No. _____

In The
Supreme Court of the United States

BELLECOURT, ET AL.,

Petitioners,

v.

CITY OF CLEVELAND,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
TERRY H. GILBERT
FRIEDMAN & GILBERT
1370 Ontario Street
Suite 1700
Cleveland, OH 44113
(216) 241-1430

Attorneys for Petitioners

KEVIN FRANCIS O'NEILL
Associate Professor of Law
CLEVELAND-MARSHALL
COLLEGE OF LAW
CLEVELAND STATE UNIVERSITY
2121 Euclid Avenue, LB 138
Cleveland, OH 44115-2214
(216) 687-5282

Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's rulings in *Texas v. Johnson*, 491 U.S. 397 (1989) and *United States v. O'Brien*, 391 U.S. 367 (1968) permit a municipality to invoke a fire safety justification as the basis for arresting and incarcerating any speaker who burns an object in effigy, no matter how small or brief the fire, no matter how minor the threat to public safety.

2. Whether a city's fire safety justification permits the arrest and incarceration of demonstrators, under an aggravated arson statute, for gathering outside a baseball stadium to protest and burn the Cleveland Indians' logo, "Chief Wahoo" – on a record in which there were no credible concerns about fire safety because the protesters were cordoned off from the public by metal barricades and were surrounded by six firefighters, who quickly doused the meager flames with fire extinguishers.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the Ohio Supreme Court in this proceeding.

OPINIONS BELOW

The opinion of the Ohio Supreme Court, review of which is sought by this petition, is reported as *Bellecourt v. City of Cleveland*, 104 Ohio St. 3d 439, 820 N.E.2d 309 (Ohio 2004) (hereinafter, "the Opinion"). It is reprinted in the appendix to this petition at page App. 1. The Opinion reversed a decision by Ohio's Eighth District Court of Appeals, which is reported at 152 Ohio App. 3d 687, 789 N.E.2d 1133 (Ohio Ct. App. 2003) and is reprinted at App. 12.

JURISDICTION

The Ohio Supreme Court's Opinion was issued on December 15, 2004. *See* App. 1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

THE CONSTITUTIONAL PROVISIONS AT ISSUE

Constitution of the United States, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the

right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE STATUTE AT ISSUE

Petitioners were arrested for the offense of aggravated arson, in violation of Ohio Revised Code § 2909.02. That statute is reprinted at App. 31.

STATEMENT OF THE CASE

On April 10, 1998, the Petitioners[1] were arrested by officers of the Cleveland Police Department following a demonstration outside Jacobs Field, where the Cleveland Indians were about to play the opening game of the baseball season. The Petitioners gathered at Jacobs Field to protest the baseball team's use of a Native American

[1] Vernon Bellecourt, Juan Reyna, James Watson, Charlene Teters, and Zizwe Tchiquka.

caricature, "Chief Wahoo," as its symbol and the use of "Cleveland Indians" as its name. The demonstration involved a march to Jacobs Field with hand-held signs, followed by speeches that protested the use of racist caricatures and symbols. These speeches culminated in the burning of two effigies: Chief Wahoo and Black Sambo. Officials of the City of Cleveland knew that there would be protests, and possibly the burning of effigies, that day. (Tr. 238.)

Petitioners gathered in a federally designated free speech zone on public land outside the stadium, which was paved and cordoned off with metal barricades. There were no fans – only protesters – inside the free speech zone. (Tr. 81-83, 288.) Also stationed inside the barricades were "peacekeepers" from the City's community relations department, police officers, and fire officials holding fire extinguishers. (Tr. 84, 103.) It was here, inside the barricades and separated from the public, that Petitioners burned the effigies, which were made from clothing and newspaper. At no point prior to the lighting of the effigies did safety officials indicate to the protesters that they felt it was unsafe to burn the effigies that day, nor was any warning given that arrests would be made if the effigies were lit. (Tr. 118, 125.)

At one point after the first effigy was lit, a small piece of burning material fell to the ground, blowing no more than a few feet, and came to rest near the foot of one Petitioner. (Tr. 146, 157.) The effigy burned for about 20 to 30 seconds before being extinguished by two of the firefighters. Immediately three Petitioners were arrested. (Tr. 248.) A second effigy was lit and instantly extinguished, resulting in the immediate arrest of the remaining Petitioners. All Petitioners were handcuffed, placed in a police

van for about one hour, and ultimately taken to the Cleveland Police headquarters, where they were held for more than 24 hours. Although they had been arrested for the offense of aggravated arson, in violation of Ohio Revised Code § 2909.02, all of the Petitioners were released without any formal charges ever filed against them. (Tr. 81, 82, 86-93, 144-48, 151-53, 167-68, 201-08, 312, 318, 327-29, 331-33, 385.)

On April 9, 1999, Petitioners filed suit in the Common Pleas Court of Cuyahoga County, Ohio against the City of Cleveland, the Cleveland police chief, and various individual officers, claiming the Defendants violated their rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution and their rights to freedom of speech and freedom from unreasonable seizure and arrest under the Ohio Constitution.

On April 6, 2001, the case against the City of Cleveland went to trial. During the course of that trial, a videotape of the effigy burning was played for the jury, and witnesses testified as to the conduct of the police, the firefighters, and the Petitioners. The jury also heard testimony about the weather conditions when the effigies were lit and the extent of the fire. Following the close of all evidence on August 7, 2001, the trial court granted a directed verdict for the government on the grounds that the police had probable cause to arrest the Petitioners. The judgment was appealed.

On May 15, 2003, Ohio's Eighth District Court of Appeals reversed the trial court's decisions to grant a motion in limine and to grant the motion for directed verdict in favor of the City of Cleveland. (App. 12.) The Court of Appeals concluded that:

(1) The conduct of the Petitioners was protected expression under the First Amendment.

(2) The City had failed to assert a sufficient interest in public safety to justify its interference with the Petitioners' exercise of free speech.

(3) There was sufficient evidence to raise a jury question regarding the liability of the City for its failure to adequately train its safety forces in proper responses to demonstrations involving the burning of effigies.

(4) The trial court improperly excluded evidence that some of the Petitioners had previously been arrested by Cleveland police for effigy burning at Jacobs Field.

(5) The trial court improperly directed a verdict in favor of the City.[2]

The City of Cleveland appealed to the Ohio Supreme Court. This appeal focused on the ruling of the Court of Appeals that reversed the trial court's grant of a directed verdict in favor of the City.[3] On December 15, 2004, the Ohio Supreme Court reversed the decision of the Court of Appeals, holding that Petitioners' actions in burning the effigies on a concrete surface cordoned off from the public by metal barricades constituted a safety hazard, making

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[2] The claim against the Chief of Police, Rocco Pollutro, a defendant in the original action, was not challenged in the appeal, which focused on the First Amendment claim as it applied to the City of Cleveland pursuant to *Monell v. Department of Social Services*, 438 U.S. 658 (1978).

[3] The City did not appeal the reversal of the grant of the motion in limine.

their arrests constitutional and the directed verdict appropriate. (App. 1.)[4]

Petitioners now appeal the decision of the Ohio Supreme Court, submitting this petition for certiorari and requesting that this Honorable Court consent to hear arguments on the merits of the case.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Deciding an Important Question of Federal Free Speech Law, the Ohio Supreme Court Has Recognized a "Fire Safety" Justification So Easy To Invoke That it May Be Used To Punish Virtually Every Instance of Flag Burning and Effigy Burning – Thereby Undercutting This Court's Decision in *Texas v. Johnson* and Creating a Question of First Impression That Requires This Court's Review and Correction.

At stake in this case is the continued vitality of *Texas v. Johnson*, 491 U.S. 397 (1989) as affording a meaningful right to burn flags and effigies as an act of symbolic expression. Does that right really exist if it can only be exercised at the cost of immediate arrest and incarceration? If allowed to stand, the Ohio Supreme Court's Opinion provides easy immunity for State retaliation against those who burn flags or effigies. The Opinion achieves this result by reducing the intermediate scrutiny required by *United States v. O'Brien*, 391 U.S. 367 (1968) to something

[4] The Ohio Supreme Court was split 5-2, with Chief Justice Moyer (App. 8) and Justice Pfeifer (App. 10) dissenting in separate opinions.

far less than rational basis review. It allows municipalities to adopt an exaggerated "public safety" response to the meager little fires that so often accompany the burning of flags and effigies. It defers to the whims of police officers who decide that simply extinguishing the fire is insufficient to protect the public – and who decide, without any basis in the statutory language (App. 8-9), that they have just witnessed an act of aggravated arson, warranting the immediate arrest and incarceration of the protesters.

Writing in dissent, Ohio Supreme Court Justice Paul Pfeifer observed:

> [C]eremonial burning is protected speech in this country. But every state has prohibitions against arson. To allow arson laws to be applied to small-scale, outdoor ceremonial burnings like the one in this case defeats the free-speech protections accorded those activities.

(App. 10.)

Also in dissent, the Chief Justice of the Ohio Supreme Court, Thomas Moyer, asserted that Petitioners did not come close to violating the aggravated arson statute under which they were arrested. (App. 8-9.) Having used the statute to arrest and jail the Petitioners, the City never attempted to prosecute them under it.

Transforming *O'Brien* into a standard of utter deference, the Opinion conludes that arresting and jailing Petitioners was merely an "incidental" restriction (App. 3-4) that was "narrowly tailored" to the preservation of public safety (App. 7). Ultimately, these arrests were fully justified under *O'Brien* "because of a perceived public safety threat" by the police (App. 7). If protesters can be

arrested and jailed every time a police officer "perceive[s]" a "public safety threat" in the burning of a flag or effigy, then the fate of *Texas v. Johnson* will hinge largely on its popularity among police officers.

This is the key danger of the Opinion: It uses *O'Brien* to set up an invincible fire safety justification so easy for the State to invoke that it can be used to punish virtually every instance of flag burning and effigy burning.

If a substantial threat to fire safety may be found *on this record*, then it will be present every time a flag or effigy is burned. The Petitioners here were cordoned off behind metal barricades. Pedestrians were re-routed away from the area where the protest took place. Inside the barricades, the protesters were situated on a concrete surface. Other than the effigies, there were no flammable objects in the area. Finally, six Cleveland firefighters armed with fire extinguishers were inside the barricades, ready to intervene if the fire grew out of control. It never did. One fragment of burning material floated to the ground near one of the protesters. That was the danger "highlight" of this event. It is simply *not* a factual record that features any legitimate threat to public safety. But the Opinion readily concludes that the police, having "perceived" a "public safety threat," were free to arrest and jail the Petitioners. (App. 7.) If protesters may be arrested and incarcerated under these circumstances, then the same punishment will always await the symbolic burning of flags and effigies.

Thus, the Opinion has created a fire safety exception to *Texas v. Johnson* so easy to invoke that it effectively overrules that decision. Under the Opinion, police are free to arrest and jail anyone who burns a flag or an effigy, so

long as they "perceive" the requisite "threat" to public safety (App. 7). And in making that arrest, police are even free to invoke a fire safety law that is facially *inapplicable* to the situation (App. 8-9). The Opinion thereby presents a question of first impression that requires this Court's review and correction.

The Opinion assures us that Petitioners were not arrested for exercising a constitutional right (App. 5). But the fact that they were arrested under an aggravated arson statute that was not remotely applicable to the situation (App. 8-9) raises a genuine question about the City's *real* reason for arresting them. If "fire safety" really *was* the main concern, why was it necessary to arrest and incarcerate the Petitioners once the effigies had been doused? Any "threat" to public safety ended with the dousing of the flames. When it took the extra steps of arresting and jailing the Petitioners, the City was no longer acting in the service of fire safety. It was punishing the Petitioners for exercising their rights under *Texas v. Johnson*. But the Opinion blithely accepts the City's "fire safety" justification for those arrests. It is untroubled by, and unwilling to examine, the lack of consistency between what the City actually *did* here and how it has sought to *justify* its actions.

This is another reason for granting review: When examining restrictions on expressive conduct, this Court has never authorized the blind acceptance of any justification that the government offers.[5] When, as here, there is a

[5] *See, e.g., Martin v. City of Struthers*, 319 U.S. 141 (1943) (striking down an outright ban on all door-to-door leafleting). Though the ordinance was justified in large part as a crime control measure designed to prevent burglaries, *id.* at 144, this Court did not hestitate

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lack of consistency between the government's regulatory conduct and its proffered justification, *some* level of judicial skepticism is in order. By reducing *O'Brien* from intermediate scrutiny to utterly deferential review, the Opinion cries out for this Court's correction.

Finally, under this Court's precedents, free speech rights are not so easily trumped (as they were here) by "the state's interest in maintaining order." (App. 5.) For more than sixty years, this Court has carefully nurtured the protections for expressive freedom, allowing their exercise even at considerable risk of public disorder.[6] In

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to peer behind the asserted governmental justification, where it found an illegitimate regulatory purpose, *id.* at 147: "[Because] the dangers of distribution can so easily be controlled by traditional legal methods, [the challenged ordinance] can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas."

[6] *See, e.g., Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."); *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) ("Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."); *Street v. New York*, 394 U.S. 576, 593 (1969) (overturning a flag-burning conviction) ("'[F]reedom to be intellectually . . . diverse or even contrary'" must be upheld regardless of any "'fear that [such] freedom . . . will disintegrate the social organization.'") (quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641 (1943)); *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (overturning a flag-burning conviction) (holding that "the government may [not] ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence," nor may it "assume that every expression of a provocative idea will incite a riot"); *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966) ("Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence."); *Coates v. City of Cincinnati*,

(Continued on following page)

sharp contrast to this Court's precedents, the Opinion elevates the preservation of public order to an overriding governmental interest that easily trumps the exercise of well-established First Amendment freedoms. Under the Opinion, maintaining public order is so important that judges must defer even to the arrest of protesters under statutes that *do not apply* to their conduct. By sacrificing the speech rights enshrined in *Texas v. Johnson* – and making their exercise readily subject to arrest and incarceration – the Opinion is a direct affront to this Court's authority. Accordingly, the Opinion urgently requires this Court's review.

CONCLUSION

Producing a question of first impression, the Ohio Supreme Court has created a "fire safety" exception to *Texas v. Johnson* so easy to invoke that it may be used by the State to punish virtually every instance of flag burning and effigy burning. If allowed to stand, the Opinion will serve as an invitation to local governments to ban, under the guise of "fire safety," the expressive freedoms that this Court established in *Texas v. Johnson*.

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402 U.S. 611, 615 (1971) (holding that "public intolerance or animosity" cannot be the basis for governmental restrictions on First Amendment freedoms); *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 508-09 (1969) ("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom . . . that is the basis of our national strength. . . .").

Accordingly, Petitioners request that this Court either grant their petition for a writ of certiorari or summarily reverse the ruling below.

Respectfully submitted,

Of Counsel:
TERRY H. GILBERT
FRIEDMAN & GILBERT
1370 Ontario Street
Suite 1700
Cleveland, OH 44113
(216) 241-1430

Attorneys for Petitioners

KEVIN FRANCIS O'NEILL
Associate Professor of Law
CLEVELAND-MARSHALL
COLLEGE OF LAW
CLEVELAND STATE UNIVERSITY
2121 Euclid Avenue, LB 138
Cleveland, OH 44115-2214
(216) 687-5282

Counsel of Record