IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

James Turturice, et al.,	)	Case No.:
Plaintiffs,	)	
– vs –	)	Judge:
The City of Cleveland, An Ohio Municipal Corporation,	)	
Defendant.	)	

MEMORANDUM OF LAW SUPPORTING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

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– INTRODUCTION –

The Plaintiffs are protestors who, in sympathy with thousands of others in cities around the world, and under the rubric of Occupy Cleveland, have gathered for two weeks in public fora in the City of Cleveland to voice their opposition to various public policies, and to express their concerns regarding the growing inequality between the rich and poor, and the increasing concentration of wealth in the hands of a tiny minority.

Toward this end, they have maintained a continuous presence on Public Square and in other public fora in the City of Cleveland, and have done so in a substantially round-the-clock vigil since at least the first week of October 2011.

That vigil was abruptly halted by Cleveland Police on the evening of October 21, 2011, when numerous protestors – not including the Plaintiffs herein – were arrested and removed from Public Square and charged with violating Cleveland Municipal Ordinance 559.541, which prohibits persons without permits from remaining on Public Square between 10:00 p.m. and 5:00 a.m. daily, and by extension, with violating the criminal trespass ordinance as well.

Plaintiffs now seek a Temporary Restraining Order prohibiting the enforcement of Ordinance 559.541, because the Ordinance violates the First Amendment – both on its face and as applied to them – in at least three ways: (1) by prohibiting their mere presence, and by extension, all expressive activity in a traditional public forum overnight; (2) because it allows discretionary exceptions to that prohibition, but provides no criteria whatever to cabin the discretion of the licensing official, and no opportunity for judicial review of an adverse decision, and; (3) because it requires the licensing official to consider audience reaction to a putative speaker's message. [1]

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[1] Plaintiffs have alleged additional constitutional infirmities of the contested ordinance in their Complaint, which they will develop as this case progresses. Given the emergent nature of the situation, and the need for prompt judicial relief, the Plaintiffs have confined themselves in this motion and memorandum to arguing the most patent constitutional flaws of the subject Ordinance.

– STATEMENT OF FACTS –

Plaintiffs are part of a rising chorus of demonstrators who have taken to public spaces in cities around the United States and around the world to protest growing economic inequality and to call for political and economic reform in that light.[2]

In order to articulate their chosen message, the Plaintiffs and others have chosen remain upon and to demonstrate in Public Square, a set of pedestrian plazas and green spaces that for more than a century have formed the civic heart of the City of Cleveland.

Though generally known to local residents as the four block area near the base of the Terminal Tower, bisected by Ontario Street and Superior Avenues, for purposes of this action, and the ordinance contested herein, Public Square has a more precise meaning, defined by law.

> 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.

Cleveland Mun. Ord. § 559.541 (American Legal Pub. 2011).[3]

The southwest quadrant of Public Square, at the base of the Terminal Tower, consists of a large brick plaza used by pedestrians as a sidewalk that is routinely the site of demonstrations, and is frequently used as a public forum by rallies, marches and itinerant preachers.

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[2] N. R. Kleinfield and Cara Buckley, *Wall Street Occupiers, Protesting Till Whenever*, N.Y. TIMES, September 30, 2011; Erik Eckholm and Timothy Williams, *Anti-Wall Street Protests Spreading to Cities Large and Small*, N.Y. TIMES, October 3, 2011; Marcia Pledger, *Occupy Wall Street Comes to Cleveland,* THE PLAIN DEALER, October 7, 2011.

[3] A copy of Ord. § 559.541 is attached hereto as Exhibit A. The Codified Ordinance of the City of Cleveland are available online at http://www.amlegal.com/library/oh/cleveland.shtml.

The northeast quadrant of Public Square, near the old Federal Courthouse and at the base of the Key Tower, consists of a central circular fountain at the vertex of two diagonal sidewalks, which cross in the center of the quadrant and are paved in the same material as, and tie directly into the public sidewalks along Superior Avenue, Ontario Street, and are offset from the surrounding streets and sidewalks by four trapezoidal sets of trees and plantings.

The northwest quadrant of Public Square, nearest Old Stone Church, is also known as the Tom Johnson quadrant, for the statue of the former mayor that sits at its northern edge. It consists of four brick sidewalks along its inner perimeter, surrounding a grassy lawn, which are tied to the surrounding sidewalks along Ontario Street, Rockwell Avenue, Superior Avenue and the West Roadway by broad low stairs at the four corners of the quadrant.

An inscription on the statute of Mayor Johnson notes that the southwest quadrant is dedicated as a forum for free expression.

The Plaintiffs and others have chosen to protest on Public Square because it is central to the Cleveland business district and home to numerous banks and financial institutions, as well as a place in which their message regarding economic justice and the need for political and financial reform can be articulated to a broad audience of passers by. Since the first week of October, they have conducted their demonstrations continuously in Public Square and on its adjacent public sidewalks.

A continuous presence in the forum is an integral part of the message they seek to deliver, to communicate, among other things, the urgency of their call for reform, their intention to persist in protest, and their solidarity with like minded demonstrators worldwide.[4]

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[4]See Id., at ¶ 9.

The demonstrations conducted by the Plaintiffs and others have been altogether peaceful. They have, in the course of the last two weeks, participated in public education, displayed signs, distributed literature, engaged in conversations with passers by, given or listened to speeches, and by their simple presence demonstrated a concern for and their commitment to economic justice.[5]

At times, the Plaintiffs and others have gathered, overnight, on a portion of the sidewalk on the western side of the West Roadway, between Rockwell and Superior Avenues.[6] They have also demonstrated at times in both the northwest and southwest quadrants of Public Square.[7] They intend and desire to continue their demonstrations, and to maintain a continual presence on Public Square toward that end, indefinitely, specifically on the Tom Johnson quadrant of Public Square.[8]

Significantly, the Plaintiffs and the demonstrators with whom they have been protesting have not occupied, and do not intend to occupy the public fora in which they have delivered their message on an exclusive basis, or in a way that precludes their use by other persons, including pedestrians and those using the quadrants for recreation.[9]

In fact, such a use would be antithetical to their purpose of interacting with other citizens and educating them regarding their message of the need for reform and economic justice.

As previously noted, the use of Public Square is governed by a municipal ordinance, which provides as follows:

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[5]See Id., at ¶¶ 5-7.

[6]They occupied that space under an encroachment permit issued by the Defendant City of Cleveland in the name of permittee Councilman Brian Cummings, on October 17, 2011, which was valid for twenty-four hours and subject thereafter to renewal over the course of four days.

[7]See Docket No. 1, Verified Complaint, at ¶ 7.

[8]See Id., at ¶¶ 7-9.

[9]See Id., at ¶¶ 7-9.

> 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.

CLEVELAND MUN. ORD. § 559.541.

On October 21, 2011, shortly after 10:00 p.m., members of the City of Cleveland Police Department arrived at Public Square and arrested a number of individuals engaged in the exercise of their rights secured by the First and Fourteenth Amendments, ostensibly for violating the contested ordinance by remaining in the Tom Johnson quadrant of Public Square after 10:00 p.m.,

and thus also for violating Municipal Ordinance 623.04, which prohibits trespass on City facilities, or a comparable state statute.[10] Plaintiffs were not among those arrested and have not been charged with any offense.[11]

These actions throttled a peaceful and ongoing demonstration in mid-course, preventing the Plaintiffs and others from continuing in the exercise of their rights under the First Amendment, without submitting to an unlawful prior restraint, to wit, the permit scheme set out in the ordinance.

As a result of that enforcement of Ordinance 559.541, the Plaintiffs fear exercising their constitutional right to peaceably assemble, to engage in constitutionally protected activity, to engage in political speech, to petition the government for a redress of grievances, to freely associate with other like-minded citizens in and on the Tom Johnson quadrant, and the other quadrants of Public Square after 10:00 p.m.[12] More specifically, Plaintiffs fear that their liberty will be abridged and they, too, will be arrested and charged with violating Ord. 559.541 or other City or State laws if they remain in Public Square to engage in constitutionally protected activity after 10:00 p.m.

As a result of that fear, Plaintiffs seek declaratory and injunctive relief in this Court to protect and defend them in the exercise of their First Amendment freedoms .

– STATEMENT OF THE ISSUES TO BE DECIDED –

1. Whether an ordinance which conditions engaging in expression in a traditional public forum between the hours of 10:00 p.m. and 5:00 a.m. on obtaining a permits, if deemed to be a content neutral time, place and manner restriction on protected expression, is unconstitutional on its face and as applied, under the First Amendment, as overbroad, underinclusive, and not narrowly tailored to serve a significant governmental interest.

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[10] See Id., at ¶ 11.

[11] See Id., at ¶¶ 12.

[12] See Id., at ¶¶ 13-14.

2. Whether that ordinance, which permits a licensing official to allow exceptions to that prohibition, but contains no sufficiently objective criteria to decide whether those exceptions should be granted or denied, and thus confers discretion on the licensing official, and further provides no opportunity for an adverse licensing decision to be appealed to or reviewed by a judicial officer, violates the First Amendment on those bases as well?

3. Whether that ordinance, which requires the licensing official to deny a license if the putative expression is likely to unreasonably interfere with public health, safety or morals, to incite violence or require burdensome or expensive policing, is a content-based prior restraint under the First Amendment and whether, if so, it can survive strict judicial scrutiny.

– SUMMARY OF THE ARGUMENT –

Public Square is indisputably a traditional public forum, in which the Plaintiffs and others seek to deliver a message which can only be characterized as core political speech, and in cases such as this, the protections of the First Amendment are at their most robust. The wholesale prohibition of all First Amendment activity on Public Square between 10:00 p.m. and 5:00 a.m. without a permit is a prior restraint on the use of a public forum.

If regarded as a content-neutral time, place and manner restriction on the use of Public Square, the contested ordinance fails intermediate scrutiny, because it is overbroad and not narrowly tailored to advance a significant governmental interest. The prohibition bars all First Amendment activity in the forum between 10:00 p.m. and 5:00 a.m., no matter how unobtrusive, and does so when the forum is open to and routinely used by pedestrians, and subject to the same policing, illumination and conditions as thousands of miles of sidewalks in the city that are not so encumbered. No legitimate, much less significant, public health, safety or welfare objective is advanced by the ban.

To the extent that the contested Ordinance imposes a licensing scheme on the use of Public Square during the overnight hours, it cannot survive the sort of scrutiny under which such schemes, as applied to restrictions on the use of public fora, are judged, because it provides no meaningful criterial to cabin the discretion of the licensing official, and provides no opportunity for judicial review of an adverse licensing decision.

Additionally, the contested restriction is content-based, and properly subject to strict judicial scrutiny, which it cannot withstand, because it not only permits but requires the licensing official to consider whether the speech of a putative demonstrator is likely to incite violence or to elicit an audience reaction which requires burdensome, extensive or unusual policing.

– LAW & ARGUMENT –

Motions for a temporary restraining order and preliminary injunctions are subject to the same, familiar four part analysis. The moving party must demonstrate: (1) a substantial likelihood of success on the merits; (2) irreparable harm absent injunctive relief; (3) that the issuance of the injunction will not cause harm to third parties, and; (4) that the requested relief is in the public interest. *See: Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008). These are not prerequisites to be met, but rather factors to be balanced in considering the propriety of injunctive relief. *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Auth.*, 163 F.3d 341, 347 (6th Cir. 1998).

I. Plaintiffs Have a Substantial Likelihood of Success on the Merits.

The Plaintiffs seek to engage in political expression, which is the essence of what the First Amendment protects.[13]

[13] Plaintiffs seek to raise public consciousness regarding disparities in wealth and income, and the public policy implications thereof. Their messages are nothing if not political, and their protests are nothing if not a call to change the status quo. This is precisely the sort of expression which the First Amendment most closely protects.

They seek to do so in a traditional public forum, where First Amendment right to do so is at its absolute zenith.[14]

Both the blanket prohibition against their doing so during nighttime hours, and the system under which they could obtain a permit to do so, are unconstitutional, because they exceed the well established limitations on how the government may restrict expression in traditional public fora.

The ability of the government to regulate speech in a traditional public forum "is sharply circumscribed." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995).

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.'

New York Time Co. v. Sullivan, 376 U.S. 254, 269 (1969)(quoting: *Roth v. United States*, 354 U.S. 476, 484 (1957); *Stromberg v. California*, 283 U.S. 359, 369 (1931)). "Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position . . . ." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992)(Stevens, J., concurring in the judgment).

[14]Streets, sidewalks and parks are the quintessential public fora, which "'time out of mind . . . have been used for public assembly and debate.'" *Snyder v. Phelps*, 131 U.S. 1207, 1218 (2011)(quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988))(streets and sidewalks)); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 776 (1988)(streets, sidewalks and parks).

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague v. Committee for Indus. Organization, 307 U.S. 496, 515 (1939). Moreover:

> No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.

Frisby, 487 U.S. at 481. *See also, United States v. Grace*, 461 U.S. 171, 179 (1983)(finding that public sidewalks are traditional public fora and should be regarded as such "without further inquiry").

The government may impose content neutral time place and manner restrictions on speech, provided that they are 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 County, Georgia v. The Nationalist Movement,* 505 U.S. 123, 130 (1992); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

Systems which require putative demonstrators to obtain a permit as a prerequisite of speaking in a traditional public forum are a form of prior restraint, and the Supreme Court has required that any such scheme contain safeguards to ensure that it cannot be used as a pretext for content-based discrimination. *Forsythe County*, 505 U.S. at 130.

Permit schemes must have adequate standards to cabin the discretion of the licensing official, and allow the applicant to obtain judicial review of an adverse licensing determination. *Thomas*, 534 U.S. at 323 (citing: *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)).

The restrictions on access to the quadrants of Public Square contested here fail First Amendment muster in at least three distinct ways: (1) they are overbroad and not narrowly tailored to serve a significant governmental interest, or any constitutionally cognizable interest at all; (2) they neither contain adequate standards to cabin the discretion of the licensing official, not provide applicants a mechanism for judicial review of an adverse licensing decision, and; (3) they are not in fact content neutral, but allow, and even require the licensing official to inquire into the anticipated reaction to a putative speaker's message, and thus the content of that message, in considering an application.

Each of these shortcomings is constitutionally fatal as a matter of First Amendment law. Plaintiffs will examine each in turn.

A. The Wholesale Ban on Expressive Activity in Public Square Overnight Is Unconstitutional Because It Is Overbroad Both on its Face and as Applied, Is Underinclusive and Is Not Narrowly Tailored to Advance a Significant Governmental Interest.

Even if regarded as a content-neutral time, place and manner restriction on the use of a traditional public forum, the contested ordinance is unconstitutional, and cannot survive intermediate scrutiny, because it is overbroad and not narrowly tailored to advance a significant governmental interest. Intermediate scrutiny does not require a given restriction to be the least restrictive means of achieving a substantial government interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). That said, a restriction on expression in a traditional public forum will not survive intermediate scrutiny if it burdens substantially more speech than is necessary to advance the interest asserted by the government, or if a substantial portion of the ban does not serve to advance the goals of the government at all. *Ward*, 491 U.S. at 799. A law is not narrowly tailored unless it targets, and eliminates, "no more than the exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-10 (1984)).

The contested ordinance bans all expressive activity on Public Square between 10:00 p.m. and 5:00 a.m. daily. "A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby*, 487 U.S. at 485.

The contested ordinance eliminates all expressive activity on Public Square overnight.[15] It falls to the City to identify the specific evil this prohibition targets, and why it cannot be eliminated in any less draconian fashion.

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[15] It is, of course, no answer to this proposition to say that the Plaintiffs, and others, who at 10:00 p.m. each evening must vacate the Tom Johnson quadrant of Public Square, where they want to exercise their rights, may then retreat to the outlying public sidewalks which are adjacent to the dedicated streets around Public Square. As the Supreme Court stated long ago: "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." *Schneider v. State of New Jersey*, 308 U.S. 147, 151-52 (1939). See also: *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

But the stated bases of the ordinance – the promotion of public health, welfare and safety – simply cannot justify such a ban.

For one thing, the ordinance does not make Public Square entirely off limits during the hours in question. It cannot be that the place is simply too dangerous to visit overnight, since pedestrians are not barred from being there, but simply from "remaining" there, during the subject hours.

It is difficult to conjure why this prohibition applies only to this space and not to the literally thousands of miles of sidewalks and streets which also constitute public fora in Cleveland.[16] It cannot be because the area is less suitable for occupation, or for demonstration, than any other sidewalk. Indeed, experience shows just the opposite: Public Square is so well suited to use for First Amendment activity that it has, by long tradition, been a place for gatherings and expression, and as noted earlier, at least the northwest quadrant of the Square has been designated as a sort of local Hyde Park Corner, dedicated to public discussion and debate.

The prohibition cannot be for purposes of crowd control: the assembled masses are prohibited from remaining on the Square, but so are solitary pickets. Noise is not the issue: amplified speeches and silent candlelight vigils are equally proscribed. The contested ordinance does not impose a ban on anti-social or disruptive conduct: merely remaining there, simply standing and talking, or quietly passing out leaflets, violates the ordinance.

And so too would the intended actions of the Plaintiffs, who seek only to gather quietly, display signs, quietly carry on discussions among themselves and passers by, and to debate the future of the country in which they live, in the place their city has set aside for precisely such discussions.

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[16] Of course, whatever its justification, as a matter of First Amendment law the burden of justifying the contested ordinance, and its restrictions upon speech in a traditional public forum, falls squarely upon the City. *See*: *International Soc. For Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992).

The Sixth Circuit, in invalidating a licensing scheme which required citizens to obtain a permit to engage in speeches and public gatherings on Capitol Square in Colombus noted that the breadth of such a scheme, with all its literal attendant consequences, was at base inimical not just to the First Amendment, but to the conception of a free society.

Drawing upon the decision in *Watchtower Bible and Tract Soc. v. Village of Stratton*, 536 U.S. 150 (2002), the court noted:

> While there are some important differences between the permit scheme in this case and the one at issue in *Watchtower*, one of the core reasons for invalidating the latter clearly applies to the permit scheme in this case as applied to individuals. That is, the permitting scheme effectively bans spontaneous speech on the Capitol grounds. The Supreme Court expressed this concern in *Watchtower* in the following words:
>
> > there is a significant amount of spontaneous speech that is effectively banned by the ordinance. A person who made a decision on a holiday or a weekend to take an active part in a political campaign could not begin to pass out handbills until after he or she obtained the required permit. Even a spontaneous decision to go across the street and urge a neighbor to vote against the mayor could not lawfully be implemented without first obtaining the mayor's permission.
>
> Similarly, under the CSRAB permit scheme, two friends debating which candidate should be elected President in November while walking across the Capitol grounds are regulated by the permitting scheme, at least according to its literal terms, but it is highly unlikely that these people would continue their discussion if they knew a permit was required to do so.

Parks v. Finan, 385 F.3d 694, 701-02 (2004)(quoting *Watchtower,* 536 U.S. at 167).

The same is true in this case. It is unlawful – indeed, it is a strict liability offense – for undersigned counsel to pause on Public Square, adjacent to their office, to discuss this case tonight, or indeed, for even one of them to stop and contemplate the case alone.

To the extent that it fails to prohibit a physical presence on, or First Amendment activity in other public fora, including the thousands of miles of sidewalk spread across the City, the contested ordinance is also **underinclusive**. If it is intended to protect the public welfare from whatever harms dwell in public fora between 10:00 p.m. and 5:00 a.m., there is no good reason why it should be limited to Public Square, unless some unique dangers haunt that space during those hours.

From a First Amendment perspective, such under-inclusiveness is highly significant, in that it frequently betrays an impermissible animus toward protected expression. As the Supreme Court noted only last term:

> Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.

Entertainment Merchant's Assoc. v. Brown, 131 S.Ct. 2729, 2740 (2011)(citations omitted).

In this case, the underinclusiveness of the contested ordinance, which applies only to the public space most frequently used as, and most commonly thought of as, a venue for free expression in the City of Cleveland, reflects a clear intention to prohibit First Amendment activity in that space, at times when no legitimate interest is advanced by its prohibition.

B. The Contested Ordinance Imposes Unconstitutional Licensing Restrictions Upon the Use of a Traditional Public Forum for Expressive Activity that Neither Cabin the Discretion of the Licensing Official Nor Provide an Opportunity for Judicial Review of Adverse Licensing Decisions.

The contested ordinance permits the Director of Parks, Recreation and Properties to grant or deny putative speakers a permit to remain – and thus to engage in First Amendment activity – in Public Square overnight. But the ordinance provides no meaningful limits on the discretion of the Director, and no opportunity for judicial review of denied applications. It is thus unconstitutional under the plain holding of *Thomas*, 534 U.S. at 323.

At issue in *Thomas* was a Chicago ordinance which required any gathering of fifty or more persons that wished to use a city park to first obtain a permit for doing so.[17] The plaintiff, a putative demonstrator, challenged the ordinance as an unlawful prior restraint on protected expression in a traditional public forum. The Court sustained the ordinance, finding that it set forth sufficient, precise criteria to cabin the discretion of the licensing official, and that it provided for judicial review of the adverse determinations, both of which are First Amendment requirements for permit schemes which limit access to traditional public fora. *Thomas*, 534 U.S. at 780-81. The same cannot be said of the ordinance sub judice.

For one thing, nothing in Section 559.541 provides for any judicial review – be it prompt or otherwise – of an adverse permit decision. Not only does the ordinance not provide for judicial review, but Ohio law forecloses the possibility. The permit scheme at bar confers decision making authority to a single administrative officer, and not a quasi-judicial panel. In such cases, Ohio Revised Code § 2506.01 – which governs appeals from administrative decisions – does not confer a right of appeal to the Common Pleas Court, or other tribunal. *State ex rel. Zeigler v. Zumbar*, 129 Ohio St.3d 240, 244 (2011)(citing *State ex rel. Scherach v. Lorain Cty. Bd. of Elections*, 123 Ohio St.3d 245 (2009)). For this reason alone, the contested ordinance fails First Amendment review.

But neither does Section 559.541 contain anything remotely resembling the sort of precise, "'narrowly drawn, reasonable and definite standards'" limiting the discretion of the licensing official, which are also a First Amendment requirement of permit schemes governing the use of traditional public fora. *Thomas*, 534 U.S. at 781 (quoting *Forsyth County*, 505 U.S. at 133 (in turn quoting *Niemotko*, 340 U.S. at 271)).

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[17]By contrast, we note that the contested ordinance requires a permit before even a solitary demonstrator may remain in Public Square overnight.

In *Thompson*, 534 U.S. at 778, the contested Chicago regulation limited the denial of permits to thirteen clearly specified circumstances. Here, by contrast, only four general criteria provide bases for the denial of a permit.

Three of those criteria, Section 559.541 (a), (b) and (c), are plainly impermissible under *Forsyth County*, as discussed in Section I.C of this Memorandum, below, because they require the Director of Parks, Recreation and Properties to make unguided and subjective predictions about the reaction of events (including demonstrations) and the need for police or other expenditures.

And even these predictions are couched in subjective terms: what is an "unusual" or "burdensome" expense? How can one be sure that an activity, or a speaker, is not "reasonably anticipated to incite violence?"

The criteria imposed by Section 559.541(a) are even more elastic, and offer an opportunity for subjective denials based on hostility to the message of a putative speaker. Any disfavored activity can be said to "detract from public health, safety or welfare." Indeed, Subsection (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. Section 559.541 manifestly lacks "narrowly drawn, reasonable and definite standards for the officials to follow," *Niemotko*, 340 U.S. at 271, and from a First Amendment perspective, this gives unbridled, and impermissible discretion to the licensing official, which renders the ordinance unconstitutional on its face. *City of Lakewood*, 486 U.S. at 771-72; *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). For this reason too, the contested ordinance violates the First Amendment.

C. The Permit Scheme Set Forth in the Contested Ordinance Is Not Content Neutral, But Actually Requires the Licensing Official to Inquire Into the Speech of a Putative Demonstrator and the Likely Reaction of His Audience.

Restrictions which permit or allow a licensing official to inquire into the anticipated reaction to a putative speaker's message are not content-neutral, but content-based, and must advance be necessary to achieve a compelling governmental interest – that is, they must survive strict judicial scrutiny – in order to pass First Amendment review. *Forsythe County*, 505 U.S. at 134-35.

In *Forsyth County*, the Court invalidated a county ordinance which permitted a licensing official to vary the cost of a permit to use public roads based upon the anticipated cost of policing the event. The Court concluded that allowing the official to vary the fees was, in effect, writing a heckler's veto into the ordinance, raising the cost of unpopular speech (or speech which the government expected to be unpopular) based on the fear of an adverse audience reaction.

> The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.
>
> * * *
>
> The costs to which petitioner refers are those associated with the public's reaction to the speech. Listeners' reaction to speech is not a content-neutral basis for regulation.
>
> * * *
>
> Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.

Forsythe, 505 U.S. at 134-35 (citations omitted).

Here, the contested ordinance requires the licensing official to inquire into the potential audience reaction not to decide upon the proper fee for a permit, but to determine whether one should issue in the first instance. Section 559.541 (a), (b) and (c) provide:

> 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 . . . .

Cleveland Mun. Ord. § 559.541.

These criteria – which under the contested ordinance provide sufficient justification for the denial of a requested permit – are indistinguishable from the considerations of anticipated audience reaction invalidated in *Forsyth County*.

Deciding that a proposed activity might detract from public safety, incite violence, or entail an unusual or extraordinarily burdensome expense or police presence necessarily requires the Director of Parks, Recreation and Properties to consider the anticipated response to a putative speaker, and thus to consider his anticipated message as well. Section 559.541 is not, for this reason, a content neutral time, place and manner restriction, and accordingly must face strict judicial scrutiny, which it cannot survive.

Presumably the mandate that a permit be issued except in cases where a violent reaction or an unusual police presence is anticipated is included in the ordinance to avoid violent reactions or the need for heavy policing. But the City has no legitimate interest – much less a compelling interest – in such a result. Indeed, in *Forsyth County*, 505 U.S. at 136, the Court held that offsetting the cost of policing associated with unpopular speech could not justify the imposition of a sliding scale that imposed higher fees on unpopular speakers.

If the government cannot charge more for a permit based on anticipated hostility to a given speaker and his message, *a fortiori* it cannot use the same considerations as a basis to deny a permit to speak in the first instance. The contested ordinance, which for this reason is properly subject to strict scrutiny, accordingly fails strict scrutiny as well.

II. The Plaintiffs Have Suffered and Will Suffer Irreparable Injury Unless the Requested Temporary Restraining Order is Entered.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 353 (1976)(*citing New York Times v. United States*, 403 U.S. 713 (1976)).

Plaintiffs have already been chilled in, and will continue to suffer a loss of their First Amendment rights absent relief from this Court. The harm is not theoretical. It has already occurred, and continues to occur every evening, because the Plaintiffs are forbidden to demonstrate overnight on Public Square.

III. Neither the Defendant Nor Any Third Party Will Be Harmed By the Requested Temporary Retraining Order.

For over two weeks, the Plaintiffs, and others, have peacefully assemble on and around Public Square, and with orderly persistence have articulated a political message to their intended audience. There has been no violence, no need for excessive policing, and no disruption of the affairs of the City or its citizens. Indeed, the City and its civic life have benefitted from the presence of demonstrators and speakers willing to engage in a discussion of the most pressing public policy questions of the day.

IV. The Temporary Restraining Order Will Serve the Public Interest.

The fourth and final factor to be examined is whether the public interest is served by the issuance of an injunction.

As one court succinctly stated in granting a preliminary injunction: "[I]t is in the public interest to uphold a constitutionally protected right." *Playboy Enterprises v. Meese*, 639 F. Supp. 581, 587 (D.D.C. 1986). *See also Morscott, Inc. v. City of Cleveland,* 781 F. Supp. 500, 507 (N.D.Ohio 1990)("It is beyond cavil that it is in the public interest to uphold a constitutionally protected right.") (citing *Playboy Enterprises*).

That interest is particularly acute when the right at stake is the freedom of expression and when that right has been infringed by a prior restraint, "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass' v. Stewart*, 427 U.S. 539, 559 (1976). If courts relax their intolerance for laws that impose prior restraints, "the free dissemination of ideas may be the loser." *Smith v. California*, 361 U.S. 147, 151 (1959). Accordingly, the last factor meriting a temporary restraining order is also present.

– CONCLUSION –

For the foregoing reason, and others to be developed as this case progresses, the contested ordinance is unconstitutional, and the Defendants should be enjoined from enforcing it.

Respectfully submitted,

/s/ J. Michael Murray

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– CERTIFICATE OF COMPLIANCE –

Undersigned counsel hereby certify, Pursuant to Local Civil Rule 7.1(f), that the foregoing is true: (a) this case has not yet been assigned to any track, but it is anticipated that it qualifies for and will be assigned to the standard track; (2) this memorandum, exclusive of the parts which may be excluded under Local Civil Rule 7.1(f), is twenty (20) pages in length, and thus exceeds the fifteen page limit for non-dispositive motions; (3) this memorandum contains a table of contents, and of authorities, and a statement of the issues and summary of the argument required of motions exceeding fifteen pages, and; (4) this memorandum has been submitted together with a motion for leave to file, instanter, a motion in excess of page limits.

/s/ J. Michael Murray

J. Michael Murray (0019626)
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One of the Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

The foregoing Memorandum of Law in Support of Plaintiffs' Motion for Temporary Restraining Order was will be served on the Defendant along with the Summons and Complaint.

/s/ J. Michael Murray

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