CASE NO. 13-5882

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OCCUPY NASHVILLE, ET. AL.

Appellee- Plaintiffs

v.

WILLIAM HASLAM,
Governor of the State of Tennessee, et. al.

Appellant-Defendants

Originating Case No.: 3:11-Cv-1037

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to 6th Circuit Rule 26.1, Plaintiffs make the following disclosures:

1. Are said parties a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal, which has a financial interest in the outcome?

   No.

3. If the answer is Yes, list the identity of such corporation and the nature of the financial interest:

   Not applicable.

s/ Tricia Herzfeld
Tricia Herzfeld
Attorney for the Plaintiffs/Appellees

September 23, 2013
Date

STATEMENT REGARDING ORAL ARGUMENT

Appellee-Plaintiffs request oral argument. Appellee-Plaintiffs oppose the Appellant-Defendants' appeal of the District Court's denial of qualified immunity. Because the Appellant-Defendants' brief fundamentally misstates the District Court's ruling and systematically mischaracterizes the evidence, Appellee-Plaintiffs believe that oral argument will allow the parties to fully address the District Court's ruling.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in denying the Appellant-Defendants' argument that they were entitled to qualified immunity on Appellee-Plaintiffs' claims under 42 U.S.C § 1983 where the Appellee-Plaintiffs established that the Appellant-Defendants violated Appellee-Plaintiffs' clearly established Constitutional rights and further held that the Appellant-Defendants' actions were objectionably unreasonable.

2. Whether the District Court erred in applying a three part test in its analysis of the Appellant-Defendants' argument that they were entitled to qualified immunity on Appellee-Plaintiffs' claims under 42 U.S.C § 1983.

STATEMENT OF FACTS[1]

In the fall of 2011, protestors formed in New York City to protest perceived disparities in wealth and power between the wealthiest 1% of the country's citizens and the other 99%. (District Court's Memo., RE 88, Page ID # 1770). By October 8, 2011, a group of protestors had gathered on the War Memorial Plaza (the "Plaza") in Nashville to express similar concerns. (Deposition of David Carpenter pgs. 126-128, RE 69-8, Page ID# 591 - 677). Styling themselves as the "Occupy Nashville" movement, these protestors maintained a 24-hour per day presence on the Plaza from about October 8, 2011 forward. (Aff. Of Preston Donaldson ¶ 8, RE 69-4, Page ID# 540 - 560).

At the time the protestors began utilizing the Plaza for their free speech activities, the Tennessee Department of General services ("DGS") was operating under a so-styled "Public Use of War Memorial Plaza Policy"(Referred to herein as the "Old Rules") (First Amended Complaint, ¶ 40; RE 18, Page ID# 85; Public Use Policy; RE18-2; Page ID# 101-102; Amended Answer to Amended Complaint, ¶ 40, RE, 64, Page ID# 507). The Old Rules stated that the "Plaza is State property which is open for use by the public as a place for expressive activity such as, but not

[1] The Appellee-Plaintiffs' Statement of Facts is largely a repetition of the District Court's Statement of Facts which should be accepted as true by this court unless they are clearly erroneous. *Great Lakes Exploration Group, LLC v. Unidentified Wrecked*, 522 F.3d 682, 687 (6th Cir.2008). Additionally, the facts underlying this matter are largely accepted by both parties.

limited to, formal and informal political or social gatherings . . . .” (First Amended Complaint, ¶ 40; RE 18, Page ID# 85; Public Use Policy; RE18-2; Page ID# 101-102; Amended Answer to Amended Complaint, ¶ 40, RE, 64, Page ID# 507). The Old Rules contained provisions governing exclusive and non-exclusive use of the Plaza. (First Amended Complaint, ¶ 40; RE 18, Page ID# 85; Public Use Policy; RE18-2; Page ID# 101-102; Amended Answer to Amended Complaint, ¶ 40, RE, 64, Page ID# 507). With respect to non-exclusive uses, it stated that “[t]he Plaza may be used free of charge by any person or group for expressive activity on a first come first serve basis.” (First Amended Complaint, ¶ 40; RE 18, Page ID# 85; Public Use Policy; RE18-2; Page ID# 101-102; Amended Answer to Amended Complaint, ¶ 40, RE, 64, Page ID# 507). With respect to reserved/exclusive use, it required users to pay a daily administrative fee, to secure $1,000,000 in liability insurance coverage, and to pay for security services (if necessary) at its own expense. (First Amended Complaint, ¶ 40; RE 18, Page ID# 85; Public Use Policy; RE18-2; Page ID# 101-102; Amended Answer to Amended Complaint, ¶ 40, RE, 64, Page ID# 507). Thus, in most relevant part: the Old Rules did not ban overnight use of the Plaza and placed no requirements (fees, insurance, or security) on non-reserved use of the Plaza, subject only to the caveat that non-reserved users would need to defer to reserved users when using the Plaza. (First Amended Complaint, ¶

40; RE 18, Page ID# 85; Public Use Policy; RE18-2; Page ID# 101-102; Amended Answer to Amended Complaint, ¶ 40, RE, 64, Page ID# 507).

Approximately one year before the Occupy Nashville "occupation" of the Plaza, the DGS had already been made aware that the Old Rules permitted overnight use of the Plaza. (Deposition of Thaddeus Watkins; RE 72-4; Page ID# 1407 to 1414). At that time, the Nashville Davidson County Metro Government had urged the DGS to issue a curfew and other rules for the Plaza in an effort to reduce urination, defecation, and vandalism from homeless individuals who, at times, had used the Plaza as a "sanctuary" for overnight accommodation. (Deposition of Thaddeus Watkins; RE 72-4; Page ID# 1407 to 1414).The DGS did not amend the Old Rules in response to Metro's urging. (Deposition of Thaddeus Watkins; RE 72-4; Page ID# 1407 to 1414).

The Occupy Nashville protestors essentially benefitted, at least initially, from these deficiencies in the Old Rules. (Appellant-Defendants' Response to Appellee Plaintiffs' Concise Statement of Undisputed Facts ¶ 9, RE 78, Page ID# 1569). That is, no existing law governing the Plaza prevented them from maintaining a non-exclusive 24-hour-per-day protest or from sleeping overnight while doing so. (Appellant-Defendants' Response to Appellee Plaintiffs' Concise Statement of Undisputed Facts ¶ 9, RE 78, Page ID# 1569).

During the continuous Occupy Nashville protest, the protestors held signs and made speeches to express their viewpoints. (District Court's Memorandum, RE 88, Page ID # 1771). The protestors also set up tents and sleeping bags for overnight accommodation, utilized cooking stoves and laptops, and set up a food and drink tent from which free food and drinks were distributed to any individuals who joined the protest. (District Court's Memorandum, RE 88, Page ID # 1771).

The first few weeks of the Occupy Nashville protest went without any major incident. (Deposition of Thaddeus Watkins, pg. 73, RE 72-4, Page Id# 1398). Facility Administrator David Carpenter and THP Capital Police Lieutenant Preston Donaldson (either on his own or through subordinate officers) periodically checked on the status of the Plaza and the protestors to monitor the situation. (Deposition of Thaddeus Watkins, pg. 73, RE 72-4, Page Id# 1398). By design the Occupy Nashville movement did not contain a "leader" as such; however, it did establish a line of communication between local attorney Tripp Hunt (acting as a voluntary liaison for the protestors) and DGS General Counsel Thaddeus Watkins. (Deposition of Thaddeus Watkins, pg. 75, RE 72-4, Page Id# 1400). In an effort to avoid conflict, Watkins kept Hunt apprised of other events scheduled to occur on the Plaza, such as the Southern Book Festival scheduled to take place on October 14-16, 2011. (Deposition of Thaddeus Watkins, pg. 75, RE 72-4, Page Id# 1400). Through this line of communication, the protestors reached an accommodation with

the Southern Book Festival that permitted both groups to utilize the Plaza simultaneously. (District Court's Memorandum, RE 88, Page ID # 1772).

Although the protest movement was initially relatively small and manageable, the population "occupying" the Plaza began to swell as homeless individuals joined the protestors, likely drawn by the availability of free food and overnight sleeping accommodations. (Deposition of Thaddeus Watkins, pg. 74, RE 72-4, Page ID# 1399). The protestors welcomed at least some of the homeless individuals into the movement, while other homeless individuals may have simply capitalized on the situation. (Deposition of Thaddeus Watkins, pg. 74, RE 72-4, Page ID# 1399). At any rate, by late October, there was no way to distinguish the independent homeless population on the Plaza from the "true" Occupy Nashville protestors (who may have included some homeless individuals). (Deposition of Thaddeus Watkins, pg. 74, RE 72-4, Page ID# 1399).

Having been alerted to this concern, DGS Counsel Watkins reported the issue to Commissioner Cates. (Deposition of Thaddeus Watkins, pg. 77-78, RE 72-4, Page ID# 1402 to 1403). It does not appear that Commissioner Cates had any knowledge of serious issues at the Plaza before October 25, 2011, nor does it appear that he had contemplated taking any drastic action with respect to the Plaza before that date. (District Court's Memorandum, pg. 10, RE 88, Page ID # 1774). At Occupy Nashville's request, Watkins arranged a meeting for October 26, 2011 with

liaisons from Occupy Nashville to discuss the mounting issues. (Donaldson Aff. ¶ 13, RE 69-4, Page ID 540 to 560, Watkins Deposition, pgs., 80-81, RE 69-21, Page ID# 920 to 1010.).

On October 26, 2011, Attorney Hunt and Jane Hussain, appearing on behalf of Occupy Nashville, met with DGS Commissioner Cates, DGS Counsel Watkins, Facilities Administrator Carpenter, and Don Johnson (Carpenter's superior within the DGS), along with Department of Safety ("DOS") General Counsel Roger Hutto, Tennessee Highway Patrol ("THP") Colonel Trott, and Lieutenant Donaldson. (Appellant-Defendants' Response to Appellee Plaintiffs' Concise Statement of Undisputed Facts ¶ 12, RE 78, Page ID# 1570). Hunt and Hussain reiterated that acts of violence and criminal activity were taking place on the Plaza and asked for the State to provide, at its own expense, portable toilets and additional security. (Appellant-Defendants' Response to Appellee Plaintiffs' Concise Statement of Undisputed Facts ¶ 13, RE 78, Page ID# 1570). Commissioner Cates denied both requests. (Appellant-Defendants' Response to Appellee Plaintiffs' Concise Statement of Undisputed Facts ¶ 14, RE 78, Page ID# 1570). Commissioner Cates told the Occupy Nashville representatives that the protestors would be permitted to return to the Plaza every day, but that, as a matter of health and safety, he would have to close the Plaza at night. (Deposition of Thaddeus Watkins, pg. 90, RE 72-4, Page Id# 1405.) At some point during or right after the meeting, Commissioner

Cates directed Watkins to draft a new "policy" that would incorporate a curfew and permit requirement for use of the Plaza. (Deposition of Thaddeus Watkins, pg. 107, RE 72-4, Page Id# 1419.)

Following Commissioner Cates' directive, Watkins performed limited legal research on his own. (Deposition of Thaddeus Watkins, pg. 107, RE 72-4, Page Id# 1419.) He testified that he pulled up First Amendment-related cases using Google, but did not independently perform any research on Westlaw or Lexis. (Deposition of Thaddeus Watkins, pg. 107 and 109-110, RE 72-4, Page Id# 1419, 1420 to 1421.) He determined that, under *Clark v. Cmt'y for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), and other unspecified cases, the State could impose "time, place, or manner" restrictions on overnight use of the Plaza. (Deposition of Thaddeus Watkins pgs. 109-110, 113, 126-32, RE 69-21, Page ID# 920-1010). Watkins then began drafting a document erroneously styled as a "Use Policy." (District Court's Memorandum, pg. 11, RE 88, Page ID # 1775). He received unspecified "assistance" from staff attorney Abigail Lipshie. (Deposition of Thaddeus Watkins pgs. 108-112, RE 69-21, Page ID# 920 to 924.) He did not prepare a legal memorandum concerning his findings. (District Court's Memorandum, pg. 11, RE 88, Page ID # 1775).

On October 27, 2011, Attorney Hunt met with Commissioner Cates, Watkins, Lieutenant Donaldson, and Carpenter. (District Court's Memorandum, pg. 11, RE

88, Page ID # 1775). Hunt reported that the Occupy Nashville protestors would not leave the Plaza as requested. (District Court's Memorandum, pg. 11, RE 88, Page ID # 1775). After that meeting, Watkins completed a first draft of the Use Policy, which purported to impose a curfew and a new permit requirement, among various other conditions. (District Court's Memorandum, pg. 11, RE 88, Page ID # 1775). Watkins then met with Governor Haslam's Chief of Staff Mark Cate, Governor Haslam's Counsel Herbert Slatery, Commissioner Gibbons, Commissioner Cates, DOS General Counsel Hutto, THP Colonel Trott, and others. (Deposition of Thaddeus Watkins pgs. 127-131, RE 72-4, Page ID# 1431 to 1434). At that meeting, Watkins presented the "Use Policy," discussed whether the "policy" would constitute a reasonable time, place, and manner restriction, and discussed the mandated duties of the DOS and DGS with respect to the protection of state property. (Deposition of Thaddeus Watkins pgs. 127-131, RE 72-4, Page ID# 1431 to 1434). Governor's Counsel Slatery made some minor suggestions, which Watkins incorporated. (Deposition of Thaddeus Watkins pgs. 127-131, RE 72-4, Page ID# 1431 to 1434).

There is no record of how the attendees purported to ratify the "Use Policy" at the October 27, 2011 meeting. (District Court's Memorandum, pg. 11, RE 88, Page ID # 1775). For example, DGS Commissioner Cates called it a "team decision" but could not recall anyone voting on it, while Watkins testified that the Governor's

representative had essentially indicated that the Governor would defer to the DGS's judgment on how to deal with the issue. (Appellant-Defendants' Response to Appellee Plaintiffs' Concise Statement of Undisputed Facts ¶ 43, RE 78, Page ID# 1579). At any rate, apparently everyone involved ultimately understood that the "Use Policy" would be implemented the next day in substantially the form discussed at the meeting. (Deposition of Commissioner Cates, pg. 83, RE 72-7, Page ID# 1475). Apparently, Watkins subjectively believed that the "Use Policy" would only be temporary, but he did not communicate this belief to the other participants at the meeting.[2] (Appellant-Defendants' Response to Appellee Plaintiffs' Concise Statement of Undisputed Facts ¶ 38-40, RE 78, Page ID# 1578). The other Appellant-Defendants understood the new requirements to be permanent; indeed, they maintained that Watkins was the only person who understood otherwise. ("Mr. Watkins was the only one who was of the opinion that the Use Policy was temporary."). (Appellant-Defendants' Response to Appellee-Plaintiffs' Motion for Summary Judgment, pg. 9, RE 77, Page ID # 1553).

No member of the public was informed about or attended the October 27, 2011 meeting, nor did the meetings' attendees provide Occupy Nashville the opportunity to comment on the Use Policy before its immediate implementation. (District Court's Memorandum, pg. 12, RE 88, Page ID # 1776). No public hearings

[2] The "Use Policy" which the state actors purported to adopt is referred to herein as the "New Rules."

were held concerning the Use Policy, and there is no indication that it was posted to the Tennessee Secretary of State website and the administrative register. (District Court's Memorandum, pg. 12, RE 88, Page ID # 1776). There is no written record of the meeting's proceedings. (District Court's Memorandum, pg. 12, RE 88, Page ID # 1776). Furthermore, the record contains no written documentation purporting to justify the manner in which the DGS, the DOS, and the Governor's office amended the Old Rules in favor of new ones. (District Court's Memorandum, pg. 12, RE 88, Page ID # 1776).

Ultimately, on October 27, 2011, the day after this meeting, Carpenter distributed copies of the Use Policy to people who were on the Plaza, the State posted signs on the Plaza about the new requirements, and Watkins emailed a copy of the new requirements to Hunt, stating that "[w]e hope that the protest participants will abide by this new policy and will work with us in obtaining permits to gather at the Legislative Plaza." (Affidavit of Thaddeus Watkins, ¶¶ 5-6; RE 69-7, Page Id # 581). Watkins sent a follow-up email to Hunt with a copy of the application for a permit requirement, noting that he would look into whether a security fee would be required. (Affidavit of Thaddeus Watkins, ¶¶ 7; RE 69-7, Page Id # 581 to 582). Hunt did not respond to Watkins. (Affidavit of Thaddeus Watkins, ¶¶ 7; RE 69-7, Page Id # 581 to 582).

That night, the Occupy Nashville protestors decided not to seek a permit as the DGS had requested. (Deposition of Tripp Hunt, pgs. 25-26 and 76-77, RE 69-23, Page ID# 1047 to 1048 and 1084 to 1085). The Tennessee Performing Arts Center ("TPAC"), which is accessible by walking across the Plaza, also learned of the new purported categorical ban on Plaza use after 10 p.m. (Deposition of Thaddeus Watkins, pgs. 175-176, RE 72-4, page ID# 1439 to 1440). Notwithstanding the Use Policy's unequivocal language; Watkins decided that TPAC patrons would be permitted to utilize the Plaza after 10 p.m. as a means of egress from TPAC events. (Deposition of Thaddeus Watkins, pgs. 175-176, RE 72-4, Page ID# 1439 to 1440).

At 3 a.m. on October 28, 2011 (just several hours after DGS purported to issue the Use Policy), THP officers surrounded the Plaza and informed the protestors that they had ten minutes to vacate the Plaza or otherwise face arrest for violating the Use Policy. (Appellant-Defendants' Response to Appellee Plaintiffs' Concise Statement of Undisputed Facts ¶¶ 48-53, RE 78, Page ID# 1580 to 1582). Within that time frame, approximately 30 people, including Appellee-Plaintiff Savage, left the Plaza voluntarily to avoid arrest. (Appellant-Defendants' Response to Appellee Plaintiffs' Concise Statement of Undisputed Facts ¶¶ 54, RE 78, Page ID# 1582). Most if not all of the remaining protestors locked arms and awaited their arrest. (Appellant-Defendants' Response to Appellee Plaintiffs' Concise Statement of

Undisputed Facts ¶¶ 48-53, RE 78, Page ID# 1580 to 1582). Troopers then arrested the remaining protestors, tied their hands with zip ties, and put them in a Department of Corrections bus, which transported them to the Davidson County jail. (Appellant-Defendants' Response to Appellee Plaintiffs' Concise Statement of Undisputed Facts ¶¶ 48-53, RE 78, Page ID# 1580 to 1582). While they were being arrested, these protestors sang "We Shall Overcome" and recited the Declaration of Independence. (Appellant-Defendants' Response to Appellee Plaintiffs' Concise Statement of Undisputed Facts ¶¶ 53, RE 78, Page ID# 1581).

The Judicial Commissioner on duty that night, Tom Nelson, refused to sign the warrants for the protestors' arrests, stating that the arrestees had not been given sufficient notice. (Appellant-Defendants' Response to Appellee Plaintiffs' Concise Statement of Undisputed Facts ¶ 55, RE 78, Page ID# 1582). Notwithstanding this ruling, the officers detained the arrestees for 3-4 hours while they prepared arrest citations for "criminal trespass." (Deposition of Matt Perry, pgs. 57-60, RE 72-13, Page ID# 1487 to 1488). During that time frame, Colonel Trott spoke with Commissioner Gibbons about Judicial Commissioner Nelson's refusal to issue the arrest warrants. Commissioner Gibbons attempted to call the District Attorney at about 4 A.M. regarding the issue, but the District Attorney did not answer. The arrestees were ultimately released, at which point they returned to the Plaza to

resume their occupation. (Deposition of Matt Perry, pg. 61, RE 69-17, Page ID# 853-870; Affidavit of David Carpenter, RE 69-1, Page Id# 530-534).

Just after midnight on October 29, 2011 (*i.e.*, the next night), essentially the same set of events transpired: THP officers gave a ten-minute warning, after which they arrested the remaining protestors and transported them to jail. (Appellant-Defendants' Response to Appellee Plaintiffs' Concise Statement of Undisputed Facts ¶¶ 58-59, RE 78, Page ID# 1583). Again, Judicial Commissioner Nelson refused to sign the arrest warrants, this time stating that probable cause was lacking. (Appellant-Defendants' Response to Appellee Plaintiffs' Concise Statement of Undisputed Facts ¶¶ 60-61, RE 78, Page ID# 1582). Following this ruling, the officers again issued misdemeanor citations to the protestors and released them. (Appellant-Defendants' Response to Appellee Plaintiffs' Concise Statement of Undisputed Facts ¶ 62, RE 78, Page ID# 1583 to 1584).

On the nights of October 29 and October 30, the State did not attempt to arrest the protestors or to implement the Use Policy in any respect. (District Court's Memorandum, pg. 14, RE 88, Page ID # 1778).

SUMMARY OF THE ARGUMENT

Appellant-Defendants, confronting a peaceful, political protest acted outside any legal authority and terminated Appellee-Plaintiffs' Constitutional rights to protest, speak and assemble on the Plaza -Tennessee's quintessential public forum. This act of fiat in and of itself, as an *ultra vires* act, denies Appellant-Defendants any right to qualified immunity. Even if the Appellant-Defendants had the right to impose the New Rules on the Plaza by fiat, the rules which they imposed violated clearly established Constitutional law. Further, while Appellee-Plaintiffs submit it is unnecessary to consider this factor, it is clear that the conduct of Appellant-Defendants is objectionably unreasonable.

The District Court's Order related to qualified immunity and summary judgment should be sustained.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED QUALIFIED IMMUNITY TO APPELLANT-DEFENDANTS.

The District Court correctly held that Appellant-Defendants; imposition of the New Rules was an *ultra vires* act negating their ability to rely upon the New Rules in defending their arrest of the Occupy Nashville protesters. The District Court then correctly concluded that under the Old Rules, the Appellant-Defendants lacked the legal authority to arrest the Appellee-Plaintiffs and conversely that the Appellee-Plaintiffs had a clearly established Constitutional right to use the Plaza, a place for the peaceful overnight protest for which they were arrested. While, the Appellee-Plaintiffs deny the necessity of this holding, the District Court also found that the Appellant-Defendants' actions were not objectionably reasonable given that they had been aware of the potential problems for over a year, the fundamental state law violation of procedural requirements, they failed to rely upon designated counsel, and they failed to choose other, less extreme alternatives.

A. The Appellant-Defendants' Adoption of the New Rules Was an *Ultra Vires* Act Which Precludes Qualified Immunity.

As the District Court found, "[t]he defendants' failure to comply with those procedures meant that, by operation of the UAPA's plain language, the Use Policy was void and of no effect *ab initio*."

> "[A]n official who performs an act clearly established to be beyond the scope of his discretionary authority is not entitled to claim qualified immunity under § 1983." *In re Allen*, 106 F.3d 582, 593 (4th Cir. 1997).

Inherent in our form of government is a segregation of powers between the three branches of government which limits the ability of each branch to take action. Not only does this segregation relate to the substance but also to the form. Specific to this matter, the State legislature is authorized to enact laws governing the conduct of the citizens of Tennessee. Likewise, the executive branch is both authorized and directed to enforce the laws adopted by the legislature. Because laws of general application, inherently, fail to address all possible circumstances, the Legislature has authorized the executive branch to adopt regulations implementing laws of general applicability.

Here, 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[3]. 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.

[3] These sections are collectively referred to as the UAPA throughout this Brief.

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 purported 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 limited 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, constituted 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).

Tennessee requires that agencies issuing rules do so 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)

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.

By ignoring the UAPA, the Appellant-Defendants exceeded the authority delegated to them by the Legislature. This violation is not without consequence to the people of the State. The transparency, review and comment embedded in the UAPA were absent and an unconstitutional, reckless rule was adopted. The Defendants should not be free to exceed the clear limits of their delegated authority and then seek the protection of this Court by an assertion of qualified immunity. On this basis alone, qualified immunity should be rejected.

B. In Order to Determine Which Rule Governing the Use of the Plaza Applied to the Appellant-Defendants' Conduct, the District Court Was Required to Determine if the New Rules Were Properly Promulgated.

The Appellant-Defendants have made much ado about the District Court's application of Tennessee administrative law - arguing that the District Court premised its qualified immunity determination on the fact that the New Rules were not promulgated in conformity with the requirements of the UAPA. This argument does not withstand scrutiny. The simple fact is that the District Court had to determine whether the New Rules or Old Rules were controlling before the Court could assess the viability of Appellee-Plaintiffs' Constitutional claims. The only way for the Court to determine which rules controlled the use of the Plaza was to determine if the New Rules were adopted as required by the UAPA or were nothing more than an *ultra vires* fiat from above. The District Court's determination is no

different than a determination about the applicability of a law passed by a legislature but not signed by a governor. It was a necessary, preliminary decision.[4]

In this respect, the first question the District Court was tasked with was whether the "Use Policy" was a rule which would necessitate compliance with the UAPA.

> [A] "rule" means "each agency statement of general applicability that implements or prescribes law or policy," expressly including an "amendment or repeal of a prior rule..[,]" but excluding "[g]eneral policy statements that are substantially repetitious of existing law" and "[s]tatements concerning *only internal management of state government not affecting private rights, privileges or procedures available to the public*." Thus "a policy is not a rule under the UAPA if the policy concerns internal management of state government and if the policy does not affect the private rights, privileges, or procedures available to the public." (internal citations omitted).

The District Court appropriately found "[a] DGS time, place, or manner regulation for the Plaza necessarily restricts the public's First Amendment right to utilize the Plaza for free speech activity, among other freedoms. Because such a regulation "impacts the private rights and privileges of the public," it is a 'rule.'"

The Tennessee Uniform Administrative Procedures Act requires certain procedures to be followed to ensure compliance, including notice to the public and that the proposed rule is reviewed by the Tennessee Attorney General for legality and Constitutionality. Appellant-Defendants do not dispute that these procedures

[4] Admittedly, few courts are required to make this determination because few state actors contemplate acting by fiat as the Appellant-Defendants did here.

were not followed. As such, the District Court was correct to rule that the "Use Policy" (New Rules) were not passed in compliance with the UAPA.[5]

Tennessee law plainly states that any Rule issued in violation of the UAPA is void *ab initio* and unenforceable. Tennessee Code Ann. §4-5-216. The District Court was well within its authority to declare the New Rules to be "rules" that were supposed to be vetted through the UAPA process and void for noncompliance with the mandatory provisions of Tennessee law. The District Court's conclusion in this aspect is sound and, in fact, not challenged on appeal. The Appellant-Defendants' argument in this respect is without merit and should be rejected.

C. Appellant-Defendants Violated Appellee-Plaintiffs' Clearly Established Constitutional Rights.

1. Appellant-Defendants Violated the First Amendment.

The District Court properly held that up until October 27, 2011, there were no rules governing Appellee-Plaintiffs' conduct or presence on the Plaza. Appellee-Plaintiffs had a clearly established First Amendment right to protest in a public forum.[6] Specifically, Appellee-Plaintiffs had a clearly established right to protest

[5] It is important to note that Appellant-Defendants' actions were not a minor deviation from the mandated procedures of the UAPA, but instead, were a wholesale rejection of the necessity to follow the procedures at all. Even though common sense (and the law) dictates consultation with the Attorney General's office, Appellant-Defendants stubbornly refused to do so.

[6] Appellant-Defendants posit that the clearly established right at issue here is the right to occupy the Plaza indefinitely. Appellant-Defendants' Brief 39-40. Appellant-Defendants misunderstand the application of the First Amendment in this context. Occupy Nashville had a clearly established First Amendment right to be present on the Plaza to air their grievances against the government.

overnight on the Plaza with no restrictions. Appellant-Defendants' conduct in drafting, adopting and enforcing the New Rules by fiat, in secret, with no notice to the Appellee-Plaintiffs, and in violation of the Tennessee Uniform Administrative Procedures Act, was unreasonable in light of the circumstances. The District Court properly denied qualified immunity to Appellant- Defendants and granted Summary Judgment in favor of Appellee-Plaintiffs.

a. Plaintiffs Were Not Arrested for Camping on the Plaza; They Were Arrested for Engaging in First Amendment Activity While Being Present on the Plaza.

The First Amendment right to protest in a public forum absent valid time, place and manner restrictions is clearly established. *Doran v. Salem Inn, Inc*., 422 U.S. 922, 932 (1975); *Roth v. United States*, 354 U.S. 476, 484 (1957).; *Mills v. Alabama*, 384 U.S. 214, 218 (1966). *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Appellant-Defendants mischaracterize the events that led up to the ultimate arrest of the Occupy Nashville protestors in an attempt to make this into a case about camping. Appellant-Defendants posit they may rely on *Clark v. Center for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), to justify their position that Appellee-Plaintiffs did not have an established right to use the Plaza for First Amendment activity, just as they relied on *Clark* when they chose

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Appellant-Defendants Reframing this case to be about how Appellee-Plaintiffs chose to express their message, twists the facts. Regardless of their message and how they expressed it, Plaintiffs had a First Amendment right to peacefully protest on the Plaza.

to close the most quintessential public forum in the State of Tennessee and arrested 55 peaceful protestors.[7] *Id.* This case is not about camping, it has never been about camping, and no matter how hard Appellant-Defendants try to put a square peg in a round hole, it still is not a case about camping.

The District Court properly held that Appellee-Plaintiffs were not arrested for camping and that Appellant-Defendants' reliance on *Clark* was misplaced. *Clark*'s holding is much narrower than portrayed by the Appellant-Defendants. *Id.*

> Furthermore, the plaintiffs here were not arrested for "camping" as such; they were arresting (sic) for being *present* on the Plaza between the hours of 10 p.m. and 6 a.m., regardless of whether they were among the protestors who had set up sleeping arrangements. Thus, Clark's holding that the government may ban sleeping in tents on "non-campground" federal property maintained by the National Park Service is inapposite. Moreover, *Clark* involved a situation in which plaintiffs challenged an *existing* time, place, and manner regulation, that had been in place before the plaintiffs sought to engage in activity that the regulation prohibited. In *Clark*, the parties did not dispute that, apart from its potential effect on plaintiffs' First Amendment freedoms as applied, the regulation in question was otherwise a valid and properly promulgated law. Here, by contrast, the defendants attempted to *change* the law overnight without following required processes, rendering that law void *ab intitio* under Tennessee law…The plaintiffs' protests contained a fundamental Constitutional core, regardless of the secondary effects that resulted from the manner in which they chose to

[7] Almost exclusively, every case cited in Appellant-Defendants' brief in support of the notion that camping, sleeping or otherwise protesting in a particular time, place or manner, the government had existing regulations in place before the protest began. The central issues in these cases were whether these existing regulations could be enforced and if so, how. None of these cases are applicable here where there were *no* prior restrictions on the Plaza. The State's imposition of the New Rules in the midst of the Occupy Nashville protest without going through the regulatory process is akin to making up new rules in the middle of the game. This is not a case where the State was enforcing exisiting rules, as the multiple cases relied upon by Appellant-Defendants may lead one to believe.

> exercise it. At any rate, the plaintiffs were not arrested because of those secondary effects; they were arrested for their *presence* on the Plaza…

Clark actually permitted much more than the State allowed for Occupy Nashville. *Id. Clark* allowed a 24 hour presence in the park and the erection of tents as symbolic free speech. Despite attempts to broaden its reach, *Clark* merely prohibited people sleeping in the tents because despite the message trying to be conveyed by the act of sleeping in a park, such actions were previously banned as camping by a pre-existing regulation. *Id.* This interpretation of the limits of the holding in *Clark* has been reiterated throughout the country.

> These circumstances render the State's enforcement policy of removing Occupy Boise's tents presumptively invalid under the First Amendment. It is unlikely that the State can show that its enforcement policy is the least restrictive means to further a compelling state interest. Unlike the circumstances in *Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), where the Supreme Court approved a ban on overnight sleeping that allowed the ***826** maintenance of a symbolic tent city, the State's enforcement policy here would ban such a symbolic display. As such, it fails to use the least restrictive means.

Watters v. Otter, 854 F. Supp. 2d 823, 825-26 (D. Idaho 2012) opinion clarified, 1:12-CV-001-BLW, 2012 WL 2065549 (D. Idaho June 8, 2012). See also *Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320 (M.D. Fla. 2011).

In the present case, the facts are even more egregious in that the previous policy was that there were no regulations in place whatsoever to limit free speech activities on the Plaza. The State was free to enforce existing laws (vandalism,

public urination, etc.), but there were absolutely no restrictions on unreserved use of the Plaza. Appellee-Plaintiffs simply exercised their rights under those conditions. Despite Appellant-Defendants' attempts to recast the facts, Appellee-Plaintiffs were not arrested for sleeping in tents, they were arrested for simply being present and engaging in First Amendment activity on the Plaza (singing "We Shall Overcome" and reciting the Declaration of Independence.")

b. The New Rules Were Not Reasonable Time, Place, and Manner Restrictions.

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)). Appellant-Defendants have posited that the government interests were to prevent crime, littering, vandalism, defecation and the like. However, instead of addressing those specific concerns, Appellant-Defendants unreasonably chose to shut down all use of the State's quintessential public forum between the hours of 10:00 p.m. and 6:00 a.m. Such a marked overreaction to the stated government interests cannot pass Constitutional muster. *Saeig v Dearborn*, 641 F.3d 727 (6th Cir. 2011) (City's restriction on pedestrian leafleting on public sidewalks within outer perimeter of private festival was substantially broader than necessary to further government's interest in vehicular traffic control, and thus violated First Amendment rights of Christian pastor who

sought to distribute literature outside festival boundaries, where primary justification for outer perimeter was to curb vehicular traffic and provide parking, not to curb pedestrian crowds, and there was no evidence of any existing problem of pedestrian traffic in outer perimeter area).

Here, the facts have plainly shown that the State did not have a substantial government interest in restricting the use of the Plaza during this period of time. The State had been made aware of issues of vandalism, crime, defecation, urination and sleeping on the Plaza, years before the Occupy Nashville protests. If the State's interest truly was substantial, they would have adopted the curfew that Metro Nashville requested nearly a year prior to the arrival of Occupy Nashville on the Plaza. The stated interests were the same: to prevent crime, littering, vandalism, defecation and the like, however, despite those concerns, the State declined to adopt such a policy and instead chose the most extreme option of closing the Plaza and arresting 55 peaceful protestors.

The District Court properly acknowledged this flagrant overreaction:

> [T]he fact that the plaintiffs had a clearly established First Amendment right to utilize the Plaza for their overnight speech activity does not mean they could do so while violating *existing* laws of neutral application, such as laws against vandalism, public urination, indecent exposure, and the like. Thus, for example, the plaintiffs could have been arrested for urinating on the plaza or for vandalizing the Plaza by causing structural damage, breaking lights, etc. But the operative point is that no existing law prevented the plaintiffs from utilizing the Plaza for overnight free speech activities. The plaintiffs' protest contained a

> fundamental constitutional core, regardless of the secondary effects that resulted from the manner in which they chose to exercise it."

The facts have plainly shown that Appellant-Defendants did not make a single effort to determine if their interests could have been achieved by less drastic measures. Instead of providing additional police presence or providing portable toilets, or doing anything to help Occupy Nashville, Appellant-Defendants chose unreasonably to clear the Plaza by police force and arrest *en masse* multiple peaceful protestors. One can hardly imagine an image more chilling to First Amendment freedoms.

The District Court appropriately held that the "Use Policy" as whole was unconstitutional.

> [T]he Use Policy was, as a whole, patently unconstitutional for multiple reasons, including, inter alia, (1) purporting to vest unfettered distraction in the DGS to issue permits; (2) banning "assemblies or gatherings" from utilizing the Plaza for any purpose without a permit, thereby imposing an (unconstitutional) prior restraint subject to a "heavy presumption" against its validity; and (3) including unconstitutionally vague definitions regarding the Use Policy's scope, including what constitutes a "gathering" or "assembly."

(internal quotations and citations omitted).

i. It Is Well Established that the New Rules are Impermissible Restrictions on the Appellee-Plaintiffs' Speech Because They Give Arbitrary Decision Making Authority to One Person and Give No Written Standards for Decision-Making.

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. 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 Rules conferred 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").

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, but those decisions are of little import here; the New Rules provide no guidance whatsoever to the state officials in determining whether to extend the Plaza hours for a specific event. In

that regard, the New Rules are 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*.

Further, Thad Watkins testified that he was responsible for the implementation of the New Rules. His testimony in this regard is almost unfathomable: 1) the New Rules were temporary even though they purport to be permanent; 2) no one knew they were temporary except him; 3) the New Rules would expire when Occupy Nashville was evicted; 4) application of the New Rules could be appealed to him even though they did not state so; 5) he had no objective way to evaluate appeals; 6) he'd use his common sense; and 7) he did not know how one would appeal his decision. (AF 36-38).

The District Court correctly concluded "the Use Policy specifically stated that permits would be issued 'at the discretion of the [DGS] on a case-by-case basis,' which is an unequivocal delegation of precisely the type of unfettered discretion the Constitution forbids."

ii. It Is Clearly Established that the New Rules Were Impermissible Restrictions on the Plaintiffs' Speech Because They Were Vague and Overbroad.

The New Rules were 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 Rules restricted far more speech than is necessary and were properly rejected by the District Court.

The New Rules are also impermissibly vague in that they fail to define key terms within the Rules. "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 standard less 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). The District Court correctly ruled that the New Rules were overbroad and included unconstitutionally vague terms including "gathering" and "assembly."

iii. It Is Clearly Established that the New Rules Were Impermissible Restrictions on the Appellee-Plaintiffs' Speech Because They Created Significant Financial Burden without an Exemption.

While the District Court did not reach the issue of the financial barriers the New Rules created to free speech and assembly, there can be little doubt that the New Rules created an unconstitutional permitting scheme that required, among other things, $1 million in liability insurance. Such onerous financial requirements oftentimes drive poorly funded groups out of the marketplace of ideas and deny them a true opportunity to exercise their First Amendment rights. 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. (AF 46). These financial requirements are invalid prior restraints on speech. *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 133 (1992), see also *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 allowed city administrators to charge a permit fee to defray expenses of police protection, because it necessarily involved speech content regulation).

The insurance requirement imposed by the State here wsa 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 permitted, free speech would be far from free; it would only be available to those with monetary means.

Courts throughout the country have held that insurance requirements, such as the one at issue here, are unconstitutional prior restraints. *Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050 (2nd Cir. 1983), (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) 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); I*nvisible 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). 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 (11th 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 (6th Cir. 1991) *cert. denied*, 502 U.S. 899 (1991) (The Supreme Court has repeatedly rejected the restriction of expression protected by the First Amendment based on a fear of violence.); *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).

Here, the New Rules offered no express exception to the financial requirement. (AF 46). Further, there was no legitimate mechanism for appeal from this requirement that would allow one to understand when an exception would be permitted. In fact, Occupy Nashville informed the State that they could not meet these hefty financial burdens in order to exercise their First Amendment rights. (AF11-15). Yet, the State provided them with no exemption from the requirements.

iv. Appellant-Defendants' Actions in Arresting Dozens of Protestors in the Middle of the Night on the Basis of a Rule that Was Adopted and Enforced by Fiat Clearly Violated the Well-established Fourth and Fifth Amendment Rights of the Occupy Nashville Protestors.

The District Court properly held that up until October 27, 2011, there were no rules governing Appellee-Plaintiffs' conduct or presence on the Plaza. Appellee-Plaintiffs had a clearly established liberty interest afforded to them by the 4th and 5th Amendments to the U.S. Constitution, but also a liberty interest created by the State of Tennessee's previous policy that anybody could use the Plaza for unreserved use at *any* time with *no restrictions*. See Letter from Watkins. Appellant-Defendants' conduct in drafting and adopting the New Rules by fiat, in secret, with no notice to the public, and in violation of the UAPA, and then enforcing the New Rules as the basis to arrest 55 peaceful protestors, violated their

Constitutional rights to be free from arrest without probable cause. The District Court properly denied qualified immunity to Appellant-Defendants and granted Summary Judgment in favor of Appellee-Plaintiffs.

Appellant-Defendants, as discussed above, should have been well aware of the Constitutional deficiencies in the New Rules and their implementation. Despite this knowledge, they chose to order the arrests of 55 peaceful protestors in the middle of the night. Even more shocking is that Appellant-Defendants persisted in their quest to arrest the Occupy Nashville protestors after having the legitimacy of the New Rules questioned by Judicial Commissioner Tom Nelson when he refused to validate the arrests of the protestors on the first night.

Regardless of the subjective intention of Appellant-Defendants, the rules were invalid on their face.

> [T]he Fourth Amendment violation that generates a § 1983 cause of action obviates the need for demonstrating malice. "For instance, if the harm alleged is a seizure lacking probable cause, it is unclear why a plaintiff would have to show that the police acted with malice." *Gallo v. City of Philadelphia,* 161 F.3d 217, 222 n. 6 (3d Cir.1998). In fact, Fourth Amendment jurisprudence makes clear that we should not delve into the defendants' intent. "[T]he reasonableness of a seizure ***310** under the Fourth Amendment should be analyzed from an objective perspective," which, even in the context of malicious-prosecution claims, renders "irrelevant" "the subjective state of mind of the defendant, whether good faith or ill will." *Brooks,* 85 F.3d at 184 n. 5.[6]

Sykes v. Anderson, 625 F.3d 294, 309-10 (6th Cir. 2010). The Appellant-Defendants here are the policy makers who drafted, approved and ordered the

enforcement of the New Rules. They were charged with being aware of the law and the requirements of the UAPA.

Appellee-Plaintiffs had a clearly established right to be free from unlawful arrest in exercising their First Amendment rights. Those rights were clearly violated here in that there was no probable cause to believe they were violating a valid law. Had Appellant-Defendants chosen to utilize the rule making procedures outlined by the UAPA, it is quite likely that the New Rules never would have been adopted in the first place. The District Court speculated:

> The fact that the Attorney General consented to a restraining order (later converted to an injunction) against enforcement of the Use Policy on the day this lawsuit was filed strongly suggests that, had the Attorney General been consulted, the Use Policy never would have been implemented in the first place. Furthermore, it is notable that the DGS ultimately utilized the UAPA rulemaking procedures to adopt the Current Rules governing the Plaza.

Appellant-Defendants simply cannot issue rules which are facially invalid; ignore the procedures in place to ensure that unconstitutional rules are not adopted and by fiat issue the New Rules; use those unconstitutional un-reviewed New Rules as the basis for arresting scores of peaceful protestors; and then claim immunity from a civil rights lawsuit on behalf of those arrested protestors. The District Court's denial of qualified immunity and granting Summary Judgment in favor of Appellee-Plaintiffs was appropriate.

v. Appellant-Defendants' Actions in Arresting Dozens of Protestors in the Middle of the Night on the Basis of a Rule

that was Adopted and Enforced by Fiat Clearly that Did Not Provide Notice or the Opportunity to be Heard Clearly Violated the Well-established Due Process Rights of the Occupy Nashville Protestors.

The District Court properly found that ignoring the mandates of the UAPA is a sufficient basis for a finding that Appellant-Defendants violated the Due Process rights of Appellee-Plaintiffs. Had Appellant-Defendants followed the law and procedures mandated by the UAPA, presumably Appellee-Plaintiffs would have been given notice, the opportunity to be heard, and the opportunity to challenge the New Rules *before* being forcibly removed from the Plaza and arrested *en masse*. Had Appellant-Defendants followed the UAPA, the New Rules would have been vetted by the Attorney General's office and likely never would have been adopted or enforced.

Appellant-Defendants have made much of the proposition that violation of a State law does not make a Constitutional violation. However, the more appropriate inquiry is whether the violation of State law *in this case*, when coupled with other factors, amounts to a Constitutional violation. *Huron Valley Hospital v. City of Pontiac*, 792 F.2d 563 (6th Cir. 1986) (former employees violated clearly established law in denying a certificate of need to construct a hospital on the basis of un-promulgated criteria, and thus, employees were not entitled to qualified immunity); *Spruyite v. Walters*, 753 F.2d 498 (6th Cir. 1985) (State's failure to comply with its own procedural requirements is not in itself a violation of Due

Process; however, when state creates entitlement, state's defeat of that entitlement without a requisite finding or process, is a violation of Due Process). In other words, a violation of state law is not always a violation of the constitution, but it can be. It was here.

Due Process is violated when defendants, without appropriate pre-deprivation process, hinder an existing liberty interest. *Jackson v. City of Columbus*, 194 F.3d 737 (1999). First Amendment rights can constitute a liberty interest. Id. When a liberty interest is denied, the question is whether plaintiffs had adequate notice and an opportunity to be heard and challenge the actions of the state. Id. Here, Occupy Nashville did not. [8]

The District Court rightly found that the violation of the UAPA was a violation of Due Process. Prior to making this determination, however, the Court had already determined that Appellee-Plaintiffs had 1) an existing liberty interest in their First Amendment rights to the Plaza; and 2) that their liberty interests had been interfered with by Appellant-Defendants. It was after making those determinations that the District Court held that the violation of the UAPA amounted to a denial of an opportunity to be heard and to challenge the deprivation of their First Amendment rights before they were ultimately arrested.

[8] Appellant-Defendants should have paused, if at no other time, certainly after Judicial Commissioner Tom Nelson invalidated the arrests on the first night finding that the State had not given sufficient notice—or in other words, Due Process.

D. Although the District Court Reached the Correct Conclusion, It Erred by Requiring that Plaintiffs Demonstrate the Conduct of the Defendants was Objectionably Unreasonable.

Government officials should not escape responsibility for violating a Plaintiffs' clearly established constitutional rights. The purpose of qualified immunity is to protect the public interest from the dangers of a government paralyzed by the fear of litigation in areas for which courts have yet to provide constitutional guidance. *Harlow v. Fitzgerald,* 457 U.S 800, 813-814 (1982). It is not intended to shield officials with impunity after trampling citizens' constitutional rights. See *Barker v. Goodrich*, 649 F.3d 428, 435 (6th Cir. 2011). While the doctrine of qualified immunity protects officials from suit for discretionary actions in the performance of governmental duties, it applies only where the law on point is uncertain. *Harlow v. Fitzgerald*, 457 U.S 800, 818 (1982). The law could not be clearer in this case.

This Court has held numerous times that qualified immunity should be evaluated based upon a two part test: 1) whether the facts as presented by the plaintiffs make out a constitutional violation, and 2) whether the constitutional right at issue was "clearly established" at the time of the alleged violation. *Barker v. Goodrich.* 428. The court may address either prong first, according to its "sound discretion…in light of the circumstances." *Id.* (quoting *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)). If the answer to both questions is yes, then qualified

immunity must be denied, and a suit against a defendant government official must go forward.

A variation on this test often includes a 3rd question: whether "plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Wheeler v. City of Lansing*, 660 F.3d 931 (6th Cir. 2011); but s*ee also Walczyk v. Rio*, 496 F.3d 139, 166-67 (2d Cir. 2007)(Sotomayor, J., concurring)("[T]he Supreme Court does not follow this "clearly established" inquiry with a second, *ad hoc* inquiry into the reasonableness of the officer's conduct. Once we determine whether the right at issue was clearly established for the particular context that the officer faced, the qualified immunity inquiry is complete.") Adding an additional step to this analysis not only provides government officials with greater cover when the actions they take are clearly outside the boundaries of the law, but also places added burdens on plaintiffs when trying to vindicate rights that were clearly violated.

In this case, however, the District Court found that in light of the circumstances of this particular case and because Appellant-Defendants were responding to a pressing public policy issue, the three-part qualified immunity test should apply. Appellee-Plaintiffs are unaware of any case law indicating that when the government acts in response to a pressing public policy issue, they are given

more leeway in a finding of immunity from suit. Given that qualified immunity is a doctrine exclusively applicable to government officials who are oftentimes responding to pressing public policy issues, if the District Court's reasoning were to be accepted, the exception would swallow the rule and many people whose rights were violated by government officials who defied clearly established law, would be left with no redress if a court determined that the government officials nonetheless, acted reasonably.

The two part qualified immunity test should apply—particularly given the egregious nature of the conduct we have present here. Appellant-Defendants Cates and Gibbons had a clear choice in responding to the Occupy Nashville protests against government. They could have protected and defended those on Legislative Plaza, and honored the exercise of precious First Amendment freedoms of speech and assembly. Instead, they used their positions of authority to close, rather than preserve, the traditional public forum on Legislative Plaza. They did so through a scheme that is facially unconstitutional in the unbridled power it confers on officials and in its vast overreach, restricting even the smallest expressions of First Amendment assembly. Accordingly, Appellant-Defendants should not be permitted to escape responsibility for the harm their actions have caused Appellee-Plaintiffs, and the chilling effect their actions had on countless others who intend to exercise their free speech rights in the future.

Fortunately, courts need not write on a blank slate. The Supreme Court and Sixth Circuit have clearly spoken on the constitutional violations committed by Defendants. While reasonable time, place and manner restrictions on First Amendment activity are allowed, government officials may not restrict substantially more freedom than necessary to achieve a significant government interest, and they may not place unfettered discretion in the hands of officials to allow or deny assembly.

Here, Appellant-Defendants Cates and Gibbons devised and enforced an unconstitutional scheme in direct response to the continued protests of Occupy Nashville. The New Rules required all assemblies, small and large, to submit to a permitting process for access to Legislative Plaza, the state's most enduring and historically significant traditional public forum. They compounded the unlawfulness of this scheme by granting government officials the power to say yes or no to a permit application with no guidelines in place to safeguard the rights of the people. Each of these transgressions alone would be enough to warrant rejection of Appellant-Defendants' qualified immunity claim. Together, they demonstrate a shocking disregard for the First Amendment rights of the people Appellant-Defendants serve, and of the judicial precedent which should be guiding their governance.

Regardless of Appellee-Plaintiffs arguments to the contrary, the District Court applied the three part test and still found that Appellee-Plaintiffs carried their burned in demonstrating that qualified immunity was not appropriate in light of the facts and circumstances in this case. The District Court held:

> The presence of multiple unconstitutional provisions in the proposed Use Policy should have raised serious procedural and substantive constitutional concerns in the minds of defendants, notwithstanding counsel's failure to oppose the approach undertaken. *See Harlow*, 457 U.S. at 819 ("when an official could be expected to know that certain conduct would violate statutory or constitutional rights, *he should be made to hesitate*, and a person who suffers injury caused by such conduct may have a cause of action.")(emphasis in original).

Although the District Court's ruling was correct, it should be reversed to the extent that it required the Appellee-Plaintiffs to prove that the conduct of the Appellant-Defendants was objectionably unreasonable. In addition to the preliminary necessity of determining what rules governed the use of the Plaza, the District Court also assessed the Appellant-Defendants compliance with the UAPA – after it had determined that the Appellee-Plaintiffs' clearly established rights had been violated. Appellant-Defendants have argued that the District Court's ruling denying qualified immunity to Appellant-Defendants and granting Summary Judgment to Appellee-Plaintiffs was predicated *solely* on the basis of the District Court's finding that Appellant-Defendants violated the mandates of the UAPA.

The drafting, adoption and enforcement of the New Rules were clearly unreasonable in light of the circumstances. Closing the State's quintessential public forum—a forum that previously had no restrictions on its use whatsoever—for all use overnight, to combat petty crimes such as vandalism, urination, defecation, was an extreme overreaction.

It should have been clear to Appellant-Defendants, who are high-ranking government officials, that the New Rules, as a whole, were patently unconstitutional. The New Rules granted unfettered decision-making authority in one department, with no guidelines whatsoever; banned any assemblies or gatherings on the Plaza between certain hours constituting a clear prior restraint on the First Amendment rights of the protestors, and neglected to define what exactly was an "assembly" or "gathering."

Appellant-Defendants did not order increased police patrol. They did not order portable toilets. They did not enforce existing laws on the books to deal with issues that arose. They did not set a curfew when one was requested by Metro. They did not go through the emergency rule making process outline by the UAPA. They did not go through any rulemaking process at all. They did not call the Attorney General's office for advice and counsel. They did not give the Occupy Nashville protestors adequate notice of the New Rules, nor did they give them the opportunity to challenge them. Appellant-Defendants did not pause after the Judicial

Commissioner invalidated the arrests. Again, they did not seek the advice of the Attorney General's office before they sent over 75 state troopers to arrest the protestors for a second night.

What Appellant-Defendants *did* do was hastily throw together a facially unconstitutional policy and order the arrest of all who violated it. They arrested 55 peaceful protestors over the course of two nights that were exercising their First Amendment rights in the middle of the Plaza as the unwavering protestors sang "We Shall Overcome" and recited the "Declaration of Independence." Appellant-Defendants' actions chilled the First Amendment rights of countless other protestors who saw how their government reacted to the exercise of free speech and chose to abandon the Plaza rather than face arrest. Appellant-Defendants did these things in violation of the Constitution. The District Court properly held Appellant-Defendants' failure to choose less restrictive, but just as effective alternatives that would not have been so extreme, was objectively unreasonable.

As discussed above, Appellant-Defendants' reliance on *Clark* to support their position that they could close the Plaza in this circumstance was not only wholly unreasonable, but contrary to the holding of *Clark*. If Appellant-Defendants had consulted with the Attorney General's office -- an office that specializes in Constitutional interpretations -- it is guaranteed that the attorneys would have performed significantly more research than looking up the *Clark* decision on

Google, as Thad Watkins did in this case.[9] It is wholly unreasonable to rely on one DGS attorney's interpretation of one case when: they did not perform any additional research; the attorney has no specialized knowledge, training or experience in the First Amendment; and specialized counsel was not only available but consultation with them is mandated by state law.

To find otherwise would set a dangerous precedent that any time government officials want to shield themselves from liability, they do not have to follow the procedures that are in place to give them proper legal advice, but instead, they can select any attorney (regardless of specialty), do whatever task it is they want to do, claim reliance on the advice of counsel, and enjoy the protections of qualified immunity. Clearly such a result is not consistent with the purposes of the reliance on the advice of counsel factor in the qualified immunity analysis. The District Court properly found that even if Appellant-Defendants were actually asking advice from their internal department attorney (or ordering him to draft the policy—the facts are in dispute on this point), the reliance on such advice was not reasonable, nor did it rise to the level of extraordinary circumstances as is mandated by the case law. *Silberstein v. City of Dayton*, 440 F.3d 306 (6th Cir. 2006); *Ross v. City of Memphis*, 423 F.3d 596 (6th Cir. 2005).

[9] It is particularly distressing that so little thought was given to the constitutional ramifications of the New Rules because Defendant Bill Gibbons is also an attorney, making his role in the issuance and enforcement of the New Rules even more egregious.

CONCLUSION

For the reasons stated, the judgment of the District Court denying the defendants qualified immunity should be sustained.

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2013, a copy of the foregoing *Brief of Appellee-Plaintiffs* was served upon the following via the Court's electronic filing system:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Fed.R.App.P. 32(a)(7)(B). The foregoing brief contains 13,262 words of Times New Roman (14 point) proportional type. The work processing software used to prepare this brief was Microsoft Word.

/C. David Briley
C. DAVID BRILEY

NO. 13-5882

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Occupy Nashville, et al.,
Plaintiffs-Appellees
v.
William Haslam, et al.,
Defendants-Appellants

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS
BY DEFENDANTS-APPELLANTS

Pursuant to 6th Circuit R. 30(b) and (f), the above Defendants-Appellants designate the following relevant District Court documents:

Docket Entry for 3:11-CV-1037	**Record No.**	**Date**
Complaint, Page ID# 1-32	1	10/31/2011
Temporary Restraining Order, Page ID# 57-58	11	10/31/2011
Agreed Order Establishing Preliminary Injunction, Page ID# 57-58	17	11/17/2011
Amended Complaint, Page ID# 76-97	18	1/05/2012
Answer, Page ID# 133-146	32	4/27/2012
Motion to Amend Answer, Page ID# 450-469	56	1/31/2013
Order Granting Motion to Amend Answer, Page ID# 502	63	2/19/2013
Amended Answer, Page ID# 503-516	64	2/19/2013
Defendants' Motion for Summary Judgment, Page ID#525-526	69	3/22/2013
Exhibits to Defendants'' Motion for Summary Judgment, Page ID# 530-1222	69-1-69-31	3/22/2013
Memorandum in Support of Defendants' Motion for Summary Judgment, Page ID# 1223-1259	70	3/22/2013
Defendants' Statement of Undisputed	71	3/22/2013

Facts, Page ID# 1261-1298		
Plaintiffs' Motion for Summary Judgment, Page ID# 1300-1301	72	3/22/2013
Exhibits to Plaintiffs' Motion for Summary Judgment, Page ID# 1302-1488	72-1 – 72-13	3/22/2013
Memorandum in Support of Plaintiffs' Motion for Summary Judgment, Page ID# 1489-1526	73	3/22/2013
Plaintiffs' Statement of Facts, Page ID# 1523-1540	74	3/22/2013
Defendants' Response in Opposition to Plaintiffs' Motion for Summary Judgment, Page ID# 1545-1565	77	4/11/2013
Defendants' Response to Plaintiffs' Statement of Facts, Page ID# 1566-1586	78	4/11/2013
Plaintiffs' Response to Defendants' Motion for Summary Judgment, Page ID# 1587-1618	79	4/11/2013
Plaintiffs' Response to Defendants' Statement of Facts, Page ID# 1619-1690	80	4/11/2013
Defendants' Reply in Support of Motion for Summary Judgment, Page ID# 1683-1693	82	4/22/2013
Defendants'' Reply Statement of Facts, Page ID# 1701-1715	83	4/22/2013
Defendants' Response to Plaintiffs' Additional Facts, Page ID# 1737-1757	85	4/22/2013
Plaintiffs' Reply in Support of Motion for Summary Judgment, Page ID# 1758-1773	86	4/22/2013
Memorandum of Court, Page ID# 1765-1809	88	6/12/2013
Order, Page ID# 1810-1811	89	6/12/2013
Notice of Appeal, Page ID# 1812-1813	90	6/27/2013

CERTIFICATE OF DESIGNATION

I hereby certify that all of the above documents are properly made a part of the record in the District Court.

/C. David Briley
C. DAVID BRILEY