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IN THE CIRCUIT COURT OF OREGON
FOR THE COUNTY OF LANE

CITY OF EUGENE, Plaintiff v. ERIC TODD JACKSON, Defendant	Case No.: 19CR79472 DEFENDANT'S MOTION TO DISMISS; FACIAL AND APPLIED CHALLENGE TO LANE MANUAL 60.035

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I. INTRODUCTION

COMES NOW the Defendant, Eric T. Jackson, by and through his attorney, Lauren C. Regan of the Civil Liberties Defense Center, and moves this Court for an order granting this Motion to Dismiss as to the charge of violating Eugene Code (EC) 4.807, "Criminal Trespass in the Second Degree," on the grounds that the underlying law, Lane Manual 60.035, is unconstitutional under the Oregon and U.S. Constitutions. This is an applied and facial challenge to Lane County Manual Rule 60.035 ("Curfew Rule").[1] Mr. Jackson's arrest pursuant to EC 4.807 is a result of his alleged presence during the time prohibited by the Curfew Rule. At the time of his arrest, Mr. Jackson was engaged in protected speech activity at the Wayne Morse Free Speech Plaza ("Free Speech Plaza"). Mr. Jackson challenges the Curfew Rule as overbroad and challenges the constitutionality of the duration and enforcement of the curfew at the Free Speech Plaza.

Mr. Jackson moves this Court to grant this Motion as to the charge of criminal trespass in the second degree (Eugene Code Section 4.807), because the arresting officer lacked probable cause to arrest Mr. Jackson, as Mr. Jackson was engaged in activity protected under the Oregon and U.S. constitutions. Mr. Jackson further requests that this Court find that Lane County Manual Rule 60.035 is facially unconstitutional and lacks viable means for constitutional interpretation. As such, the Curfew Rule must be struck down as no construction is available to cure its constitutional defects.

History of the Wayne Morse Free Speech Plaza

The history and purpose of the Free Speech Plaza is vital to understanding the constitutionality of the Curfew Rule. The Free Speech Plaza was conceived by the Wayne Morse

[1] Likewise, the accompanying Lane Code Chapter 19.100-19.125.

Historical Park Corporation and approved by the Lane County Board of Supervisors in 1984. Exhibit 101, Regan Decl. ¶ 2 (2015 statement of Wayne Morse Historical Park Corporation). The purpose of the Plaza is to "better enable Lane County Citizens to exercise the precious rights of free speech and assembly." *Id.* In 2005, to mark the 100th birthday of Senator Morse, the Plaza was reinvigorated with additional permanent memorials to free speech. The memorials include a statue of Senator Morse clutching a copy of the U.S. Constitution and over 50 sponsored wall plaques. Exhibit 102, Regan Decl. ¶ 3 (photos of Wayne Morse Free Speech Plaza). Many of the plaques contain heartfelt tributes to free speech. One plaque, quoting Thomas Jefferson, reads: "The will of the people is the only legitimate foundation of any government, and to protect its free expression should be our first object." Exhibit 102 at 22.[2] In 2015, the Wayne Morse Historical Park Corporation issued a statement regarding the history of the Plaza, noting:

> "At no time in our history has the need been greater to discuss, feature and work for integrity in politics and government. National elections have demonstrated the importance of participation in the political process.
>
> "The Morse Free Speech Plaza serves these and other purposes. It is a designated outdoor space for local and visiting speakers to air ideas. It provides a public place to reflect on the thoughts of the notable men and women whose inscribed words are part of the Plaza design. It stands as an enduring memorial to Senator Morse, who throughout his life embodied the spirt and independence of Oregon. Perhaps most importantly it is a place where young people can put a face on the concept of political integrity and realize the importance placed on citizen participation in the process of governance.
>
> "Visitors are invited to stroll about the Plaza, identify with the history of the 20th Century and rejoice that we, the people, can gather to speak freely and openly about issues of the day." Exhibit 101.

[2] A multitude of stone inscriptions at the Free Speech Plaza, excerpted in Exhibit 102, consist of impassioned opinions about the importance of upholding free speech rights. The Curfew Rule stands in stark contrast to the excerpted opinions and unwavering commitment and tradition of upholding free speech rights embodied by Senator Morse and others memorialized at the Free Speech Plaza.

As the last several years have demonstrated, the WMHPC's statement is relevant now more than ever, as are the needs to protect free speech, to hold government accountable, and voice support or opposition to government activity. One question before this Court is whether sidewalks alone can serve these purposes.

After several protests against the treatment of houseless people by local government, the City of Eugene and Lane County made several attempts to shut down free speech and speech activity at the Free Speech Plaza.

> "In December 2012 a homelessness awareness group (SLEEPS) assembled in Wayne Morse Free Speech Plaza and conducted a protest against the city's enforcement of camping laws. The group chose to continuously occupy the plaza, believing that was the most effective means of conveying their message. Tents were erected as speech symbols, though some members slept in them, making the tents both symbols and shelter." Exhibit 103, Regan Decl. ¶ 4 (Eugene Municipal Court Order, *City of Eugene v. Walker T. Ryan et. al.*, Case No. 13-00460).

On December 11, 2012, Lane County issued a five-day closure order in response to the protest. Exhibit 104, Regan Decl. ¶ 5 (Eugene Municipal Court Order, *City of Eugene v. Valkyrie*, Docket No. 1223336). The County cited "health and safety and uninterrupted County operations" as the basis of the closure order. *Id*. Some individuals, correctly believing the closure order was unconstitutional, remained in the Plaza in violation of the order.

Alley Valkyrie, who was one of several people who remained in the Plaza in violation of the closure order and was subsequently arrested for Criminal Trespass in the Second Degree, challenged the closure order pursuant to the Oregon and U.S. Constitutions. On August 7, 2013, this Court dismissed the charge against Valkyrie, stating "[e]ven under the least strict analysis, the five-day closure was not narrowly tailored to meet a compelling governmental interest and was thus unconstitutional." *Id*.

On December 17, 2012, after the five-day closure order at issue in the *Valkyrie* case concluded, “the County Administrator amended a provision of the Administrative Procedures Manual of Lane County to create a curfew closing Wayne Morse Free Speech Plaza from 11:00 pm until 6:00 am daily. The manual previously stated that speech activities should ‘generally take place’ during the hours of 6:00 am through 11:00 pm.” Exhibit 103, p. 2. The Eugene Municipal Court found that “[t]he new language is facially speech-neutral and is said to ensure health, safety and uninterrupted county operations.” *Id*.

In *City of Eugene v. Ryan, et. al.*, the Eugene Municipal Court noted that no testimony was received as to whether the same rationale that motivated the temporary closure animated the revised Administrative Procedures Manual. *Id*. But the circumstantial evidence regarding the City and County’s many attempts to limit free speech and assembly overwhelmingly suggests the amendments to the Manual were animated by hostility toward free speech and assembly at the Plaza.

In *Ryan*, the Municipal Court noted that testimony from County personnel indicated that “offensive litter and biological hazards . . . are present from time to time in and around the plaza but do not seem to be attributable to nighttime activities.” *Id.* “In fact, testimony was that most of the problems that have occurred at the plaza happened during the day.” *Id.*

In *Ryan*, similar to the holding in *Valkyrie*, the Municipal Court found that “when balancing the stated governmental interest with the impact it has on the right to assemble, the curfew does not withstand constitutional scrutiny when applying even the least stringent, content and speech neutral analysis to this group of defendants.” Exhibit 103, p. 2.

In *Ryan*, the Municipal Court noted that “enforcement of a curfew which closes the very area that the County designated ‘Free Speech Plaza’ (much of which is barely distinguishable

from a sidewalk) for a third of every day significantly limited Defendants' rights to speech and assembly, regardless of the curfew's intent." On August 15, 2013, the Municipal Court concluded that the curfew "is unconstitutional as applied to the Defendants" and ordered dismissal of Criminal Trespass II charges against all 15 defendants in *Ryan*. *Id.* at 3.

On September 4, 2013, after another continuous protest at the Plaza against the City and County's treatment of the unhoused, the County Commissioners voted 4-1 to temporarily shut down the Plaza for cleaning. In *City of Eugene v. McFadden*, *Gannon*[3], the Municipal Court ruled that people who entered the Free Speech Plaza when it was subject to a short closure for cleaning were not engaged in protected activity. The issue in that case was whether a short closure may be reasonable in order to clean the Free Speech Plaza. That is not the issue in the instant case.

In *City of Eugene v. Larry James Brugh* (Docket No. 1317478), a companion case to *McFadden* and *Gannon*, the Municipal Court found that even though he was protesting, Mr. Brugh's entering and remaining in the Free Speech Plaza during the temporary closure was not protected activity because the closure 1) was not directed at limiting speech; 2) was justified by a legitimate government interest; 3) was narrowly tailored; and 4) left open alternative forums. As noted below, the instant case turns on a very different form of closure, is directed at limiting speech, is not justified by a legitimate government interest, is not narrowly tailored, and does not leave open *ample* alternative fora.

Mr. Brugh and CLDC filed a *de novo* appeal to the Lane County Circuit Court after the Municipal Court denied his motion to dismiss based on the apparent unconstitutionality of the closure. At the Circuit Court, the City voluntarily dismissed its case against Mr. Brugh,

[3] These defendants were not represented by the CLDC.

foreclosing further review of this important constitutional matter. Exhibit 110, Regan Decl. ¶ 11 (Plaintiff's Motion to Dismiss, *City of Eugene v. Brugh*, Case No: 15CR15242, July 24, 2015). The City cited "prioritization of the City Prosecutor's workload and the burden placed upon the City" as well as "the interest of judicial economy to the court, the parties, and their respective attorneys" as reasons for the dismissal. *Id*.

On September 17, 2013, in response to the ongoing protests, the Lane County Commissioners, again in a 4-1 vote, amended the County Administrative Procedure Manual to its current form, in another effort to close the Free Speech Plaza to all assembly and expressive activity between 11:00 p.m. and 6:00 a.m. Exhibit 109, Regan Decl. ¶ 10 (Lane County Board of Commissioners Order 13-09-17-07, September 17, 2013). The amendments added several sections to Lane Manual Chapter 60. *Infra* at 20, 21; *see also* Exhibit 109. Many of the sections include language that, at first glance, appear constitutional. However, as noted below, further analysis demonstrates that this language is pretextual and, given the history of the City's and County's attempts to curtail free speech at the Plaza, a crude attempt to provide cover for a clearly unconstitutional Curfew Rule. Since Chapter 60 was amended in 2013, defendant is unaware of any person that has been arrested and attempted to challenge the constitutionality of the Curfew Rule at the Free Speech Plaza under either the Oregon or U.S. Constitutions.

On November 27, 2018, again in response to protest activity regarding the City's and County's response to unhoused people, the County imposed a curfew on all areas adjacent to the Free Speech Plaza, specifically the areas known as the "park blocks" and the "butterfly lot." Exhibit 108, Regan Decl. ¶ 9 (Lane County Ordinance 18-01). The curfew mirrors the one imposed on the Free Speech Plaza. When adopting the curfews, the County invoked its authority to issue "emergency ordinances," thereby preventing any democratic review by the public.

Exhibit 108, p. 1. The curfews forbid any activity between the hours of 11:00 p.m. and 6:00 a.m. anywhere (besides sidewalks) near the proverbial “seats of government” of the City and County.

When the November 27, 2018, curfew was discussed, some commissioners expressed concern over the potential for the curfew to violate speech and assembly rights. Responding to that concern, Counsel for the County, Stephen Dingle, reportedly stated that “[t]here hasn’t been a single legal challenge to the Free Speech Plaza’s curfew [since 2014].” Exhibit 107, Regan Decl. ¶ 8 (Eugene Weekly Article “Butterfly Lot Curfew” November 29, 2018). Clearly, the curfew has had its intended effect: chilling free speech and assembly at the Free Speech Plaza and the adjacent areas and parks between 11:00 p.m. and 6:00 a.m. While sidewalks may be available, they are not an “ample” alternative and protestors, especially in any relatively large formation, are likely to run afoul of the regulations regarding egress upon the sidewalks and right-of-way spaces adjacent to the sidewalks. See, generally, Exhibit 112. There is also some cause to be concerned about the safety of protesters who are forced to use sidewalks as their sole area for speech activity between 11:00 p.m. and 6:00 a.m. Moreover, it is absurd to accord sidewalks greater protections as a free speech forum than the aptly named “free speech plaza.”

II. FACTS

On February 12, 2019, Mr. Jackson was at the Free Speech Plaza, protesting the County’s and City’s treatment of unhoused people in the Lane County area. Jackson Decl. ¶ 4. He was also protesting the well-known and highly publicized human rights abuses perpetrated by Immigration and Customs Enforcement. *Id.* Lastly, Mr. Jackson was protesting the apparent loss of First Amendment rights and the curfew itself at the Free Speech Plaza. Mr. Jackson intended that his protest be a continuous, round-the-clock protest to demonstrate the somber seriousness of

these political issues. *Id.* The County and City recognized that Mr. Jackson was engaged in a protest. Exhibit 105, Regan Decl. ¶ 6 (Emails from County personnel to City personnel).

Shortly after 11:00 p.m. on February 12, 2019, at the Free Speech Plaza Mr. Jackson was warned by Eugene Police Department Lieutenant Harrison that he would be arrested if he remained in the Plaza in violation of the Curfew Rule. Mr. Jackson informed the Lieutenant that he was engaged in a protest, and conveyed his belief that he had a right to protest at the Free Speech Plaza at that time. In order to avoid an unexpected arrest and imprisonment, Mr. Jackson voluntarily left the Plaza that night, while expressing his desire to remain overnight and intent to arrive again, the following morning, to continue his protest.

Mr. Jackson returned to the Free Speech Plaza the next day to protest. Throughout his protest on February 12 and 13, 2019, and until his arrest on February 14, 2019, Mr. Jackson posted clear signage about his causes and engaged with passersby about the issues he was protesting. Jackson Decl. ¶ 6. Between 11:00 p.m. on February 13 and the time of his detention by law enforcement on February 14, Mr. Jackson and Lane County maintenance worker Michael Johns were the only people in the Free Speech Plaza. Jackson Decl. ¶ 7. Shortly after midnight on February 14, Eugene Police Officers placed Mr. Jackson under arrest for being in the Free Speech Plaza during the time prohibited by the Curfew Rule. Given the signage and City and County personnel emails (Exhibit 105), officers were clearly aware and informed, prior to arresting Mr. Jackson, that he was engaged in protected activity.

III. STATEMENT OF LAW

Mr. Jackson was arrested pursuant to EC 4.807, which provides: “A person commits the crime of criminal trespass in the second degree if the person enters or remains unlawfully . . . upon premises.”

EC 4.805 states that to "[e]nter or remain unlawfully" means:

"(a) To enter or remain in or upon premises when the premises, at the time of such entry or remaining, are not open to the public and the entrant is not otherwise licensed or privileged to do so; or

"(b) To fail to leave premises that are open to the public after being lawfully directed to do so by the person in charge; or

"(c) To enter premises that are open to the public after being lawfully directed not to enter the premises."

Lane County Administrative Procedures Manual Section 60.035, "Designated Free Speech Area," states, in part:

> "In order to ensure health, safety and uninterrupted access to the court house, use of this designated area is allowed only between 6:00 a.m. and 11:00 p.m., unless otherwise authorized by the County Administrator."

IV. ARGUMENT

The prohibition on free speech and assembly imposed by the Curfew Rule, as applied to Mr. Jackson, violates Mr. Jackson's rights under Article I, sections 8 and 26, of the Oregon Constitution because: 1) enforcement of the Rule restricted far more speech than necessary to advance the government's interests; 2) the government did not leave open ample alternative avenues for Mr. Jackson to exercise his rights; and 3) the Rule was enforced against Mr. Jackson because of his expression.

The Curfew Rule at issue is also overbroad and, therefore, unconstitutional under Article I, sections 8 and 26, of the Oregon Constitution and the First Amendment to the U.S. Constitution. The Curfew Rule is overbroad under the First Amendment, because it prohibits a substantial amount of freedom protected by the First Amendment as compared to its plainly legitimate sweep. It is overbroad under the Oregon Constitution for the reasons noted below.

Further, the Curfew Rule is unconstitutional under the First Amendment as applied to Mr. Jackson, because it is an unreasonable time, place, and manner restriction and is not narrowly tailored to serve a significant government interest.

Pursuant to the *Robertson* analysis, Oregon constitutional challenges must be addressed first, and then the U.S. constitutional violations are analyzed. *See State v. Charboneau,* 323 Or 38, 53, 913 P2d 308 (1996). A violation of either requires striking the Curfew Rule because no constitutional interpretation of the Rule is available.

A. The Curfew Rule is Unconstitutional Under Article 1, Sections 8 and 26, of the Oregon Constitution

Article 1, section 26, of the Oregon Constitution provides:

> "No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good; nor from instructing their Representatives; nor from applying to the Legislature for redress of greviances [sic]."

Article 1, section 8 of the Oregon Constitution provides:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."[4]

"The Oregon Supreme Court set forth a framework to address Article I, section 8, free expression issues in *State v. Robertson* . . . ." *State v. Pucket*, 291 Or App 771, 774, *rev den,* 363 Or 727 (2018) (citing *State v. Robertson*, 293 Or 402 (1982)). The same framework articulated under *Robertson* applies to challenges made pursuant to Article 1, section 26. *State v. Babson*,

[4] 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 original*).

355 Or 383, 428 (2014). The *Robertson* framework generally distinguishes between "laws that focus on the *content* of speech or writing and laws that focus on the pursuit or accomplishment of *forbidden results*." *State v. Plowman*, 314 Or 157, 164 (1992) (emphasis in original). In *Robertson*, the court created three categories to analyze laws challenged under Article I, sections 8 and 26. Challenges made under the first and second *Robertson* category are restricted to facial challenges. Challenges under the third category must be as-applied. *Babson,* 355 Or at 304.

The Curfew Rule is not easily categorized into one *Robertson* category alone. The *Robertson* categories have also created some confusion in determining when or if a law is unconstitutional, facially or as-applied. For these reasons, Defendant argues the unconstitutionality of the Curfew Rule as to each *Robertson* category in the alternative.[5] Furthermore, Defendant does not concede that analysis under the *Robertson* categories is necessarily appropriate to analyze the Curfew Rule in this case and, instead, urges the Court to proceed with analysis under the First Amendment.[6]

1. Under the first *Robertson* category, the Curfew Rule is unconstitutional on its face because it is directed at speech activity and no historical exception exists to justify the restraint on speech activity at the Free Speech Plaza

"Under the first category, the court begins by determining whether a law is 'written in terms directed to the substance of any "opinion" or any "subject" of communication.'" *Babson,* 355 Or at 391 (citing *Robertson,* 293 Or at 412). "If it is, then the law is unconstitutional" unless it falls within a well-established historical exception. *Id*. The Curfew Rule should be analyzed

[5] For the purpose of preserving this argument for appeal, defendant argues that *Babson* was wrongly decided. Again, in the alternative, defendant argues that the Curfew Rule is unconstitutional under each of the *Robertson* categories.
[6] In *Babson*, the Oregon Supreme Court noted that the parties did not dispute that the *Robertson* analysis applied to government limitations on speech at the Oregon State Capitol steps. The Court agreed that it applied but did not "express any opinion as to whether a different analysis would apply to limitations on expressive activities that occur on other types of government property." *Babson,* 355 Or at 394, n 4.

pursuant to category 1 because it is written in terms directed at expression and there is no historical exception to justify the restraint on speech activity at the Free Speech Plaza.

The Curfew Rule in Lane Manual 60.035 regulates presence at the "Designated Free Speech Area." While not all activity that occurs at the Free Speech Plaza is speech activity, the underlying purpose of the Plaza, as the name suggests, is to serve as a forum for the robust exercise of free speech rights. Ex. 101 and 102. Subsection (1) of the Curfew Rule, noting the purpose of the Curfew Rule, directly references past protests as the genesis for the institution of the Curfew Rule. Lane Manual 60.035(1) (see also, *infra* at 27). In this sense, the Curfew Rule refers to the subject of an opinion — namely the opinion that the policies of the City and County toward the houseless are inhumane. This opinion was at the heart of the instances referenced in the Curfew rule.

In *Babson*, the Oregon Supreme Court held that a curfew prohibiting all activity at the steps of the Oregon State Capitol between 11:00 p.m. and 7:00 a.m. did not violate Article 1, sections 8 and 26, of the Oregon Constitution because the curfew was not, "by its terms, directed at assembling, instructing representatives, or applying for a redress of grievances." *Babson,* 355 Or at 430. The reasoning of the court in *Babson* largely ignored the pretextual nature of the legislative rule, which was discussed and amended by the Legislative Administration Committee (LAC) only after protestors engaged in an overnight vigil at the Capitol steps. A similar, albeit less discrete, form of pretextual wordsmithing occurred in the creation of the Curfew Rule.

The curfew rule at issue in *Babson*, unlike the Curfew Rule in the instant case, does not include a lengthy statement regarding the purpose of the curfew. The distinction between the curfew in *Babson* and the Curfew Rule at issue in this case turns on three facts.

First, the Curfew Rule in this case includes references to the history of protests at the Free Speech Plaza as the genesis and justification for the Curfew Rule (again, these references are carefully worded to conceal reference to protest or speech activity). Lane Manual 60.035(1). As noted, previous attempts to shut down protests by curfew or closure have been found unconstitutional by the Municipal Court. By mentioning previous protests, the Curfew Rule is clearly directed at expressive activity. Second, the Capitol steps are fundamentally different than the Free Speech Plaza. Unlike the Free Speech Plaza, the Capitol steps were not created for the purpose of enabling people "to exercise the precious rights of free speech and assembly" or intended as a monument to free speech. Ex. 101 and 102. Third, the Curfew Rule in this case, by regulating the *Free Speech* Plaza, is necessarily directed at speech or expressive activity. For these reasons, the Curfew Rule is unconstitutional under Article 1, sections 8 and 26, of the Oregon Constitution.

2. Under the second *Robertson* category, the Curfew Rule is unconstitutional because it is overbroad

Laws that fall under the second category are examined for overbreadth "to determine if 'the terms of [the] law exceed constitutional boundaries, purporting to reach conduct protected by guarantees such as * * * [A]rticle 1, section 8.'" *Babson,* 355 Or at 397-98 (citing *Robertson,* 293 Or at 410). If the court finds the law is overbroad, it "must determine whether [the law] can be interpreted to avoid such overbreadth." *Babson,* 355 Or at 398. The Curfew Rule in this case is overbroad and should be invalidated because it cannot be interpreted to avoid such overbreadth.

Under the second *Robertson* category, a law is subject to a facial challenge for overbreadth if the law "expressly refer[s] to expression as a means of causing some harm" and "obviously" prohibits expression. *Babson,* 355 Or at 403-404. If expression is a proscribed

means of causing the forbidden effects of a law, the Court "must determine whether the law 'appears to reach *privileged* communication.'" *Id.* at 400 (citing *Robertson,* 293 Or at 417-18). Courts analyzing overbreadth challenges under the second *Robertson* category have generally limited their inquiry to whether expression is an element of the challenged law. However, the Oregon Supreme Court has "recognized that the focus in a second category overbreadth challenge on expression being an element of the law is not unyielding if there is a 'clear case' of overbreadth." *Babson,* 355 Or at 400-01 (citing *State v. Illig-Renn*, 341 Or 228 (2006)). The *Babson* court went on to interpret previous holdings that indicated that a law which "mirrors a prohibition of words" but does not expressly include expression as an element may be subject to analysis under the second category. *Babson,* 355 Or at 402-03. The *Babson* court went on to explain the rationale for subjecting these two sub-categories of laws to an overbreadth challenge under *Robertson* category two, starting with *Illig-Renn*.

In *Illig-Renn*, the defendant was charged with violating a statute that made it a crime to "[r]efuse . . . to obey a lawful order by [a] peace officer" if the defendant knew that the person giving the order was a peace officer. Defendant challenged the statute as overbroad under the first and second *Robertson* categories. The Court held that a law is subject to an overbreadth challenge under the first and second categories only if it "expressly or obviously proscribes expression." *Illig-Renn*, 341 Or at 234. The Court held that laws with "[m]arginal and unforeseen applications to speech and expression" may be challenged only as-applied, under the third category. *Id*. The Court cautioned that it would not "ignore a clear case of facial unconstitutionality or overbreadth merely because the statute manages to avoid any direct reference to speech or expression." *Id* at 235. Only "if the statute's application to protected

speech [was] not traceable to the statute's express terms[,]" the Court reasoned, it would not be subject to a facial challenge. *Id* at 236.

To understand when a law "obviously" proscribes expression, the *Illig-Renn* court cited *State v. Moyle*. 299 Or 691 (1985). In that case, the Oregon Supreme Court "addressed the constitutionality of a harassment statute that prohibited alarming another person by conveying a telephonic or written threat to inflict serious physical injury or commit a felony." *Babson*, 355 Or at 402. The Court in *Moyle* explained that "[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 the lawmakers wish to suppress." *Moyle*, 299 Or at 699. "*Moyle* recognized that lawmakers could not avoid the protections of Article 1, section 8, by phrasing a law to target harm that essentially mirrors protected expression." *Babson*, 355 Or at 402 (citing *Moyle*, 299 Or at 701).

In *Babson*, the court ultimately held that the curfew at issue was not subject to a challenge under the second *Robertson* category, although "[a] restriction on the use of the capitol steps will prevent people like defendants from protesting or otherwise engaging in expressive activities on the capitol steps overnight." *Babson* at 403. The court went on to note that "[t]he guideline is not simply a mirror of a prohibition on words. The guideline also bars skateboarding, sitting, sleeping, walking, storing equipment, and all other possible uses of the capitol steps during certain hours." *Id.*

However, unlike the curfew in *Babson*, the Curfew Rule at issue here is designed to regulate and proscribe free speech and speech activity by limiting access to *the Free Speech* Plaza and adjacent public parks and areas (quintessential traditional public fora).

The Curfew Rule also does not apply to "marginal and unforeseen" aspects of expressive activity. The history and purpose of the Plaza illustrate that the Curfew will overwhelmingly apply to expressive activity. The harms targeted by the Curfew Rule are, generally, harms that flow from acts that are already proscribed by a plethora of other laws.[7] Furthermore, the Curfew Rule, through subsection (1), directly refers to speech—albeit, with clever wording that revises the history of the protests at Free Speech Plaza as "overnight camp[s]." LC Manual 60.035(1). The curfew rule at issue in *Babson*, as compared to that at issue in this case, was largely void of context, and did not contain any language regarding the purpose of the rule. In contrast, subsection (1) of the Curfew Rule states:

> "(1) Purpose. The Board of County Commissioners finds that overnight use of the designated free speech area inevitably leads camping [sic] or a continuous use of the area to the exclusion of others. In addition, overnight camping creates safety, health and crime problems that are difficult to monitor. As the Public Health Authority for Lane County, the health, safety and well-being of Lane County citizens is of foremost concern for the Board of County Commissioners. A report from the County's public health officer after visiting an overnight camp located in the designated free speech area revealed approximately 30 campers sharing kitchen facilities and a gas cooking stove, numerous dogs, partially consumed foods on the sidewalks and around tents, a strong and persistent smell of urine and an occasional smell of feces. The public health officer's recommendation was to thoroughly clean the area in order to best protect the current occupants as well as other citizens. It was also recommended that implementing a rotating schedule to clean the grounds would be in the best interest of the public's health. A significant strain is also placed on public services due to issues such as cooking with an open flame, a lack of proper sanitation, and an increased need for public safety presence due to disputes and illegal activity such as drug use that have occurred in overnight camps. The Board finds that reasonable restrictions on the time, place and manner of expression within the designated free speech area of the county-owned Public Service Building are necessary to protect public interests related to equal access, safety and sanitation. The Board finds it necessary to close the designated free speech area from 11p.m. until 6a.m. in order to ensure a clean, safe, publicly accessible space for all who wish to utilize the area." LC Manual 60.035(1).

[7] See, e.g.,: Camping: EC 4.815 (See also, EC 4.872(2)(g)); Lane Manual 6.565; Nuisances Affecting the Public: EC 6.010(a), (c), (p); Outdoor burning: EC 6.200; Lane Code 6.505; Littering: EC 6.805; Lane Code 6.200 and 6.535.

While the Curfew Rule does not refer to the "camp" noted above as "protests," the facts and testimony of cases previously litigated (*supra* at 6-11), regarding the Free Speech Plaza indicate that the gatherings referred to are obvious references to speech and speech activity, particularly speech that is critical of the City of Eugene or Lane County. The Curfew Rule, therefore, targets a harm (mere assembly between 11:00PM and 6:00AM) that mirrors protected expression. Section (1) of the Curfew Rule is a clear indication that the Rule targets expression and assembly and is, therefore, unconstitutional.

The Oregon Supreme Court's interpretation of the second *Robertson* category in *Babson* is subject to being interpreted in a far too narrow manner. The Court appears to have jettisoned any plain meaning of the terms "obviously" and "refers to." The Court seems to conclude that, to be analyzed under the second category, a law must encompass expression as an element or must "mirror" a prohibition on words. If that was the intent of the *Babson* Court, the standard might not permit an overbreadth analysis under the second category in situations in which the challenged law obviously refers to expression and expression is *a* means of causing the harm noted in the law but does not have expression as an element or mirror a prohibition on words. However, as noted above, the Court did consider the possibility of a facial challenge where there is a "clear case" of overbreadth. The Curfew Rule at issue in this case is a clear case of overbreadth.

The Curfew Rule expressly applies and refers to the use of the "designated free speech area" (although, as the Municipal court noted in *Brugh*, the Free Speech Plaza "is undeniably a traditional public forum."[8]). The primary purpose and intended use of the Free Speech Plaza is, as the Wayne Morse Historical Park Corporation noted, to "enable Lane County Citizens to

[8] Exhibit 111, Regan Decl. ¶ 12 (Municipal Court Order, *City of Eugene v. Brugh*, Docket No. 1317478).

exercise the precious rights of free speech and assembly." Ex. 101. The general prohibition on presence in the Free Speech Plaza imposed by the Curfew Rule, therefore, expressly regulates and restrains activity that is fundamentally based on protected speech and assembly. Further, and as discussed (*supra* at 21), evidence that the Curfew Rule targets protected speech activity is found in the "purpose" section of the Curfew Rule.

Because the Curfew Rule obviously and expressly refers to expression, clearly reaching protected conduct, it is subject to an overbreadth challenge under the second category of *Robertson*. As a regulation that governs the *Free Speech* Plaza, limits speech activity for a substantial part (one-third) of every day, and is directed at shuttering speech and assembly (particularly when directed at the County), the Curfew Rule is overbroad and, therefore, unconstitutional.

3. Under the third *Robertson* category, the Curfew Rule is unconstitutional under Article 1, sections 8 and 26, because enforcement of the Rule reached protected speech activity and impermissibly burdened Mr. Jackson's right of free speech and assembly

The third category deals with laws that focus on forbidden results and do not refer to expression. *Babson*, 355 Or at 404 (citing *Plowman*, 314 Or at 164). Even if this court determines that the Curfew Rule does not refer to expression, the Curfew Rule is unconstitutional under the third *Robertson* category. Under the third category, "a law is invalid as applied to particular expression if 'it did, in fact, reach privileged communication,' and enforcement of the law against a particular defendant 'impermissibly burden[ed] his [or her] right of free speech.'" *Babson*, 355 Or at 406 (citing *City of Eugene v. Miller*, 318 Or 480, 490 (1994)). The Curfew Rule impermissibly burdened Mr. Jackson's right to assemble and protest

within a traditional public forum — the "Free Speech Plaza" — for almost one-third of every day of his protest. It is, therefore, unconstitutional under Article 1 sections 8 and 26.

Even if the Curfew Rule is deemed content neutral and "directed only against causing forbidden effects," the Rule "could not constitutionally be applied to [Mr. Jackson's] particular words or other expression." *Robertson*, 293 at 417, 435-36. Mr. Jackson meets the *Babson* requirements because: 1) he was engaged in expressive activity; 2) enforcement of the rule burdened this expressive activity; and 3) the burden was impermissible. *Babson*, 355 Or at 406. As-applied, enforcement of the Curfew Rule was impermissible as an unreasonable time, place, and manner restriction. *Id.* at 406-07.

To determine whether the enforcement of the Rule was a reasonable time, place, and manner restriction on speech, this Court must consider: 1) "whether enforcement of the [Rule] advanced a legitimate government interest without restricting substantially more speech than was necessary[;]" 2) "whether there were ample alternative avenues for [defendant] to communicate [his] message[;]" and 3) "whether the [Rule] was enforced against [defendant] because of [his] expression." *Id.* at 407-08 (citing *Outdoor Media Dimensions, Inc. v. Dept. of Transp.*, 340 Or 275 (2006)). Because Mr. Jackson was engaged in expressive activity and his arrest under the Curfew Rule burdened this activity, the only question left is whether the burden was impermissible.

The burden was impermissible because the Curfew Rule, as enforced against Mr. Jackson, does not advance legitimate government interests without restricting far more speech than necessary, and fails to leave open ample alternatives. The history of the Rule, previous litigation at the Plaza stemming from large continuous-presence protests, and the City/County's general mistreatment of unhoused people also support the contention that the Rule was enforced

against Mr. Jackson due to his expressive activity. Clearly, the feigned concerns noted in the purpose of the Curfew Rule are inapplicable to Mr. Jackson's one-man vigil. There were no health and safety concerns regarding Mr. Jackson's protest at the Free Speech Plaza.

i. The Curfew Rule does not advance legitimate government interests and restricts substantially more speech than necessary

The Oregon Supreme Court has recognized that the interests recited by the County in the Curfew Rule are facially legitimate. *Babson*, 355 Or at 408. However, based on the current form of the Curfew Rule (referencing past protests) and the City's and County's multiple attempts to severely and unlawfully restrain speech activity at the Free Speech Plaza, it is obvious that the County's recited interests in the Curfew Rule are pretextual and merely another attempt to impermissibly limit speech activity at the Free Speech Plaza.

"[W]hen a law is *enforced* in a way that restricts 'far more' speech than is necessary to advance the government interest, that enforcement is not a reasonable restriction on the time, place, and manner of expression." *Id.* at 409 (emphasis in original). Eliminating speech activity for seven hours each day at the Free Speech Plaza — *while the courthouse is closed* — fails to advance significant government interests without restraining far more speech activity than necessary, because, as discussed (*supra* at 21, n 7), laws already exist (and are vigorously enforced) to address the forbidden effects noted in the Curfew Rule. Furthermore, by County personnel's own testimony in previous cases, the forbidden effects are not due to nighttime activity. Exhibit 103, p. 2. Additionally, there is no evidence that Mr. Jackson's expression caused (or posed) any health or safety concerns whatsoever.

Subsection (1) of the Curfew Rule refers to testimony and opinions from individuals associated with the County regarding the purported government interests. The County was

careful to omit how these findings were made, the context of the cases from which they arose, and the opposing testimony that was given during similar cases. For example, the County ignored the testimony of the County Administrator during *City of Eugene v. Ryan et. al.*, in which the Administrator "testified that litter, including offensive litter and biological hazards, are present from time to time in and around the plaza but do not seem to be attributable to nighttime activities." Exhibit 103, p. 2. As the Municipal court noted in *Ryan*, "testimony was that most of the problems that have occurred at the plaza happened during the day," obviating any legitimate basis for a complete nighttime ban on protected assembly and expression. *Id.*

The City also ignores that the pretextual reference to forbidden effects that the Curfew Rule purportedly seeks to avoid are largely effects of the City's and County's own making. For example, the City and County have made little to no attempt to provide public restroom facilities for people frequenting the downtown Eugene area. Testimony will be presented that insufficient number of facilities exist and those that do exist are often subject to lengthy closure or simply remain locked on a semi-permanent basis. Likewise, the downtown area noticeably lacks sufficient waste receptacles. Rather than provide facilities and other amenities a city of this size normally would need or have to prevent health and safety concerns, the City and County have decided to restrict all activity, including constitutionally protected activity, in not only the Free Speech Plaza, but to all public areas and parks adjacent to the Plaza. Ex. 108. The pretextual government interests of "health and safety" are not advanced by a blanket curfew on the Free Speech Plaza. The Curfew Rule also states that it is intended to ensure "uninterrupted access to the court house." Lane Manual 60.035. Obviously, the court is closed during the times noted by the Curfew Rule; and the Free Speech Plaza does not encompass any of the entrances or exits to

the courthouse. This section of the Rule is further evidence of the pretextual nature of the "forbidden effects" used to justify the curfew.

Furthermore, the harms the County is attempting to avoid are already proscribed by other laws. *Supra* at 21. Camping bans are already in place for nearly all of the downtown area. *Id.* Littering and public urination bans are also already in effect. *Id.* The County also asserts that crime and other problems are "difficult to monitor" when people are in the Free Speech Plaza at night. Exhibit 106, p.1 (Section (1) of Curfew Rule). There is nothing unique about the Free Speech Plaza that makes enforcement of crime any more difficult there at night than anywhere else in the downtown area (especially now that the prying eyes of City surveillance towers litter the downtown area). The City and County's pretext for shutting down free speech and assembly in the Free Speech Plaza is obvious and the Curfew Rule does not advance significant government interests without restricting more speech or speech activity than necessary.

ii. There are not "ample alternatives" for Mr. Jackson's expression at or near the County building between the hours of 11:00 p.m. and 6:00 a.m.

There were no alternatives available to Mr. Jackson, let alone "ample" alternatives, to engage in speech activity/assembly at or near the County building between 11:00 p.m. and 6:00 a.m., particularly because he chose to utilize a tent as a symbol of his cause. As discussed (*supra* at 10), in November 2018, the County imposed an 11:00 p.m. to 6:00 a.m. curfew at the park blocks and the butterfly lot -- the three blocks adjacent to the County building. Exhibit 108. No other areas surrounding the County building could be considered an alternative or, in the aggregate, "ample" alternatives. The County has systematically shut down free speech activity anywhere near the proverbial seat of government. The Eugene City Manager, Jon Ruiz, recently proposed a rule that would further eliminate public space and limit expressive activity on

downtown sidewalks. Ex. 112. And a mere sidewalk is not adequate for his protest — Mr. Jackson would then be blocking the sidewalk with his symbols and signs, and the proximity to nighttime traffic would likely pose more of a safety threat to him and others than presence in the Free Speech Plaza.

As noted, the Oregon Supreme Court dealt with a somewhat similar set of facts and law in *Babson*. However, the facts of this case differ from those in *Babson* in critical respects. In *Babson*, the Oregon Supreme Court ruled that a regulation that prohibited "[o]vernight use" of the steps of the Oregon State Capitol Building did not violate Article I, section 8 or section 26 of the Oregon Constitution facially or as applied to defendants. The court did not undertake any analysis of the First Amendment defenses asserted.

The issue in *Babson* was very narrowly defined: "The question here . . . is whether the Oregon Constitution bars the legislature from limiting use of the capitol steps for any purpose, including protesting, to the hours of 7:00 a.m. to 11:00 p.m. (except when legislative hearings or floor sessions are taking place)." *Babson,* 355 Or at 433.

Defendants in *Babson* held an around-the-clock vigil on the steps of the state capitol to protest the deployment of Oregon National Guard troops to Iraq and Afghanistan. Defendants were arrested for Criminal Trespass in the Second Degree because they were at the Capitol steps in violation of a Legislative Administration Committee Guideline (LAC) that prohibited "overnight use" of the steps between 11:00 p.m. and 7:00 a.m. The issue in *Babson* was specifically over the Capitol steps, not other adjacent areas that remained available for assembly and expression. As the court noted, the government interest in the Capitol steps curfew is to "[maintain] the Capitol's historical integrity and dignity." In the instant case, the Curfew Rule is

completely counter to maintaining the purpose and tradition of the Free Speech Plaza, *i.e.*, a forum for speech and assembly as well as the protection of the rights of speech and assembly.

The government interests asserted by the County in the Curfew are pretextual health and safety concerns – potentially posed by large groups of continuous-multi-day protestors that are best addressed through already existing laws — not properly addressed by a blanket prohibition on assembly and speech activity for nearly one-third of every day at an area known as a monument to free speech.

The court in *Babson* found that "[a]lthough the guideline restricted the location of defendants' expression during [the hours of the curfew], it did not prohibit that expression from occurring all together . . . and there is no indication that defendants were prevented from effectively conveying their message from another location during the eight nighttime hours . . . ." *Babson,* 355 Or at 409. While the court found that the regulation did not violate the Oregon Constitution, it did "recognize the social and personal value of protest and, often, of protest at a particular time and place — such as a continuous peace vigil at the state capitol." *Id.* at 433.

No such alternatives exist in the present case. As noted, the County has systematically shuttered public fora around the County building between 11:00 p.m. and 6:00 a.m. Ex. 108. The area around the Free Speech Plaza that is available for assembly (sidewalks), in comparison to that available around the Capitol steps, is significantly smaller. See Def. Exhibits 113 and 114 (comparative maps of Capitol area and Free Speech Plaza area).

Given the history of protests against the City and County treatment of the unhoused at the Free Speech Plaza and surrounding areas, Mr. Jackson's prominence as a known houseless advocate, his persistent petitioning of the local government regarding unhoused issues, and the lack of any other police contact, trespass prosecutions, and convictions regarding the

enforcement of the Curfew, it is clear that the Rule was enforced against Mr. Jackson because of his mode and content of expression.

The Curfew Rule may be analyzed under each *Robertson* category, but it does not appear to fit squarely within a sole category. By including reference to previous protests, the Curfew Rule is clearly written in terms directed to the opinion and subject of a communication. Specifically, it is written in terms to prohibit protest and criticism of Lane County and the City of Eugene regarding their respective policies (or lack thereof) toward the unhoused at the Free Speech Plaza between 11:00 p.m. and 6:00 a.m.

Defendant urges this court to consider the constitutionality of the Curfew Rule and its application to Mr. Jackson under each *Robertson* category, while also considering the possibility that the *Robertson* framework is perhaps unhelpful and inapplicable in this case. While the Oregon Constitution is often said to protect more speech and speech activity than the U.S. Constitution, given the narrow categories created by the Oregon Supreme Court for analyzing overbreadth, that may not be true in this case. Under the U.S. Constitution, the Curfew Rule is, as the Municipal Court has held several times, clearly overbroad and unconstitutional.

B. The Curfew Rule is Unconstitutional under the First Amendment to the U.S. Constitution

The Curfew Rule, instituting a blanket seven-hour curfew at the Free Speech Plaza, violates the expression and assembly protections afforded by the First Amendment to the U.S. Constitution because the curfew is overbroad, an unreasonable time, place, and manner restriction, and is not narrowly tailored to serve a legitimate government interest.

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

assembly is fundamentally equal to the right of free speech. The two are interchangeable and, whenever the word "speech" appears in first amendment case law, it can accurately be substituted as "assembly." *Brandenburg v. Ohio*, 395 US 444, 449 n 4 (1969). Laws that impact free assembly are subject to the same strict scrutiny standard as laws that impact speech. *DeJonge v. Oregon*, 229 US 353, 364 (1937). Political speech, like Mr. Jackson's, "is core First Amendment speech, critical to the functioning of our democratic system." *Watters v. Otter,* 1:12-CV-00076-BLW, 2013 WL 6446251 (D. Idaho Dec. 9, 2013) (citing *Carey v. Brown*, 447 US 455, 467 (1980)).

"[C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Int'l Soc. for Krishna Consciousness, Inc.*, 505 US 672, 687 (1992). The characteristic nature and function of the Free Speech Plaza are clear: to promote and protect free speech and speech activity. Ex. 101, 102. The Curfew Rule is contrary to the characteristic nature and function of the Free Speech Plaza.

"Traditional public fora are defined by the objective characteristics of the property, such as whether, 'by long tradition or by government fiat,' the property has been 'devoted to assembly and debate.'" *Arkansas Educ. Television Comm'n v. Forbes*, 523 US 666, 677 (1998) (citing *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 US 37, 45 (1983)). A government may close a traditional public forum only when that forum no longer exhibits characteristics that make it a traditional public forum, *i.e.*, it is no longer a place that "by long tradition or by government fiat [is] devoted to assembly and debate," or if it sells the forum to a private party. *Perry,* 460 US at 45. The Plaza's history of protests, statements of the Wayne Morse Historical Park Corporation regarding the purpose of the Plaza, and the countless permanent monuments to

robust free-speech protections within the Plaza, as well as the Municipal court's remarks that the Plaza is "barely distinguishable from a sidewalk" (Exhibit 103, p. 3) indicate, as the Municipal court has stated, that the Free Speech Plaza "is undeniably a traditional public forum." Ex. 111.

Because the Curfew Rule applies to a traditional public forum, the question before this court is whether the Rule can survive the strict scrutiny historically applied to determine the constitutionality of a law. For the reasons already noted, and those below, the Rule is unconstitutional under the First Amendment.

1. The Curfew Rule is overbroad and, therefore, facially unconstitutional, because it is a substantial restriction on First Amendment freedoms when compared to its apparent legitimate sweep

Typically, to show that a law is facially invalid due to overbreadth, a defendant must show "that no set of circumstances exist under which [the law] would be valid," or that a substantial number of the law's applications are unconstitutional, judged in relation to the law's "plainly legitimate sweep." *United States v. Salerno*, 481 US 739, 745 (1987); *Washington v. Glucksberg*, 521 US 702, 740 n 7 (1997); *United States v. Stevens*, 559 US 460, 473 (2010). A defendant may challenge a law as overbroad "not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 US 601, 612 (1973); *Arce v. Douglas*, 793 F3d 968, 984 (9th Cir 2015). That is, the government "may not act in a manner that has a chilling effect on those wishing to exercise their right to free speech." *Occupy Eugene v. U.S. Gen. Servs. Admin.*, 43 F Supp 3d 1143 (D Or 2014).

Indeed, as the statement from Mr. Dingle (*supra* at 10), indicates, the Curfew Rule has not been legally challenged since the County amended the Rule and, since that time, no person

(until Mr. Jackson) has challenged the Rule for fear of arrest or citation. In essence, County officials have learned that, while they possess a monopoly on the power to criminalize free speech in the downtown Eugene area, they do not need to exercise their prosecutorial power to maintain strict control and discipline over people engaged in speech activity. Instead — and in spite of the numerous instances where this Court has found that the County and City have violated the First Amendment rights of protesters — they rely on the fear of arrest and prosecution of those who wish to engage in speech activity. As noted above, the Rule has chilled the First Amendment rights of those who wish to engage in expressive activity and protest between 11:00 p.m. and 6:00 a.m. at the Free Speech Plaza.

Not only has the Curfew Rule chilled First Amendment activity at the Free Speech Plaza, it is effectively a prior restraint on First Amendment activity at the Plaza. Prior restraints "are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 US 539, 559 (1976). There is a heavy presumption against the constitutional validity of any system of prior restraint. *FW/PBS, Inc. City of Dallas*, 493 US 215, 225 (1990). While the Court in *Nebraska Press Ass'n* addressed a restriction on publishing or broadcasting accounts of confessions or admissions by a defendant in a criminal trial, the reasoning is equally applicable to the case at hand. In *Nebraska Press Ass'n*, the Court noted the distinction between laws that "chill" First Amendment activity and those that "freeze" such activity: "A prior restraint . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." 427 US at 559 (citing A. Bickel, The Morality of Consent at 61 (1975)).

In the instant case, the Curfew Rule not only chills First Amendment activity, but it has effectively "frozen" speech activity for nearly one third of every day. The fact that no legal

challenge to the Curfew Rule has occurred since its imposition in 2013 demonstrates that First Amendment rights have been chilled and effectively "frozen." The City cannot meet the high burden to overcome the unconstitutional nature of the prior restraint imposed by the Curfew Rule.

The Curfew Rule's prohibition on all activity at the Free Speech Plaza for nearly one third of every day is a substantial restriction of First Amendment freedoms when compared to any "plainly legitimate sweep" of the Rule. The forbidden effects noted in the Curfew Rule are offenses already proscribed and vigorously enforced by the City and County. *Supra* at 21.

2. The Curfew Rule is an Unreasonable Time, Place, and Manner Restriction and, Therefore, Unconstitutional

An ordinance imposing a time, place, or manner restriction is constitutional only if it is 1) content-neutral, 2) narrowly tailored to serve a significant government interest, and 3) leaves open ample alternative channels of expression. *Ward v. Rock Against Racism*, 491 US 781, 789-90 (1989). The failure to satisfy any one of the three prongs renders the regulation unconstitutional. *Grossman v. City of Portland*, 33 F3d 1200, 1205 (9th Cir 1994). The Curfew Rule is not narrowly tailored to serve a significant government interest and does not leave open ample alternatives.

The requirement that a law must be "narrowly tailored" means that the time, place, or manner restriction may not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward,* 491 US at 799. Presumably, the government has a legitimate interest to "ensure health, safety and welfare; to protect the rights of the general public; and to ensure equal access to all citizens" to the Free Speech Plaza. However, excluding free speech activity from the Plaza for nearly one third of every twenty-four hours burdens substantially more speech than is necessary to further these interests. The health and safety

concerns noted in the Rule are as pretextual as the nonsensical claim that the Rule is meant to ensure "uninterrupted access to the courthouse." The supposed harms that miraculously flow from mere presence in the Plaza between 11:00PM and 6:00AM are already addressed at length by a plethora of laws. In short, the pretextual justifications asserted in the Rule cannot justify the broad sweep of the Curfew Rule.

The instant case is similar to another case involving the U.S. General Services Administration regarding a prohibition on unpermitted activities outside of the business hours Monday through Friday from 8:00 a.m. to 5:00 p.m. at the federal building in downtown Eugene. *Occupy Eugene v. U.S. Gen. Servs. Admin.*, 43 F Supp 3d 1143 (D Or 2014). In that case, U.S. District Judge Michael J. McShane found that the federal Plaza was "undoubtedly" a traditional public forum. *Id*. at 1152. As such, "the government's right to limit expressive activity in a traditional public forum [was] strictly limited." *Id*. (citing *Berger v. City of Seattle*, 569 F3d 1029, 1036 (9th Cir 2009) (*en banc*)). As the Court in that case noted, "the First Amendment does not go to sleep at 5 p.m. on Friday afternoon and wake up at 8 a.m. on Monday morning." *Id*. Likewise, in the instant case, the First Amendment does not go to sleep each night at 11:00 p.m. and awaken at 6:00 a.m. the following morning. The Court noted, further, that "[a]llowing protests and activities for only forty-five hours per week imposes significant limitations on anyone who wishes to use the Plaza . . . ." *Id*. While the federal plaza is different in many respects to the Free Speech Plaza, the conclusion in this case should be the same: prohibiting free speech at the *Free Speech* Plaza for nearly one-third of every day poses significant limitations on those who wish to use the Free Speech Plaza for its intended and historical purpose, *i.e.*, the exercise of First Amendment rights. While the *GSA* case was about the failure of the GSA to

renew an existing permit, not the right of spontaneous expression, the underlying reasoning regarding free expression and assembly bears on the outcome of the present case. *Infra* at 36.

Where a content-neutral regulation punishes conduct that is interwoven with speech activity, the regulation is justified only if: (1) the government is constitutionally authorized to regulate the conduct; (2) the regulation furthers an important substantial governmental interest; (3) the governmental interest is not related to the suppression of speech; and (4) any incidental restriction on First Amendment freedoms is no more than is essential to the furtherance of that interest. *City of Erie v. Pap's A.M.*, 529 US 277, 296 (2000); *United States v. O'Brien*, 391 US 367, 376-77 (1968); *Ward*, 491 US at 791; *Clark v. Community for Creative Non-Violence*, 468 US 288, 293 (1984).

The County and City are authorized to regulate the apparent harms noted in the Curfew Rule (*e.g.*, littering, human waste, camping) — but these harms are already regulated. The Rule does not further important or substantial government interests; rather, the Rule is related to the suppression of free speech and assembly, and the restriction on First Amendment freedoms is not essential to furthering the interests asserted in the Rule.

Just as the temporary closure of the Plaza in *City of Eugene v. Ryan et. al.* lacked narrow tailoring, the current Rule prohibiting all activity and presence at the Plaza between 11:00 p.m. and 6:00 a.m. is not narrowly tailored. The stated government interests protected by the Rule are "health, safety and welfare; to protect the rights of the general public; and to ensure equal access to all citizens to the designated free speech area. The provisions of this section of the Lane Manual are intended to accomplish these goals." As noted above, the Manual goes on to state:

> "The Board of County Commissioners finds that overnight use of the designated free speech area inevitably leads camping (sic) or a continuous use of the area to the exclusion of others. In addition, overnight camping creates safety, health and crime problems that are difficult to monitor . . . .

> The Board finds that reasonable restrictions on the time, place and manner of expression within the designated free speech area of the county-owned Public Service Building are necessary to protect public interests related to equal access, safety and sanitation." Ex. 106 (Lane County Manual Section 60.035(1)).

First, despite the fact that the County added language to the Rule that sounds constitutional (*i.e.*, that the Curfew is a "reasonable, time, place, and manner restriction"), the addition of this self-serving prophylactic language does not cure the actual constitutional defects of the Curfew Rule and enforcement of the Rule.

Second, the harms sought to be regulated are already proscribed by the Manual and other provisions of the City and County Codes. In essence, the City and County, through the Curfew Rule, target actions that are at least twice removed from the speculative harmful effects themselves. The City and County have already banned the harmful acts themselves (*e.g.*, littering, public urination, etc.). Then, the City and County banned a condition deemed to lead to such harmful acts, *i.e.*, camping. Now the County and City have banned yet another action that, they contend, could lead to the act of camping: free speech activity and mere presence at the Free Speech Plaza. The County and City have overstepped their regulatory power by passing (and enforcing) the Curfew Rule banning expressive conduct that is far removed from the harms these entities are permitted to regulate, conflating expressive activity with activity that directly leads to the harms that flow from camping. [9]

Further, the City fails to recognize that it is not protest or other expressive activity that leads to the harms sought to be prevented. Rather, it is a lack of housing and shelter, systemic economic and social inequality, lack of available health care, rising housing costs, lack of

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[9] It should be noted that, although Mr. Jackson was protesting with a tent, that is not the issue in this case. Statements from the officers, and the citation itself, indicate that Mr. Jackson was arrested under EC 4.807 solely for his *presence* in the Plaza during the curfew.

bathrooms and trash receptacles, and City and County policies regarding the unhoused that lead to camping and the associated "harms."

The attenuated causation between free-speech activity at night and the harms noted in the Rule is similar to a law addressed by the U.S. Supreme Court in *Schneider v. State of New Jersey, Town of Irvington*. 308 US 147 (1939). In *Schneider*, defendants were convicted of violating a ban on pamphleteering after passing out pamphlets in a public forum. The municipality claimed the ban was to prevent the harm of littering. While the government interest of preventing littering was not disputed, the ban on pamphleteering in a public forum was found to violate defendants' First Amendment rights because the purpose of the ban was insufficient to curtail the free speech activity of the defendants to hand out literature. The court concluded that there "are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." *Id.* at 162. Ultimately, the ordinance was deemed unconstitutional.

Likewise, if the City or County wish to address the harms stated in the Rule, such harms may obviously be addressed by existing laws. A blanket curfew prohibiting all activity at the Plaza between 11:00 p.m. and 6:00 a.m. is not, therefore, narrowly tailored to address the government interests at issue.

The Rule is also not narrowly tailored because it necessarily inhibits any spontaneous, yet timely, exercise of First Amendment rights. In *Watchtower Bible Tract Soc'y, of N.Y., Inc. v. Village of Stratton*, the Supreme Court emphasized the importance of protecting the opportunity for spontaneous expression, especially with respect to individuals or small groups. 536 US 150, 165-55 (2002). Likewise, in *Grossman v. City of Portland*, the Ninth Circuit determined that a person arrested while protesting in a public park under an ordinance that made no exception for

spontaneous expression was deprived of his First Amendment rights. 33 F3d 1200 (9th Cir 1994). In *Grossman*, the City of Portland cited the threat to the safety and convenience of park visitors to justify its ban on unpermitted speech activity. The court found that the spontaneous actions of even six to eight people holding signs were not significant enough to justify the restrictions on speech. In the case at hand, the Curfew Rule makes no exception for spontaneous speech.

In *Watters v. Otter*, the District Court for the District of Idaho considered whether a scheduled cleaning of a park that was subject to an Occupy-Wall-Street protest impermissibly burdened speech activity. 1:12-CV-00076-BLW, 2013 WL 6446251 (D. Idaho Dec. 9, 2013). The cleaning was slated to occur for only a few hours and did not occur on a daily basis. "Such a short delay," the Court ruled, "only places a minimal burden on spontaneous speech." *Id.* The court noted that "[re]stricting spontaneous political expression places a severe burden on political speech because, as the Supreme Court has observed, '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.' " *Id*. (quoting *Shuttlesworth v. City of Birmingham*, 394 US 147, 163 (1969) (Harlan, J., concurring)). Closing the Free Speech Plaza, in this case, for seven hours of every day is clearly not a "short delay" and places significantly more than a "minimal burden on speech." While *Shuttlesworth* and some other cases addressing spontaneous protest involved permitting schemes, the logic holds true when applied to a Curfew Rule at a traditional public forum: events may occur that elicit a responsive assembly of concerned Lane County residents, such as a candlelight vigil. Are these assemblies to be solely relegated to the sidewalks of downtown? Because the Curfew Rule prohibits spontaneous assembly between 11:00 PM and 6:00 AM, it necessarily prohibits more speech than necessary to further the government interests.

As the Municipal Court has previously held, “when balancing the stated governmental interest with the impact it has on the right to assemble, the curfew does not withstand constitutional scrutiny when applying even the least stringent, content and speech neutral analysis to this group of defendants.” Exhibit 103, p. 2. “[R]egardless of the curfew’s intent, . . . enforcement of a curfew which closes the very area that the County designated ‘Free Speech Plaza’ . . . for a third of every day significantly limited Defendants’ rights to speech and assembly . . . . ” *Id.* at 3. Likewise, the curfew in this case — like previous curfews attempted by the County — does not withstand constitutional scrutiny even with the pretextual addition of prophylactic constitutional buzzwords.

i. The curfew rule does not leave open ample alternative means of communication

As noted above, the County has imposed the same 11:00 p.m. to 6:00 a.m. curfew on the three blocks adjacent to the Plaza/County Building. Additionally, City of Eugene City Manager Jon Ruiz recently proposed an administrative order (R-4.872) that will reduce the available space on sidewalks for expressive activity as well as non-expressive activity. See Ex. 113 (map of excluded county plaza area). The proposed order is the latest in a series of laws passed by the County and City, including the Rule at issue in this case, to further enclose the public areas and rid the downtown Eugene area of the vibrant, outspoken, and politically engaged community that has traditionally engaged in spontaneous expressive activity at the Free Speech Plaza and surrounding areas for decades. Due to the curfews at surrounding areas and the increased reductions of public space in the downtown area, including public parks, there are not “ample alternative means” to engage in expressive conduct between 11:00 p.m. and 6:00 a.m.

CONCLUSION

The Curfew Rule is patently unconstitutional under the Oregon and US constitutions. As in previous attempts by the County and City to shutter free speech at the Free Speech Plaza, this Curfew Rule should be struck and the charge against Mr. Jackson dismissed. The County has continued its attempts to essentially skirt constitutional protections by the use of prophylactic language. But this language (*e.g.*, that the County may place "reasonable, time, place, and manner restrictions" on use of the Free Speech Plaza), while correct, does nothing to save the Curfew Rule from its clear and obvious unconstitutionality again.

The Curfew Rule stands in stark contrast to the purpose of the Free Speech Plaza, the countless monuments to robust free speech protections, and the history of the Plaza as *the* quintessential traditional public forum where members of the public have gathered for decades to exercise their precious free speech rights. The memorial to Thomas Jefferson's remark that "The will of the people is the only legitimate foundation of any government, and to protect its free expression should be our first object" is a benchmark for just how far the City and County have strayed from the purpose of the Free Speech Plaza. Local government has ignored the tradition of the Free Speech Plaza and, instead, further eroded the legacy of the Free Speech Plaza. Mr. Jackson urges this Court to finally put an end to the myriad of unsuccessful attempts by the City and County to strip people of their rights under the US and Oregon constitutions to engage in speech and assembly at the Free Speech Plaza.

A complete prohibition on speech activity and mere presence in the Free Speech Plaza for nearly one-third of every day is not a reasonable time, place, and manner restriction. The interests asserted by the County in the Curfew Rule are already addressed and enforced by other laws. Undoubtedly, the Curfew Rule restricts substantially more speech than even remotely

necessary to advance the interests asserted by the County. Defendant urges this court to see the Curfew Rule for what it is: the latest attempt by the County and City to preempt free speech and insulate the government officials and the public from those that criticize the City's and County's treatment of the unhoused. Further, with identical curfews imposed at all areas surrounding the Free Speech Plaza, there is no reasonable argument that Mr. Jackson (or anyone else) have "ample alternatives" to protest.

Despite the problematic categories as interpreted by the *Babson* court, the Curfew Rule expressly and obviously refers to speech by 1) regulating the "free speech area" and 2) mentioning past protests. The history of litigation regarding free speech rights at the Free Speech Plaza indicate that the curfew is specifically targeted toward those who criticize the County and City.

Because the Curfew Rule is an impermissible time, place, and manner restriction, fails to leave open ample alternative means to engage in expressive activity, restricts substantially more speech than necessary to advance the stated government interests, is overbroad under *Robertson* categories one and two, and unconstitutional as-applied under the third *Robertson* category, defendant moves this court to continue its tradition of upholding the free-speech and assembly rights at the Plaza and dismiss the charge of Criminal Trespass in the Second degree due the violation of the rights of defendant under the Oregon and U.S. Constitutions.

RESPECTFULLY SUBMITTED this 6th day of March, 2020:

/s/ *Lauren C. Regan*
Lauren C. Regan, OSB # 970878
Civil Liberties Defense Center
Attorney for Defendant

CERTIFICATE OF SERVICE

I, Lauren C. Regan, certify that on March 6, 2020, I caused to be served, via hand delivery to Eugene City Prosecutor Benjamin Miller at the Eugene City Prosecutor's Office at 125 E. 8th Ave., Eugene, OR 97401, a true copy of the following documents: Defendant's Motion to Dismiss, Declaration of Lauren C. Regan, Declaration of Eric T. Jackson, and Defense Exhibits 101-114.

Dated this March 6, 2020.

By: /s/ *Lauren C. Regan*
Lauren C. Regan, OSB # 970878
J. Cooper Brinson, OSB # 153166
Civil Liberties Defense Center
Of Attorneys for Defendant