

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
CINCINNATI DIVISION

OCCUPY CINCINNATI,	:	Case No. 1:11cv727
An Unincorporated Association,	:	Judge Dlott
<i>Et Al.</i> ,	:	
Plaintiffs,	:	
V.	:	
CITY OF CINCINNATI <i>Et Al.</i> ,	:	
Defendants.	:	

**PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER
(WITH ATTACHED AFFIDAVITS OF SHERRY BARON, ROBERT PACE
MICHAEL BURNHAM AND COULTER LOEB)**

Come now Plaintiffs Occupy Cincinnati, *Et Al.*, by and through counsel, and respectfully move the Court pursuant to Fed. R. Civ. P. 65 for an Order temporarily restraining Defendants City of Cincinnati, the Cincinnati Parks Board, the Cincinnati Police Department, and Chief James Craig and Director Willie Carden, both in their official capacities, from enforcing Cincinnati Parks Board Rule 21 ("P.B.R. 21") against Plaintiffs by issuing criminal citations to and/or effectuating arrests of the Occupy Cincinnati protestors located at Piatt Park in downtown Cincinnati. This motion is supported by the attached memorandum of law and the Affidavits of Sherry Baron, Robert Pace, Michael Burnham, and Coulter Loeb).

Respectfully submitted,

/s/ J. Robert Linneman

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MEMORANDUM

I. Introduction

This lawsuit challenges the facial and as applied constitutionality of a Cincinnati Parks Board Rule – P.B.R. 21 – under which City officials, in the exercise of their unbridled and unfettered discretion, may permit certain gatherings and events to occur in city parks after-hours but decline to permit others. In the context of this case, the Rule has been applied to exclude members of the Occupy Cincinnati movement, an offshoot of the Occupy Wall Street protest, from engaging in protected political expression past 10:00p.m. and before 6:00a.m. in Piatt Park, a historic and traditional public forum located in the Garfield area of downtown Cincinnati. Pursuant to P.B.R. 21, Plaintiff Coulter Loeb, acting on behalf of the Occupy Cincinnati association, sought a permit to engage in political speech in Piatt Park after the 10:00p.m. closing time. *See* Loeb Affidavit, p. 2 ¶ 6. The request was denied based solely on the hours of operation provision without reference to any other criteria. *Id.* Beginning on Sunday, October 9, 2011, Cincinnati police officers began issuing nightly criminal citations to any individuals who remained in Piatt Park after 10:00p.m. to engage in political protest activities and expression associated with the Occupy movement. As of the filing of the complaint in this case, 216 criminal citations had been issued to peaceful protestors, with the number mounting daily.¹ Each citation carries a fine of \$105.00. In addition, Defendant James Craig, Cincinnati's newly

¹In fact, the night before this motion was filed, approximately 25 additional citations were issued to protestors in Piatt Park.

installed police chief, has indicated that the planned response to the protests may change “sooner rather than later,” thus intimating that physical arrests may occur in the park.²

As a result of these enforcement activities, at least four individual members of the Occupy Cincinnati organization – Plaintiffs Sherry Baron, Robert Pace, Michael Burnham, and Coulter Loeb – have been forced to censor their political messages in fear that they would be criminally charged, or worse physically arrested, if they remained in the park after hours. As set forth in their respective affidavits which accompany this motion, this chilling effect has had grave consequences on Plaintiffs’ free expression by causing them to cease their protected political speech at 10:00p.m. The enforcement of P.B.R. 21 has therefore imposed irreparable harm to Plaintiffs’ constitutional rights which can be remedied only by the issuance of a temporary restraining order.

II. The Court Should Issue A Temporary Restraining Order Enjoining The Enforcement Of Cincinnati Parks Board Rule 21 Against Plaintiffs.

The elements in this circuit 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.

²Upon information and belief, one protestor was physically arrested in Piatt Park on the evening of October 17, 2011 when he refused to sign and accept a criminal citation. *See* Hamilton. Cty. Municipal Court, case no. 11 CRB 32595. As of this writing, that Defendant is incarcerated and awaiting release upon the posting of bond as ordered by the Municipal Court.

1999); *Mason County Medical Association v. Knebel*, 563 F.2d 256, 264 (6th Cir. 1977).

Plaintiffs can satisfy each of these factors with respect to the City's enforcement of Cincinnati Parks Board Rule 21.

A. Plaintiffs Can Demonstrate a Substantial Likelihood of Success on the Merits of Their Claim that Cincinnati Parks Board Rule 21 Vests Unbridled Discretion in the Decision-Maker and Is Therefore Facially Unconstitutional.

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 th[e 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.

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)).

And when a regulatory scheme limits speech in a traditional public forum, as P.B.R. 21 undoubtedly does, 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 P.B.R. 21. Like other ordinances invalidated by the federal courts, P.B.R. 21 confers unbridled discretion upon city officials by failing to provide those officials with narrow, objective standards for determining whether to grant or deny permits for after-hours activities in the parks. *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, P.B.R. 21, which reads in pertinent part as follows, provides no criteria at all to even purport to guide the decision-maker:

The parks shall be closed to the public between 10:00 P.M. and 6:00 A.M. except where otherwise posted on signs and except when different hours are established by resolution of the Park Board ***or by permit issued to a group by the Park Board for a specific event***, and except [f]or [sic] vehicular traffic on through roadways directly connecting to city streets. All persons shall leave the parks at or before closing time.

See P.B.R. 21 (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; Rule 21 provides no guidance whatsoever to the Parks Board in determining whether to extend the park 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 decisionmaker 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 P.B.R. 21 that prohibits the Parks Board from refusing to issue after-hours permits based on content-discriminatory factors. In this regard, the 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. Defendants will undoubtedly argue that P.B.R. 21 constitutes only a time, place, and manner restriction on speech subject to less exacting intermediate scrutiny. In the first place, this contention must be rejected because P.B.R. has not been applied in a content-neutral manner. It is common knowledge that the Park Board does in fact regularly issue permits (or waivers of the rule) to other speakers at other events such as Riverfest, TallStacks, and, upon information and belief, even the wedding that took place at Piatt Park on Saturday, October 15, 2011 until 11:30 p.m. Thus, non-expressive speech, such as a wedding, or speech of a more broadly accepted viewpoint, such as that expressed at larger events such as Riverfest or Tallstacks, has been the beneficiary of the discretion of the Park Board.

Therefore, an analysis of P.B.R 21 under intermediate scrutiny is inappropriate under the holdings of both the Supreme Court and the Sixth Circuit. For example, in *Parks v. Finan*, 385 F.3d 694, 700 (6th Cir. 2004), the court acknowledged that “[w]hen a permitting authority uses waivers to promote preferred speakers or to inhibit disfavored speakers, a court may invalidate the waiver scheme.” Similarly, in *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002), the Court observed that:

even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. 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. ***We have thus required that a time, place, and manner regulation contain adequate standards to guide the official’s decision....***

(Emphasis added). Thus, even assuming *arguendo*, that P.B.R. 21 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.

In addition to the Freedom of Speech, the First Amendment separately prohibits governmental abridgement of the “right of the people peaceably to assemble.” U.S. Const. amend. I. The right of peaceable assembly, like the freedom of speech, has been “incorporated” through the Fourteenth Amendment to apply against state and local governments. See *Hague v. Committee for Indus. Organization*, 307 U.S. 496 (1939) (“[I]t is clear that the right peaceably to

assemble and to discuss [legal and political] topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the [First and Fourteenth] Amendment protect[er]". "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). Indeed, "[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs. . . ." *Id.* (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1875)).

By their actions, the present defendants collectively have unconstitutionally exercised—and continue to unconstitutionally exercise—government power to abridge the rights of the people of Cincinnati to peaceably assemble in Piatt Park after 10:00 p.m. to discuss legal and political topics, and to communicate respecting those topics. Because such actions have effected a literal and ongoing violation of rights of peaceable assembly protected by the plain text of the First Amendment, plaintiffs have demonstrated a substantial likelihood of success on their “right of peaceable assembly” claim. This separate claim provides an additional basis for plaintiffs’ present entitlement to a temporary restraining order.

B. 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 Southen Ohio & Congretation 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 City and its agents continue to irreparably harm Plaintiffs by imposing a severe chilling effect against their desired protected expression. The affidavits of Barron, Pace, Burnham, and Loeb each set forth the extent to which each Plaintiff has voluntarily 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 Piatt Park after hours. Their opportunity to present protected speech after hours in Piatt Park since October 9, 2011 when police began enforcing P.B.R. 21 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.

C. A Temporary Restraining Order Will Not Harm Third Parties.

Enjoining the City from enforcing P.B.R. 21 in the short-term will have no obvious effect on any third party. The activities of other Occupy activists who have been cited for after-hours demonstrations have been repeatedly described as peaceful and non-violent, and even Defendant Carden has publicly complimented Plaintiffs on their treatment of the physical park space. Moreover, to the extent Plaintiffs’ activities create even a speculative risk to third parties, the City’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.

Moreover, there is direct precedent from this Court allowing individuals without an expressive purpose to remain on public property without being criminally charged or arrested during the short pendency of a temporary restraining order. *See Henry v. City of Cincinnati*, Case No. 1:03cv509 (S.D. Ohio July 23, 2003). Embodied in this decision is the recognition that third parties will not be harmed by the nighttime presence of individuals in a public forum. The interests of third parties are therefore no impediment to the issuance of a TRO.

D. 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.

III. Conclusion

For the foregoing reasons, the Court should grant Plaintiffs' motion for a temporary restraining order and should temporarily enjoin the enforcement of Cincinnati Parks Board Rule 21 against Plaintiffs by precluding Defendants City of Cincinnati, Cincinnati Parks Board,

Cincinnati Parks Department, Police Chief Craig, and Parks Director Carden from issuing citations, effectuating arrests, or otherwise enforcing the Rule against Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing document was provided via the Court's electronic filing system (CM/ECF) and by electronic mail to counsel for Defendants on the 18th day of October, 2011.

/s/ J. Robert Linneman

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