

ORIGINAL

IN THE SUPREME COURT OF OHIO

CITY OF CLEVELAND,)
)
Plaintiff-Appellant,)
)
vs.)
)
ERIN McCARDLE and)
LEATRICE TOLLS,)
)
Defendants-Appellees.)

CASE NO. 13-0096

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

Court of Appeals Case Nos.
12-98230 and 12-98231

MOTION OF DEFENDANTS-APPELLEES
ERIN McCARDLE AND LEATRICE TOLLS FOR RECONSIDERATION

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MOTION FOR RECONSIDERATION

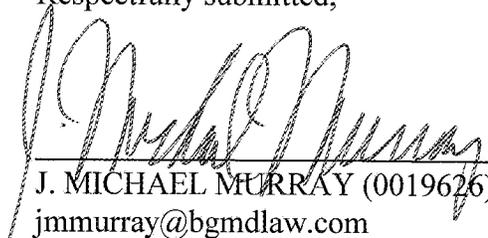
Defendants-appellees, Erin McCardle and Leatrice Tolls, by and through their counsel, respectfully move the Court, pursuant to Supreme Ct. Prac. R. 18.02, for reconsideration of the Court's opinion issued on May 28, 2014.

The ground for this motion is as follows. The Court's opinion reversed the decision of the Eighth District Court of Appeals and held that Cleveland Cod. Ord. 559.541 was a permissible, content-neutral time, place and manner regulation of expression.

But the Court's opinion failed to address the separate argument raised by Defendants-Appellees that the court of appeals's decision should be affirmed on the alternative ground that the ordinance is an unconstitutional licensing law, an argument specifically authorized by Supreme Ct. Prac. R. 16.03(B), which allows an appellee to "make any other appropriate contentions as reasons for affirmance of the order or judgment from which the appeal is taken." *Id.* Appellees made that point in their Fifth Proposition of law, which appeared at pages 26-36 of their brief, and addressed it during oral argument.

A memorandum in support of this motion is attached and incorporated by reference.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

THE COURT SHOULD RECONSIDER ITS OPINION BECAUSE IT FAILED TO ADDRESS APPELLEES' CONTENTION THAT THE DECISION BELOW SHOULD BE AFFIRMED ON THE ALTERNATIVE GROUND THAT CLEVELAND CODIFIED ORDINANCE 559.541 IS AN UNCONSTITUTIONAL LICENSING ORDINANCE UNDER THE FIRST AND FOURTEENTH AMENDMENTS, AS SET FORTH IN THEIR FIFTH PROPOSITION OF LAW.

The syllabus of the Court's opinion states:

An ordinance establishing a curfew in a public park is constitutional under the First and Fourteenth Amendments to the United States Constitution if it is content neutral, is narrowly tailored to advance a significant governmental interest, and allows alternative channels of speech.

Id.

But that mischaracterizes the Cleveland ordinance. The ordinance is *not* a law closing public parks at 10 p.m. Rather, it is a licensing law applicable to Public Square in downtown Cleveland. Indeed, paragraph 1 of the Opinion recognized the ordinance operates as a licensing law and "prevents any person from remaining in the Public Square area of downtown Cleveland between 10:00 p.m. and 5:00 a.m. without a permit issued by the Cleveland Department of Parks, Recreation and Properties. . . ."

Thus, while the Court concluded that Cleveland's ordinance passed muster under intermediate scrutiny, i.e., that it was a content neutral law that furthered a substantial governmental interest in a narrowly tailored way and left open alternative avenues of communication, that analysis is not the end of the matter.

Specifically, since the ordinance is actually a licensing law, it must *also* meet other requirements to survive a facial challenge under the First and Fourteenth Amendments, and the

Court's opinion failed to address this separate, additional body of First Amendment law that applies in this case.

To survive a facial constitutional attack under the First Amendment, an ordinance that requires a license or permit to engage in expressive activity: a) must remove discretion from government officials in deciding whether to grant or deny a license; b) must require that the decision to grant or deny a license be made within a brief specified period of time; and, c) must contain a mechanism to obtain judicial review of a license denial. *Freedman v. Maryland*, 380 U.S. 51 (1965)(striking down as facially unconstitutional motion picture licensing scheme); *FW/PBS, Inc. v City of Dallas*, 493 U.S. 215 (1990)(striking down Dallas ordinance requiring adult businesses to obtain licenses as facially invalid because it failed to assure a decision on an application within a short, brief period of time); *Thomas v. Chicago Park District*, 534 U.S. 316, 323 (2002)(“Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content. We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review.”)(internal citation omitted); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 764 (1988)(“even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not *condition* that speech on obtaining a license or permit from a government official in that official's boundless discretion.”); *City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992).

In this case, the challenge to Cleveland's ordinance was a facial one, which means that Appellees were not required to apply for a license to challenge its constitutionality in the first

instance. As the Supreme Court held in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988);

It bears repeating that ‘[i]n the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license.’ *Freedman*, 380 U.S., at 56, 85 S.Ct., at 737.

Id. at 764. *See also* *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147 (1969)(“[O]ur decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license)(footnote and citations omitted); *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 156 (2002)(striking down municipal permit law, noting that none of the petitioners had applied for a license).

Codified Ord. 559.541, on its face, fails to cabin the discretion of city officials in deciding whether or not to grant a permit, and likewise fails, on its face, to impose any requirement that city officials act on a license application within any time frame. Because each of these constitutionally mandated safeguards is lacking, the ordinance is facially unconstitutional under the First and Fourteenth Amendments.

1. Cod. Ord. 559.541 is Unconstitutional Because it Confers Impermissible Discretion on City Officials to Grant or Deny a License.

Codified Ord. 559.541 contains four general criteria as grounds for the denial of a permit, but three of those criteria, set out in paragraphs (a), (b) and (c) of the law impermissibly allow the Director of Parks, Recreation and Properties to make unguided and subjective predictions about the reaction to events (including demonstrations) and the need for police or other expenditures.

Paragraph (a) authorizes the Director to assess “That the proposed activity and use will not unreasonably interfere with or detract from the promotion of public health, welfare and safety.” That standard is *no* standard, for *anything* in the exercise of the Director’s discretion that he deems will unreasonably interfere with the promotion of health, welfare and safety can serve for denying a permit. By what criteria is the Director to make that determination?

The law is silent, and as a result, this criterion offers an opportunity for subjective denials based on hostility to the message of a putative speaker, for any disfavored activity can be said to “detract from public health, welfare and safety.” Indeed, paragraph (a) would permit the denial of a permit based on a perceived threat to any governmental interest encompassed by the police power of the City at large.¹

Paragraph (b) requires the Director to consider whether “the proposed activity or use is . . . reasonably anticipated to incite violence, crime or disorderly conduct.” *Id.* Again, by what standard is that to be judged? If the Director determines, in the exercise of his discretion, that what a speaker is going to say would not be well-received and might lead to a shouting match or a tussle, he has the authority to deny a permit.

The essence of free expression is that some messages might not be welcome, but it is no basis to deny a permit. Indeed, because that provision requires the Director to gauge the listeners’

¹ Codified Ord. 559.541 was enacted as an emergency measure, and its preamble states the putative purpose for which it was adopted. Contrary to the requirements of Section 36 of Cleveland’s Charter, which requires that the “emergency [be] set forth and defined in a preamble,” the preamble to this law merely stated that it was enacted, “for the usual daily operation of a Municipal Department.” The City Record, 8/22/07 at 48.

reaction to the event, that requirement is a content-based restriction on speech.²

Finally, the Director is authorized to consider, in Paragraph (c) of the ordinance, whether “the proposed activity will not entail unusual, extraordinary or burdensome expense or police operation by the City” *Id.* Again, these predictions are couched in subjective terms: what is an “unusual” or “burdensome” expense? How does one decide whether a protest is or is not anticipated to incite crime, violence or disorderly conduct? No standards are set out in the law.

If there were doubt about the breadth of discretion the ordinance confers on the Director and how far reaching his authority is to restrict expression, the Rules and Regulations of Cleveland’s Office of Special Events and Marketing implementing the law eliminate it. Specifically, the regulations authorize the Director to deny or revoke a license “when the Director determines that the proposed activity is not in the best public interest.” *See Br. of Appellees, Appendix B.* Broader discretion is difficult to imagine.

Time and again, the Supreme Court has held that discretion such as that conferred by Cleveland’s ordinance is constitutionally deficient. *City of Lakewood*, 486 U.S. at 769 (“It is apparent that the face of the ordinance itself contains no explicit limits on the mayor's discretion. Indeed, nothing in the law as written requires the mayor to do more than make the statement ‘it is not in the public interest’ when denying a permit application.”); *Shuttlesworth*, 394 U.S. at 149-50 (striking down permit law providing, “The commission shall grant a written permit for such parade, procession or other public demonstration. . . unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused.”).

² Appellees pointed out in their Fourth Proposition of Law that this particular provision rendered the ordinance one that was content-based, and therefore, subject to strict scrutiny. The Court’s opinion, which concluded the law was content neutral, did not address this point.

Finally, any claim by the City that it has not and will not exercise its discretion in an unreasonable manner will not save the Ordinance from a facial attack, because the limits on governmental authority must be contained within the law itself. Indeed, the Court rejected a similar claim that the government advanced in *United States v. Stevens*, 559 U.S. 460 (2010), in which it struck down on its face a law banning the dissemination of films depicting animal cruelty:

Not to worry, the Government says: The Executive Branch construes § 48 to reach only “extreme” cruelty. . . “neither has brought nor will bring a prosecution for anything less,” Reply Brief 6–7. The Government hits this theme hard, invoking its prosecutorial discretion several times. See *id.*, at 6–7, 10, and n. 6, 19, 22. But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.

Id. at 480. No less is true here.

The Court’s opinion failed to address this issue, for which reason, reconsideration is warranted.

2. The Ordinance Is Unconstitutional Because it Contains No Time Limits Within Which City Officials Must Decide to Grant or Deny a Permit.

In addition to the Ordinance’s failure to cabin the discretion of City officials in deciding whether or not to grant a license, it fails under the First and Fourteenth Amendment for the additional reason that it does not contain any time limits on city officials to pass on an application.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), the Supreme Court struck down a motion picture licensing scheme that required each film exhibited in the state of Maryland to be submitted to a film board for approval. More particularly, the statute, on its face, failed to assure

that the decision whether to issue a license was made within a brief, specified period of time:

The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. To this end, the exhibitor must be assured, by statute or authoritative judicial construction that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film.

Id. at 58-59 (internal citations omitted). For, in the absence of any time limitations, the scheme can operate an censorship system where an application may linger indefinitely.

Similarly, in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), the Court declared unconstitutional a Dallas law that required adult bookstores and other adult uses to obtain a permit before they could begin to operate. The Court held that the scheme, which did not require the issuance of a license by the police chief within a brief, specified time period, was unconstitutional, and held:

The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. *Thus, the first two safeguards are essential: the licensor must make the decision to issue the license within a specified period of time during which the status quo is maintained and there must be the possibility of prompt judicial review in the event that the license is erroneously denied.*

Id. at 228 (emphasis added). *See also id.* at 238-40 (Brennan, J., concurring). Turning to the portions of the Dallas law at issue, the Court held, “[T]he Dallas scheme does not provide for an effective limitation on the time within which the licensor's decision must be made,” and therefore, was unconstitutional. *Id.* at 229.

In *Riley v. Natl. Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781 (1988), the Court struck down a statute governing the licensing of professional charitable solicitors because it failed to contain any time limits for the issuance of a permit:

[T]he Charitable Solicitations Act (as amended) permits a delay without limit. The statute on its face does not purport to require when a determination must be made, nor is there an administrative regulation or interpretation doing so.

Id. at 802.

And in *Z.J. Gifts*, the Court reiterated *Freedman's* core holding that a law requiring a license to engage in expressive activity must contain time limits within which government officials must act to protect the First Amendment rights of speakers:

‘The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two [*Freedman*] safeguards are essential’

Id. at 780, quoting *FW/PBS*, 493 U.S. at 228.

Here, Cod. Ord. 559.541 imposes no deadlines on the Director to decide whether or not to issue a license. And, the absence of any time limits is itself a form of unbridled discretion. See *Hunt v. City of Los Angeles*, 638 F.3d 703, 718 (9th Cir. 2011) (A ‘prior restraint’ refers to an ordinance that either ‘vests unbridled discretion in the licensor,’ or ‘does not impose adequate time limits on the relevant public officials.’)(quoting *Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 894 (9th Cir.2007)).

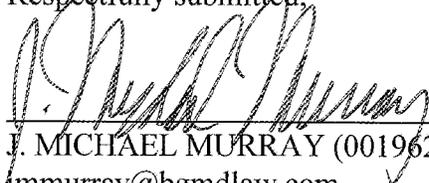
Again, it bears emphasis that in a facial challenge such as this one, it is no answer for the city to claim that city officials will act on applications within a reasonable period of time. The settled law is that to pass constitutional muster, the mandate of the First and Fourteenth Amendments that government officials act within a brief, specified period of time must be set out in the ordinance itself. Here, the ordinance at issue has no requirement that a decision be made within any specified period of time.

CONCLUSION

Cleveland Cod. Ord. 559.541 is an unconstitutional licensing law under the First and Fourteenth Amendments, and Appellees asserted that as an independent basis to affirm the judgment of the Court of Appeals. The issue was briefed and argued, but was not addressed in the Court's opinion.

For all of the foregoing reasons, the Court should grant Appellees' motion and reconsider its opinion, and affirm the judgment below on the basis asserted in Appellees' Fifth Proposition of Law because Cleveland Cod. Ord. 559.541 is unconstitutional under the First and Fourteenth Amendments.

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CERTIFICATE OF SERVICE

A copy of the foregoing Motion of Defendants-Appellees Erin McCardle and Leatrice Tolls for Reconsideration was served on Connor P. Nathanson, Assistant City Prosecutor, Counsel of Record, 1200 Ontario Street, 8th Floor, Cleveland, OH 44113, Counsel for Plaintiff-Appellant City of Cleveland, and on Eric E. Murphy, Solicitor General, and Michael J. Hendershot, Chief Deputy Solicitor and Samuel C. Peterson, Deputy Solicitor, counsel for *Amicus Curiae* State of Ohio, at 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, and Philip Hartman, Rebecca K. Schaltenbrand, and Stephen J. Smith, Ice Miller LLP, at 250 West Street, Columbus, Ohio 43215, and John Gotherman, Ohio Municipal League, at 175 S. Third Street, #510, Columbus, Ohio 43215-7100, counsel for *Amicus Curiae* The Ohio Municipal League, via regular United States mail, sufficient postage affixed, this 5th day of June 2014.



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