

DO NOT FEED THE HOMELESS: ONE OF THE MEANEST CITIES FOR THE HOMELESS UNCONSTITUTIONALLY PUNISHES THE SO- CALLED “ENABLERS”¹

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I. INTRODUCTION

Huntridge Subdivision is a 4000-acre residential neighborhood in the City of Las Vegas.² Built in 1941, the subdivision was one of the first of many subdivisions in the Las Vegas Valley.³ Constructed by the developers of the Huntridge Subdivision, Huntridge Circle Park is centrally located within the Huntridge Subdivision and sits on a three-acre oval median between the north and southbound lanes of traffic on Maryland Parkway.⁴ The developers of Huntridge Subdivision deeded Huntridge Circle Park to the City of Las Vegas in 1942. Since 1967, the park has consisted of a grassy area lined with trees, lights, and several parking spaces.⁵ Because the park was nestled between the lanes of traffic on a heavily traveled roadway, residents of the surrounding Huntridge Subdivision were hesitant to access, or allow their children to access, the park by crossing Maryland Parkway.⁶ Moreover, by 2002, the City, and many of the residents of the surrounding neighborhood, believed that vagrants had taken over the park.⁷ Thus, in 2001, the City created a Circle Park Steering Committee (“Steering Committee”) to prepare a plan to renovate the park.⁸

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¹ See THE NAT’L COAL. FOR THE HOMELESS AND THE NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, A DREAM DENIED: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 30 (2006), available at <http://www.nationalhomeless.org/publications/crimreport/report.pdf>.

² *Agenda Item No. 77: Discussion and Possible Action Regarding the Status, Uses and Other Related Matters of Huntridge Circle Park Located at 1251 South Maryland Parkway—Ward 3 (Reese)*, City of Las Vegas, City Council Meeting (June 21, 2006) [hereinafter *City Council Meeting, June 21, 2006*] (Huntridge Circle Park: History/Background).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* The Circle Park Steering Committee prepared and conducted a survey targeted at residents residing within a one-half mile radius of Huntridge Circle Park. *Id.* Twenty per-

Based on recommendations made by the Steering Committee, the City of Las Vegas undertook an approximately \$1.5 million dollar renovation of Huntridge Circle Park.⁹ The improvements included a grass amphitheater replete with shaded outdoor stage and grassy seating area, community perennial garden, jogging path, restrooms, landscaping, and children's play areas with water features and safety barriers.¹⁰ Moreover, the City of Las Vegas installed traffic controlled pedestrian crosswalks to facilitate access to the park.¹¹ Nevertheless, the City contends that despite these improvements, the presence of vagrants in the park continues to deter residents of the surrounding neighborhood from enjoying the park.¹² Moreover, the City maintains that area residents have expressed concern regarding the impact of vagrants in Huntridge Circle Park on the surrounding neighborhoods.¹³ Thus, at a City Council meeting on June 21, 2006, the City of Las Vegas held a public discussion in order to "suggest certain action that could be taken in order to ameliorate the issues that were affecting the neighborhood and at the same time address the social issues attendant with problems of homelessness."¹⁴ As a result, the City of Las Vegas enacted Las Vegas Municipal Code ("LVMC") 13.36.055(a)(6), which prohibited feeding the "indigent" in city parks.¹⁵

The American Civil Liberties Union of Nevada ("ACLUN") challenged the ordinance, arguing that it was unconstitutionally vague and overbroad.¹⁶ The ACLUN argued that the City of Las Vegas would enforce LVMC 13.36.055(a)(6) selectively and thereby violate the rights of both the indigent, as defined by the ordinance, and those who sought to provide the indigent with services, such as meals.¹⁷

cent of those surveyed by the Steering Committee responded to they survey. *Id.* Those who responded cited four areas of concern, including: "[h]omeless sleeping in the park and related criminal activity"; "[s]afety due to vehicle traffic"; "[l]andscaping: more trees and shrubs with less grass"; and "[l]ack of activities for children." *Id.*

⁹ *Id.* The City of Las Vegas committed \$870,000, and Clark County committed \$600,000 to the renovation project. *Id.* Huntridge Circle Park was closed from February 2, 2003, to November 13, 2003. *Id.* (LVMPD Crime Data).

¹⁰ *Id.* (Huntridge Circle Park: History/Background); *id.* (Huntridge Circle Park Conceptual Plan); *id.* Verbatim Excerpt, at 7 (testimony of Orlando Sanchez, Deputy City Manager).

¹¹ *City Council Meeting, June 21, 2006, supra* note 2 (Huntridge Circle Park: History/Background).

¹² *Id.* Verbatim Excerpt, at 7 (testimony of Orlando Sanchez, Deputy City Manager).

¹³ *City Council Meeting, June 21, 2006, supra* note 2 (Huntridge Circle Park: History/Background); *id.* Verbatim Excerpt, at 7 (testimony of Orlando Sanchez, Deputy City Manager).

¹⁴ *Id.* Verbatim Excerpt, at 3 (testimony of Oscar Goodman, Mayor).

¹⁵ LAS VEGAS, NEV., MUN. CODE § 13.36.055(a)(6) (2006); *see Agenda Item No. 57: Bill No. 2006-37 – ABEYANCE ITEM – Prohibits Within City Parks the Providing of Food or Meals as Would Typically Be Provided in a Rescue Mission or Shelter for the Homeless, Proposed by: Bradford R. Jerbic, City Attorney, City of Las Vegas, City Council Meeting (July 19, 2006) [hereinafter City Council Meeting, July 19, 2006].*

¹⁶ Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction Enjoining the Enforcement of LVMC 13.36.055(a)(6) and for an Expedited Hearing at 1-9, *Sacco v. City of Las Vegas*, No. 2:06-cv-00714-RCJ-LRL (D. Nev. Oct. 26, 2006) [hereinafter Motion for Preliminary Injunction]. In January of 2007, the District Court issued a Permanent Injunction against LVMC 13.36.055. *See Sacco v. Las Vegas*, No. 2:06-cv-00714-RCJ-LRL (D. Nev. Jan. 26, 2007) (order granting preliminary injunction).

¹⁷ Motion for Preliminary Injunction, *supra* note 16, at 23.

The ACLUN challenged the constitutionality of the ordinance on five grounds in *Sacco v. City of Las Vegas*.¹⁸ First, the ACLUN argued that the ordinance violated the Free Exercise Clause of the First Amendment.¹⁹ Second, the plaintiffs claimed that the ordinance violated the Free Speech Clause of the First Amendment.²⁰ Third, the ACLUN asserted a “hybrid” rights claim, which implicated the plaintiffs’ rights to religion and free speech.²¹ Fourth, the plaintiffs contended that the ordinance violated the Equal Protection Clause of the Fourteenth Amendment because it made criminal the act of associating with certain people who appeared to be indigent.²² Finally, the ACLUN claimed that the City’s ordinance was unconstitutionally vague because it failed to provide reasonable notice of prohibited conduct.²³ Ultimately, the plaintiffs sought to enjoin the City from enforcing the ordinance.²⁴

This Note contends that the *Sacco* court failed to apply the four-part test for conduct combining elements of speech and non-speech elucidated by the United States Supreme Court in *United States v. O’Brien*.²⁵ Instead, the *Sacco* court invalidated the ordinance for vagueness and Equal Protection reasons²⁶ and correctly decided that the ordinance failed constitutional analysis as a time, place, and manner restriction because the ordinance was not narrowly tailored to serve a significant government interest.²⁷ However, the court erred in finding the ordinance to be content-neutral, and, thus, the *Sacco* court misapplied *Ward*’s test for content neutrality.

Part II of this Note details the Las Vegas ordinance criminalizing those groups and individuals that feed the homeless in a Las Vegas city park. This Part also explores the events giving rise to the enactment of the ordinance by the City of Las Vegas and profiles the various plaintiffs and plaintiffs’ groups involved in the litigation. Part III of this Note details the lawsuit, including arguments proffered by the ACLUN and the City of Las Vegas. Additionally,

¹⁸ *Sacco*, No. 2:06-cv-00714-RCJ-LRL (order granting preliminary injunction).

¹⁹ *Id.* at 11.

²⁰ *Id.* at 15. Specifically, the plaintiffs claimed that because of religious and political connotations associated with the act of providing food, in this case, feeding the homeless is a symbolic form of speech. Motion for Preliminary Injunction, *supra* note 16, at 10. Moreover, the ACLUN alleged that the ordinance is content-based because the City disagreed with these religious and political messages. *Id.* at 13. Additionally, the plaintiffs claimed that the ordinance was neither a valid time, place, or manner restriction, nor was the ordinance narrowly tailored to serve a substantial government interest. *Id.* at 14-15. Furthermore, the plaintiffs argued that the ordinance did not provide adequate alternative avenues for communication. *Id.* at 18.

²¹ Motion for Preliminary Injunction, *supra* note 16, at 20. The plaintiffs argued that the district court ought to subject the ordinance to strict scrutiny, where the ordinance would ultimately fail to satisfy a time, place, and manner analysis. *Id.* In the alternative, the ACLUN argued that even if the district court determined that the ordinance was content-neutral, in a hybrid rights claim, or one involving both a free exercise claim and an additional constitutionally protected right, strict scrutiny still applies. *Id.*

²² *Id.* at 21.

²³ *Id.* at 26.

²⁴ *Id.* at 30.

²⁵ *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

²⁶ *Sacco v. Las Vegas*, No. 2:06-cv-00714-RCJ-LRL, at 6-7 (D. Nev. Jan. 26, 2007) (order granting preliminary injunction).

²⁷ *Id.* at 19, 21.

it reviews the district court's holding that the ordinance is unconstitutionally vague and fails the rational basis review under the Equal Protection Clause of the Fourteenth Amendment.²⁸ Furthermore, this Part analyzes in detail the district court's holding, concluding that while the district court reached the correct decision, ruling the ordinance unconstitutional, it erred in ruling that the ordinance did not violate the Free Speech Clause of the First Amendment.²⁹

II. BACKGROUND: THE ORDINANCE AND THE O'BRIEN TEST

A. *Las Vegas Municipal Code 13.36.055(a)(6) and Subsequent Civil Disobedience*

Previously, the City of Las Vegas attempted to exert control over the park by enforcing ordinances targeted at those who frequented the City's parks. Homeless activists claimed that Las Vegas enforced laws that "other people would not be arrested for, such as sitting at a bus stop with no money in their pocket, or for jaywalking."³⁰ Before passing the ordinance, the City announced a plan to place mentally ill homeless people in mental health hospitals for involuntary seventy-two-hour evaluations.³¹ Ultimately, however, it acknowledged that area mental health facilities were not sufficiently equipped to serve every homeless person in need under the City's plan.³² In the weeks preceding passage of the ordinance, Las Vegas more aggressively enforced laws addressing the perceived ill-effects of the homeless in Huntridge Circle Park, citing those who entered the park before it opened at 7:00 a.m. and those who trespassed on private property.³³ The City's ordinance regulating park hours reads in pertinent part:

Except when action by the City Manager has established different hours of closure of certain of the City's parks pursuant to Section 13.36.110, all of the City's parks shall be open to the public between the hours of seven a.m. and nine p.m. and during such other hours as may be appropriate to accommodate events or activities which are sponsored by the Department.³⁴

Las Vegas made at least one other attempt to criminalize activity it perceived as enabling the homeless. A city ordinance made it illegal for any person to have a gathering of over twenty-five people without a permit.³⁵ The City's group-use ordinance reads in pertinent part:

Any person who desires to use any park or recreational facility of the City for a group of twenty-five individuals or more, or any person who desires to conduct some event in which it could reasonably be assumed that twenty-five or more persons might gather at a park or recreational facility of the City to participate in or witness such

²⁸ U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the law.").

²⁹ *Id.* amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

³⁰ Francisca Ortega, *Las Vegas Makes It Illegal to Feed Homeless in Parks*, ASSOCIATED PRESS, July 20, 2006 (on file with the Nevada Law Journal).

³¹ *Id.*

³² *Id.*

³³ David McGrath Schwartz, *Feeding Homeless Outlawed: ACLU Calls Measure Unenforceable*, LAS VEGAS REV.-J., July 20, 2006, at 1A.

³⁴ LAS VEGAS, NEV., MUN. CODE § 13.36.120 (2006).

³⁵ Ortega, *supra* note 30.

event, shall first apply and obtain a permit from the Director. This Section does not apply to any event which is sponsored by the Department.³⁶

The group-use ordinance allows law enforcement officers to bar visitors to the park unilaterally for specified periods.³⁷ Police and Las Vegas city marshals cited homeless advocate and eventual litigant Gail Sacco on at least two occasions for violating the group-use ordinance.³⁸

On July 19, 2006, the Las Vegas City Council unanimously voted to pass an ordinance making it illegal to provide the indigent with food in a city park.³⁹ Las Vegas Municipal Code 13.36.055(a)(6) reads in pertinent part:

(A) The following are prohibited within any City park: . . . (6) The providing of food or meals to the indigent for free or for a nominal fee. For purposes of this Paragraph, an indigent person is a person whom a reasonable ordinary person would believe to be entitled to apply for or receive assistance under NRS Chapter 428.⁴⁰

A conviction under the ordinance carries a maximum penalty of a \$1000 fine and/or six months in jail.⁴¹

Nevada Revised Statute (“NRS”) 428.030, which the City feeding ordinance incorporates because it provides eligibility standards for indigent relief, reads in pertinent part:

When any person meets the uniform standards of eligibility established by the board of county commissioners or by NRS 439B.310, if applicable, and complies with any requirements imposed pursuant to NRS 428.040, he is entitled to receive such relief as is in accordance with the policies and standards established and approved by the board of county commissioners and within the limits of the money which may be lawfully appropriated pursuant to NRS 428.050, 428.285 and 450.425 for this purpose.⁴²

Thus, the Nevada Revised Statutes, and, therefore, the City of Las Vegas, define an indigent person as anyone who is “entitled to receive . . . relief.”⁴³

Some questioned the ordinance’s constitutionality. Allen Lichtenstein, an attorney with the ACLUN, questioned how it would be possible to determine, “without a financial statement,” whether a person was poor.⁴⁴ In response, Mayor Oscar Goodman argued that “[c]ertain truths are self-evident . . . [y]ou know who’s homeless.”⁴⁵ Lichtenstein also questioned the possible applications of the City’s proposed ordinance, asking whether the City could fine a person for serving “[t]hose who get . . . assistance” at a picnic.⁴⁶ Others questioned the City’s motive in drafting and enacting the ordinance. Gary Peck,

³⁶ LAS VEGAS, NEV., MUN. CODE § 13.36.080.

³⁷ Randal C. Archibold, *Please Don’t Feed Homeless in Parks, Las Vegas Says in Ordinance*, N.Y. TIMES, July 28, 2006, at A18.

³⁸ Schwartz, *supra* note 33.

³⁹ *City Council Meeting, July 19, 2006*, *supra* note 15, Verbatim Excerpt, at 5. City Councilwoman Lois Tarkanian did not attend this portion of the July 19, 2006 meeting and therefore did not vote on the ordinance. *Id.*

⁴⁰ LAS VEGAS, NEV., MUN. CODE § 13.36.055.

⁴¹ *Id.* § 1.24.010.

⁴² NEV. REV. STAT. § 428.030 (2005).

⁴³ *Id.*

⁴⁴ Ortega, *supra* note 30.

⁴⁵ Schwartz, *supra* note 33.

⁴⁶ *Id.*

executive director of the ACLUN, believed that the City “[was] trying to figure out ways of making homeless invisible or kicking them out of our community.”⁴⁷ Lichtenstein claimed that the City was trying to “make war on poor people.”⁴⁸ Regarding a threatened lawsuit from the ACLUN, Mayor Goodman, a former criminal defense attorney, declared, “For 35 years, I represented reputed mobsters and was never afraid to go to court . . . and I am not afraid to go to court against the A.C.L.U.”⁴⁹

At high noon on August 10, 2006, Patrick Band, a social activist from Santa Rosa, California, entered into a showdown with the City of Las Vegas.⁵⁰ Band was in Las Vegas to protest LVMC 13.36.055(a)(6)⁵¹ and was one of approximately one hundred other protesters.⁵² Band carried signs and chanted as part of the formal protest.⁵³ Later, Band moved across the street to the City’s Frank Wright Plaza, where he provided several individuals with free food and drink.⁵⁴ Then, Band moved on to another city park, Huntridge Circle Park, where he again provided a number of people with free food and drink.⁵⁵ Ultimately, however, a Las Vegas marshal cited Band for “willfully [and] unlawfully provid[ing] food or meals to one or more indigent people while within the confines of Huntridge Circle Park,” a misdemeanor.⁵⁶ Additionally, the marshal warned Band for carrying a “weapon” in the park, in this case a “pocketknife tool,” which Band used for “slicing bread, opening boxes, and assisting in other necessary food-sharing activities.”⁵⁷

On that same day, Robert Edmonds, another social advocate from Santa Rosa, California, joined others in protesting LVMC 13.36.055(a)(6). Like Band, Edmonds participated in the formal protest by chanting and carrying a sign.⁵⁸ Edmonds videotaped all of the signage in Huntridge Circle Park⁵⁹ and noted that none of the signage indicated that it was illegal to share food and water.⁶⁰ Nevertheless, Edmonds also received a misdemeanor citation from a Las Vegas marshal for “willfully [and] unlawfully provid[ing] food or meals to one or more indigent people while within the confines of Huntridge Circle Park.”⁶¹

⁴⁷ *Id.*

⁴⁸ Archibold, *supra* note 37.

⁴⁹ *Id.*

⁵⁰ Motion for Preliminary Injunction, *supra* note 16, at Exhibit 2 (declaration of Patrick Band).

⁵¹ *Id.*

⁵² *Id.* (declaration of Gail Sacco, Sept. 28, 2006).

⁵³ *Id.* (declaration of Patrick Band).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* (Las Vegas Metropolitan Police Department Event # 20060810-0040, Citation #03718538, Aug. 10, 2006).

⁵⁷ *Id.*; *see also id.* (declaration of Patrick Band).

⁵⁸ *Id.* (declaration of Robert Edmonds).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* (Las Vegas Metropolitan Police Department Event # 20060810-0040, Citation #03799804, Aug. 10, 2006).

Band and Edmonds are members of Sonoma County Food Not Bombs, a social advocacy group.⁶² Food Not Bombs is a self-described “revolutionary movement[],” through which “hundreds of autonomous chapters shar[e] free vegetarian food with hungry people and protest[] war and poverty.”⁶³ Moreover, members of Food Not Bombs argue that “[b]y spending money on bombs instead of food, our government perpetuates and exacerbates the violence of poverty by failing to provide food for everyone in need.”⁶⁴ Indeed, individual members of Food Not Bombs “do not give food without protesting nor protest without giving food.”⁶⁵ Band argues that access to food and water as well as his ability to share food and water are civil rights.⁶⁶ Additionally, Band and Edmonds were “disturbed” by the precedent set by an ordinance that criminalized the act of assisting those “most in need.”⁶⁷ Moreover, Band and Edmonds both believed that their activities on August 10, 2006, were forms of political speech aimed at “highlighting the disparity between those who have access to food resources and those who do not.”⁶⁸ Thus, the two activists believed that they owed a political duty “to speak out against [the] ordinance.”⁶⁹

Homeless advocate Gail Sacco argued that initially she did not engage in protest or community building activities as a form of political protest.⁷⁰ Rather, Sacco claims that she “just wanted to make sure people [were] fed.”⁷¹ However, Sacco contends that the City’s response to the problem of homelessness is a political act of oppression manifested by the practice of housing the homeless in jail for non-violent offenses and by criminalizing the act of providing assistance to those in need.⁷² As a result, Sacco’s activism has become more political, and she now participates in protests related to all aspects of homelessness.⁷³ For example, on October 13, 2006, Sacco fed approximately fifteen individuals at Huntridge Circle Park.⁷⁴ Individuals at the park informed Sacco that Las Vegas city marshals had been milling around the park for approximately twenty minutes that afternoon.⁷⁵ At approximately 3:00 p.m.,

⁶² *Id.* (declaration of Patrick Band); *id.* (declaration of Robert Edmonds).

⁶³ The Food Not Bombs Story, <http://www.foodnotbombs.net/story.html> (last visited Mar. 3, 2008).

⁶⁴ C.T. BUTLER & KEITH MCHENRY, FOOD NOT BOMBS (20th anniversary ed. 2000) (excerpts from this book are available at <http://www.foodnotbombs.net/bookpolitics.html>).

⁶⁵ *Sacco v. City of Las Vegas*, No. 2:06-cv-00714-RCJ-LRL, at 5, 17 (D. Nev. Jan. 26, 2007) (order granting preliminary injunction).

⁶⁶ Motion for Preliminary Injunction, *supra* note 16, at Exhibit 2 (declaration of Patrick Band).

⁶⁷ *Id.* (declaration of Patrick Band); *id.* (declaration of Robert Edmonds).

⁶⁸ *Id.* (declaration of Patrick Band); *id.* (declaration of Robert Edmonds).

⁶⁹ *Id.* (declaration of Patrick Band); *id.* (declaration of Robert Edmonds).

⁷⁰ *Id.* (declaration of Gail Sacco, Sept. 28, 2006).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* (declaration of Gail Sacco, Oct. 15, 2006).

⁷⁵ *Id.*

Sacco claimed Las Vegas city marshals “stormed” the park.⁷⁶ Sacco was detained, searched, and ultimately cited for feeding indigent people.⁷⁷

Sacco argued that, in light of other ordinances that the City has enforced against its homeless population, the ordinance prohibiting the act of feeding the indigent has made obeying the ordinance virtually impossible:

Some Marshals told me that I wouldn't be in trouble for the same thing (25 people in line); some Marshals told me they would only enforce the permit issue if I had more than 25 people in a single table group; other Marshals told me if I had more than 25 people in the whole park, they would enforce the law; and some Marshals [told me] if there were more than 25 people eating off of the same type of paper plate, which is a cheap, generic paper plate, then I would be cited. So you can see I never know when I will be ticketed for giving out food, so I just stay out of the parks.⁷⁸

Anecdotally, Sacco argued the ordinance has had a chilling effect on the ability of service providers to assist the homeless.⁷⁹ Thus, she claimed that because they feared that those receiving assistance could not afford a one-thousand dollar citation, some providers have discontinued the practice of feeding the homeless.⁸⁰

B. *Jurisprudential Background*

1. *Conduct Combining Speech and Non-Speech Elements*

When a course of conduct combines speech and non-speech elements, the state may justify incidental limitations on First Amendment freedoms supporting a sufficiently important government interest in regulating the non-speech element.⁸¹ In *United States v. O'Brien*, O'Brien was indicted, tried, convicted, and sentenced for violating the Youth Corrections Act when he burned his Selective Service registration certificates on the steps of the South Boston Courthouse.⁸² The Court of Appeals for the First Circuit held that the regulation prohibiting the mutilation or destruction of the Selective Service registration certificates was an unconstitutional violation of the First Amendment right to free speech and served no legitimate legislative purpose.⁸³ Thus, the United States Supreme Court elucidated a test for determining whether a government regulation is sufficiently justified in limiting First Amendment freedoms to support an important government interest in regulating a non-speech element.⁸⁴ A government regulation is sufficiently justified if (1) it is within the constitutional power of the government; (2) it furthers an important or substantial gov-

⁷⁶ *Id.*

⁷⁷ *Id.* (Las Vegas Metropolitan Police Department Event # 20061013-0047, Citation #03800379, Oct. 13, 2006).

⁷⁸ *Id.* (declaration of Gail Sacco, Sept. 28, 2006); see LAS VEGAS, NEV., MUN. CODE § 13.36.080 (2006).

⁷⁹ Motion for Preliminary Injunction, *supra* note 16, at Exhibit 2 (declaration of Gail Sacco, Sept. 28, 2006).

⁸⁰ *Id.*

⁸¹ *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

⁸² *Id.* at 369 & n.2; see also 18 U.S.C. § 5010(b) (1982) (repealed 1984).

⁸³ *O'Brien v. United States*, 376 F.2d 538, 541 (1st Cir. 1967); see *O'Brien*, 391 U.S. at 370, 386; see also 50 U.S.C. § 462(b) (1964) (omitted by amendment 1973).

⁸⁴ *O'Brien*, 391 U.S. at 376-77; see also U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

ernmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.⁸⁵ Finally, the Court held that the court of appeals erred and reinstated the judgment and sentence of the district court.⁸⁶

2. *Public Forum Jurisprudence*

The state may regulate the “time, place, and manner” of expression only with regulations that are content-neutral, are narrowly tailored to serve a significant government interest, and provide “ample alternative channels of communication.”⁸⁷ In *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, the Court delineated three types of government property: public forums, limited public forums, and non-public forums.⁸⁸ Public forums “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.”⁸⁹ Limited public forums encompass public property, which the state has “opened for use by the public as a place for expressive activity.”⁹⁰ Forums are not public by “tradition or designation.”⁹¹

A city must allow free speech on public property, even if the city incurs a financial burden as a result.⁹² In *Schneider v. New Jersey*, the Court considered whether four separate municipal ordinances violated the Free Speech Clause of the First Amendment.⁹³ Three of the four ordinances essentially prohibited citizens from distributing handbills on public property.⁹⁴ The Court held that “[a]ny burden imposed upon the city . . . in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press.”⁹⁵ Moreover, the Court noted that despite the constitutional protection afforded to citizens by the Free Speech Clause of the First Amendment, a city was not without power to prevent littering.⁹⁶ Thus, a city could cite its citizens for littering, rather than engaging in a scheme that infringed upon its citizens constitutionally protected free speech rights.⁹⁷

Moreover, the use of public places is a “privilege[], immunit[y], right[], and libert[y] of citizens.”⁹⁸ In *Hague v. Committee for Industrial Organiza-*

⁸⁵ *O’Brien*, 391 U.S. at 377.

⁸⁶ *Id.* at 386.

⁸⁷ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

⁸⁸ *Id.* at 45, 46 & n.7.

⁸⁹ *Id.* at 45 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

⁹⁰ *Id.*

⁹¹ *Id.* at 46.

⁹² *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939); see ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1125 (3d ed. 2006) (“*Schneider* is important because it established that a city must allow speech on its property even if doing so will impose costs on the city.”).

⁹³ *Schneider*, 308 U.S. at 153-54.

⁹⁴ *Id.* at 154-57.

⁹⁵ *Id.* at 162.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.).

tion, the Court considered whether a city ordinance, which required that citizens obtain a permit from the Director of Public Safety in order to assemble on public property within the city limits, including streets, highways, parks, or buildings, violated the First Amendment.⁹⁹ Various individuals and unincorporated labor unions alleged that the Director of Public Safety, acting in concert with other city authorities, prevented the Committee for Industrial Organization from explaining the National Labor Relations Act to the city's workers.¹⁰⁰ There is no absolute privilege to use public spaces, and the use of public space must conform to the bounds of general comfort and convenience. However, a government may not abridge or deny the privilege under the "guise of regulation."¹⁰¹ Thus, because the regulation requiring a permit for assembly on public property had the potential to "be made the instrument of arbitrary suppression of free expression," the regulation was unconstitutional on its face.¹⁰²

A legislature must narrowly tailor a regulation of the time, place, or manner of protected speech to serve the government's legitimate content-neutral interests, but a regulation need not be the least restrictive or intrusive means of doing so.¹⁰³ In *Ward v. Rock Against Racism*, New York City attempted to regulate the volume of amplified music at an amphitheater and stage structure in a manner that would neither diminish the sonic quality of the performance nor intrude upon those who resided in surrounding neighborhoods.¹⁰⁴ Thus, the regulation required performers at the City's bandshell to use sound-amplification equipment and a sound technician provided by the City.¹⁰⁵ The Court of Appeals for the Second Circuit held that the City's regulation was not the least-intrusive means of achieving a legitimate purpose.¹⁰⁶ The United States Supreme Court reversed, holding that the City's regulation was narrowly tailored to serve "the substantial and content-neutral governmental interests of avoiding excessive sound volume and providing sufficient amplification within the bandshell concert ground"¹⁰⁷ Moreover, the Court found that the regulation left numerous channels of communication open.¹⁰⁸ Ultimately, the Supreme Court held that the court of appeals failed to defer to the City's reasonable determination that its interest in controlling volume would be best served by requiring performers to utilize the City's sound technician.¹⁰⁹

⁹⁹ *Id.* at 502 n.1, 503.

¹⁰⁰ *Id.* at 500-03.

¹⁰¹ *Id.* at 515-16.

¹⁰² *Id.* at 516.

¹⁰³ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

¹⁰⁴ *Id.* at 784.

¹⁰⁵ *Id.*

¹⁰⁶ *Rock Against Racism v. Ward*, 848 F.2d 367, 371 (2d Cir. 1988). Specifically, the appellate court found that while the City's guideline was "valid only to the extent necessary to achieve the city's legitimate interest in controlling excessive volume, but found there were various alternative means of controlling volume without also intruding on respondent's ability to control the sound mix." *Ward*, 491 U.S. at 789. The City could have "directed respondent's sound technician to keep the volume below specified levels," installed a volume-limiting device, or even pulled the plug to enforce the volume limit. *Id.*

¹⁰⁷ *Ward*, 491 U.S. at 803.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 800.

A government may subject expression, which incorporates speech elements, non-speech elements, or both, to reasonable time, place, and manner restrictions.¹¹⁰ For example, in *Clark v. Community for Creative Non-Violence*, the Court considered whether a National Park Service (“NPS”) regulation, which prohibited camping in certain Washington D.C. parks, violated the First Amendment because it prohibited demonstrators from sleeping in the park as a form of protest.¹¹¹ The demonstrators sought to call attention to the plight of the homeless.¹¹² Although the NPS issued a permit to the Community for Creative Non-Violence (“CCNV”) to conduct demonstrations in two different parks, consisting of two “symbolic tent cities,” the NPS denied CCNV’s request to permit sleeping in the symbolic tents.¹¹³ The Court held that the NPS regulation was a valid time, place, and manner restriction.¹¹⁴ The regulation was content neutral, narrowly-focused on the government’s “substantial interest in maintaining the parks . . . in an attractive and intact condition,” and left sufficient communication alternatives because the regulation “otherwise left the demonstration intact.”¹¹⁵

A state may not prohibit the use of property traditionally open for expressive purposes because of the content of the proposed expression, but the state may impose reasonable “time, place, and manner” restrictions on the use of public property.¹¹⁶ In *Cox v. New Hampshire*, the Court considered whether a New Hampshire statute prohibiting “parade or procession” on a public street without a special license violated the Constitution.¹¹⁷ A New Hampshire municipal court convicted sixty-eight Jehovah’s Witnesses of violating the statute.¹¹⁸ Specifically, the Jehovah’s Witnesses assembled at a hall, split into groups of twenty, and marched in single file order through the business district distributing leaflets.¹¹⁹ The Jehovah’s Witnesses never applied for a permit, and the city never issued one.¹²⁰ The Court construed the challenged regulation narrowly, holding that the regulation required only organized formations to obtain a permit in order to use the highway.¹²¹ Thus, the small groups of Jehovah’s Witnesses did not fall under the statute’s contemplation.¹²²

In sum, a government may regulate the “time, place, and manner” of expression with content-neutral government regulations. These regulations must be narrowly tailored to serve a significant government interest and provide “ample alternative channels of communication,”¹²³ but they need not be

¹¹⁰ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

¹¹¹ *Id.* at 291.

¹¹² *Id.* at 291-92.

¹¹³ *Id.*

¹¹⁴ *Id.* at 297.

¹¹⁵ *Id.* at 295-96.

¹¹⁶ *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941).

¹¹⁷ *Id.* at 570-71.

¹¹⁸ *Id.* at 570.

¹¹⁹ *Id.* at 572.

¹²⁰ *Id.*

¹²¹ *Id.* at 575.

¹²² *Id.* at 576.

¹²³ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

the least restrictive or intrusive means of doing so.¹²⁴ Moreover, a city government must allow free speech on public property, even if the city incurs a financial burden as a result.¹²⁵

3. *Determining Whether a Regulation is Content-Based or Content-Neutral*

Content-based laws, or laws compelling speakers to utter or distribute speech of a particular message, are subject to the most exacting scrutiny.¹²⁶ Content-neutral regulations, or those unrelated to the content of speech, are subject to an intermediate level of scrutiny.¹²⁷ The “principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”¹²⁸ In *Turner Broadcasting System, Inc. v. FCC*, the Court considered whether a federal regulation, which required cable television providers to carry a specified number of local commercial broadcast television channels, violated the First Amendment.¹²⁹ The Court found the regulation to be content neutral because it “impose[d] burdens and confer[red] benefits without reference to the content of speech.”¹³⁰

Moreover, a state may not exclude citizens from a forum “generally open to the public, even if it was not required to create the forum in the first place.”¹³¹ In *Widmar v. Vincent*, the Supreme Court considered whether a state university, which provided a public forum to registered student groups, may exclude a registered student group from using its facilities based upon the religious content of the student group’s speech.¹³² The Court held that when a state discriminates against a citizen based on the content of his or her speech, it must demonstrate that the regulation is “necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”¹³³ Thus, the Supreme Court will subject any content-based regulation to review under the strict scrutiny standard.

Similarly, a state may not impose “special prohibitions” on speakers whose views it disfavors.¹³⁴ In *R.A.V. v. City of St. Paul*, the Court considered whether a city ordinance could prohibit otherwise permitted speech solely based on the subjects addressed by the speech.¹³⁵ The Court held that *content-based* regulations are “presumptively invalid,” and thus the Court will subject

¹²⁴ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

¹²⁵ *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939); see CHEMERINSKY, *supra* note 92, at 1125 (“*Schneider* is important because it established that a city must allow speech on its property even if doing so will impose costs on the city.”).

¹²⁶ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

¹²⁷ *Id.*

¹²⁸ *Ward*, 491 U.S. at 791.

¹²⁹ *Turner Broad. Sys., Inc.*, 512 U.S. at 630.

¹³⁰ *Id.* at 643.

¹³¹ *Widmar v. Vincent*, 454 U.S. 263, 268 (1981).

¹³² *Id.* at 264-65.

¹³³ *Id.* at 270.

¹³⁴ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

¹³⁵ *Id.* at 381.

such regulations to strict scrutiny.¹³⁶ The Court also applied strict scrutiny to state regulations that discriminated against certain types of speech on the basis of *viewpoint*, in addition to content-based regulations.¹³⁷ Thus, the Court held that First Amendment forbids “selective limitations upon speech,” or those that discriminate on the basis of content, viewpoint, or both.¹³⁸

A content-based regulation is content-neutral when motivated by a permissible content-neutral purpose, such as the secondary effects of the speech on the surrounding community.¹³⁹ In *City of Renton v. Playtime Theatres, Inc.*, the Court considered whether a municipal zoning ordinance violated the First Amendment.¹⁴⁰ The ordinance prohibited adult theaters from locating “within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school.”¹⁴¹ The Court found that the Renton ordinance did not contemplate the content of the films, but rather the secondary effects of theaters exhibiting adult motion pictures on the surrounding community.¹⁴² Specifically, the Renton ordinance sought to remediate the alleged “harmful” and “adverse” symptoms caused by the presence of adult motion pictures in the community, based solely upon studies detailing the effects of the presence in similar theaters in the City of Seattle, Washington.¹⁴³ Ultimately, the Court held that Renton was entitled to rely on the experiences of other cities in establishing a legislative history for the ordinance, “so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.”¹⁴⁴ Moreover, because the Court characterized the Renton ordinance as a content-neutral time, place, and manner regulation, the Court ultimately determined that Renton designed the ordinance to serve a substantial governmental interest and did not limit unreasonably alternative avenues of communication.¹⁴⁵

¹³⁶ *Id.* at 382.

¹³⁷ *Id.* at 395-96.

¹³⁸ *Id.* at 392.

¹³⁹ *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). *But see* CHEMERINSKY, *supra* note 92, at 937 (“The *Renton* approach seems to confuse whether a law is content-based or content-neutral with the question of whether a law is justified by a sufficient purpose. The law may have been properly upheld as needed to combat crime and the secondary effects of adult theaters, but it nonetheless was clearly content-based: It applied only to theaters showing films with sexually explicit content.”).

¹⁴⁰ *Renton*, 475 U.S. at 43.

¹⁴¹ *Id.*

¹⁴² *Id.* at 47.

¹⁴³ *Id.* at 50-52.

¹⁴⁴ *Id.* at 51-52.

¹⁴⁵ *Id.* at 50.

III. ANALYSIS: SACCO VS. THE PREVAILING CONSTITUTIONAL JURISPRUDENCE

A. Sacco v. City of Las Vegas

The ACLUN represented plaintiffs Band, Edmonds, and Sacco, among others, in a federal civil action.¹⁴⁶ The ACLUN argued that LVMC 13.36.055(a)(6) was unconstitutionally vague and overbroad.¹⁴⁷ Moreover, the ACLUN argued that the ordinance asked “ordinary” members of the public to engage in a form of profiling aimed at preventing “indigent” members of the community from receiving any food in order to prevent offending the City’s ordinance.¹⁴⁸ Thus, the City prevented both the public from giving food to “old people . . . on assistance,” and “[s]chools, camps and after school programs that include poor children” from “handing out any cookies during any excursion to a City park.”¹⁴⁹ Therefore, the ACLUN contended that the defendants, in order to enforce the ordinance in a way that avoided preventing harm to families, the elderly, and the young, required police and marshals to enforce LVMC 13.36.055(a)(6) selectively.¹⁵⁰ Moreover, the ACLUN argued that because it criminalized feeding the indigent, an essentially religious expressive act for the litigants, the ordinance was unconstitutional.¹⁵¹ Thus, the ACLUN feared that the City, through a scheme of selective enforcement, violated the rights of both the indigent, as defined by the ordinance, and those who sought to provide services, including meals, to the poor.

The ACLUN alleged that the ordinance was unconstitutional for five distinct reasons. First, the ACLUN averred that the ordinance violated the Free Exercise Clause of the First Amendment.¹⁵² Second, the plaintiffs alleged that the ordinance violated the Free Speech Clause of the First Amendment.¹⁵³ Third, the ACLUN asserted a “hybrid” rights claim, which implicated the plaintiffs’ rights to religion and free speech.¹⁵⁴ Fourth, the plaintiffs argued

¹⁴⁶ Complaint, *Sacco v. City of Las Vegas*, No. 2:06-cv-00714-RCJ-LRL (D. Nev. June 12, 2006).

¹⁴⁷ Motion for Preliminary Injunction, *supra* note 16, at 1.

¹⁴⁸ *Id.* at 1-2.

¹⁴⁹ *Id.* at 2.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1.

¹⁵² U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

¹⁵³ Motion for Preliminary Injunction, *supra* note 16, at 10. Specifically, the plaintiffs claimed that because of religious and political connotations associated with the act of providing food, in this case feeding the homeless is a symbolic form of speech. *Id.* Moreover, the ACLUN alleged that the ordinance is content based because the City disagreed with these religious and political messages. *Id.* at 13. Additionally, the plaintiffs claimed that the ordinance was neither a valid time, place, or manner restriction, nor was the ordinance narrowly tailored to serve a substantial government interest. *Id.* at 18. Furthermore, the plaintiffs argued that the ordinance did not provide adequate alternative avenues for communication. *Id.* at 14-15.

¹⁵⁴ *Id.* at 20. The plaintiffs argued that the district court ought to subject the ordinance to strict scrutiny, where the ordinance would ultimately fail to satisfy the time, place, and manner analysis enunciated in *O’Brien v. United States*. *Id.* In the alternative, the ACLUN argued that even if the district court determined that the ordinance was content-neutral, in a

that the ordinance violated the Equal Protection Clause of the Fourteenth Amendment because it made criminal the act of associating with certain people who appeared to be poor.¹⁵⁵ Finally, the ACLUN claimed that the City's ordinance was unconstitutionally vague because it failed to provide reasonable notice of prohibited conduct.¹⁵⁶ Ultimately, the plaintiffs sought to enjoin the City from enforcing the ordinance.¹⁵⁷

On January 26, 2007, United States District Judge Robert Jones issued an order declaring LVMC section 13.36.055(a)(6) unconstitutional as written.¹⁵⁸ The district court held that the ordinance was unconstitutionally vague because a person of ordinary intelligence was unlikely to be clear about exactly which conduct the ordinance prohibits.¹⁵⁹ Specifically, the court found that in order to determine whether the ordinance proscribes certain conduct, the potential violator and the potential arresting officer must undertake two subjective tasks.¹⁶⁰ First, the potential violator must venture a guess as to whether the person with whom the potential violator is sharing food is indigent, as defined by statute.¹⁶¹ Second, the potential arresting officer must determine a potential violator's state of mind in providing food to another.¹⁶² Thus, the court found that this second subjective determination required of an arresting officer invited "arbitrary and discriminatory enforcement" of the ordinance.¹⁶³

Furthermore, the court held that the ordinance was unconstitutional because it failed rational basis review under the Equal Protection Clause of the Fourteenth Amendment.¹⁶⁴ Despite the plaintiffs' suggestions that the court subject the ordinance to strict scrutiny, the court nevertheless reviewed the ordinance under rational basis.¹⁶⁵ The court held that because the ordinance failed even the most deferential of standards, the rational basis review, it was not necessary to apply strict scrutiny, or even some intermediate level of scrutiny.¹⁶⁶ The court found that the City of Las Vegas had a legitimate interest in dealing with the problems associated with the "homeless occupation of [Huntridge] Circle Park," including "crime, drunkenness, littering, [and] drug use," among others.¹⁶⁷ However, the court characterized the ordinance as "a blanket, criminal prohibition against feeding poor *individuals* in a city park" that was

hybrid rights claim, or one involving both a free exercise claim and an additional constitutionally protected right, strict scrutiny still applies. *Id.*

¹⁵⁵ U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

¹⁵⁶ Motion for Preliminary Injunction, *supra* note 16, at 26.

¹⁵⁷ *Id.* at 30.

¹⁵⁸ *Sacco v. City of Las Vegas*, No. 2:06-cv-00714-RCJ-LRL, at 1 (D. Nev. Jan. 26, 2007) (order granting preliminary injunction).

¹⁵⁹ *Id.* at 8, 23.

¹⁶⁰ *Id.* at 8.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)).

¹⁶⁴ *Id.* at 6-7, 23; *see also* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

¹⁶⁵ *Sacco*, No. 2:06-cv-00714-RCJ-LRL, at 9.

¹⁶⁶ *Id.* at 10.

¹⁶⁷ *Id.*

not rationally related to the City's legitimate interest.¹⁶⁸ Ultimately, the court held that the ordinance discriminated against individuals without providing a clear legislative history evidencing a correlation with the underlying legitimate government interest.¹⁶⁹

Moreover, the court held that the ordinance violated neither the Free Exercise nor Free Speech Clauses of the First Amendment either facially, or as applied to the plaintiffs.¹⁷⁰ Although several of the plaintiffs alleged they were "fulfilling a Christian tenet necessary for their spiritual redemption" by sharing food and water with the homeless, the court held that the allegation alone was insufficient evidence to demonstrate that the City targeted religious practice through the ordinance.¹⁷¹ The court also found the ordinance to be facially neutral regarding the free exercise of religion because the Las Vegas City Council was motivated not by animus for religion or a desire to restrict religious practice.¹⁷² Rather, the court found that the City was motivated by a "desire to safeguard the public from rising crime associated with homeless habitation of city parks."¹⁷³ The court again applied the more deferential rational basis review and determined that, based on the City's legitimate interests, the ordinance "easily survives rational basis review."¹⁷⁴

Finally, the court held that the ordinance did not violate the Free Speech Clause of the First Amendment because the ordinance regulated non-expressive conduct.¹⁷⁵ The court found that the plaintiffs' conduct was not inherently expressive.¹⁷⁶ Rather, conduct regulated by the ordinance was only expressive within the context of the plaintiffs' claims.¹⁷⁷ Therefore, the plaintiffs' facial challenge of the ordinance failed because the ordinance did not "narrowly target inherently expressive conduct."¹⁷⁸ Moreover, the court found that the plaintiffs' challenge to the ordinance as applied similarly failed because the ordinance did not prohibit other avenues of speech, such as chanting or carrying a sign.¹⁷⁹ Specifically, the court found that "without public and notorious violation of the ordinance" or "related pamphlets, speeches and interviews that gain[] any publicity for the Plaintiffs," "the feeding of the homeless . . . draws little public attention or publicity" to the plaintiffs' messages "about homelessness or war."¹⁸⁰ Furthermore, the court found that even if the plaintiffs' conduct was expressive, the plaintiffs' free speech rights were not without limits

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 10-11.

¹⁷⁰ *Id.* at 7; *see also* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . .").

¹⁷¹ *Sacco*, No. 2:06-cv-00714-RCJ-LRL, at 11.

¹⁷² *Id.* at 12.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 15.

¹⁷⁵ *Id.*; *see also* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

¹⁷⁶ *Sacco*, No. 2:06-cv-00714-RCJ-LRL, at 17.

¹⁷⁷ *Id.* at 15.

¹⁷⁸ *Id.* at 17.

¹⁷⁹ *Id.* at 18.

¹⁸⁰ *Id.*

and the ordinance was a valid time, place, and manner restriction.¹⁸¹ Thus, the court found that the ordinance was content neutral, narrowly tailored to serve the City's significant interests, and left undisturbed adequate alternative channels of communication.¹⁸²

B. Failure to Apply United States v. O'Brien

The *Sacco* court invokes *O'Brien's* advice that incidental limitations on First Amendment freedoms may lose out to an important governmental interest in regulating non-speech.¹⁸³ Yet, the *Sacco* court failed to apply *O'Brien's* four-part threshold test to determine whether the ordinance was sufficiently justified in limiting the plaintiffs' freedom of speech rights guaranteed by the First Amendment. Instead, the *Sacco* court held that the ordinance was void both for vagueness and on equal protection grounds.¹⁸⁴ The *O'Brien* test applies to conduct that combines elements of speech and non-speech.¹⁸⁵ Moreover, the *Sacco* court dismissed the plaintiffs' contentions that the ordinance violated their rights under the Free Speech Clause of the First Amendment because feeding the homeless was not inherently or patently expressive.¹⁸⁶ However, the record is rife with references to the various political motives underlying several of the plaintiffs' acts of feeding or sharing food with the homeless.¹⁸⁷

Thus, even assuming that the act of feeding the homeless was not inherently expressive for the purpose of a facial First Amendment attack on the ordinance, the ordinance still violates several prongs of the *O'Brien* test. The *O'Brien* test is a conjunctive test, so the failure of the City of Las Vegas to demonstrate compliance with any one of the four prongs would likely invalidate the ordinance. *O'Brien* provides that an ordinance curtailing free speech is sufficiently justified [when (1)] it is within the constitutional power of the Government; [(2)] . . . it furthers an important or substantial governmental interest; [(3)] . . . the governmental interest is unrelated to the suppression of free expression; and [(4)] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹⁸⁸

1. The Sacco Court Asserts a Substantial Government Interest That is Not Supported in the Record.

The governmental interest cited by the *Sacco* court is not sufficiently supported in the ordinance's legislative history. The City Council devoted a por-

¹⁸¹ *Id.* at 21-22; see *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) ("We have often noted that restrictions [on expressive conduct] are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

¹⁸² *Sacco*, No. 2:06-cv-00714-RCJ-LRL, at 19-22.

¹⁸³ *Id.* at 18 (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968)).

¹⁸⁴ *Id.* at 8-9.

¹⁸⁵ *O'Brien*, 391 U.S. at 376.

¹⁸⁶ *Sacco*, No. 2:06-cv-00714-RCJ-LRL, at 17-18.

¹⁸⁷ See Motion for Preliminary Injunction, *supra* note 16, at Exhibit 2 (declaration of Patrick Band); *id.* (declaration of Robert Edmonds). See generally BUTLER & McHENRY, *supra* note 64.

¹⁸⁸ *O'Brien*, 391 U.S. at 377 (emphasis added).

tion of only one meeting to discussing the ordinance.¹⁸⁹ It is questionable whether the ordinance furthers a substantial government interest. Moreover, it is not clear that the City Council was sure of the problem that the ordinance was allegedly designed to remediate. The legislative history reveals that the justification for the ordinance shifted depending on the circumstances.

On the day that the City Council unanimously voted to pass the ordinance, City Attorney Brad Jerbic was the only individual to provide evidence purportedly supporting approval of the ordinance.¹⁹⁰ Jerbic cited testimony from a previous City Council Meeting, on June 21, 2006, at which the City heard from service providers, law enforcement, and constituents, among a few others.¹⁹¹ At the June 21, 2006, council meeting, Duane Sonnenberg, Director of Grants and Special Projects for the Salvation Army, described feedings similar to those in Huntridge Circle Park.¹⁹² Sonnenberg observed feedings not at Huntridge Circle Park, but in some other area of Las Vegas, across the street from where other established service providers are located.¹⁹³ Sonnenberg noted that when the homeless arrived across the street from service providers for free meals, "it was very dangerous crossing the street because those individuals who saw the food wanted to be first in line, and without regard to traffic or safety, immediately charged across the street."¹⁹⁴ Moreover, Sonnenberg claimed that after the feedings, there "was a significant amount of debris and residue left that cluttered up the neighborhood because they did not have adequate trash bags or trash cans to collect the food."¹⁹⁵ Furthermore, because those providing the meals served them in Styrofoam containers, "the [homeless] would walk down the street eating as they walked and [left the containers] wherever they stopped."¹⁹⁶ Again, however, Sonnenberg testified not to his eyewitness observation of Huntridge Circle Park, but to another location elsewhere in Las Vegas.¹⁹⁷ Thus, citing testimony from *one* service provider at a *previous* city council meeting, City Attorney Brad Jerbic, the only person to provide evidence in support of the ordinance, articulated both a concern for the safety of the homeless in crossing the street and the litter attendant to mobile feedings.¹⁹⁸

Additionally, Jerbic extrapolated from the experience of Duane Sonnenberg and argued without any direct supporting evidence that after the feedings

¹⁸⁹ See *City Council Meeting, June 21, 2006, supra* note 2.

¹⁹⁰ *City Council Meeting, July 19, 2006, supra* note 15, Verbatim Excerpt, at 2 (testimony of Brad Jerbic, City Attorney).

¹⁹¹ *Id.*

¹⁹² *Id.* at 3.

¹⁹³ *Id.*

¹⁹⁴ *Id.* (quoting *City Council Meeting, June 21, 2006, supra* note 2, Verbatim Excerpt, at 66 (testimony of Duane Sonnenberg, Director of Grants and Special Projects for the Salvation Army)).

¹⁹⁵ *City Council Meeting, June 21, 2006, supra* note 2, Verbatim Excerpt, at 66 (testimony of Duane Sonnenberg, Director of Grants and Special Projects for the Salvation Army).

¹⁹⁶ *City Council Meeting, July 19, 2006, supra* note 15, Verbatim Excerpt, at 3 (testimony of Brad Jerbic, City Attorney) (quoting *City Council Meeting, June 21, 2006, supra* note 2, Verbatim Excerpt, at 66 (testimony of Duane Sonnenberg, Director of Grants and Special Projects for the Salvation Army)).

¹⁹⁷ *Id.* at 3.

¹⁹⁸ *Id.* at 2-4.

the homeless are “left behind without transportation.”¹⁹⁹ Thus, the homeless “end up in neighborhoods, not only leaving debris behind, but sometimes sleeping on people’s yards, sometimes defecating, urinating on people’s yards.”²⁰⁰ Finally, Jerbic claimed that the homeless population was “being displaced from where service providers can assist them with shelter, medical and other needs to an area . . . where none of those services are available.”²⁰¹ Thus, Jerbic, based on another’s experiences unrelated to Huntridge Circle Park, argued that citizens should not feed the homeless for their own good.

The *Sacco* court accepted Jerbic’s arguments as evidence of several significant and legitimate government interests that supported the ordinance. The court concluded that the ordinance served “significant government interests,” which included “protecting the public from unsafe park conditions and trying to most effectively help the homeless out of their plight.”²⁰² Other “legitimate, documented interests” that the court cites in support of the ordinance include, “to encourage the feeding of the homeless in areas where social services are available . . . [and] the protection of City parks and residential neighborhoods from crime, noise, and pollution.”²⁰³ Further, “legitimate government interest[s],” which the court cited in support of the ordinance, included the “crime, drunkenness, littering, drug use, and other problems associated with homeless occupation of Circle Park.”²⁰⁴ Moreover, the court claimed that “[t]he record also establishes that it is best to treat the homeless population by steering them towards service centers that can deal with both their hunger and other serious problems.”²⁰⁵

2. *The Ordinance Is More Restrictive Than Necessary to Further the City’s Asserted Substantial Interest*

The legislative history reveals that the City failed to correlate the existence of homeless individuals in Huntridge Circle Park with the crimes occurring in the surrounding neighborhood. The City itself provided a wide array of mobile services to the homeless in Huntridge Circle Park, including housing assistance and referrals to drug and alcohol counseling. However, the City Council overlooked the fact that the City provided services in the park and perhaps the homeless gravitated to the park because of *those* city-sponsored services, rather than, or in addition to, the mobile food service. Thus, the City failed to establish that the homeless were in the park for mobile food service and not for some other, city-sponsored service.

Indeed, the district court included, at the end of the order, a section entitled, “Guidance on Future Ordinances Addressing the Homeless Situation.”²⁰⁶ In this section, the court provided several guidelines, which presumably would

¹⁹⁹ *Id.* at 4.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Sacco v. City of Las Vegas*, No. 2:06-cv-00714-RCJ-LRL, at 20 (D. Nev. Jan. 26, 2007) (order granting preliminary injunction).

²⁰³ *Id.* at 14.

²⁰⁴ *Id.* at 10.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 22.

assist the drafters of future legislation affecting the City's homeless population with creating ordinances that would not run afoul of the federal Constitution. Thus, the court first noted that the "chief defect with the present ordinance is that it is too broad."²⁰⁷ Therefore, the court instructed the City to ensure that future ordinances reflect a stronger correlation between "clearly articulated" legislative history and the prohibited conduct.²⁰⁸ Specifically, the court noted that an ordinance regulating group feedings would be constitutional if supported by a legislative record establishing that "continuous or overnight indigent occupation of a park leads to increased crime and security issues, and the record further reflects how the frequency and size of indigent group feedings directly affects these problems."²⁰⁹ Similarly, the court also stated that the City was "free to draw upon previous legislative findings in the area of city food regulation" because of the health risks associated with the transportation of food to large groups.²¹⁰

Although it failed to apply the *O'Brien* test, the *Sacco* court conceded that the City "[did] not utilize the least restrictive means possible in pursuing the City's interests."²¹¹ Specifically, the *Sacco* court explained that the City could have prosecuted preexisting ordinances or passed new ordinances aimed at the undesired behaviors attendant to homelessness.²¹² Moreover, the *Sacco* court pointed to the ability of the City to enforce application and licensing ordinances for food distribution and thereby address the health implications of large-scale feedings.²¹³ Additionally, City Attorney Brad Jerbic testified that "[the City has] refused to issue citations for" "defecating in . . . bushes, . . . publicly urinating, [and] . . . washing . . . clothes in [Huntridge Circle Park]."²¹⁴

Even assuming that the City Council elicited testimony at its meeting on June 21, 2006, as a means of supporting its asserted substantial interest in enacting the ordinance, the testimony reveals that the City was similarly unable to correlate the incidents of crime in the surrounding neighborhood with the presence of the homeless in Huntridge Circle Park. Moreover, the City failed to demonstrate that mobile food service, and not the other services provided by city-sponsored service providers, attracted the homeless to Huntridge Circle Park. The City heard testimony from a number of those individuals with a stake in resolving the perceived homeless problem at Huntridge Circle Park.²¹⁵ Much of the testimony related anecdotal tales supporting the notion of a homeless invasion of the park.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 23.

²¹⁰ *Id.* In August of 2007, the District Court issued a Permanent Injunction against LVMC 13.36.055 because the "City has not modified the [unconstitutional] ordinance and stated at oral argument that it had no intention of doing so." See *Sacco v. City of Las Vegas*, Nos. 2:06-cv-0714-RCJ-LRL, 2:06-cv-0941-RCJ-LRL, 2007 WL 2429151, at *3 (D. Nev. Aug. 20, 2007).

²¹¹ *Sacco*, No. 2:06-cv-00714-RCJ-LRL, at 21 (order granting preliminary injunction).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *City Council Meeting, June 21, 2006, supra* note 2, Verbatim Excerpt, at 78 (testimony of Brad Jerbic, City Attorney).

²¹⁵ See *City Council Meeting, June 21, 2006, supra* note 2.

Deputy City Manager Orlando Sanchez presented crime data compiled by the Las Vegas Metropolitan Police Department (“LVMPD”).²¹⁶ In the nine months prior to the City’s renovation of the park, approximately three-hundred and fifty criminal acts occurred within a one-half mile radius of Huntridge Circle Park.²¹⁷ However, he never provided evidence supporting the inference that even one homeless individual was to blame for criminal activity in the neighborhoods surrounding Huntridge Circle Park. Sanchez only testified that during the more than nine-month period during which the park was closed for renovation, the crime rate dropped twenty-five percent, to approximately two-hundred and fifty criminal acts.²¹⁸ Sanchez noted, however, that in the nine-month period after the City reopened the park, the crime rate rose by twenty-five percent, to approximately three hundred criminal acts.²¹⁹ Mayor Oscar Goodman summed up Sanchez’s presentation of the crime data, stating that “when the park is open, it would suggest that there’s more crime in the neighborhood and therefore it would be the people who are in the park committing those crimes.”²²⁰ Ultimately, the Mayor inferred that people who frequented Huntridge Circle Park were probably responsible for criminal activities in the surrounding neighborhood. Nevertheless, the Mayor requested empirical data from representatives of the Las Vegas city marshals and the LVMPD because “if we’re going to point a finger at the [homeless], we better have some evidence in fact the finger is being pointed correctly.”²²¹ Later in the meeting, however, Mayor Goodman opened the floor to the audience, telling one member of the audience that he would “be happy to hear from [him],” if the audience member would “like to say something about the homeless that are in the park that are destroying the quality of life of the residents.”²²²

Sanchez never explained the methodology underlying the collection of this particular crime data. The Las Vegas city marshals and the LVMPD have concurrent jurisdiction within the park.²²³ However, while the marshals enforce city misdemeanors within parks, the LVMPD enforces state criminal statutes but does not enforce city park rules or regulations.²²⁴ Moreover, the City does not identify whether the total number of criminal acts comprises crimes reported by citizens, arrests made by either the marshals or the LVMPD, or whether the crime data contemplates both reports and arrests. Furthermore, it is unclear whether, assuming the crime data contemplates arrests, this figure includes arrest made by the marshals or the LVMPD or both agencies.

City representatives testified to the fact that the City itself had a hand in providing services to the homeless in Huntridge Circle Park. Shannon West, a social worker and Regional Homeless Coordinator for Southern Nevada, testi-

²¹⁶ *Id.* (LVMPD Crime Data); *id.* Verbatim Excerpt, at 7 (testimony of Orlando Sanchez, Deputy City Manager).

²¹⁷ *Id.* Verbatim Excerpt, at 7 (testimony of Orlando Sanchez, Deputy City Manager).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 8 (testimony of Oscar Goodman, Mayor).

²²¹ *Id.* at 16.

²²² *Id.* at 28.

²²³ *Id.* at 13 (testimony of Timothy Shattler, Deputy Chief, Las Vegas City Marshals).

²²⁴ *Id.* at 14.

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fied at the City Council Meeting on June 21, 2006.²²⁵ West testified that the Southern Nevada Regional Planning Coalition, which is comprised of elected officials from the cities of Boulder City, Henderson, Las Vegas, and North Las Vegas, Clark County, members of the business community, and the Southern Nevada Homeless Coalition, created a committee on homelessness.²²⁶ This committee on homelessness is part of a regional response to homelessness in Southern Nevada and lobbies the state government for funding to combat chronic homelessness.²²⁷ According to West, a chronically homeless person is any person homeless for more than a year or a person who has had four episodes of homelessness in a three-year period.²²⁸ In addition to the regional approach, the City of Las Vegas, like other individual members of the committee on homelessness, maintains individual initiatives designed to address homelessness.²²⁹ West also testified about a program known as Mobile Crisis Intervention, through which a consortium of direct service providers hired by the regional committee on homelessness, working closely with law enforcement, conduct mobile crisis intervention in the field.²³⁰ One of the areas serviced by Mobile Crisis Intervention was Huntridge Circle Park.²³¹

West testified that within Huntridge Circle Park, since approximately December 2005 or January 2006, Mobile Crisis Intervention met with over one-hundred “unique” individuals.²³² Of these one-hundred unique individuals, Mobile Crises Intervention provided “some type” of services to approximately thirty-five people, ten of whom “met the criterion of the chronically homeless.”²³³ These services included placement in housing or housing assistance, treatment programs for drug or alcohol dependency, mental health services, and transportation out-of-state.²³⁴ West also testified that just within the previous two weeks, Clark County Social Service (“CCSS”) was at Huntridge Circle Park “all the time.”²³⁵ Twenty-nine individuals that CCSS approached during this two-week period accepted services while fifty-seven refused services.²³⁶

Ultimately, the *Sacco* court failed to apply the threshold *O'Brien* test to determine whether the ordinance justifiably curtailed free speech guarantees. The City failed to articulate a substantial, or even coherent, governmental interest that justified enacting the ordinance. Arguably, the City conducted only two meetings in relation to the ordinance, one of which occurred before the ordinance was even drafted. The evidence proffered to the City Council was anecdotal and, in some cases, based upon observations that occurred not at Huntridge Circle Park, but at another Las Vegas location. The City relied on

²²⁵ *Id.* at 17, 23 (testimony of Shannon West, a social worker and Regional Homeless Coordinator for Southern Nevada).

²²⁶ *Id.* at 17-18.

²²⁷ *Id.* at 18.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 18, 20.

²³¹ *Id.* at 20-21.

²³² *Id.* at 18-21.

²³³ *Id.* at 21.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

testimony proffered prior to the drafting of the ordinance. Moreover, the ordinance was more restrictive than necessary because the City had other tools at its disposal that did not infringe free speech rights. The City Attorney, Brad Jerbic, testified that the City did not enforce ordinances prohibiting much of the activity cited as attendant to the presence of homeless in the park.

C. *Misapplication of Ward v. Rock Against Racism*

The *Sacco* court correctly decided that the ordinance failed a constitutional analysis as a time, place, and manner restriction. The court was faithful to the test elucidated by the United States Supreme Court in *Clark*, which conveys that in order to survive as a valid time, place, and manner restriction, the ordinance must be “(1) content neutral; (2) narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information.”²³⁷ Ultimately, the *Sacco* court determined that the ordinance was not a valid time, place, and manner restriction because the ordinance was not narrowly tailored to serve a significant government interest.²³⁸ However, the *Sacco* court erred in finding the ordinance to be content-neutral because the ordinance is aimed at conduct that is not inherently expressive.²³⁹ Specifically, the court held that “[t]he ordinance in this case presents a classic case of a content neutral regulation. It was not passed because of any disagreement with the message Plaintiffs, or any other group, seek to convey when they feed the homeless.”²⁴⁰

The legislative record undermines the court’s suggestion that the City Council drafted a content-neutral ordinance. The only reason the City created the ordinance was to target individuals and groups that provided mobile food service to the homeless in Huntridge Circle Park. Moreover, the City never considered a homeless problem in any other park. Furthermore, the legislative record contains direct references to groups that the Mayor and other members of the City Council found contemptible based solely upon these groups’ political and religious ideologies.

Thus, the *Sacco* court misapplied *Ward*’s test for content neutrality. *Ward* provides that “[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”²⁴¹ The Las Vegas City Council explicitly disagreed with the plaintiffs’ message because the City failed to establish a legislative history supporting its significant government interest in enacting the ordinance. The alleged secondary effects of homelessness attendant to large-scale feedings in Huntridge Circle Park did not compel the City Council to pass the ordinance unanimously, so much as the Council’s disdain for certain members of the plaintiffs’ group did. In fact, Mayor Goodman demonstrated his disdain for at least one plaintiff on the record when, at the only hearing on the

²³⁷ *Sacco v. City of Las Vegas*, No. 2:06-cv-00714-RCJ-LRL, at 19 (D. Nev. Jan. 26, 2007) (order granting preliminary injunction) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

²³⁸ *Id.* at 21.

²³⁹ *Id.* at 19-20.

²⁴⁰ *Id.* at 20.

²⁴¹ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

proposed ordinance, he asked, “Are there any members of . . . Food Not Bombs who wanna tell ME why they’re anarchistic and atheistic?”²⁴²

Moreover, Mayor Goodman demonstrated his true feelings for the homeless and the mobile service providers on several occasions, again at the only public hearing on the proposed ordinance. In response to testimony from one audience member, Mayor Goodman relayed the following anecdote: “[I]f anybody’s passing by MLK and Charleston tonight on the . . . northwest corner, there’s a woman who I see at Catholic Charities every day . . . she eats pretty good.”²⁴³ Later, he elaborates that “at night, when I’m driving home, she’s very hungry, and she’s got her sign and she’s all humped [sic] over and crying every night.”²⁴⁴ Thus, after one resident of the neighborhood related a story of encountering a naked homeless man in the park, Mayor Goodman quipped, “Maybe [that naked homeless man] . . . would take a tether ball and throw it around his head.”²⁴⁵ Later, the Mayor pontificated, “I take offense with those who choose [the homeless] lifestyle to the detriment of the neighborhood who don’t have . . . mental problems . . . [or] physical problems, who just like to live that life [of] non responsibility and defecate and urinate in people’s yards and ruin their quality of life.”²⁴⁶

Mayor Goodman was not alone in his disdain for the homeless or their providers. Councilman Reese opined, “[W]hen we start feeding the homeless away from providers, . . . once they get over [to Huntridge Circle Park] they find a comfort level . . . [and] don’t have to go back . . . where they have to give up their drugs and alcohol.”²⁴⁷ Later, Councilman Reese argued, “I always wondered how . . . our Federal judges can say, we the taxpayers have no rights. Those people that are out there causing the problems, they’re the one’s [sic] we had to protect.”²⁴⁸ While not entirely explicit, Councilman Reese could hardly mask his disdain for the homeless population in Huntridge Circle Park.

Ultimately, the *Sacco* court conducted a cursory review of an inadequate legislative record. The City failed to establish a significant, or even legitimate, government interest to support enacting the ordinance. Moreover, the scant legislative history is replete with references that demonstrate the City Council’s disdain for the plaintiffs’ group and the homeless to whom they provide mobile services. By failing to apply *Ward*’s test for content neutrality, the *Sacco* court has not only undermined the plaintiffs’ free speech rights, but the court tacitly approves the City’s illegitimate interests with its silence.

IV. CONCLUSION

Homelessness is a problem that has long plagued Huntridge Circle Park and certainly the City of Las Vegas. While the City owes a duty to those who

²⁴² *City Council Meeting, June 21, 2006, supra* note 2, Verbatim Excerpt, at 27 (testimony of Oscar Goodman, Mayor).

²⁴³ *Id.* at 29.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 30 (testimony of Beatrice Turner); *id.* at 34 (testimony of Oscar Goodman, Mayor).

²⁴⁶ *Id.* at 53 (testimony of Oscar Goodman, Mayor).

²⁴⁷ *Id.* at 58 (testimony of Gary Reese, City Councilman).

²⁴⁸ *Id.* at 81.

live, work, and own businesses in the neighborhoods surrounding the park to ensure a certain quality of life, the City must endeavor to do so while ensuring the First Amendment's fundamental guarantee of the freedom of speech. Likewise, the City must endeavor to meet the needs of the neighborhood's residents in a manner that avoids impermissible distinctions based upon the content of speech or the viewpoint of the speaker.

The *Sacco* court heeded *O'Brien's* advice that the important governmental interest in regulating non-speech would overcome incidental limitations on First Amendment freedoms. However, it ultimately failed to apply *O'Brien's* four-part test for conduct combining elements of both speech and non-speech. Instead, the *Sacco* court invalidated the ordinance for vagueness and Equal Protection reasons, thus leaving open the door for the City to craft a new or modified, and arguably unconstitutional, version of the ordinance.²⁴⁹ Ultimately, it reached the correct decision while taking the wrong route.²⁵⁰

The *Sacco* court correctly decided that the ordinance failed constitutional analysis as a time, place, and manner restriction. It was faithful to *Clark's* test for the validity of a valid time, place, and manner restriction.²⁵¹ The court determined that the ordinance was not a valid time, place, or manner restriction because the ordinance was not narrowly tailored to serve a significant government interest.²⁵² Yet, the court erred in finding the ordinance to be content-neutral. Thus, the *Sacco* court misapplied *Ward's* test for content neutrality.²⁵³ The scant legislative history supporting the ordinance demonstrates the Las Vegas City Council explicitly disagreed with the plaintiffs' message. The alleged secondary effects of homelessness attendant to large-scale feedings in Huntridge Circle Park represented an end run around the Constitution's prohibition on impermissible legislative purpose.

²⁴⁹ *Sacco v. City of Las Vegas*, No. 2:06-cv-00714-RCJ-LRL, at 23 (D. Nev. Jan. 26, 2007) (order granting preliminary injunction).

²⁵⁰ *See id.* at 17-18.

²⁵¹ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

²⁵² *Sacco*, No. 2:06-cv-00714-RCJ-LRL, at 21.

²⁵³ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).