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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

OCCUPY EUGENE, FLORENCE E. SEMPLE, TERRILL E. PURVIS, Plaintiffs, v. **WAYNE C. BENJAMIN**, Regional Director, GSA; **KIMBERLY S. GRAY,** Associate Director; **UNITED STATES GENERAL SERVICES ADMINISTRATION ("GSA")**, Defendants.	Case No. **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER** **EXPEDITED HEARING REQUEST REQUEST FOR ORAL ARGUMENT**

I. INTRODUCTION

Occupy Eugene, Florence Semple, and Terrill Purvis have had, and continue to have their

First and Fifth Amendment rights violated by the General Services Administration (GSA) while exercising their lawful rights to assemble and protest upon a traditional public forum. Currently, Plaintiffs are being threatened with arrest for lawfully exercising their constitutional rights upon a federally owned public forum. Immediate guidance is necessary to prevent Defendants from continuing to blatantly violate plaintiffs, and others, rights to assemble and publicly demonstrate.

On July 11, 2012, at approximately 5:00 pm, Plaintiffs were ordered by the General Services Administration (GSA) to leave a lawful demonstration at the Federal Plaza, or face arrest. The order to leave the Plaza came as a result of a change in GSA policies that were enacted to stifle Occupy protests around the country, whereby the GSA mandated (1) all citizens, even a single individual, apply for and receive a permit from the GSA prior to exercising First Amendment rights at this traditional public forum, and, based upon the unfettered discretion of the GSA, if a permit was not granted, the demonstrator faced arrest; and (2) a permit would be denied by the GSA if the applicant desired to protest between the hours of 5 pm and 8 am or on weekends; (3) a permit might be denied if the GSA determined that the demonstration was not aesthetically pleasing. The policy of banning certain protests, particularly Occupy Eugene protests, at the Plaza, or limiting them to certain hours or types, is unconstitutional.

In order to challenge these unconstitutional regulations and practices, on July 11th, Plaintiff Florence Semple chose to remain and defend her constitutional rights, and as a result of the complaint filed by the GSA Defendants, received a United States District Court Violation Notice while peacefully sitting in a lawn chair holding a sign regarding the importance of standing up for constitutional rights. The negotiated citation[1] alleged a violation of 41 C.F.R. § 102-74.385 which states, "Persons in and on property must at all times comply with official signs

[1] Plaintiffs' counsel, US Attorney Bud Fitzgerald, and Federal Protective Service Officer Thomas Keedy met on July 10th to discuss the pending "eviction," and the planned arrest of a single nonviolent individual in order to bring this legal challenge to court.

of a prohibitory, regulatory or directory nature and with the lawful direction of Federal police officers and other authorized individuals." While it is not disputed that Ms. Semple refused to comply with the direction of a Federal police officer to leave the public plaza, the order was unlawful because the Order violated her First Amendment Rights under the Constitutions of the United States and Oregon. Plaintiff filed a Motion constitutionally challenging the criminal charge and Judge Thomas Coffin held a hearing on the motion. During the hearing, it was evident that the Judge was going to rule in Ms. Semple's favor due to serious constitutional concerns he emphasized throughout the proceeding. In addition, the Assistant U.S. Attorney prosecuting the case stipulated and agreed that the Plaza was a traditional public forum for the purposes of constitutional analysis. At the conclusion of the hearing, he requested a two-week extension to provide supplemental briefing, but instead filed a motion to dismiss the charge. The Court granted that motion despite Ms. Semple's request for the Court to provide a written opinion regarding their rights to continue to exercise First Amendment rights at the Plaza.

II. FACTS

On or about May 1, 2012, members of Occupy Eugene (OE) began using the Plaza of the Eugene Federal Building, located at 211 East 7th Avenue, in Eugene, Oregon (the Plaza) as a place to gather, hold picket signs, raise awareness and gain publicity for the Occupy Movement and the political issues relevant to that political movement[2]. Decl. of Mary Broadhurst, p. 2. Historically, the federal government has always intended the Plaza to be a public, free speech venue without limiting speech to particular subjects or time periods, and without requiring permits, except in rare instances. Constructed in 1975, the Plaza is located on a highly visible,

[2] Such issues included drawing attention to the plight of local homeless people, corporate greed, advocating for human rights, veterans rights, and putting an end to big bank bailouts and foreclosures, to name a few.

busy street corner, is adjacent to courthouses, federal, state, and municipal political offices, and has always been a lawful place for demonstrations and picketers to congregate and exercise their rights. The U.S. Attorneys office has stipulated that the Plaza is a traditional public forum for purposes of constitutional analysis. Frequent use of the Plaza for public events is exactly what the government expected and intended to happen when the Plaza was designed and constructed. The federal website states:

> The Eugene Federal Building and Courthouse played a significant civil role in the early 1970s and during the Vietnam War. The plaza was and remains a favored venue as a stage for protests against the government's policies. There is demonstration activity weekly. Large demonstrations occurred in the spring of 2003, over the U.S. invasion of Iraq, in 1991, with a demonstration against the U.S. invasion of Kuwait and in 1992, due to the Rodney King beating. Most of the demonstrations are peaceful and without violence or arrests. The plaza has become a community focal point for citizen gatherings of many types. The courtyard was designed for people to congregate and be part of outdoor events and venues. The courtyard design was not intended for political demonstrations, but it has gained cultural and political significance due to these activities.

Http://www.gsa.gov/portal/ext/html/site/hb/category/25431/actionParameter/exploreByBuilding/buildingId/1144#.

Occupy Eugene describes itself as a protest movement focused on democracy, economic security, corporate responsibility, and financial fairness, and is comprised of local citizens dedicated to "a nonviolent movement for accountability in the United States government…" http://occupyeugenemedia.org/contact/. From October 15, 2011, until the present, Occupy Eugene has maintained a protest "occupation" site at various locations around the City. Plaintiffs Semple and Purvis are longtime member of Occupy Eugene and has participated in numerous OE protests.

On or about May 1, 2012, Occupy Eugene decided to occupy the Plaza to draw attention to several issues, one of which was the plight of homeless people who did not have a place to legally sleep at night, and must stay awake all night moving from place to place to avoid victimization, police harassment, or arrest. On May 1st, approximately 10 to 25 people,

including the Defendant, were engaged in political organizing, sign-making, and outreach on the Plaza throughout the day and night. Shortly after their arrival, Officer Thomas Keedy of Federal Protective Services (FPS)[3] approached the members and engaged in amicable discussion with the activists. Decl. Broadhurst, p. 2-3. He advised the group that they would not be able to set up a tent that was being used as a prop, and could not sleep at this location; the activists agreed. *Id*. Officer Keedy advised them that they were not doing anything wrong, that they were welcome to remain at this location for as long as they liked, but asked if anyone would be willing to be a point of contact for the group and sign a permit (with the U.S. General Services Administration (GSA)) as a formality. *Id*. Officer Keedy provided them with a permit application, and Plaintiff Terrill Purvis, an Occupy Eugene member and firefighter, agreed to be the point of contact and filled out the permit as a gesture of goodwill toward Officer Keedy. The political group was divided at this time as to whether or not they should apply for a permit to protest at the Plaza and brought the issue to their General Assembly for a consensus decision. *Id*.

On May 2, 2012, OE, through Plaintiff Purvis, submitted a standard 60 day GSA permit application to Officer Keedy, requesting the non-exclusive use of the Plaza from May 1, 2012 until July 1, 2012, to maintain a 24 hour a day presence with up to 60 people for a "1st Amendment Demonstration." *Id*. at 2. Officer Keedy reviewed the application for potential security impacts to the facility and found none. The permit application was filed with GSA and approved for 60 days as requested. OE used the Plaza peacefully and in accordance with the permit, with members occupying the public space and exercising their rights of free speech and assembly 24 hours a day. There were no reported incidents of misuse during the initial 60 days[4].

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[3] The Federal Protective Services officers provide security at the Plaza.
[4] The government informed OE that there was one incident where a man was allegedly smoking medical marijuana at the Plaza. He was informed that he was not permitted to do so on federal property, and no other related incidents occurred. During the time that OE was present at the

On or about June 6, 2012, one of Occupy Eugene's member-attorneys, Mary Broadhurst, contacted Officer Keedy about a sound permit for an upcoming event at the Plaza. Officer Keedy told Ms. Broadhurst that she would need to contact the local GSA manager because the rules for permits had been changed by the GSA due to the fact that the GSA had 'bad' experiences with other Occupy groups in other areas. He confirmed that there had been no problems with OE's use of the Plaza. Decl. Broadhurst, p. 2-3. Toward the end of the 60-day permit period, on June 27, 2012, OE filed another application with GSA to renew and extend their use of the Plaza from July 1, 2012 to July 30, 2012 requesting the same terms of use that had been granted before. *Id*. at 3; Ex. 1.

On or about this time period, OE was informed that due to problems with other Occupy movements, the GSA had decided that they were only permitting protest on federal public forums from 8am to 5pm, Monday through Friday, and that they were no longer permitting 24-hour assemblies at this location. See Decl. Broadhurst 3. Eventually, GSA Regional Director Chaun Benjamin, altered the hours of assembly from 7:00 am until 10:00pm after OE explained that it was simply outrageous to prohibit all protest after 5pm during the busy after work rush hours. Ex. 2. The GSA continued to deny OE's attempt to comply with the original permit obligations, despite the fact that many of OE members strongly contested the obligation to ask the government for permission to protest at a public forum like the Plaza. On June 30, 2012, OE member Mary Broadhurst informed the GSA that OE had determined to remain without a permit if the GSA was going to force them to accept unconstitutional conditions regarding the times they would be allowed to assemble and protest. Ex. 2. On July 9, 2012, Defendant GSA Regional Services Director Chaun Benjamin formally denied Occupy Eugene's second permit

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Plaza, a young man not participating in the protest, allegedly tagged government property with paint. The government admitted that they did not believe this person was connected to the OE activists.

application, despite the fact that nothing had changed since the first permit was approved. Ex. 3. The denial was based on the fact that (1) OE used the original permit application that did not contain the new restrictive conditions; (2) OE refused to accept the unconstitutional conditions; (3) OE applied for a permit under the same conditions as contained in the previously issued permit; and (4) OE had requested a 24 hour presence at the Plaza. Ex. 3. The permit denial also stated that the GSA has an interest in preserving the plaza for use by the general public, and maintaining an aesthetically pleasing area, though they never asserted that OE's use of the Plaza violated those interests. *Id*. After the denial of OE's permit application, OE followed the bureaucratic process and exhausted all administrative appeal options. Ex. 5, 6.

On or about July 10, 2012, GSA managers Chaun Benjamin and Don Murphy went to the Plaza to verbally inform OE members that their permit extension had been denied, and that the members must completely and indefinitely vacate the Plaza within 24 hours or GSA would request law enforcement assistance from FPS. Decl. Broadhurst p. 4; Ex. 2; 4. A permit denial letter was attached. Ex. 3. OE informed the GSA managers that they believed they did not need a permit to lawfully assemble on a traditional public forum, and they would continue their First Amendment activities in the face of the permit denial. Ex. 2.

On July 11, 2012, at approximately 5pm, Officer Keedy and FPS Area Commander Michael Foster entered the Plaza and advised the members and non-Occupy citizens who simply came to bear witness to the unconstitutional eviction, that they had to leave the forum or face arrest. Decl. Broadhurst, p. 5. Many people came to the Plaza on this day to stand up in opposition to the new repressive policies the GSA was attempting to thrust upon them, and had not previously been associated with OE. *Id*. Many Eugenians were outraged at the idea that even a single person holding a sign would be required to request and receive a government permit in

order to exercise constitutional rights at the Plaza. *Id*. Officer Keedy reiterated that OE's permit had expired and that if they did not vacate the Plaza, they would face citation or arrest as a result of the complaint filed by Defendants. *Id*. At approximately 6:00 p.m., GSA closed the Plaza to the public and surrounded the area with yellow police tape.

Shortly after 7:00 p.m., all OE members and the public had evacuated the Plaza except for Plaintiff Florence Semple, who remained seated in a lawn chair on the Plaza holding a sign. Officer Keedy again informed Ms. Semple that the Plaza was closed to the public and ordered her to vacate the Plaza. Ms. Semple communicated to Officer Keedy that she was remaining on the Plaza as a matter of conscience, and that she would only leave upon receipt of a citation or arrest in order to challenge what she believed was an unconstitutional eviction. Officer Keedy informed Ms. Semple of the maximum penalties of disobeying the order, and she chose to stay and exercise her First Amendment Rights. Ms. Semple was arrested for violating 41 CFR § 102-74.385. She was cited and released. The remaining Plaintiffs were forced to terminate their protest at the Plaza at that time. As indicated above, on December 7, 2012, the U.S. ultimately moved to dismiss the charge against Semple—but the GSA got what they wanted—Occupy Eugene was forced to terminate their protest upon the Plaza.

Plaintiffs strongly desired to return to the federal Plaza to lawfully exercise their First Amendment rights in this public forum. After Ms. Semple's case was dismissed on December 10, 2012, Plaintiffs decided they could return to the Plaza to resume their protest. On December 13, 2012, Plaintiffs began to assemble and exercise lawful First Amendment rights at the Plaza. That day, GSA demanded that Plaintiffs submit another permit application pursuant to the same unconstitutional regulations and criteria as were challenged in Semple's case. Plaintiffs determined it was fruitless for them to apply for a permit that demanded they only protest

Monday through Friday, 8am to 5pm, as they strongly believe those restrictions are unreasonable and unconstitutional. On December 14, 2012, a letter was hand delivered to Plaintiffs from GSA Director Kimberly Gray, stating they were "being directed to immediately begin to leave subject federal property. You have 24 hours to vacate the subject federal property from the time this letter is received. All persons and belongings must be removed no later than 4:00 p.m. on December 15, 2012." If Plaintiffs failed to leave, the GSA "will file a complaint with the Department of Homeland Security-Federal Protective Service and request law enforcement intervention." Exhibit 7.

Currently, Plaintiffs are continuing to protest at the Plaza under threat of arrest and prosecution. However many members of OE and/or the general public are unable or unwilling to join the assembly due to fear that they will be arrested.

III. STANDARD FOR ISSUING A TEMPORARY RESTRAINING ORDER OR PERMANENT INJUNCTION

This case clearly involves the public interest, and therefore, "where the balance of hardships tips decidedly toward the plaintiff, the district court need not require a robust showing of likelihood of success on the merits, and may grant preliminary injunctive relief if the plaintiff's moving papers raise 'serious questions' on the merits." *Los Angeles Memorial Col. v. Nat'l Football League,* 634 F.2d 1197, 1203, n. 9 (9th Cir. 1980); *Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992). Plaintiffs are thus entitled to a temporary restraining order and preliminary injunction. A plaintiff is entitled to preliminary injunctive relief when it demonstrates that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Winter v. NRDC,* 129 S. Ct. 365, 374 (2008). The Ninth Circuit recently affirmed that "'serious questions going to the merits' and a hardship balance that

tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the Winter test are also met." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-1135 (9th Cir. 2011). "Serious questions" are those that are "substantial, difficult, and doubtful" enough to require more thorough investigation. *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988).

IV. PLAINTIFFS HAVE RAISED SERIOUS QUESTIONS GOING TO THE MERITS

A. FIRST AMENDMENT

The First Amendment to the United States Constitution provides that "Congress shall make no law…abridging the freedom of speech…or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." U.S. Const. Amend. I.

> The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74–75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers,* 461 U.S. 138, 145, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (internal quotation marks omitted).

Snyder v. Phelps, 131 S. Ct. 1207, 1215, 179 L. Ed. 2d 172 (2011).

Courts must follow a three-step process to assess whether any governmental restriction is valid under the First Amendment. *See Mahoney v. Doe*, 642 F.3d 1112, 1116 (D.C. Cir. 2011 (*citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc*., 473 US 788, 797 (1985)). First, the court must determine whether the First Amendment protects the speech at issue; second, the court identifies the nature of the forum; and third, the court assesses whether the government's justifications for restricting speech satisfy the requisite standard. *Id. (quoting Cornelius*, 473 US at 797).

There should be no dispute that the conduct by Occupy Eugene falls within the protection

of the First Amendment. There should also be no dispute that OE's participation in the "occupation" of the Plaza, including on July 11, 2012, and December 14, 2012, is a matter of public concern and is within the protection of the First Amendment. Clearly, the First Amendment protects Defendant and OE's assembly and speech at the Plaza.

The Supreme Court has distinguished three types of forums on public property: traditional public forums; forums created by government designation; and nonpublic forums. *Cornelius*, 473 U.S. at 802. A traditional public forum is a location that has a long tradition or government authorization to be used for assembly and other free speech activities. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983). The U.S. has stipulated that the federal Plaza is a traditional public forum.

"A regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny." *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678, 112 S. Ct. 2701, 2705, 120 L. Ed. 2D 541 (1992). Such fora are "necessary conduit[s] in the daily affairs of a locality's citizens, but also . . . place[s] where people may enjoy the open air or the company of friends and neighbors in a relaxed environment." *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 651, 101 S. Ct. 2559, 2566, 69 L. Ed. 2d 298 (1981). The government's ability to permissibly restrict expressive conduct in a public forum is "very limited." *United States v. Grace*, 461 U.S. 171, 177, 103 S. Ct. 1702, 1707, 75 L. Ed. 2D 736 (1983).

As noted supra, the government has always held out the Plaza to the public for First Amendment activities, and has always kept it open for such use. There were no limitations on the hours in which the public could use this space, nor were there requirements that the general public secure government permission before using the Plaza for lawful First Amendment

purposes. There were rare situation where large groups desired to use amplification, electricity, or needed additional law enforcement resources, and were asked to sign a permit. Plaintiffs are unaware of any circumstances where Defendants denied a permit.

In traditional public forums, the rights of the government to limit expressive activity are sharply circumscribed. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2753, 105 L. Ed. 2d 661 (1989); *United States v. Grace,* 461 U.S. at 177; see *Frisby v. Schultz,* 487 U.S. 474, 481, 108 S.Ct. 2495, 2500, 101 L.Ed.2d 420 (1988); *Perry Education Assn.,* 460 U.S. at 45. In order for the government to enforce a content-based exclusion, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *See Carey v. Brown*, 447 U.S. 455, 461 (1980). A government may also impose reasonable time, place, and manner constraints in traditional public forums as long as it does not ban a speaker from engaging in First Amendment speech in those forums without satisfying the strictest of scrutiny. *See Clark v. Comty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984). A content-based regulation of speech will not satisfy strict scrutiny if there is a less restrictive means that "would be at least as effective in achieving the legitimate purpose" that is being served. *Reno v. ACLU,* 521 U.S. 844, 874 (1997).

Thus, because Defendants have created new rules and policies pertaining to Occupy protestors, such as Plaintiffs, they must prove a compelling state interest and narrowly drawn restriction satisfying the strictest of scrutiny. Defendants have failed to offer any legitimate basis to restrict First Amendment rights upon a public forum between 5pm and 7am weekdays, and all weekend.

A content-neutral regulation of time, place and manner of expression may be permitted when they are "narrowly tailored to serve a significant government interest, and leave open

ample alternative channels of communication." *Perry Educ. Ass'n*, 460 U.S. at 45; *Grayned v. City of Rockford,* 408 U.S. 104, 115 (1972); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State of New Jersey*, 308 U.S. 147 (1939). If a content-neutral restriction incidentally burdens speech, "intermediate scrutiny" must be applied. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994). To find an ordinance or policy facially invalid the court must determine that a "'realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.'" *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 11 (1988). If free speech is diminished, the law requires the policy must be "narrowly tailored to serve a significant government interest" and "leave open ample alternative channels of communication or the information." *Ward*, 491 U.S. at 791, 798.

The new GSA policy banning nighttime and weekend assembly and expression, as well as the mandate that all people wishing to exercise those rights receive a permit, will 'significantly compromise' the rights of all citizens who desire to use the Plaza for expressive purposes, and thus must be found facially invalid.

Because the Plaza is a public forum, Defendant's speech may not be restricted, even in a content-neutral manner, unless the restriction is narrow and necessary to serve a substantial governmental interest[5]. *Yeakle v. City of Portland*, 322 F. Supp. 2d 1119, 1124 (D. Or. 2004), citing *N.A.A.C.P. v. City of Richmond,* 743 F.2d 1346, 1355 (9th Cir.1984); *Gerritsen v. City of Los Angeles,* 994 F.2d 570, 576 (9th Cir.1993). Where a content-neutral regulation, as applied, punishes conduct that is interwoven with speech activity, the regulation is justified if:(1) the

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[5] In addition, the Supreme Court does not allow restrictions to the constitutional rights of citizens based upon future fear of disturbance. *Tinker v. Des Moine Indep. Community School District*, 393 U.S. 503, 508 (1969) ("Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.").

government is constitutionally authorized to regulate the conduct; (2) the regulation serves a substantial governmental interest; (3) the governmental interest is not related to the suppression of speech; and (4) any incidental burden on speech is no more than necessary. *City of Erie v. Pap's A.M.,* 529 U.S. 277, 296 (2000). In this case, (1) the government may regulate the Plaza, (2) the regulation does not serve a substantial governmental interest; (3) the governmental interest IS related to the suppression of speech, and (4) the burden on speech is much greater than necessary. Thus, the new GSA policies that ban or preclude protest cannot be justified.

In order for a regulation that infringes on constitutionally protected activity in a public forum to satisfy the fourth prong of *Erie*, the regulation must be narrowly tailored to meet a compelling governmental interest. *Ward*, 491 U.S. at 791. As a result of the government's denial of OE's permit and eviction of all protestors in July and now in December, Plaintiffs and others were completely banned from the Plaza, apparently forever—unless they agree to obtain a permit under the new restrictive unconstitutional terms imposed by the Defendants. Absent some showing that Plaintiffs were violating laws, damaging property, interfering with business, or hindering other uses of the Plaza, the exclusion did not rationally serve the GSA's purpose. There is no evidence that unpermitted, nighttime or weekend assemblies are more or less unlawful or damaging to government interests. In addition, the infringement on Plaintiffs' First Amendment activities caused by the exclusion cannot be said to have been "no greater than necessary." Not only was their protected First Amendment activity of protesting abruptly terminated, but all subsequent First Amendment activity at this location also appears to be terminated—particularly between the hours of 10pm and 7am, on weekends, or if the individual did not seek government permission for their expressive activity well in advance of their demonstration—even if only a single person holding a sign. Therefore, the restrictions placed on

Plaintiffs through the enforcement of this GSA exclusion suppresses a substantial amount of speech and imposes a much heavier burden on speech than necessary.

The First Amendment requires deference to the speaker's determination as to how and when the message should be disseminated. Speakers, "not the government, know best both what they want to say and how to say it…." *Riley v. Natn'l Fed'n of the Blind in N.C, Inc*., 487 U.S. 781, 790-91 (1988); *Vodak v. Chicago*, 639 F.3d 738, 749 (7th Cir. 2011) (Where spontaneity forms part of the message, "dissemination delayed is dissemination denied."). Furthermore, the Supreme Court has put forth stringent guidelines for blanket restrictions on constitutionally protected speech and expression. The Court, in *Madsen v. Women's Health Center,* 114 S.Ct. 516, 129 L.Ed.2d 593 (1994) stated:

> "... when evaluating a content-neutral injunction, we think that our standard time, place and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant governmental interest."

Defendants argue that it has a substantial interest in maintaining the Plaza in "an aesthetically pleasing" manner, and in "preserving the plaza for use by the general public." Ex. 3, p. 2). The new GSA policy criminalizes lawful protest unless government consent is obtained first—eliminating spontaneous assemblies, and also creates an absolute ban to any citizen who desires to exercise their rights 24 hours a day, and in particular, after 10 p.m. or before 7 a.m.. *Id*. However, the District of Oregon ruled:

> "the ability to be *physically present* in quintessential public forums is necessary to engaging in free speech in those forums. However, PCC 20.12.265 precludes plaintiffs and others from being physically present to participate in clearly protected activities such as picketing, demonstrating, delivering a speech, or leafleting. Thus, the ordinance regulates conduct (physical presence) that is essential to a much broader variety of protected speech conduct."

Yeakle, 322 F. Supp. at 1127. Thus, Defendants' policies do not merely regulate nonexpressive conduct; it regulates physical presence in a public forum which is intimately related and essential

to a broad variety of protected speech conduct—such as in this instance, where individuals participated in all night vigils.

The new GSA policies prevented Plaintiffs from being able to lawfully engage in any form of speech, assembly or other protected activity at the Plaza during day or night hours. The new policy of absolutely requiring every single individual to obtain a government permit in advance or their exercise, and restricting that exercise to the hours of 7am and 10pm (Monday through Friday), is not narrow and not necessary to serve a substantial governmental interest. *Yeakle* at 1124. A narrowly tailored regulation must not burden substantially more speech than is necessary to further the government's legitimate interests, it must carefully calculate the cost to speech, and must ascertain whether there are not obvious, less burdensome alternatives. *Ward* at 799. Further, given the many alternatives to a complete ban on protest activity at the Plaza by Plaintiffs or its supporters, as well as a complete ban on protest activity from 10pm to 7am, the policies impose severe restrictions without first using less restrictive alternatives, such as the enforcement of existing criminal laws and sanctions. By banning OE and others from the Plaza, the government reduces the quantity and quality of expression available in Eugene. *Id.* Even if the government were to argue that other free speech areas may exist in Eugene, an alternative location is constitutionally inadequate because Plaintiffs and others are no longer able to communicate effectively or to reach their intended audience at this unique, longstanding, and powerful free speech location. *Id*. (*citing Members of City council of Los Angeles v. Taxpayers for Vincent,* 466 US 789, 812 (1984); *Bay Area Peach Navy v. United States,* 914 F.2d 1224, 1229 (9th Cir. 1990).) As the Oregon federal court stated in *Rohman v. City of Portland*, 909 F. Supp. 767, 774 (D. Or. 1995), the presence of adequate alternative channels for communication will not save a restriction that is not narrowly tailored. The restrictions on Plaintiffs' expressive

activities at the Plaza are not narrowly tailored and fail to satisfy constitutional scrutiny under the First Amendment and this Court must strike the new GSA policies at issue[6] and enjoin their continued enforcement.

A Federal Court ruled in the *Occupy Columbia* civil case, "The court is merely enjoining Defendants from making up rules that do not comport with the First Amendment as a knee-jerk response to Plaintiffs' occupation." *Occupy Columbia v. Haley,* 2011 WL 6318587 (D.S.C. Dec. 16, 2011). The same ruling should apply in this case. The GSA's knee-jerk response to Occupy protests around the country resulted in overly broad, untailored policies that sterilize traditional public fora from unsettling protest activities, and thus patently violate the First Amendment.

It should also be noted that in the many other civil cases pertaining to Occupy protests, the Courts made a point of permitting sleeping and erecting tents as expressive activity in the Occupy Context. *See* footnote 7. In this case, the Occupy Eugene protest context requires a 24-hour presence in light of the subject matter the protestors are demonstrating against

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[6] In the civil context, there have been many cases, both pre and post Occupy, that have established a pattern of cases striking down or modifying public-forum bans that restrict First Amendment activity. *See e.g. Yeakle v. City of Portland*, 322 F. Supp. 2d 1119, 1124 (D. Or. 2004)*, Canfield v. Batiste*, No. C11-5994RJB (W.D. Wash. Filed Dec. 6, 2011) (Occupy Tacoma); *Occupy Fort Myers v. City of Fort Myers,* 2011 WL 5554034 (M.D. Fla, Nov. 15, 2011) (granting, in part, preliminary injunction against enforcement of ordinances requiring permits for parades and protests, setting park hours, and barring camping and loitering; holding occupation to be expressive conduct protected by First Amendment); *Occupy Minneapolis v. County of Hennepin,* 2011 WL 5878359 (D. Minn. Nov. 23, 2011) (granting TRO against enforcement of prohibition on signs or posters, and denying it as against prohibitions on sidewalk chalk, sleeping, and erecting structures on plaza and decision to cut off access to electricity; holding sleeping on plaza and erecting tents or other structures to be protected expressive activity in context of Occupy protests); *Isbell v. City of Oklahoma City*, 2011 WL 6016906 (W.D. Okla. Dec. 2, 2011) (granting TRO against closure of park and enforcement of curfew); *Occupy Columbia v. Haley,* 2011 WL 6318587 (D.S.C. Dec. 16, 2011) (granting PI against policy barring after-hours use of statehouse grounds, including camping and sleeping; holding camping and sleeping to be protected expressive activity in the context of Occupy protests; "The court is merely enjoining Defendants from making up rules that do not comport with the First Amendment as a knee-jerk response to Plaintiffs' occupation."); *Occupy Fresno v. County of Fresno*, 2011 WL 6182325 (E.D. Cal. Dec. 13, 2011) (granting PI against permitting requirements and ban on handbills).

(homelessness and legal places to sleep among others) and further establishes that the GSA policies are not narrowly tailored to protect substantial governmental interests or leave open ample alternative channels of communication.

1. GSA's Ban On Nighttime Assemblies Violates The Constitution

The complete ban on protest between the hours of 10 pm and 7 am violates the right to free assembly. As a Court ruled in the recent *Occupy Chicago* case,

> Because parks constitute public forums for citizens to assemble and express political views, governments may only institute content-neutral time, place or manner restrictions that tightly fit substantial government interests. The City's claim that citizen safety, park maintenance, and park preservation constitute the substantial government interests that justifies closing the park seven hours nightly fails because the City routinely closes the park for fewer than seven hours nightly, making ad hoc exceptions to the Curfew for permitted groups. Thus, the City necessarily concedes that fewer than seven hours suffices to satisfy the substantial government interests. Because it is undisputed that the City closes Grant Park longer than necessary to serve the governments interests, the Curfew is not narrowly tailored, in violation of the First Amendment.…Accordingly the Curfew is unconstitutional both on its face and as applied, and all complaints in this case are dismissed with prejudice.

City of Chicago v. Tieg Alexander, et. al, Case No. 11 MC1-237718, et. seq (Cook Co., IL Circuit Court, Sept. 27, 2012), attached as Ex. 7. The *Occupy Chicago* Court also ruled:

> Laws curtailing the rights of citizens to participate in late night assemblies reach "a substantial amount of protected conduct." *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1062 (7th Cir. 2004) (full cite added). While "no doubt many if not most of the participants would find it more convenient to exercise their First Amendment rights other than in the dead of night," it is not coincidental that "so many of the expressive activities… occur late in the evening." Id. at 1062. Because so many expressive activities take place at night, government actions that curtail nighttime assemblies necessarily impose a burden on expressive First Amendment conduct. ....
>
> …[M]ore often, however, "the late hour is closely linked with the purpose and message of the activity." Id. For example, "Take Back the Night marches and rallies frequently extend to and after midnight in order to protest the crimes that jeopardize the security of women at night." *Id*. ….Political movements often employ all-night vigils because of their commemorative power…" *Id*. at 1063.
>
> Under the First Amendment, if the burdens imposed on expressive activity are greater than necessary to serve the substantial government interest, it is inadequate to claim that the citizens could engage in "protected activity during the ample [daylight] hours," or "during [late night] hours" in other places. *Id*. at 1062.

Id. at pp. 10-11.

As with the *Occupy Chicago* case, the GSA policy forbidding assembly and speech

between the hours of 10pm and 7am is, in effect, an unconstitutional curfew. Plaintiffs have chosen to hold all-night vigils to draw attention the importance of their issues, and to illustrate the plight of homeless people who do not have a lawful place to remain at night. Decl. Broadhurst, p. 4. OE's purposeful choice to express themselves 24 hours a day is part of the message they wish to convey. Thus, Defendants' denial of OE's July permit based exclusively on their request for a 24-hour presence, is unconstitutional. Since Defendants continue to demand Plaintiffs curtail their protest at night, there was no purpose in Plaintiff making any further attempt to apply for and obtain a permit since Defendants have made it clear they will deny any permit that seeks a 24-hour presence. And finally, the order for Plaintiffs and others to leave the Plaza in July, and now on December 14th, based upon this unconstitutional permitting scheme, is also unconstitutional.

The policy challenged by Plaintiffs does not mention speech or conduct on its face. Instead, the policy banning late night and weekend assemblies is content-neutral, but is not narrowly tailored, does not leave open ample alternative channels of expression, and the restrictions on expression do not tightly fit the government's objective of keeping the Plaza "aesthetically pleasing." The government has not stated a rationale for it's "need" to close the Plaza at night, other than implying they are attempting to curtail Occupy protests around the country. *See* Decl. Broadhurst at pp. 2-3. It is unlikely Defendants can assert a rationale that would require the complete closure of the Plaza for nine hours every night, and thus imposes a far greater burden on speech than necessary to serve their legitimate interests. It is reasonably foreseeable that citizens not before the Court will also be gravely affected by the night assembly ban at the Plaza, and thus the ban will be "unconstitutional in a substantial number of its applications." *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50

(2008).

The history of the federal Plaza makes it clear that this location is a quintessential public forum. *See Perry Educ. Ass'n,* 460 U.S. at 45. The location is the only logical, desirable, and realistic alternative for safe, visible late night assemblies for OE. The court must defer to the speaker's choice, and OE as well as many, many other groups and individuals have consistently chosen the Plaza as their forum.

2. GSA's New Policies Are Content Based Restrictions in Violation of the Equal Protection Clause of the Fifth Amendment

Alternatively, the new policies restricting First Amendment rights are content-based restrictions of speech and expressive conduct because the GSA's implementation of the new policies that led to OE's eviction were specifically created to curtail protest activity by Occupy groups based on their expressive activities. Decl. Broadhurst at 2-3. The government does not, and cannot argue that Occupy Eugene violated the law or acted in a way that interfered with official government use, access by the general public, or damaged any property. See e.g. Ex. 3. Thus, any content-neutral justifications offered for the ban and policy changes must be taken as pretextual. *See Ridley v. Mass. Bay Transp. Auth.,* 390 F. 3d 65, 86 (1st Cir. 2004). Rather than serving a compelling government interest, the GSA has singled out the Occupy movement and is gravely curtailing their rights of assembly and speech because of their affiliation and message. To restrict the speech of Defendant and other members of the Occupy movement based on their affiliation with a particular group, or with the content of their message, is not content neutral and violates the Equal Protection Clause. Although the terms of the policy do not specifically address the content of speech, the motive for these policy changes, and the denial of OE's permit, were based on the content and expressive activities of Occupy movements in other locations. Decl. M. Broadhurst, pp. 2-3.

The enforcement of Defendants' permitting scheme allows broad discretion and enables the agency to pick and choose what message it will allow to use the Plaza without permit or interference. Plaintiffs have supplied this Court with a number of declarations from other organizations and individuals who have used the Plaza before and after Occupy's eviction. *See* Ex. 8, Declarations filed in Plaintiff Semple's criminal case. These declarations attest that these individuals have used the Plaza without a permit, and without interference or arrest by Defendants or law enforcement. It is only when Occupy Eugene attempts to demonstrate at the Plaza that Defendants attempt to enforce the permit mandate within hours.

Even though Defendants were not bold enough to specifically address their true reasons for denying OE's permit and altering their longstanding policies that permitted all First Amendment activity within the Plaza 24 hours a day without a permit, there can be no dispute that their actions completely banned Plaintiffs from the Plaza and continues to preclude them and others from being physically present to participate in clearly protected activities such as those of the Occupy Eugene protest[7]. It is necessary to be physically present in a public forum to engage in free speech in that forum. *Yeakle*, 322 F.Supp. 2d at 1127. Thus, the GSA policy in this case does regulate conduct through the physical presence at the Plaza that is essential to protected-speech conduct. *See i.d.*

3. GSA Policies Were Enacted with Discriminatory Intent to Stifle Occupy Movement Protests

Defendants had a discriminatory intent when it made the decision to change its policies to

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[7] The court will not ignore a clear case of facial unconstitutionality or overbreadth merely because the statute manages to avoid any direct reference to speech or expression. As the Supreme Court acknowledged in *State v. Moyle,* 299 Or 691, 699, 705 P2d 740 (1985), "[t]he constitutional prohibition against laws restraining speech or writing cannot be evaded simply by phrasing statutes so as to prohibit 'causing another person to see' or 'to hear' whatever [speech or expression] the lawmakers wish to suppress."

ban all night assemblies, and require all demonstrators to receive a GSA permit with any/all unconstitutional conditions the GSA wants, prior to exercising constitutional rights. Discriminatory intent can be established by demonstrating a stark pattern of discriminatory effect on one particular class of persons. *Yick Wo v. Hopkins,* 118 U.S. 356, 374 (1886).

Officer Keedy and the GSA managers admitted that the change in GSA policies were as a result of Occupy protests in places other than Eugene. Decl. Broadhurst pp. 2-3. Clearly, by enacting an overnight ban, GSA is attempting to curtail the occupations that have occurred around the country. By enacting, and enforcing, a policy that mandates every single person or group must first obtain government permission to protest, under the conditions and parameters the government dictates, major obstacles are being placed in front of spontaneous Occupy protests, providing law enforcement with an easy justification to shut down assemblies and arrest demonstrators who attempt to defend their lawful right to protest.

The GSA policies at issue are facially unconstitutional because they cannot survive even rational relation scrutiny. Even if this Court finds that the *Yick Wo* standard is inapplicable to the present case, the new GSA policies regarding mandatory permits and ban on protests after 10pm should still be found to facially violate of the Equal Protection Clause because it cannot meet the alternative rational relation test. Under traditional equal protection analysis, a legislative or policy classification shall be sustained if it is rationally related to a legitimate governmental interest. *Department of Agriculture v. Moreno*, 413 US 528, 533, 93 S Ct 2821, 37 L Ed 2d 782 (1973). The Equal Protection Clause allows the States wide latitude when economic or social laws are at issue. *Cleburne v. Cleburne Living Center*, 473 US 432, 440, 105 S Ct 3249, 87 L Ed 2d 313 (1985). Classifications within criminal laws (or threat of criminal prosecution), however, are subject to greater scrutiny. *Loving v. Virginia*, 388 US 1, 11,

87 S Ct 1817, 18 L Ed 2d 1010 (1967). Additionally, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare…desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Moreno,* 413 US at 534. The GSA's own admission that these new policies were intended to address and hinder Occupy protests around the country establishes their desire to harm an arguably unpopular protest movement and does not amount to a legitimate governmental interest.

B. GSA POLICIES AND EVICTION VIOLATE OREGON'S CONSTITUTION

Pursuant to Article 1, sections 8 and 26 of the Oregon Constitution[8], the freedoms that those sections guarantee provide equal, if not greater, free speech and assembly rights. *State v. Hirsch*, 338 Or 622, 628-629, 114 P3d 1104 (2005); *State v. Ausmus*, 336 Or 493, 500, 85 P3d 864 (2003). The right of assembly guaranteed by section 26 protects an important aspect of the freedom of expression protected by Article I, section 8--it assures that those who speak may have an audience. *State v. Ausmus*, 336 Or at 506-507. A law (or policy) is unconstitutional if it proscribes a constitutionally protected activity. *State v. Robertson,* 293 Or 402, 410, 649 P2d 569 (1982). All speech is constitutionally protected, unless it is a historically excepted form. *Id.* at 412. Thus, Defendants' policies of banning expression in a traditional public forum from 10 pm to 7 am, and requiring permits in advance of protest with unconstitutional conditions mandated, violates the Oregon Constitution as well.

C. PLAINTIFFS DID NOT NEED A PERMIT TO PROTEST AT A PUBLIC FORUM

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[8] In *Ciancanelli*, Article I, section 8 jurisprudence was reaffirmed by the Supreme Court by examining the text of that constitutional provision: "Turning our focus to the first clause of Article I, section 8, one is struck by its sweeping terms, both with respect to the legislative power ('[n]o' law shall be passed restraining* * * or restricting) and the kinds of expression protected ('* * * the free expression of opinion, or* * * the right to speak, write, or print freely on any subject whatever'). In fact, the words are so clear and sweeping that we think that we would not be keeping faith with the framers who wrote them if we were to qualify or water them down[.]" *State v. Ciancanelli*, 339 Or 282, 311, 121 P3d 613 (2005) (*emphases omitted; omissions in Ciancanelli*).

No permit is required to exercise First Amendment rights unless the exercise infringes on the law, or other people's rights. The courts have accepted that though permits are disfavored as a prior restraint, that they violate First Amendment rights, they are tolerated due to public safety concerns as a compelling state interest, so long as they are consistent with reasonable time, place, and manner restrictions.

Often, if speech is spontaneous, permitting ordinances must create exceptions allowing for unpermitted activity to occur. The Supreme Court has recognized the requirements for a spontaneous speech exception and condemned ordinances that do not allow for spontaneous expressive activities as "timing is of the essence in politics . . . and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969)(Harlan, J., concurring). The Court explicitly recognized this in *Watchtower*, citing a restriction against spontaneous speech as a cardinal reason the ordinance was unconstitutional. *See Watchtower Bible & Tract Soc'y. v. Stratton,* 536 U.S. 150, 167-68 (2002). The GSA policy makes no such exception and in fact serves as a total ban on spontaneous speech, because any spontaneous event taking place at the Plaza would be barred unless a permit was obtained from the GSA. If the government, with the unfettered discretion given by the regulations, decides there is not adequate time to prepare, or simply dislikes the message to be conveyed, a permit can be denied.

Judge Posner stated that while advance notice requirements are "reasonable in general," the failure to include an "exception for spontaneous demonstrations unreasonably limits free speech." *Church of the American Knights of the Ku Klux Klan v. City of Gary, Indiana*, 334 F.3d 676, 682 (7th Cir. 2003). In that case, even the City's "unwritten policy of waiving the permit requirement for a 'spontaneous' demonstration, but only if the

demonstration is 'not planned,' was not enough to save the ordinance because the "scope of the dispensation is opaque." *Id*. at 682. The Defendants' permitting scheme does not even allow for the amount of spontaneous speech which was found insufficient in *Gary*. The court in *Watchtower* looked at such requirements as "offensive-not only to the values protected by the First Amendment, but to the very notion of a free society-that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. . . [A] law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition." *Watchtower*, 536 U.S. at 165-66.

In addition, a permit is usually not required for a march on the sidewalk that obeys all traffic laws, or a modest sized assembly at a public forum like the Plaza, but a permit may be required for a march in the street requiring traffic diversions by police or city services, or if the assembly is very large and crowd policing may be required. In addition, using loud amplified sound (such as stereo speakers), may require a permit since it infringes on other peoples quiet enjoyment, while using normal amplified sound (megaphone) does not.

Defendants' permitting scheme, which requires that citizens obtain permission from the GSA in order to use public forums such as the Plaza, is an unconstitutional prior restraint because it prevents spontaneous speech by the extreme delay it can cause before a permit is issued, or the delay caused by an appeal of a permit denial.

In addition, the scheme is unconstitutional because there are no real standards governing the GSA's decision to permit or deny certain types of speech. Particularly relevant with Occupy protests, where spontaneity forms part of the message, "dissemination delayed is dissemination denied." *Vodak* at 749.

Long established law states that any attempt to subject "the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority is unconstitutional." *Shuttlesworth*, 394 U.S. at 150-151. "A government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth*, 505 U.S. at 130. "The doctrine requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice. This Court will not write nonbinding limits into a silent state statute." *Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750, 770 (1988) (internal citations omitted). "Without these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether licensor is permitting favorable, and suppressing unfavorable, expression." Id. at 758.

The success of a constitutional challenge on the basis 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." *Forsyth*, 505 U.S. at 133. If the grant or denial of a permit rests on the "appraisal of facts, the exercise of judgment, and the formation of an opinion," it is content-based and the "danger of censorship and abridgment of our precious First Amendment freedoms is too great to be permitted." *Forsyth*, 505 U.S. at 131 (internal citations omitted). "Even a facially content-neutral time, place, and manner regulation may not vest public officials with unbridled discretion over permitting decisions." *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1256 (11th Cir. 2004).

A prior restraint cannot vest unfettered discretion in a government official to decide whether to permit or deny the opportunity to engage in protected speech. *See United States v. Abney,* 534 F.2d 984 (D.C. Cir. 1977) (reversing a conviction under a federal regulation banning sleeping in a public park where the superintendent of the park service authority was vested with the ability to grant permission to sleep in public parks beyond time limit specified because the regulation contained no narrow, objective, and definite standards to guard against danger of arbitrary action or de facto censorship). *See also Cox v. State of La.,* 379 U.S. 536 (1965). A facial challenge is appropriate when there is a lack of adequate procedural safeguards necessary to ensure against undue suppression of protected speech. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 n. 15 (1984); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir. 1998), rev'd on other grounds.

Defendants denied OE's permit based on 41 CFR§ 102-74.500(c), which states that federal agencies may disapprove a permit application or cancel an issued permit if the proposed use *interferes* with access to the public area, *disrupts* official Government business, interferes with approved uses of the property by tenants or by the public, or damages any property. In addition, GSA stated one of its interests was to ensure an "aesthetically pleasing" area. Ex. 3.

In this case, the permitting scheme grants unfettered discretion to the government in determining what activity might interfere or disrupt the government or its property, and what might be deemed "aesthetically pleasing." There are no explicit standards listed that would enable any person to determine in what circumstances a permit must be approved or denied and thus the scheme is facially unconstitutional.

D. THE DENIAL OF A PERMIT TO OCCUPY EUGENE SEVERELY RESTRICTS THE EXERCISE OF SPEECH AND ASSEMBLY ON THE FEDERAL PLAZA.

The denial of Plaintiffs' permit application was based on 41 CFR § 102-74.500(c), which

states that federal agencies may disapprove a permit application or cancel an issued permit if the proposed use interferes with access to the public area, disrupts official Government business, interferes with approved uses of the property by tenants or by the public, or damages any property. There is no evidence that OE's use of the Plaza did any of those things, yet the permit was denied in its entirety, and OE members were forced to evacuate or face arrest, now for a second time. When yellow police tape was placed around the Plaza, the public forum was completely foreclosed to the public, thus the restriction was of the most severe variety.

Because the standards for disapproving permits are vague and undefined, the GSA is left with unfettered discretion to determine if an individual, group, or political movement, is engaging in conduct in violation of the regulation. Or in the case at bar, the GSA does not even attempt to state that OE violated existing regulations, they simply created new policies to curtail free speech rights. Although the GSA offers the ambiguous explanation that regulation of the Plaza hours assists in achieving the goals itemized in 41 CFR § 102-74.500(c), OE engages in the same activities regardless of the time of day and there were absolutely no complaints or incidents during the nighttime demonstrations. The GSA's attempted justification for their denial certainly does not meet the constitutional standards set forth above.

1. The GSA Denied Occupy Eugene Access to the Plaza Under a Federal Statute that was Inapplicable to the Outdoor Plaza.

The subsection relied upon by the GSA to deny OE's permit is 41 C.F.R. § 102-74.500(c), which is pursuant to Subpart D – "Occasional Use of Public Buildings." The Plaza is public property, but not a public building. The distinction is made clear in such regulations as 41 C.F.R. § 102-74.426, which allows breastfeeding "on public properties and inside public buildings." If there were no distinction between public property and public buildings, the regulation would not include both terms. The GSA denial was based on restricted conduct

within public buildings, where the government may have more of an interest in limiting expressive activity due to the business functions that might occur. However, OE's activities clearly fall outside of that definition, and are therefore not subject to Subpart D. There has been no proper basis cited for the denial of OE's permit application.

In response to OE'S permit appeal, the GSA countered this argument by saying that the Plaza falls within the definition of "Public Area" under Title 41 C.F.R. Part 102-71. While it is correct that 41 C.F.R. § 102-71.20 defines "public area" as "any area of a building under the control and custody of GSA that is ordinarily open to members of the public, including lobbies, courtyards, auditoriums, meeting rooms, and other such areas not assigned to a lessee or occupant agency" and defines "real property" as, "any interest in land, together with the improvements, structures, and fixtures located thereon," neither of these definitions address the fact that Subpart D governs the occasional use of "public buildings," but not "public areas" or "public property." The relevant subpart applies solely to the interior portions of buildings. And, as argued supra, the fact that this Plaza is a traditional public forum weighs heavily against the government's ability to arbitrarily deny citizens the use of such forums for lawful expressive activities.

V. PLAINTIFFS WILL SUFFER IMMEDIATE AND IRREPARABLE INJURY IN THE ABSENCE OF A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

Irreparable injury to plaintiffs is imminent, as they are currently being threated with arrest if they continue to exercise their First Amendment rights at this public forum. Plaintiff Semple was already subjected to an unlawful arrest as a result of Defendants' complaint, and then had the U.S. dismiss the case months later. During the time the case was proceeding, Plaintiffs were not allowed to set foot on the Plaza at all. Plaintiff Semple is currently present at the Plaza and is attempting to exercise her rights, and intends to continue to do so at this location. *See* Ex. 8-

Semple Declaration. In the wake of the federal dismissal of her case before Judge Coffin could issue a ruling, Defendants are again attempting to shut down assembly at this forum in violation of well-established constitutional norms. Defendants cannot continue to have people arrested only to have the charges dismissed after they have cleared the Plaza. The parties, as well as Federal Protective Services, require immediate Court guidance regarding the legality of Plaintiffs presence at the federal Plaza.

VI. CONCLUSION

The Defendants' policies and subsequent eviction, and current threat of eviction, of Plaintiffs violate the right to free speech and assembly under both the First and Fifth Amendments of the U.S. Constitution, and Article I, sections 8 and 26 of the Oregon Constitution. The GSA policy banning late-night assemblies at the Plaza (as well as weekends according to the revised permit application), upon a traditional public forum, clearly violates the First Amendment and will cause immediate and irreparable harm to the constitutional rights of Plaintiffs and others. For the foregoing reasons, Plaintiffs respectfully request an immediate temporary restraining order and preliminary injunction enjoining defendants from proceeding with their second eviction and/or arrest of citizens gathered at the Plaza, until the Court can address the merits of plaintiffs' claims in this lawsuit.

CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 9986 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of authorities, signature block, and any certificates of counsel.

DATED: December 18, 2012.

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