

IN THE SUPREME COURT OF OHIO

CITY OF CLEVELAND,
Plaintiff-Appellant,

v.

ERIN MCCARDLE AND
LEATRICE TOLLS,
Defendant-Appellees.

Case No. **13-0096**

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District

Court of Appeals
Case No. 12-98230 and 12-98231

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
PLAINTIFF-APPELLANT CITY OF CLEVELAND**

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case thus raises a substantial constitutional question concerning the City of Cleveland's right to enact and enforce content-neutral time, place and manner restrictions on expression that are narrowly-tailored to advance a significant government interest. Clearly, the right of the City and all municipalities to enforce such restrictions is one of public and great general interest. The Eighth District Court of Appeals in finding Cleveland Ordinance §559.541 to be unconstitutional has rendered a decision that is contrary to law and that, if allowed to stand, will have a tremendously detrimental impact on the long-recognized authority of state and local officials to maintain safety and properly regulate public property. While balancing and protecting the public's right to gather and exercise their constitutional right of free speech.

The City of Cleveland ("City") enacted C.C.O. §559.541 in 2007 with the goal of balancing the City's proprietary interests in its long-recognized downtown Public Square with the public's interest in having a public place to gather and exercise free speech. In order to further those interests, the City's ordinance establishes a 10 PM to 5:00 AM curfew while also allowing for exceptions wherein persons may obtain permits that would allow them to remain in Public Square during the otherwise prohibited hours. The permit application is content neutral and may only be denied if an applicant's proposed use of the park involves illegal conduct, is dangerous to the welfare of the public, would create a substantial risk to the safety of the grounds, or if the space is already reserved by another party. The possible content of an applicant's expressive message is in no way evaluated when granting or denying a permit application. The City's primary interests in enacting and enforcing the ordinance were to manage the limited space available, to ensure that the park grounds remain properly preserved, to prevent dangerous or unlawful uses of the property, and to ensure financial accountability for

any damage that may be caused by those using the park. The City contends these are recognized significant governmental interests.

This Eighth District's decision, while recognizing that the City's ordinance was a content neutral regulation, failed to properly apply requisite intermediate scrutiny in analyzing the constitutional interests presented. The Eighth District's misapplication of the law and disregard of the City's significant government interests can be expected to be relied upon by others in future forums throughout the State in similar attempts to invalidate long-standing permit schemes adopted by state and local authorities in the regulation and maintenance of parks and other public properties. Potentially every park curfew ordinance in the state could be deemed unconstitutional under the flawed analysis adopted by the Eighth District. State and local authorities would be unduly limited in their abilities to manage properties for the benefit of their communities. They would not be able to ensure that park occupants do not damage it, or preempt occupants from committing proposed illegal activities there. Nor will they be able to hold wrongdoers criminally or financially accountable for their negligent or intentional destruction of property within the parks. A conclusive answer from this Honorable Court would benefit all parties, as well as other municipalities, and the State of Ohio.

The Eighth District incorrectly held that the City's only interests in enacting and enforcing C.C.O. 559.541 were to promote the "aesthetics and convenience" of the parks. The court's holding that C.C.O. 559.541 is not narrowly-tailored to advance a significant government interest clearly disregards precedential authority, which was either erroneously dismissed as being inapplicable, or completely ignored by the court. The court particularly misapplied the U.S. Supreme Court's holding in *Snyder v. Phelps*, 131 S.Ct 1207, 179 L.Ed.2d 172 (2011) in justifying its decision. Such action is a violation of the Eighth District Court's scope of review,

and its obligation to use every reasonable inference favoring the constitutionality of a duly enacted ordinance. *State v. Dorso*, 4 Ohio St.3d 60, 61, 446 N.E.2d 449 (1983).

This case raises a substantial constitutional question and is one of public or great general interest, creating a right to file a jurisdictional appeal pursuant to Ohio Supreme Court Rules of Practice Rule 7.01. Acceptance of the City's appeal and reversal of the Eighth District's incorrect constitutional analysis would benefit the City, other municipalities and the State of Ohio, while at the same time continuing to recognize the constitutional protections and freedoms of individuals to assemble and express themselves.

STATEMENT OF THE CASE AND FACTS

In August 2007 the City enacted C.C.O. 559.541. The ordinance established a curfew for the downtown Public Square and authorized a permit process through the City's Director of Parks, Recreations and properties:

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.

The ordinance does not prevent individuals from conducting activities, expressive or otherwise, 24 hours per day on the sidewalks, other public spaces, or even within any quadrant itself. The ordinance merely prohibits them from conducting activities that involve remaining or loitering within the quadrants of Public Square during late night and early morning hours if they do not have a permit protecting the City's substantial interests. C.C.O. 559.541 as enacted is a content-neutral time, place, and manner regulation that is narrowly tailored to significant governmental interests, that leaves open ample alternatives for communication, and that contains adequate standards to guide decisions on issuing after-hours permits, which is subject to effective judicial review.

On October 21, 2011, at 10:30 p.m., Appellees, Erin McCardle and Leatrice Tolls, were present in the Northwest Quadrant of Public Square in downtown Cleveland, Ohio under the auspices of the announced Occupy Cleveland protest. Cleveland Police officers had advised Defendant-Appellees several times after 10:00 PM that they were no longer allowed to be in that quadrant of the park, pursuant to the prohibition contained in C.C.O. 559.541. Despite several more warnings by police officers at or around 10:30 p.m., Appellees did not move. Officers again advised that they would each receive a citation if they did not vacate the premises, but the Defendant-Appellees again refused to leave.

Several dozen people exited the park after being instructed to do so by the officers, but Defendant-Appellees and several others persisted in violating the City ordinance by remaining in

the park without a permit after 10:00 p.m. Officers then approached Defendant-Appellees in order to obtain their names so they could issue them a citation. However, Defendant-Appellees ignored the officers' requests and would not provide their names. After 10:30 p.m., the remaining people were issued several more warnings to vacate the park, but refused. Defendant-Appellees and the others were then placed under arrest. At this time Defendant-Appellees purposely went limp and the officers had to physically remove them from the park.

Defendant-Appellees were arrested and charged with trespassing on Public Square in violation of C.C.O. 559.541. They were also charged with Criminal Trespass and Resisting Arrest, in violation of C.C.O. 623.04 and 615.08, respectively. The following day Defendant-Appellees were arraigned and their cases were assigned to the personal dockets of the Honorable Pauline H. Tarver and Anita Laster Mays, respectively, of the Cleveland Municipal Court.

On November 28, 2011, the Defendant-Appellees filed motions to dismiss. The City of Cleveland filed a response to the motions to dismiss on December 16, 2011. A motion hearing regarding Defendant McCardle was conducted on December 20, 2011 in front of Judge Tarver. On February 28, 2012, the court rendered a decision denying Defendant McCardle's Motion to Dismiss. The Court denied the motion after determining that C.C.O. 559.541 was a content-neutral time, place and manner restriction that did not violate Defendant-Appellees' First Amendment rights. On April 5, 2012, Defendant McCardle then entered a no contest plea to the charge of violating C.C.O. 559.541. The remaining charges against Defendant McCardle were dismissed and the court sentenced Defendant McCardle to pay a fine of one hundred dollars and court costs, which was stayed pending appeal. Defendant Tolls, who opted to forgo a motion hearing in response to Judge Tarver's ruling in Defendant McCardle's case, entered a No Contest

plea to the same charge on April 10, 2012. The remaining separate charges were dismissed, and Defendant-Tolls was ordered to pay a seventy-five dollar fine plus court costs.

Defendant-Appellees filed separate Notices of Appeal on April 12, 2012. Subsequent to briefing the issues presented on appeal, oral argument was held on October 3, 2012. On November 6, 2012, the Eighth District consolidated both appeals. On December 6, 2012, the Eighth District reversed the trial courts' rulings and remanded the case, holding that C.C.O. 559.541 violated Defendant-Appellees' First Amendment rights to free speech and assembly. *Cleveland v. McCardle*, 8th Dist. No. 98230 and 98231, 2012-Ohio-5749, ¶ 9. Specifically, while the court held that the ordinance was content-neutral on its face, the court also held that the City had failed to show that the ordinance was narrowly tailored, or that it served a substantial, significant government interest. *McCardle* at ¶ 21. The City seeks jurisdiction to appeal the Eighth District's opinion.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law:

It is constitutionally permissible for a municipality to enforce a content-neutral time, place and manner restriction such as Cleveland Codified Ordinance 559.541, where the ordinance is narrowly-tailored to advance a significant government interest that leaves open alternative channels of communication.

The Supreme Court has said, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired" and, therefore, even expression "protected by the First Amendment, [is] subject to reasonable time, place, and manner restrictions." *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 at 647 (1981). The government may impose such restrictions on that speech, provided they survive intermediate scrutiny by being 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 *Forsythe City v. The Nationalist Movement*, 505 U.S. 123, 130 (1992); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The Eighth District Court of Appeals correctly held that C.C.O. 559.541 is content-neutral. *McCardle* at ¶ 21. However, it incorrectly held that the ordinance is not narrowly-tailored, and that Plaintiff-Appellant's interests in enacting and enforcing the ordinance are not substantial and significant government interests. *McCardle* at ¶ 21.

A. Cleveland Codified Ordinance § 559.541 promotes substantial government interests.

Based on its own terms, the City's ordinance is plainly designed to serve the City's vital interests in managing the limited space that is available within Public Square, adequately controlling crowds and vehicle and pedestrian traffic, ensuring that the interior of the quadrants are preserved and maintained, protecting the parks from overuse and unsanitary conditions, and preventing dangerous, unlawful or impermissible uses, and to assure financial accountability for any damage that may be caused. These same interests that C.C.O. 559.541 seeks to promote have previously been held to be substantial governmental concerns. *Thomas v. Chicago Park Dist.* 534 U.S. 316 at 322 (2002). See also, *Clark v. Community for Creative Non-Violence*, 468 US 288 at 296 (1984).

However, none of the City's proprietary interests for enacting and enforcing the ordinance were acknowledged in the Eighth District court's decision. In its merit brief and at oral argument, the City had identified and placed before the Court the significant interests associated with enacting C.C.O. 559.541. Further, the substantial interests being protected by C.C.O. 559.541 were evident in the permit applications Defendant-Appellees' group had previously submitted. The application, which was attached to Plaintiff-Appellant's merit brief,

requires the applicant to specify the duration of the activity, the estimated number of participants, and a contact-person with a phone number. It also requires the applicant to agree that there will be no overnight camping, no impeding the flow of pedestrian traffic, to pick up any trash, and not to use a sound system that can be audible from over one-hundred and fifty feet away. These conditions of using a city park mirror the proprietary interests that were upheld in *Thomas v. Chicago Park District*, 534 U.S. at 323. Despite it being directly on point and authoritative, the Eighth District refused to discuss, or even acknowledge, the U.S. Supreme Court's holding in *Thomas*, even though it is the most applicable precedent. In *Thomas*, the Supreme Court upheld similar proprietary interests as being substantial, significant interests that can survive intermediate scrutiny. *Thomas* at 323.

At oral argument, the City strenuously argued that there is a great concern for public safety in and around the park, and that C.C.O 559.541 was enacted to address those prevalent concerns. The Eighth District dismissed this assertion by opining that no such concerns exist.¹ In fact, the Eighth District disregards the very language of the ordinance in incorrectly stating that the City's only interests in enacting C.C.O. 559.541 were "aesthetics, convenience, and sanitation." *McCardle* at ¶¶ 22,23,26.

In order to justify its decision to hold that Plaintiff-Appellant's interests in C.C.O. 559.541 are not substantial and significant, the Eighth District erroneously applies the U.S. Supreme Court case of *Snyder v. Phelps*, stating that Plaintiff-Appellant's interests in its ordinance certainly fail if the interests in *Snyder* were deemed insufficient. *McCardle* at ¶ 23.

¹ It should be noted that three days after the oral arguments a man was robbed and stabbed with a pair of needle-nose pliers less than one block from the park. 19 Actions News, *Man Robbed at Public Square, stabbed in the neck*, (October 6, 2012) <http://www.19actionnews.com/story/19752434/man-robbed-at-public-square-stabbed-in-the-neck> (accessed January 10, 2013).

However, *Snyder* is not factually or legally analogous to this case. In *Snyder*, the plaintiff was the father of a deceased soldier who sued the defendant for intentional infliction of emotional distress after he and other protesters had picketed the plaintiff's son's funeral. *Snyder v. Phelps*, 131 S.Ct. 1207 (2011). The Supreme Court upheld the lower court's decision that the defendant's speech was protected and that an award of damages against the defendant cannot be upheld unless doing so constituted a "compelling" government interest. *Snyder* at 1207. The award of civil damages resulting from the content of what the Court deemed protected speech in *Snyder* amounted to a content-based restriction on the exercise of free speech. Such a restriction on speech is incomparable to the ordinance at issue here, which the Eighth District conceded was content-neutral. *McCardle* at ¶ 21.

Content-based restrictions on speech must be of a compelling nature in order to be constitutional, and for the Eighth District to hold Plaintiff-Appellant to that standard is a gross misapplication of First Amendment law. Content-neutral time, place, and manner restrictions need only rise to the level of a significant interest, not a compelling one, to be constitutional. *Thomas* at 323 (emphasis added). Yet, the Eighth District held that since the interests at issue in *Snyder* were insufficient to uphold the restriction, so too must be the City's in enacting C.C.O. 559.541. *McCardle* at ¶ 23. But this analysis is improper, as the City's content-neutral restriction does not have to rise to the same compelling nature as the content-based restriction in *Snyder*. The flawed reasoning and misapplication of First Amendment law by the Eighth District in disregarding the City's substantial governmental interests is contrary to precedent and must be overturned.

B. Cleveland Codified Ordinance § 559.541 is narrowly-tailored to advance the City of Cleveland's significant government interests.

The Eighth District incorrectly determined that C.C.O. 559.541 constituted a “complete ban” on speech, and that the ordinance “failed to achieve the legitimate goals of the City, and instead of meeting these goals, the law substantially banned more speech than was necessary.” *McCardle* at ¶ 26. This reasoning fails for multiple reasons. First, C.C.O. 559.541 is not a complete ban on access to the park. Rather, it only prohibits presence in the park between the hours of 10:00pm and 5:00am, and allows unfettered and completely unrestricted access at all other times of day. *See* C.C.O. 559.541. Taking into account those seventeen hours of completely unrestricted time, and the minimalist nature of the limits regarding the seven hours at issue, the Eighth District’s characterization that C.C.O. 559.541 is a complete or wholesale ban on expression is erroneous. Additionally, Defendant-Appellees’ group had been granted multiple permits by the City to use its parks, and to even erect tents in the parks, on prior occasions for other dates. C.C.O. 559.541 limits its impact on an individual’s ability to conduct after-hours activities, within the quadrants of Public Square, by merely requiring permits that could only be denied if certain specified concerns arise. The content-neutral criteria associated with obtaining a permit to remaining within a quadrant directly address and advance the concerns specified for limiting the hours in the first place. Any incidental impact on expression is justified because the ordinance substantially serves to advance the City’s interests. *See, Ward v. Rock Against Racism*, 491 U.S. 781 at 799-801.

Second, the ordinance’s incidental impact on speech only serves to advance the City’s significant government interests for enacting it. As noted above, an ordinance survives the narrowly-tailored requirement if it “promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Ward v. Rock Against Racism*, 491 U.S. at 788.

The City enacted C.C.O. 559.541 to be able to ensure the preservation of the park; to prevent dangerous, unlawful or impermissible uses; and to assure financial accountability for any damage that may be caused thereon. Effectively, all the ordinance does in addressing the City's governmental interest is create a record of who is using the park, how many people will be present, and establishes the conditions for its use during the limited hours of 10 PM to 5 AM. It allows for the City to protect its properties when a proposed use is dangerous or illegal, and to identify a party that may be liable for property damage. Absent this paper trail, the City would be unable to regulate possible overcrowding, possible damage, and possible criminal activity.

The U.S. Supreme Court has held that a regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. *Ward* at 800. "The validity of time, place, or manner regulations does not turn on a judge's agreement with the responsible decision-maker concerning the most appropriate method for promoting significant government interests" or the degree to which those interests should be promoted. *Id.* Despite the *Ward* holding, the Eighth District's decision explicitly proposes that C.C.O. 559.541 would be sufficiently narrowed if its restriction exempted potential speakers wishing to use the public park to express concern regarding an issue of public importance. *McCardle* at ¶ 30. This "solution" would impermissibly turn C.C.O. 559.541 from a content-neutral regulation into an impermissible content-based restriction evaluating the subjective worth of speech. Such a statement by the Eighth District shows a misunderstanding of the law in analyzing the constitutionality of the City's ordinance.

The Eighth District erroneously determined that the City's substantial interests were not narrowly-tailored, as an ordinance will survive the narrowly-tailored requirement if it "promotes a substantial government interest that would be achieved less effectively absent the regulation."

Ward v. Rock Against Racism, 491 U.S. at 788. Clearly the City’s interests would be achieved less effectively, if at all, without the enactment and enforcement of the content-neutral C.C.O. 559.541. As pointed out above, the ordinance does not prohibit individuals from expressing themselves twenty-four hours a day within the park. Individuals are only prohibited from “remaining” within the prohibited area without a permit during the late night and early morning hours. C.C.O. 559.541 is narrowly-tailored to achieve its substantial, significant interests and the Eighth District’s decision to invalidate the ordinance was in error.

C. Cleveland Codified Ordinance § 559.541 provides for alternative channels for communication.

Whether C.C.O. 559.541 satisfied the “Alternative Channels of Communication” prong of the *O’Brien* test was not specifically addressed by the Eighth District. *McCardle* at ¶ 31. However, the fact that Defendant-Appellees had multiple use permits for city properties on other dates, had access to other property, and had seventeen hours during the day to be in the affected quadrant at Public Square without even needing to obtain a permit to gather evidences that Defendant-Appellees had multiple alternative channels of communication to express their views.

CONCLUSION

Cleveland Codified ordinance 559.541, on its face and as applied to Appellees, does not run afoul of the First Amendment because it constitutes a content neutral time, place and manner regulation of City facilities. The standards prescribed for evaluating an after-hours permit request address are narrowly tailored and address substantial governmental interests. The ordinance requirements are unrelated to speech and the applicable language properly limits the

permitting official's discretion. For these reasons, the Court should accept review and reverse the Eighth District's misapplication of the governing standards with its opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing City of Cleveland's Brief was sent by ordinary U.S. Mail to J. Michael Murray, attorney for Defendant-Appellees, at 55 Public Square, Suite 2200 Cleveland OH 44113, on this 17th day of January, 2013.

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APPENDIX

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 98230 and 98231

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

**ERIN MCCARDLE AND
LEATRICE TOLLS**

DEFENDANTS-APPELLANTS

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cleveland Municipal Court
Case Nos. 2011-CRB-037719 and 2011-CRB-037724

BEFORE: Blackmon, A.J., Celebrezze, J., and Sweeney, J.

RELEASED AND JOURNALIZED: December 6, 2012

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**FILED AND JOURNALIZED
PER APP.R. 22(C)**

DEC 06 2012

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BY  DEP.**

PATRICIA ANN BLACKMON, A.J.:

{¶1} For purposes of this opinion, the appeals of both appellants Erin McCardle and Leatrice Tolls have been consolidated.¹

{¶2} Appellants Erin McCardle and Leatrice Tolls appeal their convictions for violating Cleveland Codified Ordinances 559.541 (“CCO 559.541”), which prohibits remaining, without a permit, between the hours of 10:00 p.m. and 5:00 a.m., on an area of downtown Cleveland, Ohio known as Public Square, specifically, the Tom L. Johnson quadrant.² They assign the following error for our review:

I. Cleveland Cod. Ord. 559.541 is unconstitutional under the First and Fourteenth Amendments to the United States Constitution.

{¶3} Having reviewed the record and pertinent law, we reverse and remand the trial court’s decision. The apposite facts follow.

¹See journal entries dated November 6, 2012.

²Tom L. Johnson was the 35th Mayor of the city of Cleveland. His full name was Thomas Loftin Johnson. In his book, *My Story: the Autobiography of Tom L. Johnson* [Clevelandmemory.org/ebooks/johnson(accessed Dec. 4, 2012)], he explains why tents are useful for campaigning as opposed to public halls. He said “tent meetings have many advantages over the hall meetings. Tent meetings can be held in all parts of the city - in short the meetings are literally taken to the people.” In the final section of that chapter, he writes about a man trying to speak at one of the meetings and someone shouted “come on, come on! Speak where you are.” P. 82-84. We take judicial notice that this park is dedicated to him, and his statue is erected there as a testament to free speech.

Background

{¶4} On September 17, 2011, approximately a thousand demonstrators assembled in Zuccotti Park, near Wall Street in New York City, to protest against the claimed increasing income disparity between the highest income earners, now known as the “one percent” and everyone else, now known as the “99 percent.” The protesters erected tents and remained in Zuccotti Park around the clock and the movement called “Occupy Wall Street” began. In the days and weeks that followed, this movement spread to other cities, including Cleveland, Ohio.

Occupy Cleveland

{¶5} In Cleveland, members of the Occupy Movement began a symbolic occupation of Public Square, in an area consisting of three out of a four quadrant park. The city of Cleveland (“City”) granted the members of the Occupy Cleveland movement a permit to remain in the southwest quadrant past 10 p.m.

Facts

{¶6} It is uncontraverted that both appellants were arrested in the Tom L. Johnson quadrant and charged with violating the City’s permission to use ordinance. Both appellants respectively moved to dismiss their cases on First Amendment grounds. The McCardle judge ruled in a written opinion that the City ordinance that McCardle violated was constitutional. McCardle then pled

no contest to violating the permission ordinance, otherwise known as the prohibited hours law, and her execution of judgment was stayed pending appeal.

{¶7} Subsequently, the judge in the Tolls case adopted the McCardle judge's opinion, and Tolls likewise pled no contest and her execution of judgment was stayed pending appeal.

{¶8} On August 16, 2007, CCO 559.541, Prohibited Hours on Public Square, went into effect. It reads 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.

{¶9} The City offered no evidence as to why the Soldiers and Sailors Monument was exempted from the prohibited use ordinance. Whoever violates the ordinance is guilty of a minor misdemeanor for a first-time offender. We conclude that the City ordinance is an unconstitutional violation of the First Amendment rights to free speech and assembly.

The Activity and the Place

{¶10} The appellants were engaged in a peaceful protest on grounds that have historically been viewed as a public place. However, between 10:00 p.m. and 5:00 a.m., this area becomes less public for those who are unauthorized to be in the park. An unauthorized person is anyone who fails to obtain a permit to be in the park physically. It forbids a person from being on the park grounds; but allows for "permitted activity" or "proposed use" once sanctioned by the director of parks.

{¶11} The ordinance has a curfew for individuals and requires a permit for activity or use by an individual. Consequently, it does not exempt a person or group who intends to erect a tent for a meeting or speech nor does it narrow

its focus to those who seek to be in the area to demonstrate or protest for an hour or all night.³

{¶12} We conclude that the activity of the Occupy Cleveland group, including the appellants, was speech-related activity and is protected under the First Amendment. The police identified the appellants' activities in the police report, (Exhibit A), as protesting the economic inequities between Wall Street and the rest of America. Thus, their activity advanced a public purpose and spoke to a public issue. See *Snyder v. Phelps*, ___ U.S. ___, 131 S.Ct. 1207, 179 L.Ed. 2d 172 (2011). They were not a private group using the park for a private purpose such as camping for recreation. The place was public with unlimited access until 2007 when the City restricted use between the hours of 10:00 p.m. to 5:00 a.m.

{¶13} In *Capital Square & Review Advisory Bd. v. Pinette*, 515 U.S. 753, 757-770, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995), the Supreme Court citing *Hague v. Commt. for Indus. Organization*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939), held there is a constitutional right to use "streets and parks for communication of views." This right to use is based on the fact that "streets and parks * * * have immemorially been held in trust for the public and, time out of mind, have been used for purposes of assembly, communicating thoughts

³We take judicial notice that had this law been in effect when Tom L. Johnson was running for public office, he would have been arrested for erecting a tent regardless of his purpose.

between citizens, and discussing questions." *Hague* at 515. Thus, the Ku Klux Klan could erect a cross on Capital Square in Columbus, Ohio, with impunity and without having to seek permission.

{¶ 14} Therefore, the appellants' peaceful activity and the public nature of the area makes for a perfect blend of the notion that ideas should be advanced and vetted in the open marketplace, protected by the tenant of the First Amendment to the United States Constitution.

Permission to Speak In Public

{¶ 15} The First Amendment provides in part that "Congress shall make no law * * * abiding the freedom of speech * * *." First Amendment to the U.S. Constitution. As we discussed earlier, the appellants were engaged in peaceful speech-related activity at the Tom L. Johnson public park. The appellants should not have been required to obtain permission to use the park.

{¶ 16} In *Perry Edn. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed. 2d 794 (1983), the following pronouncement was made:

In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

{¶17} CCO 559.541 was not aimed at the Occupy Movement. It was enacted in 2007, well before the movement. It is unclear from the record the interest the City was concerned with and why this ordinance was enacted at that time.

{¶18} The City has argued that the ordinance is a time, place, and manner restriction, content-neutral, and thus constitutional. We conclude that even a time, place, and manner restriction may be deemed unconstitutional when it over burdens speech, which is the case here.

{¶19} Initially, the City argued that the appellants were engaged in non-speech or at best low-valued speech and this court should review the City's law under a rational basis standard. It is undisputed that appellants were protesting or demonstrating the claimed economic inequality in America under the tent of a group named Occupy Wall Street. They were expressing their beliefs and planned to erect tents in the park as further protest to bring attention to their concerns.

{¶20} Consequently, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), is not helpful and inapplicable. The ordinance in that case specifically banned sleeping in public parks; the interest was to keep the national parks aesthetically placed in and near the Capital. The non-violent picketers had a permit to engage in the use of the park for expressive activity, but did not have a permit to sleep in the park. Under the

ordinance in *Clark*, the regulation specifically forbade sleeping in the nation's parks. CCO 559.541 does not forbid sleeping; it forbids absolute presence in the park between 10:00 p.m. and 5:00 a.m., regardless of the user's message or purpose.

{¶21} It is uncontroverted that this regulation does not specifically reference any speech activity. The City's prohibited use law does not ban picketing or demonstrating specifically. As a result, it is on its face content-neutral. The City has not adopted this regulation of speech because it disagrees with the message being conveyed. *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). However, an ordinance may be a content-neutral time, place, and manner regulation and nonetheless be unconstitutional. The issue for us is whether it serves a substantial significant interest; is narrowly tailored; and offers alternative channels of communication. As to each issue, the City has failed to meet the *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), test.

{¶22} We must point out that the appellants did not seek a permit for this quadrant; consequently, we are not concerned with whether the City's permit requirement was administered in a content-neutral manner. Also, the evidence is void in the record of how the City advanced its permit requirement. Our concern is the prior restraint aspect as it is viewed under the *O'Brien* test. Thus, we turn to whether the City's law restricting use of a park, although content-

neutral, is nonetheless invalid under *O'Brien*. The City must establish that it has a significant, substantial interest in having this law. The City has relied solely on the right to pass laws that protect the health and safety of its citizens. However, when the freedom of speech is at issue, the City has a significant burden, which it has not sustained. During oral argument, the City argued that the ordinance was needed so that Cleveland could clean the area. Also, it argued that it was a sanitation concern because the protesters were planning to sleep at the park. The ordinance uses the same health, welfare, and safety language and adds expense and burden to City's services and conflicts with other users. Aesthetics and convenience are not significant interests in this case when the ban prohibits all speech.

{¶23} In *Snyder*, 131 S.Ct. 1207, the court rejected a welfare interest when the religious group was accused of causing mental anguish to the family of a deceased serviceman while picketing during the funeral service. The Supreme Court held when the speaker is in a public place with a public message of a public concern, the expressive activity may not be burdened unless it serves a compelling interest. We are not suggesting that the Supreme Court has altered the *O'Brien* test, but if the interest in *Snyder* did not suffice, certainly sanitation, convenience, and aesthetics will not suffice under *O'Brien* in this case.

{¶24} We reiterate that the City failed to present any testimony regarding a specific interest that concerned the City. It is conceivable that the City was concerned more with private issues, such as homeless individuals using the park for the private purpose of sleeping. Here, the appellants were engaged in the very activity noted by the Supreme Court in *Snyder*: engaged in speech-related activity in a public place concerning a public issue.

{¶25} The City did not seek to make exceptions for those individuals seeking to use the park for a speech-related activity. The way the ordinance is written, it seems to be concerned with those who seek to use the park for private reasons. Consequently, it is not narrowly tailored. The City argues that it allows for the users to seek a permit and that is sufficient to meet the *O'Brien* test. We disagree.

“A statute is narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.” *Frisby v. Schultz*, 487 U.S. 470-485 (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807, (1984). The narrow-tailoring requirement is satisfied when the governmental regulation “promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Ward*, 491 U.S. at 799. However, this standard “does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government’s legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.” *Id.* Yet, this “narrowly tailored” analysis does not require a court to decide whether there are alternative methods of regulation that would achieve the desired end, but would be less restrictive of plaintiffs’ First Amendment rights. *Id.* at 797.

{¶26} The City's ordinance impacts the appellants' right to speak and engage in speech-related activity. The City's purported interest is convenience and sanitation. It is no question that the appellants are banned from expressive activity. The City contends that the permit requirement is sufficiently narrowing. We disagree. The permit's requirement serves as an unreasonable ban and has the purpose of eliminating peaceful speech. In *Frisby*, 487 U.S. 470 and *Ward*, 131 U.S. 1207, the Supreme Court held that the concern was whether the laws' impact on speech failed to achieve the legitimate goals of the City, and instead of meeting these goals, the law substantially banned more speech than was necessary. Here, the ban absolutely forbids access regardless of the purpose.

{¶27} When balancing the City's need to clean the park with the right of appellants to engage in a communicative activity, the latter should always prevail. Consequently, we believe the City's law targets and eliminates more than the evil it seeks to remedy, which it claims is convenience and sanitation.

{¶28} Because the City's law is not narrowly tailored, it is unnecessary to discuss whether there were alternative channels of communication. At one point in the record, it was suggested that the police told appellants to move to another area. Also, we note that the appellants could have used the Soldiers and Sailors quadrant; it was also suggested that they could have protested at other hours without penalty. As we have pointed out on several occasions in this opinion, the

City's regulation burdens the rights of appellants to use a public place for public discourse on a public matter. The City must have a significant, substantial interest. Convenience is an insufficient interest, and permit laws are by their nature prior restraints of which a time, place, and manner regulation will not suffice when the regulation bars more speech than is necessary. Accordingly, under *O'Brien*, the City's prohibited hours law is unconstitutional.

{¶29} Finally, appellants argue the City's unauthorized persons law is unconstitutionally overbroad and facially invalid. The sum of the appellants' argument is that this law in all of its application directly restricts protected First Amendment activity. The City argues that the ordinance is designed to protect the City's legitimate governmental interests, which are health, safety, and welfare.

{¶30} It is well established that a law may be facially void for overbreadth reasons. This occurs even when the appellants are the parties at interest and the City is acting to regulate matters in its interest: health, safety, and welfare. However, when the ordinance sweeps broadly and burdens the freedom to engage in communicative activity, any interest it seeks to protect may be overshadowed by its ban on speech. Here, the ordinance fails to take into consideration persons who are seeking to use the park for peaceful protest with a public message of interest to those who might want to see, hear, or know about the protest. Consequently, we agree with the appellants that this law on

its face is void. But as such, we believe it can be narrowed by exempting those who seek to use the park for expressive activity when the message is of a public concern and there exists individuals who want to know about the message.

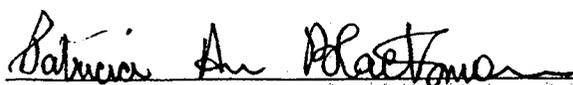
{¶31} In conclusion, we hold that the City's regulation is content-neutral, but unconstitutional because the appellants' speech-related activity occurred in a public forum and thus, the regulation is not narrowly tailored in ways that the government has showed is necessary to serve a significant, substantial interest. Thus, we conclude that we need not address the alternative channels prong of *O'Brien*. Besides, we conclude it is not enough to validate the City's law.

{¶32} Judgment reversed and remanded for further proceedings consistent with this opinion.

It is, therefore, considered that said appellants recover of said appellee their costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



PATRICIA ANN BLACKMON, ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, J., and
JAMES J. SWEENEY, J., CONCUR