

**IN THE SUPREME COURT OF OHIO**

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

**BRIEF OF AMICUS CURIAE  
THE OHIO MUNICIPAL LEAGUE  
IN SUPPORT OF THE PLAINTIFF-APPELLANT  
CITY OF CLEVELAND**

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## INTRODUCTION

The Ohio Municipal League (“League”), as amicus curiae on behalf of the City of Cleveland (“City”), urges this Court to reverse the decision of the Eighth District Court of Appeals, in *City of Cleveland v. McCardle*, 2012-Ohio-5749. In this decision, the Eighth District held that a City ordinance prohibiting persons from remaining on or in Public Square between certain hours was unconstitutional. In reaching this decision, the Eighth District concluded that the City’s regulation “serves as an unreasonable ban and has the purpose of eliminating peaceful speech.” *City of Cleveland* at ¶ 26.

However, the United States Supreme Court has held that “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.” *Heffron v. Int’l Soc. for Krishna Consciousness*, 452 U.S. 640 (1981). (Emphasis added.) Therefore, “expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.” *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1998). Furthermore, “reasonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression but are nevertheless valid.” *Clark* at 294.

Section 559.541 of the Codified Ordinances of the City of Cleveland (“Public Square Use Ordinance”) prohibits persons from remaining on or in any portion of Public Square between the hours of 10:00 p.m. to 5:00 a.m., unless a permit is obtained from the Director of Parks, Recreation and Properties. The Public Square Use Ordinance is content neutral and is a valid time, place and manner restriction as it is narrowly tailored to serve significant governmental interests and leaves open ample alternatives for communication.

However, the Eighth District departed from the time, place, and manner framework and concluded that the Public Square Use 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.” *City of Cleveland* at ¶ 30. In other words, the Eighth District concluded that the Public Square Use Ordinance in order to be constitutional must make a twenty-four hours a day, seven days a week exception for “expressive activity when the message is of a public concern.” *City of Cleveland* at ¶ 30. In doing so, the Eighth District rejected the constitutionality of time, place and manner restrictions.

Therefore, this Court should reverse the decision of the Eighth District.

### **STATEMENT OF AMICUS INTEREST**

The Ohio Municipal League (“League”) is a non-profit Ohio corporation composed of a membership of more than 700 Ohio cities and villages. All of these cities and villages own and operate public parks and public buildings.

The League and its members have an interest in ensuring that content-neutral time, place, and manner restrictions are upheld. The League and its members also have an interest in ensuring that public safety and park management are recognized as significant governmental interests.

### **STATEMENT OF THE CASE AND FACTS**

The League hereby adopts, in its entirety, and incorporates by reference, the statement of the case and facts contained within the Merit Brief of the City.

### **ARGUMENT**

**Proposition of Law No. 1: The City’s Public Square Use Ordinance, limiting public park hours, is content-neutral and is a valid time, place, and manner restriction as it is narrowly**

**tailored to serve a significant governmental interest that leaves open ample alternatives for communication.**

**A. The City's Public Square Use Ordinance is Content-Neutral and, therefore, an Intermediate Level of Scrutiny is the Appropriate Standard.**

The City's Public Square Use Ordinance prohibits persons from remaining on or in any portion of Public Square between the hours of 10:00 p.m. to 5:00 a.m., unless a permit is obtained from the Director of Parks, Recreation and Properties. This prohibition applies to all persons, regardless of the content of their speech, and the Eighth District correctly concluded that the "regulation does not specifically reference any speech activity." *City of Cleveland* at ¶ 21. Therefore, the City's Public Square Use Ordinance is content-neutral and an intermediate level of scrutiny is applied.

Under intermediate scrutiny, a local government may impose time, place, and manner restrictions on protected speech provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

For each of the reasons set forth below, the Eighth District's conclusion that the City's Public Square Use Ordinance is "an unconstitutional violation of the First Amendment rights to free speech and assembly" should be reversed. *City of Cleveland* at ¶ 9.

**B. Public Safety and Park Management Are Significant Governmental Interests.**

The United States Supreme Court has held that "it is clear that a State's interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective." *Heffron* at 650.

The United States Supreme Court has also acknowledged that “consideration of a forum’s special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.” *Heffron* at 651, citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972) and *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

In *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002), the United States Supreme Court reviewed an ordinance regulating the use of public parks in the Chicago Park District. The Court concluded that the object of the Park District’s regulations “is not to exclude communication of particular content, but to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or impermissible under the Park District’s rules, and to assume financial accountability for damage caused.” *Thomas* at 322. The Court upheld the Park District’s regulations and noted that “[t]o allow unregulated access \*\*\* could easily reduce rather than enlarge the park’s utility as a public forum.” *Thomas* at 322.

In this instance, 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 use of the property, and to ensure financial accountability for any damage that may be caused by those using the park.” *Memorandum In Support of Jurisdiction of Plaintiff-Appellant City of Cleveland*, pages 1-2. These governmental interests were acknowledged by the U.S. Supreme Court in *Thomas*.

The Eighth District noted that “[t]he City has relied solely on the right to pass laws that protect the health and safety of its citizens” and concluded that “[a]esthetics and convenience are not significant interests in this case.” *City of Cleveland* at ¶ 22. However, this conclusion ignores the health and safety realities that arise from protestors occupying public spaces twenty-

four (24) hours a day, including the need for toilets, drinking water, and bathing facilities, the provision of trash and sanitation services, and public space maintenance. It also ignores the realities that arise for public safety officials who, during a time of financial challenges, are forced to provide twenty-four (24) hour safety services to protestors. The City's health and safety concerns surpass aesthetics and convenience and the Eighth District incorrectly concluded that the City does not have "a significant, substantial interest in having this law." *City of Cleveland* at ¶ 22.

### **C. The City's Public Square Use Ordinance is Narrowly Tailored.**

The U.S. Supreme Court has established that the "narrowly tailored to serve a significant government interest" standard does not require the least restrictive means available:

Lest any confusion on this point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied 'so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'

*Ward* at 798-799, quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985).

#### The Public Square Use Ordinance Is Narrowly Tailored to Serve the City's Governmental Interest in Public Safety and Park Management

The Public Square Use Ordinance does not prohibit all use of Public Square. Without a permit, the prohibition is limited to the hours between 10:00 p.m. and 5:00 a.m. Public Square is available for first amendment expression during all other hours of the day. Therefore, the Eighth District's conclusion that the Public Square Use Ordinance "absolutely forbids access regardless of the purpose" is erroneous. *Cleveland* at ¶ 26.

The Public Square Use Ordinance was drafted in a manner to enhance public safety and park management. It provides an opportunity for City staff to manage the limited Public Square space available, to perform maintenance, to ensure that Public Square will not be used after-business hours for activities that may reasonably be anticipated to incite violence, crime or disorderly conduct, and to ensure that the proposed activity will not result in unusual, extraordinary or burdensome expense by the City.

The City's efforts to provide park management and public safety services in a more efficient manner should not be dismissed. Local governments throughout the State of Ohio are forced to balance budgets and provide services with fewer resources. Reasonable time, place, and manner regulations that are content-neutral are a tool available to local governments seeking to balance the first amendment rights of citizens with the local government's obligation to provide public safety services and maintain public parks.

The City's Interest in Public Safety and Park Management Would be Achieved  
Less Effectively Absent the Public Square Use Ordinance

The Public Square Ordinance assists the City with public safety and park management. As the City points out, the Public Square Use Ordinance enables the City to obtain "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 and 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." *Memorandum In Support of Jurisdiction of Plaintiff-Appellant City of Cleveland*, page 11.

The Public Square Use Ordinance ensures that Public Square is available and maintained in a manner that enables citizens to exercise their free speech rights. The City's Public Square

regulations are not “inconsistent with civil liberties ... but [are] one of the means of safeguarding the good order upon which [civil liberties] ultimately depend.” *Thomas* at 323, citing *Cox v. New Hampshire*, 312 U.S. 569 (1941).

This Court should grant deference to the City’s reasonable time, place and manner regulations that assist the City in its efforts to provide for the public safety of all users of Public Square.

**D. The City’s Public Square Use Ordinance Leaves Open Ample Alternatives for Communication.**

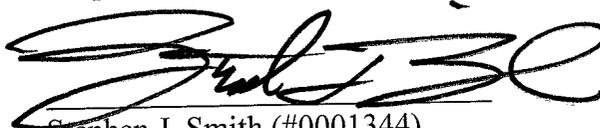
The final prong in the time, place and manner test is whether the regulation “leave[s] open ample alternative channels for communication of the information.” *Clark* at 293.

The Eighth District did not address whether the Public Square Use Ordinance provided ample alternatives for communication. However, it is clear that there are other opportunities for communication as the ordinance applied only for a limited period each night and excludes “public sidewalks adjacent to dedicated streets and RTA bus shelters.” Section 559.541 of the Codified Ordinances of the City of Cleveland.

**CONCLUSION**

Based upon the foregoing, the League respectfully requests this Court to reverse the Eighth District’s judgment.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing *Brief of Amicus Curiae The Ohio Municipal League In Support of the Plaintiff—Appellant City of Cleveland* has been sent via regular U.S. mail, postage pre-paid this \_\_\_ day of May, 2013 to:

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