

ORIGINAL

IN THE SUPREME COURT OF OHIO

CITY OF CLEVELAND,)	Case No. 13-0096
)	
Plaintiff-Appellant,)	On Appeal from the
)	Cuyahoga County Court
v.)	of Appeals, Eighth
)	Appellate District
)	
ERIN MCCARDLE AND)	Court of Appeals
LEATRICE TOLLS,)	Case No. 12-98230 and 12-98231
)	
Defendants-Appellees.)	

REBUTTAL BRIEF OF
PLAINTIFF-APPELLANT CITY OF CLEVELAND

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INTRODUCTION

Plaintiff-Appellant City of Cleveland appealed the decision of the Eighth District Court of Appeals to the Supreme Court of Ohio with one, narrowly-defined proposition of law. In the City's Memorandum in Support of Jurisdiction, it submitted this case for jurisdictional appeal based upon the proposition that: "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." On March 27, 2013, this Honorable Court accepted this appeal after reviewing the jurisdictional memorandum of the City, which argued this sole proposition of law.

Defendant-Appellees' reply brief, however, argues for affirming the Eighth District's opinion based upon five distinct propositions of law. Under S.Ct.Prac.R. 16.03(B):

The appellees' brief shall comply with the provisions in S.Ct.Prac.R. 16.02(B), answer the appellant's contentions, and make any other appropriate contentions as reasons for affirmance of the order or judgment from which the appeal is taken.

Rule 16.03(B) allows for an appellee to support its argument for affirmance of order or judgment with additional arguments. Defendant-Appellees' Propositions of Law No. 4 and No. 5 argue for affirmance of the Eighth District's decision based upon additional constitutional arguments. Defendant-Appellees' Proposition of Law No. 4 argues that the ordinance's permit requirement is an impermissible content-based restriction under strict scrutiny that violates the First Amendment. Defendant-Appellees' Proposition of Law No. 5 argues that the City's ordinance violates the First Amendment because the permit requirement is an impermissible prior restraint on free speech which leaves no opportunity for judicial review. These alternative theories of

unconstitutionality were never discussed in the Eighth District's opinion, and were not the basis of its decision.

This Honorable Court accepted jurisdiction under the City's sole Proposition of Law, which argued that the Eighth District erred in finding its ordinance unconstitutional because its intermediate scrutiny analysis was flawed. The Eighth District chose not to discuss or make any findings relating to the ordinance's permit requirement. As discussed below, C.C.O. 559.541 is a content-neutral time, place, and manner restriction which is narrowly-tailored to advance significant government interests and leaves open alternative channels of communication. It is only pursuant to the Eighth District's flawed intermediate scrutiny analysis that Plaintiff-Appellant has appealed this case.

Defendant-Appellees' Propositions of Law No. 4 and No. 5, which were not part of the Eighth District's opinion, are beyond the scope of the proposition of law accepted for review by this Honorable Court. Even if this Honorable Court considers these arguments, they are without merit because the City's ordinance does adequately constrain the discretion of the licensing official, and provides an opportunity for judicial review.

LAW AND ARGUMENT

A. C.C.O. 559.541 is a content-neutral time, place, and manner restriction

Even though the Eighth District conceded that C.C.O. § 559.541 is a content-neutral regulation, Defendants-Appellees continue to maintain that it is specifically directed at restricting free speech. This argument, however, is without merit. In the First Amendment context, a facial freedom of speech attack must fail unless, at a minimum, the challenged statute "is directed narrowly and specifically at expression or conduct commonly associated with expression." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 760 (1988). C.C.O. 559.541

prohibits remaining in Public Square between the hours of 10:00 pm and 5:00 am without a permit. However, Defendants-Appellees have failed to show how that regulation is directed “narrowly and specifically” at expression or conduct commonly associated with expression. The Supreme Court has held that “[i]t is possible to find some kernel of expression in almost every activity a person undertakes- for example, walking down the street or meeting one’s friends at a shopping mall- but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.” *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). While Defendants-Appellees argue that Public Square has been used as a forum where expressive activity has taken place, they have wholly failed to show how remaining in the park is integral to their expressive message. In fact, it was for their non-expressive conduct, remaining in the park after-hours without a permit, that caused them to be arrested, not their supposed expressive message. Defendants-Appellees have not pointed to any specific facts to show that the ordinance is specifically aimed to curtail expression. Thus, it is not facially invalid under the First Amendment.

The United States Supreme Court has also 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” and therefore, even protected expression “is subject to reasonable time, place, and manner restrictions.” *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640, 647 (1981). Even if this Honorable Court determined Defendant-Appellant’s conduct to be a form of protected speech, the government may impose content-neutral time, place, and manner restrictions on that speech, provided they survive intermediate scrutiny by being narrowly tailored to advance a significant governmental interest, and leave open ample alternative avenues of communication. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) citing *Forsythe City*

v. The Nationalist Movement, 505 U.S. 123, 130 (1992); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

When evaluating an ordinance for content-neutrality, “[t]he government’s purpose is the controlling consideration.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). A regulation that promotes purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or message but not others. *Id.* Here, none of the grounds for approving or denying a permit application in any way relates to the potential speech content of the speaker seeking the permit. C.C.O. 559.541 states, in pertinent part:

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

These limits in the ordinance only relate to the time, place, and manner in which the permit holder may be present in the park. Like the ordinance at issue in *Thomas v. Chicago Park District*, C.C.O. 559.541 “is not even directed to communicative activity as such, but rather to all activity conducted in a public park. The picnicker and soccer player, no less than the political activist or parade marshal, must apply for a permit.” *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002). The ordinance does not aim to exclude any particular type of speech, but rather is designed to manage the limited space that is available; to ensure that the park grounds are preserved; to prevent dangerous, unlawful or impermissible uses; and to assure financial accountability for any damage that may be caused thereon. *Id.*

Defendants-Appellees claims that the ordinance's criteria for granting or denying a permit looks at the views or messages the permit-holder seeks to promote, but that claim is without merit. When processing a permit application, the Director of Parks looks at the proposed activity or use of the park space itself, and not the content of a speaker's message. In fact, the Director of Parks approved multiple permits for the group with whom Defendants-Appellees were affiliated, including an approval for the date of the offense, albeit for a different location than where they were arrested. (See Appendix A: City of Cleveland Dept. of Public Works Permit No. 11000616).

There are several content-neutral factors that justify the City's need to require a permit to be in the park after 10:00 p.m. Just like the ordinance in *Thomas v. Chicago Park Dist.*, the only concerns the Director of Parks takes into account are how to manage the limited space available, how to ensure that the park grounds are preserved, how to prevent dangerous or unlawful uses, and how to ensure financial accountability for any damage that may be caused. 534 U.S. 316, 323 (2002). This is evidenced by the permit application itself, which requires the applicant to specify the duration of the activity, the number of participants, and a contact-person with a phone number. (See Appendix B: "City of Cleveland Department of Public Works Special Use Application"). It also requires the applicant to agree that there will be no overnight camping, no impeding the flow of pedestrian traffic, to pick up any trash, and not to use a sound system that can be audible from over one-hundred and feet away. *Id.*

As such, the restrictions in the ordinance are thus conduct-based, not content-based, and only have an incidental impact on speech. Thus, the ordinance is content-neutral and intermediate judicial scrutiny should be applied.

B. C.C.O. 559.541 is narrowly-tailored to advance significant government interests

Defendants-Appellees argue that C.C.O. 559.541 is not narrowly-tailored to advance the City's significant government interests. In arguing their position, Defendants-Appellees maintain that the government interests the City has asserted are somehow illusory. They state that because the ordinance does not operate to protect the City's interests during the day when the curfew is not in effect, that it then does not actually protect the City's interests at night during the curfew. *Defendants-Appellees' Reply Brief* p. 17-19. In regards to the City's substantial interests in managing space and controlling vehicular and pedestrian traffic, Defendants-Appellees argue that there is no reason to restrict park access during the night when there are presumably more people and more traffic in and around the park during the daytime hours when there is no restriction. *Id.*

The obvious difference that they fail to acknowledge is that there are significantly less police officers, traffic enforcement agents, and public safety personnel on duty near Public Square during the nighttime hours. There are little, if any, city officials working at City Hall during those hours who can address any potential problems on park grounds that may arise. If a large group of people gather at Public Square during the curfew, many of them would presumably drive to the location, which creates a potential traffic problem near Public Square, because there are less police and public safety officers on duty. The fact that a solitary person could also be in violation of the ordinance does not invalidate this concern. Solitary persons who are present inside the park during restricted hours create different concerns for the City, such as the potential for criminal activity or damage to city property. This is exactly the reason that the ordinance was enacted. The fact that there are less police officers on duty near Public Square

between the hours of 10:00 pm and 5:00 am is why a curfew is the only feasible way to protect the City's interests during that time.

Defendants-Appellees attempt to counter these realities by arguing that the ordinance does not actually protect the City's interests at all. They argue that 1,000 people could walk across the grass during the restricted hours without violating the ordinance because they are not "remaining" in the park. Whether or not someone has been present in the park long enough is a factual question that an officer using his discretion must determine when issuing a citation. However, the location of the lawn on the Tom Johnson quadrant need not be crossed by pedestrians simply wishing to pass by. In fact, the lawn is elevated several feet above the surrounding city sidewalks, and one must walk up the stairs or up the handicap accessible ramp to walk on the grass. It is just as fast, if not faster, for a pedestrian to get to the other side of Public Square by walking on the adjacent city sidewalks, rather than cutting through the lawn. As such, it is logical to conclude that anyone who is present on the grass for any amount of time went out of his way to be there, and is in violation of the ordinance. Because those persons may commit criminal activity or damage city property, it is necessary to enforce the curfew to protect the City's interests.

Despite these truths, Defendants-Appellees maintain that the ordinance is constitutionally under-inclusive and therefore not narrowly tailored. *Defendants-Appellees' Reply Brief*, p. 22. They argue that there is not a sufficient nexus between the City's interests and the restriction of the ordinance, which shows that the City must therefore purposely be attempting to "curtail the free expression of ideas". *Id.* To that end, Defendants-Appellee's cite *Brown v. Entertainment Merchant's Assoc.* to support their contention that the City's ordinance only serves to prohibit protesting on the Tom Johnson quadrant of Public Square. *Id.* In *Brown*, however, the State of

California placed restrictions on distributors of video games so that they could not sell games which depict violence or sexual situations to children under the age of 18. *Brown v. Entertainment Merchant's Assoc.*, 131 S.Ct. 2729, 2740 (2011). The U.S. Supreme Court held that the restriction was underinclusive because there were other purveyors of the same explicit material, such as in books, magazines, music, and movies, which were not placed under any such age restrictions. *Id.* The Court stated that singling out only one medium of entertainment would do little to accomplish the goal of preventing minors from exposure to explicit material, and thus there is not a sufficient nexus between the restriction and the government interests. *Id.*

This case, however, is not analogous to *Brown*. C.C.O. 559.541 does not single out any one particular person or group to be restricted of park access. The City's ordinance does not target any one particular speaker or group in order to keep them from voicing their opinion or message. All persons are equally subject to the park curfew, and all may apply for a permit to be present during the restricted hours. In order to be analogous to *Brown*, C.C.O. 559.541 would have to explicitly target Occupy Cleveland, or some other group, by enacting a curfew on park property that only applied to them. If that were the case, then Defendants-Appellees' argument that the curfew does little to protect the City's asserted interests would carry more weight, because other persons or groups would be free to access the park at all times of the day. However, since the City's ordinance applies to everyone and does not single out any particular person or group, *Brown* is not applicable to this case.

Defendants-Appellees also attempt to support their argument by citing to *Parks v. Finan*. 385 F.3d 694 (6th Cir. 2004). The statute at issue in *Finan* required persons to obtain a permit before being able to use Capitol Square in Columbus for speeches and public gatherings of expressive purposes. *Id.* That statute is directed at restricting speech activities and does not limit

itself to certain hours of the day or certain areas of the Square. *Id.* As such, its' restriction is distinguishable from C.C.O. 559.541, which only restricts certain areas of Public Square during a seven-hour time period during the night, regardless of the purpose.

Chicago v. Alexander, 2012 WL 4458130, No. 11 MC1-237718, to which Defendants-Appellees cite, is equally inapplicable. *Alexander* is a Chicago Municipal Court opinion addressing a municipal park curfew ordinance that was challenged by members of Occupy Chicago. They highlight this case both to argue that the City's ordinance is not narrowly-tailored, and to advance the Eighth District's flawed opinion that the City was required to introduce additional factual evidence to establish that its interests were real and significant. See *Defendants-Appellees' Reply Brief* p. 19-20. However, *Alexander* is not controlling precedent, nor is it even authoritative. One municipal court opinion from another state has no effect on long-standing Ohio jurisprudence. *Alexander* is not even analogous to this case, because the ordinance at issue in Chicago was a park curfew that did not exempt any of the park from the restriction, nor did it allow citizens to apply for a use permit, like C.C.O. 559.541 does. *Alexander* at 19.

Unlike *Alexander*, and the Eighth District's opinion in this case, actual controlling precedent has long held that the First Amendment does not require the government "to demonstrate the significance of its interest by presenting detailed evidence, but is entitled to advance its interests by arguments based 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). The U.S. Supreme Court has "permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and simple common sense.

Fla. Bar v. Went for It, 515 U.S. 618, 628 (1995). As such, it is of no consequence that the City did not call a multitude of witnesses to testify at the trial court regarding the history and necessity behind the enactment of its ordinance. It is based upon standard propriety interests and the responsibilities entrusted to all municipalities that the City's ordinance is justified. Thus it was constitutionally permissible for the trial court to apply common knowledge, history, and simple common sense when determining that C.C.O. 559.541 satisfied intermediate scrutiny. Therefore, the Eighth District's decision should be reversed.

C. C.C.O. 559.541 leaves open ample alternative channels of communication

While the Eighth District did not evaluate the "alternative channels of communication" prong of intermediate scrutiny when making its decision, this prong is a crucial part of the analysis. Defendants-Appellees continually attempt to categorize the City's ordinance as a "complete ban" on speech in an effort to make it appear that the restriction burdens more speech than is necessary to advance the City's interests. They make reference to *Schneider v. State of New Jersey*, 308 U.S. 147, 158 (1939), a 1939 free speech case where the government prohibited persons from distributing literature on city streets. The Court in *Schneider* stated that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Id.* at 151-152. However, modern First Amendment jurisprudence has refined the standard upon which the government may impose content-neutral regulations to include this prong because it speaks to whether or not the government is restricting more speech than is necessary to protect its interests. See *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647-648 (1981); *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) citing *Forsythe City v. The Nationalist Movement*, 505 U.S. 123, 130 (1992); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

C.C.O. 559.541 is not a “complete ban” because it only imposes a curfew during seven hours of the night. It is also not a “complete ban” because it specifically excludes various areas from the curfew, including all adjacent dedicated streets, public sidewalks, and RTA bus shelters. The fact that the ordinance is so narrow and specific shows that the City has taken steps to protect its own interests while also protecting the First Amendment Rights of citizens. In fact, after Defendants-Appellees were arrested for violating the ordinance, many people from their group walked one block down the street to the Cuyahoga County Justice Center and continued their protest, unimpeded, in front of Cleveland Police Headquarters. The group’s action that night shows that its ability to speak its expressive message was not inhibited by the City’s content-neutral time, place and manner restriction.

Defendants-Appellees have repeatedly argued that the City should have been required to proffer testimony to show that its ordinance is constitutional. However, the burden is actually on Defendants-Appellees to show that the available alternative public fora are inadequate to voice their expressive message. *The Contributor v. City of Brentwood, Tenn.*, 6th Cir. No. 12-6598, 2013 WL 4081905 (Aug. 14, 2013); *Ward v. Rock Against Racism*, 491 U.S. 781 at 802. Since they failed to show that the alternative public fora are inadequate, then these fora constitute adequate alternative channels of communication.

D. Cleveland Codified Ordinance 559.541 contains adequate standards that constrain the discretion of the licensing official and provides a mechanism for judicial review.

Should this Honorable Court hear argument pertaining to Defendants-Appellees’ Propositions of Law No. 4 and 5, which were not part of the Eighth District’s opinion, it will see that the ordinance does in fact provide constitutionally adequate standards upon which to grant or

deny a permit application, and that the City provides a mechanism for judicial review of any permits denied.

1. Cleveland Codified Ordinance 559.541 Contains Adequate Standards that Constrain the Discretion of the Licensing Official.

Cleveland Codified Ordinance 559.541 states, “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; and
- (d) That the facilities desired have not been reserved for other use at the day and hour required in the application.

The ordinance expressly lists these criteria upon which the licensing official is to base his decision. Defendants-Appellees argue that the criteria in C.C.O. 559.541 are unconstitutional. However, similar language was upheld as constitutional in *Thomas v. Chicago Park Dist.* 534 U.S. 316, 323. In *Thomas*, the ordinance in question allowed a licensing official to deny a permit application pursuant to certain criteria, such as if “the proposed use or activity is prohibited by or inconsistent with the classifications of the park or part thereof...”; or “the use or activity intended by the application would present an unreasonable danger to the health or safety of the applicant or other users of the park...”; and “the use or activity intended by the application is prohibited by law.” *Id.* The U.S. Supreme Court held that this language “sufficiently limited the licensing officials’ discretion to satisfy First Amendment concerns” because they are “reasonably specific and objective, and do not leave the decision to the whim of the administrator.” *Id.* The criteria in C.C.O. 559.541 are substantially similar to those in *Thomas*.

Despite this, Defendants-Appellees contend that the ordinance's criteria must necessarily call on the licensing official to look at the applicant's expressive message and make a determination based upon the public's reaction to the content. However, "[t]here is no statute or regulation imaginable that does not require some degree of interpretation by the agency charged with its enforcement. The First Amendment requires only that the regulation give the agency sufficient standards to apply in determining whether to issue a permit." *Parks v. Finan*, 385 F.3d 694 (6th Cir. 2004). In *Parks*, the Sixth Circuit Court evaluated the regulation's criteria for granting or denying use permits. *Id.* at 699. The Court held that criteria such as "appropriate to the physical context of the capitol, hazard to the safety of the public, and expose the state to the likelihood of unrecoverable expenses are not so vague as to engender content-based favoritism." *Id.* The Court held that these terms may require the government to evaluate whether an activity conflicts with one of these provisions, but they also provide sufficient guidance. These constitutionally upheld provisions in *Thomas* and *Parks* are substantially similar to the language of C.C.O. 559.541. As such, the City's ordinance provides sufficient standards upon which to constrain a licensing official's discretion. Thus, Defendants-Appellees' argument is without merit.

2. Cleveland Codified Ordinance 559.541 Provides a Mechanism for Effective Judicial Review

Defendants-Appellees also mistakenly assert that C.C.O. 559.541 provides no opportunity for judicial review of denied permit applications. That specific section of the Cleveland Codified Ordinances does not specify the right for judicial approval because that right is conferred by other sections. The City of Cleveland Charter § 76-6(b) states:

It shall be the duty of the Board of Zoning Appeals to hear and decide appeals made for exceptions to and variations in the application of ordinances governing zoning in the City of Cleveland in conformity with the purpose and intent thereof,

and to hear and decide all appeals made for exceptions to and variations in the application of ordinances, or orders or regulations of administrative officials or agencies. (Emphasis Added).

Defendants-Appellees claim that this duly legislative enactment is erroneous because they believe that the Board of Zoning Appeals does not have jurisdiction to conduct quasi-judicial hearings. That claim is false, however, as section 76-6(b) of the Cleveland City Charter expressly confers upon the Board of Zoning Appeals the right “to hear and decide all appeals made for exceptions to and variations in the application of ordinances.” Under this ordinance, the Board of Zoning is explicitly charged with the duty of hearing appeals relating to the application of ordinances and orders of administrative agencies. Pursuant to the rules of statutory construction, the plain and obvious interpretation of the City Charter shows that the Board of Zoning Appeals can hear and decide appeals regarding the implementation of the Cleveland Codified Ordinances and any exceptions made to their rules, such as applying for permits to exclude someone from the time restrictions of C.C.O. 559.541.

Defendants-Appellees also claim that there are no time limits established for submitting a permit application and appealing one that is denied. However, the Department of Public Works Special Use Application plainly states that “permit applications must be received at least ten (10) business days prior to event date and the applicant must read the rules and regulations for property/facility use and sign/date the agreement. Failure to sign the agreement may be cause for denying permit request.” (See Appendix A: “City of Cleveland Department of Public Works Special Use Application Permit”). If an applicant is denied a permit by a city official, the applicant is then sent a notice from the official’s agency describing why they were denied, and is expressly informed of their right to appeal to the Board of Zoning Appeals. (See Appendix B: Sample Letter Explaining Denial of Permit Application). The notice that an applicant would

receive from the Public Works Department expressly states that the applicant may appeal to the Board of Zoning Appeals within ten (10) days of the date of the letter. As such, appropriate timelines and procedures are in place in order to seek review of a denied permit application.

In addition, R.C. 2506.01 confers a special right of appeal from any decisions of administrative agencies of political subdivision to the Common Pleas Court. That right would include decisions by the Board of Zoning Appeals. That right is reiterated in C.C.O. 329.02(e), which states that “Final orders, adjudications or decisions of the Board of Zoning Appeals may be appealed by the City or any proper party, as provided in appropriate provisions of R.C. Chapters 2505 and 2506.” A permit applicant who was denied by the initial agency and by the Board of Zoning Appeals then may follow the appellate procedures outlined in R.C. 2505 in order to effectuate an appeal to the Common Pleas Court.

When all of these ordinances, statutes, and administrative regulations are viewed in their full context, they clearly show that C.C.O. 559.541 is subject to effective judicial review as required by *Thomas v. Chicago Park District*, 534 U.S. 316, 323 (2002) at 323. In fact, this Honorable Court has held that such administrative appeals are an effective form of judicial review that satisfies constitutional concerns. *State ex rel. Village of Chagrin Falls v. Geauga County Bd. Of Com'ners*, 96 Ohio St.3d 400, 403 (2002). Thus, Defendants-Appellees' claim that there is no method of effective judicial review for a denial of a permit application under C.C.O. 559.541 is without merit.

CONCLUSION

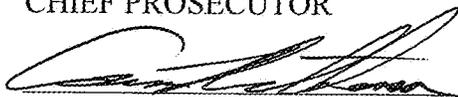
For these reasons, this Honorable Court should now reverse the decision of the Eighth District Court of Appeals.

Respectfully submitted,

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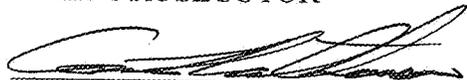
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Rebuttal 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; to Michael J. Hendershot, Chief Deputy Solicitor, counsel for *Amicus Curiae* State of Ohio, at Ohio Attorney General 30 East Broad St. 17th Floor, Columbus, Ohio 43215; and to Philip Hartmann, Ice Miller LLP, counsel of record for *Amicus Curiae* Ohio Municipal League, at 250 West Street Columbus, Ohio 43215, on this 15th day of August, 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 – 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 664-4850
(216) 664-4399 Facsimile
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Attorneys for Plaintiff-Appellant

APPENDIX A



CITY OF CLEVELAND
Mayor Frank G. Jackson

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

Special Use Application Permit

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

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

APPLICANT INFORMATION

APPLICATION DATE	APPLICANT NAME	EMAIL ADDRESS	ORGANIZATION/GROUP NAME (IF APPLICABLE)	
STREET ADDRESS		CITY	STATE	ZIP CODE
HOME PHONE	CELL PHONE	WORK PHONE	FAX NUMBER	
Have you applied previously for a park/facility use permit from the City of Cleveland?				
<input type="checkbox"/> YES <input type="checkbox"/> NO DATE: _____ LOCATION: _____				

EVENT INFORMATION

LOCATION REQUESTED		
EVENT DATE	ESTMATED ATTENDANCE	CLEAN-UP TO BE PROVIDED BY
EVENT START TIME	EVENT ENDING TIME	SECURITY TO BE PROVIDED BY
EVENT TYPE		
<input type="checkbox"/> PICNIC <input type="checkbox"/> REUNION/GATHERING <input type="checkbox"/> SCHOOL ACTIVITY <input type="checkbox"/> RALLY <input type="checkbox"/> CHURCH ACTIVITY <input type="checkbox"/> BIRTHDAY <input type="checkbox"/> WEDDING CEREMONY/PHOTOS <input type="checkbox"/> OTHER: _____		
Event Description		
List any equipment (sound systems, grills, tents, etc.) That will be set up for the event		

FOR OFFICE USE ONLY, DO NOT FILL IN BELOW

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

**CITY OF CLEVELAND
OFFICE OF SPECIAL EVENTS & MARKETING**

Cleveland Convention Center
500 Lakeside Avenue
Cleveland, Ohio 44114

P: 216.664.2484 • F: 216. 420.8122

RULES & REGULATIONS FOR USE OF PROPERTY/FACILITY

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

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

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

Applicant's Signature

Date

APPENDIX B



City of Cleveland
Frank G. Jackson, Mayor

Mayor's Office of Capital Projects
Jomarie Wasik, Director
601 Lakeside Avenue, Room 113
Cleveland, Ohio 44114-1015
216/664-2231 • Fax 216/664-2198
www.cleveland-oh.gov

May 2, 2012

VIA E-MAIL AND REGULAR U.S.
MAIL

Mr. John Adelman
1550 Superior Avenue
Cleveland, Ohio 44114
c/o bcummins@clevelandcitycouncil.org

RE: Request temporary canopy permit on West Roadway

Mr. Adelmann:

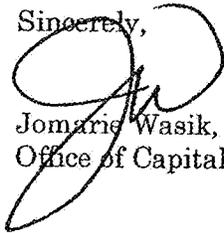
Your request dated April 26, 2012 for a permit to utilize a "protective canopy" in the right of way is denied for the following reasons: (1) the original rationale supporting the "protective canopy" on West Roadway is no longer apparent; (2) continuing to successively grant permits allowing a canopy in the right of way contravenes the controlling ordinance authority; and (3) the canopy will hinder the increased use of Public Square by the public in the spring and summer.

The City granted you multiple successive permits authorizing a "temporary canopy" in the public right-of-way of the West Roadway sidewalk, which started with a permit commencing on October 17, 2011. The request for the first permit was supported by a "concern regarding the inclement weather expected to begin tomorrow." There is no longer a need to extend the authorization for a "protective canopy" into May. You are free to otherwise conduct lawful activities on the sidewalk without a canopy.

As a reminder, the last permit for the North West Quadrant of Public Square expired at midnight on January 31, 2012. If you desire to utilize any park property for any preplanned group activities requiring a special event permit, you must obtain the necessary approvals through the Department of Public Works. The Office of Special Events and Marketing is available to assist you with any questions you may have regarding the special event permit requirements.

If you wish to appeal this denial, you may request a hearing from the Board of Zoning Appeals in writing within ten (10) days of the date of this letter.

Sincerely,


Jomarie Wasik, Director
Office of Capital Projects

cc: Michael Cox, Director of Public Works