ORIGINAL

IN THE SUPREME COURT OF OHIO

CITY OF CLEVELAND, Plaintiff-Appellant, vs. ERIN McCARDLE and LEATRICE TOLLS, Defendants-Appellees.	)	CASE NO. 13-0096 On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case Nos. 12-98230 and 12-98231

BRIEF OF DEFENDANTS-APPELLEES ERIN McCARDLE AND LEATRICE TOLLS

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STATEMENT OF THE FACTS

A. Procedural History

Appellees Erin McCardle and Leatrice Tolls were arrested on the evening of October 21, 2011, while engaged in a peaceful protest on Public Square in Cleveland. Each was charged with remaining on Public Square after 10:00 p.m. without authorization, a minor misdemeanor, and criminal trespass, a fourth degree misdemeanor. Ms. McCardle was also charged with resisting arrest, a second degree misdemeanor.

Each of the appellees moved to dismiss the charges against her on the ground that Cleveland Cod. Ord. 559.541, the law that prohibited them from remaining on Public Square without a permit after 10:00 p.m., and from which the other charges flowed, was unconstitutional under the First and Fourteenth Amendments to the Constitution.

In Ms. McCardle's case, a hearing on the motion to dismiss was held on December 20, 2011, and on February 28, 2012, the court entered an order denying her motion to dismiss. She thereafter entered a plea of no contest to the charge that she violated Cleveland Cod. Ord. 559.541, at which time the remaining charges were dismissed. She was sentenced to pay a fine of $100.00 and court costs, which the court stayed pending appeal.

In Ms. Toll's case, the municipal court denied her motion to dismiss, adopting *in toto*, the order that had been entered in Ms. McCardle's case. She, too, entered a plea of no contest to the charge that she violated Cleveland Cod. Ord. 559.541, at which time the criminal trespass charge was dismissed. She was sentenced to pay a fine of $75.00 and court costs, which the court stayed pending appeal.

Each appealed her conviction to the Cuyahoga County Court of Appeals, which reversed their convictions.

The City of Cleveland appealed, and this Court accepted the case for review.

B. Facts of the Case at Bar

On the evening of October 21, 2011, members of the group known as Occupy Cleveland engaged in a peaceful protest on Public Square to rally against economic injustice. Tr.3-4, 26.[1] Appellees Erin McCardle and Leatrice Tolls were among them.

More particularly, as drawn from the complaints and police report,[2] on the evening of October 21, 2011, shortly after 10:00 p.m., Erin McCardle and Leatrice Tolls were sitting in the northwest quadrant of Cleveland's Public Square as a part of a peaceful protest. Each of them was allegedly instructed that remaining in Public Square after 10:00 p.m. was a violation of Cleveland Cod. Ord. 559.541, and that the failure to leave Public Square was an arrestable offense. When neither left, but instead, remained seated in protest, the Cleveland Police Department arrested them.

Ms. McCardle was charged with violating Cleveland Cod. Ord. 559.541, which prohibits "unauthorized persons" from remaining on Public Square between 10:00 p.m. and 5:00 a.m. daily. She was also charged with criminal trespass, in violation of Cleveland Cod. Ord. 624.04, and with resisting arrest, in violation of Cod. Ord. 615.08.

Ms. Tolls was also charged with violating Cleveland Cod. Ord. 559.541, as well as with criminal trespass.

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[1] "Tr." refers to the transcript of the motion hearing held in Ms. McCardle's case on December 20, 2011.

[2] The report was introduced as Ex. A at the hearing held on the Ms. McCardle's Motion to Dismiss the complaint. Tr. 26.

The Ordinance

Cleveland Cod. Ord. 559.541, which governs the use of Public Square, provides as follows:

> No unauthorized person shall remain on or in any portion of the area known as the Public Square area between the hours of 10:00 p.m. to 5:00 a.m. Persons may be authorized to remain in Public Square by obtaining a permit from the Director of Parks, Recreation and Properties.
>
> Such permits shall be issued when the Director finds:
>
> (a) That the proposed activity and use will not unreasonably interfere with or detract from the promotion of public health, welfare and safety;
>
> (b) That the proposed activity or use is not reasonably anticipated to incite violence, crime or disorderly conduct;
>
> (c) That the proposed activity will not entail unusual, extraordinary or burdensome expense or police operation by the City;
>
> (d) That the facilities desired have not been reserved for other use at the day and hour required in the application.
>
> For purposes of this section, the "Public Square area" includes the quadrants and all structures (including but not limited to walls, fountains, and flower planters) located within the quadrants known as Public Square and shown on the map below, but excludes the quadrant on which sits the Soldiers and Sailors Monument; the Public Square area also excludes all dedicated streets, public sidewalks adjacent to dedicated streets and RTA bus shelters within this area.
>
> Whoever violates this section is guilty of a minor misdemeanor on the first offense, a misdemeanor of the fourth degree on the second offense, and a misdemeanor of the third degree on the third and any subsequent offense.

Id.[3]

The Public Square

Public Square is generally known to Cleveland residents as the four block area near the base of the Terminal Tower, bisected by Ontario Street and Superior Avenues. But Public Square has a more precise meaning under Cod. Ord. 559.541, and consists of only three of the four quadrants of Public Square. (The southeast quadrant, on which the Soldier's and Sailor's monument stands, is excluded from the definition.)

More specifically, the southwest quadrant of Public Square, at the base of the Terminal Tower, consists of a large brick plaza used by pedestrians as a sidewalk.

The northeast quadrant of Public Square, near the old Federal Courthouse and at the base of the Key Tower, consists of a central circular fountain at the vertex of two diagonal sidewalks, which cross in the center of the quadrant and are paved in the same material as, and tie directly into the public sidewalks along Superior Avenue, Ontario Street, and are offset from the surrounding streets and sidewalks by copses of trees and shrubs, one on each side of the quadrant.

The northwest quadrant of Public Square, nearest Old Stone Church, is also known as the Tom Johnson quadrant, for the statue of the former mayor that sits at its northern edge. The inscription behind the statue reads as follows:

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[3] As originally introduced before the City Council, the law provided that, "No unauthorized person *shall be or remain on or in* any portion of the area known as Public Square. . . ." *See* The City Record, July 18, 2007, at 22 (emphasis added). The phrase "be or" was removed during the legislative process, and a penalty provision was added. *See* The City Record, August 15, 2007, at 75. As a consequence, only *remaining* in or on Public Square became unlawful; simply *being* in or on Public Square between 10:00 p.m. and 5:00 a.m. was allowed.

> Erected by popular subscription in memory of the man who gave his fortune and his life to make Cleveland, as he often expressed it, a happier place to live in, a better place to die in, and *located on the spot he dedicated to the freedom of speech.*

(Emphasis added). The quadrant consists of four brick sidewalks along its inner perimeter, which are tied to the surrounding sidewalks along Ontario Street, Rockwell Avenue, Superior Avenue and the West Roadway by broad low stairs at the four corners of the quadrant, and that surround a small lawn.

Though each quadrant of Public Square is open, with benches or bleachers on which people may sit, it is not a recreation area. Rather, it is the crossroad of downtown Cleveland and its central hub of free expression. For more than a century, Public Square has been the site of political rallies, protests and vigils where citizens have met, gathered and collectively rallied on the important topics of the day.

Indeed, Public Square's history as a forum for political expression was documented more than a hundred years ago. In 1910, Samuel Peter Orth described Public Square in his *History of Cleveland*:

> The speaking pavilion erected on the northwest section became a popular 'place of assembly.' . . .
> . . .
> The Square has been the forum of our partisanship and political conviction, where the fervid eloquence of statesmen and political leaders thrilled vast throngs of eager citizens, gathered in the great open air meetings that were popular fifty years ago.
>
> . . .
>
> Today, the din of the metropolis makes out-of-door meetings in the Square impossible. But in the northwest corner is even now heard the strident voice of agitator, revolutionist, visionary and exhorter, uttering their puny protests against

things as they are, their wails and threats lost in the roar of actual life that swirls through the busy Square."

Orth, *A History of Cleveland, Ohio* (Vol. I), S.J. Clarke Pub. Co., Chicago-Cleveland (1910), at 760, 762-763. Two years before Orth wrote those words, Mayor Tom Johnson had allowed Emma Goldman, the radical anarchist, to speak there in 1908, where she addressed a crowd of some 3,000 people.[4]

Orth's description of Public Square is equally apt today. In the century that has passed since he authored those words, Public Square has served as the rallying site for thousands of citizens to speak and gather about the pressing issues of the day. It was the place where those who sympathized with Sacco and Vanzetti gathered in 1927[5], where 3,000 Communists rallied against President Hoover in 1930 for his failure to aid the unemployed[6], and where CIO members gathered in support of striking Republic Steel workers, in 1937.[7]

Public Square was the site where, in 1946, the American Youth for Democracy rallied to protest Sen. Robert Taft's attempt to amend the act authorizing the Office of Price Administration, a core New Deal agency, and hung him there in effigy.[8]

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[4] Mattson, Kevin, *Creating a Democratic Public: The Struggle for Urban Democracy During the Progressive Era,* Penn. State Univ. Press University Park: (1998) at 38-39; The Public, Vol. Xi, No. 53, 11/6/1908 at 753.

[5] *Youngstown Vindicator*, 8/10/27 at 23.

[6] *New York Times*, 4/15/30.

[7] *Meriden Daily Journal*, 10/3/30 at 6.

[8] *Youngstown Vindicator*, 7/4/46 at 1.

The roiling and turbulence of the 1960's and 1970's drew political dialogue and action to Public Square. The University Circle Teach-in Committee held a midnight vigil rally on Public Square in the fall of 1965 to protest the war in Vietnam, which drew jeering counter-protesters.[9] African-Americans rallied on Public Square that same year to protest against discrimination against them in the building trade unions when a new federal building was being constructed.[10] Hundreds gathered at Public Square on May 5, 1971, to commemorate one year anniversary of the day that Kent State students were shot by members of the Ohio National Guard.[11]

Anti-draft protesters gathered on the Tom Johnson quadrant of Public Square in 1980 to rally against the revival of draft registration in 1980.[12] Nearly 1,000 citizens rallied at Public Square in 1981 against proposed budget cuts proposed by the Reagan administration.[13] And in 1987, Public Square was the site of a candlelight vigil against the testing of nuclear weapons.[14]

The historic tradition continues to this day. In the last several years, Public Square has been the rallying site for citizens to gather to support military troops serving overseas,[15] to

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[9]Encyclopedia of Cleveland History, *Vietnam War*, ech.case.edu/cgi/article.pl?id=VW (last accessed 7/08/2013)

[10] *New York Times*, 3/25/65 at 28.

[11] *Portsmouth Times*, 5/6/71 at 26.

[12] *Plain Dealer*, 7/22/80 at 1.

[13] *Bryan Times*, 5/11/81 at 3.

[14] *Observer Reporter,* 11/2/87 at A-4.

[15] *Plain Dealer*, 5/1/2011.

encourage the adoption of a medical marijuana law in Ohio,[16] and in the past several months, a gathering place to protest against the shooting of a dog and for stricter animal cruelty laws.[17]

The Tom Johnson free speech quadrant of Public Square served as the historic backdrop for the case at bar, the place where Erin McCardle, Leatrice Tolls and other citizens gathered and peacefully rallied and protested against economic disparity in the United States.

Thus, unlike the parks to which the City and its *amici* compare the Public Square, Cleveland's Public Square is not a recreation area where citizens play baseball, fish or swim, and then go home at dusk. It is not a public green where families have picnics, throw frisbees to their dogs or walk hand-in-hand through the woods. It is an urban area that is never closed to the public, through which citizens are free to walk twenty-four hours a day, seven days a week. Access to the Public Square is never closed.

It is for that reason that the *amici's* claim that the decision below restricts and undermines the ability of the State and of local governments to enforce general curfew laws for state parks and grounds is misplaced and wrong.

Public Square is not a park; it is *sui generis*.

The Proceedings Below

Each of the appellees moved to dismiss the charges against her and contended that the Public Square ordinance they were charged with violating was unconstitutional under the First and Fourteenth Amendments. Specifically, they asserted that the law was unconstitutional because, if deemed a "content-neutral law," it failed to further a substantial governmental interest

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[16] http://tinyurl.com/muphk95 (Last accessed 6/28/2013).

[17] http://tinyurl.com/n2ka6le (Last accessed 6/28/2013).

in a narrowly tailored way. They also argued that the ordinance, which required a permit to remain on Public Square after 10:00 p.m., was unconstitutional because it failed to provide narrow and circumscribed criteria for City officials in deciding whether to grant or deny a permit, and failed to impose any time limit on administrative decision making. The Ordinance also failed to provide for judicial review in the event a permit was denied. Appellees asserted that if the ordinance were viewed as a content-based law, it was unconstitutional because it failed to survive "strict scrutiny."

The municipal court denied the appellees' motions to dismiss, and each ultimately pled no contest to a charge that they violated the Public Square ordinance. The remaining charges against each were dismissed, and appellees timely appealed their convictions to the Cuyahoga County Court of Appeals.

The court of appeals reversed each of their convictions. Its opinion recognized that the City came forward with no evidence, other than its *ipse dixit*, of any governmental interest that the Ordinance was purportedly designed to further. Nevertheless, the court treated the Ordinance as a "content-neutral" law and, applying intermediate scrutiny, concluded that it failed to pass muster because it was not narrowly tailored to further a substantial governmental interest.

For the reasons set out below, the decision below should be affirmed. Cleveland Cod. Ord. 559.541, is unconstitutional under the First and Fourteenth Amendments.

LAW AND ARGUMENT

PROPOSITION OF LAW NO. 1

> Cleveland Cod. Ord. 559.541, Which Prohibits Remaining on Cleveland's Public Square, a Traditional Public Forum, Between 10 P.M. and 5 A.M. Without a Permit, Is Unconstitutional Under the First and Fourteenth Amendments to the United States Constitution.

Cleveland's Public Square, the location where Ms. McCardle and Ms. Tolls were arrested, and the location governed by Cod. Ord. 559.541 is, in constitutional parlance, a public forum, where a citizen's right to engage in free expression is at its highest.

Streets, sidewalks and parks are the quintessential public fora, which "'time out of mind . . . have been used for public assembly and debate.'" *Snyder v. Phelps*, 131 S.Ct. 1207, 1218 (2011)(quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988))(streets and sidewalks)); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 776 (1988)(streets, sidewalks and parks).

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939). *See also United States v. Grace*, 461 U.S. 171, 179 (1983)(finding that public sidewalks are traditional public fora and should be regarded as such "without further inquiry").

The blanket prohibition imposed by Ord. 559.541 prohibiting Ms. McCardle, Ms. Tolls and others from gathering on Public Square to engage in constitutionally protected activity during nighttime hours without a permit, and the system under which they could obtain a permit to do

so, are unconstitutional because they exceed the well established limitations on how the government may restrict expression in a traditional public forum.

Specifically, the ability of the government to regulate speech in a traditional public forum "is sharply circumscribed." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995). While the government may impose content-neutral time, place and manner restrictions on speech, it can do so only if the regulations are narrowly tailored to advance a significant governmental interest, and leave open ample, alternative avenues of communication. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002)(*citing Forsyth County, Georgia v. The Nationalist Movement,* 505 U.S. 123, 130 (1992)); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

Separate and apart from the standards governing the regulation of expression in a public forum, laws that require citizens to obtain a permit as a prerequisite to speaking in a traditional public forum are a form of prior restraint, and the Supreme Court has required that any such scheme contain safeguards to ensure that it cannot be used as a pretext for content-based discrimination. *Forsyth County*, 505 U.S. at 130. To ensure that is the case, permit schemes must have adequate standards to cabin the discretion of the licensing official, and allow the applicant to obtain judicial review of an adverse licensing determination. *Thomas*, 534 U.S. at 323, *citing Niemotko v. Maryland*, 340 U.S. 268, 271 (1951).

One need not apply for, and be denied, a license to challenge the constitutionality of a licensing scheme under the First Amendment. As the Supreme Court pointedly stated in *City of Lakewood v. Plain Dealer Publishing Co.*,486 U.S. 750 (1988);

> It bears repeating that "[i]n the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license." *Freedman*, 380 U.S., at 56, 85 S.Ct., at 737.

Id. at 764. *See also Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147 (1969)("[O]ur decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license)(footnote and citations omitted); *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 156 (2002)(striking down municipal permit law, noting that none of the petitioners had applied for a license).

The restrictions on remaining in Public Square contained in Cod. Ord. 559.541 at issue here fail to pass muster under the First Amendment in at least three distinct ways: (1) they do not further a substantial governmental interest, let alone do so in a narrowly tailored way; (2) they are not in fact content-neutral, but are content-based because they allow, and even require, the licensing official to inquire into the anticipated reaction to a putative speaker's message, and thus the content of that message, in considering an application; and, (3) they neither contain adequate standards to cabin the discretion of the licensing official, nor provide applicants a mechanism for judicial review of an adverse licensing decision.

Each of these shortcomings is fatal as a matter of First Amendment law, and renders Cod. Ord. 559.541 unconstitutional.

PROPOSITION OF LAW NO. 2

A City, Such as Cleveland, that Adopts an Ordinance Regulating Expression, Bears the Burden of Establishing the Constitutionality of Its Law, and the Failure to Present any Evidence to Support the Validity of its Law Renders It Unconstitutional Under the First and Fourteenth Amendments.

The Supreme Court has held time and again that when a law regulates expression, regardless of whether the law is treated as a content-based restriction of speech and subject to strict scrutiny, or is treated as a content-neutral law and examined under intermediate scrutiny, the government bears the burden of demonstrating its constitutionality. *See United States v. Alvarez*, 567 U.S. ___ , 132 S.Ct. 2537 (2012) ("'the Constitution 'demands that content-based restrictions on speech be presumed invalid ... and that the Government bear the burden of showing their constitutionality.'")(Kennedy, J); *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729, 2738 (2011)("Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest."); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000)("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions"); *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 665 (1994)("In applying [intermediate] scrutiny we must ask first whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry. Assuming an affirmative answer to the foregoing question, the Government still bears the burden of showing that the remedy it has adopted does

not 'burden substantially more speech than is necessary to further the government's legitimate interests.'")(citation omitted).

Thus, the ordinance at issue here enjoys no presumption of constitutionality; the City bore the burden of demonstrating its constitutionality, and failed to carry that burden.

As the court of appeals recognized, "We reiterate that the city failed to present any testimony regarding a specific interest that concerned the city." The City does not dispute the court's contention, and its failure to satisfy that burden renders the law incapable of passing constitutional muster. *See Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 170 (2002)(Breyer, J., concurring)("In the intermediate scrutiny context, the Court ordinarily does not supply reasons the legislative body has not given.) *Cf. United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, *the Government bears the burden* of proving the constitutionality of its actions" (emphasis added))." *Accord Rock Against Racism v. Ward*, 848 F.2d 367, 370 n.3, (2d Cir. 1988) *rev'd*, 491 U.S. 781(1989)(outlining factual record supporting City's asserted interest); *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 573-74 (6th Cir. 2012)(describing City's evidence adduced in support of its ordinance).

By dint of City's failure to present any evidence in support of the asserted interest the law was putatively designed to further, it failed to meet its constitutionally mandated burden, for which reason, standing alone, the judgment below should be affirmed.

PROPOSITION OF LAW NO. 3

> A Content-Neutral Law that Requires a Permit to Engage in Expressive Activity in a Traditional Public Forum Is Unconstitutional, both on Its Face and as Applied, when the Law Does Not Further a Substantial Governmental Interest, and Assuming *Arguendo*, Such an Interest Could Be Identified, Is Not Narrowly Tailored to Further That Interest. Cleveland Cod. Ord. 559.541 Does not Meet That Standard.

A content-neutral restriction on expression in a traditional public forum can only survive if a) the regulation furthers a substantial governmental interest; b) it does so in a narrowly tailored way; and, c) it leaves open alternative avenues of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989). If Cod. Ord. 559.541 is regarded as a content-neutral time, place and manner restriction on the use of a traditional public forum, it cannot survive intermediate scrutiny because it is overbroad and does not further a substantial governmental interest, let alone do so in a narrowly tailored way.

Accordingly, the first inquiry necessarily is what substantial governmental interest is the Ordinance designed to further.

Here, Ord. 559.541 bans all expressive activity on Public Square between 10:00 p.m. and 5:00 a.m. daily without first obtaining a permit. As with any law burdening expression, the burden rested with the City to identify the specific evil this prohibition targets, and why that evil cannot be eliminated in any less draconian fashion. *Int'l Soc. for Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992). "A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby*, 487 U.S. at 485.[18]

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[18] It is, of course, no answer to state that at 10:00 p.m. one can simply retreat to the outlying public sidewalks adjacent to the dedicated streets around Public Square. As the Supreme Court stated long ago: "one is not to have the exercise of his liberty of expression in appropriate

(continued...)

The City asserts a laundry list of general police power interests that it claims the Ordinance is designed to further, including managing space, controlling vehicle and pedestrian traffic, preserving and maintaining the interior of the quadrants, protecting it from overuse, protecting it from unsanitary conditions, preventing dangerous and unlawful uses, and assuring financial accountability for damages. *See* Br. of City at 7-8, 14.

The interests it has asserted in this Court, however, have shifted and are more expansive, than the interests the City asserted in the trial court and in the court of appeals. Specifically, in the trial court, the City, simply by citing to Supreme Court's decision in *Thomas v. Chicago Park District*, 534 U.S. 316, 323 (2002), rather than relying on evidence, claimed that the Ordinance was simply designed "to manage the limited space that is available, to ensure that the park grounds are preserved; to prevent dangerous, unlawful or impermissible uses; and to assure financial accountability for any damage that may be caused thereon." *See* City's Response in Opposition to Defendant's Motions to Dismiss, at 8. It identified those same interests before the court of appeals. *See* Br. of Plaintiff-Appellee City of Cleveland at 6. Irrespective of its shifting justifications for the law, when one examines each of those potential justifications for the law, it becomes manifestly clear that none of those interests are furthered by the Ordinance, let alone furthered in a narrowly tailored way as the First Amendment requires.

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[18](...continued)
places abridged on the plea that it may be exercised in some other place." *Schneider v. State of New Jersey*, 308 U.S. 147, 151-52 (1939). *See also Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

The City's claim that the law furthers the substantial governmental interest of managing space defies logic and common sense. The City does not explain how that interest is furthered by its curfew law, and the fatal flaw in its contention is easily exposed.

What is it about the asserted interest in managing space that makes it necessary for a citizen to obtain a permit to remain on Public Square in the evening, while permission is not needed during the daytime hours, when presumably more people are present? How does a ban on citizens remaining in a traditional public forum between the hours of 10:00 p.m. and 5:00 a.m. further the claimed interest in managing space?

The answer to the first question is that there is nothing about managing space that would require a permit in the first instance but not the second. There is simply no basis upon which the City's curfew law has any connection to managing space, let alone the notion that the law is narrowly drawn to further that interest; there is a complete disconnect between the two.

The City also argues that its Ordinance furthers its interest in maintaining vehicle and pedestrian traffic. The plain language of the Ordinance belies any contention that such an interest, whatever its validity might be in the abstract, is served by this specific law.

At the outset, the Ordinance is wholly unrelated to controlling *vehicular* traffic. Public Square, under the Ordinance's specific definition, *excludes "all dedicated streets, public sidewalks adjacent to dedicated streets and RTA bus shelters within this area." Id.* (emphasis added). Simply put, there is no vehicular traffic in or on Public Square.

Nor does the law further the claimed interest in controlling pedestrian traffic. Again, it bears repeating that no permit is necessary to remain on Public Square during the daytime hours, presumably the time when pedestrian traffic would be the greatest.

What is more, the law's failure to further that asserted interest in any way whatsoever is demonstrated by the fact that the prohibition applies to a single person remaining on Public Square as much as it applies to a group of picketers– a sole protester is barred from remaining on Public Square as equally as ten or a hundred. The claimed interest in crowd control and maintaining pedestrian traffic simply is not furthered by the law.

The City next suggests that the substantial governmental interest of preserving "the park" is furthered by the Ordinance. At the outset, the City never explains what it means when it states that the law is designed "to ensure preservation of the park." Nor does it explain how a ban on remaining in Public Square during the restricted hours furthers that interest or is narrowly tailored to do so.

What is it about the Ordinance that possibly could further that asserted interest? A brief example demonstrates why this asserted rationale fails as well.

Under the Ordinance, 1,000 people could walk through Public Square over the course of 10 minutes at midnight– which is not prohibited. Yet, a single person who stood within the quadrants of Public Square and watched the throng pass by has committed a crime. Banning the latter but not the former does nothing to further the claimed interest in preserving the park. Accordingly, the notion that this law is justified on the ground of preserving the park is illusory.

The contention that the law furthers the interest in preventing dangerous or unlawful uses suffers from the same defects, a point that the City's brief itself establishes. Specifically, the City argues that the law allows the City to protect its properties when a proposed use is dangerous or illegal, asserting that "even a solitary person inside Public Square could inflict damage to park property or commit criminal activity." Br. at 10.

That point dooms the City's claim, for one need not *remain* in Public Square– the prohibited act– to engage in unlawful activity; a person walking through Public Square is equally capable of littering, damaging park property or engaging in other activity harmful to the public. What is more, one can engage in that misbehavior at any time, not just during the hours that remaining on Public Square is prohibited.

As appellees noted earlier, there is no prohibition on walking through Public Square after 10:00p.m.– the prohibition is on *remaining* in Public Square. One can walk up and down and through the Public Square with impunity and without violating the law. It is only if one stops long enough to be regarded as remaining there that a crime is committed. The City's law utterly fails to further the asserted interest of preventing dangerous or illegal uses.

Finally, the City does not explain how the ban imposed by the Ordinance furthers the interest in assuring financial responsibility for damage that might be caused. Nor could it, since under the law thousands of people, as history shows, can rally in Public Square and can remain in Public Square between 5:01 a.m. and 9:59 p.m., without the necessity of obtaining a permit from the City and without providing any assurance of financial responsibility to the City.

It is for each of these reasons that the City's claim that its law is narrowly tailored to further a substantial governmental interest rings hollow.

It was precisely because there was a lack of fit between the asserted interest and Chicago's ordinance banning late night assemblies in Grant Park that the court in *Chicago v. Alexander*, 2012 WL 4458130, No. 11 MC1-237718 (Cook County Circuit Ct.), declared the Chicago's law unconstitutional. There, the City failed to adduced any factual basis to show that its hours law was justified, and the court found that the city's "mere assertion that the [law] is

necessary does not suffice to demonstrate the tight fit" necessary to pass constitutional muster. *Id.* at 24. But even considering the asserted bases for the law, namely park preservation and the reduction of crime against park patrons and property, the court determined the law was not narrowly tailored to further those asserted interests. *Id.* at 23-25.

The Sixth Circuit, in *Parks v. Finan*, 385 F.3d 694 (6th Cir. 2004), invalidated a licensing scheme that required citizens to obtain a permit to engage in speeches and public gatherings on Capitol Square in Columbus. In striking down the law, the court noted that the breadth of such a scheme, with all its literal attendant consequences, was inimical not just to the First Amendment, but to the conception of a free society. Drawing upon the Supreme Court's decision in *Watchtower Bible and Tract Soc. v. Village of Stratton*, 536 U.S. 150 (2002), it wrote:

> While there are some important differences between the permit scheme in this case and the one at issue in *Watchtower*, one of the core reasons for invalidating the latter clearly applies to the permit scheme in this case as applied to individuals. That is, the permitting scheme effectively bans spontaneous speech on the Capitol grounds. The Supreme Court expressed this concern in *Watchtower* in the following words:
>
> > there is a significant amount of spontaneous speech that is effectively banned by the ordinance. A person who made a decision on a holiday or a weekend to take an active part in a political campaign could not begin to pass out handbills until after he or she obtained the required permit. Even a spontaneous decision to go across the street and urge a neighbor to vote against the mayor could not lawfully be implemented without first obtaining the mayor's permission.
> >
> > Similarly, under the CSRAB permit scheme, two friends debating which candidate should be elected President in November while walking across the Capitol grounds are regulated by the permitting scheme, at least according to its literal terms, but it is highly unlikely that these people would continue their discussion if they knew a permit was required to do so.

Id. at 701-02 (quoting *Watchtower,* 536 U.S. at 167).

Here, the application to use the Public Square during the restricted time, appended to the City's brief in the court of appeals (and included in the appendix to this brief), demonstrates the law is incompatible with free speech. The application itself provides that it "must be received **at least (10) business days** prior to event date. . . ." and therefore leaves citizens who desire to spontaneously gather and express themselves on a matter of immediate public concern completely foreclosed from doing so.

What is more, it is unlawful – indeed, it is a strict liability offense – for undersigned counsel to pause on Public Square, adjacent to their office, to discuss this case tonight after 10 p.m., or indeed, for even one of them to stop and contemplate the case alone.

Finally, whatever substantial governmental interest might be asserted in defense of the law, the Ordinance cannot be said to further any such interest in a narrowly tailored way because it is underinclusive– the law fails to prohibit a physical presence on, or First Amendment activity in other public fora, including the sidewalks adjacent to Public Square.

More particularly, if the Ordinance is intended to protect the public health, welfare and safety from whatever harms dwell in public fora between 10:00 p.m. and 5:00 a.m., there is no good reason why it should be limited to Public Square, unless some unique dangers haunt that space during those hours. For, whatever governmental interest might be claimed to be advanced by prohibiting one from remaining on Public Square after 10:00 p.m. would likewise be applicable to remaining on the sidewalk adjacent to Public Square.

That is particularly true since the prohibition set out in the ordinance is not on walking through Public Square to get from one place to another, but from remaining on Public Square.

Indeed, the law's failure in that regard is highlighted by the City for it recognizes that Defendants-Appellees could have simply moved to the adjacent public sidewalk. *See* City Br. at 17.

From a First Amendment perspective, the under-inclusiveness of the law is highly significant, because under-inclusiveness frequently betrays an impermissible animus toward protected expression. As the Supreme Court noted recently:

> Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.

Brown v. Entertainment Merchant's Assoc., 131 S.Ct. 2729, 2740 (2011)(citations omitted).

In this case, the underinclusiveness of the Cod. Ord. 559.541, which applies *only* to the public space most frequently used as, and most commonly thought of as, a venue for free expression in the City of Cleveland, reflects a clear intention to prohibit First Amendment activity in that space, at times when no legitimate interest is advanced by its prohibition.

For these reasons, the Ordinance is unconstitutional. The judgment below should be affirmed.

PROPOSITION OF LAW NO. 4

> An Ordinance, Such as Cod. Ord. 559.541, that Requires a Licensing Official to Inquire Into the Speech of a Putative Demonstrator and the Likely Reaction of His Audience in Deciding Whether or not a Permit Should Issue, Is A Content-Based Restriction of Speech That Must Satisfy Strict Scrutiny to Pass Muster Under the First and Fourteenth Amendments.[19]

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[19] Because the court of appeals decided that Cleveland's Ordinance did not pass muster under intermediate scrutiny, it had no need to address the appellees' other arguments that warranted reversal of their convictions, namely that Cod. Ord. 559.541 was a content-based restriction on expression that failed to pass muster under strict scrutiny, and that the Ordinance

(continued...)

Laws that impose restrictions on expression, including time, place and manner restrictions, because of the content of the message being communicated are "content-based laws." If a law is deemed content-based, it must satisfy strict scrutiny to pass muster under the First Amendment. Strict scrutiny demands that the regulation at issue be the least restrictive means possible to further a compelling governmental interest. *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729 (2011); *United States v. Playboy Entertainment, Inc.*, 529 U.S. 803, 816-17(2000)(*quoting Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173 (1999)); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997); *Edenfield v. Fane*, 507 U.S. 761 (1993); *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992); *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989).

Strict scrutiny is a demanding standard: "It is rare that a regulation restricting speech because of its content will ever be permissible." *Brown*, 131 S.Ct. at 2738 (citation omitted).

In *Forsyth County*, the Court invalidated a county ordinance which permitted a licensing official to vary the cost of a permit to use public roads based upon the anticipated cost of policing the event. The Court concluded that allowing the official to vary the fees was, in effect, writing a

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[19](...continued)
was an unconstitutional licensing scheme that failed to pass muster under the First and Fourteenth Amendments. Appellees raise these arguments, advanced in the trial court as well as in the court of appeals, as alternative grounds to affirm the judgment below. *See, e.g, Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 489, 727 N.E.2d 1265, 1273 (2000); *State ex rel. Chrysler Corp. v. Indus. Comm'n of Ohio*, 81 Ohio St.3d 158, 167, 689 N.E.2d 951, 958 (1998); *Morgan v. Cincinnati*, 25 Ohio St.3d 285, 289-290, 496 N.E.2d 468, 472 (1986); S.Ct. Prac. R. 16.03(B)(1).

heckler's veto into the ordinance, raising the cost of unpopular speech (or speech which the government expected to be unpopular) based on the fear of an adverse audience reaction.

> The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.
>
> * * *
>
> The costs to which petitioner refers are those associated with the public's reaction to the speech. Listeners' reaction to speech is not a content-neutral basis for regulation.
>
> * * *
>
> Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.

Forsyth, 505 U.S. at 134-35 (citations omitted).

This Court, too, has recognized that when a listener's reaction to expression is to be taken into account by the government, the restraint on speech is one that is content-based, not content-neutral:

> The primary justification for seeking this portion of the injunction was Seven Hill's fear of a hostile reaction among listeners. The speech restriction in this case is directly related to the speech's impact on listeners rather than being incidental to the purpose. 'Listeners' reaction to speech is not a content-neutral basis for regulation'.

City of Seven Hills v. Aryan Nations, 76 Ohio St.3d 303, 307, 667 N.E.2 942, 946-47, 1996-Ohio-394 (1996), *quoting Forsyth Cty.*, 505 U.S. at 134, *citing, in turn, Boos v. Berry*, 485 U.S. 312 (1988).

Here, an examination of the language employed in Cod. Ord. 559.541 reveals that it demands that the licensing official inquire into the potential audience reaction to expression in

deciding whether or not a permit should issue in the first instance. Section 559.541(a), (b) and (c) provide:

> Such permits shall be issued when the Director finds:
>
> (a) That the proposed activity and use will not unreasonably interfere with or detract from the promotion of public health, welfare and safety;
>
> (b) That the proposed activity or use is not reasonably anticipated to incite violence, crime or disorderly conduct;
>
> (c) That the proposed activity will not entail unusual, extraordinary or burdensome expense or police operation by the City . . . .

Id.

These criteria – which under the contested Ordinance provide sufficient justification for the denial of a requested permit – are indistinguishable from the considerations of anticipated audience reaction invalidated in *Forsyth County*.

Deciding that a proposed activity might detract from public safety, incite violence, or entail an unusual or extraordinarily burdensome expense or police presence necessarily requires the Director of Parks, Recreation and Properties to consider the anticipated response to a putative speaker, and thus to consider his anticipated message as well. Section 559.541 is not, for this reason, a content neutral time, place and manner restriction, and accordingly must face strict judicial scrutiny, which it cannot survive.

Presumably the mandate that a permit be issued except in cases where a violent reaction or an unusual police presence is anticipated is included in the ordinance to avoid violent reactions or the need for heavy policing. But the City has no legitimate interest – much less a

compelling interest – in such a result. Indeed, in *Forsyth County*, 505 U.S. at 136, the Court held that offsetting the cost of policing associated with unpopular speech could not justify the imposition of a sliding scale that imposed higher fees on unpopular speakers.

If the government cannot charge more for a permit based on anticipated hostility to a given speaker and his message, *a fortiori*, it cannot use the same considerations as a basis to deny a permit to speak in the first instance.

The Ordinance thus fails under strict scrutiny. Accordingly, the judgment below should be affirmed.

PROPOSITION OF LAW NO. 5

> A Law Such as Cleveland Cod. Ord. 559.541, That Imposes Licensing Restrictions on the Use of a Traditional Public Forum, but That Fails to Cabin the Discretion of the Licensing Official or Require a Prompt Decision, or Fails to Provide the Opportunity for Judicial Review of an Adverse Licensing Decision, is Unconstitutional Under the First and Fourteenth Amendments.

Separate and apart from its facial invalidity under intermediate scrutiny and due to overbreadth and underinclusiveness, the ordinance is unconstitutional for a separate reason. Specifically, the law allows the Director of Parks, Recreation and Properties to grant or deny putative speakers a permit to remain – and thus to engage in First Amendment activity – in Public Square overnight.

An ordinance, such as the one at issue here, that requires a license or permit to engage in activity protected by the First Amendment must remove discretion from government officials in deciding whether to grant or deny a license. In addition, the decision to grant or deny a license must be made within a brief period of time and there must be a mechanism to obtain judicial review of a license denial.

Codified Ord. 559.541 lacks each of these safeguards on expression, and therefore, is unconstitutional.

1. Cod. Ord. 559.541 is Unconstitutional Because it Confers Impermissible Discretion on City Officials to Grant or Deny a License.

It is well-settled that a law that imposes upon a speaker the burden of obtaining a permit in order to engage in expressive activity is, by definition, a prior restraint on expression. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Moreover, "any system of prior restraints of expression. . .bear[s] a heavy presumption against its constitutional validity." *Id.* To conform to the requirements mandated by the First Amendment, any law which requires a permit to engage in expressive activity must contain narrow grounds to cabin the discretion of government officials. *Thomas v. Chicago Park District*, 534 U.S. 316 (2002); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) *Lovell v. Griffin*, 303 U.S. 444 (1938). Two fundamental principles underlie this rule.

First, censorship may result from the exercise of such raw, standardless power by officials who may use that power to silence messages with which they disagree. "A newspaper espousing an unpopular viewpoint on a shoestring budget may be the likely target for a retaliatory permit denial. . . . That paper might instead find it easier to capitulate to what it perceives to be the mayor's viewpoint, or simply close up shop." *Lakewood*, 486 U.S. at 758. *See also, e.g., Shuttlesworth v. Birmingham*, 394 U.S. 147, 150 (1969).

Second, the absence of objective standards to provide a guidepost for official action renders it impossible to ascertain whether the licensor is discriminating against speech because of its content or for some other reason. "Without these guideposts, post hoc rationalizations by the

licensing official and the use of shifting and illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is . . . suppressing unfavorable expression." *Lakewood*, 486 U.S. at 758 (citation omitted).

Indeed, the danger of censorship is omnipresent where discretion is left to government officials, the Court wrote in *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992):

> 'because such discretion has the potential for becoming a means of suppressing a particular point of view.' *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649, 101 S. Ct. 2559, 2565, 69 L.Ed.2d 298 (1981). To curtail that risk, 'a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority.' *Shuttlesworth*, 394 U.S., at 150-151, 89 S.Ct., at 938; *see also Niemotko v. Maryland*, 340 U.S. 268 (1951). The reasoning is simple: If the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion,' *Cantwell v. Connecticut*, 310 U.S. 296, 305, 60 S.Ct. 900, 904, 84 L.Ed. 1213 (1940), by the licensing authority, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great" to be permitted. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 95 S.Ct. 1239, 1244, 43 L.Ed.2d 448 (1975).

Id. at 130-31.

Here, the ordinance provides no meaningful limits on the discretion of the Director. It is thus unconstitutional under the plain holding of *Thomas*, 534 U.S. at 323.

In *Thomas*, the Court addressed the validity of a Chicago ordinance that required any gathering of fifty or more persons that wished to use a city park to first obtain a permit for doing so. The plaintiff, a putative demonstrator, challenged the ordinance as an unlawful prior restraint on protected expression in a traditional public forum. The ordinance at issue contained thirteen criteria upon which the city official could deny a permit. Specifically, it stated:

To the extent permitted by law, the Park District may deny an application for permit if the applicant or the person on whose behalf the application for permit was made has on prior occasions made material misrepresentations regarding the nature or scope of an event or activity previously permitted or has violated the terms of prior permits issued to or on behalf of the applicant. The Park District may also deny an application for permit on any of the following grounds:

(1) the application for permit (including any required attachments and submissions) is not fully completed and executed;

(2) the applicant has not tendered the required application fee with the application or has not tendered the required user fee, indemnification agreement, insurance certificate, or security deposit within the times prescribed by the General Superintendent;

(3) the application for permit contains a material falsehood or misrepresentation;

(4) the applicant is legally incompetent to contract or to sue and be sued;

(5) the applicant or the person on whose behalf the application for permit was made has on prior occasions damaged Park District property and has not paid in full for such damage, or has other outstanding and unpaid debts to the Park District;

(6) a fully executed prior application for permit for the same time and place has been received, and a permit has been or will be granted to a prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular park or part hereof;

(7) the use or activity intended by the applicant would conflict with previously planned programs organized and conducted by the Park District and previously scheduled for the same time and place;

(8) the proposed use or activity is prohibited by or inconsistent with the classifications and uses of the park or part thereof designated pursuant to this chapter, Section C.1., above;

(9) the use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant, or other users of the park, of Park District Employees or of the public;

> (10) the applicant has not complied or cannot comply with applicable licensure requirements, ordinances or regulations of the Park District concerning the sale or offering for sale of any goods or services;
>
> (11) the use or activity intended by the applicant is prohibited by law, by this Code and ordinances of the Park District, or by the regulations of the General Superintendent ....

Id. at 318 n.1.

The Court sustained the ordinance, finding that "[t]hese grounds are reasonably specific and objective, and do not leave the decision 'to the whim of the administrator.' They provide 'narrowly drawn, reasonably and definite standards' to guide the licensor's decision." *Id.* at 324.

Here, however, Cod. Ord. 559.541 does not contain anything remotely resembling the sort of precise, "'narrowly drawn, reasonable and definite standards'" limiting the discretion of the licensing official, which are a First Amendment requirement of permit schemes governing the use of traditional public fora. *Thomas*, 534 U.S. at 324 (quoting *Forsyth County*, 505 U.S. at 133 (in turn quoting *Niemotko*, 340 U.S. at 271)).

While Cod. Ord. 559.541 contains only four general criteria as grounds for the denial of a permit, unlike the thirteen reasons in *Thomas*, three of those criteria set out in paragraphs (a), (b) and (c) of the law are plainly impermissible under *Forsyth County*, as discussed below, because they require the Director of Parks, Recreation and Properties to make unguided and subjective predictions about the reaction to events (including demonstrations) and the need for police or other expenditures.

Paragraph (a) authorizes the Director to assess "That the proposed activity and use will not unreasonably interfere with or detract from the promotion of public health, welfare and safety." That standard is *no* standard, for *anything* in the exercise of the Director's discretion

that he deems will unreasonably interfere with the promotion of health, welfare and safety can serve for denying a permit. By what criteria is the Director to make that determination?

This criterion offers an opportunity for subjective denials based on hostility to the message of a putative speaker, for any disfavored activity can be said to "detract from public health, welfare and safety." Indeed, paragraph (a) would permit the denial of a permit based on a perceived threat to any governmental interest encompassed by the police power of the City at large.[20]

Paragraph (b) requires the Director to consider whether "the proposed activity or use is. . . reasonably anticipated to incite violence, crime or disorderly conduct." *Id.* Again, by what standard is that to be judged? If the Director determines, in the exercise of his discretion, that what a speaker is going to say would not be well-received and might lead to a shouting match or a tussle, he has the authority to deny a permit.

The essence of free expression is that some messages might not be welcome, but it is no basis to deny a permit. Indeed, because that provision requires the Director to gauge the listeners' reaction to the event, that requirement is a content-based restriction on speech, a problem with the law discussed more fully below.

Finally, the Director is authorized to consider, in Paragraph (c) of the ordinance, whether "the proposed activity will not entail unusual, extraordinary or burdensome expense or police operation by the City . . . ." *Id.* But these predictions are couched in subjective terms: what is an

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[20] Codified Ord. 559.541 was enacted as an emergency measure, and its preamble states the putative purpose for which it was adopted. Contrary to the requirements of Section 36 of Cleveland's Charter, which requires that the "emergency [be] set forth and defined in a preamble," the preamble to this law merely stated that it was enacted, "for the usual daily operation of a Municipal Department." The City Record, 8/22/07 at 48.

"unusual" or "burdensome" expense? How does one decide whether a protest is or is not anticipated to incite crime, violence or disorderly conduct?

Section 559.541 manifestly lacks "narrowly drawn, reasonable and definite standards for the officials to follow," *Niemotko*, 340 U.S. at 271, and from a First Amendment perspective, vests unbridled and impermissible discretion to the licensing official, which renders the Ordinance unconstitutional on its face. *City of Lakewood*, 486 U.S. at 771-72; *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969).

Finally, if there were any question about the breadth of discretion that the law confers on the Director, and how far reaching his authority is to restrict expression, one need only examine the Rules and Regulations of Cleveland's Office of Special Events and Marketing, appended to the City's brief in the court of appeals. Those Rules authorize the Director to deny or revoke a license "when the Director determines that the proposed activity is not in the best public interest." Broader authority is difficult to fathom, and the Supreme Court has held that discretion that immense is constitutionally deficient. *City of Lakewood*, 486 U.S. at 769 ("It is apparent that the face of the ordinance itself contains no explicit limits on the mayor's discretion. Indeed, nothing in the law as written requires the mayor to do more than make the statement 'it is not in the public interest' when denying a permit application."); *Shuttlesworth*, 394 U.S. at 149-50 (striking down permit law providing, "The commission shall grant a written permit for such parade, procession or other public demonstration. . .unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused.").

For this reason as well, the ordinance violates the First Amendment, and the judgment below should be affirmed.

2. The Ordinance Is Unconstitutional Because it Contains No Time Limits for City Officials to Grant or Deny a Permit and Provides No Mechanism to Obtain Review of That Decision.

In addition to the Ordinance's failure to cabin the discretion of City officials in deciding whether or not to grant a license, it fails for the additional reason that it does not contain any time limits on city officials to pass on an application.

In *Thomas*, the Court recognized that " a time, place, and manner regulation [of expression must] contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Id.* at 323. The Court, in sustaining Chicago's law, noted that its ordinance required the park district to decide whether to grant or deny a permit application within 14 days and further, provided a mechanism to seek review of that decision within 7 days from the General Superintendent of the Park District, who then has 7 days to pass on the appeal. *Id.* at 318-19. As the Court noted, "[T]he Park District must process applications within 28 days. . .and must clearly explain its reasons for any denial. . . .These grounds are reasonably specific. . . and they are enforceable on review– first by appeal to the General Superintendent of the Park District, and then by writ of common-law certiorari in the Illinois courts. . . ." *Id.* at 324.

Here, Cod. Ord. 559.541 imposes no deadlines on the Director to decide whether or not to issue a license. And the absence of any time limits is, itself, a form of unbridled discretion. *See Hunt v. City of Los Angeles,* 638 F.3d 703, 718 (9th Cir. 2011) (A 'prior restraint' refers to an ordinance that either 'vests unbridled discretion in the licensor,' or 'does not impose adequate time limits on the relevant public officials.')(*quoting Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 894 (9th Cir.2007)).

In addition to the lack of time limits for the Director to decide whether to grant or deny a permit, there is no means to obtain any review, let alone judicial review – be it prompt or otherwise – of an adverse permit decision.

Not only does the ordinance not provide for judicial review, but Ohio law forecloses the possibility. Specifically, the permit scheme at bar confers decision making authority to a single administrative officer, and not a quasi-judicial panel. In such cases, Ohio Revised Code § 2506.01 – which governs appeals from administrative decisions – does not confer a right of appeal to the common pleas court, or other tribunal. *State ex rel. Zeigler v. Zumbar*, 129 Ohio St.3d 240, 244, 951 N.E.2d 405 (2011)(citing *State ex rel. Scherach v. Lorain Cty. Bd. of Elections*, 123 Ohio St.3d 245, 915 N.E.2d 647 (2009)).

The City argued below that the Ordinance did, in fact, provide an opportunity for judicial review because the denial could be appealed to the City's Board of Zoning Appeals ("BZA"), which could hold a quasi-judicial hearing, the result of which could then be appealed to the common pleas court. Br. of City at 12. But the City's argument is flawed. Specifically, the provision of the City Charter creating the BZA is clear that the decision by the Director to deny a license does not fall under the BZA's authority to review. Section 76-6(b) of the City Charter provides:

> **Jurisdiction of Board of Zoning Appeals**. It shall be the duty of the Board of Zoning Appeals to hear and decide appeals made for exceptions to and variations in the application of ordinances governing zoning in the City of Cleveland in conformity with the purpose and intent thereof, and to hear and decide all appeals made for exceptions to and variations in the application of ordinances, or orders or regulations of administrative officials or agencies; except such as are within the jurisdiction of the Board of Building Standards and Building Appeals.

Id.

Refusing to issue a license does not fall into any category of the Board's jurisdiction. Such a determination is neither an order nor a regulation of an administrative official or agency. Indeed, the ordinance does not describe any procedure for applying for a license, let alone describe how the Director's decision is to be communicated to an applicant. Thus, the Director may communicate a denial orally-- there is no requirement in the ordinance that the Director's decision be reduced to writing, let alone be put into some formal "order." *See Municipal Construction Equipment Operators' Labor Council v. City of Cleveland Civil Service Comm'n*, 2010-Ohio-5849 ¶33, 2010 WL 4893623 (Cuyahoga App. 2010)(rejecting Cleveland's "tortured" interpretation that the City charter authorized a decision of the civil service commission to be appealed to the Board of Zoning Appeals).

Again, contrast Cleveland's law with the requirements contained in Chicago's law sustained in *Thomas*: the decision to deny a permit had to be in writing; if the application were deemed deficient, where feasible, the written denial was required to propose measures to cure the claimed defects; and, if there were competing applications for the same time and place, the Park District was required to suggest alternatives. *Id.* at 319.

No such requirements are contained in the Cleveland ordinance.

Finally, other provisions in the Cleveland Codified Ordinances demonstrate that when the Council intends to confer jurisdiction on the Board, it does so expressly by ordinance. *See, e.g.*, Cod. Ord. 354.14 (appeal regarding wireless telecommunication facility setback); 630.01(appeal from notice declaring property to be a nuisance); 683A.25 (appeal from issuance, denial or suspension of massage license); 680.06 (appeal from damage assessment caused by newspaper box); 684.05 (appeal from refusal to issue or from suspension or revocation of street motion

picture license); 505.13 (appeal from decision of Bd. of Sidewalk Appeals); 695.08 (appeal from refusal to issue shooting gallery license); 110.03 (appeal from finding of Law Director of Campaign Violation law); 604.06 (appeal from Dir. of Public Safety as to dangerous dog classification).

These failures likewise render the Ordinance void under the First Amendment.

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals below should be affirmed.

Respectfully submitted,

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APPENDIX A

(Ord. No. 815-86. Passed 6-2-86, eff. 6-4-86)

559.541 Prohibited Hours in Public Square

No unauthorized person shall remain on or in any portion of the area known as the Public Square area between the hours of 10:00 p.m. to 5:00 a.m. Persons may be authorized to remain in Public Square by obtaining a permit from the Director of Parks, Recreation and Properties.

Such permits shall be issued when the Director finds:

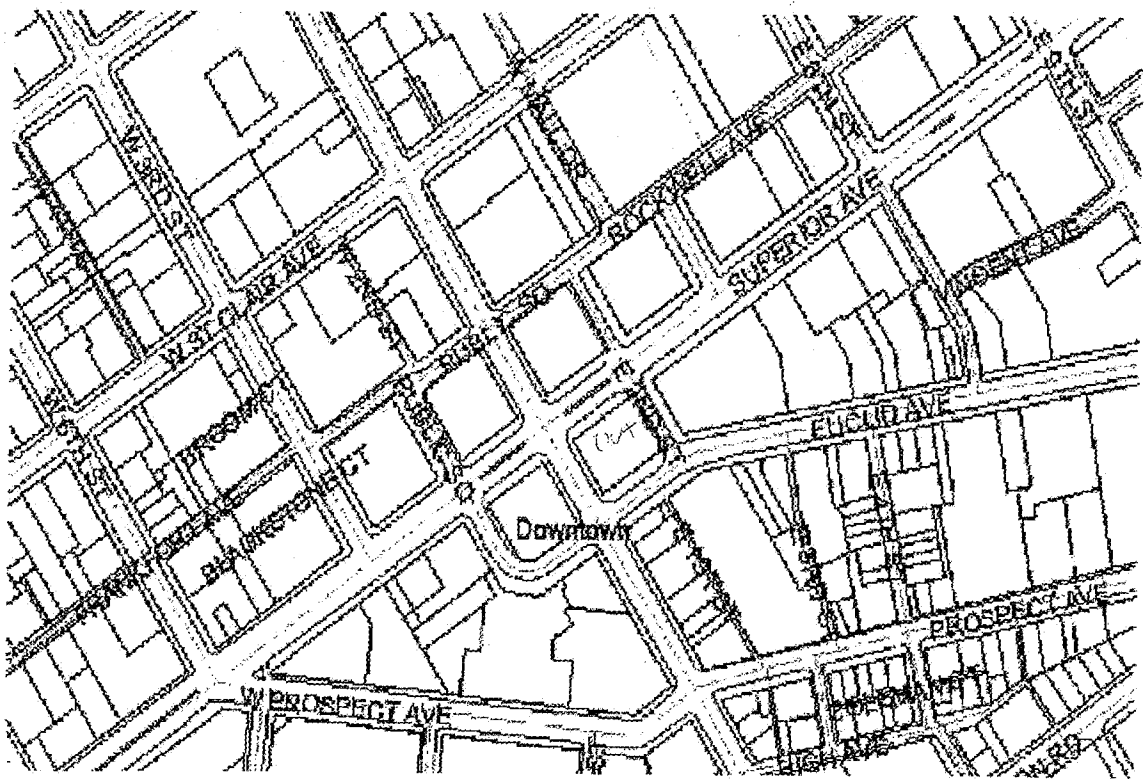
(a) That the proposed activity and use will not unreasonably interfere with or detract from the promotion of public health, welfare and safety;

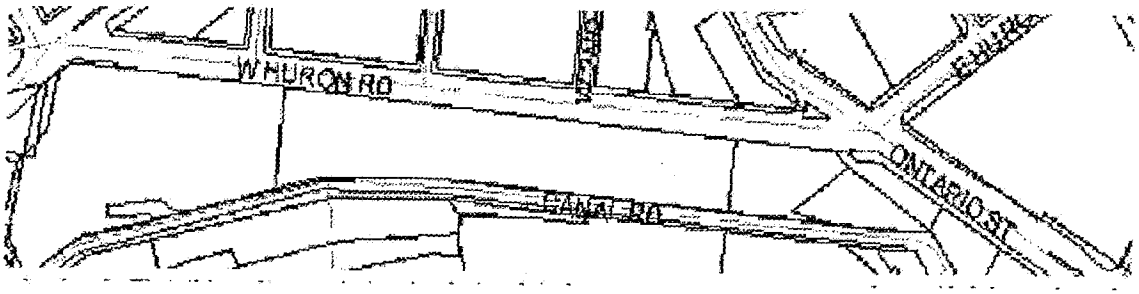
(b) That the proposed activity or use is not reasonably anticipated to incite violence, crime or disorderly conduct;

(c) That the proposed activity will not entail unusual, extraordinary or burdensome expense or police operation by the City;

(d) That the facilities desired have not been reserved for other use at the day and hour required in the application.

For purposes of this section, the "Public Square area" includes the quadrants and all structures (including but not limited to walls, fountains, and flower planters) located within the quadrants known as Public Square and shown on the map below, but excludes the quadrant on which sits the Soldiers and Sailors Monument; the Public Square area also excludes all dedicated streets, public sidewalks adjacent to dedicated streets and RTA bus shelters within this area.





Whoever violates this section is guilty of a minor misdemeanor on the first offense, a misdemeanor of the fourth degree on the second offense, and a misdemeanor of the third degree on the third and any subsequent offense.

(Ord. No. 1140-07. Passed 8-8-07, eff. 8-16-07)

559.55 Resisting Police

No person shall resist any member of the police force in the discharge of his duty or in any way interfere, hinder or prevent him from discharging his duty, nor offer or endeavor so to do; nor in any manner assist any person in custody of any member of the police force to escape, nor attempt to rescue any person in custody.

559.56 Exhibiting Permits for Inspection

Every person claiming to have a permit from the Director of Public Properties or any of his officers shall produce and exhibit such permit upon the request of any authorized person who shall desire to inspect the same.

559.57 Limitations on Permits; Liability of Holders

All permits issued by the Director of Public Properties shall be subject to the park rules and regulations and City ordinances. The persons to whom such permits are issued shall be bound by the rules, regulations and ordinances as fully as though the same were inserted in such permits. Any person to whom such permits are issued shall be liable for any loss, damage or injury sustained by any person whatever, by reason of the negligence of the person to whom such permits are issued, as well as for any breach of such rules, regulations and ordinances, to the person so suffering damages or injury.

APPENDIX B

CITY OF CLEVELAND
Mayor Frank G. Jackson

Special Use Application Permit

City of Cleveland
Department of Public Works
Office of Special Events & Marketing
Cleveland Convention Center
500 Lakeside Avenue
Cleveland, Ohio 44114

Phone: 216.664.2484 • Hours of Operation: 8 am to 5 pm Weekdays • Fax: 216.420.8122

- ► This application is only a request to use the property/facility and in no way should be considered a permit approval. All requests for facility use must be approved by the Director of Public Works before a permit is issued.
- ► Permit applications must be received at least ten (10) business days prior to event date and the applicant must read the rules and regulations for property/facility use and sign/date the agreement. Failure to sign the agreement may be cause for denying permit request.
- ► Submit completed application in person or mail or fax to the address above

APPLICANT INFORMATION

APPLICATION DATE	APPLICANT NAME	EMAIL ADDRESS	ORGANIZATION/GROUP NAME (IF APPLICABLE)

STREET ADDRESS	CITY	STATE	ZIP CODE

HOME PHONE	CELL PHONE	WORK PHONE	FAX NUMBER

Have you applied previously for a park/facility use permit from the City of Cleveland?

☐ YES ☐ NO DATE: LOCATION:

EVENT INFORMATION

LOCATION REQUESTED		
EVENT DATE	ESTMATED ATTENDANCE	CLEAN-UP TO BE PROVIDED BY
EVENT START TIME	EVENT ENDING TIME	SECURITY TO BE PROVIDED BY

EVENT TYPE

☐ PICNIC ☐ REUNION/GATHERING ☐ SCHOOL ACTIVITY ☐ RALLY ☐ CHURCH ACTIVITY ☐ BIRTHDAY
☐ WEDDING CEREMONY/PHOTOS ☐ OTHER:

Event Description

List any equipment (sound systems, grills, tents, etc.) That will be set up for the event

FOR OFFICE USE ONLY, DO NOT FILL IN BELOW

PERMIT NUMBER	FEE	Date Mailed or Date Picked Up (Circle One)
APPPLICATION COMPLETED BY		HARBOR MASTER APPROVAL

CITY OF CLEVELAND
OFFICE OF SPECIAL EVENTS & MARKETING

Cleveland Convention Center
500 Lakeside Avenue
Cleveland, Ohio 44114

P: 216.664.2484 • F: 216. 420.8122

RULES & REGULATIONS FOR USE OF PROPERTY/FACILITY

The following rules apply to all groups or person(s) using properties under the jurisdiction of the Department of Public Works.

1) If during the course of any event or activity for which the Department has granted a permit, the activities of any participant(s) or spectators(s) has become abusive or destructive to Department property or equipment, or have become adverse to the intent for which the permit has been granted, the Department reserves the right to immediately adjourn such event or activity.
2) Special use permits may be denied or revoked by the Director of the Department of Public Works when the use of property authorized under the permit is used for any purrpose other than permitted function, when there has been a violation of these regulations, or when the Director determines that the proposed activity is not in the best public interest.
3) All department facilities/properties must be left in a clean and orderly condition at the conclusion of any event. Cleveland Department Public Works personnel will conduct an inspection after use of site. If found
4) damaged and/or unclean, applicant or organization will be billed for any and all costs incurred by the Department as a result of group's activity.
5) No alcoholic beverages permitted on grounds.
6) No gambling permitted.
7) Music or sound must be kept at a volume that does not interfere with others.
8) Vehicles are allowed in designated parking areas ONLY. NO PARKING ON GRASS OR WALKWAYS.

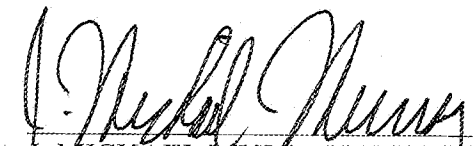
I have read and agree to abide by all rules and regulations stated above.

_____ _____

Applicant's Signature Date

CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Defendants-Appellees was served on Connor P. Nathanson, Assistant City Prosecutor, Counsel of Record, 1200 Ontario Street, 8th Floor, Cleveland, OH 44113, Counsel for Plaintiff-Appellant City of Cleveland, and on Alexandra T. Schimmer, Solicitor General, and Samuel C. Peterson, Deputy Solicitor, counsel for *Amicus Curiae* State of Ohio, at 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, and Philip Hartman, Rebecca K. Schaltenbrand, and Stephen J. Smith, Ice Miller LLP, at 250 West Street, Columbus, Ohio 43215, and John Gotherman, Ohio Municipal League, at 175 S. Third Street, #510, Columbus, Ohio 43215-7100, counsel for *Amicus Curiae* The Ohio Municipal League, via regular United States mail, sufficient postage affixed, this 8th day of July, 2013.



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STEVEN D. SHAFRON (0039042)
BERKMAN, GORDON, MURRAY & DeVAN

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