

FILED

IN THE UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

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U.S. DISTRICT COURT  
MIDDLE DISTRICT OF TN

OCCUPY NASHVILLE (an unincorporated  
organization), PAULA ELAINE PAINTER,  
MALINA CHAVEZ SHANNON, LAUREN  
MARIE PLUMMER, ADAM KENNETH  
KNIGHT, WILLIAM W. HOWELL and  
DARRIA HUDSON,

Plaintiffs,

v.

WILLIAM EDWARD "BILL" HASLAM,  
GOVERNOR OF THE STATE OF  
TENNESSEE, WILLIAM L. GIBBONS  
COMMISSIONER OF THE TENNESSEE  
DEPARTMENT OF SAFETY, STEVEN G.  
CATES COMMISSIONER OF THE  
TENNESSEE DEPARTMENT OF GENERAL  
SERVICES,

Defendants.

CIVIL ACTION NO. \_\_\_\_\_

JURY DEMAND

**PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND  
MEMORANDUM OF LAW IN SUPPORT OF MOTION**

Come now Plaintiffs Occupy Nashville, et al., by and through counsel, and respectfully move the Court pursuant to Fed. R. Civ. P. 65 for an Order temporarily restraining Defendants William Edward "Bill" Haslam, Governor of Tennessee (and others) in their official capacities, from enforcing new rules as outlined in a memo, issued by the Tennessee Commissioner of General Services on Thursday, October 27, 2011, imposing restrictions preventing overnight assembly altogether and drastically impairing and/or preventing any assembly whatsoever anytime in Legislative Plaza, located at the corner of Sixth Avenue and Union Street, Nashville, Tennessee 37244, (the "New Rules") from taking actions against Plaintiffs by issuing criminal citations or

and/or effectuating arrests of the Occupy Nashville protestors located at Legislative Plaza in downtown Nashville. This motion is supported by the memorandum of law (incorporated below) and the Verified Complaint in this matter which is incorporated herein by reference.

## **MEMORANDUM**

### **I. Introduction**

Defendants Haslam, Cates and Gibbons have created by mere fiat – without authority and without following required procedures – *ad hoc* restrictions on use of a public forum, namely Legislative Plaza opposite the State House in Nashville. They have imposed those restrictions on Plaintiffs despite having never imposed these restrictions on persons in the past and they have relied on those invalid restrictions to prohibit free speech, arrest the Plaintiffs, and seize their property, including political signs, media equipment, computers, food rain gear and other items. Plaintiffs have now sued to enjoin the enforcement of the New Rules in violation of their constitutional rights to speech, assembly and due process.

This lawsuit challenges the facial and as applied constitutionality of General Services rules under which State officials, in the exercise of their unbridled and unfettered discretion, may permit certain gatherings and events to occur on state grounds but decline to permit others. In the context of this case, the New Rules have been promulgated and applied to exclude members of the Occupy Nashville movement, an offshoot of the Occupy Wall Street protest, from engaging in protected political expression past 4:00 p.m. and before 6:00 a.m. in Legislative Plaza, an historic and traditional public forum located in downtown Nashville. This lawsuit also challenges the lawfulness of the process by which these new rules were adopted.

## II. Factual Background<sup>1</sup>

On October 9, 2011, a group of people gathered together to express frustration with their government in Legislative Plaza, a public plaza in downtown Nashville historically used by political protesters. Relying on the historic policy of the Tennessee Department of General Services, the citizens did not seek a permit for their assembly, because one had never been required before for protests in the Plaza. Between October 9, 2011, and October 27, 2011, the protesters protested, held up signs, and generally communicated frustration with their Government's policies. The protesters were notably non-violent, and in fact had taken great care to report even minor misdemeanors to law enforcement.

On October 27, allegedly responding to a report of a fist fight and an incident involving consensual sex beneath a magnolia tree, the Government issued the New Rules, which dramatically restricted the plaintiffs' ability to protest during business hours, eliminated their right to gather after 4:00 p.m., and denied their right to remain in the plaza at all after 10:00 p.m. without express permission from the State of Tennessee.

The protesters, and others, remained in Legislative Plaza after 4:00 p.m. On October 27, and well into the night. At approximately 3:00 a.m. the next morning, about seventy-two State Troopers arrived on Legislative Plaza to order the protesters to leave. While some did leave, others chose to stay and non-violently advocate change for their government. The State Troopers arrested the remaining protesters, bound their hands with "zip ties," and loaded them onto a waiting prison bus, which took them to jail.

Upon arrival at the Davidson County Sheriff's Criminal Justice Center, the State Troopers sought to have their actions ratified by a Judicial Commissioner as required by state law. The

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<sup>1</sup> This factual background is a summary of those facts stated in the Verified Complaint supported by the affidavits of the individual plaintiffs.

Commissioner denied the Troopers' request, refusing to find probable cause and effectively ordering the protesters' release. Several hours later, the State Troopers complied with the Commissioner's order, but only after illegally detaining and ultimately issuing the protesters state citations for criminal trespassing, a class "C" misdemeanor, carrying a potential fine and jail time.

As a result of these enforcement activities, individual members of the Occupy Nashville organization have been forcibly arrested and silenced. Their rights to free assembly and political expression have effectively been taken by their government upon threat of jail. The enforcement of the new rules has therefore imposed irreparable harm to Plaintiffs' constitutional rights which can be remedied only by the issuance of a temporary restraining order.

### **III. The Court Should Issue A Temporary Restraining Order Enjoining The Enforcement of the New Rule.**

The elements to be considered and "carefully balanced" in deciding whether to issue or withhold a temporary restraining order ("TRO") are: (1) whether the movant has shown a substantial likelihood or probability of success on the merits; (2) whether the movant has shown irreparable injury; (3) whether the issuance of a temporary restraining order could harm third parties; and (4) whether the public interests would be served by issuing the temporary restraining order. *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456, 460 (6th Cir. 1999).

#### **A. Plaintiffs Can Demonstrate a Substantial Likelihood of Success on the Merits of Their Claims:**

The First Amendment to the United States Constitution presumptively protects all forms of expression against governmental interference and restraint. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975). The broadest protection is afforded to political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes

desired by the people.” *Roth v. United States*, 354 U.S. 476, 484 (1957). Indeed, “there is practically universal agreement that a major purpose of the [First] Amendment was to protect the free discussion of governmental affairs.” *Mills v. Alabama*, 384 U.S. 214, 218 (1966). This conclusion reflects the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). As the Supreme Court has repeatedly observed, advocacy of a politically controversial viewpoint is the essence of First Amendment expression. *See, e.g., Citizens United v. Fed. Election Comm’n*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 876, 892 (2010) (noting that political speech is “central to the meaning and purpose of the First Amendment”); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995). Given the fundamental nature of the right to unrestrained political dialogue, laws burdening core political speech are weighed with “exacting scrutiny” and may be upheld only if narrowly tailored to serve an overriding state interest. *McIntyre*, 514 U.S. at 347.

#### **1. IMPROPERLY PROMULGATED RULE – VOID ; DUE PROCESS VIOLATION**

The Tennessee Department of General Services is authorized and obligated to make rules for the use of the Plaza. Tenn. Code Ann. §§ 4-3-1105, 4-4-103; 4-8-101, 103 & 104, 4-3-1103 & 1105 and 4-3-2206. Prior to Occupy Nashville’s protest commencing at Legislative Plaza, the Department of General Services had adopted a set of limitations on the Plaza’s use (the “Old Rules”). It is unknown when or how these Old Rules were adopted; however, it is clear that they placed no limitation on the hours of use and had been interpreted by the State to allow non-exclusive use of the Plaza without seeking a permit.

Tennessee requires that agencies issuing rules do so only after notice and a hearing:

- (a) An agency shall precede all its rulemaking with notice and a public hearing unless:
  - (1) The rule is adopted as an emergency rule; or

(2) The proposed rule is posted to the administrative register web site within the secretary of state's web site within five (5) business days of receipt, together with a statement that the agency will adopt the proposed rule without a public hearing unless within sixty (60) days after the first day of the month subsequent to the filing of the proposed rule with the secretary of state a petition for a public hearing on the proposed rule is filed by twenty-five (25) persons who will be affected by the rule, an association of twenty-five (25) or more members, a municipality or by a majority vote of any standing committee of the general assembly. If an agency receives such a petition, it shall not proceed with the proposed rulemaking until it has given notice and held a hearing as provided in this section. The agency shall forward the petition to the secretary of state. The secretary of state shall not be required to compile all filings of the preceding month into one (1) document.

(b) Subdivision (a)(2) does not apply if another statute specifically requires the agency to hold a hearing prior to adoption of the rule under consideration.

(c) The secretary of state shall prescribe rules governing the manner and form in which proposed rules shall be prepared by the agencies for submission for publication under subdivision (a)(2). The secretary of state may refuse to accept for publication any proposed rule that does not conform to such requirements. Tenn. Code Ann. § 4-5-202 (West)

On October 27, 2011, the Old Rules were amended by fiat in secret without notice, comment, approval by the Attorney General and Reporter or publication by the Secretary of State. These New Rules which purport to be of immediate applicability, were posted on the Plaza in the afternoon of October 27, 2011. The New Rules were then enforced on October 28, 2011. No emergency requiring the promulgation of new rules existed. These New Rules unconstitutionally limit access by the public to a forum universally accepted to be an area protected for the speech of the governed.

Although the Tennessee Department of General Services characterized these rules (both Old and New) as policies, they, in fact, constitute rules under the UAPA. A “policy” means a set of decisions, procedures and practices pertaining to the internal operation or actions of an agency. Tenn. Code Ann. § 4-5-102(12)(emphasis added). “Rule” means each agency statement of general applicability that implements or prescribes law or policy or describes the procedures

or practice requirements of any agency. "Rule" includes the amendment or repeal of a prior rule. Tenn. Code Ann. § 4-5-102(12).

The Department of General Services did not comply with the notice and hearing or any other requirement of the UAPA in issuing the New Rules. Instead, they simply issued them by fiat. State policies that are not promulgated in compliance with the UAPA are void. See Tenn. Code Ann. § 4-5-216.

Because the New Rules are void *ab initio*, their enforcement resulted in the illegal arrest of the plaintiffs, the destruction of their property and the silencing of their political speech. Denying the Plaintiffs rights based upon this arbitrary absence of process amounts to a procedural due process violation by the State of Tennessee. This violation alone warrants the granting the requested relief.

## 2. INTENTIONAL CONTENT BASED DISCRIMINATION

According to public statements, Defendant Haslam personally approved the implementation of the New Rules and enforcement the new curfew on Legislative Plaza beginning at 3:00 a.m. on Friday, October 28, 2011. Citing the apparent commission of three misdemeanors by someone at or near Legislative Plaza during October, i.e, an assault, public urination and an apparent tryst beneath a Magnolia tree, Defendant Haslam said his administration was responding to complaints from lawmakers and the general public about sanitation and safety on Legislative Plaza during the Occupy Nashville protests.

Enjoining or preventing First Amendment activities before demonstrators have acted illegally or before the demonstration poses a clear and present danger is presumptively a First Amendment violation. *Carroll v. President and Com'rs of Princess Anne*, 393 U.S. 175, 180-81, 89 S. Ct. 347, 351-52, 21 L. Ed. 2d 325 (1968); Laurence Tribe, *American Constitutional Law*, §

12-34, at 1041 (2d ed. 1987) (collecting cases). The generally accepted way of dealing with unlawful conduct that may be intertwined with First Amendment activity is to punish it after it occurs, rather than to prevent the First Amendment activity from occurring in order to obviate the possible unlawful conduct. *Carroll*, 393 U.S. at 180-81, 89 S.Ct. at 351-52; *Kunz v. New York*, 340 U.S. 290, 294, 71 S.Ct. 312, 315, 95 L.Ed. 280 (1951) (distinguishing subsequent punishment from suppression of speech); *Collin v. Chicago Park District*, 460 F.2d 746, 754 (7th Cir.1972).

Here, the government has sought impermissibly to prohibit the political speech at issue rather than enforcing the criminal law. Indeed, the Governor's public statements, along with those of his commissioners, do not indicate that the government tried, much less failed, to enforce the criminal law. Instead, the Governor chose a metaphorical shotgun to kill a fly when he decided to close the city's most historic political forum in response to the commission of misdemeanors by people near the protest.

### **3. VIOLATION OF 1<sup>ST</sup> AMENDMENT AND ARTICLE 1, SECTION 19 & 23**

#### **A. VAGUE AND OVERBROAD**

The New Rules are also impermissibly overbroad, in that their enforcement necessarily curtails free speech and expression. A law is overbroad under the First Amendment if it “reaches a substantial number of impermissible applications” relative to the law’s legitimate sweep. *New York v. Ferber*, 458 U.S. 747, 771, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). The overbreadth doctrine exists “to prevent the chilling of future protected expression.” *Staley v. Jones*, 239 F. 3d 769, 779 (6th Cir. 2001). Therefore, any law imposing restrictions so broad that it chills speech outside the purview of its legitimate regulatory purpose will be struck down.

The New Rule restricts far more speech than is necessary. For example, a press conference to announce the filing of the instant lawsuit would be prohibited under the New Rules

unless the ACLU-TN applied for a permit, paid a permit fee, a security fee and provided proof of \$1,000,000 in liability insurance. Such demands are unreasonable, unnecessary and unfair, especially given the historical uses of this particular forum.

The New Rules are also impermissibly vague in that they fail to define key terms within the Rule. For example, they fail to define what is a “gathering” or “assembly.” It also instructs that this Rules are applicable to Legislative Plaza, War Memorial Courtyard and the Capitol grounds without defining the boundaries of those locations. “No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.” *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888 (1939). Indeed, a conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Although ordinarily “[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others,” the Supreme Court has relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-49 102 S. Ct. 1186, 71 L.Ed.2d 362 (1982); *see also Reno v. American Civil Liberties Union*, 521 U.S. 844, 870-874, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

An example of how the New Rules are both vague and overbroad is illustrated by Plaintiff Shannon’s arrest was arrested while attempting to take photographs of the events while

she was on the sidewalk beside Legislative Plaza. The New Rules are so vague that Plaintiff Shannon could not reasonably have been expected to know that they would be interpreted so broadly as to cover speech on the sidewalks abutting Legislative Plaza. “No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.” *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888 (1939).

**B. THE FINANCIAL BURDEN REQUIREMENTS IN THE NEW RULE ARE UNCONSTITUTIONAL CONTENT BASED RESTRICTIONS ON SPEECH.**

The New Rules require the payment of a use fee, security fees (which are themselves determined arbitrarily), and proof of \$1,000,000 in liability insurance coverage in order to obtain a permit for use of the Plaza between the hours of 9:00 a.m. and 4:00 p.m. These financial requirements are invalid prior restraints on speech.

In *Forsyth County v. The Nationalist Movement*, the Supreme Court held that vesting a city administrator with discretion to set parade permit fees designed to deal with police costs was unconstitutional, because it would involve the city administrator inquiring about the content of the speech and making determinations of fees based on perception of the speech content:

There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official. 505 U.S. 123, 133 (1992).

In *Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1031 (C.D. Cal. 2002), the court invalidated an ordinance that, like the New Rules, allowed city administrators to charge a permit fee to defray expenses of police protection, because it necessarily involved speech content regulation. Citing *Forsyth County*, the court held

[T]he City of San Luis Obispo administrator must look to the content of the proposed activity to make his or her determination of what City resources will be required. Based on that determination, the City official prepares a budget which may not be revised and which must be paid by the applicant ten days before the event. Thus, the determination of the amount of such service charge will turn on the administrator's view of the resources necessary, a view which may be based on the content of the message.

Additionally, even if the State had clearly defined criteria for setting police and clean-up fees, there must be an exception to ensure that speakers who engage in free speech activities or who are not well-financed are not excluded from exercising their free speech rights in traditional public forums.

The Supreme Court has recognized that a significant requirement for upholding any permit scheme is whether it is "exerted as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and discussion of public questions immemorially associated with resort to public places." *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). While the State may have an interest in recouping police costs for the use of its public spaces, it should have exceptions for free speech activities and for poorly financed speakers. At least three circuit courts have required that permit schemes provide for an indigency exception to burdensome monetary permit conditions. *See Central Florida Nuclear Campaign Freeze v. Walsh*, 774 F.2d 1515 (11<sup>th</sup> Cir. 1985), *cert. denied* 475 U.S. 1120 (1986); *Invisible Empire of the Knights of the Klu Klux Klan v. Thurmont*, 700 F.Supp. 281, 286 (D.Md. 1988); *Invisible Empire of the Knights of the Klu Klux Klan v. City of West Haven*, 600 F.Supp. 1427, 1435 (D.Conn. 1985); see also *Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050 (2d Cir. 1983) (\$200 administrative fee unreasonable and unconstitutional); *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6<sup>th</sup> Cir. 1991)(The Supreme Court has repeatedly rejected the restriction of expression protected by the First Amendment based on a

fear of violence.), *cert. denied*, 502 U.S. 899 (1991); *United Food & Commercial Workers Union Local 442 v. City of Valdosta*, 861 F.Supp. 1570, 1584 (M.D. Ga. 1994); *Gay and Lesbian Services Network v. Bishop*, 841 F.Supp. 295, 296-297 (W.D.Mo. 1993).

The insurance requirement imposed by the State here is a particularly onerous prior restraint because it drives indigent and poorly financed speakers out of the marketplace of ideas. Groups like Occupy Nashville with small or non-existent annual budgets, simply cannot afford to purchase the required insurance policy and are therefore effectively silenced by the requirement. Were such a policy to stay in place, free speech would be far from free; it would only be available to those with monetary means.

Furthermore, insurance requirements are inherently content-based because insurance companies will take into account the nature of an event and charge more to insure unpopular speakers whose message may be more likely to cause a disturbance. This is the precise sort of “heckler’s veto” that the United States Supreme Court forbade in *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-135 (1992), only here the decision to discriminate against unpopular speakers has been delegated to the insurance companies. The Third Circuit recently ruled that even a monetary provision that seems neutral on its face is unconstitutional if the end result is that disparate costs will be imposed upon speakers based upon the content of the speech and on the popularity or unpopularity of the views expressed. The *Nationalist Movement v. City of York*, 481 F.3d 178, 185 (3<sup>rd</sup> Cir. 2007).

For all of these reasons, courts throughout the country have held that insurance requirements, such as the one at issue here, are unconstitutional prior restraints. For example, in addition to the cases cited above, in *Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050 (2nd Cir. 1983), a case very similar to this one, the state department of transportation

attempted to impose a \$750,000 insurance requirement on a particular free speech event “to avoid the loss to the State of Connecticut from any and all claims made as a result of plaintiffs’ activities.” *Id.* at 1056. The court held that the insurance requirement was an unreasonable restraint on the First Amendment because there was no basis for requiring such a large amount of insurance and because there was no evidence that existing civil and criminal laws were insufficient to address the state’s concerns. *Id.* at 1057. *See also Wilson v. Castle*, 1993 U.S. Dist. LEXIS 9726 (E.D. Pa. 1993) (insurance requirement of \$100,000 to \$1,000,000 unconstitutional where there are other less restrictive methods of satisfying the government’s interest); *Pritchard v. Mackie*, 811 F.Supp. 665 (S.D.Fla. 1993) (\$1,000,000 insurance requirement unconstitutional and is a burden on poorly financed and unpopular groups); *Collin v. O’Malley*, 452 F.Supp. 577, 578-79 (N.D. Ill. 1978) (\$10,000 to \$50,000 insurance requirement unconstitutional where record shows that plaintiff and similar speakers cannot obtain insurance); *Invisible Empire of the Knights of the Ku Klux Klan v. Thurmont*, 700 F.Supp. 281, 285-86 (D. Md. 1988) (insurance requirement unconstitutional because there is no indication that it is necessary).

**C. The New Rule Created by the State Officials Vests Unbridled Discretion in the Decision-Maker and Is Therefore Facially Unconstitutional.**

Consistent with strict scrutiny analysis, any government functions that enact a prior restraint on speech “come to court bearing a heavy presumption against their validity.” *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 889 (6th Cir. 2000) (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975)). This presumption flows from the risk of two particular “‘evils that will not be tolerated:’ (1) the risk of censorship associated with the vesting of unbridled discretion in government officials; and (2) ‘the risk of indefinitely suppressing permissible speech’ when a licensing law fails to provide for the prompt issuance of

a license.” *Nightclubs*, 202 F.3d at 889 (citing *FW/PBS v. City of Dallas*, 493 U.S. 215, 225-7 (1990)).

To protect against the occurrence of these impermissible risks, ordinances which regulate protected speech and expression by requiring a permit or other form of governmental permission must limit the amount of discretion vested in state officials. *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969). An ordinance that gives public officials the power to decide whether to permit expressive activity in this manner must contain precise and objective criteria on which they must make their decisions; an ordinance that gives too much discretion to public officials is invalid. *See City of Jacksonville v. Lady J. Lingerie, Inc.*, 529 U.S. 1053 (2000). To ensure that prior restraints do not infringe upon First Amendment rights, courts have required that a permitting scheme leave relatively little discretion in the hands of public officials regarding whether or not to grant a permit. *See, e.g., Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992). In other words, “an ordinance . . . which makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of the official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.” *FW/PBS*, 493 U.S. at 226 (quoting *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958)).

When a regulatory scheme limits speech in a traditional public forum, as the New Rules undoubtedly do, it is even more imperative that the constitutionally protected expressive activity at issue be protected from governmental censorship. As the Supreme Court has stated, “‘a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license’ must contain ‘narrow, objective, and definite standards to guide the licensing authority.’ . . . The

reasoning is simple: If the permit scheme ‘involves appraisal of facts, the exercise of judgment, and the formation of an opinion,’ . . . by the licensing authority, ‘the danger of censorship and of abridgment of our precious First Amendment freedoms is too great’ to be permitted.” *Forsyth County*, 505 U.S. at 131 (internal citations omitted). “[Without express standards by which to measure an official’s actions], post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.” *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988); *see also BJS No. 2, Inc. v. City of Troy*, 87 F.Supp.2d 800 (S.D. Ohio 1999) (invalidating conditional use zoning scheme on basis that vague criteria for issuance of a permit vested unbridled discretion in government officials).

The exact danger sought to be avoided by the prohibition on unbridled discretion and prior restraints in the First Amendment context arises from the facial terms of the new rules. Like other ordinances invalidated by the federal courts, the New Rule confers unbridled discretion upon state officials by failing to provide those officials with narrow, objective standards for determining whether to grant or deny permits at Legislative Plaza and other Capitol grounds. *See Shuttlesworth*, 354 U.S. at 150-151 (“[T]he prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional”). Strikingly, the New Rule, which read in pertinent part as follows, provides no criteria at all to even purport to guide the decision-maker:

Effective immediately and until further notice, all assemblies and gatherings of persons on the State of Tennessee Legislative Plaza, War Memorial Courtyard and Capitol grounds areas in Nashville, Tennessee shall require a use permit from the Tennessee Department of General Services. Use of any portion of the Capitol grounds also requires the approval of the Tennessee Capitol Commission.

The Department of General Services may issue permits upon proper application and satisfaction of use fees, security and liability insurance requirements for use of the Legislative Plaza, War Memorial Courtyard and Capitol grounds between the hours of 9:00 a.m. and 4:00 p.m.

Special use permits for the Legislative Plaza, War Memorial Courtyard and Capitol grounds during hours outside of the 9:00 a.m. to 4:00 p.m. period may be approved at the discretion of the Department on a case by case basis.

Notwithstanding the above, the Legislative Plaza, War Memorial Courtyard and Capitol ground areas are closed to the public from 10:00 p.m. until 6:00 a.m. daily and no person shall enter upon those premises during this curfew period without specific authorization by the State of Tennessee. In no event shall overnight occupancy of the Legislative Plaza, War Memorial Courtyard or Capitol grounds areas be permitted by any group or individual. (Emphasis added)

While there have been numerous cases discussing whether certain proscribed criteria sufficiently narrow the exercise of governmental discretion to pass constitutional muster, *see, e.g., Shuttlesworth*, 394 U.S. 149-50, those decisions are of little import here; the New Rule provides no guidance whatsoever to the state officials in determining whether to extend the Plaza hours for a specific event. In that regard, the rule is most analogous to the parade permit provision declared invalid in *Forsyth County*, 505 U.S. at 132-33, in which no articulated standards either in the rule or in established practice guided the decision of whether to grant or reject a parade permit application. Noting that the administrator need not rely on any objective factors or even explain the basis for his decision to the applicant, the Court squarely denounced even the possibility for content-discrimination in the issuance of permits. *Id.* “The success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decision maker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so.” *Id.* at 133 n.10.

There is nothing on the face of the new rules that prohibits the State Officials from refusing to issue permits based on content-discriminatory factors. In this regard, the New Rule does nothing to protect against censorship of viewpoints or, when interpreted broadly, censorship of the mere existence of a viewpoint as opposed to a non-expressive purpose.

Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content. The Supreme Court has required that a time, place, and manner regulation contain adequate standards to guide the official's decision. Thus, even assuming *arguendo*, the New Rule imposes a constitutionally valid time, place, and manner restriction on speech, the rule nonetheless runs afoul of the First Amendment by permitting content-based application of the rule to silence certain speakers while permitting others. *See Forsyth County*, 505 U.S. at 132-33. Plaintiffs have thus demonstrated a substantial likelihood of success on their unbridled discretion claim entitling them to a temporary restraining order.

#### **D. TOO MUCH DISCRETION – UNEQUAL ENFORCEMENT AS APPLIED**

The unbridled discretion discussion (*infra*) is not merely conjecture in the present case. In fact, State officials have already begun applying the New Rule in an unequal manner. Pursuant to an agreement with the State, the New Rule will not be enforced against patrons of the Tennessee Performing Arts Center (TPAC). In effect, Legislative Plaza, under the New Rule is closed to all who may walk upon it from 10 p.m. until 6 a.m. to all except those persons who have attended performances at TPAC.

#### **E. UNREASONABLE TIME PLACE & MANNER**

The Supreme Court has held that a restriction on protected speech is “sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or

substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L. Ed.2d 672 (1968). Similarly, “time, place, and manner” regulations of protected speech will survive constitutional scrutiny “so long as they are [content neutral,] designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.” *City of Renton v. Playtime Theatres*, 475 U.S. 41, 47, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

Time, place, and manner regulations must “ ‘promote[ ] a substantial government interest that would be achieved less effectively absent the regulation.’ ” *Ward*, 491 U.S. at 799, 109 S.Ct. 2746 (quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985)). “ ‘The validity of time, place, or manner regulations does not turn on a judge’s agreement with the responsible decision maker concerning the most appropriate method for promoting significant government interests’ or the degree to which those interests should be promoted.” *Id.* at 800, 109 S.Ct. 2746 (quoting *Albertini*, 472 U.S. at 689, 105 S.Ct. 2897) (internal alteration marks removed).

For example, in *Saeig v Dearborn*, 641 F.3d 727 (6th Cir. 2011), the Sixth Circuit held that a City’s restriction on pedestrian leafleting on public sidewalks within the outer perimeter of a private festival was substantially broader than necessary to further government’s interest in vehicular traffic control, and thus violated First Amendment rights of a Christian pastor who sought to distribute literature outside the festival boundaries, where the primary justification for the outer perimeter was to curb vehicular traffic and provide parking, not to cabin pedestrian crowds, and there was no evidence of any existing problem of pedestrian traffic in outer

perimeter area. Similarly, limiting the times available for First Amendment activity at the Plaza to 9 a.m. to 4 p.m. is neither a reasonable restriction nor is it sufficiently narrowly tailored.

#### **IV. Plaintiffs Have Suffered and Will Continue to Suffer Irreparable Harm Absent a Temporary Restraining Order**

The deprivation of a fundamental constitutional right, if but for a moment, constitutes irreparable harm for the purposes of injunctive relief. *See, e.g., Elrod v. Burns*, 427 U.S. 347 (1976) (noting that First Amendment violation imposes irreparable harm on the silenced speaker); see also 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2948, at 440 (1973) (“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary”). “Even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.” *Chabad of Southern Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004), *citing Newsome v. Norris*, 888 F.2d 371 (6th Cir. 1989).

The State Officials and their agents continue to irreparably harm Plaintiffs by imposing a severe chilling effect against their desired protected expression, each set forth the extent to which each Plaintiff has been arrested or engaged in self-censorship to avoid the likely criminal citation that would be issued and the possible physical arrest that could occur were they to continue expressing themselves in Legislative Plaza after hours. Their opportunity to present protected speech in Legislative Plaza after October 21, 2011 when police began enforcing new rules against Occupy protestors is forever lost and cannot be regained. This is a classic case of irreparable harm justifying the issuance of a temporary restraining order.

### **V. A Temporary Restraining Order Will Not Harm Third Parties.**

Enjoining the State from enforcing the New Rule in the short-term will have no obvious effect on any third party. The activities of Occupy activists who have been cited for these demonstrations have been repeatedly described as peaceful.

Moreover, to the extent Plaintiffs' activities create even a speculative risk to third parties, the Government's existing criminal laws governing excessive noise and public sanitation can readily address these hypothetical problems. When compared to the very real and substantial harm to Plaintiffs that will likely occur if the TRO is not granted, any potential harm to third parties that could be adduced is insignificant. The interests of third parties are therefore no impediment to the issuance of a TRO.

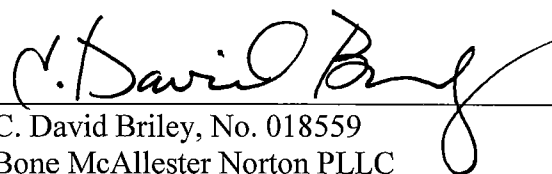
### **VI. Issuance of a Temporary Restraining Order is in the Public Interest.**

Like Plaintiffs' interests in preserving their constitutional rights, the public interest is best served by the issuance of a restraining order. Indeed, the public interest always weighs in favor of protecting fundamental constitutional rights. *See G&V Lounge v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). *See also Chabad of Southern Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427 (6th Cir. 2004). Plaintiffs have therefore met the test for a temporary restraining order, and this Court should accordingly grant Plaintiffs' motion.

### **VIII. Conclusion**

For the foregoing reasons, the Court should grant Plaintiffs' motion for a temporary restraining order and should temporarily enjoin the enforcement of the new rules against Plaintiffs by precluding Defendants Haslam, Case and Gibbons, from issuing citations, effectuating arrests, or otherwise enforcing the Rule against Plaintiffs.

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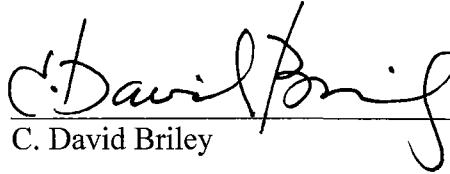


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**CERTIFICATION OF NOTICE TO OPPOSING PARTIES/COUNSEL**

The undersigned has given notice to counsel for the Defendants that Plaintiffs intended to seek this temporary restraining order prior to filing it with the Court. Notice was given by e-mail and telephonically.

  
C. David Briley