

**2009 JUDSON A. FALKNOR APPELLATE ADVOCACY
COMPETITION**

FEBRUARY 7, FEBRUARY 9-12th, 2009

COMPETITION PROBLEM

**PRESENTED BY
UNIVERSITY OF WASHINGTON SCHOOL OF LAW
MOOT COURT HONOR BOARD
WITH THE PERMISSION OF:
THE UNIVERSITY OF WISCONSIN LAW SCHOOL'S MOOT COURT BOARD**

No. 05-1338

In the Supreme Court of the United States

MICHAEL GARDENER,
PETITIONER,

v.

CITY OF OCEANVIEW,
RESPONDENT.

*ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE FOURTEENTH CIRCUIT*

RECORD ON APPEAL

MICHAEL GARDNER
v.
CITY OF OCEANVIEW

No. 222, October Term, 2007

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF YORK

Opinion by Vanden Brook, J.

OPINION

Michael Gardner challenges the constitutionality of the City of Oceanview's decision to ban the wearing of pants below the waist which expose one's undergarments. I find that the regulation as applied to Mr. Gardner's decision to wear sagging pants in public is unconstitutional under the First and Fourteenth Amendments. Mr. Gardner's conduct is protected by the First Amendment and because the regulation fails intermediate scrutiny it cannot be upheld. Furthermore even if Mr. Gardner's actions were not expressive in nature, the regulation does not pass constitutional muster. As an adult, Mr. Gardner has a fundamental right to choose his attire. Because Oceanview has failed to put forth a compelling justification for restricting Mr. Gardner's interest in his appearance, the regulation is unconstitutional.

I. Factual Background

A. The Plaintiff: Michael Gardner

Michael Gardner is a 28-year-old resident of the City of Oceanview ("Oceanview" or "the City"), a city within the State of York. Mr. Gardner, a black male, grew up in a single-parent home on Oceanview's east-side. A talented poet, Mr. Gardner dropped out of York State University ("YSU") after two years. For the past four years, Gardner worked as a car salesman at a local car dealership to help provide for his aging mother. Despite dropping out of school, Mr. Gardner continued to pursue poetry by performing, for a profit, on open-microphone nights at local restaurants, lounges, and bars. His poetic style has made him somewhat of a local celebrity in Oceanview. He has performed for profit between

30 and 40 times over the past three years.

Mr. Gardner is clean cut and wears a collared shirt and khaki pants on a daily basis, as it is required for his employment as a car salesman. As a part of his poetic performances, however Mr. Gardner generally dons a skull cap, a slim-fitting t-shirt, and jeans, which he allows to hang several inches below his boxer-briefs. Occasionally, Gardner wears similar attire outside of his performances because it is comfortable and because it is a part of his identity. While Mr. Gardner has achieved local success as a poet, he plans to return to YSU to pursue a four-year degree.

R. The Defendant: City of Oceanview

Oceanview is a growing college town in the State of York. Oceanview has a population of 285,000, which is 58% White, 22% African American, 11% Hispanic, 5% Asian American, and 4% other. A liberal progressive city, Oceanview is often labeled one of the top 10 best places to live in the nation. In addition to racial diversity, Oceanview is home to an eclectic mix of individuals. College students, hippies, conservatives, openly gay individuals, businessmen, and religious zealots alike find Oceanview an attractive and welcoming place to live.

Adding to Oceanview's attractiveness is its low crime rate. On the whole, the city has one of the lowest crime rates per capita in the nation, and has few problems with gangs and other juvenile delinquency activities. Outside of downtown, Oceanview is an upper-middle class city and is considered a great place to raise a family. Property values are high, schools are great, and residential and commercial development is booming. Downtown Oceanview, which is home to GSU, is undergoing a similar development boom. Retail shops and high-rise condominiums are continuously springing up as young professionals and students continue to move into the area.

Despite Oceanview's affluence, there are

sections of Oceanview that suffer from a negative image. Particularly, the Williamsville and North Cliff communities, which are known as lower-income parts of town, do not share in Oceanview's general economic wellbeing. In these areas, property values are low and lower-income housing is prevalent. The crime rates in Williamsville and North Cliff are significantly higher than rates in other Oceanview communities. Additionally, many older Williamsville and North Cliff residents complain that loitering youths make them hesitant to walk the neighborhoods in the evenings. Because of these issues, several commercial and luxury-residential developers have expressed reluctance to develop in Williamsville and North Cliff. Consequently, commercial and residential development in these neighborhoods remains stagnant.

The Oceanview City Council (“the Council”) is concerned about this negative image and the effect it has had on Oceanview as a whole. The Council, which consists of fourteen members (six White men, four White women, two African American women, one African American man, and one Hispanic man) from the city's fourteen voting districts, continues to consider ways to improve the images of Williamsville and North Cliff and to increase developers' interest in these areas.

In an effort to clean up Oceanview's image, the Council introduced an ordinance that would ban the wearing of pants below the waist that exposed one's undergarments. The regulation would follow similar measures adopted by Oceanview's public schools. The Council, along with Oceanview mayor Dave A. Werner, began seriously contemplating the ban over the summer of 2005, when developers discussed how suffering areas of Oceanview (and the city as a whole) could improve their images and boost redevelopment potential. According to the Council, developers specifically mentioned the propensity of Williamsville and North Cliff youths to “let their pants ride low.”

C. The Ordinance

In January 2006, the Council enacted a so called “saggy pants ordinance” (“the Ordinance”) making it unlawful for any person

to appear in a public place or in view of the public wearing pants below the hips (crest of the ilium) which expose the person's skin or undergarments. *See* Appendix A. The Ordinance carries a \$250 penalty, and provides that a violation is not grounds for arrest. *See* Appendix A.

The minutes from several Council meetings preceding the Ordinance's adoption reflect that the Council's three African American members introduced the legislation. Two represented voting districts that included either the Williamsville or North Cliff neighborhoods. Like Mayor Werner, each expressed some concern about improving the image and redevelopment potential of the Williamsville and North Cliff neighborhoods.

The minutes further indicate that the major concern expressed by Council members and residents was the prevalence of sagging pants among Oceanview's youth. “Our kids kind of got away from us,” said 62-year-old alderman James Broussard, who proposed the ordinance. “[Sagging pants] are not going to get kids high-paying jobs. It's a distraction. It's also disrespectful to older women. They need to start showing respect to their elders.” Expressing similar concerns, 55 year-old resident Kieran Nickel stated, “Little children see it and want to adopt it, thinking it's the in-thing. I don't want a young person thinking that half-dressing is the way to go.” 72-year-old alderman Jon Barksdale stated, “I look at the future of a person and their ability to get a decent job. It's going to be pretty difficult if you are not wearing your belt.”

Several supporters felt simply that the sagging pants style was distasteful and offensive. “I don't like it. I'm from the old school,” Mary Murphy said of the ordinance she co-sponsored. “You have to leave something for the imagination.” The 67 year-old alderwoman also said, “I'm tired of looking at people's behinds. It just doesn't look nice.” Similarly, Gary Borh, an Oceanview grandparent, expressed the need for sagging pants to be addressed in large shopping malls. According to Borh, several Oceanview citizens stopped walking local malls because they disliked seeing so many

saggy pants. "It is absolutely disgusting," Borh said. "The people want their community back. No one wants to see your dirty underwear." Mayor Werner agreed, stating, "The principle reason I support this ordinance is that this just isn't an appropriate way to dress in public. It's an issue that needs to be addressed and discussed."

Of the fourteen council members, ten voted in favor of the Ordinance, which Mayor Werner signed. Before signing the Ordinance, Mayor Werner stated that "police enforcement was necessary to deal with the problem because parents are ignorant about the issue and just aren't around enough to correct their kids." The remaining members felt that a public campaign involving Oceanview's schools, parents, and community would be more appropriate.

D. Effects of the Ordinance

According to the Oceanview Police Department ("OPD"), the department has cited 400 individuals for violating the Ordinance. Of the 400 citations, 65% have been given to black males between the ages of thirteen and twenty-five. 60% of the citations occurred in the Williamsville or North Cliff neighborhoods. Of those cited, 70% live or grew up with only one parent. Finally, of those cited who were above the age of 18, 20% were currently in college or had received some college education, and 40% were unemployed.

Like the OPD, the Oceanview Chamber of Commerce ("OCO") has maintained city-wide development and employment statistics since the Ordinance's adoption. The statistics reveal that one new commercial development project was undertaken in the North Cliff neighborhood since January 2006. No new development projects have commenced in Williamsville since that time. In contrast, the introduction of new commercial and large-scale residential projects has continued to increase throughout the rest of Oceanview. City-wide unemployment rates decreased by approximately 1%.

E. Mr. Gardner's Citation

On March 1, 2007, the OPD cited Mr. Gardner for violating the Ordinance. At approximately 11:03 p.m., police officer Don Deutsch entered Dive Martini Lounge and witnessed Mr. Gardner on stage performing a poem entitled "This System." The poem reflected Mr. Gardner's perceived exploitation of young black males in today's society. As usual, Mr. Gardner dressed in a slim fitting t-shirt and sagging jeans, which revealed his boxers. When Mr. Gardner finished, officer Deutsch complimented Mr. Gardner's poetry and then proceeded to ticket Mr. Gardner for sagging his pants in public. After receiving a \$250.00 citation, Mr. Gardner pulled up his jeans, tightened his belt, and headed home.

While Mr. Gardner does not dispute that he violated the Ordinance, he seeks to have the charges against him dismissed on various constitutional grounds. Mr. Gardner challenges the constitutionality of the Ordinance as applied to him under the First and Fourteenth Amendments.

II. Arguments of the Parties

A. Mr. Gardner

Mr. Gardner claims that the Ordinance, which prohibits residents from wearing pants that expose their undergarments, violates his guarantees of freedom of speech, due process, and equal protection. First, Mr. Gardner alleges that the Ordinance, as applied to his decision to sag his pants while he performed on stage violated his right to free expression under the First Amendment. He asserts that his choice to expose his boxers was a form of self-expression and a way to help convey the messages contained in his poetry. According to Mr. Gardner, his performance of "This System" would not convey the same message or create the same effect if he were dressed in a polo shirt and securely fastened khaki pants. He asserts that his attire was central to his performance as it expressed his link with his black identity, the black culture, and the styles of black urban youth.

Additionally, Mr. Gardner asserts that anyone who watched him perform would understand his message. While Mr. Gardner acknowledges that his chosen attire is a

fashion, he stresses that sagging pants are part of "hip hop" style which is extremely prominent within and which originated within the black community. Thus, Mr. Gardner contends that sagging pants are a part of a group identity and that intentional identification with such a group must clearly involve freedom of expression.

Mr. Gardner does not contend that the Council enacted the Ordinance with the purpose of suppressing his expression of his black identity. He claims, however, that a restriction on his choice of attire nonetheless suppresses this expression. Mr. Gardner argues that because the Ordinance incidentally suppresses free speech it must be analyzed under intermediate scrutiny. He points to the text of the Ordinance and the statement of city council members as evidence that the Ordinance was enacted "simply out of distaste for the style of sagging." Mr. Gardner emphatically asserts that a general dislike for one's style can never be a substantial government interest.

Second, Mr. Gardner alleges that the City's restriction on sagging pants unconstitutionally deprives him of his liberty interest in his appearance without due process of law. He asserts that the liberty interest in one's appearance is a fundamental right akin to rights of procreation, marital privacy, and family. He argues that if the court declines to find the liberty interest in one's appearance fundamental, there will be virtually no limit on a municipality's ability to regulate the appearance of the citizenry at large. Thus, Mr. Gardner argues that Oceanview should be prohibited from restricting his right to expose his boxers unless it has a compelling interest in doing so. He again asserts that a general dislike of his style is neither a compelling nor rational reason to strip him of his right to expose his boxers.

B. City of Oceanview

The City claims that the Ordinance is justifiable notwithstanding the First and Fourteenth Amendments. First, the City argues that Mr. Gardner has no

constitutional right to engage in the practice of sagging because sagging is neither speech nor expressive conduct protected by the First Amendment. They assert that the mere fact that Mr. Gardner intends to convey some message by sagging his pants does not bring that conduct within the protection of the First Amendment. Rather, the message subjectively intended to be conveyed must be a particularized one rather than a nebulous one. The City claims that expression of a "link to one's black identity and styles of black urban youth culture" is too vague to warrant First Amendment protection. Moreover, Oceanview contends that Mr. Gardner's intended message would not be understood by objective observers because most people view sagging pants as "nothing more than a distasteful fad." The City also argues that if sagging is somehow protected by the First Amendment, the Ordinance still passes constitutional muster because it furthers important and substantial governmental interests. These interests are their interests in (1) boosting redevelopment potential throughout the city, especially in Williamsville and North Cliff, (2) promoting a safe appearance and image of the city and (3) improving the ability of its youth to secure gainful employment.

Second, the City argues that the Ordinance does not deprive Mr. Gardner of his liberty interest in his appearance without due process of law. The City concedes that Mr. Gardner may have a liberty interest in his appearance. They contend, however, that this interest is not a fundamental right. Thus, the City contends that it must merely show that it possesses a rational basis for legislating one's right to sag his or her pants. The City asserts that it has done so. Again, the City argues that the Ordinance is rationally related to its previously stated legitimate interests.

III. Discussion

In a ditty entitled "30 Something," hip-hop artist Jay-Z rhymed, "I used to let my

pants sag, not givin' a f*** baby boy, now I'm all grown up.” For residents of Oceanview, growing up cannot come fast enough. Not since the zoot suits of the 1940’s has there been a more controversial style of attire than sagging pants. The style of sagging pants is said to have originated in prisons. Inmates weren’t given belts, and their baggy uniform pants often sagged to expose underwear. It’s unclear how the trend spread, but some observers say former inmates brought it with them when they were released from prison. Others say the trend caught on through gangster rap videos and then skateboarders. One thing, however, is for sure: the practice of “sagging” offended the seniority in Oceanview, so they passed a law against it.

Today this court is asked to determine whether an ordinance, which bans sagging pants, violates Mr. Gardner's First or Fourteenth Amendment rights. I conclude that Oceanview's ban on sagging pants violates Mr. Gardner’s right to free expression and deprives him of his liberty interest in his appearance without due process of law.

A. Freedom of Expression

Mr. Gardner alleges that the Ordinance violates his right to free expression under the First Amendment. The First Amendment inquiry contains two parts: (1) whether Mr. Gardner's actions constitute “expressive conduct” entitled to protection under the First Amendment; and if so, (2) whether the City's regulation impermissibly denies him such protection. *See Texas v. Johnson*, 49 U.S. 397, 403 (1989). The standard used to determine whether the regulation impermissibly denies First Amendment protections hinges on the regulation's relation to the suppression of free expression. *See id.* If the regulation is not related to expression, then the less stringent *O'Brien* standard for regulations of noncommunicative conduct controls. *Johnson*, 49 U.S. at 403; *see United States v. O'Brien*, 391 U.S. 367, 377 (1968). If, on the other hand, the regulation is related to expression, a more exacting strict scrutiny standard applies. *See id.*; *Spence v. Washington*, 418 U.S. 405, 411 (1974).

I find that Mr. Gardner's decision to sag his pants constitutes expressive conduct entitled to First Amendment protection. I further find that the Ordinance, analyzed under *O'Brien*, impermissibly denies Mr. Gardner his First Amendment rights.

1) Mr. Gardner's Actions Constituted Expressive Conduct Protected by the First Amendment

Although the First Amendment strictly forbids only the abridgement of speech, it is well-established that “[t]he First Amendment affords protection to symbolic or expressive conduct as well as to actual speech.” *Virginia v. Black*, 538 U.S. 343 (2003); *see Texas v. Johnson*, 491 U.S. 397 (flag burning); *Spence*, 418 U.S. 405 (flag misuse); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (armband worn in protest of Vietnam War); *O'Brien*, 391 U.S. 367 (destruction of draft card). Symbolic or expressive conduct has been defined as conduct “sufficiently imbued with elements of communication.” *Texas v. Johnson*, 491 U.S. at 404.

In deciding whether a particular activity is sufficiently imbued with communicative elements, the court must ask whether there was (1) an intent to convey a “particularized message” along with (2) a great likelihood that the message will be understood by those viewing it. *Texas v. Johnson*, 491 U.S. at 404; *Spence*, 418 U.S. at 410-11. When assessing a plaintiff's claim, courts look to the particular activity, combined with the factual context and environment in which it was undertaken. *See Spence*, 418 U.S. at 409-10. I find that, in light of the context surrounding his conduct, Mr. Gardner has satisfied both elements of expressive conduct.

First, Mr. Gardner has met the initial prong of the *Texas v. Johnson* test for expressive conduct in that the message he intended to convey by wearing sagging pants was sufficiently particularized. Mr. Gardner asserts that sagging pants is for him an expression of his link with his black identity, the black culture, and the styles of black urban youth. I find this message

sufficiently particularized. The City, on the other hand, insists that Mr. Gardner's asserted message is a nebulous one. However, the threshold to be sufficiently imbued with communicative elements is not a difficult one, as "a narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). Thus, despite Oceanview's arguments, I find that Mr. Gardner has satisfied the first prong of the test.

Second. Mr. Gardner has met the test's second prong because I find a great likelihood that his message would be understood by those viewing it. While wearing sagging pants alone might prove insufficient, "the context in which a symbol is used for purposes of expression is important, for context may give meaning to the symbol." *Spence*, 418 U.S. at 410. In *Spence*, the Supreme Court held a state flag misuse statute unconstitutional as applied to the action of a college student who hung a privately owned U.S. flag, upside down, with a peace symbol affixed to it as a means of expressing his opinion that America stood for peace. *Id.* at 414-15. There, the court acknowledged that out of context a similar flag display might be interpreted as "nothing more than bizarre behavior." *Id.* at 410. The court concluded, however, that in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it. *Id.* at 411. Because the student's actions occurred simultaneously with the Cambodian incursion and Kent State massacre, "it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it." *Id.*

As in *Spence*, Mr. Gardner's decision to sag his pants must be viewed in context. Mr. Gardner wore pants below his waist that exposed his undergarments at the same time he performed a controversial poem expressing his opinion that young black males are exploited in America. Mr. Gardner assures this court that his connection to black culture and the exploitation of black youth would not be perceived as "truthful" if he were instead

wearing "a polo shirt and securely fastened khaki pants." To counter Mr. Gardner's assertions, the City has produced evidence indicating that, in general, many residents view sagging pants as "nothing more than a distasteful fad." As in *Spence*, however, Mr. Gardner's actions should not be considered in isolation.

Out of context, his actions might be considered nothing more than a distasteful choice of attire. However, Mr. Gardner, who did not normally sag his pants, was performing a controversial poem at the time he was cited. The poem related to young black youth, many of whom engage in the practice of "sagging." Moreover, Mr. Gardner is well-known in the City as he has performed his poetry nearly 40 times over the past three years. Thus I find that, because he sagged pants while performing a poem related to the struggles of young black youth, it would have been difficult for the great majority of the audience to "miss the drift" of Mr. Gardner's point at the time he made it.

Moreover, I find persuasive the case law of several circuits, which suggests that an individual's choice of attire "may be endowed with sufficient levels of intentional expression to elicit First Amendment Shelter." See *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 440 (5th Cir. 2001) (assuming, without deciding, that the First Amendment applied to a student's choice of attire); see also *Church of American Knights of the KKK v. Kerik*, 356 F.3d 197, 206 (2d Cir. 2004) (regalia of the American Knights of the KKK, including robe, mask, and hood is sufficiently expressive to warrant First Amendment protection); *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 540 (6th Cir. 2001) (wearing of clothing depicting Confederate flag as an expression of pride in one's southern heritage constitutes speech governed by the First Amendment); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 285-86 (5th Cir. 2001) (following *Canady*).

The City cites *Tinker* and other appellate court cases for the proposition that the wearing of a particular type or style of clothing is usually not seen as expressive conduct. See *Tinker*, 393 U.S. at 507-08 ("The problem

posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment”); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381 (6th Cir. 1995) (First Amendment did not extend to student's desire to wear jeans to school “because they looked nice”); *Zalenska v. County of Sullivan*, 316 F.3d 314 (2d. 2003) (female employee's act of wearing a skirt to work was not the type of expressive conduct entitled to free speech protection); *East Hartford Educ. Ass’n v. Bd. Of Educ. Of the Town of East Hartford*, 562 F.2d 838 (2d. Cir. 1977) (teacher's refusal to wear necktie to work was not expressive conduct).

Tinker, however, did not hold that one’s choice of attire could not constitute expressive conduct. Moreover, the non-binding appellate court cases the City has cited are inapposite. In each of those cases, the courts found the plaintiff’s intended message to be nonexistent or too “vague and unfocused.” This problem is not present in this case.

Thus, despite the City’s arguments, I think it clear that an individual’s choice of attire may constitute expressive conduct. As I previously concluded, Mr. Gardner’ message was sufficiently particularized and there was a great likelihood that those who viewed his sagging pants would understand his point. He chose to sag his pants while simultaneously performing a controversial poem. In sagging his pants, Mr. Gardner engaged in expressive conduct entitled to First Amendment protection.

2) Under *O'Brien*, the Ordinance is an Impermissible Restriction on Mr. Gardner’s Freedom of Speech

Having found that Mr. Gardner's choice of attire did implicate the First Amendment we consider which First Amendment principles should govern the consideration of the constitutionality of the Ordinance. To ascertain the level of scrutiny that must be applied to the Ordinance, this court must determine whether the City's regulation is related to the suppression of expression. *City of Eire v. Pap's A.M.*, 529 U.S. 277, 289 (2000).

If the City’s purpose in enacting the Ordinance is content neutral or unrelated to the suppression of expression, the Ordinance need only satisfy the “less stringent” intermediate scrutiny standard articulated in *O'Brien*. *Id.* at 289 (plurality opinion) (explaining that restrictions on public nudity are content neutral and should be analyzed under *O'Brien* intermediate scrutiny); *Texas v. Johnson*, 491 U.S. at 403; *O'Brien*, 391 U.S. 367, 377 (1968). If the City's interest is related to the content of the expression, however, then the Ordinance must be justified under a more demanding standard. *Pap's AM*, 529 US at 289; *Texas v. Johnson*, 491 U.S. at 403. “The principal inquiry in determining content neutrality, in speech cases generally . . . is whether the government has adopted a regulation or speech because of disagreement with the message it conveys.” *Hill v. Colorado*, 530 U.S. 703, 719 (2000) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). In this case, neither party contends that the City banned sagging pants because of disagreement with the message the practice conveys. Thus, I apply *O'Brien*’s framework.

In *O'Brien*, the Supreme Court created an analytical framework to evaluate content-neutral restrictions on expressive activities. There, the Court held that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course or conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” 391 U.S. at 376. Applying *O'Brien* to the challenged governmental policy at issue, the saggy pants Ordinance will survive constitutional scrutiny if (1) it is within the constitutional power of the government, (2) it furthers an important or substantial governmental interest, (3) the interest is unrelated to the suppression or expression, and (4) the incidental restrictions on First Amendment activities are no more than necessary to facilitate that interest. *Id.* at 377.

The City asserts that the purposes behind its ban on sagging pants are to: (1) boost redevelopment potential in blighted areas of the City, (2) promote a safe appearance and image of the City, and (3)

improve the ability of its youth to secure gainful employment. I am not completely convinced that these asserted goals constitute 'important' or 'substantial' governmental interests. Nonetheless, even assuming that they do, the relevant question is whether the City's avowed interests are its true interests in proscribing low-riding pants, and/or whether its ban does in fact further those interests.

The City asserts that its ban on saggy pants was intended to and does advance each of its stated interests. However, I see no indication that the ban has affected the City's asserted interests in any way. According to the OCoC, unemployment rates dropped only marginally since the Ordinance's adoption. Moreover, the City has not presented any evidence linking the drop in the unemployment rate to the Ordinance. There is also no indication that the crime rate or the appearance of safety has been positively affected. Even more disturbing is that, more than 18 months after banning sagging pants, only one new development has commenced in either Williamsville or North Cliff. According to the City, these are the areas that the Ordinance was enacted to benefit. I am hardly persuaded that the suggestions of a few property developers, who have clearly chosen not to invest in the City's suffering neighborhoods, supports a finding that the Ordinance was truly enacted to boost redevelopment potential.

On the other hand, as Mr. Gardner asserts, there is significant evidence to support the conclusion that the City's true interest in banning sagging pants is the seniority's general dislike of the fashion. The minutes from the Council meetings prior to the Ordinance's adoption are quite telling. Several yes-voting Council members simply felt the fad was "disgusting;" they were "tired of looking at behinds." Even Oceanview's mayor supported the ordinance simply because he felt that sagging pants "just [are not] an appropriate way to dress in public." Furthermore, the Ordinance itself mentions that the "fad of wearing low hanging/saggy pants which expose one's underwear" is

"becoming a major concern for communities." The Ordinance fails to specifically mention any of the City's asserted interests. I am cognizant that one councilman's reason for enacting an ordinance does not necessarily reflect another's. In this case, however, it is clear that the true reason for the ban was a general dislike of the saggy pants fad.

One's right to express him or herself however, may not be curtailed simply because the speaker's expressive conduct may be offensive to his audience. *Hill*, 530 U.S. at 716. Indeed, "[i]t may not be the content of the speech, as much as the deliberate 'verbal or visual assault,' that justifies proscription." *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-211, n. 6 (1975). However, even in a public forum, one of the reasons we tolerate a protester's right to wear a jacket expressing his opposition to government policy in vulgar language is because offended viewers can "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen v. California*, 403 U.S. 15, 21 (1971).

The recognizable privacy interest in avoiding unwanted communication varies widely in different settings. *Hill*, 530 U.S. at 716. It is far less important when in public than when "in the confines of one's own home, or when persons are powerless to avoid it." *Id.*

In this case, as alluded to in *Cohen*, the City's residents can simply "avert their eyes" if their sensibilities are offended by Mr. Gardner's slightly exposed boxers. Therefore, the Council's disdain for the fashion simply cannot be held to be an 'important' or 'substantial' governmental interest. As such, the Ordinance fails to meet the second element of the *O'Brien* test. I conclude that the City's ban on saggy pants constitutes an impermissible restriction on Mr. Gardner's First Amendment rights.

B. Substantive Due Process

Mr. Gardner next argues that the dress code's prohibition of saggy pants violates his right to substantive due process under the Fourteenth Amendment. Specifically, Mr. Gardner argues that he has a liberty interest in his appearance and that this interest is a fundamental right. Therefore, Mr. Gardner asserts that the City should not be

allowed to infringe his right to determine his appearance in absence of a compelling governmental interest to do so. I agree. While I have already found the Ordinance in violation of Mr. Gardner's First Amendment rights, it is necessary to address his substantive due process claim. Even if he did not intend to convey any message by his attire, as an adult, Mr. Gardner has the right to wear his dungarees as he pleases.

1) Mr. Gardner's Liberty Interest in His Appearance is a Fundamental Right

The first (and often last) issue in the substantive due process arena is the proper characterization of the individuals asserted right. *Reno v. Flores*, 507 U.S. 292, 302 (1993). Governmental actions that infringe on a fundamental right are reviewed with strict scrutiny. While actions which infringe lesser interests require only a rational relationship to a legitimate state interest, *see Roe v. Wade*, 410 U.S. 113 (1973) (“[w]here certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest’”), I find that as an adult, Mr. Gardner's interest in his appearance is a fundamental right. As such, the Ordinance must be reviewed with the strictest of scrutiny.

Since the days of the Founding Fathers, the right to dress as one pleases has been regarded as a basic, if seemingly trivial, form of personal liberty; one not even requiring explicit mention in the Constitution to be recognized. *Kelley v. Johnson*, 425 U.S. 238 (1976) is the principal Supreme Court opinion which addresses the issues whether there is a constitutional right to dress or liberty interest within the Fourteenth Amendment in matters of personal appearance. In *Kelley*, the Court upheld a police department's hair and grooming regulation against an employee's challenge. There, the Court distinguished the liberty interest in an employee's on the job appearance from the right to control one's own body. The Court concluded that an employee's interest in his on-the-job appearance was less weighty than (fundamental) rights associated with procreation, marriage and family life protected

under *Roe* and its progeny. 425 U.S. at 244 (“those cases involved a substantial claim of infringement on the individual's freedom of choice with respect to certain basic matters . . .”). Although the Court declined to decide whether the citizenry at large had a liberty interest in matters of personal appearance, it assumed such a right for purposes of deciding the case. *Id.*

Since *Kelley*, the nation's courts have assumed or found a liberty interest in a veritable fashion show of different factual scenarios. *See Zaleska*, 316 F.3d 314 (2d Cir. 2003) (female employee wearing a skirt); *Rathert v. Village of Peotone*, 903 F.2d 510, 514 (7th Cir. 1990) (police officers wearing earrings); *DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1367 (11th Cir. 1987) (shirtless male jogger); *Domico v. Rapides Parish Sch. Bd.*, 675 F.2d 100, 101 (5th Cir. 1982) (prohibition against beards as applied to teacher in public schools). Despite recognizing such an interest, no court to our knowledge has held the liberty interest in one's appearance to be a fundamental right. Defendant cites this fact, and further asserts that *Kelley* made clear that whatever liberty interest one may have in his appearance does not rise to the level of a fundamental right. Defendant urges this court to exercise judicial restraint and to follow the lead of a series of cases—decided in employment or secondary school contexts—which have declined to find one's interest in his appearance to be a fundamental right. However, while “[i]t is tempting, as a means of curbing the discretion of federal Judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution,” the Supreme Court has never accepted this view. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992).

As we noted, *Kelley* was decided in an employment context and courts have found greatly significant the distinction between regulating public employees and regulating

members of the public at large. *See Kelley*, 425 U.S. at 244-45 (“[r]espondent has sought the protection of the Fourteenth Amendment, not as a member of the citizenry at large, but on the contrary as an employee of the [county] police department”); *Zalewska*, 316 F.3d at 321 (“in [the public employment] context, a liberty interest in choice of apparel is far from a ‘fundamental right’”). Similarly, it has long been the case that constitutional claims generally receive less rigorous review in the secondary and middle school setting than they do in other settings. *See Tinker*, 393 U.S. at 507 (“[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of school officials . . . to prescribe and control conduct in the schools”).

In *Korr v. Schmidt*, 460 F.2d 609, 615 (5th Cir. 1972), for example, a heavily divided court declined to hold that the right of a high school student “to wear hair in school at a length that suits him” was a fundamental right, in part, because the court felt compelled to give local school boards the “widest possible latitude in the management of school affairs.” The court worried that school officials would be called into federal court to prove that other in-school restrictions also served a compelling interest” and that no “alternatives less restrictive of liberty were available.” *Id.* at 616.

The *Korr* majority made clear that it was “patently absurd” to suggest that its holding provided a basis for sustaining a state regulation requiring conventional haircuts for the general adult population. *Id.* at n. 13. Furthermore, only five months later, the same court in *Landsdale* declined to extend *Korr* into the university setting and reaffirmed that “the adult’s constitutional right to wear his hair as he chooses supersedes the State’s right to intrude. *See Landsdale v. Tyler Junior Coll.*, 470 F.2d 659, 663 (5th Cir. 1972). While the court purported to apply rational basis review, it held that “in absence of a showing that unusual conditions exist, the regulation of the length or style of a college student’s hair is irrelevant to any legitimate college administrative interests.” *Id.* at 664.

In this case, Oceanview’s regulation is, like the regulations in *Roe* and its progeny, a substantial regulation of the citizenry at large with respect to the basic right to control one’s appearance. If ever there were a circumstance in which a court should reaffirm one’s right to be let alone, it is this case. Indeed, ‘liberty’ to us seems an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their own liberty. As the Supreme Court opined in *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1981):

“No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference by others, unless by clear and unquestionable authority of law.”

This observation strikes at the heart of Mr. Gardner’s case. Today this court readily recognizes the conclusion the Fifth Circuit ultimately reached—that the vogue of an adult to wear his pants slightly below his waist is a personal choice that determines his own appearance; and a state regulation which prescribes generally the dress habits of adults can only be reviewed with close judicial scrutiny. It is clear that an adult’s right to determine his appearance is a fundamental one. In absence of a “compelling” state interest, the City must refrain from regulating Mr. Gardner’s attire.

2) The Ordinance is Not Narrowly Tailored to a Compelling Governmental Interest

Having determined that Mr. Gardner’s liberty interest in his appearance is a fundamental right, the Ordinance must be reviewed under the strictest of scrutiny. The Ordinance can only pass constitutional muster if it is narrowly tailored to a compelling

governmental interest. *See Roe*, 410 U.S. 113. That is, when a statute in exercise of the state's police power impinges upon fundamental rights, the court requires a compelling state interest and a showing that no less restrictive alternatives are reasonably available. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Earlier in this opinion, the Ordinance was weighed; it was measured; and it was found wanted under a less demanding intermediate scrutiny standard. Thus, I find little utility in exhaustively weighing the Ordinance against a more exacting standard. My previous conclusions suffice to show that the Ordinance is not narrowly tailored to a compelling state interest.

Moreover, even assuming that Oceanview's asserted interests are "compelling" there were several less restrictive avenues that the City could have traveled to achieve its interests. For instance, the City could have provided incentives for businesses to invest in developmentally stagnant parts of the city. Instead, the City chose to blame its problems on a particular fashion and then sought to trample on the liberties of those who partook in that fashion.

The fact that Oceanview specifically singled out sagging pants—while paying no mind to gaucho pants, so called "booty shorts," Speedos, thong bikinis and a plethora of other revealing and arguably offensive attire—makes it clear that the Ordinance was enacted simply because many disliked the fad. In the absence of an intrusion on the right of others to enjoy their own liberty, this reasoning should never be enough to justify intrusion upon an individual's right to determine his appearance.

IV. Conclusion

For the reasons stated above, this court finds that the City's ban on saggy pants is unconstitutional as applied to Mr. Gardner. The Ordinance impermissibly restricts Mr. Gardner's right to free expression under the First Amendment because it does not further a substantial governmental interest. Additionally, the Ordinance impermissibly

infringes upon Mr. Gardner's fundamental liberty interest in his appearance as Oceanview has failed to put forth a compelling justification for banning saggy pants

JUDGMENT OF THE DISTRICT COURT FOR THE DISTRICT OF YORK FOR PLAINTIFF

CITY OF OCEANVIEW
Appellant
v.
MICHAEL GARDNER
Appellee

No. 248, December Term, 2007

UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

Argued before Rhoades, C.J., Honkamp,
Hable, Sandel, and Ring, JJ.

Opinion by Rhoades, C.J.

OPINION

This is an appeal of a decision by the District Court of the State of York which found that the City of Oceanview’s saggy pants ordinance (“the Ordinance”) was unconstitutional under the First and Fourteenth Amendments. We conclude that the district court erred in its findings and we reverse.

I. Factual Background

The facts presented in the district court’s opinion are adopted and incorporated by reference herein.

II. Discussion

The district court erred in finding the Ordinance unconstitutional. Contrary to the court’s conclusion, Mr. Gardner does not have a fundamental right to expose his underwear in public. In addition, his decision to expose his underwear, while expressive of something, does not rise to the level of expressive conduct entitled to First Amendment protection. Thus, the district court erred in applying heightened scrutiny, as opposed to rational basis review, when it reviewed the Ordinance. Accordingly, we reverse.

**A. Mr. Gardner’s Decision to
Expose His Underwear did not
Constitute Expressive Conduct**

The district court dismissed the charges against Mr. Gardner, in part, because it

determined that the Ordinance impermissibly restricted Mr. Gardner’s right to free expression. Mr. Gardner’s argument rests on his claim that exposing his boxers is for him an expression of “his link with his black identity, the black culture, and the styles of black urban youth.” We realize that for Mr. Gardner—as for most people—clothing and personal appearance are important forms of self-expression. Clothing may communicate a vast array of information about the wearer. It may indicate, for instance, cultural background and values, creativity or lack thereof, awareness of current fashion, gender identity and social status.

Yet, the fact that something is in some way communicative does not automatically afford it constitutional protection. *Zalewska v. Country of Sullivan*, 316 F.3d 314, 319 (2d. Cir. 2003). The Supreme Court has cautioned that “[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” *United States v. O’Brien*, 391 U.S. 367, 376 (1968). As the district court noted, the test for expressive conduct is whether there was: (1) an intent to convey a “particularized message” and (2) a great likelihood that the message would be understood by those viewing it. *Texas v. Johnson*, 401 U.S. 307, 404 (1989); *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). The party asserting that its conduct is expressive bears the burden of demonstrating that the First Amendment applies to its conduct. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n. 5 (1984).

In *Zalewska*, the Second Circuit Court of Appeals dealt with a situation directly analogous to the instant case. There, the court declined to hold that wearing a skirt to express one’s¹ “deeply held cultural value” constituted expressive conduct. *Zalewska*, 316 F.3d 314, 319 (2003). The court held that *Zalewska*’s decision to wear a skirt communicated a vague, overarching view of cultural tradition.

¹ In *Zalewska*, the plaintiff, a county van driver, challenged the county’s dress code applicable to employees. 316 F.3d 314.

Id. at 320. Moreover, the court found that Zalewska’s message would not readily be understood since “no particularized communication can be divined simply from a woman wearing a skirt.” *Id.*

In this case, as in *Zalewska*, we find that Mr. Gardner’s actions do not constitute expressive conduct. Mr. Gardner admitted that he at times exposed his boxers because it was comfortable and because it was the style. Undoubtedly, exposing one’s underwear says no more about one’s identity than a woman’s decision to wear a skirt. Even more than in *Zalewska*, Mr. Gardner’s asserted message—a link to the black community—is too broad to warrant constitutional protection. It is also difficult to see how Mr. Gardner’s broad message would be readily understood by those who viewed him since most citizens simply view sagging pants as a tasteless fad. As Mr. Gardner concedes, people from all backgrounds engage in “sagging” and 35% of those cited under the Ordinance were not black. Thus, Mr. Gardner’s actions, while expressive, did not rise to the level of expressive conduct. As such, the district court erred in applying intermediate scrutiny to the Ordinance.

B. Mr. Gardner Does Not Have a Fundamental Right to Expose His Underwear in Public

The district court also dismissed the charges against Mr. Gardner in part because it determined that the Ordinance violated the Fourteenth Amendment’s substantive due process guarantees. Under substantive due process analysis, if government action does not burden a fundamental right it will survive a due process challenge if it is rationally related to a legitimate governmental interest. *See Vacco v. Quill*, 521 U.S. 793 (1997) (applying the rational basis standard of review to uphold New York’s statutes outlawing assisted suicide, which neither infringe on fundamental rights nor involve suspect classifications). Contrary to the district court’s view, there is no case law supporting the conclusion that one’s

interest in his or her appearance is a fundamental right. In fact, the Supreme Court in *Kelley* specifically distinguished the interest in one’s appearance from the interests protected by the Court in *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and *Meyer v. Nebraska*, 262 U.S. 390 (1923). *Kelley v. Johnson*, 425 U.S. 238, 244 (1975). Thus, the district court erred in reviewing the Ordinance with strict scrutiny.

C. The Ordinance is Rationally Related to a Legitimate Governmental Interest

In this case, rational basis review is the appropriate level of scrutiny. In a rational basis analysis, the legislative enactment is presumed valid and must be upheld if rationally related to a legitimate governmental objective. *See City of Cleburne*, 473 U.S. 432, 440 (1985); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974). Review of enactments must be “a paradigm of judicial restraint.” *F.C.C. v. Beach Commuc’ns, Inc.*, 508 U.S. 307, 314 (1993). “[I]f those attacking the rationality of the legislative classification have the burden to negate every conceivable basis which might support it.” *Id.* at 315. More importantly, the legislature need not actually articulate its reasons for enacting the legislation. *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993). The legislative choice “is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data.” *Beach Commuc’ns*, 508 U.S. at 315.

Following these decisional directives, we conclude that the district court erred in finding that the Ordinance was not rationally related to a legitimate governmental interest. The City has articulated three purposes for its ban on sagging pants: (1) boosting redevelopment potential, (2) promoting a safe image and appearance of the City, and (3) improving the ability of its youth to secure gainful

employment. Undoubtedly, Oceanview has a legitimate interest in boosting redevelopment potential in its suffering areas. The City based its decision to ban sagging pants on the advice of several developers. This was reasonable. Since the Ordinance's adoption, at least one new development has commenced in a suffering area of Oceanview and development has increased throughout the City as a whole. Moreover, the unemployment rate has dropped significantly since the Ordinance was enacted. As the City seeks to attract the nation's brightest individuals to attend its university and work in its industries, it is in the City's best interest to redevelop suffering areas of town. One rational way to do that is by cleaning up aspects of the City which potential developers and residents find unattractive.

For these reasons, we conclude that the Ordinance (1) does not unconstitutionally deprive Mr. Gardner of his liberty interest in his appearance without due process of law and (2) does not impermissibly restrict Mr. Gardner's right to free expression.

III. Conclusion

We **REVERSE** the district court's findings on the Ordinance's constitutionality and reinstate the charges against Mr. Gardner.

IN THE SUPREME COURT OF THE UNITED STATES

Michael Gardner,

Petitioner,

Docket No. 05-1338

v.

City of Oceanview,

January 28, 2008

Respondent

ORDER

Petition for Writ of Certiorari is GRANTED as to the following questions

1. Whether a City ordinance, which prohibits the wearing, in public, of pants below the waist which exposes one's undergarments, violate the First Amendment's guarantee of free speech as applied to an adult resident who "sags" his pants as a part of an artistic performance.
2. Whether a City ordinance, which prohibits the wearing, in public, of pants below the waist which exposes one's undergarments, unconstitutionally deprive an adult resident of his liberty interest in his appearance without due process of law.

Appendix A.

**AN ORDINANCE TO AMEND CHAPTER 26 OF THE CITY
CODE REGARDING INDECENT EXPOSURE**

WHEREAS, the dress fad of wearing low hanging/saggy pants which exposes one's underwear and usually covered body parts is becoming a major concern for communities, cities and states around the country; and

WHEREAS, some jurisdictions are taking action to limit the exposure of a person's underwear in a public setting by implementing indecent exposure legislation to curtail this cultural phenomenon; and

WHEREAS, the City Council of the City of Oceanview deems it necessary to amend Chapter 26 by adding a section to set forth penalties regarding the indecent exposure of underwear and usually covered body parts.

**THE COUNCIL OF THE CITY OF OCEANVIEW HEREBY
ORDAINS:**

SECTION 1. Chapter 26 of the Oceanview City Code is hereby amended by adding Section 26-08 by adding the following language to read as follows:

Sec. 26-08. Public Exposure in Certain Attire Prohibited

a) It shall be unlawful for any person to appear in a public place or in view of the public wearing pants below the hips (crest of the ilium) which expose the person's skin or undergarments.

b) A conviction of violation of this section shall be punishable by fine of not more than \$250.00. If a juvenile is determined to be in violation of this section, a citation shall be issued to the parent or legal guardian who has care and control of the minor. If an adult is determined to be in violation of this section, a citation shall be issued to the person.

c) Any violation of subsection (a) shall be cited by the law enforcement officer by the issuance of a citation and summons to appear before a court of proper jurisdiction, and shall itself not be grounds for an arrest or for a full search of the persons cited.

SECTION 2. This ordinance shall become effective immediately upon its date of passage by the City Council and approval by the Mayor.

Passed by City Council

President of City Council

Attest: _____
City Clerk