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## INTRODUCTION

The City of Cleveland enacted Cleveland Codified Ordinance 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 10:00pm to 5:00am 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.

After being convicted of violating C.C.O. 559.541, Defendants-Appellees appealed their cases to the Ohio Eighth District Court of Appeals on First Amendment grounds. Defendants-Appellees argued that C.C.O. 559.541 is unconstitutional both on its face and as applied, and that its procedures for obtaining a permit amount to an unconstitutional prior restraint on their freedom of expression. The Eighth District reversed Defendants-Appellees convictions, holding that the ordinance was unconstitutional on its face and as applied. Specifically, the Eighth District held that while it concedes that the ordinance is content-neutral, it also determined that

the City's interests in enacting it are not substantial government interests, and that the ordinance is not narrowly-tailored.

The Eighth District's analysis of the facts and the law are flawed in multiple ways. First, it 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, stating that these were not substantial government interests that could survive intermediate scrutiny. This holding completely ignores the plethora of other proprietary interests advocated by the City and the well-established precedent case law that upholds those interests as constitutionally sufficient.

Second, the Eighth District also held that C.C.O. 559.541 is not narrowly-tailored to advance any significant government interest because it burdens more speech than is necessary. This holding is similarly flawed in that it clearly disregards the precedential authorities cited by the City. These authoritative precedents were outright ignored or erroneously deemed inapplicable by the Eighth District.

Third, the Eighth District misapplied the United States Supreme Court's holding in *Snyder v. Phelps* in justifying its decision. See 131 S.Ct 1207, 179 L.Ed.2d 172 (2011). This misapplication resulted in the City being held to a higher level of constitutional scrutiny than was required. Such action is a violation of the Eighth District'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).

The City's interests in ensuring public safety, in preserving the maintenance and quality of public property, and in protecting its limited funds and resources are core responsibilities entrusted to every municipality in the United States of America. C.C.O. 559.541 is not a "blanket ban" on speech, as Defendants-Appellees maintain, but rather it creates limited curfews

on public property consistent with many other ordinances throughout the State. The Eighth District's opinion ignores authoritative precedent and erroneously held the City to an inappropriate level of scrutiny. Therefore, this Honorable Court should now reverse.

### STATEMENT OF THE CASE AND FACTS

#### **A. The City of Cleveland has enacted Cleveland Codified Ordinance 559.541 to prohibit after-hours trespassing in Public Square**

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 the late night and early morning hours if they do not have a permit in order to protect the City's substantial interests. C.C.O. 559.541 as enacted and enforced is a content-neutral time, place, and manner restriction that is narrowly tailored to advance significant governmental interests, and leaves open ample alternative channels of communication. It also contains adequate standards to guide decisions on issuing after-hours permits, which are subject to effective judicial review.

**B. Defendants-Appellees violated C.C.O. 559.541, were convicted, and appealed**

On October 21, 2011, at 10:30 p.m., Defendants-Appellees, Erin McCardle and Leatrice Tolls, were present in the Northwest Quadrant of Public Square in Cleveland, Ohio under the auspices of the Occupy Cleveland protest. Cleveland police officers had advised Defendants-Appellees several times after 10:00 p.m. that they were no longer allowed to remain in that quadrant of the park, since it was after-hours and they did not have a permit 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., Defendants-Appellees did not move. Officers again advised that they would each receive a citation if they did not vacate the premises, but the Defendants-Appellees, again, refused to leave. *See* McCardle Trial Court Transcript p. 3-4.

Several dozen people exited the park after being instructed to do so by the officers, but Defendants-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 Defendants-Appellees in order to obtain their names so they could be issued a citation. However, Defendants-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 Defendants-Appellees purposely went limp and the officers had to physically remove them from the park. See McCardle Trial Court Transcript p. 26-27.

Defendants-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, Defendants-Appellees were arraigned in the Cleveland Municipal Court and their cases were assigned to the personal dockets of the Honorable Pauline H. Tarver and Honorable Anita Laster Mays, respectively.

On November 28, 2011, the Defendants-Appellees filed motions to dismiss. The City filed a response to the motions to dismiss on December 16, 2011. A motion hearing regarding Defendant-Appellee McCardle was conducted on December 20, 2011 in front of Judge Tarver. On February 28, 2012, the court rendered a decision denying Defendant-Appellee McCardle's motion to dismiss. The trial court held that C.C.O. 559.541 was a content-neutral time, place and manner restriction that did not violate Defendants-Appellees' First Amendment rights. On April 5, 2012, McCardle then entered a no contest plea to the charge of violating C.C.O. 559.541. The remaining charges against McCardle were dismissed and the court sentenced her to pay a fine of 100 dollars and court costs, which was stayed pending appeal.

In light of Judge Tarver's ruling in Defendant-Appellee McCardle's case, Defendant-Appellee Tolls entered a No Contest plea to violating C.C.O. 559.541 on April 10, 2012. The remaining charges were dismissed, and Tolls was ordered to pay a 75 dollar fine plus court costs.

Defendants-Appellees filed separate notices of appeal on April 12, 2012. Subsequent to briefing the issues presented on appeal, the Eighth District consolidated both cases for oral argument, which was held on October 3, 2012.

**C. The Ohio Eighth District Court of Appeals held that C.C.O. 559.541 was unconstitutional for violating Defendants-Appellees' First Amendment Rights.**

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*, 8<sup>th</sup> Dist. No. 98230 and 98231, 2012-Ohio-5749, ¶ 9. While the Eighth District held that the ordinance was content-neutral, it also held that the ordinance was unconstitutional on its face because the City had failed to show that it was narrowly-tailored to advance a substantial and significant government interest. *McCardle* at ¶ 21. Specifically, the Eighth District held that the City's only governmental interests in enacting the ordinance were the "aesthetics and convenience" of parks, which it believes are not constitutionally significant government interests. *McCardle* at ¶ 22.

The Eighth District held that the ordinance constitutes a ban which "prohibits all speech." *McCardle* at ¶ 22. It also held that the permit requirement "serves as an unreasonable ban and has the purpose of eliminating peaceful speech." *McCardle* at ¶ 26. The Eighth District went on to state that the ordinance banned more speech than was necessary, but that it could be sufficiently narrowed by exempting persons seeking 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. *McCardle* at ¶ 21.

The City timely appealed, and this Honorable Court accepted jurisdiction on March 27, 2013.

## 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 United States Supreme Court has held, “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”; 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); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The Eighth District 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 and significant government interests.**

Based on its own terms, the City's ordinance is plainly designed to serve the City's vital government interests, such as: managing the limited space that is available within Public Square; adequately controlling crowds, vehicle, and pedestrian traffic; ensuring that the interior of the quadrants are preserved and maintained; protecting the parks from overuse and unsanitary

conditions; preventing dangerous, unlawful or impermissible uses; and to assure financial accountability for any damage that may be caused.

Further, these significant interests that are being protected by C.C.O. 559.541 are evident in the permit applications Defendants-Appellees' group had previously submitted to the City. The application, which was attached to Plaintiff-Appellant's merit brief to the Eighth District, 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 to not use a sound system that can be audible from 150 feet away.

The Eighth District's holding that C.C.O. 559.541 did not promote a substantial and significant government interest is flawed in two primary ways. First, that holding ignores and incorrectly dismisses applicable authoritative precedents which have upheld the City's interests as surviving intermediate scrutiny. Second, the Eighth District misapplied the holding in the U.S. Supreme Court case of *Snyder v. Phelps*, which dealt with an entirely different level of judicial scrutiny, inapplicable to this case, resulting in the City being held to a higher level of constitutional scrutiny than is required. As such, the Eighth District's determination that C.C.O. 559.541 does not promote substantial and significant government interests is in error.

1. The Eighth District ignored and refused to acknowledge authoritative precedents which uphold the City's proprietary interests as constitutional

None of the City's stated proprietary interests for enacting and enforcing the ordinance were acknowledged in the Eighth District's decision. In its merit brief and at oral argument, the City had identified and placed before the court these significant interests for enacting C.C.O. 559.541. The City has repeatedly maintained that the conservation and protection of the parks is of paramount concern, which has resulted in states and municipalities across the country enacting

curfew ordinances. In *Clark v. Community for Creative Non-Violence*, the U.S. Supreme Court explicitly held that “there is a substantial Government interest in conserving park property.” 468 US 288 at 299 (1984). However, the Eighth District held that *Clark* was “not helpful and inapplicable” for the sole reason that the ordinance at issue in that case forbade sleeping in the park, rather than mere presence in a park like C.C.O. 559.541. *McCardle* at ¶ 20.

To blatantly discard the applicable holding in *Clark* merely because the park ordinance at issue there was not the exact same restriction as that at issue here is a *non sequitur*. The most pertinent part of the *Clark* holding is that conservation of park property constitutes a substantial government interest that will survive intermediate scrutiny. 468 US 288 at 299 (1984). The fact that the two ordinances being compared did not restrict park use in the exact same way is irrelevant to the constitutional analysis of C.C.O. 559.541. The primary reason the City referenced *Clark* was because the U.S. Supreme Court explicitly held that conserving and protecting park property, one of the exact same government interests at issue here, survives intermediate scrutiny. 468 US 288, 297-299 (1984). It was therefore erroneous for the Eighth District to be dismissive of *Clark* during its analysis of whether or not the City has a substantial and significant government interest in enacting C.C.O. 559.541.

Additionally, the City strenuously asserted at oral arguments that there is a great concern for public safety in and around the park, and that the ordinance was enacted to address those prevalent concerns. Many jurisdictions around the country have enacted park curfew ordinances to curtail the possibility of criminal activity and to prevent damage within parks during late night hours. The Eighth District dismissed this assertion by opining that no such concerns exist, even though the U.S. Supreme Court “has consistently recognized the important interest that localities

have in insuring the safety of persons using city streets and public forums.” *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 782-783, 108 S.Ct. 2138 (1988).

C.C.O. 559.541 is specifically aimed to address these issues. Large gatherings in Public Square create concerns relating to crowd-control, vehicle and pedestrian traffic, possible damage to park property, and potential criminal conduct. Even the presence of a solitary person inside Public Square could inflict damage to park property or commit criminal activity. Thus, the ordinance’s curfew and permit requirement allow the City to ensure that these issues are addressed, as well as imposing financial accountability to those who may damage City property. It is evident that the ordinance’s curfew restriction and permit scheme are designed to ensure both the safety of citizens wishing to use the park after hours, and to protect the City’s substantial investment in that property so that other citizens will be able to use it in the future. For the Eighth District to ignore this argument, which is supported by decades of judicial precedent, was improper.

Instead of addressing the majority of the City’s specified government interests, the Eighth District disregarded them, as well as the very language of the ordinance. The Eighth District incorrectly stated that the City’s *only* interests in enacting C.C.O. 559.541 were “aesthetics, convenience, and sanitation.” *McCardle* at ¶¶ 22,23,26. It held that such concerns were insufficient to uphold the constitutionality of the City’s ordinance. *McCardle* at ¶¶ 22 to 29. However, the U.S. Supreme Court has routinely held that even merely preserving the aesthetics of public property can be a substantial government interest that can survive intermediate scrutiny. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 816-817, 104 S.Ct. 2118 (1984); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 782-783, 108 S.Ct. 2138 (1988). Even in *Clark*, which the Eighth District erroneously held to be

inapplicable, the U.S. Supreme Court held that there is a substantial government interest in maintaining the parks in an attractive and intact condition, so that it is readily available to people who wish to see and enjoy them. 468 US 288 at 296 (1984).

The governmental interests the City seeks to promote and protect through C.C.O. 559.541 have consistently been upheld by the U.S. Supreme Court as satisfying intermediate scrutiny. Such blatant disregard for authoritative precedent by the Eighth District was improper and calls into question the entirety of its constitutional analysis.

2. The Eighth District held the City of Cleveland to a higher level of constitutional scrutiny than is required

In order to justify its holding that Plaintiff-Appellant's interests in C.C.O. 559.541 are not substantial and significant, the Eighth District erroneously applied the U.S. Supreme Court case of *Snyder v. Phelps*, 131 S.Ct. 1207 (2011). The Eighth District stated that the City's interests in enacting its ordinance certainly fail if the government's interests in *Snyder* were deemed constitutionally insufficient. *McCardle* at ¶ 23. 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 U.S. 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 Supreme Court deemed protected speech in *Snyder* amounted to a content-based restriction on the exercise of free speech. *Snyder* at 1207, 1219. Such a restriction on speech is incomparable to C.C.O. 559.541, which the Eighth District conceded was content-neutral. *McCardle* at ¶ 21. (emphasis added).

Content-*based* restrictions on constitutionally protected speech must be of a “compelling nature” in order to survive strict constitutional scrutiny. *Sable Communications of California, Inc. v. F.C.C.* 492 U.S. 115, 126, 109 S.Ct. 2829 (1989). (emphasis added). Content-*neutral* time, place, and manner restrictions need only rise to the level of a substantial or significant interest, not a compelling one, to be constitutional under intermediate scrutiny. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). (emphasis added). Despite the Eighth District’s holding that C.C.O. 559.541 is content-neutral, it held that since the interests at issue in *Snyder* were constitutionality insufficient, so too must be the City’s interests in enacting its ordinance. *McCardle* at ¶ 21-23. But this analysis is improper and illogical, as the City’s content-*neutral* restriction does not have to rise to the same “compelling nature” as *Snyder*’s content-*based* restriction on speech in order to be constitutional. In light of the fact that the City’s ordinance is a content-*neutral* restriction, which the Eighth District plainly conceded, it is a gross misapplication of First Amendment law to invalidate the City’s significant government interests because they are not of a “compelling nature”. By making the comparison with *Snyder*, the Eighth District erroneously applied a strict scrutiny standard to C.C.O. 559.541, which was improper given that the City’s ordinance was held to be content-*neutral*.

The Eighth District thus held the City to a higher standard of constitutional scrutiny than is required by long-standing First Amendment jurisprudence. This flawed reasoning and misapplication of fundamental constitutional principles by the Eighth District are in error and must be overturned.

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

The government may impose reasonable time, place, and manner restrictions on speech, provided they survive intermediate scrutiny by being content-neutral, narrowly-tailored to advance a significant governmental interest, and leave open ample alternative avenues of communication. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The Eighth District incorrectly determined that C.C.O. 559.541 was not “narrowly-tailored” to advance a significant government interest. *McCardle* at ¶ 26. The Eighth District held that the City’s ordinance constituted a “complete ban” on speech, and that it “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, a proper analysis of the “narrow-tailoring” requirement was not conducted, given that the Eighth District ignored and disregarded the actual significant interests the City protects with C.C.O. 559.541. The Eighth District could not have been able to properly weigh the City’s interests against any possible First Amendment concerns, since it failed to actually acknowledge that those interests existed, as previously discussed. Due to the Eighth District’s complete failure to acknowledge long-standing precedent regarding the City’s interests, a proper judicial review was not performed regarding whether the City’s ordinance survives intermediate scrutiny.

Second, C.C.O. 559.541 is not a complete ban on speech at all. 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 unrestricted time, and the minimalist nature of the ordinance’s restrictions during the seven hours at issue, the Eighth District’s characterization that the ordinance is a complete or wholesale ban on expression is without merit. The Eighth District’s

own opinion is riddled with inconsistent statements regarding this very point. In one sentence it claims “the ban absolutely forbids access regardless of the purpose,” but in another it says that the ban “has the purpose of eliminating peaceful speech.” *McCardle* at ¶ 26. It is unclear if the Eighth District is attempting to claim that the ordinance was not applied in a content-neutral way, because no facts were provided in its opinion to support its claim that the ordinance has the purpose of eliminating peaceful speech.

Third, the Eighth District erroneously held that a substantial portion of the ordinance’s burden on speech does not serve to advance the City’s interests. In reality, any incidental impact on speech created by C.C.O. 559.541 only serves to advance the City’s significant government interests. The City enacted the ordinance to manage the limited space that is available within Public Square, to adequately control crowds and vehicle and pedestrian traffic, to ensure that the interior of the quadrants are preserved and maintained, to protect the parks from overuse and unsanitary conditions, to prevent dangerous, unlawful or impermissible uses, and to assure financial accountability for any damage that may be caused during the prohibited hours. Essentially, the ordinance promotes and advances the City’s significant government interests by creating 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 10:00pm to 5:00am.

Due to the City’s limited resources, it is unable to staff city officials who can monitor and regulate the use of the parks twenty-four hours a day. Nor is the City able to assign police officers or park rangers to continually monitor the parks throughout the night. As such, being able to establish a curfew and permit requirement allows the City to keep a record of who is using the park during the hours when it cannot be adequately monitored. It is the only feasible way for the City to be able to protect its interests when there are no city officials available who

can address potential threats and hazards. The curfew and permit requirement allows for the City to protect its properties when a proposed use is dangerous or illegal. It also can identify a party that may be liable for property damage caused in the park during the prohibited hours. Additionally, it allows the City to manage the space when multiple persons are seeking to use the park at the same time. It also allows the City to manage the use of the space so that it can know when it will be able to schedule maintenance. Moreover, the ordinance gives the City notice of potential crowd control and public safety issues that may be present when large amounts of people are gathering in a confined space downtown late at night. Such gatherings create several public safety concerns that the City is obligated to address.

The U.S. Supreme Court has held that an ordinance survives the narrow-tailoring 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. 781, 788, 109 S.Ct. 2746 (1989). Without the curfew in place to prevent persons from remaining in the park after hours, the park would be exposed to potential damage and other unlawful activity when city officials are not available to respond. Without the curfew the City would incur extreme difficulty in scheduling maintenance and cleanup of the park. The permit requirement is the only feasible remedy. Absent the paper trail created by the permit requirement, the City would be unable to regulate possible overcrowding, possible damage, and possible criminal activity during the prohibited hours. As such, the City’s significant interests would certainly be achieved less effectively, if at all, absent C.C.O. 559.541. Thus, it is narrowly-tailored pursuant to the U.S. Supreme Court’s holding in *Ward v. Rock Against Racism*. 491 U.S. at 788.

Lastly, the Eighth District violated precedent when it held that C.C.O. 559.541 is not narrowly-tailored because it could have imposed a “less-restrictive” alternative to the curfew.

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. *Ward* at 800. Despite the holding in *Ward*, 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 ¶ 25 and 30.

However, this “remedy” would impermissibly turn this content-neutral ordinance into an impermissible content-*based* restriction. It is completely illogical for the Eighth District to propose amending the ordinance in such a fashion. To do so would result in a city official having to evaluate the subjective worth of speech. Such a proposal by the Eighth District shows a misunderstanding of the law in analyzing the constitutionality of the City’s ordinance. The U.S. Supreme Court has specifically held that a “less-restrictive means” evaluation is improper when determining whether or not a restriction is narrowly-tailored. *Ward* at 800; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984).

The Eighth District erroneously determined that the City’s substantial and significant interests were not narrowly-tailored, as an ordinance will survive the narrow-tailoring 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 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. Without the enactment and enforcement of this ordinance, the City would not be able to establish a record of who is using the park in order to protect its governmental interests. Therefore, C.C.O. 559.541 is narrowly-tailored to achieve its substantial and 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” requirement of intermediate scrutiny was not specifically addressed by the Eighth District. *McCardle* at ¶ 31. The ordinance’s restriction, however, does satisfy this element of intermediate scrutiny because it expressly excludes “all dedicated streets, public sidewalks adjacent to dedicated streets and RTA bus shelters within this area.” See C.C.O. 559.541. Consequently, Defendants-Appellees could have simply moved off of the grass and onto the public sidewalk surrounding Public Square in order to be in compliance with C.C.O. 559.541.

Additionally, Defendants-Appellees had multiple permits for use of city properties on other dates. They had unrestricted access to the sidewalks adjacent to Public Square, and had seventeen hours during the day to be in that park without needing to obtain a permit. The facts clearly show that Defendants-Appellees had multiple alternative channels of communication available to express their views. Since Defendants-Appellees had ample alternative areas where they could gather and express their message, C.C.O. 559.541 satisfied every element of intermediate constitutional scrutiny.

**CONCLUSION**

For these reasons, this Honorable Court should now reverse the decision of the Eighth District Court of Appeals.

Respectfully submitted,

BARBARA LANGHENRY (0038838)  
DIRECTOR OF LAW  
CITY OF CLEVELAND

VICTOR R. PEREZ (0074127)  
CHIEF PROSECUTOR

By:   
CONNOR P. NATHANSON (0085191)  
ASSISTANT CITY PROSECUTOR  
Justice Center – 8<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 664-4850  
(216) 664-4399 Facimile  
cnathanson@city.cleveland.oh.us

Attorneys for Plaintiff-Appellant

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Merit Brief of Plaintiff-Appellant City of Cleveland was sent by ordinary U.S. Mail to J. Michael Murray, attorney for Defendants-Appellees, at 55 Public Square, Suite 2200 Cleveland OH 44113, on May 20, 2013.

BARBARA LANGHENRY (0038838)  
DIRECTOR OF LAW  
CITY OF CLEVELAND

VICTOR R. PEREZ (0074127)  
CHIEF PROSECUTOR

By:   
\_\_\_\_\_  
CONNOR P. NATHANSON (0085191)  
ASSISTANT CITY PROSECUTOR  
Justice Center – 8<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 664-4850  
(216) 664-4399 Facsimile  
cnathanson@city.cleveland.oh.us

Attorneys for Plaintiff-Appellant

# **APPENDIX**

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

**NOTICE OF APPEAL OF PLAINTIFF- APPELLANT CITY OF CLEVELAND**

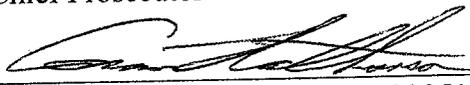
Plaintiff-Appellant, City of Cleveland, hereby gives notice of appeal to the Supreme Court of Ohio, from judgment of the Cuyahoga County Court of Appeals Eighth Appellate District, journalized as Court of Appeals Case Numbers 98230 and 98231 on December 6, 2012.

Plaintiff-Appellant files this jurisdictional appeal pursuant to Ohio Supreme Court Rule 7.01, as it raises a substantial constitutional question and is one of public or great general interest.

Respectfully Submitted,

BARBARA LANGHENRY (0038838)  
Director of Law  
VICTOR R. PEREZ (0074127)  
Chief Prosecutor

By:

  
CONNOR P. NATHANSON (0085191)

Assistant City Prosecutor  
City of Cleveland Prosecutor's Office  
1200 Ontario Street, 8<sup>th</sup> Floor  
Cleveland, Ohio 44113  
(216) 664-4850; (216) 664-4399 Facimile  
cnathanson@city.cleveland.oh.us  
Attorneys for Plaintiff-Appellant

**FILE COPY**

**FILED**  
JAN 17 2013  
CLERK OF COURT  
SUPREME COURT OF OHIO

**EXHIBIT A**

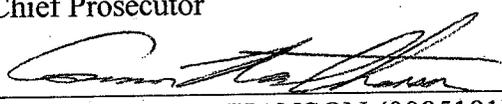
## CERTIFICATE OF SERVICE

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 17<sup>th</sup> day of January, 2013.

BARBARA LANGHENRY (0038838)  
Director of Law

VICTOR R. PEREZ (0074127)  
Chief Prosecutor

By:

  
CONNOR P. NATHANSON (0085191)  
Assistant City Prosecutor  
City of Cleveland Prosecutor's Office  
1200 Ontario Street, 8<sup>th</sup> Floor  
Cleveland, Ohio 44113  
(216) 664-4850  
(216) 664-4399 Facimile  
cnathanson@city.cleveland.oh.us

Attorneys for Plaintiff-Appellant

[Cite as *Cleveland v. McCardle*, 2012-Ohio-5749.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
Nos. 98230 and 98231

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**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

**EXHIBIT B**

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

**RELEASED AND JOURNALIZED:** December 6, 2012

**ATTORNEYS FOR APPELLANTS**

J. Michael Murray  
Steven D. Shafron  
Berkman, Gordon, Murray & DeVan  
55 Public Square, Suite 2200  
Cleveland, Ohio 44113

**ATTORNEYS FOR APPELLEE**

Barbara A. Langhenry  
Interim Director of Law

Victor R. Perez  
Chief City Prosecutor  
Connor P. Nathanson  
Christina Haselberger  
Assistant City Prosecutors  
City of Cleveland  
Justice Center - 8th Floor  
1200 Ontario Street  
Cleveland, Ohio 44113

**PATRICIA ANN BLACKMON, A.J.:**

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

{¶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.<sup>2</sup> 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.

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<sup>1</sup>See journal entries dated November 6, 2012.

<sup>2</sup>Tom L. Johnson was the 35<sup>th</sup> 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.<sup>3</sup>

{¶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

---

<sup>3</sup>We 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.

public and, time out of mind, have been used for purposes of assembly, communicating thoughts 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*, 491 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.

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PATRICIA ANN BLACKMON, ADMINISTRATIVE JUDGE

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

CLEVELAND MUNICIPAL COURT  
CLEVELAND, OHIO

CITY OF CLEVELAND,

Plaintiff

Case No. 2011 CRB 37724

vs.

Judge Pauline H. Tarver

ERIN McCARDLE,

Defendant.

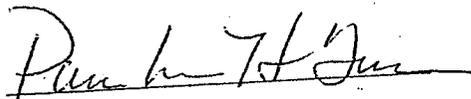
JUDGMENT ENTRY

Defendant is charged with violating prohibited hours in Public Square, Cleveland Codified Ordinances 559.541; criminal trespass, C.C.O. 623.04(A)(4); and resisting arrest, C.C.O. 615.08. The court now has before it defendant's two motions to dismiss, both filed November 22, 2011; the City's response in opposition, filed December 15, 2011; and defendant's motion for leave to file instanter, filed February 3, 2012. The court heard oral argument in this case on December 20, 2011.

Defendant's motion for leave to file instanter is, without objection, hereby GRANTED. For the reasons set forth in the attached Memorandum of Law, defendant's motions to dismiss are both hereby DENIED.

This case shall be set for a jury trial forthwith.

The Clerk shall serve the parties with a copy of this judgment entry. It is so ordered.

  
Judge

Copies to: Prosecutor  
Defense counsel

**EXHIBIT C**

## MEMORANDUM OF LAW

### *Introduction*

Defendant is a member of the Occupy Cleveland/Occupy Wall Street movement, peacefully seeking changes in this country's economic system. She and ten other like-minded individuals were arrested by officers of the Cleveland Police Department when they refused to leave Public Square in downtown Cleveland, Ohio on the evening of October 21, 2011. Officers ordered them to leave pursuant to Cleveland Codified Ordinance (hereinafter "C.C.O.") 559.541, which prohibits remaining on Public Square after 10pm unless a permit has been granted by the Director of Parks, Recreation and Properties. A permit had earlier been granted, but defendant and her friends allegedly overstayed their welcome.

Defendant argues that the prohibited hours ordinance, C.C.O. 559.541, is unconstitutional and thus violates her First Amendment and Fourteenth Amendment rights. If that is so, she argues, she had a right to lawfully remain on Public Square and the criminal trespass and resisting arrest charges ought never to have been brought against her.

The court is not persuaded. The court believes that C.C.O. 559.541 is a reasonable, valid and content-neutral exercise of the City's police power, and that defendant's constitutional rights have not been violated.

### *Constitutionality of Ordinance*

It is well settled under Ohio law that "all legislative enactments must be afforded a strong presumption of constitutionality." *State v. Knight* (2000), 140 Ohio App.3d 797, 810; *see also State v. Anderson* (1991), 57 Ohio St.3d 168. In order for a court to declare a statute or ordinance unconstitutional, it must appear beyond a reasonable doubt that the measure is incompatible with a particular constitutional provision. *State v. Cook* (1998), 83 Ohio St.3d 404, 409. One who challenges a statute must establish that no set of circumstances exists under which the statute would be valid. *State v. Coleman* (1997), 124 Ohio App.3d 78, 80, citing *United States v. Salerno* (1987), 481 U.S. 739, 749, 107 S.Ct. 2095, 2102-2103. Defendant cannot establish this, and her motions must fail. The presumption of constitutionality has not been overcome; far from it.

As the Supreme Court of Ohio has held, "Ohio law abounds with precedent to the effect that constitutional issues should not be decided unless absolutely necessary." *Mayer v. Bristow* (2000), 91 Ohio St.3d 4, 9, quoting *Ohioans for Fair Representation, Inc. v. Taft* (1993), 67 Ohio St.3d 180, 183, in turn quoting *Hall China Co. v. Pub. Util. Comm.* (1977), 50 Ohio St.2d 206, 210. Courts should not reach constitutional issues where a case is capable of resolution on other grounds. *In re Miller* (1992), 63 Ohio St.3d 99, 110; *In re Boggs* (1990), 50 Ohio St.3d 217, 221; *State v. Kawaguchi* (2000), 137 Ohio App.3d 597, 610. The court believes the question of the ordinance's constitutionality is squarely before it, however, and ought to be addressed.

Generally, a "legislative enactment will be deemed valid... if it bears a real and substantial relation to public health, safety, morals or general welfare of the public and... if it is not unreasonable or arbitrary." *Mayer, supra*, 91 Ohio St.3d at 13, quoting *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, 274; see also *Benjamin v. Columbus* (1957), 167 Ohio St. 103; *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 688-689. It is a "well-settled principle of statutory construction that where constitutional questions are raised, courts will liberally construe a statute to save it from constitutional infirmities." *Woods v. Telb* (2000), 89 Ohio St.3d 504, 516-517, quoting *State v. Sinito* (1975), 43 Ohio St.2d 98, 101, citing *State ex rel. Prospect Hosp. v. Ferguson* (1938), 133 Ohio St. 325; see also *Wilson v. Kennedy* (1949), 151 Ohio St. 485. Furthermore, R.C. 1.47 provides, "In enacting a statute, it is presumed that... compliance with the constitutions of the state and of the United States is intended...."

The Ohio Constitution authorizes cities "to exercise all powers of local self-government," and to adopt and enforce within their limits local police, sanitary and other similar regulations which do not conflict with the general laws of the state. Ohio Const. Art. XVIII, Sec. 3; *Youngstown v. Craver* (1933), 127 Ohio St. 195. Cities are authorized by statute to prevent riot, noise and disturbances, and to preserve peace and good order. R.C. 715.49. Any doubt as to the legislative power of a city council must be resolved in favor of that body. *Youngstown v. Mitchell* (1943), 30 Ohio Op. 122. As noted above, a city ordinance is presumed constitutional when it has a substantial relationship to the public peace, health, safety or welfare and is not arbitrary, discriminatory, capricious or unreasonable. *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35; *Geauga Co. Bd. of Commrs. v. Munn Rd. Sand & Gravel* (1993), 67 Ohio St.3d 579; *Akron v. Holley* (1989), 53 Ohio Misc.2d 4. The ordinance must be reasonably designed to accomplish a purpose falling within the scope of the police power. *Springfield v. Hurst* (1943), 41 Ohio L. Abs. 129, *judg. affd.* (1944), 144 Ohio St. 49. See also *Feldman v. Cincinnati* (1937), 20 F.Supp. 531.

Legislation in furtherance of a city's police power "is only limited by the public welfare and the Constitution." *Commrs. of Franklin Co. v. Publ. Util. Comm.* (1923), 107 Ohio St. 442; *Columbus v. Truax* (1983), 7 Ohio App.3d 49; *Dublin, supra*, 118 Ohio Misc.2d at 63. A municipal ordinance, or the application thereof, must not be "arbitrary, discriminatory, capricious or unreasonable." *Cincinnati v. Correll* (1943), 141 Ohio St. 535; *Richmond Heights v. LoConti* (1969), 19 Ohio App.2d 100; *Truax, supra*, 7 Ohio App.3d at 51. "Wide discretion is not unlimited discretion, and... reasonable presumptions require reasonable interpretation." *LoConti, supra*, 19 Ohio App.2d at 113. Among a city's governmental functions are regulation of the use or maintenance of public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and (most importantly for this case) public grounds. R.C. 2744.01(C).

It is clear that the City of Cleveland may regulate, within broad bounds and in a nondiscriminatory manner, when citizens and visitors may remain in Public Square, and when they must leave. Public Square is not a campground. The City persuasively argues that its ordinance is necessary for the promotion of the public health, welfare and safety. Although the ordinance at issue is not as broadly worded as some which have previously

been upheld as valid, *Thomas v. Chicago Park Dist.* (2002), 534 U.S. 316, it clearly passes constitutional muster.

### *Prosecutorial Discretion*

Defendant argues that she was improperly charged, and that the City cannot prosecute her for violating prohibited hours in Public Square, Cleveland Codified Ordinances 559.541, since there also exists (and she was also charged with) a more general charge of criminal trespass, C.C.O. 623.04(A)(4). The court is not persuaded.

A prosecutor has broad discretion in deciding how to charge an individual. There is a strong presumption that prosecutorial choices are not discriminatory. *State v. Keene* (1998), 81 Ohio St.3d 646; *Cleveland v. Trzebuckowski* (1999), 85 Ohio St.3d 524, 532; see also *Cleveland v. Whitner* (2002), 119 Ohio Misc.2d 100. The conscious exercise of some selectivity in enforcement is not, in itself, a violation of the Equal Protection Clause. *State v. Flynt* (1980), 63 Ohio St.2d 132; *Zageris v. Whitehall* (1991), 72 Ohio App.3d 178, 186. Intentional or purposeful discrimination will not be presumed from a showing of mere differing treatment. *Snowden v. Hughes* (1944), 321 U.S. 1, 8-9, cited in *State v. Freeman* (1985), 20 Ohio St.3d 55, 58. In our system of justice,

So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring... generally rests entirely in his discretion.

*Bordenkircher v. Hayes* (1978), 434 U.S. 357, 364; *State ex rel. Nagle v. Olin* (1980), 64 Ohio St.2d 341, 347. This is so unless the prosecutor's decision is based upon an improper factor such as the defendant's race or religion. *Nagle*, 64 Ohio St.2d at 347. A prosecutor may consider the nature or degree of aggravation of a crime in deciding whether or not to prosecute. *Nagle*, 64 Ohio St.2d at 348. Defendant has not shown that the City acted outside the bounds of the law in deciding how to charge her.

### *First Amendment*

The First Amendment provides, "Congress shall make no law... abridging the freedom of speech." Although the First Amendment originally applied only to Congress, state and local governments are equally bound to respect the free speech rights of citizens under the terms of the Fourteenth Amendment. *Cantwell v. Connecticut* (1940), 310 U.S. 296, 303; *Parks v. Columbus* (6<sup>th</sup> Cir. 2005), 395 F.3d 643, 647; *Ohio Citzs. Action v. Englewood* (6<sup>th</sup> Cir. Feb. 2, 2012), Nos. 10-3265, -3293, unreported.

This court is second to none in its respect for the First Amendment. The freedoms guaranteed by the First Amendment "are delicate and vulnerable, as well as supremely precious in our society...." *NAACP v. Button* (1963), 371 U.S. 415; *Rhines v. Bailiss* (2005), 140 Ohio Misc.2d 5. They are "fundamental to the protection of our democracy and are not to be interfered with lightly." *Greer v. Columbus Monthly Publishing Corp.* (1982), 4 Ohio App.3d 235.

Clearly, however, citizens' First Amendment rights are not absolute. *Schneider v. Irvington* (1939), 308 U.S. 147. The "right to communicate and persuade [does] not include the right to trespass on another's rights." *Cleveland v. Sundermeier* (1989), 48 Ohio App.3d 204. No one has the First Amendment right to remain indefinitely on public land in order to make a point. *Clark v. Community for Creative Nonviolence* (1984), 468 U.S. 288. A content-neutral regulation may impose reasonable restrictions on the time, place, or manner of speech as long as the restrictions are justified without reference to the content of the speech, are narrowly tailored to serve a significant governmental interest, and leave open alternative channels for communication of the information. *Ward v. Rock Against Racism* (1989), 491 U.S. 781, 791; *Thomas, supra*, 534 U.S. at 323; *H.D.V.-Greektown, LLC v. Detroit* (6<sup>th</sup> Cir. 2009), 568 F.3d 609, 623. It is the court's opinion that C.C.O. 559.541 clearly meets this test.

### *Conclusion*

Defendant has a First Amendment right to make her views known, without fear of censorship, intimidation or brutality, unlike far too many other people around the world in countries less free than the United States. But that right is not unlimited. Defendant was allegedly warned that she was in violation of a Cleveland ordinance and was given ample opportunity to leave Public Square. She chose to stay, ignoring the orders of police, and was arrested. Of course defendant is still presumed innocent, and is entitled to a fair trial, but she has failed to show that the ordinance was unconstitutional, or that she could not lawfully be charged as she was.

Accordingly, defendant's motions to dismiss are both hereby denied.

# CITY OF CLEVELAND, OHIO CODE OF ORDINANCES

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**EXHIBIT D**

## § 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.

