VENUE**

14. The Court has subject matter jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. §§ 1331, 1343(a)(3)-(4), and 42 U.S.C. § 1983. This Court has supplemental jurisdiction over New York state law claims pursuant to 28 U.S.C. § 1367.

15. Venue of this action is properly in this district pursuant to 28 U.S.C. § 1391 (b), on the ground that a substantial part of the events or omissions giving rise to the claims alleged herein occurred, and threaten to occur, in this district.

### PARTIES

16. Plaintiffs Diane Levy and Jay Levy are residents of the State of New York, County of Nassau.

17. Defendant City of New York is a municipal entity created and authorized under the laws of the State of New York. It is authorized by law to maintain a police department, which acts as its agent in the area of law enforcement and for which it is ultimately responsible. The defendant City of New York assumes the risks incidental to the maintenance of a police force and the employment of police officers as said risks attach to the public consumers of the services provided by the New York City Police Department.

18. Defendant Raymond Kelly is the Commissioner of New York City Police Department. He is sued in his official capacity.

19. Defendant Lt. Eugene Whyte is the Commanding Officer of the Public Information Division of the New York City Police Department. He is sued in his official and individual capacity.

20. At all times relevant herein, the individual defendants were acting under color of state law in the course and scope of their duties and functions. Kelly and Whyte as commissioner, agents, servants, employees and officers of the New York City Police Department, performed and engaged in conduct incidental to the performance of their lawful

functions in the course of their duties. Defendants Kelly and Whyte were acting for and on behalf of the New York City Police Department at all times relevant herein, with the power and authority vested in them as commissioner, officers, agents and employees of the New York City Police Department and incidental to the lawful pursuit of their duties as commissioner, officers, employees and agents of the New York City Police Department.

## **FACTS**

### **The Administrative Process for Obtaining NYPD Press Credentials**

21. Under the applicable Rules and Regulations of the City of New York, *i.e.* 38 R.C.N.Y. §§ 11-01, 11-02, and 11-04 (Working Press Card, Reserve Working Press Cards, and Press Identification Card) (collectively “the Rules”), the NYPD is authorized to issue press credentials to staff and independent journalists. More specifically, NYPD issues Working Press Cards and Reserve Press Cards.

### **Working Press Card**

22. The eligibility requirements for a Working Press Card (“WPC”) are set forth in 38 R.C.N.Y. § 11-01 (“Sec. 11-01”). According to Sec. 11-01 (a), one is entitled to a WPC if he or she is a “full-time employee[] of a news gathering organization covering spot or breaking news on a regular basis such as robbery scenes, fires, homicides, train wrecks, bombings, plane crashes, where there are established police or fire lines at the scene [and] [t]he Working Press Card enables the individual to cross such lines at these emergency scenes, and at public events of a non-emergency nature such as parades and demonstrations.”

23. Subsection (b) of Sec. 11-01 further provides that “[n]ewspersons (such as freelancers), not otherwise eligible for a Working Press Card, who demonstrate a need to

cover the above-described spot or breaking news events on a regular and routine basis will be eligible for a Working Press Card. Such persons will be required to submit with their application at least three (3) letters from previous media employers or one (1) letter from one (1) media employer indicating there were three (3) articles or photographs published within the twelve (12) months immediately preceding the application.”

### **Reserve Working Press Card**

24. The eligibility for a Reserve Working Press Card is set forth in Section 38 R.C.N.Y § 11-02 (“Sec. 11-02”). Sec. 11-02 provides that the Reserve Working Press Card is “limited in number and is issued only to news organizations. It bears only the name of the news organization to which it is issued. It is designed to afford maximum flexibility to print or broadcast assignment editors and to facilitate random coverage of police and fire scenes by individuals not normally entitled to the Working Press Card. This credential is also granted by the assignment editor to a free lancer that he may be using for a particular story.”

### **Press Identification Card**

25. Section 38 R.C.N.Y § 11-04 (“Sec. 11-04”) provides that a journalist may be eligible for a Press ID Card (“PIC”) when “the individual named on the card is employed by a legitimate news organization, but that the individual does not normally cover spot or breaking news events such as those listed in §11-01(a). These journalists include, among others, sports writers, drama critics, fashion writers, financial reporters, and music critics. This credential does not entitle the bearer to cross police or fire lines and is issued as a courtesy by the Police Department recognizing a need for official identification.”

### **Plaintiffs' Application for Press Credentials**

26. Plaintiffs, Diane Levy and Jay Levy are both long-time holders of annually issued NYPD WPC and Reserve WPC. During the course of applying for their 2009 press credentials plaintiffs reported to defendants that Black Radio Network was changing the way it presented news and would be converting to a web-based news, with photo and audio service.

27. Plaintiffs' application for renewal of their press credentials was the same as it had been for the past forty years with the exception of the disclosure that plaintiffs were changing the medium by which they would disseminate news information.

28. Plaintiffs' application for renewal included stories that they had covered including the Dominican Day Parade, State Officials Honor Local Teens, and Italians Return to Spanish Harlem for Street Festival.

29. On April 3, 2009, plaintiffs were informed that their application for New York City Police Department Press Credentials had been denied. Upon information and belief, defendant Lt. Eugene Whyte made this decision. Defendants' decision to deny press credentials was based on their view that plaintiffs' did not establish a demonstrable need to cover spot or breaking news events on a regular and routine basis. However, plaintiffs' application was no different from many other applications where the defendants have granted press credentials. For example, in 2008, WCBS political correspondent Marcia Kramer applied for a Working Press Card and her application consisted of the following stories: Press Conference with Mayor Bloomberg, Governor Spitzer Press Conference, and Mayor Bloomberg Announcement. Although none of Marcia Kramer's stories established a demonstrable need to cover spot or breaking news events such as robbery scenes, fires,



homicides, train wrecks, etc., defendants granted her application for a Working Press Card. Meteorologist Lee Goldberg in his application failed to include any stories to establish a need to cover spot or breaking news and defendants granted his application for a Working Press Card. In 2008, Roger Ailes the Chairman of Fox News Channel was granted a Working Press Card by defendants after submitting an application where he claimed to have covered the Midtown Steam Pipe Explosion, the Fire at Deutsche Bank, and Glass Falling from Building. Defendants' in violation of their own rules, and upon information and belief, issued the press credentials to Mr. Ailes without verifying his claims. Daily News reporter Donald Bertrand was issued a Working Press Card in an application where he listed a neighborhood rally, a flood, and dispute over street paving. Nothing in the Daily News reporter's application established a need to cover spot or breaking news yet he was granted press credentials. In light of the examples above defendants' decision to deny plaintiffs' press credentials is constitutionally flawed.

30. Because Plaintiffs did not receive Working Press Cards and Reserve Working Press Cards, their ability to report on current events has been substantially compromised. For example, on May 28, 2009, when an African American police officer was mistakenly shot in East Harlem by another police officer, plaintiffs wanted to respond to the scene but did not because they did not have press credentials. They feared going to that location without a Working Press Pass would not only hinder their ability to speak to witnesses but would also create problems with the New York City Police Department. Their ability to report on a story that was of significant concern to their minority constituent was significantly disrupted. There are many other instances where plaintiffs' ability to cover and disseminate news was hampered by defendants' decision denying them press credentials.

31. Moreover, because plaintiffs were denied a Working Press Card they have been unable to launch their website. Without the press credentials plaintiffs have not been able to cover the news stories that were essential to their web based programming. The inability to launch their website has damaged plaintiffs financially. After thirty plus years of disseminating news plaintiffs have been shut out of the news business by defendants' unconstitutional conduct. In sum, plaintiffs have been harmed by the denial of their application for a Working Press Card and Reserve Working Press Cards, because their ability to report on newsworthy events has been substantially compromised.

### **FIRST CAUSE OF ACTION**

#### **FIRST AMENDMENT VIOLATIONS - DENIAL OF THE RIGHT TO THE FREEDOM OF THE PRESS AND FREEDOM OF SPEECH**

32. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "31" hereof as though more fully set forth herein.

33. Defendants, acting under color of state law, violated Plaintiffs' rights to the Freedom of Press and Freedom of Speech under the First Amendment of the United States Constitution because Defendants interfered with Plaintiffs' work of gathering and reporting the news.

### **SECOND CAUSE OF ACTION**

#### **DENIAL OF EQUAL PROTECTION – FIRST AND FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES**

34. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "33", with the same force and effect as though more fully set forth herein again at length.

35. Defendants, acting under color of state law, have violated Plaintiffs' rights

under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by impermissibly discriminating against and distinguishing between journalists and publications based on content and viewpoint.

36. Since the Defendants have interfered with Plaintiffs' work of gathering, reporting and communication the news, their conduct has interfered with a fundamental First Amendment right of the freedom of the press.

37. Because Defendants have no compelling government interest to impede the Plaintiffs' efforts to provide news coverage for their readers while permitting journalist for other media to do the same for their readers, the Defendants' conduct violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

### **THIRD CAUSE OF ACTION**

#### **VIOLATION OF THE RIGHT TO THE FREEDOM OF THE PRESS AND/OR SPEECH UNDER ARTICLE I, SEC. 8 OF THE NEW YORK STATE CONSTITUTION**

38. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "37", with the same force and effect as though more fully set forth herein again at length.

39. Defendants, under color of state law, violated Plaintiffs' rights under Article I, Sec. 8 of the New York State Constitution because they have interfered with Plaintiffs' work of gathering, reporting and communicating the news.

40. Plaintiffs are entitled to press credentials because they have satisfied the requirements set forth in the applicable regulations. Defendants have no compelling

government interest to impede Plaintiffs' efforts to provide news coverage for their readers.

41. Because they have violated Plaintiffs' rights to gather, report and communicate the news, the Defendants have run afoul of the protections of the New York State Constitution. The Regulations and the manner in which they are administered "restrain" and/or "abridge" the "liberty" of the press and/or speech under Article I, Sec. 8 of the New York Constitution.

### **JURY DEMAND**

42. Plaintiffs hereby demand trial by jury of all issues properly triable thereby.

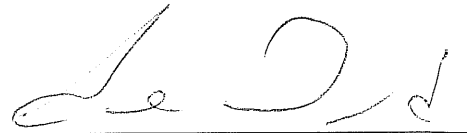
### **PRAYER FOR RELIEF**

**WHEREFORE**, plaintiffs respectfully ask this Court:

- (1) To enter a judgment declaring that Defendants' actions violated the First Amendment of the United States Constitution, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and New York State Constitution, Article I, Sec. 8 in denying plaintiffs press credentials.
- (2) To enter a permanent injunction granting plaintiffs press credentials;
- (3) To enter a monetary judgment for compensatory damages under 42 U.S.C. § 1983 for violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the First Amendment of the United States Constitution;
- (4) To award Plaintiffs costs and disbursements associated with the filing and maintenance of this action, including an award of reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and

(5) To award such other equitable and further relief as the Court deems just and proper.

Dated: June 14, 2010

A handwritten signature in black ink, appearing to read "Earl S. Ward", written over a horizontal line.

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