

In the  
Supreme Court of Ohio

CITY OF CLEVELAND,	:	Case No. 2013-0096
	:	
Plaintiff-Appellant,	:	
	:	On Appeal from the
v.	:	Cuyahoga County
	:	Court of Appeals,
ERIN MCCARDLE AND	:	Eighth Appellate District
LEATRICE TOLLS, et al.,	:	
	:	Court of Appeals Case
Defendants-Appellees.	:	Nos. 98230 & 98231
	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF  
AMICUS CURIAE STATE OF OHIO

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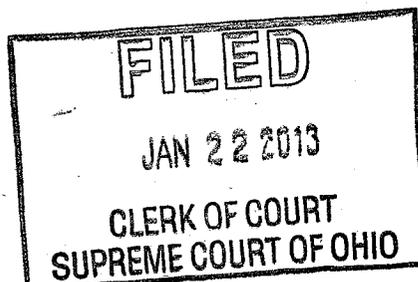
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## INTRODUCTION

The need for review in this case is manifest. In its decision below, the Eighth District concluded that a city ordinance imposing a curfew on Public Square in downtown Cleveland was facially invalid and violates the First Amendment to the United States Constitution because it “fails to [exempt] persons who are seeking to use the park for peaceful protest.” *City of Cleveland v. McCardle*, Nos. 98230 and 98231, 2012-Ohio-5749, ¶ 30 (8th Dist.) (“App. Op.”). In doing so, the court announced a novel constitutional right, essentially requiring Public Square to remain open to expressive activity twenty-four hours a day, seven days a week. Review is warranted for at least two reasons.

First, this sweeping right of access is incompatible with the legitimate interests of the State and local governments in managing public property and ensuring public safety. Second, although the Eighth District purported to apply the constitutional principles governing content-neutral time, place, and manner restrictions, it did so in name only. The Eighth District’s analysis and its ultimate conclusion reflect a dramatic departure from that long-settled framework and therefore should not stand.

This Court should accept review and reverse the judgment below.

## STATEMENT OF AMICUS INTEREST

The State of Ohio and its agencies manage thousands of acres of public land, as well as countless public buildings. The State therefore has a strong interest in any decision—such as the one below—that threatens to dramatically restrict the ability of the State and local governments to enforce reasonable time, place, and manner restrictions for the sake of public safety and for the protection and maintenance of public property.

**THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS  
OF PUBLIC AND GREAT GENERAL INTEREST**

- A. The sweeping constitutional rule adopted by the Eighth District threatens the ability of the State and local governments to ensure public safety and to protect public lands through reasonable limitations on public access and use.**

At its core, the Eighth District's decision establishes a 24/7 right of access to Public Square for those wishing to engage in speech. Review is warranted because that rule threatens the ability of the State and local governments to control access to public property in the interests of public safety and the property's protection.

For instance, the Ohio Department of Parks and Recreation oversees Ohio's seventy-five state parks—comprising 174,000 acres of land and water resources—and seeks to “enhance quality of life through exceptional outdoor recreational experiences and sound resource management” by “providing fun, safe, clean and friendly places” for visitors to enjoy. Ohio Department of Natural Resources, Ohio State Parks, <http://www.dnr.state.oh.us/parks/resources/aboutus/tabid/90/Default.aspx> (last visited Jan. 17, 2013). The Department accomplishes this mission in part by enforcing access and use restrictions on state-park land. For example, some state parks are closed at night while access to others is limited overnight. Ohio Adm. Code 1501:41-7-01. Parks may also be closed or evacuated when necessary to ensure public safety. *Id.* 1501:41-3-02. The rules also restrict certain activities, like camping, by requiring all campers to seek a permit, confining camping to designated areas, and limiting the period during which an individual may camp at a particular site. *Id.* 1501:41-9-01 to -03.

Another state agency tasked with managing public land is the Capitol Square Review and Advisory Board, which “maintain[s] the historic character of the Statehouse and Capitol Square” in Columbus and “provid[es] for the health, safety and convenience

of those who work in or visit the complex.” See [https://www.csrab.state.oh.us/index.php?option=com\\_content&view=article&id=47:what-is-csrab&catid=34:about-csrab&Itemid=53](https://www.csrab.state.oh.us/index.php?option=com_content&view=article&id=47:what-is-csrab&catid=34:about-csrab&Itemid=53) (last visited Jan. 17, 2013). The board also enforces certain access and use restrictions with respect to the State Capitol and its grounds. There are nighttime closing hours. See Ohio Adm. Code 128-4-02(F). Camping on the grounds is not allowed. *Id.* 128-4-02(G)(8). And the rules prohibit any activities that, among other things, expose the grounds and buildings to possible damage or excessively burden financial, security, or equipment resources. *Id.* 128-4-02(A)(1)-(4).

Local governments, like the City of Cleveland, shoulder identical responsibilities. For example, nearly every community in Ohio has at least one public park, and larger cities often have an entire network of parks. Like the State, local governments have established access and use parameters for public properties. Columbus and Cincinnati, for instance, close city parks overnight. Columbus City Code 919.05; Cincinnati Board of Parks Rule 21, available at <http://www.cincinnatiiparks.com/about-us> (last visited Jan. 17, 2013).

These regulations, and others like them, serve important public interests related to the management and protection of public spaces and public safety. Closing times, for example, allow the State and local governments to allocate their limited financial and human resources efficiently. They can reduce staffing when public demand is likely to be at its lowest (overnight) and thereby ensure adequate security and maintenance services when use of the property is at its peak (during the day). Nighttime closing rules also serve important public safety purposes—to reduce the potential for criminal activity or injury that might occur because of unseen hazards.

Camping limitations also further important interests. Limits on camping—particularly in public spaces not designed for it (like city parks and squares)—ensure that public spaces remain

open for all to enjoy. And when encampments reach a certain size, even greater public-health and personal-safety concerns may arise. *See, e.g., Tracy, Pressure Mounts to Evict Occupy DC*, Wall Street Journal (Jan. 17, 2012) A2 (stating that a health inspection conducted at one of the Occupy D.C. encampments revealed a “dangerous rat infestation as well as serious potential for communicable disease, hypothermia, and food-borne illness.”); McConville, *1 Year on, Occupy’s Future up in the Air*, Boston Herald (Sept. 17, 2012) 7 (observing that protest “[c]amps across the country were plagued by reports of sexual assault, drug use, poor sanitation and other problems”).

Access and use restrictions do not exist to suppress speech, but rather to further important and legitimate public interests. True, they may burden speech incidentally. But courts balance that burden against the regulatory interests at stake. The Eighth District made no effort at such an analysis, and the novel and sweeping right of access it announced instead warrants this Court’s review.

**B. Review is warranted because the Eighth District’s novel constitutional analysis contravenes well-settled First Amendment principles established by the United States Supreme Court.**

The constitutional principles that apply to Cleveland’s ordinance are well settled. Indisputably, the imposition of a curfew on Public Square—a traditional public forum—might burden some speech. But the ordinance must be upheld as a reasonable time, place, and manner restriction so long as it is content-neutral, “narrowly tailored to serve a significant government interest,” and “leave[s] open ample alternative channels of communication.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *City of Painesville Bldg. Dep’t v. Dworken & Bernstein Co.*, 89 Ohio St. 3d 564, 568 (2000).

The Eighth District acknowledged these principles but disregarded them all the same, embracing a new constitutional rule that effectively requires 24/7 access to Public Square for those seeking to exercise their First Amendment rights. App. Op. ¶ 30 (The ordinance “fails to take into consideration [and exempt] persons who are seeking to use the park for peaceful protest with a public message . . . . Consequently, we agree with the appellants that this law on its face is void.”). This sweeping pronouncement finds no support in precedent and the court’s analysis suffers from at least two fatal flaws, both of which warrant review.

First, the Eighth District ignored longstanding precedent in concluding that the government interests proffered by Cleveland—concern for public health and safety, maintaining public spaces in a sanitary and aesthetic manner, and conserving limited public resources—could not justify a time, place, and manner restriction. App. Op. ¶¶ 22-23. It is beyond dispute that these government interests are sufficient to justify such regulations. The U.S. Supreme Court has long recognized that a city’s “interest in attempting to preserve the quality of urban life is one that must be accorded high respect.” *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) (internal quotation marks and citation omitted). And the Court has recognized both public-safety and property-maintenance concerns as substantial government interests. *See City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 781-82 (1988) (stating that “the important interest that localities have in insuring the safety of persons using city streets and public forums” has been consistently upheld); *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (governments have a “substantial interest in maintaining” public parks in “an attractive and intact condition”); *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (“It is well settled that the state may legitimately exercise its police powers to advance esthetic values.”); *see also Hill v. Colorado*,

530 U.S. 703, 715 (2000) (“It is a traditional exercise of the State’s police powers to protect the health and safety of their citizens.”) (internal quotation marks and citation omitted).

The Eighth District wrongly concluded that the U.S. Supreme Court’s recent decision in *Snyder v. Phelps* compels a contrary view. App. Op. ¶ 23 (“[I]f the [welfare] interest in *Snyder* did not suffice, certainly sanitation, convenience, and aesthetics will not suffice” here.). But *Phelps* involved the intersection of state-law tort claims and the First Amendment, not the standards for evaluating time, place, and manner restrictions. As the Court itself noted, the task before it was to determine “[w]hether the First Amendment prohibits holding Westboro liable” in tort, which, in turn, depended “largely on whether [its] speech is of public or private concern.” *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011). The *Phelps* case is wholly inapposite here.

Review is therefore needed because the Eighth District has embraced a rule that is flatly inconsistent with precedent. More importantly, if the Eighth District can so breezily brush off core governmental interests such as ensuring public safety, protecting public property, and safeguarding public funds, one cannot help but wonder what, if any, government interest would ever pass muster.

Second, the Eighth District also departed from long-established constitutional principles in conducting the tailoring analysis. To be narrowly tailored, a speech restriction need not be “the least restrictive or intrusive” means of regulation. *Ward*, 491 U.S. at 798. Narrow tailoring demands only that the selected regulatory means not be “substantially broader than necessary to achieve the government’s interest.” *Id.* at 799-800.

Despite the clarity of this principle, the Eighth District’s tailoring analysis (and ultimately its conclusion about the facial validity of the ordinance) turned on the court’s conclusion that the ordinance fails to “make exceptions for those individuals seeking to use the park for a speech-

related activity.” App. Op. ¶¶ 25, 30; *see also id.* ¶ 28. But if the Eighth District’s approach were correct, few if any time, place, and manner restrictions would ever withstand scrutiny. Access restrictions of all types—no matter their justification—would appear to run afoul of the Eighth District’s standard.

In short, the Eighth District’s approach threatens a sea change in First Amendment jurisprudence, effectively requiring public property to be held open to expressive activity at all times. Review is warranted because this new constitutional rule is doctrinally unsound and endangers countless state and local regulations in one of Ohio’s most populous counties.

## ARGUMENT

### *Amicus Curiae State of Ohio’s Proposition of Law:*

*A law limiting overnight access to a public park is facially constitutional so long as it is content-neutral, narrowly tailored, and leaves open ample alternative channels for communication.*

The constitutional principles governing time, place, and manner regulations are long-settled. These rules are valid so long as they are content-neutral, “narrowly tailored to serve a significant governmental interest,” and “leave open ample alternative channels for communication.” *Ward*, 491 U.S. at 791; *City of Painesville Bldg. Dep’t*, 89 Ohio St.3d at 568. Although the Eighth District purported to apply these principles, it did so in name only. The ordinance easily passes muster as a valid time, place, and manner restriction, and the decision below should therefore be reversed.

#### **A. Cleveland Codified Ordinance 559.541 is content-neutral and serves significant government interests.**

There can be little doubt that the ordinance is content-neutral, as the Eighth District itself concluded. App. Op. ¶ 21. “The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has

adopted a regulation of speech because of disagreement with the message it conveys.” *Ward*, 491 U.S. at 791. This standard is easily met here. The ordinance restricts remaining in certain portions of Public Square between the hours of 10:00 pm and 5:00 am. In contrast to content-based laws, where the validity of the person’s expression “depends on what they say,” the ordinance here is both content- and viewpoint-neutral on its face. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2723-24 (2010).

Moreover, it is clear that the interests served by the ordinance—public safety, preservation of public property, and conservation of public resources—are sufficiently important to justify the city’s reasonable time, place, and manner restriction. A city’s interest in “preserv[ing] the quality of urban life” merits “high respect.” *Playtime Theatres*, 475 U.S. at 50 (internal quotation marks and citation omitted). And therefore courts have recognized that cities may regulate the use of a public forum to ensure “the safety of persons using city streets and public forums,” *City of Lakewood*, 486 U.S. at 781-82, and even “to advance esthetic values,” *Taxpayers for Vincent*, 466 U.S. at 805. Indeed, the U.S. Supreme Court has recognized that “[r]egulations of the use of a public [park] that ensure the safety and convenience of the people are not ‘inconsistent with civil liberties but . . . [are] one of the means of safeguarding the good order upon which [civil liberties] ultimately depend.’” *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) (quoting *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941)) (alteration and omission in original).

The Eighth District ignored the strong precedent governing this inquiry, and rejected these interests out of hand. App. Op. ¶¶ 22-23. And as explained above, the premise for the court’s conclusion was flawed and based on inapplicable case law. The significance of

Cleveland's regulatory interests is well settled, and those interests justify its time, place, and manner restriction here.

One final point: The Eighth District takes Cleveland to task for failing to “present any testimony regarding a specific interest” furthered by the ordinance. App. Op. ¶ 21. But that sets the bar too high for such a commonplace regulation. As a preliminary matter, Cleveland's government interests are plain on the face of the enactment, and specifically the permitting regime. The ordinance states that permits “shall be issued” unless doing so would (1) unreasonably threaten public health, welfare, or safety; (2) be reasonably likely to incite violence or other unlawful activity; (3) impose excessive financial or operational costs, or (4) interfere with another reservation of the same facilities. Cleveland Codified Ordinance 559.541. In other words, Cleveland's reasons for denying an exception to the curfew clearly explain its justifications for enacting the curfew in the first place—to safeguard public health, welfare, and safety, to guard against the incitement of violence or other unlawful activity, and to manage city resources and preserve the property. Moreover, there is no requirement that the government “demonstrate the significance of its interest” by presenting “detailed evidence;” it is free to rely on “appeals to common sense and logic.” *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1318 (11th Cir. 2000) (internal quotation marks omitted); *see also Multimedia Publ'g Co. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 160 (4th Cir. 1993) (same). Logic and commonsense are surely on Cleveland's side here. And the notion that Cleveland must defend such a routine type of regulation with testimony establishing that the overnight closure serves the interest of public safety and the preservation of public resources is not defensible.

**B. The ordinance is narrowly tailored to further Cleveland's significant governmental interests.**

The ordinance is narrowly tailored to further Cleveland's significant interests because Cleveland "could reasonably have determined that its interests overall would be served less effectively without the" ordinance "than with it." *Ward*, 491 U.S. at 801. The connection between the ordinance and the interests it serves is obvious. Limiting overnight access reduces the potential for criminal activity or nuisance. The restriction also prevents individuals from effectively setting up residence in the park, which threatens legitimate sanitary and aesthetic interests and can stifle access by other members of the public. Also, overnight access would mean additional public safety and maintenance burdens for the city—burdens the city is justified in mitigating by restricting access during hours when society generally is not carrying on with public activities.

Implicit in the Eighth District's tailoring analysis is the suggestion that Cleveland could have achieved these goals without limiting expressive activity, since, in the court's view, the ordinance "seems to be concerned with those who use the park for private reasons." App. Op. ¶ 25. As a preliminary matter, that rationale goes nowhere because the ordinance in fact draws no distinction at all between "public" or "private" reasons for overnight access, and the government interests served by the ordinance would be compromised by overnight use regardless of whether such use were for public or private purposes. More important, the Eighth District ignored what the U.S. Supreme Court has long intoned: to be narrowly tailored, a time, place, or manner restriction "need *not* be the least restrictive or least intrusive means" of serving the governmental interest. *Ward*, 491 U.S. at 798 (emphasis added). While the restriction may not "burden substantially more speech than is necessary to further the government's legitimate interests," *id.* at 799, "[s]o long as the means chosen are not substantially broader than necessary

to achieve the government's interest . . . , the 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," *id.* at 800.

The Eighth District ran far afoul of those black-letter principles in essentially concluding that a time, place, and manner restriction is facially invalid if it fails to "make exceptions for those individuals seeking to use the park for a speech-related activity." App. Op. ¶ 25; *see also id.* at ¶ 30. In the Eighth District's view, the absence of a speech exception means that the ordinance is "substantially broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 800. But if that logic were correct, nearly every time, place, or manner restriction would fail the tailoring requirement since, *by definition*, such restrictions either purposely or incidentally could burden some speech. *Id.* at 791 ("government may impose reasonable restrictions on the time place or manner of *protected speech*") (emphasis added). To reduce the tailoring inquiry to an evaluation of whether the restriction contains an exception for First Amendment activities is, in effect, to have no tailoring requirement at all but instead condemn all such restrictions as invalid.

Finally, while the ordinance's curfew requirement would pass constitutional muster by itself, there was another major flaw in the Eighth District's approach. The court below found fault with the ordinance in part because it bans "expressive activity," and, in the court's view, that ban "absolutely forbids access regardless of purpose." App. Op. ¶ 26. But that characterization is wrong. The ordinance is *not* a blanket ban. To the contrary, it allows individuals to engage in certain speech (or any other) activity during the curfew period so long as they obtain a permit. *See* Cleveland Codified Ordinance 559.541. Thus, the ordinance is tailored far more narrowly than the Eighth District described.

**C. The ordinance leaves open ample alternative channels of communication.**

Finally, although the Eighth District declined to reach this issue, App. Op. ¶ 31, the ordinance's speech restriction leaves open ample alternative channels of communication. To meet this requirement, a challenged restriction need only leave open a "reasonable opportunity" for the speaker to communicate his or her message. *Playtime Theatres*, 475 U.S. at 54; *see also Menotti v. City of Seattle*, 409 F.3d 1113, 1138 (9th Cir. 2005) ("[T]he Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communication unless the government enactment will foreclose an entire medium of public expression across the landscape of particular community or setting.") (internal quotation marks omitted).

There can be little doubt that the ordinance satisfies the alternative-channels prong. The curfew applies to only a portion of Public Square. It applies for only a limited period each night. And the ordinance explicitly exempts "dedicated streets, public sidewalks adjacent to dedicated streets and RTA bus shelters within this area." Cleveland Codified Ordinance 559.541. Any suggestion that this ordinance leaves no "reasonable opportunity" for speakers to communicate their message would strain credulity.

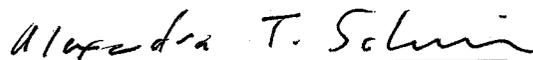
In sum, rather than apply the well-worn constitutional principles that apply in these circumstances, the Eighth District crafted a new doctrinal framework that is both unfaithful to U.S. Supreme Court precedent and incompatible with legitimate State and local regulatory interests. When properly applied, these constitutional principles confirm that the ordinance is a valid time, place, and manner restriction, and the Court should therefore grant review and reverse the decision below.

## CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction and reverse.

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## CERTIFICATE OF SERVICE

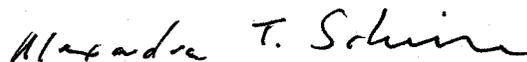
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