No. 12-2858

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CITY OF CHICAGO, a municipal corporation,

Plaintiff-Appellant,

v.

TIEG E. ALEXANDER, et al.,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County, Illinois
Municipal Department, First District
Nos. 11 MC1 23771801, et al. (cons.)
The Honorable Thomas More Donnelly, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLANT CITY OF CHICAGO

STEPHEN R. PATTON
Corporation Counsel
of the City of Chicago
30 North LaSalle Street, Suite 800
Chicago, Illinois 60602
(312) 744-0746

BENNA RUTH SOLOMON
Deputy Corporation Counsel
MYRIAM ZRECZNY KASPER
Chief Assistant Corporation Counsel
KERRIE MALONEY LAYTIN
Assistant Corporation Counsel
Of Counsel

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE

On two occasions in October 2011, protestors affiliated with the "Occupy Chicago" movement were arrested in Grant Park and charged with violating the Chicago Park District ("Park District") ordinance that prohibits, with limited exceptions, remaining in Chicago parks between 11:00 p.m. and 6:00 a.m. Plaintiff-appellant City of Chicago brought charges against those arrested to prosecute the ordinance violations. Motions to dismiss the charges were filed on behalf of ninety-two of those arrested – defendants-appellees ("defendants") here – and the circuit court consolidated these cases. Defendants' motions asserted that their arrests violated their rights to free expression under the U.S. and Illinois Constitutions and their right to equal protection under the U.S. Constitution. After briefing and oral argument, the circuit court granted defendants' motions, holding that the ordinance is unconstitutional on its face and as applied to defendants, and dismissing the charges. The City appeals. All questions are raised on the pleadings.

ISSUES PRESENTED

1. Whether the circuit court erred in holding the Park District ordinance facially unconstitutional in violation of the First Amendment to the U.S. Constitution.

2. Whether the circuit court erred in holding defendants' arrests unconstitutional in violation of defendants' rights under the First Amendment, the Illinois Constitution, and the Equal Protection Clause of the Fourteenth Amendment.

3. In the alternative, whether the circuit court improperly decided factual issues on a motion to dismiss.

JURISDICTION

The circuit court granted defendants' motions to dismiss on September 27, 2012, dismissing the complaints in this consolidated case with prejudice. A1-A38.[1] On September 28, 2012, the City timely filed its notice of appeal. A244-A250. On October 3, 2012, the City filed an amended notice of appeal, correcting the case caption. A251-A257. This court has jurisdiction under Ill. Sup. Ct. R. 303.

STATEMENT OF FACTS

Defendants were protestors affiliated with Occupy Chicago, a grass roots political movement that, like the nationwide "Occupy" movement, claims to represent the interests of 99% of the U.S. population in challenging wealth inequality favoring the top 1%. A51-A52 ¶¶ 3-5; A61 ¶ 2.[2] On September 22, 2011, Occupy Chicago protestors began

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[1] The record in this case consists of five volumes of common-law record and one volume containing a report of proceedings. We cite the common-law record, which is consecutively paginated, as "C. __." There is also a three-volume supplemental record, containing two consecutively-paginated volumes of common-law record, cited as "SR __," and one volume containing reports of proceedings, cited as "Tr. __." We cite the separate appendix filed with this brief as "A__," and our citations to materials contained in it will be solely to the separate appendix. The table of contents to the separate appendix includes parallel citations to the pages of the record corresponding to each document in the separate appendix for the purpose of locating the document in the record.

[2] Our statement of facts relies on the filings and supporting affidavits associated with defendants' motions to dismiss. These motions to dismiss fall into two categories – those filed on behalf of defendants represented by several different attorneys who are members of the National Lawyers Guild ("NLG defendants") and those filed on behalf of defendants represented by Durkin & Roberts ("Durkin defendants"). The NLG defendants' motion papers are virtually identical, C. 81-89, 224-32, 691-99, 734-42, 752-60, 762-70, 789-97, 806-14, 996-1004, 1005-13; SR 101-18; SR 156-64, and we will cite one set, which we include in this brief's separate appendix at A51-A59 and A189-A206. Similarly, the Durkin defendants' motion papers are alike, C. 233-63, 365-78, 443-59, 472-88, 509-22, 581-93; SR 119-55, and we will again cite one set, found in the separate (continued...)

demonstrating on the sidewalks in front of the Federal Reserve, the Chicago Board of Trade, and the Bank of America buildings, at Jackson Boulevard and LaSalle Street, an intersection with heavy pedestrian and vehicular traffic. A54 ¶ 9; A61 ¶ 3; A110-A111 ¶¶ 4-5. According to defendants, this area was symbolic of the "financial interests that are at the root of our country's economic collapse and numerous economic and social inequalities." E.g., A200 ¶ 5; A224 ¶ 5; A229 ¶ 5; A234 ¶ 5. The Chicago Police Department ("CPD") permitted protestors to remain on the sidewalks for up to 24 hours per day, but did not permit them to store provisions, erect structures, or block pedestrian or vehicular traffic. A111 ¶ 5. These restrictions protect the health, safety, and welfare of both protestors and members of the public who use the streets and sidewalks. A111 ¶ 5. Thereafter, Occupy Chicago conducted, without incident, a number of protests, rallies, marches, and assemblies, with CPD present to maintain order and assist with traffic control. A111 ¶ 6.

On October 15, 2011, Occupy Chicago conducted a rally near the intersection of Jackson and LaSalle. A111 ¶ 7. Protestors then marched around downtown Chicago for approximately one hour and entered Grant Park at the northeast corner of Michigan Avenue and Congress Parkway. A111 ¶ 7. Protestors made speeches over a public announcement ("PA") system, chanted that they would not leave the park, and erected

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[2](...continued)
appendix at A60-A90 and A189-A206.

The circuit court granted the City's motion to strike certain portions of the affidavits defendants attached to their reply briefs; the stricken portions contained hearsay, improper opinion testimony, or statements that were conclusory or not based on personal knowledge. A39-A50. Some of these affidavits appear to be missing from record. We intend to supplement the record with them as soon as we can obtain complete copies.

approximately thirty tents. A111 ¶ 8. Throughout the evening, CPD command personnel communicated with protestors and attorneys from the National Lawyers Guild ("NLG") and informed them that protestors would not be allowed to remain in Grant Park after it closed at 11:00 p.m. A111-A112 ¶ 9. NLG attorneys, in turn, informed protestors over the PA system that the Park District ordinance required them to leave the park by 11:00 p.m., and that if they did not, they would be subject to arrest. A112 ¶ 9.

CPD estimated that there were approximately 3,000 protestors in Grant Park at around 7:15 p.m. A111 ¶ 8. At approximately 8:00 p.m., the number of protestors had dwindled to 700. A112 ¶ 10. Before 11:00 p.m., CPD used the PA system to read the language of the Park District ordinance and warn protestors that, if they stayed in the park after 11:00 p.m., they would be subject to arrest, and they should leave if they did not want to be arrested. A112 ¶ 11. At approximately 10:45 p.m., around 200-300 protestors relocated from the park to the sidewalk on the west side of Michigan Avenue in front of Roosevelt University. A112 ¶ 12. CPD permitted these protestors to continue their protest there. A112 ¶ 12. Approximately 300 protestors remained in Grant Park. A112 ¶ 12.

At approximately 1:00 a.m. on October 16, 2011, CPD again used the PA system to warn protestors regarding the park's closing; CPD also asked each protestor individually whether he or she wanted to leave the park or be arrested. A112 ¶ 13. CPD then arrested the 173 protestors who refused to leave after these warnings for violating chapter VII, section B.2 of the Park District Code. A112 ¶¶ 13-14.

On October 22, 2011, Occupy Chicago protestors staged another rally in the vicinity of Jackson and LaSalle. A115 ¶ 4. CPD estimated that there were approximately

1,500 protestors at 7:00 p.m., when the group marched to the northeast corner of Michigan and Congress in Grant Park. A115-A116 ¶ 5. At around 8:00 p.m., there were approximately 1,500 to 3,000 protestors in Grant Park, and CPD heard protestors begin announcing plans to stay and set up a permanent encampment. A116 ¶ 6. At around 8:45 p.m., with approximately 1,500 protestors remaining in the park, CPD heard protestors begin chanting, "The Occupation is not leaving!" A116 ¶ 7.

Throughout the evening, CPD command personnel informed Occupy Chicago members and NLG attorneys that protestors would not be allowed to remain in Grant Park after it closed. A116 ¶ 8. Before 11:00 p.m., CPD announced over a Long Range Acoustical Device that the park closed at 11:00 p.m. and those who remained after 11:00 p.m. would violate the law and be subject to arrest. A116 ¶ 9.

After 11:00 p.m., CPD again announced that the park was closed and those who remained were subject to arrest. A116 ¶ 10. Many protestors left the park and relocated across the street to the west side of Michigan Avenue in front of Roosevelt University. A116 ¶ 11. Many other protestors left the park and lined up along the east sidewalk of Michigan Avenue immediately adjacent to Grant Park. A116-A117 ¶ 11. CPD approached each protestor who remained in Grant Park after 12:45 a.m. on October 23, 2011 and asked if he or she wanted to leave the park or be arrested. A117 ¶ 12. After these warnings, CPD arrested the 130 protestors who refused to leave for violating Park District Code chapter VII, section B.2. A117 ¶¶ 12-13.

Pursuant to its authority under the Municipal Code of Chicago, Ill. § 10-36-185 (2013), the City pursued charges against defendants for violating the Park District ordinance. E.g., C. 824-31; see also A95 n.2. The circuit court consolidated defendants'

separate cases. C. 1054-57; C. 1064-70 (City's motion).

Defendants filed motions to dismiss the charges. A51-A90. The NLG defendants' motion alleged that their arrests violated the First Amendment because there was no other adequate forum to express their views and because their message was a substantial motivating factor in their arrests. A57 ¶ 21; A58-A59 ¶ 28. They further alleged that their arrests violated the Equal Protection Clause because CPD does not routinely arrest people in the park after 11:00 p.m., but instead ignores them or issues citation tickets. A57 ¶ 22. The Durkin defendants' motion alleged that the ordinance violates the First Amendment and the Illinois Constitution and that the City selectively enforced the ordinance against them based on their viewpoint in violation of the First Amendment. A60; A64 ¶ 12; A78-A89. Defendants did not attach affidavits to their motions, as required by section 2-619(a) of the Illinois Code of Civil Procedure, which applies where the grounds for the motion do not appear on the face of the complaint. See 735 ILCS 5/2-619(a)(9) (2010). The City filed a response to defendants' motions, along with supporting affidavits, A91-A188, and defendants filed replies, which included supporting affidavits for the first time, A189-A206; A207-A243. The court heard oral argument on the motions to dismiss on February 15, 2012. Tr. 2-128.

Thereafter, pursuant to leave of the court, C. 1159, the City moved to strike defendants' affidavits because they were not timely filed or, in the alternative, to strike certain portions of the affidavits because they contained hearsay, improper opinion testimony, or statements that were conclusory or not based on personal knowledge, SR 167-75. Defendants filed responses to the motion to strike, SR 222-65; SR 266-82, and the City filed replies, SR 285-309; SR 327-34. In addition, the Durkin defendants filed a

motion seeking discovery pursuant to Ill. Sup. Ct. R. 191(b), SR 178-205; the City filed a response, SR 208-21; and the Durkin defendants filed a reply, SR 310-24. The court heard oral argument on the City's motion to strike and the Durkin defendants' motion for discovery. C. 1160; Tr. 129-92. The court granted the City's motion to strike certain portions of defendants' affidavits and denied the Durkin defendants' motion for discovery. A39-A50.

At the oral argument on the motions to dismiss, the NLG defendants agreed they were not challenging the Park District ordinance on its face, but only as applied to them. Tr. 15-16, 89. Their counsel asserted that the test for an as-applied challenge is whether there was "an ample opportunity given to [a] group . . . to make [its] statement" and "to set forth their political viewpoints," Tr. 23, and "you have to look at whether [the City] had a significant governmental interest," Tr. 27. Counsel also argued that "the City had an obligation to allow [defendants'] political statement, to allow this political movement by an occupation of Grant Park . . . on those two distinct evenings," Tr. 25. Counsel argued that the NLG defendants had not waived their as-applied challenge, but could not identify cases they cited about as-applied challenges. Tr. 90-92.

Counsel for the Durkin defendants argued that they were challenging the Park District ordinance "on its face" and that the test is whether the ordinance is "a reasonable time, place and manner restriction." Tr. 39. Counsel also claimed these defendants had challenged the ordinance "as applied." Tr. 45. According to counsel, there was no evidence the City had "provided any ample alternative channel for communication of this information," Tr. 39-40, and the City "never once attempted to negotiate with [defendants] to provide them with an alternative space," Tr. 44; see also Tr. 59-60.

Counsel for the City argued that the Park District ordinance is facially constitutional under Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984). Tr. 75-78, 83. With respect to whether there are alternative channels available for exercising First Amendment rights, counsel noted that the parks are open to protestors for 17 out of 24 hours per day, and non-park property is open 24 hours per day. Tr. 70. Counsel also explained that the First Amendment does not require governments to negotiate with particular groups to provide alternative channels for their expression; instead, it requires only that alternatives be available. Tr. 70-71. Counsel further argued that defendants had not identified anyone similarly situated who was treated differently, precluding a selective enforcement claim. Tr. 79-82.

The court issued its memorandum and opinion granting the motions to dismiss on September 27, 2012. A1-A38. According to the court, the Park District ordinance is facially unconstitutional in violation of the First Amendment to the U.S. Constitution. A2. The court agreed that the ordinance is a "uniform regulation of conduct" and "content-neutral on its face"; it "does not describe speech by content on its face, nor does it distinguish favored speech from disfavored speech on the basis of the ideas or views expressed." A19. The court also agreed that the ordinance "serves legitimate government interests" because closing parks for a period overnight allows park employees to maintain the parks; ensures park facilities do not become over-fatigued; and reduces crime against park patrons and property. A19-A20. But the court thought the ordinance was nevertheless facially unconstitutional because the court did not believe that the ordinance is narrowly tailored or leaves open ample alterative channels for expression. A20.

Regarding alternative channels, the court thought it was not relevant whether "on a particular night a certain group had no remaining channel to express their [sic] views." A20. Instead, according to the court, the relevant test on a facial challenge is "whether third parties not before the court would have realistic and ample alternative channels of expression" and whether the restriction on expression is "so great . . . that citizens are left without ample alterative channels of expression for their views." A20. The court thought that there were no realistic alternatives to Grant Park for large groups of people, such as groups of 500,000 to 1,000,000, to gather. A21. The court believed it was reasonably foreseeable that large groups would want to rally at midnight in the park in the future, and thus that the ordinance would be unconstitutional in a substantial number of cases. A20.

Regarding narrow tailoring, the court believed it was required to weigh whether the ordinance closes parks any "longer than is necessary [to] preserve park safety and greenery, collect the garbage, and make repairs." A23. According to the court, because the City has not enforced the ordinance "on certain occasions," that constituted an admission that the ordinance closes the park longer than necessary: "If the City repeatedly make[s] exceptions to the seven-hour closing rule, that is inconsistent with the notion that closing Grant Park every night for seven hours is necessary for park maintenance and preservation." A23; see also A26 (City "implicitly concedes" undue burden on expression by making occasional exceptions). The court refused to credit the affidavit of a Park District official, attached to the City's response, regarding the Park District's need for closing the parks overnight, because he "fail[ed] to provide the length of time spent by park district staff during the nights working on park cleaning and maintenance"; "never aver[red] that any work is done on the parks during the night"; and

did not explain "how occasional events interfere so greatly with maintenance or cleaning." A23-A24. According to the court, it was "difficult to credit his assertion[s]"; "the credibility of his assertions [was] undermined"; and "the probative value of his affidavit [was] diminished" by what the court perceived to be a lack of factual details in his affidavit. A24-A25. The court conceded park that managers might "properly determine camping and certain activities should be forbidden in the park based on park preservation or maintenance concerns," but thought it "beyond their expertise" to close the parks to all expressive activity overnight. A25.

The court further held that the ordinance violates the Illinois Constitution's right to free assembly. A27-A28. According to the court, the Illinois Constitution provides broader protection than the U.S. Constitution because it extends to all peaceable assemblies, including non-expressive assemblies, which "increases the number of applications in which the [ordinance] would infringe on the right to free assembly." A27. The court believed that the Illinois Constitution protects an overnight gathering by picnickers just as much as a protest. A28. The court thought this was an "independent and adequate state ground[ ] for . . . dismissal [of the complaints]." A28.

The court also ruled that dismissal was required because the City had applied the ordinance to defendants "selectively in a viewpoint discriminatory way," A28, in violation of equal protection, A29-A34, A37-A38. The court agreed this challenge required proof that the parties claiming selective enforcement "received different treatment from others similarly situated" and "the differing treatment was clearly based on their exercise of First Amendment rights." A30. Thus, establishing this required proof of intent to discriminate, not merely awareness that adverse effects would result.

A31. In the court's view, the group attending the 2008 Obama election-night rally was similarly situated to defendants, yet received better treatment: Both groups remained in Grant Park after it closed in violation of the ordinance, and defendants were treated differently because they were told to leave whereas the Obama rally participants were not. A31-A32. The court believed this constituted discriminatory enforcement because "if the police decide not to tell one group to leave, the [ordinance] is not violated," which gives CPD "unguided discretion" over whom to arrest and "flies in the face of the [ordinance's] plain language." A33 (internal quotation marks omitted).

The court also believed that defendants had proved they were treated differently from the Obama rally participants because of their exercise of First Amendment rights. A34. According to the court, not arresting the Obama rally participants on one occasion constituted a "clear pattern" compared to defendants' arrests on two separate occasions, which suggested "hostility." A34. The court also believed that defendants had shown the City had "hostility to their viewpoint" because, in the month preceding their arrests, while they protested at the intersection of Jackson and LaSalle, CPD became increasingly stricter about not allowing defendants to leave their belongings on the public way. A34-A36. Although "in isolation the rules and regulations appear reasonable," the court saw "an inference that the City was attempting to discourage this particular protest." A36. According to the court, this treatment, "together with the clear pattern of selective enforcement of the [ordinance], support a finding that the City *intended* to discriminate against [d]efendants based on their views." A37. This established the ordinance was unconstitutionally applied to defendants. A37.

The City appeals. A244-A257.

ARGUMENT

The Park District ordinance is directed at conduct, not expression. With minor exceptions, no one is allowed to be present in City parks between the hours of 11:00 p.m. and 6:00 a.m. Although this naturally affects those who wish to use the parks for expressive purposes, the ban also extends to picnickers, soccer players, and stargazers. As a content-neutral regulation with only an incidental effect on free expression, the constitutionality of the ordinance is judged by whether it serves important governmental interests unrelated to the suppression of free expression and does not restrict First Amendment freedoms substantially more than necessary.

The Park District ordinance easily satisfies this test. The circuit court itself agreed that performing park maintenance, conserving park property, and reducing the opportunity for crime constitute substantial governmental interests completely unrelated to free expression. Indeed, these purposes ensure that parks will be in the best condition for the enjoyment of the general public. Closing parks for seven hours per day during the hours when the fewest people seek to use parks is not more restrictive than necessary to achieve these ends. Moreover, there are ample alternative locations for those who wish to exercise their First Amendment rights during the late-night hours.

Nevertheless, in a sweeping ruling, the circuit court invalidated the Park District ordinance on its face. Under this ruling, the parks must be open to all comers – protestors and picnickers alike – 24 hours per day. This profoundly misunderstands applicable constitutional standards. The court found the ordinance facially unconstitutional based on the remote possibility that others not before the court might not be able to exercise their

First Amendment rights in the future, without explaining how the ordinance could possibly violate the First Amendment when applied to the vast majority of cases, including when applied to those not exercising First Amendment rights and to these defendants. Moreover, the court doubted that closing the parks for seven hours per day was necessary, ignoring that the judiciary is not competent to serve as parks manager and that multiple alternatives are available for First Amendment expression during the few hours per day the parks are closed. In addition, the court incorrectly interpreted the Illinois Constitution to require greater protection for the assembly rights of those gathered for non-expressive activity, such as picnickers – no precedent supports that view and even defendants did not raise the argument. The Park District ordinance plainly satisfies the correct constitutional standards.

Nor is there any selective enforcement in applying the Park District ordinance to these defendants. The Obama rally participants are not similarly situated, and defendants lack evidence that the two groups were treated differently in any meaningful way. Regardless, by definition, one incident in which the ordinance was not enforced against others cannot constitute a "pattern," and defendants lack evidence that the City enforced the ordinance against them because of their protected expression.

In short, the circuit court should not have struck down the ordinance and dismissed the complaints. This court owes no deference to the circuit court on whether legislation is constitutional; review is de novo, and there is a strong presumption in favor of constitutionality. See, e.g., In re Detention of Samuelson, 189 Ill. 2d 548, 558 (2000); Russell v. Department of Natural Resources, 183 Ill. 2d 434, 441 (1998). Moreover, the familiar standards applicable to motions to dismiss brought under section 2-619(a)(9)

govern this court's analysis whether defendants' challenges require dismissal of charges against them. Affirmative matters negating a claim that are not apparent on the face of the complaint must be supported by affidavit. See, e.g., Kedzie & 103rd Currency Exchange, Inc. v. Hodge, 156 Ill. 2d 112, 116 (1993). If a defendant satisfies the initial burden, the burden shifts to the plaintiff, who can supply counter-affidavits to refute evidentiary facts or establish that the defense is unfounded. See, e.g., id. The trial court then considers the pleadings and affidavits in deciding whether to grant the motion, which must be viewed in the light most favorable to the nonmoving party. See, e.g., Sage Information Services v. King, 391 Ill. App. 3d 1023, 1028, 1035 (2d Dist. 2009). In ruling on the motion, the court should not weigh evidence or resolve controverted facts. See, e.g., id. at 1035. If the submitted affidavits present disputed facts, there must be an opportunity for an evidentiary hearing. See, e.g., In re Marriage of Vaughn, 403 Ill. App. 3d 830, 836 (1st Dist. 2010). On appeal, this court decides de novo whether there is a genuine issue of material fact precluding dismissal or whether dismissal is appropriate as a matter of law. See, e.g., Kedzie, 156 Ill. 2d at 116-17. Under these standards, the circuit court should not have granted defendants' motions to dismiss, and this court should reverse that judgment.

Below, we first explain that the ordinance is constitutional on its face. Next, we explain that the ordinance may be constitutionally applied to defendants here, and they have no claim for selective enforcement or viewpoint discrimination. Finally, we explain that to the extent defendants' claims depend on weighing evidence and assessing witness credibility, the circuit court erred by not conducting an evidentiary hearing.

I. THE PARK DISTRICT ORDINANCE IS NOT FACIALLY UNCONSTITUTIONAL.

The Park District ordinance survives facial challenge. The U.S. Supreme Court has admonished that invalidating an enactment on its face "is, manifestly, strong medicine" that should be prescribed "sparingly and only as a last resort." E.g., National Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998) (internal quotation marks omitted). This is because facial challenges "often rest on speculation," "run contrary to the fundamental principle of judicial restraint," and "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 450-51 (2008).

There are two types of facial challenges: those claiming legislation is "unconstitutional in every conceivable application" and those claiming it is unconstitutional "because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'" Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984); accord, e.g., New York State Club Association, Inc. v. City of New York, 487 U.S. 1, 11 (1988). Facial challenges of the first type contend that "the statute could never be applied in a valid manner," typically because enforcing the law "would create an unacceptable risk of the suppression of ideas." Taxpayers for Vincent, 466 U.S. at 797-98. Challenges of the second type are rooted in concern that some broadly written laws "may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected" and "even though a more narrowly drawn statute would be valid as applied to the party in

the case before it." Id. at 798-99.

Defendants have not argued that the Park District ordinance is facially invalid for either reason. Indeed, the NLG defendants denied bringing a facial challenge. Tr. 15-16, 89. The Durkin defendants claimed they were challenging the ordinance on its face, Tr. 39, but nowhere explained how the ordinance could be unconstitutional in every application, nor claimed that, although the ordinance was valid as applied to them, it was overbroad because of the possibility it could chill another's expression. The circuit court should not have reached out to decide whether the ordinance was facially unconstitutional when that question was not properly presented. Deciding an issue that has not been adequately briefed is disfavored. See, e.g., People v. Eddington, 129 Ill. App. 3d 745, 781 (4th Dist. 1984) (deciding issue "without the benefit of briefing by the parties . . . [is] an unjustified intrusion into the normal adversarial process") (Miller, J., concurring in part and dissenting in part). In particular with respect to overbreadth challenges, the U.S. Supreme Court "generally do[es] not apply the strong medicine of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law." Washington State Grange, 552 U.S. at 449 n.6 (internal quotation marks omitted). That aside, neither type of facial invalidity applies here, as we now explain.

A. Not Every Conceivable Application Of The Park District Ordinance Violates The First Amendment.

At the outset, it is clear that the Park District ordinance, on its face, does not regulate expression at all, much less on the basis of content. Instead, the ordinance prohibits a specific kind of nonexpressive conduct – remaining in a park between the hours of 11:00 p.m. and 6:00 a.m. Indeed, the circuit court conceded just that. A19

(ordinance "acts as a uniform regulation of conduct"). It is well established that where, as here, a challenged law "deal[s] with conduct subject to regulation so as to vindicate important interests of society," the fact that there might, in certain situations, be expression "intermingled with [the regulated] conduct does not bring with it constitutional protection." E.g., Cox v. Louisiana, 379 U.S. 559, 564 (1965). Indeed, the Supreme Court has upheld a ban on a broad swath of conduct – camping and sleeping in parks – where the regulation did not define the banned conduct with reference to its expressive conduct, even though the effect of applying the ordinance to particular demonstrators ended their expressive activity. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293-99 (1984). Even regulations addressed directly to activity with an obvious expressive component can pass muster: "nonverbal expressive activity can be banned because of the action it entails," so long as the ban is "not because of the ideas it expresses." R.A.V. v. City of St. Paul, 505 U.S. 377, 385 (1992) (noting that "burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not"). In short, in many cases the government may permissibly regulate conduct, even conduct with an expressive component, without running afoul of the First Amendment.

Applying these principles to the Park District ordinance, it is easy to conceive of many applications in which the ordinance is constitutional. The First Amendment's protection for free expression does not give picnickers, soccer players, stargazers, or others engaged in non-expressive conduct the right to use City parks between the hours of 11:00 p.m. and 6:00 a.m. – or, indeed, a constitutional right to use them at any time. Regulating uses of the park unrelated to free expression is plainly within the City's

governmental powers. Cf. Clark, 468 U.S. at 298-99 ("No one contends that aside from its impact on speech a rule against camping or overnight sleeping in public parks is beyond the constitutional power of the Government to enforce."). Indeed, defendants do not contend otherwise. As such, the circuit court wrongly concluded the Park District ordinance is facially invalid in all of its applications.

To be sure, where, as here, regulating particular conduct has an incidental effect on expressive activity, such laws are subject to intermediate scrutiny to ensure they do not violate the First Amendment. The appropriate test is the one set forth in United States v. O'Brien, 391 U.S. 367 (1968):

> a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377. This test is generally used to evaluate whether a regulation is constitutional as applied to particular activity with an expressive component. See, e.g., Taxpayers for Vincent, 466 U.S. at 803-05. We address whether the Park District ordinance is constitutional as applied to defendants' expressive activity in Part II, below.

B. The Park District Ordinance Is Not Substantially Overbroad.

Nor is the ordinance subject to facial challenge on overbreadth grounds. The overbreadth doctrine is an exception to general standing requirements that prohibit deciding the claims of parties not before the court. See, e.g., Taxpayers for Vincent, 466 U.S. at 796-99. The rationale for the exception is that a broadly written law's "very existence may cause others not before the court to refrain from constitutionally protected

speech or expression." Id. at 799 (internal quotation marks omitted).

Still, the Supreme Court has cautioned that the exception to ordinary standing requirements should not swallow the rule. Invalidating a law as overbroad merely predicts that others not before the court will be inhibited; this is proper only if the overbreadth is "not only . . . real, but substantial as well, judged in relation to the [law's] plainly legitimate sweep." Taxpayers for Vincent, 466 U.S. at 799-800 (emphasis added; internal quotation marks omitted). Otherwise, "particularly where conduct and not merely speech is involved," the overbreadth doctrine would improperly prevent the government from enforcing a law "against conduct that is admittedly within its power to proscribe." Id. at 799 (internal quotation marks omitted). Indeed, "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." Virginia v. Hicks, 539 U.S. 113, 124 (2003). And "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." Taxpayers for Vincent, 466 U.S. at 800. In short, overbreadth is not found where a law's "legitimate reach dwarfs its arguably impermissible applications." New York v. Ferber, 458 U.S. 747, 773 (1982).[3]

Here, in the vast majority of situations, applying the Park District ordinance – which, again, is directed at conduct, not speech – will not create any First Amendment problems. Those who wish to use the parks for the purpose of constitutionally-protected free expression form a small subset of all those who use the parks. Indeed, the Supreme

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[3] Any impermissible applications of a law can, of course, be challenged as they arise. See, e.g., Hicks, 539 U.S. at 124. We address this issue in Part II, below.

Court has held that a law applicable to everybody who entered certain streets was not subject to an overbreadth challenge because those "not engaged in constitutionally protected conduct," including "strollers, loiterers, drug dealers, roller skaters, bird watchers, [and] soccer players" would "seemingly far outnumber First Amendment speakers." Hicks, 539 U.S. at 123. And, here, those who wish to use the parks for expressive activity during the late-night hours is but a small subset of those using the parks for expression – generally, those who use parks for expressive purposes hope to reach others with their message, and in the late-night hours there are the fewest people around to reach. To be sure, there are legitimate reasons that expressive activity during late-night hours might be necessary or desirable. See, e.g., Hodgkins ex rel. Hodgkins v. Peterson, 355 F.3d 1048, 1062-63 (7th Cir. 2004) (listing examples). But they plainly do not dwarf or substantially outnumber non-expressive park uses, much less expression during other times. Because the ordinance potentially affects only a tiny fraction of park users, it is not subject to facial invalidation on overbreadth grounds.

The circuit court's ruling seemed to rely on an overbreadth theory. For example, the court believed that it was required to consider whether the ordinance would "significantly compromise recognized First Amendment protections of *parties not before* the Court." A7 (internal quotation marks omitted; emphasis in original); see also A14 (stating First Amendment challenges require historical review because court must determine interests of "parties *not before the Court*") (internal quotation marks omitted; emphasis in original); A20 (claiming facial challenge focuses on "third parties not before the court"). Likewise, the court believed that "the question properly put is whether other groups *not before the court* would have ample alternative channels for large late-night

assemblies." A20 (emphasis in original).

This greatly misunderstands overbreadth principles. Instead of evaluating whether the risk that the ordinance potentially could be misapplied to protected late-night expressive activity so substantially dwarfs its other applications, the court flipped this test on its head. It identified about a dozen examples of late-night expressive activity in the past half century. A18-A19; see also A20 (relying on "several examples"); A27 (referencing supposed "parade of nighttime assemblies"). Then, from these few instances, the court leaped to the conclusion that the ordinance was "unconstitutional in a substantial number of its applications." A20 (internal quotation marks omitted). But it is settled that invalidation on overbreadth grounds cannot be based on "the mere fact that [a court could] conceive of some impermissible applications." Taxpayers for Vincent, 466 U.S. at 800.[4]

Facial invalidation on overbreadth grounds is also inappropriate where there is "nothing in the record to indicate that the ordinance will have any different impact on any third parties' interests in free speech" than it does on the party raising the constitutional challenge. Taxpayers for Vincent, 466 U.S. at 801. Here, defendants have never claimed that there is anyone who is not a party to the case with a stronger First Amendment claim

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[4] The court also speculated that there is no realistic alternative to Grant Park for 500,000-1,000,000 people and that "throughout its history Grant Park has hosted such late night assemblies." A21. In one of these examples, the Obama election rally, the ordinance was not enforced, as the court noted. A25. That is the basis for defendants' claim, A64 n.1, A86-A87, A218-A221, and the court's conclusion, A37, that the ordinance was enforced selectively. We address that argument below. Given that argument, there was no basis for the court to rely on the Obama rally participants as a group whose rights could be affected by the ordinance.

than they have.[5] No doubt for that reason, they did not even urge invalidation on overbreadth grounds. But it is settled that where those challenging the ordinance "fail[ ] to identify any significant difference between their claim that the ordinance is invalid on overbreadth grounds and their claim that it is unconstitutional when applied to [them]" and do "not attempt[ ] to demonstrate that the ordinance applies to any conduct more likely to be protected by the First Amendment than their own," it is "inappropriate . . . to entertain an overbreadth challenge to the ordinance," and, instead, the court should consider only whether the ordinance "is invalid as applied to [particular] expressive activity." Id. at 802-03. In short, the circuit court overstepped its bounds by declaring the ordinance to be facially unconstitutional – it is not subject to any recognized facial challenge.

II. THE PARK DISTRICT ORDINANCE IS CONSTITUTIONAL AS APPLIED TO DEFENDANTS.

The Park District ordinance also is constitutional as applied to defendants. Below, we explain that the ordinance can be validly applied to defendants' expressive activity without violating the U.S. or Illinois Constitutions, and the ordinance was not enforced in a discriminatory manner.[6]

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[5] Indeed, defendants seem to have gone out of their way to foreclose such a showing. They made a point of explaining how careful they were to avoid damaging the park and how cooperative they were with police. A193, A210. Thus, as in Taxpayers for Vincent, "if the ordinance may be validly applied to [defendants], it can be validly applied to most if not all . . . parties not before the [c]ourt." 466 U.S. at 802.

[6] Defendants claimed the right to protest in the park between 11:00 p.m. and 6:00 a.m. They disavowed any intention to remain permanently in the park or to camp there, e.g., A202 ¶ 15; A231 ¶ 15; A236 ¶ 15, and did not claim a First Amendment right to camp in their motion papers. Rightly so. Any such claim would be foreclosed by the Supreme Court's decision in Clark. See 468 U.S. at 297-99.

A. The Park District Ordinance Is Constitutional Under The First Amendment As Applied To Defendants' Expressive Activity.

As we have explained, the O'Brien test for content-neutral regulations of conduct with only an incidental effect on expression applies here. That test considers whether the governmental interest in closing the parks during the late-night hours is substantial and unrelated to the suppression of ideas; whether the effect on expressive activity is no greater than necessary to accomplish that purpose; and whether the remaining modes of communication are inadequate. See, e.g., Taxpayers for Vincent, 466 U.S. at 805, 812; O'Brien, 391 U.S. at 377. In the end, this test "'is little, if any, different from the standard applied to time, place, and manner restrictions'" on expression. Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (quoting Clark, 468 U.S. at 298); accord, e.g., R.A.V., 505 U.S. at 386; Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (plurality opinion); Hodgkins, 355 F.3d at 1057. The time, place, and manner test requires that regulations of expression be "'justified without reference to the content of the regulated speech'"; "'narrowly tailored to serve a significant governmental interest'"; and "'leave open ample alternative channels'" for expression. Ward, 491 U.S. at 791 (quoting Clark, 468 U.S. at 293). The circuit court utilized the time, place, and, manner test. A7. Under either test, the Park District ordinance is constitutional.

1. Substantial governmental interests unrelated to suppressing expression justify the Park District ordinance.

It is well settled that preserving parks for the public's enjoyment is a substantial governmental interest. "[T]here is a substantial Government interest in conserving park property, an interest that is plainly served by, and requires for its implementation,

measures such as the proscription of sleeping that are designed to limit the wear and tear on park properties." Clark, 468 U.S. at 299. Moreover, "[i]t is well settled that the state may legitimately exercise its police powers to advance esthetic values." Taxpayers for Vincent, 466 U.S. at 805.

The Park District ordinance serves both of these interests. A central mission of the Park District, which owns and maintains Grant Park, is to "provide safe, inviting and beautifully maintained parks and facilities." http://www.chicagoparkdistrict.com/about-us/mission-core-values (last visited May 7, 2013). This enhances the quality of life in the City, encourages all children and families to enjoy the parks and their facilities, and implements responsible stewardship practices to preserve the parks for future generations. See id. As the Park District official explained in his affidavit attached to the City's response to the motions to dismiss, overnight closure of the parks gives "park employees [the opportunity] to collect trash, make repairs to park facilities, and maintain the landscaping," which ensures "parks remain sanitary and pleasing to the eye with limited disruption and maximum safety to park patrons." A120 ¶ 4. It also ensures that "park facilities do not become over-fatigued." A120 ¶ 4.

Preventing crime is another substantial governmental interest. See, e.g., Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 650 (1981) (protecting safety of people in public forum is "valid governmental objective"); cf. Taxpayers for Vincent, 466 U.S. at 807 ("[T]he city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect.") (internal quotation marks omitted; alterations in original). Closing the parks during the dark overnight hours when few people are around serves this interest by eliminating

spaces that could otherwise facilitate crime. As the Park District official explained, "limit[ing] access to pedestrians during park closure hours reduces crime against park patrons and park property." A120 ¶ 4.

Defendants do not dispute that the governmental interests underlying the ordinance are substantial. Indeed, the Durkin defendants did not discuss the significance of the interests at stake in their motion or reply. And the NLG defendants acknowledged "the beauty of Grant Park," A194, and claimed only that their use of the park would not have impeded the ability of the Park District to maintain the park because they "specifically intended and planned to maintain the area [of their protest] in a clean and undisturbed condition" and "to keep[ ] all of their spaces clean, safe and orderly," A193. Even the circuit court conceded that the Park District ordinance "serves legitimate government interests." A20; see also A9 ("There is a substantial government interest in conserving park property."). Thus, this element of both the O'Brien and time, place, and manner tests is plainly satisfied.

2. The Park District ordinance's effect on expression is no greater than necessary and is narrowly tailored to serve substantial governmental interests.

Under both the O'Brien and time, place, and manner tests, regulations must serve the government's interests without restricting substantially more expression than necessary for the purpose. See, e.g., Taxpayers for Vincent, 466 U.S. at 808; Ward, 491 U.S. at 798-99. But the correct question on this prong is not whether "there is some imaginable alternative that might be less burdensome on speech." United States v. Albertini, 472 U.S. 675, 689 (1985); accord, e.g., Ward, 491 U.S. at 797. It is settled that the regulation need not employ the "least restrictive or least intrusive means." Ward, 491

U.S. at 798. Instead, burdening expression is acceptable if satisfying the government's substantial interests "would be achieved less effectively absent the regulation." E.g., Albertini, 472 U.S. at 689; accord, e.g., Ward, 491 U.S. at 799. This "does not turn on a judge's agreement . . . concerning the most appropriate method for promoting significant government interests." Albertini, 472 U.S. at 689. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Ward, 491 U.S. at 800.

In this case, closing the parks for seven hours overnight is not substantially more restrictive than necessary to serve the Park District's substantial interests in maintaining and conserving park property and reducing crime. Closing the parks overnight precisely serves these interests because it gives the Park District the opportunity to do maintenance and beautification without people around; allows the parks a reprieve from traffic; and reduces opportunities for crime. It is beyond dispute – and undisputed in this case – that when parks are accessible to the public, the public's use of the parks causes wear and tear. And that is true whether that use is for purposes of expression or for some other purpose. Cf. Clark, 468 U.S. at 298 ("Damage to the parks as well as their partial inaccessibility to other members of the public can as easily result from camping by demonstrators as by nondemonstrators. In neither case must the Government tolerate it."). It is also beyond dispute that the overnight hours are the ones most fraught with risk for crime. Thus, closing the parks for a period of hours overnight addresses precisely the governmental interests in maintaining and conserving park property and reducing crime.

Indeed, the regulation does "no more than eliminate the exact source of the evil it sought to remedy." Taxpayers v. Vincent, 466 U.S. at 808.

Clark is squarely on point. There, the Court upheld a ban on overnight camping in the parks because "there is a substantial Government interest in conserving park property, an interest that is plainly served by, and requires for its implementation, measures such as the proscription of sleeping that are designed to limit the wear and tear on park properties." 468 U.S. at 299. Moreover, "the regulation narrowly focuses on the Government's substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence." Id. at 296. According to the Court, permitting overnight camping "would be totally inimical to these purposes, as would be readily understood by those who have . . . observed the unfortunate consequences of the activities of those who refuse to confine their camping to designated areas." Id. "If the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment . . . [because] the regulation 'responds precisely to the substantive problems which legitimately concern the [Government].'" Id. at 297 (quoting Taxpayers for Vincent, 466 U.S. at 810) (alteration in original).

Just as in the Nation's Capital, the use of City parks during the overnight hours would impede the Park District's ability achieve its goals of maintenance, preservation, and crime reduction. On this issue, it does not matter whether the Park District's ends might also be served in a different or less restrictive manner – for example, by closing the

parks for six instead of seven hours or making exceptions for expressive activity. As we have explained, a regulation is acceptable unless it burdens substantially more expression than necessary, and government need not select the least restrictive method of achieving its goals. The judiciary should not attempt to micro-manage these types of decisions, especially with respect to park preservation. As the Supreme Court has explained:

> We are unmoved by the Court of Appeals' view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest in preserving park lands. . . . [T]hese suggestions represent no more than a disagreement with the Park Service over how much protection the core parks require or how an acceptable level of preservation is to be attained. We do not believe, however, that either . . . O'Brien or the time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

Clark, 468 U.S. at 299; see also Taxpayers for Vincent, 466 U.S. at 815-16 ("Plausible public policy argument might well be made in support of any . . . exception [to a regulation], but it by no means follows that it is therefore constitutionally mandated.).

The circuit court ignored these clear admonitions that the least restrictive means is not required and that the judiciary may not assume the role of parks manager. Instead, the court relied on its own belief that the Park District could close the parks for fewer hours per day or exempt expressive conduct from the ban. E.g., A15, A22-A27. For example, the circuit court quibbled with the number of hours the parks are closed, claiming that "[i]f the City repeatedly make[s] exceptions to the seven-hour closing rule, that is inconsistent with the notion that closing Grant Park every night for seven hours is necessary for park maintenance and preservation," A23, and doubting that "occasional events interfere so greatly with maintenance or cleaning such as would support a

complete ban on nighttime events," A24.[7] Worse still, the circuit court questioned the credibility of the Park District official who explained the need for closing parks overnight. A23-A25. According to the court, he "lack[ed] . . . familiarity with the maintenance and preservation of the parks." A24. But this ignored the official's affidavit, in which he attests that "part of [his] regular duties includes ensuring that the parks remain safe, clean, attractive, and in good condition," and he is "therefore familiar with the rules and requirements of proper park usage." A119 ¶ 1. Thus, the court was required to respect his expertise on the Park District's needs even without a detailed description of "his knowledge of what nighttime maintenance or cleaning, if any, is performed." A24.[8] Moreover, in defiance of Clark, the court claimed that park managers are not competent to decide to close parks because "curtailing all access . . . to a public forum during a time of day that forms the most appropriate time for many forms of expressive conduct falls beyond their expertise." A25. But claiming to know better than the Park District how to regulate the parks was outside the court's expertise and plainly improper under Clark.

The circuit court also incorrectly believed that if any exceptions are ever made to the Park District ordinance, this invalidates the whole regulation, on the theory it

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[7] The circuit court believed the City "admits it routinely closes Grant Park fewer than seven hours daily" and that this means there is not a tight fit between closing parks seven hours per day and the governmental interests at stake. A15. But the ordinance is not a City ordinance – it is a Park District ordinance. The City's choice on occasion not to enforce the ordinance does not show that the Park District's decision to close the park for seven hours per day is substantially longer than necessary to achieve its ends, or otherwise undermine the fit between the ordinance's means and ends.

[8] Judging his credibility also was improper on a motion to dismiss, as we explain below.

somehow proves that not every minute of overnight closure is necessary to accomplish the governmental objectives. A23, A26. This, too, erroneously requires the least restrictive means. Moreover, the Supreme Court has rejected such an all-or-nothing approach. In Clark, it rejected the argument that permitting some overnight activities in the parks, such as erecting tents, precludes banning other activities, such as sleeping in tents, because there was merely an "incremental benefit" to preventing the banned activities. Clark, 468 U.S. at 296. In fact, government may exempt some activities from the ban even though the resulting regulation provides "imperfect[ ] protection to the parks." Id. at 297. Thus, an occasional exception to enforcement is no reason to strike a regulation. Instead, "if the parks would be more exposed to harm without the . . . prohibition than with it, the ban is safe from invalidation under the First Amendment." Id.

Nor does this mean that the Constitution requires government to permit at least some overnight activity in parks. The circuit court seemed to believe this, claiming that the Court in Clark upheld the regulation at issue there only because it did not also ban "occupy[ing] the park all night and erect[ing] symbolic tents." A9-A10; see also A25 (claiming it is permissible to regulate what protestors do in the park at night, but banning access completely is different). Defendants, too, fell victim to this view below. A212-A216 (arguing complete overnight ban on expressive activity is improper). But there is nothing in Clark suggesting that closing parks altogether for a certain number of hours overnight would violate the Constitution. To the contrary, the Court "seriously doubt[ed] that the First Amendment requires the Park Service to permit a demonstration in Lafayette Park and the Mall involving a 24-hour vigil and the erection of tents to

accommodate 150 people" and suggested that the governmental interests in maintaining the parks perhaps "would be more effectively and not so clumsily achieved by preventing tents and 24-hour vigils entirely in the core areas." Clark, 468 U.S. at 296-97; see also Taxpayers for Vincent, 466 U.S. at 810-11 (rejecting argument that prohibiting some unattractive signs is invalid because it does not apply to all unattractive signs).

Finally, defendants claimed entitlement to a special exception on the basis that the particular activities in which they wished to engage on the nights question in would not have hurt the park. A192-A193. But the Supreme Court has held that "the validity of . . . regulation[s] need not be judged solely by reference to the demonstration at hand." Clark, 468 U.S. at 296-97. Without the Park District ordinance in place, there would be other groups who would want to use the parks during those hours with as good a claim as defendants, and there would be no good way to distinguish them from multiple others. Cf. Taxpayers for Vincent, 466 U.S. at 816 ("To create an exception for appellees' political speech and not these other types of speech might create a risk of engaging in constitutionally forbidden content discrimination."). The cumulative effect of allowing access during the overnight hours would defeat the governmental interests at stake. As the Supreme Court explained, "[t]he First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests." Albertini, 472 U.S. at 688. Instead, such regulations "must be evaluated in terms of their general effect." Id. at 689. In short, the Park District does not have to exempt those who promise to be careful from the overnight closure of the parks.

3. The Park District ordinance leaves open ample alternative channels for expression.

There are also ample alternatives available for those seeking a place to express their message during the overnight hours when the parks are closed. Under both the O'Brien and time, place, and manner tests, the remaining modes of communication need not be the speaker's first or best choice. See, e.g., Taxpayers for Vincent, 466 U.S. at 812; Gresham v. Peterson, 225 F.3d 899, 906 (7th Cir. 2000) (citing Heffron, 452 U.S. at 647). Indeed, the alternative can be a different form of communication entirely. See, e.g., Taxpayers for Vincent, 466 U.S. at 812 (acceptable alternative to ban on posting signs was individual's opportunity to speak or distribute literature from same location); Gresham, 225 F.3d at 907 (nighttime ban on vocal panhandling was acceptable where non-vocal methods of panhandling were permissible). Or it may be engaging in expression in a different location than the speaker prefers. See, e.g., City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 53 (1986) (acceptable alternative was remaining 520 acres of city that were available for sexually oriented entertainment); Gresham, 225 F.3d at 907 (acceptable alternative was panhandling in other locations). And the alternative need not enable reaching the same audience, nor have the same impact as the preferred method. See, e.g., Ward, 491 U.S. at 802; Gresham, 225 F.3d at 906.

In this case, there were ample alternative channels available for defendants to express their message. City parks are closed only seven hours per day; defendants are free to demonstrate in the parks for the remaining seventeen hours. In addition to alternative times, alternative locations are available to defendants. The City's streets and sidewalks are open during the overnight hours when the parks are closed. Indeed, the City permitted the Occupy Chicago demonstrators who complied with the ordinance and

left Grant Park on the nights in question to protest on public sidewalks directly across from the park. A112 ¶ 12; A116-A117 ¶ 11. Moreover, Daley Plaza and Federal Plaza are available.

The circuit court believed that the available alternative locations were inadequate. According to the court, "[s]treets or even plazas fail to provide a realistic alternative for several thousand people to gather" and "are impracticable for 500,000 or a million people." A21. But this focuses on whether there are alternatives available to people other than defendants. A20 (describing relevant question as whether "citizens are left without ample alternative channels of expression for their views," not whether "on a particular night a certain group had no remaining channel to express [its] views"). There is no doubt that the City's streets and plazas were "realistic" alternatives for the Occupy Chicago protestors who remained in Grant Park at closing time on the two nights in question. Again, two or three hundred protestors moved across the street and continued to protest without incident, and there is no evidence that the remaining 130 or 173 protestors who ended up arrested, A112 ¶¶ 12-13; A116-A117 ¶¶ 11-12, could not have done the same.[9] The circuit court should not have declared the ordinance unconstitutional

[9] The NLG defendants claimed that they could not have accessed the sidewalks on the nights in question because they would not have fit and, earlier, had been "continually harassed" by CPD at Jackson and LaSalle. A196. The circuit court struck the portions of defendants' speculative affidavits claiming they would not have fit on the sidewalks because they had no basis for opining that the sidewalks could not have accommodated them. Tr. 162-63; A42-A46; A200 ¶ 8; A202 ¶ 17; A224 ¶ 8; A226 ¶ 17; A229 ¶ 8; A231 ¶ 17; A234 ¶ 8; A236 ¶ 17; A239 ¶ 8; A242 ¶ 17. Moreover, the affidavits at most could support an assertion that CPD did not want defendants to leave belongings on the sidewalks indefinitely; they do not show that CPD would have prevented a protest on the sidewalk. A34-A37, A199-A206, A223-A242. Indeed, the evidence showed the contrary, as we have explained – that CPD permitted 200-300 protestors to continue demonstrating on the sidewalks after Grant Park closed.

as applied to defendants here on the ground that a theoretical, much-larger group would have nowhere to go. Morever, the court should not have invalidated an ordinance that governs all City parks – large and small – based on a theoretical group too large to fit anywhere but Grant Park.

Regardless, there are ample acceptable alternative locations for virtually every size group that wishes to use parks for expression during the overnight hours. Even groups as large as several thousand people may gather on Daley and Federal Plazas. We are advised by CPD that Federal Plaza can accommodate 3,000-3,500, and Daley Plaza can accommodate up to 5,000-6,000. At their absolute largest, the Occupy Chicago protests here were well within these ranges. A111 ¶ 8 (10/15/11 crowd was 3,000 at 7:15 p.m.); A116 ¶ 6 (10/22/11 crowd was 1,500 to 3,000 at 8:00 p.m.). And the number who wished to remain in the park after 11:00 p.m. was even smaller. A112 ¶¶ 10, 12 (10/15/11 crowd dwindled to 700 at 8:00 p.m., and to 500-600 at 10:45 p.m.); A116 ¶ 7 (10/22/11 crowd dwindled to 1,500 at 8:45 p.m.). Moreover, City streets are always open to groups the size of the protests at issue – including the intersection of Jackson and LaSalle, the location of the initial protests, which defendants have claimed is particularly meaningful to their message given its proximity to financial institutions, A82-A83. In the late hours when parks are closed, the concern about pedestrian and vehicular traffic in the downtown area is lessened, so it would not have been "impossible," A196, to use the streets, as defendants claimed.

With respect to the circuit court's expressed concern for groups as large as 500,000 to 1,000,000, there simply was no evidence before the court that groups of that size – fifteen to thirty percent of the population of the City – often need to gather between

11:00 p.m. and 6:00 a.m., such that denying access to parks during those hours could be suspect. As we have explained, defendants cannot assert a facial overbreadth challenge on others' behalf based on speculative possibilities. Indeed, the circuit court's only example of a group approaching that size was the Obama victory rally in November 2008 – but the City accommodated that group when its rally extended past 11:00 p.m., as the court acknowledged. A25.[10] In any event, speculation that another presidential candidate in a down-to-the-wire race will seek to give a victory speech to a crowd of half a million in a City park after it closes, let alone because the group will not fit anywhere but Grant Park, does not render inadequate the alternatives available to these defendants.

The circuit court also seemed dissatisfied with the alternatives to Grant Park because it perceived a need to defer to speakers' "venue of choice." A21. That directly contradicts the premise of the time, place, and manner test, which is that some regulations may constitutionally require speakers to utilize alternatives for their expression. Although speakers no doubt know best what they want to say and may prefer to express that message in a particular way or from a particular location, A8-A9, A85, their preferences plainly are not controlling. Morever, this is a particularly inappropriate case in which to defer to speakers' preferences, because Grant Park has no apparent

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[10] The issue that arises from the Obama group's rally is not about ample alternatives, but selective enforcement, which we address below. The circuit court also relied on newspaper articles about prior protests in Grant Park. A17-A19. But newspapers are not reliable evidence. Indeed, it is settled that the contents of newspaper articles are inadmissible hearsay. See, e.g., McCall v. Devine, 334 Ill. App. 3d 192, 203 (1st Dist. 2002); see also id. ("It is very obvious that factual matters should not be proven by newspaper reports of occurrences. . . . [T]hey are often, if not notoriously, apt to be inaccurate. . . . [News articles] purport[ ] to report only, or mostly, what others have said about the matter.") (internal quotation marks omitted). Nor is there any indication that prior protests the circuit court referenced were significantly larger than the protests at issue here or that any came close to the size of the Obama rally.

significance to defendants' expression. While defendants have explained the importance of the intersection of Jackson and LaSalle, where business interests predominate, A83 ("symbolism of this expressive conduct at [Jackson and LaSalle] . . . could not be more evident"; "hard to imagine a more appropriate place in Chicago"); A195 ("in the area of downtown Chicago, corporate speech predominates and businesses erect vast symbols and continually bombard the public with their message"), they have made no similar claim to Grant Park. Defendants' half-hearted justification for wanting to use Grant Park was that "Occupy Chicago has several different audiences," including "the government," "its community demographic," and the "wealthy 1%," and they "seek out different forums depending on their targeted audience and message." A83. That may be, but in the middle of the night, when the ordinance is in effect, there is no reason to think there is more audience present in Grant Park than in the City's streets, sidewalks, and plazas. To the contrary, a law abiding audience is not present in the park at all. And in any event, contrary to defendants' assertions, A85, A217, the alternative need not permit reaching the exact same audience, see, e.g., Ward, 491 U.S. at 802; Gresham, 225 F.3d at 906, as we have explained.[11]

In addition to alternative locations, defendants also had alternative times available to them to use the parks to express their message. The circuit seemed to doubt that

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[11] The circuit court's other concern about the ordinance's effect on defendants' message was that their "spontaneity" could somehow be affected. A8-A9, A23 (claiming where spontaneity is "part of the message dissemination delayed is dissemination denied") (internal quotation marks omitted). This seems an odd concern in the context of a protest that had been going on for a month, where part of the expressed objective was to "occupy" public property indefinitely. This is not a case in which defendants were responding to an emerging current event, such as a presidential election. Nor did the court explain why the alternative locations available during the hours the parks are closed would be insufficient to accommodate any need for "spontaneity."

daytime could ever be an alternative to nighttime, relying on Hodgkins. A10-A11, A25-A26. According to the court, there can be no restrictions on nighttime assemblies because they are "a particular type of First Amendment activity." A26. That is plainly not the law. See, e.g., Gresham, 225 F.3d at 907 (nighttime ban on vocal panhandling acceptable where daytime vocal panhandling is option). But more important, it misunderstands the Park District ordinance, which does not prevent altogether "the public's right to assemble for . . . nighttime rallies." A25. Rather, when the nighttime hours are crucial to the expression, demonstrators need only choose a location other than City parks. A restriction on where nighttime rallies gather is not properly characterized as a complete prohibition. This alone distinguishes Hodgkins. In Hodgkins, the curfew at issue required minors to "surrender [their] right to participate in late-night activities whose context and message are tied to the late hour and the public forum." 355 F.3d at 1063. In contrast, to maintain defendants' desired "visibility throughout the evening hours," A196, they simply needed to move across the street.

Finally, defendants mistakenly believe that this prong requires the government to negotiate with and provide an alternative location to individuals seeking to exercise their First Amendment rights. E.g., A84 (claiming City made "no good faith effort . . to provide an adequate substitute forum"); A217 (claiming "City completely and deliberately failed to provide [d]efendants an alternative adequate forum"). They cite no precedent in support of this, and we have found none. In considering the adequacy of alternative channels for expression, the question is whether such alternatives exist, not whether government has provided them to anyone on any specific occasion. Indeed, a rule requiring government to offer alternatives could collide with the idea that speakers,

not the government, know best what to say and how to say it. A9, A85.

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In short, the application of the Park District ordinance to defendants' expressive conduct is constitutional under the First Amendment tests applicable either to regulations of conduct with an incidental effect on speech or of the time, place, and manner of speech. Many other municipalities have similar ordinances, and multiple courts around the country have upheld such regulations in challenges brought by other Occupy groups. See, e.g., Occupy Sacramento v. City of Sacramento, 878 F. Supp. 2d 1110, 1116-24 (E.D. Cal. 2012); Occupy Tucson v. City of Tucson, No. CV–11–699–TUC–CKJ, 2011 WL 6747860, at *7-8 (D. Ariz. Dec. 22, 2011); Occupy Fresno v. County of Fresno, 835 F. Supp. 2d 849, 863-66 (E.D. Cal. 2011); Freeman v. Morris, No. 11–cv–00452–NT, 2011 WL 6139216, at *1, *10-*12 (D. Me. Dec. 12, 2011). This court should reach the same result and hold defendants' arrests did not violate the First Amendment.

B. The Park District Ordinance Is Constitutional Under The Illinois Constitution As Applied To Defendants' Expressive Activity.

The application of the Park District ordinance to defendants also was constitutional under the Illinois Constitution. The Illinois Supreme Court has recognized that the Illinois Constitution's provisions might be interpreted differently from similar ones in the U.S. Constitution, see People v. DiGuida, 152 Ill. 2d 104, 118-22 (1992), and that it may provide "greater protection than the [F]irst [A]mendment in some circumstances," City of Chicago v. Pooh Bah Enterprises, Inc., 224 Ill. 2d 390, 446-47 (2006). Nevertheless, that "does not mean that greater protection is afforded in every context." Id. at 447. Indeed, the Illinois Constitution provides no greater protection to

expressive conduct than the U.S. Constitution. See id. at 447-48. Here, the Illinois Constitution's free speech and expression component, see Ill. Const. art. I, §§ 4-5, is not different from the First Amendment in any way that is meaningful.

It is settled that the right to use public property for free expression may be subject to reasonable restrictions, including time, place, and manner restrictions, without running afoul of the Illinois Constitution. See Chicago Park District v. Lyons, 39 Ill. 2d 584, 590 (1968) ("[N]either our own constitution nor the first amendment guarantees of the Federal constitution gives individuals the unqualified right to speak or distribute their writings in any manner and at any time or place chosen by them without regard to the consequences to others."); People v. Barnett, 7 Ill. App. 3d 185, 188 (1st Dist. 1972) ("The right of the people to assemble in a peaceful manner to make known their opinions and to petition for a redress of their grievances [under both state and federal constitutions] does not permit them to congregate at any time or place, or to communicate their viewpoint by whatever method they choose."). Indeed, the Illinois Supreme Court has held that there is no "constitutional" or "primary or inalienable right . . . to use [a park facility] for public addresses . . . regardless of the municipality's right to control, manage, and regulate this park facility, with the parks generally, for the best interests of the public." Coughlin v. Chicago Park District, 364 Ill. 90, 107 (1936). The court has further held that constitutional rights to free speech and assembly "do not mean that everybody wanting to express an opinion may plant themselves in any public place at any time and engage in exhortations and protest without regard to the inconvenience and harm it causes to the public." City of Chicago v. Joyce, 38 Ill. 2d 368, 371 (1967). In short, free expression under the Illinois Constitution is not without its limits.

Defendants have never claimed that the tests to evaluate the constitutionality of regulations with incidental effects on expression or the time, place, or manner of expression are different under the Illinois Constitution than under the U.S. Constitution. Nor have we found any authority supporting a difference. Thus, defendants' constitutional challenge should have the same result under both the Illinois Constitution and the U.S. Constitution.

The circuit court did not think so. According to the court's interpretation of the debates conducted during the 1970 constitutional convention, the Illinois Constitution broadly protects peaceable assembly in that it applies "regardless of [the assembly's] expressive purpose," A12, and protects "non-expressive assemblies," A13; see also A27-A28. Tellingly, the court cited no case law supporting this interpretation. Regardless, even assuming that the Illinois Constitution protects "non-expressive assemblies of picnickers as well as expressive assemblies of protestors," A28, defendants are protestors, not picnickers, and they do not claim to represent the interests of picnickers.[12] Moreover, there is no reason to think that picnickers would have a stronger claim of entitlement to the use of public space than protestors do. Instead, it seems evident that regulations affecting non-expressive assemblies would be subject to the same tests as regulations affecting expressive assemblies when evaluating their constitutionality. And, quite possibly, the tests for regulations affecting picnickers would be more favorable to

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[12] Nor could they represent picnickers on an overbreadth theory. A27-A28 (circuit court's claim that including non-expressive assemblies "substantially increases" the potential that ordinance will be applied to protected rights). An overbreadth challenge would fail because the number of people not participating in peaceable assemblies late at night still dwarfs the number who are, as we explain above. Assemblies of midnight picnickers, and the like, do not so substantially outnumber other park users that a facial overbreadth challenge on their behalf would be appropriate.

governmental interests, given that, historically, free expression has been more valued than the right to gather for a picnic or to play soccer. In short, the circuit court erred in invalidating the Park District ordinance under the Illinois Constitution; that claim, like defendants' First Amendment claim, should be rejected.

C. The Park District Ordinance Was Not Applied To Defendants In A Discriminatory Manner.

Whether to prosecute an offense is a matter within the broad discretion of the government. See, e.g., Wayte v. United States, 470 U.S. 598, 607 (1985). Indeed, the Seventh Circuit has observed that the "Constitution does not require states to enforce their laws (or cities their ordinances) with Prussian thoroughness as the price of being allowed to enforce them at all. . . . Selective, incomplete enforcement of the law is the norm in this country." Hameetman v. City of Chicago, 776 F.2d 636, 641 (7th Cir. 1985). Selective enforcement is problematic only when based on improper reasons such as race, religion, or speech. See, e.g., Wayte, 470 U.S. at 608; Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 430 (1996); People v. Khan, 136 Ill. App. 3d 754, 759 (1st Dist. 1985). This includes enforcing a law based on the message or viewpoint of a particular speaker. See, e.g., Thomas v. Chicago Park District, 534 U.S. 316, 325 (2002). Challenging the application of a law on this basis presumes that the law "is neutral and constitutional in all factual situations, but that it has been enforced selectively in a viewpoint discriminatory way." McGuire v. Reilly, 386 F.3d 45, 61 (1st Cir. 2004). Such a claim depends on showing "that the government enforces 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." Id. at 62. This may be argued as a claim for viewpoint discrimination in violation of the First Amendment or a

claim for unequal treatment in violation of equal protection. See id. at 62-64.[13]

The NLG defendants' motions claimed that their arrests were unconstitutional because they were motivated by their message and violated their right to equal protection. A57 ¶ 22; A58-A59 ¶ 28. The Durkin defendants' motions claimed that the City selectively enforced the ordinance in a viewpoint discriminatory way in violation of their First Amendment rights. A64 ¶ 12; A78; A86-A89. The circuit court treated these claims together, A29-A31, and we will do the same.

A party claiming selective enforcement based on viewpoint must show that similarly situated others were treated differently; that the differential treatment constituted a pattern of unlawful favoritism; and that it was the decisionmaker's intent to discriminate on the forbidden basis. McGuire, 386 F.3d at 62-64. Discriminatory intent means a discriminatory purpose behind the challenged actions, not just a discriminatory effect. In other words, it "implies more than . . . intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Wayte, 470 U.S. at 610 (quoting Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979)) (alteration in original); see, e.g., ESG Watts, Inc. v. Pollution Control Board, 286 Ill. App. 3d 325, 333 (3d Dist. 1997). Intent is difficult to prove because there are numerous legitimate, nondiscriminatory reasons for initiating or not initiating a prosecution. See, e.g., McGuire, 386 F.3d at 63. Defendants lack evidence to satisfy any element of this claim, and the circuit court accordingly erred in

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[13] There may be some differences between the applicable standards, see, e.g., McGuire, 386 F.3d at 62-64, but none is meaningful here. Defendants' claim fails regardless.

granting their motions to dismiss on this basis.

To begin, there is no evidence that the City treated similarly situated individuals more favorably by not prosecuting them for violating the Park District ordinance. Whether others are similarly situated is a question of fact for the factfinder, and to be similarly situated "individuals must be very similar indeed." McDonald v. Village of Winnetka, 371 F.3d 992, 1002 (7th Cir. 2004). On a selective prosecution claim, the evidence against those alleged to be similarly situated "must be as strong [as] or stronger than that against the person" urging selective prosecution. Id. at 1006 (internal quotation marks omitted; alteration in original).

Here, defendants and the circuit court identified participants in the Obama victory rally as similarly situated and claimed defendants were treated differently because the Obama rally participants were not arrested despite remaining in the park after 11:00 p.m. A28-A29, A31-A33, A86-A87, A218-A221. But there is no evidence how long the Obama rally participants remained in the park, nor is there evidence whether or not any of them was arrested. The Durkin defendants and the circuit court relied on a YouTube video suggesting that Obama did not exit the stage until 11:23 p.m. to extrapolate that rally participants remained in the park after 11:00 p.m. A19 n.18; A29 n.24; A219 n.11. The park closing time is not the relevant point of comparison. It is undisputed that the City did not enforce the ordinance against defendants at the stroke of 11:00 p.m., either; defendants were not arrested until 1:00 a.m., and that was only after they were given multiple warnings and the opportunity to leave. A112 ¶¶ 11, 13-14; A116-A117 ¶¶ 8-10, 12-13. Thus, between 11:00 p.m. and 1:00 a.m., CPD did not enforce the ordinance against numerous Occupy Chicago participants who left the park on their own volition.

A112 ¶¶ 12-13; A116-A117 ¶ 11. While arrests were made at 1:00 a.m., there is absolutely no evidence that anyone attending the Obama rally remained in the park after 1:00 a.m., much less in defiance of repeated warnings to leave. In short, if no one from the Obama rally was arrested at the stroke of 11:00, or even as late as 1:00 p.m., that simply shows that defendants were treated the same. To show different treatment, defendants needed evidence that someone attending the Obama rally remained in the park after 1:00 a.m. and was not arrested. Defendants adduced no such evidence and cannot show that similarly situated people received better treatment based on speculation that this group even existed.

Oddly, the circuit court seemed to think defendants were treated worse than Obama rally participants because defendants were warned about the Park District ordinance and given chances to leave before the ordinance was enforced against them. A32-A33. These second and third chances to avoid arrest should count as favorable treatment, not evidence of unlawful disparate treatment. Besides, there is no evidence one way or other what Obama rally participants were told about the ordinance and thus no basis to conclude they were treated differently. Regardless, if the groups were treated differently, it is readily explainable why. Obama rally participants were there for a discrete one-time event, with a definable ending time – Obama's departure. In contrast, Occupy Chicago rally participants announced an intent to "occupy" the park indefinitely, A111 ¶ 8; A116 ¶¶ 6-7, and defendants expressly refused to leave when asked to do so before they were arrested, A112 ¶¶ 13-14; A117 ¶¶ 12-13. Arresting defendants does not show unlawful disparate treatment as compared to people who gave no indication they intended to occupy the park and, in fact, left the park as soon as they could safely

disperse. Instead, obvious differences between the groups warranted any difference in treatment.

The circuit court believed that arresting people who announce their intent to remain in the park after CPD warnings to leave is constitutionally suspect because it "vests limitless discretion with the police." A33. That concern is misguided. It is settled that it is not unconstitutional to arrest only those who express an intent to defy the law after being warned to comply. See Wayte, 470 U.S. at 608-14. In Wayte, the petitioner challenged the government's "passive enforcement" policy of prosecuting only those who announced their intent not to register for the Selective Service and failed to register after repeated warnings. See id. at 601-02. The Supreme Court rejected petitioner's selective enforcement claim, upholding the government's right to prosecute those who "in effect selected themselves for prosecution by refusing to register after being reported and warned by the Government." Id. at 610. The Court observed that the argument this policy violated the First Amendment would mean "any criminal [could] obtain immunity from prosecution simply by reporting himself and claiming that he did so in order to 'protest' the law. The First Amendment confers no such immunity from prosecution." Id. at 614.

Defendants' selective enforcement claim also fails because they lack evidence that the treatment they received was based on their expressive activities. The circuit court believed the City's intent to discriminate was evident from what it called a "clear pattern" of "unlawful favoritism in the enforcement of the challenged ordinance," namely, "three instances . . . the two Occupy protests and the Obama rally." A34 (internal quotation marks omitted). This makes no sense. Pattern evidence reflects the common-sense idea

that the treatment of many others in one way is unlikely to be random. There is no pattern here but, at most, one instance in which others were not arrested. By definition, one instance is not a pattern. For this reason, Yick Wo v. Hopkins, 118 U.S. 356 (1886), is distinguishable. There, the city enforced a law forbidding the use of wood buildings for laundries against 200 Chinese laundry operators but did not against 80 white laundry operators. See id. at 374. The Court held that this disparity could only be explained on the ground of racial hostility. See id. In this case, there is evidence that two out of multiple Occupy Chicago rallies, protests, and marches during September and October 2011 ended in arrests. On the other hand, at most there was one occasion the City did not enforce the Park District ordinance against a nighttime Grant Park rally. That is no pattern from which to infer any hostility to defendants' message.

Nor did defendants adduce other evidence to show that the City's motivation for their arrests was because of their First Amendment activities. The evidence shows only that defendants were arrested because they violated the law. And Wayte shows that this motivation is not unconstitutional. There, the Court held that "the passive enforcement system penalized continued violation of the [law], not speech." 470 U.S. at 611 n.12. That is exactly what occurred here. The evidence shows that CPD arrested only those who refused to leave the park after repeated warnings. A112 ¶¶ 11, 13-14; A116-A117 ¶¶ 8-10, 12-13. In fact, CPD did not arrest protestors who had the exact same message as defendants when those others complied with the law. A112 ¶ 12; A116-A117 ¶ 11. That group is the one most similarly situated to defendants. Because there were many others who participated in the same rallies as defendants who were not arrested, there is no possible inference that defendants were arrested because of their message or First

Amendment activities.

The circuit court relied on defendants' affidavits explaining that they believed the City mistreated Occupy Chicago protestors during the weeks leading up to the Grant Park rallies by making them move their supplies and belongings and by making increasingly more onerous demands on where they could leave their belongings. A34-A42. There is absolutely no evidence this treatment was because of disagreement with Occupy Chicago's message or activities as opposed to desire to enforce municipal laws regarding the free flow of pedestrian and vehicular traffic and not blocking the public way. In addition, as we have explained, numerous members of this same group were not arrested, despite also violating the Park District ordinance for a time, because they ultimately agreed to comply with the law. Thus, whatever hostility defendants perceived toward them clearly was not based on their message. Again, to make out a selective enforcement claim, the evidence must show action "because of, not merely in spite of" protected activity. Wayte, 470 U.S. at 610 (internal quotation marks omitted). The circuit court should not have dismissed the complaints in this case.

III. ALTERNATIVELY, THE MATTER SHOULD BE REMANDED FOR FURTHER PROCEEDINGS BECAUSE THE CIRCUIT COURT DID NOT FOLLOW PROPER PROCEDURE ON A MOTION TO DISMISS.

To the extent that any issue in this case turns on the resolution of disputed facts, the circuit court should not have granted the motions to dismiss. As we have explained, it is settled that on a motion to dismiss, the circuit court should not assume the role of factfinder. See, e.g., Sage Information Services, 391 Ill. App. 3d at 1035. The motion should be granted only if there are no disputed facts, and, in ruling on the motion, the court should not weigh evidence or resolve controverted facts. See, e.g., id. If the

submitted affidavits present disputed facts, the parties must be given an opportunity for an evidentiary hearing. See, e.g., Marriage of Vaughn, 403 Ill. App. 3d at 836.

Here, the court overstepped its bounds by making credibility determinations and weighing evidence. For example, it doubted that the Park District needed to keep the parks closed for seven hours every night because it did not believe the Park District official whose affidavit explained the Park District's needs. A24 (stating "credibility of his assertions is undermined"; "it is difficult to credit his assertion[s]"; "lack of facts considerably weakens [his] credibility"). This was not the proper function of the court on a motion to dismiss. Defendants submitted no counter-affidavits refuting the Park District official's statements regarding park maintenance needs. The circuit court should not have doubted those assertions or at most should have conducted an evidentiary hearing to resolve credibility issues regarding the Park District's needs.

Similarly, in ruling on defendants' selective enforcement claim, the court acknowledged that defendants "must prove that the City *intended* to discriminate against them." A31. Yet, by crediting defendants' affidavits stating CPD made them move their belongings, A34-A37, the court claimed defendants had "established" that their treatment was based on exercising their First Amendment rights, A37. As we explain, this evidence did not give rise to an inference that defendants were arrested because of their speech. The court should not have concluded this element was established without proof. Nor should it have assumed the role of factfinder and concluded that Obama rally participants were similarly situated to defendants based on inferences from a YouTube video instead of based on evidence.

Indeed, even the Durkin defendants agreed that "an evidentiary hearing should be

ordered to resolve the questions of fact that have arisen from conflicting factual representations" and that they would wish to seek discovery "aimed at further supporting [their] factual assertions contained herein." A210. Although the City believes the motions to dismiss should be denied based on the legal arguments and lack of evidence adduced by defendants, to the extent that any element of their defense turns on disputed facts, this matter should be remanded to the circuit court for an evidentiary hearing.

CONCLUSION

For the foregoing reasons, this court should reverse the circuit court's judgment and remand for further proceedings.

Respectfully submitted,

STEPHEN R. PATTON
Corporation Counsel
of the City of Chicago

BY: 
KERRIE MALONEY LAYTIN
Assistant Corporation Counsel
30 North LaSalle Street, Suite 800
Chicago, Illinois 60602
(312) 744-0746

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 containing 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 49 pages.

Kerrie Maloney Laytin, Attorney

CERTIFICATE OF SERVICE

I certify that I served the Brief of Plaintiff-Appellant City of Chicago and Separate Appendix to Brief of Plaintiff-Appellant City of Chicago by placing three copies of each in envelopes with sufficient postage affixed and directed to the persons named below at the addresses indicated, and by depositing those envelopes in the United States mail on May 8, 2013.

Kerrie Maloney Laytin, Attorney

Persons served:

Thomas Anthony Durkin Janis D. Roberts Augustus F. Moss Joshua G. Herman Gabriel L. Mathless DURKIN & ROBERTS 2446 N. Clark Street Chicago, IL 60614	John L. Stainthorp Sara Gelsomino Joey L. Mogul Janine K. Hoft People's Law Office 1180 N. Milwaukee Avenue Chicago, IL 60642
Melinda Power West Town Law Office 2502 W. Division Chicago, IL 60622	Alexa Van Brunt MacArthur Justice Center Bluhm Legal Clinic Northwestern University School of Law 375 E. Chicago Avenue Chicago, IL 60611

Matthew A. Dodge 2204 N. Sacramento #1 Chicago, IL 60647	Molly Armour Law Office of Molly Armour 4050 N. Lincoln Avenue Chicago, IL 60618
Behzad Raghian The Law Office of Behzad Raghian, P.C. 2923 N. Milwaukee Avenue, Suite 908 Chicago, IL 60618	James R. Fennerty James R. Fennerty & Associates, L.L.C. 36 S. Wabash, Suite 1310 Chicago, IL 60603
Aaron Goldstein 158 W. Erie Chicago, IL 60654	