

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PITTSBURGH ORGANIZING GROUP,)	
MICHAEL BUTLER, DE'ANNA CALIGIURI,)	
PATRICK YOUNG, MARIE SKOCZYLAS and)	
DAVID MEIERAN,)	Civil Action No.
)	
Plaintiffs,)	
)	
vs.)	
)	
CITY OF PITTSBURGH,)	
PITTSBURGH BUREAU OF POLICE,)	
CHIEF NATHAN HARPER, and)	
COMMANDER KATHY DEGLER)	
)	
Defendants.)	

**PLAINTIFFS' LEGAL MEMORANDUM IN SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION**

INTRODUCTION

Plaintiffs in this First Amendment, free-speech lawsuit are anti-war activists in the midst of a one-month vigil on a public sidewalk in Pittsburgh's Oakland neighborhood protesting against America's involvement in Iraq. Plaintiffs' protest involves a stationary picket and leafleting. Plaintiffs have arranged themselves on an approximately five-by-fifteen-foot (5' x 15') rectangle of the sidewalk, being careful not to block either the entire sidewalk or to obstruct passage into and out of nearby storefronts. Indeed, protesters are careful to leave at least a five-foot-wide (5') passage on the sidewalk so as not to obstruct pedestrian movement.

Despite the protesters' care to avoid any actual obstruction, Defendant City of Pittsburgh police officers have for the past two weeks issued citations and threatened to arrest Plaintiffs and

other protesters under Pennsylvania's obstruction of highways statute, 18 Pa.C.S. § 5507. The citations and threats of arrest have all been leveled against protesters who are either sitting or laying down on the sidewalk, and the police have advised the protesters that they may not do either, even if they are careful not to obstruct the passage.

The City has no legal authority to prevent Plaintiffs and other protesters from sitting or laying down on the sidewalk as part of a political protest, so long as the participants do not completely block pedestrian passage. The City has no ordinance prohibiting the non-obstructive sitting or laying down on a public sidewalk. The sanctions and threat thereof are based on City police officers' misunderstanding and misapplication of § 5507. Under that statute, however, conduct is illegal only if the City can prove that Plaintiffs "intentionally or recklessly obstruct" the sidewalk and "render [it] impassable without unreasonable inconvenience or hazard." Simply sitting or lying down, without rendering the sidewalk "impassable," is not a crime.

Without legal authority or significant justification to harass, sanction and threaten to arrest Plaintiffs and other protesters simply because they may choose to sit or lie on the sidewalk in the course of their non-violent, non-obstructive, constitutionally-protected protest violates the First Amendment. Unless Plaintiffs and other protesters, especially those who are fasting, are permitted to sit and lay down on the sidewalk they will be unable to continue the vigil and protest. Plaintiffs seek declaratory and injunctive relief, preliminary and permanent thereafter, to enjoin Defendants from interfering with the protests simply because one or more protesters may sit or lay on the sidewalk. Nothing in the requested injunction would interfere with police officers' authority to prevent intentional and complete obstruction of the sidewalk, or to take any other measures necessary to protect public safety.

FACTS

Plaintiffs incorporate by reference the factual allegations contained in the *Verified Complaint*.

ARGUMENT

Under Fed. R. Civ. P. 65, this Court must weigh four factors when deciding whether to grant a motion for preliminary injunction: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the non-moving party; and (4) whether granting preliminary relief will be in the public interest.¹ Balancing the factors in this free-speech case, where irreparable harm is legally presumed, clearly weighs in favor of granting the requested injunction.

1. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR FIRST AMENDMENT CLAIM

A. Defendants Bear the Burden of Proof and Persuasion in this First Amendment Case.

At the outset, Plaintiffs note that unlike most legal disputes, in First Amendment cases *Defendants* carry the burden of proof and persuasion.² In other words, once Plaintiffs have shown

¹ *American Civil Liberties Union v. Reno*, 217 F.3d 162, 172 (3d Cir. 2000) (citations omitted).

² *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816, (2000) (“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions”) (citations omitted); *Phillips v. Borough of Keyport*, 107 F.3d 164, 172-73 (3rd Cir. 1997)(*en banc*), *cert. denied*, 522 U.S. 132 (1997) (accord).

a restraint on free expression, the burden shifts to the government agency to justify the restraint under the relevant First Amendment standard.³ Strict scrutiny applies in this case, but even if the Court were to apply intermediate scrutiny the City cannot satisfy its heavy burden.

B. Plaintiffs Are Engaging in Constitutionally Protected Expressive Activities in a Traditional Public Forum And, Therefore, the City's Restrictions Are Subject to Close Scrutiny

Plaintiffs in this case are engaging in quintessential First-Amendment-protected activities, namely, an anti-war protest involving peaceful picketing and leafleting.⁴ Plaintiffs are displaying signs and distributing literature to convey their views against America's continuing involvement in the Iraq War.

The locus of the protest is key. Sidewalks, along with streets and parks, are "traditional public forums" that the First Amendment holds in trust for public use, especially for "purposes of assembly, communicating thoughts between citizens, and discussing public questions."⁵ "Such use

³ *Phillips*, 107 F.3d at 172-73 ("When a legislative body acts to regulate speech, it has the burden, when challenged ... of satisfying the relevant First Amendment standard").

⁴ See, e.g., *United States v. Grace*, 461 U.S. 171, 176 (1983) ("There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment") (citations omitted); *Boos v. Barry*, 485 U.S. 312, 318 (1988).

⁵ *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939). Public streets, parks, and sidewalks have long been recognized as quintessential, traditional "public forums." *Id.* Traditional public forums are the most protected type of government property. The Supreme Court described the three types of public forums in *Perry Education Ass'n v. Perry Local Educators' Association*, 460 U.S. 37 (1983). "Traditional" public forums include "places which by long tradition or government fiat have been devoted to assembly and debate." *Id.* at 45-46. Typically, these are parks, streets and sidewalks. "Limited public forums" are considered to be "public property which the State has opened for use by the public as a place for expressive activity." *Id.* In such a

of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”⁶ “When expressive activities, like leafleting and picketing take place in quintessential public fora, such as streets and sidewalks, the ‘government’s ability to permissibly restrict expressive conduct is extremely limited. . . .”⁷ The United States Supreme Court has “traditionally subjected restrictions on public issue picketing to careful scrutiny.”⁸ The City does not, presumably, contest Plaintiffs’ First Amendment right to picket and leaflet on the sidewalk along Forbes Avenue in Pittsburgh’s Oakland neighborhood.

The issue in this motion for emergency injunctive relief is whether the City can prohibit Plaintiffs from sitting or lying down on the sidewalk during the protest, even when those actions do not impede pedestrian traffic. The dispute centers on the City’s interpretation of 18 Pa.C.S.A. § 5507, which is Pennsylvania’s statute making it a crime to obstruct highways and other public passages. The City appears to have taken the position that it is *per se* illegal, under § 5507, for Plaintiffs to sit or lay down on the sidewalk. Therefore, even though Plaintiffs have taken care not to block passage on the sidewalk or ingress and egress to nearby storefronts, City police have repeatedly cited Plaintiffs for violating the statute, and the conduct identified on every citation is that the individual either sat, slept or laid down on the sidewalk. Defendants misread § 5507 and,

forum, the “Constitution forbids the [government] to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.” *Id.* (citations omitted). “Nonpublic” forums are those which have no specific relation to open or free communication. *Id.* This case concerns only traditional public forums.

⁶ *Hague*, 307 U.S. at 515.

⁷ *Grace*, 461 U.S. at 177.

⁸ *Frisby v. Schultz*, 487 U.S. 474, 479 (1988).

indeed, their interpretation in the context of political protests violates the First Amendment.

Under § 5507 conduct becomes illegal only if the City can prove that Plaintiffs “intentionally or recklessly obstruct” the sidewalk and “render [it] impassable without unreasonable inconvenience or hazard.” The *mens rea* requirement is contained in § 5507(a).⁹ § 5507(c) contains the additional limitation, one that is crucial to this case. It reads:

(c) Definition.—As used in this section the word “obstruct” means renders impassable without unreasonable inconvenience or hazard.

Accordingly, the obstruction has to render the route “impassable.”

Nothing in the statute’s text or the annotations indicates that simply sitting or lying down on the sidewalk is illegal. Even though sitting down or putting down a sleeping bag and laying in or on it results in the occupation of that portion of the sidewalk to the exclusion of everyone else, if the passage is wide enough for people to get by it is not and cannot be a crime. It is an abuse of the statute for a police officer to sanction people “on a sidewalk doing nothing, blocking no one and creating no hazard.”¹⁰ Moreover, to apply the statute as the City has done, in the context of a political demonstration, compounds the injury and transforms the abuse into a First Amendment violation.

⁹ The provision reads as follows:

(a) Obstructing.— A person, who, having no legal privilege to do so, intentionally or recklessly obstructs any highway, railroad track or public utility right-of-way, sidewalk, navigable waters, other public passage, whether alone or with others, commits a summary offense, or, in case he persists after warning by a law officer, a misdemeanor of the third degree.

18 Pa.C.S.A. § 5507(a).

¹⁰ *Commonwealth of Pennsylvania v. Porter*, 480 F.Supp 686, 698-99 (W.D. Pa. 1979), *modified on other grounds*, 659 F.2d 306 (3d Cir. 1981) (*en banc*).

West's Pennsylvania Practice Series discusses the statute's genesis, noting that it was taken nearly verbatim from the Model Penal Code and that it "must be applied extremely cautiously to avoid infringement on first amendment protected rights to free speech, assembly and peaceful protest." 14 West's Pa. Prac., Crim. Offenses & Defenses § 80 (2007).¹¹ While it might be possible to pass a law generally prohibiting people from sleeping in a traditional public forum, even such a law might have to make exception for First-Amendment-protected activities.¹² But the City has no

¹¹ The entire paragraph reads as follows:

Section 5507 was taken nearly verbatim from the Model Penal Code. The intent of the Model Penal Code draftsmen was "twofold: to prevent the danger and inconvenience that may result from unjustified obstruction of public passage; and, at the same time, to withdraw the threat of penal sanctions from lawful assembly." [FN1] Quite clearly, as a matter of constitutional law, § 5507 must be applied extremely cautiously to avoid infringement on first amendment protected rights to free speech, assembly and peaceful protest. [FN2] In this vein, the Model Penal Code draftsmen further commented that "obstructs" was carefully defined (in § 5507(c) in the Crimes Code) so that it "effectively precludes the suppression of otherwise lawful activity on the ground of some trivial inconvenience to passersby So long as members of the public are able to go on their way with reasonable safety and convenience, presence in an obstructive gathering is not criminal." [FN3] Finally, the Model Penal Code draftsmen note of the analogue to Crimes Code § 5507(a) that: "It exempts from liability ... a speaker or listener who acts without purpose to obstruct a public passage If the presence of such a gathering becomes a significant obstacle to use of the streets or highways, the remedy is for the police or other authorities to issue an order to move on." [FN4].

(Footnote text omitted).

¹² See, e.g., *Whiting v. Town of Westerly*, 942 F.2d 18, 21 (1st Cir. 1991) ("The act of sleeping in a public place, *absent expressive content*, is not constitutionally-protected conduct (emphasis added)); *United States v. Gilbert*, 920 F.2d 878, 885 (11th Cir. 1991) (narrowing injunction prohibiting homeless man from sleeping in designated public forum unless "he does so as part of a protest"). The Supreme Court has never resolved the issue. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (assuming, but not deciding, that overnight sleeping in park as part of demonstration is expressive conduct entitled to some First Amendment protection). *Clark* is distinguishable. In that case the National Park Service had a rule, applied unvaryingly, prohibiting all overnight camping in D.C. parks, and the

ordinance making sitting or laying down on the sidewalk illegal, and Plaintiffs have uncovered no state or federal law that makes this conduct a crime either.

The case that most closely approximates the facts at issue here is *Metropolitan Council, Inc. v. Safir*, 99 F.Supp.2d 438 (S.D.N.Y. 2000). In *Metropolitan Council*, a tenant-advocacy organization moved to enjoin the New York City police from using the state’s disorderly conduct statute, which makes it a crime to intentionally “obstruct[] vehicular or pedestrian traffic,” to prevent them from sleeping overnight on public sidewalks as part of an all-night protest and vigil in front of the Mayor’s home.¹³ After the parties stipulated that the City had a policy of prohibiting everyone from sleeping on sidewalks and thus that it was content neutral, the Court applied intermediate scrutiny.¹⁴ Under intermediate First-Amendment scrutiny, applicable to regulations of expressive conduct and content-neutral time, place and manner restrictions, the government must justify the speech restriction by showing that it advances a “significant governmental interest,” is “narrowly tailored” to serve that interest, and “leave[s] open ample alternative channels for communication.”¹⁵

justification for that rule outweighed protesters’ rights to sleep in the park. *Id.* at 296-98. In this case there is no rule or law, either in Pittsburgh or Pennsylvania, prohibiting people from laying down or sitting on the sidewalk.

¹³ *Id.* at 439-40.

¹⁴ *Id.* at 444.

¹⁵ *Clark*, 468 U.S. at 293. There “is little, if any, differen[ce]” between the standards applied to a content-neutral time, place, and manner restriction on speech in a traditional public forum and a content-neutral regulation of conduct that incidentally burdens speech. *Metropolitan Council*, 99 F. Supp. 2d at 445. See also, *Turner Broadcasting System, Inc. v. Federal Commun. Comm’n*, 512 U.S. 622, 662 (1994) (discussing the test derived from *O’Brien v. United States*, 391 U.S. 367 (1968)). “The Supreme Court has equated their requirements for narrowly-tailored advancement of a significant governmental interest. *Metropolitan Council*, 99 F. Supp. 2d at 445, citing *Turner Broadcasting*, 512 U.S. at 662.

The Court then concluded that the restriction was overbroad if it applied to non-obstructive, overnight sleeping on the sidewalks as part of a protest, and thereby violated the First Amendment.¹⁶ Upon balancing the equities, as required in a preliminary-injunction context, the court concluded that, “Here, where core First Amendment rights to political protest are at stake, where the City concedes that this vigil will not itself cause any public disorder, and where the City’s authority to treat sleeping as *per se* disorderly conduct is far from clear, the equities weigh heavily in favor of permitting this vigil to go forward without restraint.”¹⁷

The facts in *Metropolitan Council* do not differ significantly from the facts in this case, except that here Plaintiffs do not concede that the City’s application of the Pennsylvania obstruction statute is content-neutral.¹⁸ But even if it were, applying the same intermediate scrutiny that the *Metropolitan Council* court used yields the same result. Unless the City can show that the protesters’ prone or sitting position on the sidewalk actually obstructs pedestrian passage, the statute cannot be applied to restrict First-Amendment-protected activity. Such application is overbroad because it is

¹⁶ *Metropolitan Council*, 99 F. Supp. 2d at 445-47.

¹⁷ *Id.* at 450.

¹⁸ The City does not appear to have any guidelines or standards that regulate when police officers should cite people under the § 5507 simply for sitting or lying on the sidewalk. This absence of any standards triggers strict scrutiny because it gives police the standardless and unfettered discretion to restrict constitutionally protected expression. The Supreme Court has regularly stricken systems where government officials have been given unlimited discretion to approve or deny expressive activities. *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). In 2002 a unanimous Supreme Court reaffirmed the importance of constraining official discretion over expressive activities. *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). The Court noted that the danger of arbitrary, politically-motivated, and discriminatory censorship is significant when standards do not constrain the censors. *Id.* at 320-21.

not a “narrowly-tailored advancement of a significant governmental interest.”¹⁹

The injunction entered by the *Metropolitan Council* court provides a framework for an appropriate order in this case. The injunction reads, in relevant part, as follows:

This order concerns only plaintiff’s planned vigil on the sidewalk abutting the northwestern corner of the intersection of East End Avenue and 88th Street between the hours of 1 a.m. and 8 a.m. on June 14, 2000. The Court orders defendants not to interfere with this vigil, nor with individuals’ participation in it, on account of participants assuming a prone position and/or sleeping, so long as the participants abide by the conditions to which plaintiff has previously stipulated. Those conditions are that at all times during the vigil plaintiff will provide at least two marshals who will remain awake and alert and who will ensure that the vigil (1) will occupy no more than a 7.5 foot wide swath of sidewalk extending from the sidewalk’s edge furthest from the street and extending in length no more than 75 feet, (2) will not obstruct or impede access to the building entrances on East End Avenue and 88th Street, and (3) will consist of no more than 25 persons.

Metropolitan Council, 99 F. Supp. 2d at 450. In this case, Plaintiffs seek an order restraining the Pittsburgh Police from interfering with their vigil and protest on Forbes Avenue in Oakland by issuing criminal citations or threatening arrest for simply sitting, laying or sleeping on the sidewalk so long as they “occupy no more than a [5] foot wide swath of sidewalk extending from the sidewalk’s edge furthest from the street and extending in length no more than [15] feet; and (2) will not obstruct or impede access to the building entrances on [Forbes] Avenue”

Since the City is unlikely to be able to meet its burden to prove that preventing the Plaintiffs and other protesters from sitting, lying down or sleeping on the sidewalk in a confined area even when doing so does not result in complete obstruction of the sidewalk is a narrowly tailored restriction that actually promotes some significant governmental interests, Plaintiffs are likely to prevail on the merits of their free-speech claims.

¹⁹ *Metropolitan Council*, 99 F. Supp. 2d at 445, citing *Turner Broadcasting*, 512 U.S. at 662.

2. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE COURT DECLINES TO ISSUE THIS INJUNCTION.

As the Supreme Court has noted, “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”²⁰ In this case, the ability to rest by sitting or lying down, is essential to maintain the vigil and to allow for a sustained presence at the site. Absent the requested relief, Plaintiffs will not be able to deliver their message during the entire period of the planned demonstration.

3. DEFENDANTS WILL SUFFER NO IRREPARABLE HARM IF THIS INJUNCTION ISSUES.

The requested order will not prejudice the City’s ability to maintain public safety, crowd control and orderly traffic movement. The City will be able to enforce all state and local laws, and to take all lawful actions necessary to protect public safety and control traffic.

4. GRANTING THE INJUNCTION WILL SERVE THE PUBLIC INTEREST.

The free exchange of ideas on Pittsburgh’s streets and sidewalks is in the public interest. “[T]ime out of mind, public streets and sidewalks have been used for public assembly and debate,

²⁰ *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976) (emphasis added). *See also*, *Swartzwelder v. McNeilly*, 297 F.3d 228, 241-42 (3d Cir. 2002) (restriction on First Amendment rights – in this case police officer’s court testimony – constitutes irreparable harm); *American Civil Liberties Union*, 217 F.3d at 180 (generally in First Amendment challenges plaintiffs who meet the merits prong of the test for a preliminary injunction “will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights.”) (citation omitted); *Abu-Jamal v. Price*, 154 F.3d 128, 135-36 (3d Cir. 1998) (same). *See also*, 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (2d ed.1995) (“When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary”).

the hallmarks of a traditional public forum.”²¹ Enjoining the City from unduly and unfairly burdening political activities in Pittsburgh’s public forums is in the public interest.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court issue a TRO/preliminary injunction enjoining the Defendant City of Pittsburgh and its officials, employees, agents, assigns and others who may be acting in concert with them from issuing citations, threatening to arrest or actually arresting Plaintiffs and other protesters for sitting, lying down or sleeping on the sidewalk in the 3700 block of Forbes Avenue, unless Plaintiffs are positioned so that pedestrians cannot pass by.

Nothing in the requested order would preclude Defendant City of Pittsburgh and its officials, employees, agents, assigns and others who may be acting in concert with them from enforcing the laws of Pennsylvania, including the Crimes Code, and to take necessary and reasonable measures to maintain public order, ensure public safety and provide for the orderly flow of traffic around the protesters while protecting the Plaintiffs’ First Amendment right to engage in non-violent political activity on Pittsburgh’s sidewalks.

Respectfully submitted,

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²¹ Frisby, 487 U.S. at 480 (citation omitted).

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