No. 12-2858

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

CITY OF CHICAGO, a municipal corporation,	)	Appeal from the Circuit Court of Cook County, Illinois, Municipal Department, First District.
Plaintiff-Appellant,	)	
v.	)	Nos. 11 MC1 23771801, et al.
TIEG E. ALEXANDER, et al.,	)	The Honorable Thomas More Donnelly, Judge Presiding.
Defendants-Appellees.	)	

BRIEF AND ARGUMENT OF CERTAIN DEFENDANTS-APPELLEES

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POINTS AND AUTHORITIES

PARTIES REPRESENTED

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Other Defendants are represented by separate counsel and have filed a separate brief. Together, all Defendants-Appellees file a separate Joint Supplemental Appendix.

NATURE OF THE CASE

On two evenings in October of 2011 members of Occupy Chicago—a grass roots political movement dedicated to advancing social change so as to make our economic and social structure more equitable—were arrested and charged with violating the Chicago Park District curfew for their occupation of Grant Park. The curfew ordinance prohibits, with few exceptions, any presence in city parks from 11:00 p.m. until 6:00 a.m. Occupy Chicago utilizes the act of occupation as its principal means to raise consciousness and protest widespread economic and social inequality. Ninety-two Defendants in the quasi-criminal proceedings before the circuit court filed Motions to Dismiss their charges on the basis of violation of their First Amendment rights to free speech and free assembly and their right to Equal Protection, as guaranteed by the United States and Illinois Constitutions. The circuit court consolidated the cases; after briefing and oral argument, the court granted the motions to dismiss, holding that the blanket curfew ordinance was unconstitutional on its face and as applied to the Defendants. The City of Chicago appeals. No issue raised challenges the charging instrument. All questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

I. Whether the Chicago Park District curfew ordinance, as applied to these Defendants, violated the Defendants' free speech and assembly rights as enshrined in the United States and Illinois Constitutions?

II. Whether the Chicago Park District curfew ordinance was discriminatorily applied to the Defendants and thus violated Defendants' right to equal protection as protected by the Equal Protection Clauses of the United States and Illinois Constitutions?

JURISDICTION

Defendants were arrested and charged with ordinance violations, which are quasi-criminal in nature and subject to rules governing civil actions. A39 (R. C335).[1] The circuit court granted all Defendants' motions to dismiss on September 27, 2012. A1-A38 (R. C1106-43). The City of Chicago timely appealed the following day and filed an amended notice of appeal on October 3, 2012. A244-257 (R. C1144-57). This Court has jurisdiction pursuant to Ill. Sup. Ct. R. 303(a)(1).

[1] The consecutively paginated common-law record is cited as R. C ___. Citations to the supplemental common-law record are noted as SR. C ___. For ease of reference, citation to the separate appendix and supplemental appendix are cited as A___ and SA___, respectively. Parallel citation to the common-law record is accomplished via parenthetical reference. Transcripts of proceedings are cited as Tr. ___.

STATEMENT OF FACTS

The Inception of the Occupy Movement

The Occupy movement is a widespread grassroots movement organized to represent the 99% of the population who have been excluded from the ever-increasing wealth concentration of the richest and most powerful of our society. A51-52, ¶¶ 3, 5. The movement began in New York City with "Occupy Wall Street" and took root in Chicago on or about September 22, 2011 when Occupy Chicago protestors established a 24-hour physical presence near Jackson and LaSalle, outside of the Federal Reserve Bank, adjacent to the Chicago Mercantile Exchange. A54, ¶ 9 (R. C227); A61 ¶¶ 2, 3 (R. C234); SA1, ¶ 3 (SR. C19). This area was significant as symbolic of the financial interests that led to the economic collapse and the perpetuation of economic and social inequalities. *E.g.* A223-24, ¶ 4 (R. C135-36). Occupy's rallying call is "We are the 99%," which harkens to statistics showing a tremendous economic disparity between the wealthiest 1% of the American population and everybody else. A52, ¶ 5 (R. C225). The core message and values of the Occupy movement are best explained in the words of one Occupier:

> I occupy because corporations are not people, and money is not the same things as free speech.
> I occupy because I believe in united citizens, not Citizens United.
> I occupy because our military is spending billions of dollars to occupy foreign countries while jobs, infrastructure and the economy suffer at home.
> I occupy because my generation should have opposed these wars in greater numbers and with greater outrage to start with.
> I occupy because I am tired of going to the polls and trying to decide which politician is least likely to attempt to sell a Senate seat to the highest bidder.
> I occupy because I am tired of seeing executives of failed companies receiving bonuses while their employees are laid off without severance.

> I occupy because I believe in the First Amendment and the civil liberties it grants us.
> I occupy because the system is not broken but relies on this kind of active participation to remain strong.
> I occupy because it is exciting to see democracy working.
> I occupy because after seven years combined of undergraduate and graduate studies, I have student loan debt but not the gainful employment necessary to pay it down.
> I occupy because I have been underemployed since finishing school, often working two or three part-time jobs to try to make ends meet.
> I occupy because I have spent half of this year unemployed altogether, through no fault of my own. I occupy because the unemployed cannot afford to be invisible statistics any longer.
> I occupy because the alterative is sitting in my parent's basement writing cover letters that won't even be rejected, just ignored.
> I occupy because it if weren't for the safety net my parents have provided, I would be sitting on a street corner all day asking for a different kind of change.
> I occupy because my dreams have been deferred, and it was only a matter of time before they would explode.

A53-54 (R. C226-27).

The Occupy Chicago and national Occupy movements rely upon continuous occupation of a public physical space as a powerful statement against the excesses of the "1%" while the remaining 99% of the population deal with, among other things, unemployment, poverty, cuts in social services, and unaffordable health care. A52-53, ¶¶ 6, 8 (R. C225-26). Non-violent occupation is the movement's chosen form of expression; reclaiming public space in a stationary location over an extended period of time provides for greater dissemination of its message and offers the only rebuff against pervasive 24-hour corporate speech. A52, ¶ 4 (R. C225); A195 (SR. C107). Occupation both allows participants a greater opportunity to communicate their message and attracts additional supporters and occupiers. A53, ¶¶ 7-8 (R. C226). The expression of occupation highlights occupiers' willingness to contribute their bodies to the cause and undergo

physical discomfort in order to bring attention to the desperate economic situation. A53, ¶ 7 (R. C226).

Occupy Chicago was committed to growing a peaceful, collaborative, and responsible movement. SA5 (SR. C24); SA3, ¶ 15 (SR. C21); SA6, ¶ 5 (SR. C26); SA14, ¶ 14 (SR. C36). To that end, it created rules surrounding cleanliness, respect for others, and maintaining positive relationships with law enforcement. SA5 (SR. C24); SA14, ¶ 16 (SR. C36); SA6, ¶ 5 (SR. C26); A202, ¶ 16 (SR. C114). Occupy accomplished these goals democratically through various committees, and delegated people to serve as a "police liaison" so as to facilitate communication between Occupy and the Chicago Police. SA6, ¶ 5 (R. C26).

Nightly, Occupy Chicago held its "General Assembly"—the highest decision-making body for the movement—in Grant Park near the northeast corner of Michigan Avenue and Congress parkway. *See* SA13-14, ¶¶ 3, 15 (SR. C36); SA6, ¶ 5 (R. C26); SA9, ¶ 4 (SR. C30); A56, ¶ 16 (SR. 229). This concrete-surfaced plaza on the edge of Grant Park, immediately to the east of Michigan Avenue, was commonly known as "the Horse" in reference to a statute nearby. *See* SA12, ¶ 3 (SR. C34); SA14, ¶ 15 (SR. C36); A201, ¶ 10 (SR. C113). One of the primary reasons this location was chosen was an expressed preference by the Chicago Police that Occupy Chicago utilize this particular part of Grant Park. *See* SA14, ¶ 15 (SR. C36).

Occupy Chicago Faces Increasing Police Harassment

Despite Occupy Chicago's continued willingness to coordinate and compromise with the Chicago Police Department and the City of Chicago, it faced increased harassment from the City of Chicago. A54, ¶ 10 (R. C227); SA6-7, ¶ 4-7, 9, 10 (SR.

C26-27); SA2-3, ¶¶ 7-14 (SR. C20-21). Throughout September and October 2011, police officers were regularly present at the Occupy Chicago encampment, insisting that Occupiers remain mobile. SA7, ¶ 7 (SR. C27).

From its first days, Occupy Chicago began to receive donations and supplies at Jackson and LaSalle from supporters. SA1, ¶ 4 (SR. C19). When the Federal Reserve Police informed Occupy that it could not store its supplies against the bank, Occupy reached an agreement with the Chicago Police Department to store these supplies and donations on the edge of the sidewalk. *Id.* In accordance with this agreement, Occupy Chicago then stored its supplies and donations in containers along the sidewalk as soon as they arrived at the encampment. *Id.* at ¶ 5. Over the next days, Chicago Police brought what they claimed to be bomb-sniffing dogs to smell the containers of supplies and donations. *Id.* at ¶ 6.

On September 29, 2011, Chicago Police issued Occupy Chicago a "move it or throw it away" ultimatum in violation of their prior agreement about storage of supplies and donations. SA2, ¶ 7 (SR. C20). In response, Occupy quickly secured an off-site storage space and moved most of their supplies off of the sidewalk. *Id.* During the course of that day, additional supplies and donations arrived at Jackson and LaSalle. *Id.* at ¶ 8. Later that day, Chicago Police Lieutenant arrived and informed Occupy Chicago members that their efforts to remove their belongings were insufficient and anything still on site at 9:00 a.m. the next morning would be thrown away by the Chicago Police Department. R. *Id.*

Occupy Chicago then moved across the street to the sidewalk in front of the Bank of America building. SA2, ¶ 11 (SR. C20). Thereafter, Chicago Police officers were

present at the Occupy Chicago encampment several times each day and ordered Occupy Chicago to move its belongings; sometimes this meant Occupy was to keep the supplies moving at that location, while other times it meant they were to be moved to another location altogether. SA2-3, ¶¶ 12-13 (SR. C20-21).

As the Occupy Chicago presence continued the police became more harassing. Whereas at one time the police were satisfied when supplies were put into mobile carts or taken to an off-site storage facility, they later changed the requirement to mandate that all supplies must be in carts and moved at least a few inches regularly. SA3, ¶¶ 12-13 (SR. C21). This later progressed to requiring that carts cover more distance. *Id.* at ¶ 14. Ultimately, the police began to require that all supplies remain in constant motion. *Id.* at ¶ 13. Occupy Chicago attempted to comply with these orders and keep all its property moving. SA10, ¶ 6 (SR. C31). Around the same time, Chicago police began to confiscate Occupy Chicago's belongings, including drums, carts carrying signs, food, water and medical supplies. SA3, ¶ 14 (SR. C21). Police would even seize Occupy Chicago's property as Occupy Chicago members were attempting to comply with police orders to keep all of the carts in constant motion. *Id.*

Arrests in Grant Park

Throughout September and October 2011, Occupy Chicago regularly held its daily democratic General Assembly at "the horse" in Grant Park, near the northeast corner of Michigan Avenue and Congress parkway. *See* SA12, ¶ 3 (SR. C34); SA14, ¶ 15 (SR. C36); SA6, ¶ 5 (R. C26); SA9, ¶ 4 (SR. C30); A56, ¶ 16 (SR. 229). On October 15, 2011, Occupy demonstrators once again marched from Jackson and LaSalle to this area of Grant Park. A200, ¶ 7 (SR. 112). Occupy Chicago peaceably assembled on a

concrete plaza at the edge of Grant Park. A56, ¶ 16 (SR. C229); A201, ¶ 10 (SR. C113). The presence of Occupy Chicago did not disrupt pedestrian or vehicular traffic; Occupy Chicago positioned itself so as not to impede anyone from passing freely on the street or from using the park space. A56, ¶ 18 (SR. C229).

The Chicago Police maintained a continuous police presence during the march, and upon Occupy's arrival at Grant Park around 8:00 p.m. A200, ¶ 7 (SR. 112). The number of police officers continued to grow as the demonstration continued. A235, ¶ 11 (SR. 147). Occupy Chicago had no intention of creating a permanent camp in Grant Park. A202, ¶ 15 (SR. 114). No police questioned Occupy Chicago about a permit to be in Grant Park, nor did they discuss any alternative locations for Occupy Chicago to relocate to. A201-02, ¶¶ 12, 14 (SR. 113-14); A231, ¶ 17 (SR. C143). After threats to arrest demonstrators who remained in the park after 11:00 p.m., some people left the park and relocated across the street. A112, ¶¶ 11-12 (SR. C23). At around 1:00 a.m. on October 16, 2011, after the Chicago Police warned those who remained in the park that if they did not leave they would be arrested, the Chicago Police stopped the demonstration in the park, arrested 173 protesters who were participating in the occupation and confiscated Occupiers' tents and other belongings. *See* A56, ¶ 19 (SR. C229); A112, ¶ 13 (SR. C23); A242, ¶ 19 (SR. C154). The police charged the arrested protesters with violation of chapter VII, section B.2 of the Park District Code which closed the parks from 11:00 pm to 6:00 am. A112, ¶ 13 (SR. C23).

On October 22, Occupy Chicago again marched to Grant Park from the area of Jackson and LaSalle and once again gathered in the same location. A115, ¶¶ 4, 5 (SR. 26). The police proceeded as on October 16, warning the occupiers that they must leave

or be arrested, and then terminated the demonstration in the park in the early morning hours of October 23, 2011, arresting all demonstrators who remained in the park, and again charging them with the same Park District code violation. A116-17, ¶¶ 9, 11-13 (SR. C27-28).

Proceedings in the Circuit Court

On both October 16 and 23, all arrestees were taken to police stations, fingerprinted, booked, and given court dates in a various criminal courthouses throughout the City. A227, ¶ 19 (SR. C139). Numerous pro-bono counsel appeared for the Defendants, including attorneys affiliated with the National Lawyers Guild of Chicago (NLG) and attorneys from the law firm of Durkin & Roberts. City prosecutors in these criminal courthouses prosecuted the cases and accepted plea bargains for those arrestees who wished to resolve their cases by plea. Ninety-two Defendants represented by NLG and Durkin & Roberts attorneys filed Motions to Dismiss, each seeking the dismissal of charges on the grounds that the charges violated their rights under the First Amendment and the Fourteenth Amendment Equal Protection Clause of the United States Constitution. The NLG Defendants advanced an as-applied challenge and the Durkin & Roberts Defendants advanced a facial and as-applied challenge. Many of the criminal courts set hearing dates for those Occupy arrestees who filed Motions to Dismiss and initiated the discovery process. *See, e.g.*, R. C945-46. The circuit court then consolidated the Defendants' cases before the Honorable Thomas More Donnelly.

The City filed a consolidated response to the collective motions to dismiss, and attached affidavits. A91-188 (SR. 2-100). All Defendants then filed a reply with supporting affidavits. A189-206 (SR101-18); A207-43 (SR119-55). The circuit court

granted the City the right to submit a sur-reply and responsive affidavits, but none were filed. Tr. 73. The court held oral argument on February 15, 2012. Tr. 2-28.

Thereafter, with leave of the circuit court, the City filed motions to strike the Defendants' affidavits. SR. 167-75. Defendants filed responses to the motions to strike, SR. 222-65; SR. 266-82, and the City replied. SR. 285-309; SR. 327-34. The Durkin & Roberts Defendants also filed a motion for discovery. SR. 178-205; SR. 208-21; SR. 310-24. On September 13, 2012, the court issued an opinion dealing with procedural matters raised in the filings. A39-A50 (SR. 335-46). Therein, the court denied in part and granted in part the City's Motion to Strike Affidavits and denied the Motion for Discovery. *Id.*

Then, on September 27, 2012, the circuit court issued a written opinion holding the City of Chicago Park District ordinance unconstitutional on its face and as applied to the arrestees, holding that it violated the First Amendment to the United States Constitution and related provisions of the Illinois Constitution. A1-A38 (R. C1106-43). The court further held that the curfew ordinance had been discriminatorily enforced in violation of the Equal Protection Clauses of the United States and Illinois Constitutions. The City appealed. A1-A38 (R. C1106-43); A244-257 (R. C1144-57).

I. THE ARRESTS OF OCCUPY CHICAGO DEMONSTRATORS IN GRANT PARK VIOLATED DEFENDANTS' FREE SPEECH AND ASSEMBLY RIGHTS ENSHRINED IN THE UNITED STATES AND ILLINOIS CONSTITUTIONS.

The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble[.]" U.S. CONST. amend. I. The Bill of Rights to the Illinois Constitution prescribes that "[a[ll persons may speak, write and publish freely," and that "[t]he people

have the right to assemble in a peaceable manner, to consult for the common good, to make known their opinions to their representatives and to apply for redress of grievances." Ill. CONST. art. I, §§ 4, 5.

As a threshold matter, the First Amendment's limitation on governmental suppression of speech applies to states and municipalities pursuant to the Fourteenth Amendment. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 792 n.2 (1984) (citing *Lovell v. Griffin*, 303 U.S. 444 (1938)). In navigating the complexities of First Amendment jurisprudence, a three-step process enunciated in *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985), is useful. Under this framework, a court should first determine whether the First Amendment protects the speech at issue; second, determine the nature of the forum at issue; and, lastly assess whether the state's asserted justifications for restricting speech "satisfy the requisite standard." *Id. See also Mahoney v. Doe*, 642 F.3d 1112, 1116 (D.C. Cir. 2011). This Court reviews *de novo* the circuit court's finding that the Park District curfew ordinance is unconstitutional. *People v. Madrigal*, 241 Ill. 2d 463, 466 (2011).

A. Occupy Chicago's Speech was Protected by the First Amendment.

As the Supreme Court recently held:

> Speech on matters of public concern is at the heart of the First Amendment's protection. The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.

Snyder v. Phelps, ___ U.S. ___, 131 S. Ct. 1207, 1215 (2011) (internal quotation marks and citations omitted). The Court has "long recognized that [First Amendment]

protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Expressive conduct that is symbolic speech is clearly entitled to First Amendment protections. *Id.* There is no question but that at the time of their arrests, Occupy Chicago demonstrators were engaged in speech protected by the First Amendment.

Occupation encompasses both traditionally protected means of speech and the unique form of symbolic speech employed by Occupy Chicago to spread its political message. The physical act of occupying space is a necessary precursor to engaging in conventional forms of protected speech such as chanting, picketing, leafletting, displaying signs and banners, engaging in debate and giving speeches addressing political and social issues of local, national, and global concern. *See Carey v. Brown*, 447 U.S. 455, 460 (1980) (picketing on public streets and sidewalks); *United States v. Grace*, 461 U. S. 177, 176 (1983) (carrying a flag, banner, or device on Supreme Court grounds); *Gregory v. Chicago*, 349 U.S. 111, 112 (1969) (marching); *Jamison v. Texas*, 318 U.S. 413 (1943) (distribution of handbills); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (picketing on private land); *Schneider v. State*, 308 U.S. 147 (1939) (distribution of literature on public streets); *Lovell v. Griffin*, 303 U.S. 444 (1938) (distribution of literature). Thus, by maintaining a presence in a public space, the act of occupying creates a necessary platform for speech.

Moreover, occupation itself has a rich history as protected speech, particularly with regard to the civil rights movement. *See Brown v. Louisiana*, 383 U.S. 131, 133 (1966) (peaceful sit-in at public library with segregated services); *Garner v. Louisiana*, 368 U.S. 157, 174 (1961) (sit-in at a segregated lunch counter); *Taylor v. Louisiana*, 370

U.S. 154 (1962) (African-Americans maintaining a presence in "whites only" waiting room at bus station). Thus, spatial occupation does not simply create a venue for protected speech such as picketing, marching, and leafleting—it is protected speech itself.

Even if occupation is not construed as pure speech, it contains sufficient communicative elements to entitle it to First Amendment protection. *Johnson*, 491 U.S. at 404. From adorning black arm-bands in protest of the Vietnam War, to picketing for a variety of causes, to sits-in by African-Americans at a "Whites only" area in protest of racial segregation, the Supreme Court has long recognized conduct-based speech has a rich and important place in American political discourse. *See, e.g.*, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505 (1969); *Brown v. Louisiana*, 383 U.S. at 141-142; *Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313-314 (1968). As these potent examples illustrate, conduct-based speech carries the potential to communicate a particular message that can impact an audience in a more profound and lasting way than just the written or spoken word.

In *Spence v. Washington*, 418 U.S. 405 (1974), the Supreme Court set forth two factors to consider in determining whether such expressive activity falls under First Amendment protection: 1) whether the actor intended to convey a particularized message, and 2) whether there is a great likelihood "that the message would be understood by those who viewed it." 418 U.S. 405, 409-411. The test for symbolic speech thus first looks to the intent of the speaker and then to the perception of the audience. *Id.*

With respect to the Occupy movement, numerous courts have found that overnight occupation is symbolic speech entitled to First Amendment protection. *See, e.g.*, *Cleveland v. McCardle*, 2012 Ohio 5749 (Ohio Ct. App. 2012); *Occupy Columbia v*

Haley, 866 F. Supp. 2d 545, 557-58 (D.S.C. 2011); *Freeman v. Morris*, 2011 U.S. Dist. LEXIS 141930, at *14, 2011 WL 6139216, at *6-7, (D. Me. .2011); *Occupy Minneapolis v. County of Hennepin*, 866 F. Supp. 2d 1062, 1069 (D. Minn. 2011); *Occupy Ft. Myers v. City of Ft. Myers*, 882 F. Supp. 2d 1320, 1328 (M.D. Fla. 2011).

As to the first element, individuals active in the Occupy movement are opposed to the increasing power and presence of corporations in the lives of the 99%, such as the proliferation of corporate advertisements throughout the city landscape. By maintaining a prolonged physical presence in a public space such as a park, plaza, or sidewalk, Occupy Chicago demonstrates its social message that public resources should be utilized by, and serve the interests of, members of the public, rather than corporate entities. The physical occupation of public space also symbolically demonstrates Occupy's opposition to the corruption of the democratic process by private interests, such as by corporate campaign financing and lobbying by big business. Through the creation of an encampment that exercises direct democracy and engages in political discourse in an open and public setting which anyone can participate in, Occupy demonstrates its desire for an open political democratic process free of corporate influence.

Occupy Chicago, through its initial presence in the financial district and in its attempts to remain overnight in Grant Park, intended to convey a message of opposition to economic and social inequality and the power of peaceful, collective action. *See, e.g.*, SA14, ¶ 14 (SR. 36); SA9, ¶¶ 3, 4 (SR. C30). Occupy Chicago was born in the wake of the Great Recession which followed a "stock market crisis, subsequent bank bailouts, high unemployment, deflation of the housing market, rise in foreclosures, and increasing disparity between the incomes of the highest wage-earners and the low and middle-

income earners," all of which were "well-known and . . . set the stage for the Occupy movement." *Freeman*, 2011 U.S. Dist. LEXIS 141930, at * 14, 2011 WL 6139216, at *5.

With regard to the second prong, Occupy Chicago received enormous media coverage from its inception and became a mainstay of downtown Chicago in the fall of 2011 through its presence at LaSalle and Jackson and smaller, innovative actions "occupying" various places and events. Its message—"we are the 99%"—and its mode of expression—occupation—became the memes of the moment. Situated in that historical context, the grand gesture of occupying Grant Park would undoubtedly be perceived by the viewer as a commentary on social and economic disparity and a metaphorical reclamation of the public's resources and assets. *See Spence*, 418 U.S. at 410 (pointing to the contemporaneous historical context in ferreting out the likely impact on the viewer).

Here, there is no real argument that Occupy Chicago was not engaged in protected speech. Indeed, the City of Chicago impliedly concedes that the activities of Occupy Chicago were protected under the First Amendment. It is clear that Occupy Chicago activists were engaging in constitutionally protected conduct at the time of their arrest, and that their intention to maintain an overnight presence in Grant Park was expressive speech protected by the First Amendment.

B. Grant Park is a Quintessential Public Forum.

"To ascertain what limits, if any, may be placed on protected speech, we have often focused on the 'place' of that speech, considering the nature of the forum the speaker seeks to employ." *Frisby v. Shultz*, 487 U.S. 474, 479 (1988). "[T]he extent to

which the Government can control access depends on the nature of the relevant forum," *Cornelius*, 473 U.S. at 800, and "the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Education Ass'n. v. Perry Local Educators' Ass'n.,* 460 U.S. 37, 44 (1983). The Supreme Court has recognized "three types of fora: 'the traditional public forum, the public forum created by government designation, and the nonpublic forum.'" *Frisby*, 487 U.S at 479-80 (quoting *Cornelius*, 473 U.S. at 802).

A traditional public forum is a place in which "by long tradition or by government fiat have been devoted to assembly and debate." *Perry Educ. Ass'n*, 460 U.S. at 45. "Public streets and parks fall into this category." *Cornelius*, 473 U.S. at 802. Parks "have immemorially been held in trust for the use of the pubic and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussion of public questions." *Perry Educ. Ass'n*, 460 U.S. at 45 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). Indeed, a "principal purpose of traditional public fora is the free exchange of ideas." *Cornelius*, 473 U.S. at 800. Accordingly, "the rights of the state to limit expressive activity are sharply circumscribed" therein. *Id.*

In dismissing the Occupy cases, the circuit court took judicial notice of the unique and potent history of Grant Park as an essential public forum for protest and assembly. A14-15 (R. C1119-20). *See also* discussion at A14-A20 (R. C1125). From hosting demonstrations at the 1968 Democratic Convention to the election-night speech by the first African-American President of the United States, Grant Park also holds a special historical place on the national stage as a public forum for political discourse.

The history of Grant Park as a public forum predates Chicago's incorporation. In 1836, a publicly recorded map of downtown Chicago plainly stated the park's legacy: "A Common to remain forever Open, Clear & free of any buildings, or other Obstructions." A16 (R. C1120). In a dispute with private railroad companies in 1892, the Supreme Court sided with the state of Illinois and found that Grant Park's land was to be "held by the people in trust for their common use and of common right, as an incident to their sovereignty." *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 459-60 (1892).

Having the right to their shared public forum, the People of Illinois have long used their refuge at Grant Park to give voice to the paramount political, social, and economic issues of their time. In 1856, Abraham Lincoln used this public space to advocate "in favor of the new Republican Party and its anti-slavery platform." A16 (R. C1121). Importantly, Grant Park is no stranger to symbolic "occupation" in exercise of First Amendment rights; jobless World War I veterans encamped there in protest of the plague of unemployment. A17 (R. C1122). The Chicago Park District as it is known today was formed in the midst of the Great Depression, during a climate of social upheaval and frequent mass protests against the deleterious economic and social conditions of the working class. *See* Julia Sniderman Bachrach, *The City in a Garden: A Photographic History of Chicago's Parks: Chicago Park District: 1934-1940s* (2001), *available at* http://www.chicagoparkdistrict.com/history/city-in-a-garden/chicago-park-district/. From World War II to the present, Grant Park has played host to public debate on pressing political and social issues, including nuclear disarmament, civil rights, anti-War protests, women's rights, worker's rights, and abortion. A17 (C. 1122). Most notable, of course, is the 1968 Democratic Convention, during which peaceful protestors

occupied Grant Park continuously until violently ejected by the Chicago Police Department. Those events came to represent the very pinnacle of free speech in this country, and formed the backdrop for the expansive free assembly provisions incorporated into the 1970 Illinois Constitution. Thus, it is uncontroverted that throughout our history as a city and nation, Grant Park has been the paragon of a traditional public forum.

"Traditional public forum property occupies a special position in terms of First Amendment protection." *Grace*, 461 U.S. at 180. Once it is established that the forum is a quintessential public forum, "the government's ability to permissibly restrict expressive conduct is very limited." *Id.* "[G]overnment agencies by their very nature are driven to overregulate public forums to the detriment of First Amendment rights, [and] facial viewpoint-neutrality is no shield against unnecessary restrictions on unpopular ideas or modes of expression." *Clark v. Community of Creative Nonviolence*, 468 U.S. 288, 315-16 (1984) (Marshall, J., dissenting).

Having demonstrated that the Occupy Chicago's occupation was symbolic speech within the ambit of First Amendment protection and that Grant Park was a traditional public forum preserved for the People as common space for political discourse, it is necessary to evaluate the City's asserted interests as advanced against the essential nature of Occupy Chicago's speech.

C. The City's Arrest of Defendants for Engaging in Speech in Grant Park Cannot Pass First Amendment Scrutiny.

Having determined Occupy Chicago was engaging in protected speech in a traditional public fora, we next turn to whether the State's asserted interests satisfy the appropriate standard. *Cornelius*, 473 U.S. at 797. Here, the parties agree that in a public

forum a content-neutral regulation is subject to reasonable "time, place and manner" regulation. It is the City's burden to establish that the ordinance is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication.[2] *Grace*, 461 U.S. at 177 (quoting *Perry Ed. Ass'n.*, 460 U.S. at 45); *Heffron v. Int'l Soc. For Krishna Consciousness, Inc.*, 452 U.S. 640, 658 (1981). Failure to meet either of these prongs is fatal to the entire law. *Perry Ed. Ass'n.*, 460 U.S. at 45; *Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 168-69 (2002) (invalidating an ordinance that served a substantial government interest because it was not narrowly tailored—without discussing whether ample alternative channels of communication existed). Further, "[a] government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

Although the City's asserted interests of maintenance, beautification and safety may be, in theory, substantial governmental interests to justify some reasonable regulation, the Park District ordinance is not narrowly tailored to these interests. Further, the ordinance does not provide sufficient ample alternatives for protected speech. Therefore, the circuit court's ruling that the ordinance is unconstitutional must stand.

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[2] Although the City asserts that the test enumerated in *United States. v. O'Brien*, 391 U.S. 367 (1968), should apply, it employs the time-place-manner test to guide its analysis. The circuit court also relied on a time-place-manner analysis. Regardless, as the Supreme Court noted in *Clark*, the *O'Brien* and time-place-manner tests are essentially the same, thereby requiring the same analysis, stating that "[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions." *Clark v. Community of Creative Nonviolence*, 468 U.S. at 293, 298. Moreover, for defendants with standing, facial and as applied constitutional challenges alike utilize this analytical framework.

1. The Park District Ordinance is Not Narrowly Tailored to Serve Substantial Governmental Interests.

The circuit court was correct in finding that the arrests of Occupy Chicago demonstrators violated the First Amendment because the Park District ordinance is not narrowly tailored to the City's interests. While a regulation need not employ the least restrictive means of protecting the government's interests, it cannot "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone[.]" *NAACP v. Button*, 371 U.S. 415, 438 (1963). The City has absolutely failed to establish that the burden to establish that the ordinance is narrowly tailored. *Heffron*, 452 U.S. at 658.

a. There is Insufficient Evidence that the City's Asserted Interests Are Actually Implicated on the Facts of this Case.

When "'confronted with a case of prosecution for the expression of an idea through activity,'" particular care must be taken to first examine the interests advanced by the government in support of its prosecution. *Texas v. Johnson*, 491 U.S. at 411 (quoting *Spence v. Washington*, 418 U.S. at 411). Thus, the threshold question is whether the City has met its burden to show that the expressive activity actually—and not theoretically—endangers the asserted interests. *Johnson*, 491 U.S. at 407; *Weinberg v. City of Chicago*, 310 F.3d 1029, 1038-40 (7th Cir. 2002) (finding insufficient evidence in the record to support the asserted interests); *Kuba v. 1-A Agr. Ass'n*, 387 F.3d 850, 859 (9th Cir. 2004) (clarifying that the government cannot merely invoke an interest, it must show actual endangerment). *See also Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 73, 75 (1981) (rejecting city's asserted zoning interests because it "presented no evidence").

"In the context of a First Amendment challenge under the narrowly tailored test, the government has the burden of showing that there is evidence supporting its proffered justification." *Weinberg v. City of Chicago*, 310 F.3d at 1038 (citing *DiMa Corp. v. Town of Hallie,* 185 F.3d 823, 829 (7th Cir. 1999)); *City of Watseka v. Illinois Public Action Council,* 796 F.2d 1547 (7th Cir.1986), *aff'd*, 479 U.S. 1048 (1987). If "the State's asserted interest is simply not implicated on [the] facts," then "the interest drops out of the picture." *Johnson*, 491 U.S. at 403-04 (citing *Spence*, 418 U.S. at 414, n. 8) (dismissing the State's asserted interest in preventing breaches of the peace as not implicated by the record before it). *See also Weinberg*, 310 F.3d at 1038; *Kuba*, 387 F.3d at 859.

Weinberg involved an avid Chicago Blackhawks fan who authored a book that was sharply critical of the team's ownership and who then sold the book on sidewalks outside the United Center where the team plays its home games. *Weinberg*, 310 F.3d at 1033. After he was threatened with arrest for violating the Chicago Municipal Code's anti-peddling ordinance Weinberg brought suit to have the ordinance declared unconstitutional. In evaluating his challenge, the Seventh Circuit found that Mr. Weinberg's book was classic protected speech in an undoubtedly public fora, *id.* at 1034, and then looked closely at the interests asserted by the Government in support of the ordinance: "to alleviate traffic congestion and maintain pedestrian safety around the United Center." *Id.* at 1038-40. Although the court found the City's asserted interest was meritorious in theory, *id.* at 1038, it held that in reality the City had failed to provide objective evidence "that traffic flow on the sidewalk or street is disrupted when Mr. Weinberg sells his book." *Id.* at 1039. Moreover, "[t]he City offered no empirical

studies, no police records, no reported injuries, nor evidence of any lawsuits filed." *Weinberg*, 310 F.3d at 1039. The City also failed to explain why there were no actual disturbances or problems during the time when he was permitted to freely sell his book. *Id.* Because of this failure, and because "[u]sing a speech restrictive blanket with little or no factual justification flies in the face of preserving one of our most cherished rights," the court struck down the ordinance as unconstitutional. *Id.* at 1039, 1046.

Similarly, the City's asserted interests in the present case are not implicated by the record below. Here, the City's asserted interest is maintaining parks in a "safe, clean, attractive, and [ ] good condition." A100 (SR. C11); A119, ¶ 1 (SR. C30). It avers that park conservation can only be accomplished by closing the park from 11:00 p.m. to 6:00 a.m. nightly. A119-20, ¶ 3 (SR. C30-31). Yet, the City has failed to demonstrate that Occupy Chicago's presence in Grant Park on these two nights endangered any of its asserted interests.

No City affidavit contains allegations that Occupy Chicago *actually* caused or threatened to cause any damage to Grant Park, prevented the Park District from conducting any maintenance or beautification project, or affected the safety and security of the park or individuals in or around it. The City even disavowed the opportunity to file additional affidavits in a sur-reply, which could have been used to provide evidence of Occupy Chicago's effect on their interests. Tr. 73. While the City asserted in a conclusory affidavit that in general it needed to close the parks on a nightly basis in order to clean and conduct repairs, it failed to show that it actually conducted maintenance work in the middle of the night, or that there was any repair plans for the area of the park occupied by Occupy Chicago. Similarly, while asserting a generalized interest in

avoiding excessive wear on park district lands, and the need to allow them to recuperate from constant public use, the City failed to demonstrate how occupation of a concrete area implicated its interests. Indeed, there are absolutely no facts in the record upon which this Court could rely to determine that the Park District ordinance is narrowly tailored to the interests asserted by the City. *Watseka*, 796 F.2d at 1555-56; *Weinberg*, 310 F.3d at 1038-40.

Instead, the unrebutted facts in the record demonstrate that Occupy Chicago demonstrators peacefully gathered in a concrete area of Grant Park void of any landscaping or other features that could have possibly been damaged by their use of the space. A201, ¶ 10 (SR. C113). No other people were attempting to use this section of Grant Park for any purpose, let alone a purpose that would further the City's interests. A200-01, ¶ 910 (SR. C112-13).

The record further illustrates Occupy Chicago's commitment to maintaining a clean, orderly and safe environment in their encampments. "In the early days of the movement Occupy Chicago started an organizational committee that was responsible for maintaining the cleanliness of the sidewalks at Jackson and LaSalle, ensuring that our supplies were organized in a neat and orderly fashion." SA14, ¶ 16 (SR. C36). Occupy Chicago adopted rules governing the conduct of the occupiers with the goal of keeping the encampment clean and orderly. Rule number one was "[c]lean up after yourself!" SA5 (SR. C24). Other rules included: pick up your personal items, pick up trash, no drugs or alcohol, smile and talk to people, "don't antagonize the police," no sleeping, do not leave loose papers and flyers out, respect the space, and keep it neat. *Id.*; SA3, ¶ 15 (SR. C21); SA14, ¶ 16 (SR. C36). After every meeting in Grant Park prior to the dates of

the arrests, Occupy Chicago engaged in a group cleanup of the areas used by them and other patrons. A202, ¶ 16 (SR. C114). Occupy Chicago's overall philosophy toward maintaining their space was, "[t]his is our home, we need to keep it clean." SA14, ¶ 16 (SR. C36). The City does not contest Occupy Chicago's commitment to maintaining a safe and clean space.

The use of the Park District ordinance's complete ban on expression to silence Occupy Chicago did not serve the City's stated interests. Thus, these interests cannot justify the use of the ordinance to arrest all individuals expressing their message in Grant Park.

b. The Park District Ordinance Unconstitutionally Bans More Expression Than Necessary to Support the City's Interests.

Even if the Court believes the City's asserted interests were threatened by Occupy Chicago's presence in Grant Park, the use of the ordinance proscribed conduct far afield of those interests. The Park District ordinance essentially constitutes a complete ban on all overnight activities, including expressive activities, in any and all section of the parks, and closes the parks for longer than necessary to achieve the Park District's stated goals thus rendering it unconstitutional.[3] *See Watseka*, 796 F.2d at 1547. A complete ban on a particular form of expressive activity may only be deemed narrowly tailored if each activity within the proscription's scope is an appropriately targeted evil. *Frisby*, 487 U.S. at 485 ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."); *Grace*, 461 U.S. at 181 (ban on expressive

[3] Although the ordinance does contain a permit provision, the City has explicitly stated that the park closure hours were absolute and no permit would issue past 11:00 p.m. Tr. 79; A22 (R. C1127). Therefore the ordinance, in effect, is a complete ban on overnight activity in the parks.

conduct "is unconstitutional because it does not sufficiently serve those public interests that are urged as its justification,"); *ACLU v. Alvarez*, 679 F.3d 583, 606 (7th Cir. 2012) ("by legislating this broadly [ ] the State has severed the link between the [ ] statute's means and its ends); *Initiative and Referendum Instit. v. United States Postal Serv.*, 417 F.3d 1299, 1307-08 (D.C. Cir. 2005) (quoting *Am. Library Ass'n v. Reno*, 33 F.3d 78, 88 (D.C. Cir. 1994) (Regulations are not narrowly tailored where a "'substantial portion of the burden on speech does not serve to advance the government's content-neutral goals.'")). Therefore to survive constitutional muster, the City must show that that its complete ban on all overnight expression was directly related to its asserted interests of preserving the park's maintenance, beauty and security. The ban at issue here clearly proscribes far more conduct than necessary to secure the City's asserted interests and thus was unconstitutional as applied to the Occupy demonstrators.

As elucidated above, the City failed to support its claims that the use of the ordinance was necessary to protect its asserted interests. There was no evidence that a complete ban on being in the park at night was necessary for required maintenance, no evidence, for instance, of work schedules showing that park district personnel used the night hours to perform essential repair work, and no evidence that the beauty of the park was negatively impacted by the presence of Occupy Chicago at night, as opposed to during the day. Nor was there any evidence that a complete ban on a gathering at night on the perimeter of the park was necessary to advance anti-crime interests. While a more limited ordinance could legitimately protect the City's interests the ordinance under which the Appellees were prosecuted was essentially a blunderbuss that blasted everything before it, legitimate targets and the illegitimate. It is clear that the Park

District ordinance banned far more expression than was necessary to protect the City's asserted interests when it was used to arrest all Occupy Chicago activists in Grant Park on two occasions and completely shut down their speech.

c. The City Had Less Restrictive Means Available to Protect Its Asserted Interests.

The ordinance is further exposed as lacking a sufficient nexus to the City's stated interests because the City has available many less restrictive means to enforce its asserted interests. *See Watseka*, 769 F.2d at 1553, 1557 (if there is a less restrictive alternative to a challenged regulation, then the ordinance is not as precise and narrowly drawn as it could be). Here, other existing municipal ordinances and state laws adequately protect the City's interest in the maintenance, beauty and safety of Grant Park without shutting down the First Amendment protected speech and expressive conduct of Occupy Chicago.

For instance, should any of the asserted Government interests actually have been threatened by Occupy, the City could have used a host of Chicago Park District ordinances to address those concerns. For instance, there is an ordinance prohibiting breaches of the peace, that outlaws "threatening, abusive, insulting or indecent language" and "obscene or indecent act[s]." M.C.C. § 10-36-050. There also exists a Chicago Park District ordinance which protects the natural beauty of Grant Park; it prohibits visitors from "cut[ting], break[ing] or in any way injur[ing] or defac[ing] trees, shrubs, plants, turf or any of the buildings, fences, bridges or other construction or property contained" within city parks. M.C.C. § 10-36-090. Additionally, state anti-littering statutes would be sufficient to ensure that the Occupiers did not discard detritus, although the prior conduct of Occupy made this a theoretical, not real, concern.

The presence of these statutes which more specifically address the City's asserted interests "tends to confirm" that it need not have punished this curfew violation in order to preserve the parks. *Johnson*, 491 U.S. at 410. *See also Boos v. Barry*, 485 U.S. 312, 327-29 (1985).

d. Absolute Park Closure For Seven Hours Every Day Is Not Necessary For the Stated Interests.

The City implicitly concedes in the record that the Park District ordinance closes the parks for longer than is necessary to protect the beauty, maintenance and safety of the parks. The Park District manager admitted that some permitted events are allowed to remain in the parks beyond the closing hour. A120, ¶ 3 (SR. C31). Also, "exemptions from an otherwise legitimate regulation of a medium of speech . . . may diminish the credibility of the . . . rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994). *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489, (1995) (holding that a policy violates the First Amendment because "exemptions and inconsistencies bring into question the purpose" of the policy, even though "the Government's interest . . . remains a valid goal"). The circuit court correctly concluded, therefore, that the ordinance is not narrowly tailored to its stated interests.

The City has discretion when and whether to arrest for a violation of the ban and the City has exercised that discretion to not enforce the overnight park curfew in the past. A33 (R. C1138); A23 (R. C1128); A120, ¶ 4 (SR. C31). This discretionary enforcement of the ordinance highlights that the City improperly eliminates more than "the exact source of the evil it sought to remedy," *Frisby v. Shultz*, 487 U.S. at 485, and unconstitutionally allows the City of Chicago to completely shut down all overnight First

Amendment expression in the parks of which it does not approve. *See Bell v. Keating*, 697 F.3d 445, 463 (7th Cir. 2012) (limitless police discretion is impermissible).

The circuit court properly determined that the statements set forth in the affidavit of the Park District manager could not support its bold assertions that the park must close for seven hours each day. In doing so, the court did not make impermissible credibility determinations or "assume the role of the parks manager" as the City asserts. Appellant's Brief, p. 28. In fact, the circuit court noted that the "park official's unsupported opinions regarding park maintenance and preservation are entitled to some deference." A25 (R. C1130). Rather, the court rightfully determined that the Park District manager's affidavit was void of the foundation necessary to credit his averments. A23-24 (R. C1128-29).

First, under constitutional jurisprudence, a court is required to weigh the governmental interests asserted based upon the facts and record before it. *See, e.g., Johnson*, 491 U.S. at 407. Here, the City elected to provide the court with unsupported opinions rather than assertions of fact.

Second, as an evidentiary matter, an affidavit must state the facts supporting its conclusions with particularly. *Steiner Elec. Co. v. NuLine Tech., Inc.*, 364 Ill. App. 3d 876, 881-82 (1st Dist. 2006) (court properly struck an affidavit that offered conclusory facts without providing underlying factual support); *Madden v. Paschen*, 395 Ill. App. 3d 362, 386 (1st Dist. 2009) (court properly struck the portions of affidavits that contained legal conclusions and that did not show that the statements were based on personal knowledge). As with all threshold evidentiary issues, proper foundation must be laid. Improper lay opinions, hearsay, and conclusory statements in affidavits cannot be credited. Here, the Park District manager improperly concluded, without including any

factual basis or foundation, that "in order to keep parks safe, clean, attractive and in good condition the parks *need to be* closed from 11:00 o'clock in the evening until 6:00 o'clock the following morning." A120, ¶ 3 (SR. C31). Yet, there are no other justifications in the record offered in an attempt to legitimize the ordinance as narrowly tailored to the City's stated interests. The Park District manager provided absolutely no detail about the length of time workers spend on cleaning and maintenance in a given evening. *See* A119-20 (SR. C30-31). "Indeed, he never avers that any work is done on the parks during the night." A24 (R. C1129). No statement is offered to explain how occasional and limited events so thwart the government's interests as to support a complete ban on nighttime events. *Id.* The circuit court properly determined that the Park District manager's "mere assertion that the curfew is necessary does not suffice to demonstrate the tight fit." *Id.* His affidavit was insufficient.

e. *Clark v. Community for Creative Nonviolence* Does Not Support the City's Argument.

The City's reliance on *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984), to support its argument that the ordinance is narrowly tailored to its asserted interests is unavailing. In *Clark*, the Court examined a ban on living and sleeping in parts of the National Parks that were not designated as camping sites. The Court was primarily concerned with the effect of cooking and sleeping on the park ground. *Id.* at 293-95. Notably, the regulation allowed for overnight demonstrations, including the construction of temporary structures in the park, and also provided certain locations where overnight camping was permitted. *Id.* at 291-293, 295.

Here, in contrast to *Clark*, Occupy Chicago had no intention to "camp"—that is, to cook, sleep, and live—in Grant Park. A202, ¶ 151 (SR. 114). Additionally, unlike the

regulation in *Clark*, the Park District ordinance forbids all forms of nighttime expression in the parks, regardless of its effect on the park, which is an unreasonable time, place, and manner restriction. In fact, it is notable that the City has not identified any case upholding a complete ban on expressive activity as a constitutional restriction on speech.

2. There Were No Ample Alternative Channels of Communication.

The Park District ordinance is further exposed as an unconstitutional ban on First Amendment expression because it failed to leave open ample alternative channels of communication. *Taxpayers*, 466 U.S. at 812 ("[A] restriction on expressive activity may be invalid if the remaining modes of communication are inadequate."). The Government bears the burden to show that the available alternatives are both ample and adequate. *Weinberg*, 310 F.3d at 1041; *Watseka*, 796 F.2d at 1553. The analysis of whether alternatives are ample and adequate should be considered from the speaker's point of view. *Weinberg*, 310 F.3d at 1041. "As the Supreme Court has stated, the First Amendment mandates that we presume that speakers, not the government, know best [ ] what they want to say and how to say it." *Id.* at 1041 (internal quotation marks omitted). The First Amendment also presumes that speakers know best when to express their message; an ordinance may not restrict the time of the expression without adequate justification. *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1063 (7th Cir. 2004). *See also Vodak v. Chicago*, 639 F.3rd 738, 749 (7th Cir. 2011) ("[D]issemination delayed is dissemination denied.") (internal quotation marks omitted).

"[A]n alternative is not adequate if it foreclose[s] a speaker's ability to reach one audience even if it allows the speaker to reach other groups." *Weinberg*, 310 F.3d at 1041 (internal quotations omitted). *See also Bery v. City of New York*, 97 F.3d 689, 698

(2d Cir. 1996) (holding that a complete ban on sidewalk art fails to leave open ample alternative communicative means because displays in art galleries or museums would not reach the same audience). Moreover, the alternatives must exist within the forum in question. *Heffron*, 452 U.S. at 654-55.

The City suggests that Occupy Chicago could use the City's streets, walks, and plazas during the hours of the overnight curfew. Appellant's Brief, p. 32. However, the alternatives must be realistic, not simply theoretical. *See Hodgkins*, 355 F.3d at 1064. The reality as demonstrated by the record below is that Occupy Chicago had no realistic ample alternatives available to them. A21 (R. C1126). The demonstrators occupied this particular concrete section of Grant Park because the City, who obviously felt this location best served the City's interests, previously directed them there. *See* SA14, ¶ 15 (SR. C36). Occupy Chicago faced increased police harassment at their primary location on the sidewalk near Jackson and LaSalle. There is no evidence that the City would have been more accommodating to hundreds or thousands more demonstrators on the City's sidewalks or streets. Such a gathering may well have exposed Occupy Chicago demonstrators to the realistic risk of arrest for violations of City and state ordinances relating to, for example, congestion, pedestrian, and right-of-way laws.

Here, it is unquestionable that no adequate alternative existed to a nighttime occupation of a highly visible area of Grant Park. The expression of a political viewpoint through occupation had already earned Occupy extensive dissemination of its political viewpoint, bringing its message to many who would be jaded by op-ed pieces or conventional demonstrations or picket lines, but who were energized by the specter of people stridently opposing many current policies of the government while demonstrating

that they were willing to undergo significant hardship to do so. Innovative strategies of communication were a hallmark of Occupy, and its plans to use the traditional public forum of Grant Park, a forum which had in its legacy Abraham Lincoln, the unemployed veterans of World War I, and the election night celebration of the nation's first African-American president, were a further attempt to do protest differently, to break out of conventional forms of how to convey a message, and speak to an audience that would be dismissive of other types of speech. Moreover, by demonstrating in the park that abutted one of Chicago's major thoroughfares, especially on a Saturday night, Occupy was attempting to put its message personally before itinerants on Michigan Avenue, and through the press coverage it would engender to a larger audience of readers and viewers. Thus, this overnight occupation of Grant Park was a unique opportunity for Occupy to broadcast its message, but it was an opportunity that was denied to it because of the enforcement of the Park District ordinance.

The City failed to provide Occupy Chicago with any realistic, adequate alternative to an overnight presence in Grant Park. Therefore, the Park District ordinance fails the test of a reasonable time, place, and manner restriction.

D. The Defendants' Arrests Are Also Unconstitutional under the Broader Protection for Freedom of Speech Liberties Secured by the Illinois Constitution.

The protection of First Amendment freedoms of speech and assembly are afforded broader protection under the Illinois Constitution. *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 979 (N.D. Ill. 2003) (citing *C.L.U.B. v. City of Chicago*, 1996 U.S. Dist. LEXIS 2230, at * 75, 1996 WL 89241, at * 25 (N.D. Ill. Feb. 27, 1996); *People v. DiGuida*, 152 Ill. 2d 104, 120-21 (1992); *City of Blue Island v. Kozul,* 379 Ill. 511, 520 (1942). Specifically, the freedom

of assembly clause states: "The people have the right to assemble in a peaceable manner, to consult for the common good, to make known their opinions to their representatives and to apply for redress of grievances." Ill. Const. art. I, § 5.

Unlike the federal Constitution, the Illinois Constitution provides a free-standing, independent right to assemble in a peaceable manner. *Id.* The circuit court's thorough historical analysis of the origins of the free assembly clause demonstrates that the citizenry of Illinois consciously choose to exalt the importance of freedom of assembly and to afford such liberty greater protection than the federal Constitution. A11-14 (R. C1116-19). Ratified in 1970 in the wake of the protests and occupation of Grant Park during the 1968 Democratic Convention, the decision to jealously guard the liberty of free assembly was a direct affirmation of Illinois' commitment to maintaining a free and open marketplace of ideas. It would be unthinkable to those Framers that demonstrators peaceably assembling in a public forum would be subject to arrest and prosecution.

The history behind the free speech and assembly rights of our state Constitution evinces a strong intent to provide greater protection than the federal Constitution—the Supreme Court's floor of First Amendment protections is not Illinois' ceiling. *DiGuida*, 152 Ill. 2d at 118-20. Thus, if this Court is unpersuaded by federal First Amendment jurisprudence, the Illinois Constitution most certainly protected the rights of the Occupy Defendants to freely and peaceably assemble in a public park for the express purpose of discourse on the state of our nation.

II. THE ARRESTS OF OCCUPY CHICAGO DEFENDANTS WERE DISCRIMINATORY AND VIOLATED EQUAL PROTECTION.

The circuit court found that the application of the curfew ordinance to the

Occupy Defendants was also unconstitutional based upon discriminatory enforcement of the law. A29 (R. C1134). In doing so, the circuit court also recognized that the Illinois Constitution provides greater protections than the federal right of free assembly and that therefore the inference of selective enforcement may be even stronger than in the federal context. A31, at n.25 (R. C1136) (citing *Sixth Ill. Const. Convention*, 3 Record of Proceedings 1403 and *DiGuida*, 152 Ill. 2d at 120-121). The City concedes that the government may not enforce the law "against persons of one viewpoint who violate the statute while not enforcing the law against similarly situated persons of the opposing viewpoint who also violate the statute." Appellant Brief, p. 41 (citing *McGuire v. Reilly*, 386 F. 3d 45, 62 (1st Cir. 2004)). The City further concedes such discriminatory enforcement may constitute viewpoint discrimination in violation of the First Amendment as well as unequal treatment in violation of equal protection. *Id.* at 41-42.

"[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Taxpayers*, 466 U.S. at 789, 804. Viewpoint discrimination claims are broad in possibility and "may occur in different contexts. One such context occurs when the state decides whether or not to impose criminal penalties based on the viewpoint expressed by someone's words." *McGuire*, 386 F.3d at 62. In order to establish a selective enforcement claim, the following must be shown: 1) differential treatment from others similarly situated; and, 2) the differential treatment was clearly based on the exercise of First Amendment rights. A30 (R. C1136). Discriminatory purpose and effect must be show in order to establish selective enforcement. *Wayte v. United States*, 470 U.S. 598, 608 (1985).

The Occupy Defendants were ordered by the Chicago Police Department to leave the park and were arrested for violating the 11 p.m. curfew, whereas individuals remaining in the park for an Obama rally were not ordered to leave and were not arrested. This differential treatment was based on the particular speech of the Occupy Defendants in violation of the First Amendment. In addition, the police conduct toward the Occupy Defendants, both at the time of the arrests and during events leading up to the arrests, further evidences the City's discriminatory animus against them.

A. City's Differential Treatment of Obama Celebrants.

The circuit court compared the application of the curfew ordinance to arrest the Occupy protestors to the City's failure to apply the ordinance to those violating the park curfew during a rally for Obama. The 500,000 people remaining in the park after 11 p.m. for the Obama rally were similarly situated to the 303 Occupy protestors. Both groups violated an ordinance that strictly states that no one may be in the park between 11 p.m. and 6 a.m. As the City admitted during oral argument, no curfew exception applied to the Obama election celebrants. Tr. 79. Yet, plainly 500,000 exceptions were made.

The circuit court also found a pattern of favoritism through failing to make even one arrest of 500,000 Obama ralliers ("100% non-enforcement of the curfew") and arresting all 303 Occupy protestors ("100% enforcement of the curfew") over the course of two incidents. A33 (R. C1138). This pure pattern further established that the expressive conduct of the Occupy Defendants was treated differently and less favorably than the celebratory speech of the Obama ralliers.

Similarly situated does not mean identical and the facts and circumstances of the Obama ralliers remaining in the park after curfew closely resembles the Occupy

Defendants, so that an objectively identifiable basis for comparability exists. *Coleman v. Donahoe,* 667 F. 3d 835, 850 (7th Cir. 2012) (comparators must have engaged in similar —not identical—conduct to qualify as similarly situated). *See also Mosdos Chofetz Chaim, Inc. v. Vill. Of Wesley Hills*, 815 F. Supp. 2d 679, 696 (S.D.N.Y. 2011) (comparators should be roughly equivalent and exact correlation is neither likely nor necessary).

The City on appeal complains that the Obama ralliers were not similarly situated because they were not asked to leave the park and the Occupy protestors were arrested two hours after the park curfew. The curfew does not provide for any exception, including requiring a warning or affording a reasonable time to depart. An individual's presence in the park after 11 p.m. establishes the violation. Moreover, the City's argument begs the question: Why were the Occupy protestors asked to leave when the Obama ralliers were not? Therefore, the application of the ordinance equally applied to the Obama ralliers and the Occupy Defendants. Both groups of individuals violated the curfew and therefore were similarly situated and susceptible to a comparative analysis.

The court below found that the City's attempt to justify its treatment of the Occupy Defendants by an alleged procedure to only arrest those who refuse to leave the park when ordered to do so by police was contrary to the plain language of the ordinance. The fact the police ordered one group to leave and not the other does not defeat their status as similarly situated. In fact, the differential police conduct underscores the discriminatory treatment toward the Occupy Defendants. The City's procedure "effectively grants police the discretion to make arrests selectively on the basis of the content of the speech." A23 (R. C1137) (quoting *City of Houston v. Hill*, 482 U.S. 451,

466 n.15 (1987)); *see Bell*, 697 F.3d at 463. There was no evidence that the police made any inquiries of the Obama ralliers. The police simply ignored the ralliers' violation of the curfew ordinance, thus providing them preferential treatment. The comparative analysis of the treatment of the Occupy Defendants with the Obama ralliers shows that the Occupy Defendants were subjected to discriminatory treatment based on the nature and content of their unique speech in violation of the First Amendment.

B. Additional Evidence of Discriminatory Animus.

Admitted discriminatory treatment, in and of itself, supports the conclusion that the different treatment resulted from hostility. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). However, in this case the City's prior treatment of Occupy Chicago further establishes that the differential treatment resulted from its hostility to their viewpoint.

In the months leading up to the arrests, the City, through the Chicago Police Department (CPD), repeatedly showed its discriminatory intent toward Occupy Chicago. From the inception of the protest at its original location, the City, through its police force, engaged in a campaign to harass and intimidate Occupiers in a blatant attempt to disrupt and chill their First Amendment activities. A54, ¶ 10 (R. 227); SA6-7, ¶¶ 4-7, 9, 10 (SR. C26-27); SA2-3, ¶¶ 7-14 (SR. C20-21). Officers constantly monitored and provided arbitrary and capricious directives to protestors. The CPD would promulgate rules for the Occupiers to follow and when the Occupiers followed those rules, the officers would change them. SA2-3, ¶¶ 6-7, 12-14 (SR. C20-21). Officers lulled them into thinking their presence was acceptable in certain locations only to subsequently redirect them and order their removal. *Id.* Officers erected barricades that disrupted pedestrian traffic at

the same time chastising protestors for any and all minor obstructions. SA7, ¶ 10 (SR. C26); SA2-3, ¶¶ 9-10, 12 (SR. C20-21).

Occupy protestors diligently and repeatedly attempted to comply with all directives and appease the City. SA2, ¶¶ 6-7, 12-14 (SR. C20). Occupy Chicago created police liaisons for the purpose of facilitating smooth communication with the police. Self-enforced rules of Occupy Chicago counseled respect for the police. SA5 (SR. C24); SA14, ¶ 16 (SR. C36); SA2, ¶ 5 (R. C20). The CPD's conduct toward property of the Occupiers best exemplifies the blatant hostility directed toward them. Occupiers initially accommodated police demands by storing supplies out of the public way behind a row of planters. SA1, ¶ 5 (SR. C19). Not only did officers direct Occupiers to move and relocate certain property, they brought police dogs to sniff the protestors' supplies. SA1-2, ¶ 6 (SR. C19-20). Occupiers were told the property must be moved first at regular intervals and then, without explanation, that the property must be in constant motion. SA13, ¶ 9 (SR. C35); SA10, ¶ 5-6 (SR. C31). No justification existed for these requirements. The Occupiers went so far in their efforts to attempt to accommodate police directives that they obtained and utilized roller carts. SA13, ¶ 9 (SR. C35). The CPD's ultimate response was to remove and confiscate the Occupiers' property. SA3, ¶ 14 (SR. C21).

This pattern of harassment demonstrates the relationship of the City and the CPD to Occupy Chicago in the days leading up to the arrests. The City's constant changing of rules and directives was conducted in a manner that can only be seen as an attempt to thwart or impede the efforts of Occupy Chicago protestors. This clearly established pattern revealed the City's efforts to chill and obstruct the First Amendment activities of

the Occupy Defendants and further establishes the City's intent to discriminate against them.

III. CERTAIN OCCUPY DEFENDANTS JOIN AND ADOPT ARGUMENTS OF CO-APPELLEES ON APPEAL.

At consolidated proceedings below, the circuit court below rightfully found that the ordinance was unconstitutional on its face and as applied to all the Occupy Defendants. The ruling impacts the constitutional rights of all Occupy Defendants. As appellees directly benefitting from the court's findings, NLG Defendants seek to defend all aspects of that ruling.

Supreme Court Rule 366(a)(5) "provides that this court may, in the exercise of its responsibility to insure that a cause has a just result, ignore the doctrine of waiver and grant any relief that the case may require." *People v. Burchette*, 257 Ill. App. 3d 641, 656 (1st Dist. 1993). Thus, this "court is not precluded from considering issues not properly preserved by the parties, and indeed has 'the responsibility . . . for a just result and for the maintenance of a sound and uniform body of precedent [that] may sometimes override the considerations of waiver.'" *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill.2d 240, 251 (1994) (quoting *Hux v. Raben*, 38 Ill.2d 223, 225 (1967)); *Mellon v. Coffelt*, 313 Ill. App. 3d 619 (1st Dist. 2000). *See also In re Marriage of Turk*, 2013 IL App (1st) 122486; *Geise v. Phoenix Co. of Chicago, Inc.*, 159 Ill.2d 507, 514 (1994) ("[W]aiver is, of course, a limitation on the parties and not the courts.").

In this consolidated appeal, there is an ample record for the reviewing court to draw upon, thereby defeating the primary concern of waiver. Concerns about judicial economy, just results, and maintaining a uniform body of precedent militate in favor of the NLG Defendants defending the entirety of the circuit court's ruling below.

As similarly situated Defendants, NLG Defendants join and adopt Co-Appellees' Brief in this consolidated appeal to the extent that any arguments inure to their benefit.

CONCLUSION

The circuit court of Cook County was correct in recognizing that the arrest of the Occupy demonstrators violated their rights under the United States and Illinois constitutions, and that the ordinance violations proceedings should therefore be dismissed. This ruling should be affirmed on whatever grounds the Court sees fit.

In the alternative, should the Court remand the matter for an evidentiary hearing, Defendants assert they are entitled to full discovery pursuant to the rules of Civil Procedure.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Ill. Sup. Ct. R. 341(a) and (b). The length of this brief, excluding the pages concerning the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 41 pages.

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CERTIFICATE OF SERVICE

I certify that I served the Brief of Certain Defendant-Appellees and Joint Supplemental Appendix by hand delivering placing three copies of each on September 23, 2013.

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