OCCUPY TRENTON (an unincorporated organization) and ALEXANDER HIGGINS, Plaintiffs, v. RAYMOND L. ZAWACKI (in his official capacity as Deputy Commissioner for Veterans Affairs in the Department of Military and Veterans Affairs), COL. RICK FUENTES (in his official capacity as the Director of the New Jersey State Police), JOHN DOES 1-11 (in their official capacities), DEPARTMENT OF MILITARY AND VETERANS AFFAIRS, and NEW JERSEY STATE POLICE, Defendants.	)	SUPERIOR COURT OF NEW JERSEY MERCER COUNTY CHANCERY DIVISION Docket No. CIVIL ACTION

BRIEF IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINTS

Bennet D. Zurofsky
Attorney at Law
17 Academy Street, Suite 1010
Newark, NJ 07102
973-642-0885
bzurofsky@zurofskylaw.com

David Perry Davis
Attorney at Law
112 West Franklin Avenue
Pennington, NJ 08534
609-737-2222

Edward Barocas, Esq.
Jeanne LoCicero, Esq.
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY
P.O. Box 32159
89 Market Street, 7th Floor
Newark, NJ 07101
(973) 642-2084

Attorneys for Plaintiffs

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PRELIMINARY STATEMENT

Defendants have created by mere fiat - without authority and without following required procedures – *ad hoc* restrictions on use of a public forum, namely Veterans Park opposite the State House in Trenton. They have imposed those restrictions on Plaintiffs despite having never imposed those restrictions on persons in the past. And they have relied on those invalid restrictions to seize Plaintiffs' property, including political signs, media equipment, computers, food, rain gear, and other items. Plaintiffs have now sued to enjoin the enforcement of those invalid policies in violation of their constitutional rights to speech, due process, freedom of the press and freedom of assembly.

STATEMENT OF FACTS

Plaintiffs -- Occupy Trenton and freelance journalist Alexander Higgins -- have, since October 6, 2011, used Veterans Park as the forum for their expressive activities. Occupy Trenton is an outgrowth of the "Occupy Wall Street" movement. The Occupy Trenton movement seeks to bring attention to the imbalance in our financial system and to ensure that politicians are as concerned about and responsive to citizens of our country without means or with moderate means as they are to those with the most. *Verified Complaint*, para. 13.

Veterans Park is located on State Street in Trenton, directly across the street from the Statehouse, making it the most appropriate and effective public forum at which Occupy Trenton can convey its message. *Id.*, para. 14. Veterans Park is open to all persons at all times and, like other parks, has been and is a quintessential public forum. *Id.*, para. 15. Upon information and belief, there are no permit requirements for the use

of the park, nor are there any regulations or restrictions that have been promulgated pertaining to use of the park. *Id.*, para. 16. The park does not close, but is available 24 hours a day for use or to just pass through. *Id.* Because no regulations exist, persons using the park must simply comport generally with any applicable statutes or ordinances (such as prohibiting destruction of property, city noise ordinances, obstruction ordinances, etc.) that may exist.

While the park has existed for many years, it was dedicated in 2008 as the site of a World War II Memorial. As part of that memorial, in the front half of the park abutting State Street, there is a rotunda with a statue of Lady Victory in the center. Surrounding the Lady Victory statue is open pedestrian space, which is in turn surrounded by large amphitheater stepped-seating. Outside of the stepped-seating is more open pedestrian space, on the outsides of which are ledges. Further in from the ledges are plaques and story walls. On the back half of the park (abutting Capital Street) are more pedestrian walkways, along with seating areas, bushes and sculptures. *Id.*, para. 17. Pictures of the park are attached to the Verified Complaint as Exhibit 1.

Other organizations have used Veterans Park for speech purposes, including a demonstration by a group known as NJ-CAN on August 8, 2011. NJ-CAN sought a permit approximately a week in advance at the State Police office in the State House and advised the police that they intended to set up at least one table to distribute literature, a microphone with an amplifier and to also erect a temporary canopy if there was inclement weather. The State Police initially responded that they did not believe the State of New Jersey controlled the park and that they knew of no permitting requirements or other restrictions on its use. NJ-CAN was eventually informed by the State that there was no

permit requirement, no restrictions on erecting tables or a canopy, and no rules or regulations governing the use of the Veterans Park with the exception that NJ-CAN "clean up after" and "show respect". *Id.*, para. 19.

NJ-CAN held its demonstration on August 8, 2011, at which time it set up a table for the distribution of literature and spread signs all around Veterans Park, many of which were not held by or even close to any of the demonstrators. With the exception of a brief initial inquiry when NJ-CAN first set up, the State Police did not interfere with its activities in any way. Indeed, no one from the State Police or any other State agency made inquiry as to what the demonstrators were doing, how long they intended to stay, or anything else. *Id.*, para. 20.

Since October 6, 2011, Occupy Trenton has had a continuous presence at the park. Occupy Trenton participants were not normally sleeping at the park but, rather, maintained a continuous around-the-clock presence by rotating in participants. At any one time, there has been as few as one participant or as many as 20 participants. Occupy Trenton participants have mainly located themselves and their property right near the rotunda, on a seating section of the stepped-seating, or at a section of one of the ledges. Participants positioned themselves and their property so as not to obstruct other pedestrians' usage of or passage through the park. Signs, when not being used by protestors who were conveying their message to passing pedestrians and motorists, were kept in a pile in the rotunda behind the statue, so as to be available for use to additional participants and supporters who showed up. *Id.*, para. 21.

Part of the method and message of Plaintiff is to have a continuous around-the-clock, seven-days-per-week presence until the problems concerning the economic and

political systems' failure to adequately address the needs and interests of "the 99%" who do not control the majority of wealth are responded to. *Id.*, para. 22. As such, the ability to "live-stream" their presence, and to give 24-hour commentary and proof of their activities, is an essential part of Plaintiffs' speech.

Further, part of the message being conveyed by Occupy Trenton is that there is strength in the uniting and coming together of all of "the 99%" of persons who do not control the majority of the wealth in the country. As such, the "Occupy" participants seek to connect to and associate with other "Occupy" participants around the country and around the globe. Again, they do so through "live-streaming" their activities on the Internet and engaging in running commentaries and "live chats" on the Internet. *Id.*, para. 23. Therefore, the computerized, Internet-based live-streaming conveyance of their activities is as important, or more important, to Plaintiffs than the conveyance of their message to Trenton's pedestrians or motorists via the holding of signs.

Plaintiff Alexander Higgins is a freelance journalist. He both participates in and, at the same time, reports on Occupy Trenton's speech activities through live web-stream video commentary, live on-the-scene chat, and blogging. *Id.*, para. 24. The use of his computer and video equipment was therefore essential to conveying his message. Other Occupy Trenton participants also brought computers and video equipment and engaged in live chats and provided streaming video of Occupy Trenton's activities. *Id.*, para. 25.

Some Occupy Trenton participants brought with them coolers of food, drinks or small medical supplies for use if needed during their speech activities. They also brought political signs. A few had small non-obstructive pup-tents. They brought tarps to cover items for when it began raining. A few brought small collapsible chairs to sit in or small

single-person tables upon which to place their computer to engage in real-time live chat from the "occupation" site. Again, given the size of the park and of the pedestrian walkways, none of the activities engaged in by Occupy Trenton, even at their peak of participation, obstructed the use of the park by other persons. *Id.*, para. 26.

To power their media equipment, participants utilized the electrical outlets that were in the park. There were no signs or regulations that prohibited public use of these outlets. However, at some point prior to October 13, 2011,, Defendants turned off electricity to all of the outlets. At that point, for continued use of their media equipment, Plaintiffs utilized a small, bookbag-sized, non-obstructive, self-contained generator. *Id.*, para. 27. Currently, Plaintiffs do not keep the generator on state property but, rather, keep it on the city sidewalk, without objection from the City of Trenton. *Id.*, para. 40.

On Wednesday, October 12, 2011, it began to rain. Plaintiffs set up a covering to protect their media equipment and other property. They were informed by Defendants that the covering was a sign of "permanence" and that all "signs of permanence" had to be taken down. Plaintiffs did not want to remove the covering, but did so. *Id.*, para. 28.

Prior to Friday, October 14, 2011, State Police officers read Plaintiffs a letter from Department of Military and Veterans Affairs' Deputy Commissioner Raymond L. Zawacki. The letter set forth never-before-existing restrictions on the use of the park. Plaintiffs were told that they had to, before noon Friday, remove their coolers, equipment, generator, and any signs of camping or even of "picnicking." They were also informed that anything (including signs, media equipment and obvious personal property) that was "unattended" would be considered "trash" and would be removed. Plaintiffs asked for a copy of the letter but they were refused. *Id.*, para. 29.

Plaintiffs are not aware of any statute or Executive Order or other authority that grants the Department of Military and Veterans Affairs authority to regulate, or in any way control, the park at issue. Even the World War II Memorial Commission (which was established as "in, but not of" the Department) was not granted such authority but, rather, was only granted authority to raise money for and provide recommendations regarding the creation of a World War II memorial. *See* Executive Order 107 of 2004; Executive Order 45 of 2006; *N.J.S.A.* 38A:3-2.4 and -2.5. Therefore, it appears that Defendants Zawacki and the Department of Military and Veterans Affair have no authority to establish regulations on use of the park, even if such regulations are properly promulgated under the Administrative Procedures Act (which they were not).

Prior to noon on Friday, October 14, 2011, Plaintiffs cleared certain items away. However, since they were never provided with written rules that they could identify as having the force of law, Plaintiffs did not comply with the invalid mandate to remove "picnicking" and other items. *Verified Complaint*, para. 31.

On Friday, October 14, 2011, just after noon, members of the State Police were present as Defendant JOHN DOES (who did not identify themselves to Plaintiffs) came on to the park and seized Plaintiffs' property over Plaintiffs' objection. Included among the items taken were political signs, Plaintiff Higgins' computer, another Occupy Trenton participant's computer, other media equipment, tripods, backpacks, umbrellas, rain gear, and additional property. *Id.*, para. 32.

At one point, one of the unidentified individuals began to take away Plaintiffs' political signs, whereupon a State Police officer stated the signs should not be taken. The unidentified individual who was taking the signs threw three or four of the signs on the

ground while still seizing and carrying away all of the rest of Plaintiffs' political signs. The individual then brought back more, but not all, of the signs. *Id.*, para. 33.

During the seizure of their items, Plaintiffs were present and were questioning why and how their property could be taken. It was therefore clear that the items being seized were not abandoned items but were the property of Plaintiffs. Indeed, as Plaintiffs were in the park during the time of the seizure, they were never more than 20 or 30 feet away from their property, which was constantly under their visual supervision. An accurate video of a portion of the seizure of Plaintiffs' property can be found at: http://blog.alexanderhiggins.com/2011/10/14/police-confiscate-occupy-trenton-protest-signs-media-gear-occupywallstreet-77361/ *Id.*, para. 34.

All of Plaintiffs' seized items were placed into a truck and were driven away. The property was placed into the possession of the State Police. *Id.*, para. 35. Plaintiffs were informed that they would have to go to the State Police office located in the State House to arrange to retrieve their items and that they would need to obtain their own truck to carry their items away (and that the retrieval could not occur over the weekend). *Id.*, para. 36. Plaintiffs have been unable to date to obtain and arrange for trucks to retrieve their items. *Id.*, para. 37.

On Monday, October 17, 2011, Plaintiffs' counsel was provided with the letter from Defendant Zawacki that created the invalid *ad hoc* rules that were imposed upon Plaintiffs (see Exhibit 2 to the Verified Complaint) and pursuant to which Plaintiffs' property was seized. The letter was dated October 13, 2011, i.e., the date it was read to Plaintiffs.

The prohibitions and restrictions contained in the October 13, 2011, Zawacki letter were not rules that were in existence prior to Occupy Trenton's use of the park. Further, the rules were created and implemented by Defendant Zawacki by mere fiat rather than by following required process.

The Zawacki letter sets forth that any "unattended" items, "camping" items, "picnicking" items, and "tables, furnishings, coolers and boxes" are prohibited. The letter does not define the terms "unattended," "camping [items]," "picnicking items," or "furnishings."[1] None of these prohibitions or restrictions on use of the park were passed pursuant to the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq.; nor were any of the prohibitions or restrictions adopted via ordinance, statute or other proper process;

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[1] The letter in full stated:

To Whom It May Concern:

The property that you are on is State property under the management of the Department of Military and Veteran Affairs, known as DMAVA.

You are more than welcomed to stay on this site and exercise your First Amendment rights of expression. However, in order to protect you, the public, the accessibility of this memorial to all members of the general public, and to maintain the safety, condition, and esthetic value of this site, DMAVA requires that you comply with the following rules:

1. You may bring your personal property with you so long as you attend to that property. All unattended items will be considered trash and must be removed.
2. You are not permitted to use this site as a campground. You therefore must remove all tables, furnishings, coolers, and boxes. Other camping or picnicking items are also prohibited.
3. You may not affix or attach anything to the walls of the Monument.
4. You may not erect structures of any type.
5. You may use signs, flags, and other symbols in the exercise of your First Amendment rights. However, all such items must be attended. All unattended items will be considered trash and must be removed.
6. You may not use the electricity available on this site. We have previously advised you not to use the electricity on the site and we advise you again not to use the electricity.
7. You may not operate a generator on this site.

Sincerely,

Raymond L. Zawacki
Deputy Commissioner for Veteran Affairs
New Jersey Department of Military and Veteran Affairs

nor did they correspond to any other prohibitions or restrictions that were validly adopted.

On Friday, October 21, 2011, Plaintiff Higgins was again threatened with confiscation of property if "camping" and "picnicking" items, including coolers of food or drink, were not removed by Monday, October 24, 2011. Occupy Trenton was also asked to remove its small backpack-sized generator (which Plaintiffs have been keeping on City property without objection) and gas for the generator (which Plaintiffs do not object to also keeping on City property rather than in the park). *Verified Complaint*, para. 40.

Plaintiffs continue to use the park for their free speech activities, although they are being irreparably harmed (including in the conveyance of their message and in the deprivation of the use and possession of their property) by the restrictions placed upon them. Plaintiffs seek to continue to engage in free speech activities (and to generally enjoy the use of the park) now and in the future. They wish to do so without being subjected to the irreparable harm arising from the invalid, unlawful prohibitions, restrictions and confiscations imposed upon them by Defendants.

ARGUMENT

I. PLAINTIFFS EASILY MEET THE STANDARDS FOR GRANTING TEMPORARY RESTRAINTS.

To be entitled to interim relief pursuant to Rule 4:52-1, a party must show (a) that the restraint is necessary to prevent irreparable harm, *i.e.*, that the injury suffered cannot be adequately addressed by money damages, which may be inadequate because of the nature of the right affected; (b) that the party seeking the injunction has a likelihood of

success on the merits; (c) that the relative hardship favors the party seeking the restraint; and (d) that the restraint does not alter the *status quo ante*. *Crowe v. DeGoia*, 90 NJ 126, 132-136 (1982). *Id.* Plaintiffs satisfy these requirements.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR CLAIMS AS DEFENDANTS' IMPOSITIONS OF *AD HOC* RESTRICTIONS UPON PLAINTIFFS' USE OF A PUBLIC FORUM VIOLATES THEIR CONSTITUTIONAL RIGHTS

A. Plaintiffs are likely to succeed on their claim that Defendants have violated (and continue to violate) Plaintiffs' right to due process by imposing ad hoc and invalid restrictions on Plaintiffs' use of a public forum and by seizing Plaintiffs' property pursuant to those invalid restrictions.

1. Promulgation of the Zawacki letter violated the basic requirements of Due Process and of Article 5, Section 4, Paragraph 6 of the New Jersey Constitution.

Deputy Commissioner Zawacki and the Department of Military and Veterans Affairs are not free to create rules governing the use of Veterans Park by fiat. Article 5, Section 4, Paragraph 6 of the New Jersey Constitution explicitly states: "No rule or regulation made by any department, officer, agency or authority of this state . . . shall take effect until it is filed either with the Secretary of State or in such other manner as may be provided by law." The Legislature implemented this requirement through the enactment of the Administrative Procedures Act, N.J.S.A. 52:14B-1 *et seq*., thereby setting the requirements of Due Process for administrative rulemaking.

As is more fully briefed in the following subsections of this brief, rules of the sort contained in the Zawacki letter , "can be promulgated only on notice and in compliance with *N.J.S.A.* 52:14B-4 [i.e., the Administrative Procedures Act]." *Woodland Private Study Group v. State of New Jersey*, 109 N.J. 62, 65 (1987). The Zawacki letter plainly was not issued in accordance with these requirements. Rather, the rules contained therein

seem to have been created out of whole cloth by a single individual acting without any claim to direct statutory authority or semblance of process and in direct reaction to the Free Speech activities of Occupy Trenton.

Before Occupy Trenton began its demonstration in Veterans Park, there were no rules. However, soon after Deputy Commissioner Zawacki learned of Occupy Trenton's demonstration, public access to electric power was cut off and the letter decreeing new restrictions suddenly appeared. It has been long established that the New Jersey government cannot act in such a manner. As Chief Justice John Marshall memorably held, it is the "very essence of civil liberty" that our Nation is "a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 163 (1803). As the United States Supreme Court held in *Hurtado v. California*, 110 U.S. 516, 535-36 (1884):

> Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. . . . The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.

Here, Deputy Commissioner Zawacki transcended the limits of his lawful authority and issued a personal decree in violation of the most basic requirements of due

process. Defendants then seized Plaintiffs' property pursuant to Defendant Zawacki's decree, again in violation of Plaintiffs' right to due process of law. Accordingly, continued enforcement of the Zawacki letter must be enjoined.

2. The Zawacki letter does not create valid enforceable regulations.

Defendants may claim that the Zawacki letter (which was read to Occupy Trenton participants but which Defendants originally refused to provide to them) establishes regulations pursuant to which Plaintiffs' items could be seized and to which Plaintiffs (and the entire public) should continue to be bound. Such a position is unsupportable, as any rules or regulations contained in the Zawacki letter are patently invalid and unenforceable.

First, Defendant Zawacki's *ad hoc* restrictions were decreed by mere fiat rather than promulgated and adopted pursuant to the process our State requires. In short, they are invalid as Defendant failed to comply with the mandatory requirements of the Administrative Procedures Act. Further, it does not appear that Defendants Zawacki and the Department of Military and Veterans Affairs even have authority to create such regulations, regardless of whether proper process is adhered to or not. Research could not locate any statutory authorization for their promulgation of such regulations. Finally, even if Defendants have authority to create regulations for the use of Veterans Park and properly adopt them, the Zawacki regulations still do not pass constitutional muster, as they are vague and overly broad.

a. The *ad hoc* restrictions contained in the Zawicki letter are not enforceable as they were not passed pursuant to the Administrative Procedures Act, as would be required.

Rules of "general applicability," such as the ones decreed through the Zawacki letter, "can be promulgated only on notice and in compliance with *N.J.S.A.* 52:14B-4 [i.e., the Administrative Procedures Act]." *Woodland Private Study Group*, 109 N.J. at 65. Indeed, "whenever the authority of an agency to act without conforming to the formal rulemaking requirements is questioned" as it is here, the court must assess whether the agency action constituted "rulemaking" and thus falls under the APA. *Doe v. Poritz*, 142 N.J. 1, 97 (1995). If it does, and if the agency failed to follow the strict requirements of the APA, the action is invalid and unenforceable. *Woodland Private Study Group*, 109 N.J. at 66.

The restrictions and prohibitions on the use of a public forum that were contained in the Zawacki letter clearly meet the definition of "rulemaking" and thus are invalid unless and until promulgated and passed pursuant to the APA.

In *Metromedia v. Division of Taxation*, 97 N.J. 313 (1984), the New Jersey Supreme Court set forth six factors to consider in determining whether agency action constitute rulemaking which must conform to the APA. *Id.* at 331-32. "All six of the *Metromedia* factors need not be present to characterize agency action as rulemaking...." *In re Solid Waste Ulit. Customer Lists*, 106 N.J. 508, 518 (1987). The six factors the court must consider are whether the agency action:

> (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and

> significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

Metromedia, 97 N.J. at 331-32.

In the present case, all six factors undoubtedly establish that the rules created by Defendant Zawacki constituted rulemaking.

As to the first two *Metromedia* factors, there can be no doubt that the Zawacki letter sets forth rules that are "intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group" and are "intended to be applied generally and uniformly to all similarly situated persons." The letter is facially written to set forth rules of general applicability. Indeed, were the rules only meant to apply to a "select group" (in other words, only Occupy Trenton) and not to other persons using the park for free speech or other activities, then the letter would establish restrictions based upon the identity of the speakers and the content of their speech – amounting to an obvious and gross violation of Plaintiffs' fundamental constitutional rights. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2663 (2011).

It is further clear that the rules contained in the Zawacki letter are "designed to operate...prospectively." The letter can have no retroactive application to persons who previously used the park, nor does it claim to have such application. Thus, the third factor also favors a finding of agency action

There appears to be no statutory authority pertaining to the right to set forth regulations on the park's use, whether by Defendants or others. Irrespective of that fact, despite repeated requests by Plaintiffs and their counsel, Defendants have been unable to

provide any preexisting rules regulating use of Veterans Park. As such, regarding the fourth *Metromedia* factor, the rules governing use of Veterans Park that were decreed in the Zawacki letter are not "otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization."

As the rules contained in the Zawacki letter did not previously exist, (not even in practice, *see Verified Complaint*, paragraphs 18-20), the fifth factor also favors a finding of requiring adherence to the APA. Indeed, the Zawacki letter creates policy that was both "not previously expressed in any official and explicit agency determination, adjudication or rule" and "constitutes a material and significant change from a clear, past agency position on the identical subject matter." *See id.*

Finally, a decision on whether to restrict (and how to restrict) public use of a park "reflects a decision on administrative regulatory policy in the nature of the interpretation of...general policy" and, thus, the sixth factors favors a finding of agency rulemaking as well.

All of the *Metromedia* factors therefore favor a finding that the rules regarding the public's use of Veteran's Park that were decreed by the Zawacki letter constituted "agency rulemaking" that required conformity with the APA.

As can be seen in the administrative code, agencies have always recognized that rules regulating the public use of parks must be adopted pursuant to the APA. *See,* most notably, *N.J.A.C.* 7:2-2.11 (setting forth code of conduct for use of state parks), *N.J.A.C.* 7:2-2.22 (prohibiting certain recreational activities in state parks) and *N.J.A.C.* 7:2-1.2 ("This chapter shall constitute the rules of the State Park Service and shall govern the use of all State parks, forests, recreation areas, historic sites, natural areas, marinas, golf

courses, botanical gardens, and other lands, waters and facilities under the jurisdiction of the Department of Environmental Protection and assigned to the State Park Service in the Division of Parks and Forestry"). *See also, e.g., N.J.A.C.* 7:2-2.5 (prohibiting commercial use of parks except in limited circumstances); *N.J.A.C.* 7:2-2.6 (precluding possession of alcohol in state parks); *N.J.A.C.* 7:2-2.20 (regulating use of swimming areas); *N.J.A.C.* 7:2-2.24 (restricting skiing, sledding and other winter activities in certain park areas); *N.J.A.C.* 7:2-2.25 (regulating use of bicycles, skateboards and roller skates); *N.J.A.C.* 7:2-3.5 (regulating use of snowmobiles, including specific regulations regarding Lake Hopatcong); *N.J.A.C.* 7:5-4 (permitting camping in state parks except on beaches, and setting forth limitation on type of tents used); 7:2-5.5 (setting forth which state lakes jet skiing is permitted on without permit and which lakes require a permit); *N.J.A.C.* 7:6-1 (regulating camping); *N.J.A.C.* 7:2-9.1 to -9.7 (regulating groups of 20 or more including for picnicking); *N.J.A.C.* 7:5D-8.1 (setting forth separate permitted uses for each designated state trail). The prohibitions on park use decreed by Defendant Zawacki are no different.

Through the Zawacki letter, Defendant sought to engage in agency rulemaking without conforming to the requirements of the APA. As such, the *ad hoc* rules imposed by Defendant Zawacki are invalid. The seizure of Plaintiffs' property pursuant to those invalid rules was therefore also improper.

b. Defendants Zawacki and the Department of Military and Veterans Affairs do not have the authority to create regulations for use of Veterans Park.

Plaintiffs have been unable to identify any statute, executive order, or other authority that grants control or rule-making authority. Although the Legislature

established a World War II Memorial Commission, the Commission's authority only extended to raising money for an intended memorial and providing advice on locations and design. *N.J.S.A.* 38A:3-2.4 (creating WWII Veterans' Memorial Fund); *N.J.S.A.* 38A:3-2.5 (Adjutant General to solicit and accept donations); Executive Order 107 (Gov. McGreevey); Executive Order 45 (Gov. Corzine). Further, the Commission was in "but not of" the Department of Military and Veterans Affairs. Executive Order 107; Executive Order 45. Any rule "exceeding the agency's grant of authority from the Legislature is considered ultra vires" and, thus, unenforceable. *Gonzalez v. New Jersey Property Liability Ins. Guar. Ass'n.*, 412 N.J.Super. 406, 41 (App. Div. 2010). That is the case here.

c. Even if the restrictions contained in the Zawicki letter were properly passed and pursuant to statutory authority, the regulations are fatally vague and overly-broad.

i. Confiscation of "unattended" items

In addition to being unenforceable, the rule concerning confiscation of "unattended" items, even if properly passed, would be fatally vague and overly broad. The *ad hoc* "rule" the State created does not require that the items be legally "abandoned" before being seized. *See, e.g., Poulathas v. Atlantic City Zoning Bd. of Adjustment*, 282 N.J.Super. 310 (App. Div. 1995) ("abandonment" requires a factual showing of the owner's actual *intent* to abandon). Indeed, none of the seized items would meet the definition of abandonment. *Id.* Rather, the State has simply decided to seize items that are "unattended"; and it has failed to provide a written definition of that term.

"It is established that a law fails to meet the requirements of the Due Process Clause if the language is so vague and standardless that it leaves the public uncertain as

to the conduct it prohibits...." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Further, an ordinance must "establish minimal guidelines to govern law enforcement. " *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Although the State's definition of the term "unattended" is unwritten, and thus vague and unclear, the State is apparently taking the position that anything not continually within arm's reach is "unattended" and therefore "abandoned" or "garbage." Indeed, all of the items seized by Defendants (1) were at all times within 20 or 30 feet of an Occupy Trenton participant, (2) were well within view of, and thus under constant visual supervision of, an Occupy Trenton participant, and (3) were known by the Defendants to be claimed by the Plaintiffs, who were on site and present when their items were seized.

Under Defendant's *ad hoc* rule and definition, a person who rides a bicycle to the park will be subject to having that bicycle confiscated if the individual leaves the bicycle near the entrance to take a walk around the park or to eat lunch on the stadium seating. A person who puts down her political sign to greet an arriving friend will be subject to having her sign confiscated. A person who leaves her lunch on one of the stadium's seats to go a short distance away to have a conversation with a co-worker will have "abandoned" her lunch. And a member of the media who sets up a stationary camera to capture an event happening in the park or outside the Statehouse across the street will be subject to having his camera confiscated if he walks more than an arm's length away. Further, as is clear from the seizure of Plaintiffs' property, the fact that the Defendants know who the owners of the items are or the fact that the individuals come back into

immediate proximity of their items will not save their bicycles or signs or cameras from seizure.[2]

Not only have Defendants failed to define the term in writing, and not only is their chosen implementation of that phrase unduly harsh and irrational, it also conflicts with other agencies' definition of the term. *See, e.g., N.J.A.C.* 7:25-6.2 (Department of Environmental Protection regulation setting forth: "'Unattended' means user not available for questioning by officer at the time of inspection"); *N.J.A.C.* 7:25-18.5 (marine fisheries regulation defining "unattended" as "that set of circumstances where the operator is more than 1/2 nautical mile (3,040 feet) from the nearest portion of his net"); *N.J.A.C.* 7:30-1.2 (in pesticide control regulations, "'unattended' means a situation wherein the person or a knowledgeable employee of the person...either is not present at the storage site or is present but is so located that he cannot immediately detect and respond if any unauthorized second party enters the storage site").

Defendants' policy regarding "unattended" items would thus be constitutionally suspect under due process principles even if such a rule was properly adopted and a clearly-identified written definition of "unattended" was created.

ii. "Picknicking" items

Defendant Zawacki's decree that "picnicking items" are prohibited is likewise vague and irrational. First, the entire design of the park encourages people to come to sit and eat and relax – the very essence of "picnicking." It has large stepped-seating on one half of the park, and has benches amongst bushes and monuments on the other half. It would be fundamentally *inconsistent* with the nature of the park to impose a ban on

[2] Indeed, if Defendants did *not* seize those items and choose only to seize Plaintiffs' items, then the arbitrary, discretionary and selective enforcement of the "unattended items" policy would likewise make it unconstitutional.

groups of people congregating on the seating areas or benches with food, drinks or other "picnicking item." Further, once again, no definition of "picnicking" is provided, leading to discretionary enforcement, as plaintiffs have been subjected to.[3]

iii. "Camping" items

A prohibition on "camping" could be constitutional if passed pursuant to proper process, which did not occur here. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 292 (1984). However, here, Defendants in practice have taken the position not only of prohibiting camping, but anything that appears to create an intent to have a continuous 24-hour per day presence. There is a fundamental difference between "camping" (i.e., sleeping overnight with use of sleeping bags or tents) and creating and maintaining a continuous presence at a location (especially when done by use of rotating in individuals rather than one or more persons staying at a site without leaving for days on end). Indeed, the prohibition on "camping" in *Clark v. Community for Creative Non-Violence* was defined as follows: "activities constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation." Thus, the use of tents or sleeping bags can be prohibited. However, while the mere use of computers, media equipment, coolers, small personal computer tables, collapsible chairs, and rain gear may assist in creating a continuous presence, those actions (especially when individual participants are not staying for days on end but, rather, create the continuous presence by

[3] While the Department of Environmental Protection's State Park Service Code also does not define "picnicking," it at least does not place any restrictions on picnicking except for groups of 20 or more. *N.J.A.C.* 7:2-9.7.

rotating with other participants) are fundamentally different from creating "living accommodations."

B. Plaintiffs are likely to succeed on their claim that Defendants violated (and continue to violate) their right to free speech, freedom of assembly and freedom of the press.

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Hague v. C.I.O.*, 307 U.S. 496, 515-516 (opinion of Mr. Justice Roberts, joined by Mr. Justice Black). Occupy Trenton is engaging in an exercise of these ancient rights that the State is not free to restrain by *ad hoc* promulgation of rules of conduct and the warrantless seizure of the political signs, communication equipment, and other personal property that the demonstrators are employing in their assembly to communicate with their fellow citizens in the discussion of public questions. Article 1, Paragraph 6, *N.J. Constitution.*

The Zawacki letter is a clear violation of these basic rights of speech and assembly, as it was promulgated *ultra vires*, in direct response to Occupy Trenton. "[W]hen the use of its public streets and sidewalks is involved . . . a [government] may not empower its . . . officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or

'morals' of the community." *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 153 (1969).

As has been demonstrated in the previous portions of this brief, the Zawacki letter was promulgated without even a pretext of compliance with the requirements of the Administrative Procedure Act. "It is settled by a long line of . . . decisions . . . that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958). Deputy Commissioner Zawacki engaged in just such an exercise of his "uncontrolled will" when he unilaterally established new rules on use of Veterans Park in reaction to the Occupy Trenton demonstration. Similarly, the defendants exercised "uncontrolled will" when they turned off the electric power that had previously been available to the public in Veterans Park in reaction to Occupy Trenton's use of that power for computers and communication equipment. The Zawacki letter then compounded this hindrance of the demonstrators' communication by purporting to ban the use of the demonstrators' own generator in Veterans Park.

The State may take the position that Plaintiffs' rights are not violated as they are permitted to hold signs. However, that minimal allowance is insufficient. Without establishing that a restriction serves a "substantial" government interest and that the restriction is "narrowly tailored" to that interest, the government cannot take it upon itself to restrict the manner of Plaintiffs' expressive activities. *Clark*, 468 U.S. at 293. Here, as

previously explained, Occupy Trenton participants seek to connect to and associate with other "Occupy" participants around the country and around the globe via the continuous "live-streaming" of their activities on the Internet and by engaging in running commentaries and "live chats" on the Internet. Therefore, the computerized, Internet-based live-streaming conveyance of the protest is equally or even more important to Plaintiffs than the conveyance of their message to Trenton's pedestrians or motorists via the holding of signs. Defendant cannot establish *ad hoc* limitations that severely hinder Plaintiffs' desired mode of expression.

Decades of United States Supreme Court "decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. at 151. Thus, the Occupy Trenton demonstrators can not be required to abide by the newly-created restrictions of Deputy Commissioner Zawacki and must be permitted to continue their demonstration in their chosen manner of peaceful assembly and speech communicated to their fellow citizens through the internet media equipment that has been confiscated from them.

C. Plaintiffs are likely to succeed on their claim that Defendants violated (and continue to violate) their right to enjoy, defend, acquire, possess and protect property and to maintain that property free from unreasonable seizure.

Simply quoting the text of the New Jersey Constitution is sufficient to establish that the defendants have violated its protection of every individual's right to possess and enjoy personal property. Indeed, the very first substantive paragraph, Article 1, Paragraph 1, states:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

In addition, Article 1, Paragraph 7, states:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

Together, these paragraphs make it clear that the State Police have no right to seize property simply by declaring it to be "abandoned" or "trash" when people are present and are asserting supervisory authority or even ownership of that property, where no warrant has been issued, when there is no probable cause to believe that the property is evidence of any crime being committed, and when none of the individuals claiming ownership or control of the property is being arrested or even being issued a ticket for violation of an ordinance.

As the New Jersey Supreme Court has recently held, reiterating long-established principals of law:

> A warrantless seizure is "presumptively invalid as contrary to the United States and the New Jersey Constitutions." *State v. Pineiro,* 181 *N.J.* 13, 19, 853 *A.*2d 887 (2004) (citation omitted). "Because our constitutional jurisprudence evinces a strong preference for judicially issued warrants, the State bears the burden of proving by a preponderance of the evidence that a warrantless search or seizure falls within one of the few well-delineated exceptions to the warrant requirement." *Elders, supra,* 192 *N.J.* at 246, 927 *A.*2d 1250 (citations and internal quotation marks omitted).

State v. Mann, 203 N.J. 328, 337-38 (2010). Here, of course, there is no exception to the warrant requirement that is possibly applicable to the seizure of the property of the Occupy Trenton participants.

What occurred at Veterans Park, and the repetition of that conduct that the Defendants continue to threaten, is, quite simply, a blatant violation of the New Jersey Constitution's protections of property. New Jersey is not a police state. It is a state that protects property against unreasonable, warrantless seizure and accords property holders with the right to hold and enjoy their property, which cannot be taken from them without due process of law. Here there was no process whatsoever and this Court must enjoin the repetition of such unconstitutional seizures by the defendants.

III. THE OTHER FACTORS ALSO FAVOR AN INJUNCTION

A. Restraints are necessary to prevent irreparable harm.

As explained above, the State is now imposing *ad hoc* restrictions on Occupy Trenton participants despite having never imposed those restrictions on persons in the past. Defendants' reliance on those invalid restrictions has resulted in seizure of Plaintiffs' property, including political signs, media equipment (including computers), food, rain gear, and other items. Defendants have made clear that they continue to seek enforcement of the Zawacki letter and will continue to seize items they believe are not in compliance therewith. Indeed, Occupy Trenton participants were just recently once again threatened will seizure of their property if they did not remove it from Veterans Park by Monday, October 24, 2011. The threat included the seizure of Plaintiffs' coolers, computer tables, and "picnic" items. *Verified Complaint*, para. 40. A video of the threat can be found at: http://www.youtube.com/watch?v=7etpEJ88MpY. *Id.*

Without an injunction, Plaintiffs are also constantly faced with the threat of seizure of any item which is "unattended." While that term is undefined, the State has in

practice followed a rule that anything not directly on the person or within arm's reach is considered "unattended" and will be confiscated. Indeed, as noted, all of the Plaintiffs' items seized by the State on October 14, 2011, (1) were at all times within 20 or 30 feet of an Occupy Trenton participant, (2) were well within view of, and thus under constant visual supervision of, an Occupy Trenton participant, and (3) were known by the State to be claimed by the Plaintiffs, who were on site and present when their items were seized. Thus, based on the above, Plaintiffs face a real and imminent threat to all of their property absent an injunction.

Further, Occupy Trenton participants (including freelance journalist Alexander Higgins) engage in free speech activity not only by holding signs, but by blogging about, live-streaming and live-chatting about the rally they are attending. As noted, for Plaintiffs, the world-wide live-streaming expression of their activities is equally if not more fundamental to their freedom of speech than is the holding of signs in front of passing pedestrians or motorists. Thus, in addition to the immediate harm in violation of Plaintiffs' right to due process, Mr. Zawacki's *ad hoc* rules directly interfere with Plaintiffs' right to free speech.

It is axiomatic that, whether it be the right to due process or free speech, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Davis v. New Jersey Dept. of Law*, 327 N.J. Super. 59, 68-69 (L. Div. 1999). The loss of those rights is at stake here and the potential harm is both irreparable and immediate.

B. The relative hardship favors entering injunctive relief

As expressed above, the hardships facing Plaintiffs are of a fundamental constitutional nature. Obviously, the ongoing restrictions and threats of loss of property on Occupy Trenton by the Defendants are imposing substantial hardship upon the demonstrators' ability to maintain their public assembly and communicate their message. The Defendants have confiscated, and are continuing to threaten further confiscation, of Occupy Trenton's computers, power supply, food, drink, chairs, tables, temporary shelters and protest signs. The Defendants' active efforts to inhibit, if not entirely suppress, Occupy Trenton also interferes with the demonstrators' ability to attract more active supporters, as many people avoid situations where they believe they are likely to have some sort of confrontation with law enforcement authorities.

The Defendants, however, will experience no hardship if an injunction is entered that rescinds the Zawacki letter and returns plaintiffs' property to them. Such an injunction will merely return Veterans Park to the status under which it has been open to the public for decades, with conduct there regulated by the laws of the State of New Jersey and the ordinances of the City of Trenton. The defendants will also suffer no harm from returning the property that they seized to its rightful owners. Further, Defendants will still be able to enforce existing laws (such as regarding destruction of property or obstruction laws if applicable) in order to maintain safety of the park. Indeed, no safety matter has ever been at issue since Occupy Trenton's free speech activities in Veterans Park began and there is no reason to anticipate any in the future.

Clearly, the balance of hardships supports immediate injunctive relief.

C. The restraint does not alter the *status quo ante*

For decades, Veterans Park has been open to the public and used as a public forum for speech without the restrictions on its use created by the Zawacki letter. Entry of the injunction will restore that *status quo ante.*

The Occupy Trenton demonstrators were and are the lawful owners of all of the property that the Defendants seized. Entering an injunction will restore their property to them for their own lawful use. Again, the *status quo ante* will prevail.

Prior to the Defendants' unconstitutional acts, Occupy Trenton was conducting itself peacefully and in accordance with the law. Entering an injunction will allow Occupy Trenton to resume such lawful activity without fear of unconstitutional harassment by the police and the seizure of the demonstrators' property, thereby restoring the *status quo ante.*

D. The public interest requires entering injunctive relief

It is frequently said that in determining whether to order immediate injunctive relief, the public interest must be considered. Indeed, "courts, in the exercise of their equitable powers, 'may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *Waste Mgmt. of New Jersey, Inc. v. Union County Utilities Auth.*, 399 N.J. Super. 508, 520-21 (App. Div. 2008) *quoting Yakus v. United States,* 321 *U.S.* 414, 441 (1944).

Here the public interest requires injunctive relief. Administrative officials simply are not free to declare law by edict.

An injunction enforcing this core prohibition against rule by proclamation is therefore imbued with the deepest public interest, especially when the result is to prevent the hindrance of citizens' exercise of their rights to Free Speech, Assembly, Press and Possession and Enjoyment of Property free from unreasonable seizure.

Indeed, denial of an injunction in this case would impose great injury upon the public's interest in preserving the New Jersey Constitution's dedication to freedom and due process. Occupy Trenton is nothing more than the peaceful and lawful assembly of a group of citizens wishing to address issues of vital public importance and communicate their views both to the local community in Trenton and the entire world through the internet. The defendants' determination that they somehow had the right to create and enforce new rules against Occupy Trenton (and also turn off the public electric power supply in Veterans Park) in order to inhibit, if not entirely suppress, the demonstrators' activity is a gross violation of constitutional norms and cannot be permitted to stand. The right of New Jersey citizens to act in accordance with the law must be protected from such naked abuse of governmental authority. The public interest therefore requires the entry of immediate injunctive relief.

CONCLUSION

For the reasons set forth above, Plaintiffs request that their Order to Show Cause be granted, including immediate restraints against further enforcement of the Zawacki letter and requiring the restoration of public access to electric power in Veterans Park.

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Bennet D. Zurofsky
Attorney at Law
17 Academy Street, Suite 1010
Newark, NJ 07102
973-642-0885
bzurofsky@zurofskylaw.com

David Perry Davis
Attorney at Law
112 West Franklin Avenue
Pennington, NJ 08534
609-737-2222

Edward Barocas, Esq.
Jeanne LoCicero, Esq.
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY
P.O. Box 32159
89 Market Street, 7th Floor
Newark, NJ 07101
(973) 642-2084