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.

REPLY 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

ARGUMENT

As we explain in our opening brief, the circuit court's sweeping ruling grossly misunderstands First Amendment jurisprudence, and invalidating the Park District's overnight-closure ordinance on its face effectively opens every City park to all comers, 24 hours per day. This broad ruling cannot stand.

Indeed, on appeal, defendants do not defend the facial invalidation of the ordinance.[1] Rightly so – the content-neutral regulation closing City parks to everyone for limited hours overnight does not violate the First Amendment in every conceivable application. Soccer players, picnickers, stargazers, and drug dealers have no First Amendment right to be in City parks overnight. Similarly, the ordinance is not facially overbroad because park users not engaged in First Amendment activity so greatly outnumber park users who are that unconstitutional applications of the ordinance cannot substantially predominate. Defendants develop no contrary argument.[2] Thus, the facial invalidation should be reversed. And while defendants argue that the ordinance was unconstitutionally applied to them, below we first explain that the ordinance easily passes intermediate scrutiny. Next, we explain that defendants' claim under the Illinois Constitution also fails. Then, we explain that the circuit court incorrectly held, on defendants' motion to dismiss, that they had "established" their

---

[1] The Durkin defendants reference the circuit court's observation "that they challenge the ordinance both on its face and as applied," Brief of Defendants-Appellees Samuel Brody, et al. 2 n.3 ("Durkin Br."), and assert it violated their rights "both on its face and as applied," id. at 4. But the Durkin defendants do not develop any argument or cite any legal authority, and the NLG defendants do not mention the facial ruling at all.

[2] The Durkin defendants make the contradictory argument that "resort to overbreadth [analysis] is not necessary" because the ordinance interfered with their own speech, but then claim they "challenge the ordinance on its face, because it creates an unacceptable risk of suppression of ideas." Durkin Br. 7 n.4. Perhaps they do not understand that the latter is an overbreadth challenge. No matter – the ordinance is not overbroad. Brief of Plaintiff-Appellant City of Chicago 18-22 ("Opening Br.").

selective prosecution claims. Finally, if this court determines resolution of any question turns on disputed facts, we explain that an evidentiary hearing is required.

I. THE PARK DISTRICT ORDINANCE IS CONSTITUTIONAL AS APPLIED TO DEFENDANTS' EXPRESSIVE ACTIVITY.

The test for content-neutral regulations with incidental effect on protected expression applies to the Park District ordinance. Opening Br. 18, 23. On its face, the ordinance regulates conduct (being present in City parks overnight), not expression. Thus, under intermediate scrutiny, the ordinance is constitutionally applied where it serves substantial governmental interests, unrelated to suppressing expression, and restricts no more protected expression than necessary. United States v. O'Brien, 391 U.S. 367, 377 (1968). The time, place, and manner test is similar; such regulations must be justified without reference to the content of expression, narrowly tailored to serve significant government interests, and leave open ample alternative channels for expression. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Defendants do not argue for any difference between the tests, and there is none in practice, Opening Br. 23.[3]

We have never disputed that defendants were engaged in protected expression, nor that Grant Park is a public forum. Indeed, our submission that intermediate scrutiny applies accepts that First Amendment expression is involved. Thus, we do not address arguments about defendants' expression or that Grant Park is a public forum. NLG Br. 12-19; Durkin Br. 5-7. But "to say the ordinance presents a First Amendment issue is not necessarily to say that

[3] The Durkin defendants claim that O'Brien analysis "is unnecessary" because it overlaps with time, place, and manner analysis, Durkin Br. 7 n.4, and the NLG defendants agree, Brief and Argument of Certain Defendants-Appellees 20 n.2 ("NLG Br."). That the tests are similar does not change that one framework is a better fit. Here, the ordinance regulates conduct without regard to accompanying expression, making O'Brien conceptually more appropriate. Opening Br. 18, 23. But as we explain, nothing in this case turns on any difference between the tests. Id. at 23.

it constitutes a First Amendment violation." Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 803-04 (1984) (quotes omitted). Likewise, "[e]ven in public forums . . . the government may impose reasonable content-neutral restrictions on . . . protected speech." Lederman v. New York City Department of Parks & Recreation, 731 F.3d 199, 202 (2d Cir. 2013). Thus, even protected expression in Grant Park is subject to regulation.

Indeed, defendants concede this. NLG Br. 19-20; Durkin Br. 7. They also concede the ordinance is content neutral, thus admitting intermediate scrutiny applies. Id.[4] And they agree that the governmental interests – reducing crime and protecting public safety; maintaining and beautifying the parks for public enjoyment; and preserving parks for future generations – are substantial. NLG Br. 20; Durkin Br. 7-8, 12. The significance of such interests is well settled. See, e.g., Lederman, 731 F.3d at 202. Defendants contest only whether the ordinance as applied to them is narrowly tailored and leaves ample alternatives available. We first address defendants' claims about the City's evidence and then turn to those issues.

A. In Resisting A Motion To Dismiss, The City Did Not Need To "Prove" The Ordinance Passes Intermediate Scrutiny.

Defendants insist the City failed to supply sufficient evidence to dispute their First Amendment defense. NLG Br. 21-25; Durkin Br. 8-12. This ignores the procedural posture. Defendants' section 2-619 motion, claiming a defense not apparent from the complaint,

---

[4] Inconsistently, defendants cherry-pick statements from First Amendment cases applying stricter scrutiny to content-based regulations. NLG Br. 20 (Forsyth County v. Nationalist Movement, 505 U.S. 123, 130-36 (1992) (fees based on message is content-based prior restraint)); id. at 21 (Texas v. Johnson, 491 U.S. 397, 410 (1989) (political flag burning; O'Brien inapplicable)); id. at 28 (Rubin v. Coors Brewing Co., 514 U.S. 476, 481-82 & n.2 (1995) (content of beer labels; Central Hudson scrutiny applies); City of Ladue v. Gilleo, 512 U.S. 43, 45-48 (1994) (ban on residential signs with content-based exceptions); Boos v. Barry, 485 U.S. 312, 321 (1985) (content-based restriction of political speech; "most exacting scrutiny" applies)); Durkin Br. 18 (Reno v. American Civil Liberties Union, 521 U.S. 844, 879-80 (1997) (content-based restriction on indecent speech; time-place-manner test inapplicable)). Defendants do not actually argue for heightened scrutiny. Thus, standards from these cases are inapplicable.

required affidavits, Opening Br. 13-14, and yet their motion failed to include them. Only after the City attached its own, A96-A97, A110-A121, did defendants supply theirs, A191-A242. The circuit court improperly granted dismissal. The movant has "the burden of proof on [a section 2-619] motion, and the concomitant burden of going forward," and shifting the burden to the non-movant is improper. Clemons v. Nissan North American, Inc., 2013 IL App (4th) 120943 ¶¶ 36-37 (quotes omitted). Thus, the plaintiff need not allege facts to show that an affirmative defense does not apply because it is "*defendant's* burden to show that plaintiff's claim was so barred." Noesges v. Servicemaster Co., 233 Ill. App. 3d 158, 164 (2d Dist. 1992). Moreover, the circuit court cannot decide disputed issues of fact based on affidavits and counter-affidavits. See, e.g., Glassie v. Papergraphics, 248 Ill. App. 3d 621, 624 (1st Dist. 1993). Instead, the court "has a duty either to hear other proof bearing on the material facts, or to deny the motion without prejudice to the right of the defendant to raise the subject matter thereof by answer." Glass Specialty Co. v. Litwiller, 147 Ill. App. 3d 653, 655 (3d Dist. 1986). In short, dismissal because the plaintiff has not "proved" its case makes no sense.

We have located no case, state or federal, deciding, without an evidentiary hearing, a First Amendment challenge to a content-neutral law on the ground the government had not supplied sufficient evidence. Indeed, this court has reversed dismissal of a municipal prosecution under the First Amendment where the ordinance survived intermediate scrutiny – without requiring evidence. City of Waterloo v. Markham, 234 Ill. App. 3d 744, 745-48 (5th Dist. 1992). The cases defendants rely on for "whether the City has met its burden to show" narrow tailoring; "insufficient evidence"; the burden of proof; and the like, NLG Br. 21-22; Durkin Br. 8, 10-12, are off point. These cases universally involved summary judgment or trials. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 64 (1981); Kuba v. 1-A Agricultural Association, 387 F.3d 850, 852 (9th Cir. 2004); Weinberg v. City of Chicago,

310 F.3d 1029, 1033 (7th Cir. 2002); DiMa Corp. v. Town of Hallie, 185 F.3d 823, 826 (7th Cir. 1999); City of Watseka v. Illinois Public Action Council, 796 F.2d 1547, 1549-50 (7th Cir. 1986). Similarly, empirical studies and the like, NLG Br. 22-23 (citing Weinberg, 310 F.3d at 1039); Durkin Br. 10 (same), are not required in response to a motion to dismiss.

Even on summary judgment, courts have upheld regulations without requiring so-called "empirical evidence" where the interests were undisputably significant. Because regulations designed to serve park aesthetics, conservation, and public safety unquestionably advance significant interests, see, e.g., Clark v. Community for Creative Non-Violence, 468 U.S. 288, 296, 299 (1984), the court in Watters v. Otter, No. 1:12-cv-00086-BLW, 2013 WL 3270429 (D. Idaho June 26, 2013), which also involved Occupy protestors, rejected the claim defendants make here, explaining that the government has no "heightened . . . evidentiary burden" and "empirical evidence was *not* necessary." Id. at *6-*7 (citing City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002)); see also Alameda Books, 535 U.S. at 439 (Court had never required a "showing" with "empirical data[ ] that . . . ordinance will successfully lower crime").

Here, the affidavit from a Park District official, Alonzo Williams, who was familiar with the Park District's interests, policies, and practices, A119-A120, satisfied the City's burden to show the ordinance served significant government interests. Defendants' counter-affidavits contained no facts contradicting this evidence, and, thus, the circuit court was required to accept it. Where facts contained in an affidavit are not controverted by a counter-affidavit, the court deciding the motion to dismiss must accept them as true. See, e.g., Goldberg v. Brooks, 409 Ill. App. 3d 106, 112 (1st Dist. 2011). Even where credibility determinations or weighing evidence is required, the appropriate course is an evidentiary hearing or denying the motion without prejudice to evidentiary development, as we explained.

Defendants dispute the sufficiency of Williams's affidavit, NLG Br. 29-30; Durkin Br. 8-11, relying on summary judgment cases in which affidavits were not based on personal knowledge or contained legal conclusions, Madden v. Paschen, 395 Ill. App. 3d 362, 388 (1st Dist. 2009); Steiner Electric Co. v. NuLine Technologies, Inc., 364 Ill. App. 3d 876, 881-82 (1st Dist. 2006). Defendants do not claim any statement by Williams contains legal conclusions. As for personal knowledge, Williams attested he is "familiar with the rules and requirements of proper park usage" as "part of [his] regular duties." A119 ¶ 1. Affidavits "based on . . . personal knowledge" where "there is a reasonable inference that the affiant could competently testify to its contents" are admissible. Madden, 395 Ill. App. 3d at 386 (quotes omitted). Williams's statements are thus not merely "assertions" or "opinions." NLG Br. 29; Durkin Br. 9; A24. Moreover, the court did not strike the affidavit, and even conceded Williams "possesses some familiarity with these matters" and his testimony is "entitled to some deference." A24-A25. The court's decision not "to credit" his uncontroverted testimony because the court disagreed and wanted more factual detail, A24, was improper on a motion to dismiss. Evidentiary issues aside, we turn to intermediate scrutiny.

B. The Park District Ordinance's Effect On Expression Is Narrowly Tailored To Serve Important Interests.

A regulation is narrowly tailored if it does not burden "substantially" more expression than necessary, even if it is not the least restrictive means. Opening Br. 25-26. Defendants agree. NLG Br. 21; Durkin Br. 8. Closing parks overnight, when the risk of crime is highest, precisely serves the interest in eliminating locations conducive to crime, thus increasing public safety. Opening Br. 24-25, 26-27. It is hard to imagine any less restrictive method that would be as successful at addressing nighttime crime – not even a substantial increase in policing. Defendants do not even suggest an increased police force, nor any other way to address

nighttime safety. One Occupy court had "no trouble believing that sidewalks are safer than parks in the middle of the night"; thus,"Defendants could reasonably conclude that they do not wish to spend County funds on increased law enforcement for the Park at night." Occupy Fresno v. County of Fresno, 835 F. Supp. 2d 849, 864 n.10 (E.D. Cal. 2011).

The Park District also needs time to perform maintenance and beautification. Opening Br. 24, 26. It is easiest and least burdensome, for the Park District and public alike, to do so when the fewest people are around, which also minimizes the risk of public interference or injuries. Daytime work does not restrict less speech because more people want to use parks during the day, and daytime closure thus would affect more people.

Finally, the presence of people – no matter how many or few – causes wear and tear on parks and their facilities. Opening Br. 23-24, 26; cf. Frisby v. Schultz, 487 U.S. 474, 487 (1988) ("the actual size of the group is irrelevant; even a solitary picket can invade residential privacy"). This is true no matter whether people stand on grass or concrete; whether there are many people or just one; or whether people intentionally damage the parks or promise to be very careful. The best practices so parks will last for generations include some daily reprieve from use. A119-A120 ¶¶ 1, 3-4. Like nighttime maintenance, a daily reprieve overnight when the fewest people wish to use parks serves the governmental interest precisely, while not burdening substantially more expression than necessary.

Defendants do not seriously dispute the ordinance serves these important interests. Durkin Br. 13. Instead, they claim it does not serve the interests closely enough. But their arguments directly contradict Supreme Court cases on narrow tailoring. They rely on the pre-Ward decision in Watseka to argue that the ordinance "closes the parks for longer than necessary," NLG Br. 25; there are "many less restrictive means," id. at 27; "if there is a less restrictive alternative . . . , then the ordinance is not as precise and narrowly drawn as it could

be," id.; and the Park District "could have used" other ordinances, id. at 27-28, to preserve "cleanliness, beauty, and safety of the parks without completely banning their use seven hours each day," Durkin Br. 14; see also id. at 9 n.5. This demands, in terms, the least restrictive means, and that is obsolete after Ward: "Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech . . . need not be the least restrictive or least intrusive means of doing so." 491 U.S. at 798. The focus on whether the City could have approached the problem differently is likewise misplaced. "Of course, the availability of other means of accomplishing a governmental objective does not foreclose the government's ability to pursue its chosen course." Initiative & Referendum Institute v. United States Postal Service, 417 F.3d 1299, 1309 (D.C. Cir. 2005); see also Ward, 491 U.S. at 797 (regulation not invalid "simply because there is some imaginable alternative" (quotes omitted)).[5] Instead, narrow tailoring "is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." Ward, 491 U.S. at 799 (quotes omitted). In contrast, a regulation is invalid only if it "burden[s] substantially more speech than is necessary." Id.

Defendants fail to explain how an ordinance that temporarily closes parks for limited hours when the fewest people want to use them burdens substantially more protected expression than necessary. Nor can they dispute that the governmental interests would be served less effectively absent the ordinance – in parks open 24/7, it is harder to limit overnight crime, provide for a daily reprieve, and perform maintenance and beautification. Moreover,

[5] The alternative ordinances defendants prefer, NLG Br. 27; Durkin Br. 13-14, do not address the governmental interests completely. Ordinances prohibiting harming grass and greenery do not protect other park facilities, and those prohibiting destruction do not address simple wear and tear. Ordinances prohibiting public urination or littering do not provide a window for maintenance and beautification. Ordinances prohibiting breaches of the peace, abusive language, obscene acts, and firearms do not prevent crime as effectively. And none of these ordinances addresses giving parks a daily respite from use.

daytime closure restricts more, not less, expression, since more people want to express themselves during the day when a larger audience is around. Indeed, after hours, other protestors would be the only audience – again, parks can be closed to everyone not using them for expression. Accordingly, closing the parks overnight to the few seeking to use empty parks for expression cannot possibly burden substantially more expression than necessary.

Quibbling with the number of hours parks are closed, e.g., Durkin Br. 8-9, is impermissible. Again, this seeks the least-restrictive means, in addition to ignoring the interest in minimizing overnight crime. Moreover, it ignores, as the Court repeatedly has held, that second-guessing governmental decisions on methods or the need for regulation is improper. Opening Br. 28-29; Ward, 491 U.S. at 800; see also, e.g., Clark, 468 U.S. at 299 (judiciary does not have "competence to judge how much protection of park lands is wise and how that level of conservation is to be attained").

Next, defendants mis-characterize the Park District ordinance as a "complete" ban. E.g., NLG Br. 25-26; Durkin Br. 8-9, 12, 15. Parks are open 17 hours per day for expression. That is no more "complete" than any other time, place, and manner restriction – by definition, such regulations "completely" ban expression for some particular time, place, or manner. There would be no permissible time, place, or manner regulation if such bans were prohibited. To the contrary, in Clark, camping was banned "completely," 24 hours per day, and yet the Court upheld it. See 468 U.S. at 290-91, 294. Banning expressive conduct for some, but not all, hours of the day is no more "complete" than that.

Defendants attempt to distinguish Clark because the regulation banned "camping," "living and sleeping," and "cooking," but not overnight presence in the park. Durkin Br. 14; NLG Br. 30. That just shows the regulation was different. There, the "provisions . . . [limit] the manner in which the demonstration could be carried out," 468 U.S. at 294, while the Park

District ordinance permits every manner of expression, just not at all times. But Clark nowhere holds that a regulation can be narrowly tailored only if directed at the manner, and not the time or place, of expressive conduct. Indeed, far from prohibiting overnight restrictions on expression, Clark states: "[W]e seriously doubt 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 "[p]erhaps these purposes would be more effectively and not so clumsily achieved by preventing tents and 24-hour vigils entirely." Id. at 296-27. Similarly, defendants' claim that the ordinance should have "target[ed] a particular category of conduct," instead of restricting park hours, Durkin Br. 14, merely urges a different means of achieving the ordinance's ends. As we have explained, the government may choose among different methods without constitutional concern.

Defendants' reliance on cases finding different regulations not narrowly tailored, NLG Br. 22-23, 25-26; Durkin Br. 8, 10-13, is misplaced. In fact, Frisby upheld as narrowly tailored a ban on one method of picketing because it was an appropriate "evil" to remedy. See 487 U.S. at 485-88. Similarly, people's presence in parks overnight needs a remedy because of crime, maintenance, and conservation needs. Defendants' other cases concern regulations that did not serve the governmental interests at all. United States v. Grace, 461 U.S. 171, 182-84 (1983) (banning flags and banners on Supreme Court sidewalks did not closely serve interest in decorum because they were not necessarily disruptive); American Civil Liberties Union v. Alvarez, 679 F.3d 583, 605-06 (7th Cir. 2012) (banning audio recordings of public conversations did not serve interest in protecting private conversations); Initiative & Referendum Institute, 417 F.3d at 1307-08 (banning signature-gathering on postal property did not closely serve interest in customer access because it was not necessarily disruptive); Weinberg, 310 F.3d at 1039-40 (banning book peddling did not necessarily avoid congestion

or maintain safety, especially where leafleting and newspaper sales were permitted).

The issue is also not whether defendants' own conduct would have hurt the park or increased crime. E.g., Durkin Br. 12; NLG Br. 23-25, 26. Justification for a regulation "should not be measured by the disorder that would result from granting an exemption solely to" litigants before the court, because no organization has a "special claim to First Amendment protection." Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 652 (1981). A regulation invalidly applied to one group cannot bar similar groups, opening the floodgates to the harm at issue. See id. at 652-54. Thus, "the inquiry must involve not only [the litigant], but also all other organizations that would be entitled to" avoid the regulation. Id. at 654. Accord, e.g., United States v. Albertini, 472 U.S. 675, 688-89 (1985).

It also does not follow that any exception to enforcement undermines the need for the regulation or precludes enforcement against others. NLG Br. 28; Durkin Br. 13. As we have explained, Opening Br. 41, 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," Hameeteman v. City of Chicago, 776 F.2d 636, 641 (7th Cir. 1985). Of course, an invidious exception for one group and not another could reveal selective enforcement. But defendants' cases, NLG Br. 28, do not show that non-enforcement on occasion means the ordinance does not serve its ends closely enough. They addressed exceptions written into the regulation, which can cast doubt on its importance by identifying other interests that override it. Rubin, 514 U.S. at 488-89; City of Ladue, 512 U.S. at 52-53. In this case, the ordinance contains no exceptions on its face. Moreover, the City's non-enforcement cannot shed any light on whether it is necessary to the Park District, which enacted the ordinance. Defendants cite no authority to support that law enforcement's decision not to enforce a law undermines the reasons for it. Nor, in any case, is there evidence that either the Park District or City

"regularly," Durkin Br. 13 n.8, or "repeatedly," A23, makes exceptions.[6] The circuit court's reliance on hearsay newspaper articles describing a few protests in Grant Park over decades, A17-A19, some even before the ordinance's 1934 enactment, A119 ¶ 2, does not show otherwise. Here, the ordinance is narrowly tailored to serve significant governmental interests.

C. The Park District Ordinance Leaves Open Ample Alternative Channels For Expression.

There are ample alternatives available for expression while the parks are closed overnight – more than 200 square miles of City streets and sidewalks are available 24 hours a day, and Grant Park itself is available 17 hours a day. Opening Br. 32-37. Other courts agree with the adequacy of similar alternatives. E.g., Mitchell v. City of New Haven, 854 F. Supp. 2d 238, 253 (D. Conn. 2012); Occupy Fresno, 835 F. Supp. 2d at 863-64.

Defendants' insistence that no other location in the whole City besides Grant Park would suffice is, in essence, a belief they should be entitled to their first choice venue. NLG Br. 31-33; Durkin Br. 16. This ignores that alternatives need not be the speaker's "first or best choice," e.g., Gresham v. Peterson, 225 F.3d 899, 906 (7th Cir. 2000); see also Opening Br. 32. No regulation would survive time, place, or manner scrutiny if speakers' preferences controlled: By definition, speakers have been denied access to their first choice, or they would not be complaining. E.g., Marcavage v. City of New York, 689 F.3d 98, 107 (2d Cir. 2012). Considering speaker's needs, NLG Br. 31; Durkin Br. 16, does not mandate their first choice.

Defendants' claim that the City's streets and sidewalks were not "realistic" alternatives, Durkin Br. 18; NLG Br. 32, defies common sense. In this as-applied challenge there are 90 defendants before the court, and there is no serious argument that the City's

---

[6] Nor is it "fair to infer" that the City "coordinates its enforcement efforts with the Park District." Durkin Br. 13 n.8. There is no support for this in the record, and it was defendants' obligation to support their motion to dismiss with evidence.

streets and sidewalks cannot accommodate that number. Indeed, the record shows that on October 15, 2011 up to 300 protestors moved to Michigan Avenue, A112 ¶ 12, and on October 22, 2011 numerous protestors did the same, A116-A117 ¶ 11. The 173 protestors arrested on October 16, A112 ¶ 13, and 130 arrested on October 23, A117 ¶ 12, easily could have done likewise. The record also shows that CPD allowed 1,500-3,000 protestors to march through the Loop to get to Grant Park at 7:00. A111 ¶¶ 7-8; A115 ¶ 5. Defendants only speculate that CPD would not have allowed these protestors to march back at 11:00. NLG Br. 32.[7] Given the late hour, there was far less concern about pedestrian and vehicular traffic. Perhaps they would have needed a permit, but those are available 24/7.[8] Moreover, Federal and Daley Plazas accommodate larger groups and also allow permitted protests.[9]

Grant Park was no better for defendants' purposes than these alternatives. A group that had spent 1-2 months directing its message to the Federal Reserve and Board of Trade at Jackson and LaSalle cannot credibly claim otherwise. Opening Br. 36; see also Durkin Br. 2 (important to be in "vicinity of the workplace of the one percent"). Defendants cite no

---

[7] Defendants suggest that they should be entitled to use Grant Park because CPD directed them there. NLG Br. 32. But proposing Grant Park as an alternative to the disruption defendants were causing by marching through the Loop during rush hour did not require CPD to allow defendants to remain there after Grant Park closed. Even allowing an ordinance to lie fallow does not prohibit or estop the government from enforcing it prospectively. E.g., LaTrieste Restaurant & Cabaret Inc. v. Village of Port Chester, 40 F.3d 587, 590 (2d Cir. 1994). CPD never represented it would not enforce the ordinance, but, to the contrary, warned protestors that it would.

[8] The availability of permits explains why defendants' concern that municipal ordinances prohibit their use of streets and sidewalks to block traffic and pedestrians, Durkin Br. 19 n.10, NLG Br. 32, lacks merit. Permits allow protestors to use streets and sidewalks in a manner that would otherwise violate City ordinances.

[9] The Durkin defendants' concern that Daley Plaza closes at 11:00 p.m., Durkin Br. 16 n.9, is misplaced. A permit would authorize using the space after normal closing hours, and defendants do not claim they ever applied for one. Nor do they cite anything showing they could not have obtained a permit for Federal Plaza.

contrary evidence, nor attempt to explain why returning to Jackson and LaSalle, where they had protested up to 24 hours per day, A111 ¶ 5, would have been inadequate. Instead, they offer weak, post-hoc rationalizations about Grant Park's significance. NLG Br. 33 (invoking so-called "legacy [of] Abraham Lincoln, the unemployed veterans of World War I," the Obama rally, and Grant Park's proximity to "one of Chicago's major thoroughfares"); Durkin Br. 17 (claiming Grant Park contains "different" nighttime audience). In fact, their claim that they needed to reach an audience "near the park," Durkin Br. 17, so they could get their message "before itinerants on Michigan Avenue," NLG Br. 33, actually concedes our point. An even better alternative was available – like others from their movement, defendants could have moved to Michigan Avenue, even closer to whatever "itinerants" might have been there at that hour. And there is no reason "the press coverage," id., would have been different.

Defendants' lack of significant connection to the forum distinguishes all their cases. Weinberg involved peddling a book critical of the owner of the Chicago Blackhawks at the United Center, the Blackhawks' home. See 310 F.3d at 1033. The court found the alternatives inadequate because the United Center was "a unique location"; selling to fans at game time was the "most opportune time and place to reach this audience"; and the same audience would not be at bookstores or on the internet. Id. at 1042. Even so, the court did not dispute that "an adequate alternative does not have to be the speaker's first or best choice, or one that provides the same audience or impact for the speech." Id. (quotes omitted). Similarly, in Initiative & Referendum Institute, the speakers needed access to the post office for a significant reason – to collect signatures for ballot initiatives because "sidewalks and other exterior areas of post offices are particularly fertile locations" for that. 417 F.3d at 1303. The ban limited the likelihood they could obtain the desired number of signatures. See id. at 1312. Defendants' other cases are similar. E.g., Grace, 461 U.S. at 179-81 (ban on speakers'

access to Supreme Court grounds); Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 86 (1977) (ban on placing "for sale" signs on real estate); Horina v. City of Granite City, 538 F.3d 624, 628, 636 (7th Cir. 2008) (ban on handbills on unoccupied parked cars and residences meant solicitors had to wait for owners' return); Bery v. City of New York, 97 F.3d 689, 698 (2d Cir. 1996) (ban on selling art on sidewalks prevented reaching people who would not enter museums or galleries). These cases show, at most, that an important reason to access a particular forum matters to the analysis. They do not hold that alternatives outside the forum are always constitutionally inadequate.[10] To the contrary, an opportunity to reach the intended audience suffices. E.g., Johnson v. City & County of Philadelphia, 665 F.3d 486, 494-95 (3d Cir. 2011); Marcavage v. City of Chicago, 659 F.3d 626, 631 (7th Cir. 2011).

Defendants' other arguments are as easily swept aside. They claim having access to Grant Park during the day was not enough because – supposedly – their "message [was] tied to the late hour and the public forum." Durkin Br. 17 (quotes omitted). But they do not explain how so other than to say that there is a "different" audience at night, id., which contradicts their claim that it is crucial to protest from "a physical location in the vicinity of the workplace of the one percent," id. at 2 (emphasis added). In any event, as we have explained, there is no audience in Grant Park between 11:00 p.m. and 6:00 a.m. because the park is closed, and even opening it to protestors means the sole audience would be other protestors. To the extent there is an audience to reach during those hours, that audience is found elsewhere – including on the streets and sidewalks outside Grant Park, where defendants were free to protest. This also answers defendants' concern that some protestors "had jobs during the day." Id. at 18. If

[10] Contrary to defendants' suggestion, NLG Br. 32; Durkin Br. 18, Heffron does not hold that the alternative must be in the forum in question. Although the alternative there was in the forum, 452 U.S. at 643-44, 654-55, the Court nowhere stated this was a constitutional requirement. Indeed, courts have upheld alternatives in close proximity to the desired forum. E.g., Marcavage, 689 F.3d at 107-08.

after-work hours before 11:00 were insufficient, the City's streets and sidewalks could be used after 11:00. This also distinguishes Hodgkins ex rel. Hodgkins v. Peterson, 355 F.3d 1048 (7th Cir. 2004). Durkin Br. 17. There, minors could not exercise their rights at all during the curfew's hours, unless accompanied by an adult, which required them to forgo many expressive activities tied to the late hour. See 355 F.3d at 1062-64. In contrast, defendants had all of the City's streets and sidewalks available for protests between 11:00 and 6:00. In short, the available alternatives were more than adequate to survive constitutional scrutiny.

II. THE APPLICATION OF THE PARK DISTRICT ORDINANCE WAS CONSTITUTIONAL UNDER THE ILLINOIS CONSTITUTION.

The Illinois Constitution does not protect defendants' conduct to any greater extent than the First Amendment. As we have explained, Opening Br. 39-40, the Illinois Constitution's free speech and expression component likewise accepts reasonable time, place, and manner restrictions, and there is no authority requiring a different test from the U.S. Constitution's. Defendants do not urge any different test. Instead, they claim that the Illinois Constitution's protection is "broader," NLG Br. 33, Durkin Br. 20, because it protects more than expression – it also protects a "right to assemble in a peaceable manner," NLG Br. 34, "regardless of the[ ] expressive purpose" underlying the assembly, Durkin Br. 20.

The assumption that the Illinois Constitution provides "broader" protection by including non-expressive assemblies does not aid defendants' as-applied challenge. Defendants were engaged in expressive conduct. Accordingly, the test applicable to non-expressive assemblies is not before the court.[11] Defendants' claim that it "would be

[11] Nor, as we have explained, is there any reason to believe the Illinois Constitution would apply stricter scrutiny to a regulation of non-expressive assemblies. Opening Br. 40-41. Historically, the right to expression has been afforded much greater importance than the right to gather for non-expressive purposes. Defendants do not even argue that non-expressive gatherings of soccer players and the like should receive greater protection.

unthinkable to [the] Framers that demonstrators peaceably assembling in a public forum would be subject to arrest and prosecution," NLG Br. 34, contradicts the supreme court's pronouncement that under the Illinois Constitution municipalities "can set up reasonable restrictions governing the time, place and manner of expressive activity," People v. DiGuida, 152 Ill. 2d 104, 127 (1992). The City may enforce the Park District ordinance against defendants under the Illinois Constitution, just as under the First Amendment.

III. THE PARK DISTRICT ORDINANCE WAS NOT APPLIED TO DEFENDANTS IN A DISCRIMINATORY MANNER.

Based on no evidence, only speculation, regarding how CPD treated one other Grant Park gathering, the circuit court held that defendants had "established" claims for selective prosecution. A31. Deciding this issue, on which defendants had the burden of proof, on a motion to dismiss was patent error. Defendants presented no evidence regarding how anyone else was treated, nor any evidence proving intent to discriminate against them because of their message. Accordingly, they did not "establish" either element of their claim. On appeal, defendants concede that they had to show differential treatment from similarly situated others and discriminatory intent. NLG Br. 35. But they still point to no evidence of either.

On the similarly-situated question, defendants contend they do not have to show identical facts and circumstances to show others were similarly situated, and claim the Obama participants supposedly "closely resemble[ ]" them, such that "an objectively identifiable basis for comparability exists." NLG Br. 36-37. Whatever this is supposed to mean, where a party claiming selective prosecution cannot prove that anyone else committed the same or similar conduct, this requirement is not satisfied. Here, defendants do no more than speculate about what happened during the Obama rally, id. at 36-38; they do not point to any evidence to support their claim. On this issue of fact, there must be proof of others who are "very similar

indeed." McDonald v. Village of Winnetka, 371 F.3d 992, 1002 (7th Cir. 2004). Defendants' complete absence of evidence that anyone was treated better alone requires reversal on the selective prosecution claim.

In any event, defendants' arguments about the Obama rally do not show it was similarly situated. They contend no one at the Obama rally was arrested, whereas "all 303 Occupy protestors" were. NLG Br. 36. This ignores the evidence that not "all" the Occupy protestors were arrested – around 130 who left the park between 11:00 and 1:00 on October 15-16 were allowed to continue their protest from the sidewalk. A112 ¶¶ 12-13; see also A116-A117 ¶¶ 10-12 (Oct. 22-23). For this same reason, showing there were Obama rally participants in the park after 11:00 who were not arrested would not be enough because there also were Occupy protestors in the park after 11:00 who were not arrested. To be similarly situated, the evidence warranting prosecution against the comparator must be as strong as or stronger than the evidence against the person claiming selective prosecution. McDonald, 371 F.3d at 1006. Indeed, defendants' own cases, Coleman v. Donahoe, 667 F.3d 835 (7th Cir. 2012), and Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills, 815 F. Supp. 2d 679 (S.D.N.Y. 2011), NLG Br. 37, make plain that there must be similarity "in all material respects," Mosdos Chofetz Chaim, 815 F. Supp. 2d at 697, and the conduct must be "of comparable seriousness," Coleman, 667 F.3d at 850 (quotes omitted). Any Obama rally participants in the park between 11:00 and 1:00 did nothing comparable to these defendants, who were arrested only after 1:00. Defendants have no evidence showing any Obama rally participant remained in the park after 1:00. The circuit court's reference to a YouTube video showing Obama rally participants in the park at 11:23 p.m. certainly does not. If unauthenticated internet videos even count as evidence, this would not show anyone from the Obama rally remained at 1:00 a.m., much less anyone remained who flagrantly ignored

multiple warnings to leave, as these defendants did.

Defendants further argue that the "curfew does not provide for any exception" and arresting only those who refuse to leave is "contrary to the plain language of the ordinance." NLG Br. 37. This fundamentally misunderstands selective prosecution claims, which do not depend on what the ordinance says. Instead, the issue is whether the ordinance was enforced in a discriminatory manner, which turns on the application of the ordinance in different factual contexts, not its words. Opening Br. 41.

Defendants also query why they were asked to leave, when Obama rally participants were not. NLG Br. 37. But they presented no evidence of what Obama rally participants were told, as they concede. Id. at 38 ("There was no evidence that the police made any inquiries of the Obama ralliers."). Defendants make a confused argument that we think it is relevant whether CPD asked either group to leave. Id. at 37-38.[12] This is wrong. The difference between the groups turned on their respective conduct. Even if Obama rally participants received no warnings to leave, there is no evidence that discrimination explains the difference: CPD has no obligation to issue any warnings, much less unnecessary ones, and unlike the Occupy protestors, Obama rally participants gave no indication of any intent to remain. Opening Br. 44. Thus, there was no need for warnings, and no evidence that anyone from the Obama rally remained in the park at 1:00 a.m., much less someone who needed to be asked to leave. Nor should it be considered "discrimination" to give protestors numerous opportunities to come into compliance before enforcing an ordinance in any event.

[12] Defendants also make the nonsensical claim that warning the Occupy protestors about the ordinance "'effectively grants police the discretion to make arrests selectively on the basis of the content of the speech.'" NLG Br. 37 (quoting A23). They fail to explain how issuing warnings about protestors' conduct – remaining in the park – was an unconstitutional exercise of discretion based on the content of their speech. Nor was issuing warnings "contrary to the plain language of the ordinance." Id. The ordinance says nothing about whether CPD may give violators opportunities to comply before enforcing it.

Defendants' notion that the treatment of the Obama rally shows a "pure pattern," NLG Br. 36, is even more nonsensical. Leaving aside the complete lack of evidence of "100% non-enforcement of the curfew" against the Obama participants, and the factually incorrect claim of "100% enforcement of the curfew" against Occupy protestors, id., defendants offer no coherent explanation how the treatment of one other group on one other occasion could possibly be a "pattern" showing anything.

Turning to defendants' claims regarding the City's supposed intent to discriminate, they incorrectly assert that "discriminatory treatment, in and of itself, supports the conclusion" of discrimination. NLG Br. 38. As we have explained, Opening Br. 42, this is not the law. Discriminatory treatment is not enough unless the "impact can be traced to a discriminatory purpose." Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979) (citing Washington v. Davis, 426 U.S. 229 (1976)). The treatment must be "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Id. at 279. Defendants presented no evidence they were arrested because of their speech, as opposed to their conduct.

Defendants rely solely on their affidavits asserting the belief CPD was hostile to their message. NLG Br. 38-39; Durkin Br. 22. But on a motion to dismiss, the circuit court should have viewed these affidavits in the light most favorable to the nonmoving party, the City, as we have explained. Accordingly, this court should ignore defendants' hyperbolic characterizations. That aside, nothing in the affidavits permits an inference that defendants' message motivated the arrests. Monitoring defendants; promulgating rules for them to follow; erecting barricades; and chastising them for rule infractions, NLG Br. 38-39, describes CPD's conduct, not the intent behind that conduct. Similarly, changing the rules, bringing dogs to sniff defendants' belongings, and directing defendants' to relocate their supplies or keep their property in motion, id., say nothing whatsoever about what motivated those actions. Even

showing "blatant hostility directed toward" defendants, id. at 39, if there were any evidence of that, would not satisfy defendants' burden because there is no evidence about the reason for the hostility. It would be equally fair to infer that it was because of the protestors' conduct as that it was because of their message. Moreover, because the record shows that CPD accommodated protestors' desire to protest 24/7 on the City's streets for 1-2 months without incident, and did not arrest hundreds of protestors with the exact same message as defendants who also violated the ordinance, the only permissible inference from the actual evidence here is that the arrests were motivated by defendants' continued lawbreaking, not their message. The circuit court should not have held defendants had "established" selective prosecution.

IV. ALTERNATIVELY, THE MATTER SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING.

As we have explained, in ruling on the motion to dismiss, the circuit court improperly resolved factual disputes and made credibility determinations. The court should have denied the motion because the application of the Park District ordinance to defendants was constitutional as a matter of law. If the facts mattered, an evidentiary hearing was required. See, e.g., Glass Specialty Co., 147 Ill. App. 3d at 655.

The Durkin defendants claim the City "forfeited" its right to insist that the court follow correct procedure because the City did not ask to submit counter-affidavits, which they call "gamesmanship." Durkin Br. 21. They further claim the City "opposed" an evidentiary hearing below, id., and "had an opportunity to present whatever evidence it deemed necessary," id. at 22 n.11. This grossly misrepresents the record. To begin, it was defendants who created the procedural difficulties in this case by failing to submit affidavits in support of their motion to dismiss, as required by section 2-619. Defense counsel admitted that the City's position on this was "well-taken." Tr. 157. The Durkin defendants requested an evidentiary

hearing during oral argument on the motion to dismiss, but the circuit court explained that this request was premature "until there is a conflict, in fact, between two sets of affidavits," Tr. 64; see also Tr. 166 (same), and the City had not yet had the opportunity to create a factual conflict because the City had submitted affidavits first, Tr. 63-64. The City asked the court to first resolve its motion to strike defendants' affidavits (SR 167-75) before deciding whether to submit counter-affidavits – if the motion were granted, there would be no need for counter-affidavits because the City's affidavits would stand alone. Tr. 67-68.

At the hearing on the motion to strike, the court took the matter under advisement before ruling, but offered the City an opportunity to submit counter-affidavits first. Tr. 180-81. This was still premature. Tr. 176-78, 180-81. When the court nevertheless pressed the City on filing counter affidavits, the City stated they would be unnecessary if the court accepted the legal position that no as-applied claim was properly before the court. Tr. 181. In later denying the motion to strike defendants' affidavits completely, the Court called this a decision "to stand on its original affidavits," A41, but went on to strike parts of the affidavits, A41-A46, without offering another opportunity to submit counter-affidavits.

This background makes clear that the City never opposed an evidentiary hearing. At most, the City declined to submit counter-affidavits that would have been unnecessary if the court had granted the City's motion to strike defendants' affidavits or agreed that affidavits were unnecessary because the issues were legal, not factual. At that time, the City could not have predicted that the circuit court would mishandle the motion to dismiss by making negative credibility determinations about the City's affidavits – when defendants had submitted no evidence contradicting them – and by viewing defendants' affidavits in the light most favorable to them. Indeed, the court's only statements on evidentiary hearings seemed consistent with the City's understanding of the rules of procedure – that the court would

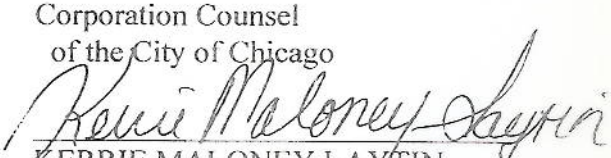
conduct an evidentiary hearing if it found the affidavits conflicted. In short, the City did not forfeit an evidentiary hearing that was never even offered.

CONCLUSION

This court should reverse the 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 reply brief conforms to the requirements of Ill. Sup. Ct. R. 341(a) and (b). The length of this reply 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 23 pages.

Kerrie Maloney Laytin, Attorney

CERTIFICATE OF SERVICE

I certify that I served the Reply Brief of Plaintiff-Appellant City of Chicago by placing three copies in envelopes with sufficient postage affixed and directed to the persons named below at the addresses indicated, and by depositing the envelopes in the United States mail on December 9, 2013.

Kerrie Maloney Laytin, Attorney

Persons served:

Thomas Anthony Durkin Janis D. Roberts Joshua G. Herman DURKIN & ROBERTS 2446 N. Clark Street Chicago, IL 60614	Sara Gelsomino John L. Stainthorp Janine K. Hoft People's Law Office 1180 N. Milwaukee Avenue Chicago, IL 60642
John D. Cline Law Office of John D. Cline 235 Montgomery St., Suite 1070 San Francisco, CA 94104	Molly Armour Law Office of Molly Armour 4050 N. Lincoln Avenue Chicago, IL 60618
	Melinda Power West Town Law Office 2502 W. Division Chicago, IL 60622