THE STATE OF NEW HAMPSHIRE
SUPREME COURT

MAY SESSION
2013 TERM

No. 2012-0781

State of New Hampshire
Appellee

v.

Catherine Bailey, & a.
Defendants-Appellants

BRIEF FOR THE DEFENDANTS-APPELLANTS

Rule 7 Mandatory Appeal from a Final Decision on the Merits
in the NH Circuit Court, 9th Circuit-District Division-Manchester

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(15 minutes of oral argument requested)

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES AND OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Constitution of New Hampshire

Art. 1. Equality of Men; Origin and Object of Government

> All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.

Art. 4. Rights of Conscience Unalienable

> Among the natural rights, some are, in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the Rights of Conscience.

Art. 8. Accountability of Magistrates and Officers; Public's Right to Know

> All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

Art. 9. No Hereditary Office or Place

> No office or place, whatsoever, in government, shall be hereditary - the abilities and integrity requisite in all, not being transmissible to posterity or relations.

Art. 10. Right of Revolution

> Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.

Art. 22. Free Speech; Liberty of the Press

> Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved.

Art. 32. Rights of Assembly, Instruction, and Petition

> The people have a right, in an orderly and peaceable manner, to assemble and consult upon the common good, give instructions to their representatives, and to request of the legislative body, by way of petition or remonstrance, redress of the wrongs done them, and of the grievances they suffer.

Art. 38. Social Virtues Inculcated

> A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to justice, moderation, temperance, industry, frugality, and all the social virtues, are indispensably necessary to preserve the blessings of liberty and good government; the people ought, therefore, to have a particular regard to all those principles in the choice of their officers and representatives, and they have a right to require of their lawgivers and magistrates, an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of government.

Manchester Park Operating Policy § 96.04

(A) Parks shall be closed to the public every day of the year from 11:00 p.m. until 7:00 a.m., except for such functions as fireworks displays and such other community programs as my be authorized the Public Works Director, or his or her designee.

SECONDARY SOURCES

QUESTIONS PRESENTED FOR REVIEW

I. Whether the trial court erred in determining as a matter of law that the State had the right, consistent with the First Amendment and Part I, Article 22, to cite the defendants for violation of a park curfew ordinance when they respectfully declined to abandon their occupation and leave Veteran's Park even though no significant government interest had been adversely affected by the occupation.

II. Whether the trial court erred in determining as a matter of law that Part 1, Article 22 of the New Hampshire Constitution provides no greater protection for free speech than does the First Amendment to the United States Constitution.

These issues were raised in the defendants' Motion to Dismiss.

STATEMENT OF THE CASE

This is an as applied challenge to a Manchester curfew ordinance that was enforced to shut down the Occupy New Hampshire assembly and suppress free speech.

On September 17, 2011 a movement now known as "Occupy Wall Street" began in New York City. The main goals of the movement were to protest to expose and end wealth disparity in the United States, the disenfranchisement of the poor and middle class, and corporate control and influence in politics, as well as to combat systemic discrimination based upon race, sex, gender, class, nationality, and sexual orientation. Occupy Wall Street declaimed that it was involved in revolutionary activity that would fundamentally change the government of the United States.

The Occupy movement rapidly spread throughout the country, with occupations from Boston to Fresno, and virtually every major city in between. Occupy Manchester was a direct outgrowth of that movement and adhered to the same principles and political message.

On October 17, 2011 Occupy Manchester set up an encampment in Veteran's Park. The encampment involved a twenty-four hour presence. The twenty-four hour presence violated Manchester Ordinance 96.04 PARK OPERATING POLICY, which closes the public parks every day of the year from 11:00 p.m. until 7:00 a.m. A violation of this ordinance carries a maximum $1000 fine.

On October 19, 2011 approximately 40-50 people were peacefully assembling and occupying Veteran's Park. Shortly after 11p.m. a team of Manchester police officers descended upon the park to enforce the park ordinance. Those assembled were given an opportunity to leave. All of the named defendants politely declined to leave the park and were issued citations for violation of the park curfew ordinance.

The defendants filed a motion to dismiss the charge arguing that enforcement of the curfew ordinance violated their right to free speech under both the First Amendment to the United States Constitution and Part, Article 22 of the New Hampshire Constitution, their right of assembly under both the First Amendment to the United States Constitution and Part I, Article 32 of the New Hampshire Constitution and their right of revolution under Part 1, Article 10 of the New Hampshire Constitution.

The defendants and the State agreed that the outcome of the motion would be dispositive and that if the Court denied the motion to dismiss, then the Court could impose sentence with no further proceeding.

The Court denied the motion and imposed a fine of $62.50. This appeal followed.

STATEMENT OF FACTS

According to Wikipedia, the Occupy movement is an international protest movement against social and economic inequality, its primary goal being to make the economic and political relations in all societies less vertically hierarchical and more flatly distributed. Local groups often have different foci, but among the movement's prime concerns is the claim that large corporations and the global financial system control the world in a way that disproportionately benefits a minority, undermines democracy and is unstable.

The first Occupy protest to receive wide coverage was Occupy Wall Street in New York City's Zuccotti Park, which began on September 17, 2011. By October 9th Occupy protests had taken place or were ongoing in over 95 cities across 82 countries, and over 600 communities in the United States.

The first gathering of Granite Staters took place on October 4th when 10 or 20 people met to consider how to bring the Occupy movement to New Hampshire (Transcript, 183). This group decided to hold a General Assembly in Manchester on October 5th.

At the General Assembly in Manchester there was an agreement to hold a second General Assembly in Concord and then actually commence an occupation in New Hampshire. (Transcript, 51-53)

In preparation for the occupation, which was scheduled to begin on October 15th at Veteran's Park in Manchester, several groups were formed. (Transcript, 51) Among the groups that formed were the logistics committee, an art group, a spirituality group, a medical team, a media team and an outreach team (Transcript, 52)

More than 300 occupiers met as scheduled at Veteran's Park on October 15th. (Transcript, 56); however they learned that the police were using the park to hold a benefit for

fallen police officers at Veteran's Park, so they agreed to move and set up the occupation up Victory Park temporarily. (Transcript, 55) Approximately 40 individuals actually engaged in the occupation at Victory Park. (Transcript, 57)

The logistics team arranged for meals for the occupiers. (Transcript, 57) There was a clean-up detail which walked around the park and picked up trash. The Manchester Police told the occupiers that the park was in better condition when the occupiers left it than it was when the occupation began. (Transcript, 58) The occupiers anticipated hygiene and sanitation needs by soliciting neighbors to open up their homes to protestors to use showers and renting port-a-potties. (Transcript, 58) The occupiers instituted and enforced a no drugs/no alcohol policy. (Transcript 59) They offered food and shelter to anyone who was in need. (Transcript, 61) The safety committee formed two person teams and took two-hour shifts to make sure there were no problems. (Transcript, 62) During the occupation in Victory Park there were no assaults, thefts or disturbances. (Transcript, 62-63) There was one noise complaint based on drumming. The occupiers agreed to stop drumming at 8 p.m. and there were no further complaints. (Transcript, 63)

On October 17th the occupation moved from Victory Park to Veteran's park. Approximately 25 to 30 people participated in the occupation. About 10 tents were erected. (Transcript, 64) Less than 20% of the area of the park was used by the occupiers. (Transcript, 68)

All decisions made by the occupy movement were made by consensus during twice daily meetings of the General Assembly. The idea of the General Assembly is to have a 'true democracy' where everyone has a voice in the decision making process. (Transcript, 15-16)

On October 19th the police informed the occupiers that they were planning to enforce the curfew ordinance that night. As defendant Will Hopkins described it:

> I believe it was just a little after 11 – at that point I believe Arnie Alpert was speaking in an informal general assembly.
>
> A police officer approached the encampment and made the hand sign for 'I'd like to be recognized', the triangle. And what he said, I though his was the most moving speech of the night, actually.
>
> He said, you know, we have orders to remove you from the park....we want you to know that we recognize that we are part of the 99 percent. What you're doing here is important, and essential.
>
> We thank you for your cooperation with us over the past few [days]. But we have orders to ask you to leave. So, if you'd like to leave now you can leave.
>
> If you'd like to receive a citation so that you challenge this in the Courts, we can let you do that.

(Transcript, 29)

All of the named defendants declined to leave the park and were cited for violation of the curfew ordinance.

SUMMARY OF THE ARGUMENT

I. Application of the park curfew ordinance to suppress constitutionally protected expressive activity violates both Part 1, Article 22 of the New Hampshire constitution and the First Amendment to the United States constitution for two reasons. First, there was no need to enforce the ordinance in order to protect significant government interests because the defendants had taken into account any interest that the government has in protecting the park in their planning and execution of the occupation. Second, enforcement of the ordinance left the defendants with no alternate channels to express their very unique message.

II. The New Hampshire constitution provides significant more protection for speech than does the United States constitution. The First Amendment is a restraint upon government action that might abridge free speech. Under the United States Constitution, free speech, although cherished and protected, is not afforded the respect and deference that is shown in the New Hampshire constitution. The New Hampshire constitution elevates free speech. It declares that free speech, like a free press, is essential to the security of freedom in a state and ought to be inviolably preserved. Under the New Hampshire constitution a citizen is not merely "entitled" to protest against corrupt government action, he has a "duty" to do so.

ARGUMENT

I. The Manchester Park Ordinance is overbroad as applied to the constitutionally protected activity of the Defendants

Manchester City Ordinance 96.04 provides "[p]arks shall be closed to the public every day of the year from 11:00 p.m. until 7:00 a.m. except...." The defendants agree that on its face this ordinance is content neutral and does not limit speech or expressive conduct.

The New Hampshire state Constitution provides: "Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved." N.H. CONST. pt. I, art. 22. The First Amendment to the United States Constitution prevents the passage of laws "abridging the freedom of speech." U.S. CONST. amend. I. It applies to the states through the Fourteenth Amendment to the United States Constitution.

Although the court traditionally begins its analysis of whether a rule or regulation is constitutional with reference to the state constitution, the defendants will start with a federal analysis. We will argue that the park curfew is overbroad as applied under a federal constitutional analysis, and in a separate section argue that even if the Court finds that the enforcement of the ordinance is justified under the First Amendment, that it fails a stricter standard that is required by our state constitution.

The Court reviews the constitutionality of the application of state regulations de novo.

1. The Defendants' were engaging in constitutionally protected activity

At the trial level, the state did not dispute that the enforcement action taken in this case encompassed expressive speech (NOA, p.10). The defendants were participating in a national

movement, a hallmark of which was the occupation of public spaces for the purposes of discussing political ideas, seeking redress of grievances, and modeling the collaborative type of government that they desire. The trial court agreed that the encampment was part of the core message because it demonstrated and modeled a democratic and transparent government, transforming the activities into symbolic speech.

As Professor James Pope testified, the present day tactic of occupying spaces equates to the sit-ins of the 1960's and factory occupations of the New Deal. (Transcript, 165)

2. Veteran's Park is a traditional public forum

"The standards by which limitations on speech must be evaluated differ depending on the character of the property." *Doyle v. Comm'r, N.H. Dep't. of Resources & Economic Dev., 163 N.H. 215, 221 (2012).*

Government property generally falls into three categories — traditional public forums, designated public forums and limited public forums. *Pleasant Grove City v. Summum, 555 U.S. 460, 469-70 (2009).* A traditional public forum is government property "which by long tradition or by government fiat [has] been devoted to assembly and debate." *Cornelius v. NAACP Legal Defense & Ed. Fund, 473 U.S. 788, 802(1985).* In such forums, the government may impose reasonable time, place and manner restrictions. If a restriction is content-based, it must be narrowly tailored to serve a compelling government interest. If a restriction is content-neutral, it must satisfy a slightly less stringent test — it must be narrowly tailored to serve a significant government interest. *Ward v. Rock Against Racism, 491 U.S. 781, 791(1989).* Content-neutral restrictions, however, must also leave open ample alternative channels for communication. *Doyle v. Comm'r, N.H. Dep't. of Resources & Economic Dev., 163 N.H. at 221.*

Federal law and state law are consistent with respect to forum analysis. This Court has held that the "appropriate standard for reviewing a content-neutral time, place or manner restriction on speech or expressive activity on public property depends on whether the public place or facility subject to regulation is a quintessential public forum, *like a sidewalk or park*, or an area provided by the government to serve as a public forum, or is merely public property without traditional or designated character as a forum for public expression." *State v. Hodgkiss, 132 N.H. 376, 382-383 (N.H. 1989(*emphasis provided).

There can be no serious doubt that Veteran's Park is a quintessential public forum. It has been the frequent venue of political assemblies, most recently during the 2012 elections.

3. The Park curfew, as applied, is not narrowly tailored to serve a significant government interest

In deciding an "as applied" challenge, the court must carefully examine the factual record. *State v. Derrickson, 97 N.H. 91 (N.H. 1951)* (The persistent and perplexing problem of making a reasonable and nondiscriminatory accommodation when fundamental rights collide cannot be solved in a vacuum. The factual situation is therefore extremely important in every case.); *State v. Theriault, 158 N.H. 123, 129 (N.H. 2008)* (We emphasize that our holding is dictated by the specific charges and unique facts of this case).

The trial court found and the defendants do not dispute, that the park curfew ordinance advances significant government interests. Those interests are identified as the general public's enjoyment of park facilities, the viability and maintenance of those facilities, the public's health, safety, and welfare, as well as the protection of city parks and public property from overuse and unsanitary conditions. (NOA, 10)

When reviewing the unique facts of this case, the Court must conclude that the park curfew should not have been applied to suppress the activities because the defendants took into account each of the government interests in planning and executing the occupation.

The "general public's enjoyment of park facilities" cannot be used as a rationale for enforcing the curfew against the defendants. The reason that the defendants are permitted to use the park in the forbidden hours is that they are engaged in constitutionally protected expression which outweighs the government's interest closing the park from 11 p.m. to 7 a.m. This does not open up the park to non-protected, recreational activity during those hours.

The occupiers were willing to, and did, accommodate competing uses of the park. On the day that the occupation was to begin at Veteran's Park the police held an event called the Footrace for the Fallen. The occupiers willingly deferred to the competing use of the park and postponed their plan to occupy Veteran's Park. Instead they set up their occupation in Victory Park (Transcript, 57) Thus, the defendants were willing to bend to the general public's enjoyment of the park. For the short time that they occupied the park, no group or gathering had a need for a competing use of the park. And, based on the defendants' willingness to work collaboratively with those that did have a competing desire to use the park, it can be assumed that they would have accommodated competing needs in the future. At any rate, the government did not give them a chance to put that to the test.

The viability and maintenance of the park cannot be the reasons that the occupation was suppressed. The occupiers were thoughtful and considerate in their use of the park in order to maintain the park facilities. As was repeatedly stated, the occupiers left the park in better shape than when they found it. They formed a clean-up detail to pick up trash and litter. They did not so much as damage a twig. (Transcript, 58)

The defendants did not negatively affect the public's health, safety and welfare while they were in the park. The occupiers had a safety team that patrolled the park. During the brief time that they occupied the park there were no assaults, thefts or disruptions. (Transcript, 63) There was one noise complaint which was immediately responded to. (Transcript, 63) The occupiers enforced a "no drugs/no alcohol" policy in the park. (Transcript, 60) A logistics team provided anyone who was in need, including homeless people, with tents, clothing and meals (Transcript, 57, 61) There was a medical team that could respond to simple medical emergencies. (Transcript, 55) The public's health, safety and welfare were enhanced while the occupiers were in the park.

The park property was not overused, nor was it left in an unsanitary condition. The occupation utilized less than 20% of the park area. (Transcript, 61) The occupiers tended to hygiene and sanitation by arranging for port-a-potties and for neighbors to allow folks to wash. (Transcript, 58)

In short the defendants anticipated every government interest and dealt with them head on. There was no need to apply the ordinance to the defendants' constitutionally protected activity in order to protect the government's interest in the park.

The defendants acknowledge that under a different set of facts the balance may shift in favor of the state. If, for instance, the defendants were littering the park or were occupying so much of the park that the rest of the community could not have enjoyed it, then the government interests may outweigh the fundamental interest of the defendants in free speech. But, under the present facts, where the defendants had only been in the park for two days, and had been careful stewards of the park, the balance favors the defendants' constitutional expression.

4. Enforcement of the park curfew did not leave ample alternative channels for communication

Why was it important for the "occupy" movement to inhabit a public space for 24 hours a day? By law, the occupiers could have assembled at Veteran's Park every day at 7 a.m. and stayed until 11 p.m. to discuss politics, express their views, and demand redress of their grievances. What they could not do in those hours was to actually establish the kind of egalitarian, transparent democratic government that they aspire for our country. By continuously occupying the park the defendants demonstrated what that government would look like; that it is possible to make decisions in an open, collaborative manner; it is possible for every member of our society to be sheltered, even if only in a rudimentary manner, clothed, and fed; it is possible for every member of our society to have access to medical care.

The best analogy to what the occupiers created is to a theatrical production. It was not a static event; it was not a protest per se. Each General Assembly was a vivid example of transparent, non-hierarchical governing. Each meal served was an enactment of a society that is based on economic equality, compassion and sharing. Each homeless person who was sheltered was a rebuke to the vast inequity of our current economic system and a rejection of the government policies that fostered and promote such wealth disparity.

The occupiers created a new paradigm that required hardship, persistence and commitment. They could only be successful if they were given time and space. The defendants were not living in the park because they had no place else to go. They were sacrificing comfort and convenience to make an important political point. (Transcript, 190) And the public park, the quintessential public forum. was the only place available for them to make it in.

Contrast the peaceful, orderly assembly at issue in this case, with the disruptive situation in State v. Albers. In that case demonstrators were arrested because they would not leave the

public highway. The court stated, "[h]owever laudatory, protests have often created problems for officials and have prompted the development of certain state interests that may be invoked to regulate them. These interests are the prevention of riots, disorder, interference with traffic, blockage of sidewalks or entrances to buildings, and disruption of the normal functions of the public facility." *State v. Albers, 113 N.H. 132, 137-138 (N.H. 1973)*

The trial court found that there were ample alternative channels for communication because no law prohibited the defendants from continuing their activities on the sidewalks that adjoined the park, or on any privately owned property such as parking lots. (NOA, 11) Utilizing that alternative channel for communication would require setting up tents in the park where they don't impede foot or vehicular traffic each morning at 7 a.m. and then taking them down and reassembling them on the adjoining sidewalk at 11 p.m. Not only is that not a viable alternative channel of communication but it also has the potential to subject the defendants to arrest under the criteria enunciated in *Albers* for blockage of the sidewalk or interference with traffic.

The public parks exist for public expression. There are no ample alternative channels for a continuous occupation.

II. Part 1, Article 22 of The New Hampshire Constitution is more protective of civil liberties than the First Amendment

When a law is challenged as violating a provision of the New Hampshire Constitution and that provision is similar to a provision of the United States Constitution, this Court has stated it will "rely on the State Constitution, adverting to federal law 'only as an aid to our analysis.'" *Petition of Hamel, 137 N.H. 488, 490 (1993)(citing State v. Gravel, 135 N.H. 172, 176 (1991)).* Yet, the court has made clear that its responsibility goes beyond determining how the issue would be decided under the federal constitution. In *State v. Ball, 124 N.H. 226 (1983),*

where the issue was the protection against unreasonable searches and seizures afforded by Part I, Article 19 of the state constitution, the Court stated:

> When State constitutional issues have been raised, this court has *a responsibility to make an independent determination of the protections afforded under the New Hampshire Constitution.* If we ignore this duty, we fail to live up to our oath to defend our constitution and we help to destroy the federalism that must be so carefully safeguarded by our people (emphasis added).
>
> * * *
>
> This court has historically viewed the rights of people in light of both the United States Constitution and the Constitution of the State of New Hampshire." ... While the role of the Federal Constitution is to provide the *minimum* level of national protection of fundamental rights, our court has stated that it has the power to interpret the *New Hampshire Constitution as more protective of individual rights than the parallel provisions of the United States Constitution.* ...The Supreme Court has recognized this authority and has stated that its holdings "[do] not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so." (citations omitted)(emphasis added)

124 N.H. at 231-232.

This court has not directly held that the free speech clause in Part 1, Article 22 provides more protection than the First Amendment, but it has suggested it. Before we flesh out that argument, a brief history of the amendment is in order.

1. The free speech of the New Hampshire Constitution was designed to provide more protection to speech than its federal counterpart

The New Hampshire constitution did not contain a free speech clause until the citizens voted to amend it in 1968. The Journal of the 1964 Constitutional Convention sheds little light on why the amendment was proposed that year or why the clause was inserted into Part 1, Article 22. The record indicates only that it was meant to correct a historical omission. But surely that cannot be the entire answer. The history of our amendment demonstrates that our citizens deliberately place higher value on free speech than the federal government. The clause was inserted into a uniquely powerful section of the constitution, one that states that "the liberty of

the press is essential to the security of freedom in a state: It ought, therefore to be inviolably preserved." The constitution points to no other liberty as being *essential to the security of freedom.* Nor does the constitution exhort that any other liberty ought to be *inviolably preserved.* The voters consciously put free speech into that singularly elevated category of liberties.

Because much of the New Hampshire Constitution was taken from the Massachusetts Constitution, this Court has often looked to Massachusetts when interpreting provisions of our own Bill of Rights. *Opinion of the Justices (Tax Plan Referendum), 143 N.H. 429, 437 (N.H. 1999).* Therefore it is instructive to compare the history of the Massachusetts free speech clause with our own.

Like New Hampshire, the original Massachusetts Declaration of Rights did not contain a free speech clause. The clause was added by way of amendment in 1948, twenty years before ours. The Massachusetts amendment was also added to the section of the constitution that dealt with freedom of the press. Article LXXVII was amended to read as follows:

> The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. *The right of free speech shall not be abridged.*

The voters of Massachusetts, unlike those in New Hampshire, did not state that free speech is essential to the security of freedom. The Massachusetts constitution simply restated the exact language of the First Amendment. As an aside, one is left to ponder why the good citizens of Massachusetts bothered to adopt the clause at all since it appears to add nothing to the federal right they already enjoyed.

If our electorate meant for our free speech clause to provide no more protection than its federal counterpart, they had an example of how to accomplish this – just add the single sentence that Massachusetts did. But our electorate soundly rejected this approach. This is an important

distinction and persuasive evidence that the voters of New Hampshire were not content with the federal interpretation of free speech.

2. When a statute threatens a fundamental right such as freedom of speech special judicial scrutiny is required

The trial court found that Part1, Article 22 did not provide broader constitutional rights than its federal counterpart. (NOA, p 15) This finding is wrong. To support its finding the court cited *Bennett v. Thompson, 116 NN.H. 453 (1976).* However, *Bennett* was analyzed and decided under the federal constitution, with only a passing reference to "the constitutional command of the New Hampshire Constitution." The case does not contain a specific cite to Part 1, Article 22.

In the twenty years after the free speech clause was added to Part 1, Article 22 this Court has made passing references to the provision in several cases, but the cases were actually decided under federal principles - there was no independent analysis of the state free speech clause. See, for example, *State v. Albers, 113 N.H.132 (1973)(*whether statute void on its face for vagueness and overbreadth decided under First Amendment); *Dover News v. City of Dover, 117 N.H. 1066(1977)* (ordinance regulating display of adult books analyzed under federal First Amendment law); *State v. Nickerson, 120 N.H. 821 (1980)* (Disorderly conduct statute unconstitutional under First Amendment).

Opinion of the Justices, 128 N.H. 46 (1986) was the first case to base its holding on Part 1, Article 22. The Court held that Part 1, Article 22 prohibits view point discrimination. However, yet again, a federal analysis was applied in reaching its conclusion. The court did not need to decide whether the state constitution provides greater protection than its federal counterpart.

In *State v. Comley, 130 N.H. 688 (1988)* the Court held that the prosecution of the defendant for disorderly conduct when he interrupted the inauguration of Governor Sununu did

not violate Part 1, Article 22. Once again, even though the holding was ostensibly under the state constitution, the Court applied the federal standard, stating:

> The State constitutional right of free speech, N.H. Const. pt. I, arts. 22 & 32, is not absolute, but may be subject to reasonable time, place and manner regulations that are content-neutral, narrowly serve a significant governmental interest, and allow other opportunities for expression. Even where a law regulates conduct generally, without addressing speech in particular, it nonetheless may effect an incidental regulation of speech that, like direct regulation, is constitutionally permissible if it does not exceed the bounds of the limited, content-neutral time, place and manner standard.

Comley, 130 N.H. at 691, (internal citations omitted) The *Comley* decision contains no discussion about whether or not our constitution gives greater protection to speech based on its own unique language, i.e. that it is *essential to freedom of the state*, and ought to be *inviolably preserved.* There is no real independent analysis of our free speech clause, simply a recitation of the federal standard. Importantly, *Comley* does not hold that the protection under Part 1, Article 22 and the First Amendment are co-extensive and that our constitution can never provide greater freedom.

When the Court has analyzed the "free press" provision under Part 1, Article 22, it has found that our constitution provides greater protection than the federal counterpart. *Opinion of Justices, 117 N.H. 386 (1977)* held that the state constitution protects the reporter's privilege even though the First Amendment does not. The greater protection is based entirely on the language of the constitution: "Our constitution quite consciously ties a free press to a free state, for effective self-government cannot succeed unless the people have access to an unimpeded and uncensored flow of reporting." 117 N.H. at 389

Applying the same analysis, our state constitution provides more protection to speech than its federal counterpart because speech is also consciously tied to a free state. In *State v.*

Allard, 148 N.H. 702(2002), this Court held that, under Part 1, Article 22 "when a statute threatens a fundamental right such as freedom of speech *special judicial scrutiny* is required." *Allard at 707(*emphasis provided)

As discussed above, the test for analyzing the restriction of speech in the application of a content neutral regulation under the First Amendment is whether the regulation is narrowly tailored to serve a significant government interest. As this test does not require *special judicial scrutiny*, it is too lenient for Part 1, Article 22.

The phrase "special judicial scrutiny" implies that the government must demonstrate more than a "significant government interest" to restrict speech. In general, when the government is put to a test which involves more than a "significant" interest, the test has involved compelling interests and strict scrutiny. "We apply the strict scrutiny test, in which the government must show a compelling State interest in order for its actions to be valid, when the classification involves a suspect class based on race, creed, color, gender, national origin, or legitimacy, *or affects a fundamental right.*" *In re Hamel, 137 N.H. 488, 490-491 (N.H. 1993)*(emphasis provided). Accord, *Appeal of City of Portsmouth, Bd. of Fire Comm'rs, 140 N.H. 435 (N.H. 1995)*(citing Part 1, Article 22 and stating that the freedom to communicate one's views to requires the highest level of protection that can be provided).

The city may have had significant interests in protecting the park, but none of those interests were so compelling that the city could enforce its curfew ordinance to the detriment of the fundamental right to speech.

3. Part 1 Article 22 must be read in the context of the entire constitution

The several articles of the constitution cannot be read in isolation. They must be read in the context of the entire document. *Opinion of the Justices, 111 N.H. 175, 177, 278 A.2d 475 (1971)*

Any analysis under the state constitution must begin with the language of the document itself and with an understanding of the ways in which our constitution is unique. *State v. DeCato, 156 N.H. 570, 574 (N.H. 2007)* (Moreover, our State is one of only a handful of States with a constitutional provision that explicitly protects the public's right of access to governmental proceedings and documents.)

The Bill of Rights of the New Hampshire constitution is a document that is radically different than the federal bill of rights. In general, the federal bill of rights serves to limit the actions of government, i.e. Congress shall make no law respecting an establishment of religion...or abridging free speech. It expresses the unremarkable notion that government needs to be restrained but doesn't express any sentiment one way or another about the nature of the government. In stark contrast, the New Hampshire constitution is not neutral towards government. It posits a distrusting view of government, that government has a natural tendency towards corruption and abuse, and that the citizens have not just a right, but an affirmative duty to preserve their liberties. NH Const. Part 1, Article 10

The NH Constitution unequivocally and unabashedly promotes the ideals of individual freedom and evinces a deep seated distrust and skepticism about the corrupting influence of governmental power. The very first article of the Constitution asserts that "all government of right originates from the people". NH Const. pt 1 art. 1. The document recognizes and extols the Rights of Conscience. NH Const. pt 1 art 4. Our constitution reiterates in Part 1, Article 8 that all

power resides in and is derived from the people and demands that government be open and transparent. The drafters of the constitution, who had just deposed a royally appointed governor, worried that a ruling class would evolve and therefore specifically stated that no governmental position could be inherited. Part 1, Article 9. Part 1, Article 10 emphasizes that government was not instituted for the private interest or emolument of any one man, family, or class of men.

In addition to enumerating the rights of the people, the NH Constitution also expressly articulates that these rights are fragile and will be undermined unless the people are vigilant. Thus the NH Constitution declares that the people have not only a right, but an affirmative duty to preserve their freedoms. This duty is most eloquently expressed in Part 1, Article 38 and Part 1, Article10.

Part 1, Article 38 states that the people have "a right to require of their lawgivers and magistrates, an exact and constant observance of [fundamental principles], in the formation and execution of the laws necessary for the good administration of government". Part 1, Article 10 is even clearer. It serves as an exhortation to action to "whenever the ends of government are perverted".

Much of New Hampshire's Bill of Rights was derived from the Massachusetts Declaration of Rights. Susan Marshall, *The New Hampshire State Constitution (2004)* p. 11. But it is significant that in most instances where the language in our state constitution diverges from that of Massachusetts, our constitution is much stronger in support of individual rights. For instance the Massachusetts Declaration of Rights states that liberty of the press ought not to be restrained or freedom of speech abridged. In contrast, our constitution states that freedom of the press and speech should be *inviolably preserved.* Webster's New World Dictionary of the American Language defines "restrain" as "to hold back from action" and "abridge" as "to

reduce in scope"; while to "preserve" means "to keep from harm, damage, danger, evil...to protect and save". The work "inviolable" implies "sacred". New Hampshire could not have expressed its commitment to and esteem for free speech in a more powerful way.

4. The duty to reform a perverted government bolsters the argument that the state constitution is more protective of speech than the First Amendment

The defendants argue that this Court should consider the entire Bill of Rights, including Part 1, Article 10 in deciding whether the city violated their right to expression by enforcement of the curfew ordinance. Part 1, Article 10 reads:

> Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right *ought* to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.

This is an extraordinary statement. It means that a citizen is not only entitled to protest against government policy, but has a duty to reform the government under certain circumstances. There is a three part test to determine if an action is protected by Part 1, Article 10. First, the ends of government are perverted; second, the public is manifestly endangered, and three, all other means of redress are ineffectual.

In general an individual's right to speech is not dependent on whether the views they espouse are correct. The right to free speech includes the right to false or untrue speech. But Part 1, Article 10 does imply that there must at the very least be a good faith basis to believe that the three criteria exist. Professor James Pope of Rutgers law school testified with respect to these criteria. In very broad strokes, Professor Pope testified that the ends of government have been

perverted because there is an elite class of individuals who are directly and substantially benefitting from government policies at the expense of the vast majority; these policies threaten the public liberty because they disempower the majority of citizens; and all other means of redress are ineffectual because of the corrupting influence of money on the electoral process. (T, 137-181)

Part 1, Article 22 should be read in conjunction with Part 1, Article 10. The duty to reform a perverted government is hollow indeed unless the rights of free speech and assembly are given robust protection.

CONCLUSION

For the reasons stated above the Appellants requests that this Honorable Court reverse the convictions.

REQUEST FOR ORAL ARGUMENT

The Appellants requests fifteen minutes of oral argument.

A copy of the decision below is appended

Respectfully submitted,

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By and through their attorney,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2013, two true and complete copies of the foregoing Brief were hand delivered to the Attorney General's Office.

Barbara Keshen

Barbara R. Keshen