

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, FIRST DISTRICT**

CITY OF CHICAGO,)	
a municipal corporation,)	
)	
Plaintiff,)	11 MC1 237718
v.)	
)	Hon. Kenneth E. Wright, Jr.
TIEG ALEXANDER, <i>et al.</i> ,)	
)	
Defendants.)	

AFFIDAVIT

I, Christopher J. Kennedy, having been duly sworn, do hereby attest and state, based upon personal knowledge and the information that I gathered, as follows:

1. I am over the age of 18 and am competent to testify in this matter.
2. I am the Commander of the First District of the Chicago Police Department ("CPD")

and have held that position for the past three years. I was hired by CPD in 1992 and have held various positions during this time including: Lieutenant in the Marine and Helicopter Unit, Lieutenant in Targeted Response, Lieutenant of the Eleventh District, Administrative Sergeant to the Chief of Patrol, Tactical Sergeant, and various assignments as a Police Officer.

3. As Commander of the First District, I have overall responsibility for the district's operations during all three watches - 24 hours per day. My duties and responsibilities include managing all major operations which draw significant police resources, and responding to significant incidents, such as large rallies and protests taking place within the First District.

4. On or about September 22, 2011, protesters who call themselves "Occupy Chicago" started demonstrating on the sidewalks at the intersection of Jackson and LaSalle Streets in downtown Chicago, Illinois. The protests started in front of the Federal Reserve Building and



then moved across the street to in front of the Chicago Board of Trade and the Bank of America.

5. The Jackson and LaSalle Street intersection is in the heart of the loop with heavy vehicular and foot traffic. Protesters have been allowed to remain on the sidewalks for up to 24 hours per day but are not permitted to store provisions, erect structures, block pedestrian traffic, or block vehicular traffic in the street. These restrictions are for the health, safety and welfare of the protesters and other members of the public who need to use the sidewalks and streets.

6. Since September 22, 2011, there have been numerous protests, rallies, marches, and assemblies conducted by Occupy Chicago. CPD has been present to maintain order and assist with traffic control. There has been little police enforcement action necessitated by these protests, rallies, marches, and assemblies.

7. On October 15, 2011, a rally took place in the vicinity of Jackson Street and LaSalle Street. After the rally the protesters marched around the downtown area for approximately one hour and then proceeded to Grant Park at the northeast corner of Michigan Avenue and Congress Parkway, 431 South Michigan Avenue, Chicago, Illinois.

8. At around 7:15 p.m., there were approximately 3,000 protesters present in Grant Park. Throughout the evening, protesters made speeches over a public announcement ("PA") system, chanted that they would not leave the park, and erected approximately 30 tents.

9. Periodically throughout the evening, I and other command personnel from CPD were in communication with Occupy Chicago members and attorneys from the National Lawyers Guild ("NLG") who were present and identified themselves as intermediaries between the protesters and CPD. We informed both Occupy Chicago members and the NLG attorneys that Grant Park closed at 11:00 p.m. and that the protesters would not be allowed to remain in the

park after closing hours. The NLG attorneys used the PA system to let protesters know that the Chicago Park District ordinance required them to leave the park by 11:00 p.m., and if they did not leave, they would be subject to arrest.

10. At approximately 8:00 p.m., there were around 700 protesters gathered in Grant Park.

11. Prior to 11:00 p.m., Tina Skahill, Chief of Special Operations, used the Occupy Chicago PA system to read the exact language of the Chicago Park District Ordinance, Chapter VII, Section B.2., that required the protesters to leave the park after 11:00 p.m. The protesters were specifically told that if they stayed in Grant Park after 11:00 p.m. that would subject them to arrest but if they did not want to be arrested they should leave the park.

12. At approximately 10:45 p.m., between 200-300 protesters moved to the sidewalk on the west side of Michigan Avenue in front of Roosevelt University and were permitted to continue their protest on the public way. Approximately 300 protesters chose to remain in Grant Park.

13. At approximately 1:00 a.m. on October 16, 2011, Chief Skahill again used the Occupy Chicago PA system to give another warning. Then each protester was individually approached by Lieutenant Robert Lajewski and asked if he or she wanted to leave the park or be arrested. After refusing to leave, 173 protesters were arrested for violating Chapter VII, Section B.2 of the Chicago Park District Code.

14. Since protesters disregarded all requests and warnings to leave the park, physical arrests were made in accordance with Chicago Police Department Special Order SO4-22-01, as well as other Chicago Police Department policies.

15. Tents and personal property remaining in Grant Park were inventoried as abandoned property by CPD officers and subsequently returned to Occupy Chicago members.

16. A couple of weeks later, on November 7, 2011, approximately 1,000 people held a rally in the Federal Plaza at 230 South Dearborn Chicago, Illinois to protest cuts to senior citizen programs.

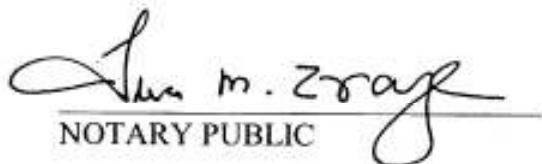
17. After the rally, the protesters marched to the intersection of Jackson and Clark Streets where approximately 43 people sat in the street. Upon request by CPD, those protesters were escorted from the street without incident. In accordance with Chicago Police Department policy, ANOV citations were issued to approximately 43 protesters for violating Section 9-60-120 of the Municipal Code of Chicago.

18. If called upon to testify as a witness, I could and would competently testify to the matters contained herein.

FURTHER AFFIANT SAYETH NOT.


Christopher J. Kennedy

SIGNED AND SWORN TO
BEFORE ME THIS 19th DAY
OF JANUARY, 2012.


NOTARY PUBLIC



**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, FIRST DISTRICT**

CITY OF CHICAGO,)	
a municipal corporation,)	
)	
Plaintiff,)	11 MC1 237718
v.)	
)	Hon. Kenneth E. Wright, Jr.
TIEG ALEXANDER, <i>et al.</i> ,)	
)	
Defendants.)	

AFFIDAVIT

I, Matthew E. Tobias, having been duly sworn, do hereby attest and state, based upon personal knowledge and the information that I gathered, as follows:

1. I am over the age of 18 and competent to testify in this matter.
2. I am the Deputy Chief of Patrol for Area 3 of the Chicago Police Department ("CPD"). I have held that position since July, 2011. I have been employed at CPD for over 25 years and my positions have included: Assistant Deputy Superintendent, Commander, District Commander, Lieutenant, Sergeant, and Patrolman.
3. As the Deputy Chief of Patrol, I have overall command and control of all operations within Area Three which is comprised of the following six Chicago Police Districts: 1st District, 18th District, 19th District, 20th District, 23rd District, and 24th District. The District Commanders of each of these Districts report to me.
4. During the evening of October 22, 2011, a rally took place at the Federal Reserve Building in the vicinity of Jackson Street and LaSalle Street, Chicago, Illinois.
5. When the rally began, there were approximately 225 protesters present but that number grew to approximately 1,500 protesters. At about 7:00 p.m., the 1,500 protesters marched from Jackson and LaSalle Streets to the northeast corner of Michigan Avenue and Congress Parkway, 431 South Michigan Avenue, Chicago, Illinois, and then made their way into



Grant Park.

6. At around 8:00 p.m., there were approximately 1,500-3,000 protesters in Grant Park. At about this time, protesters began announcing their plans to stay and set up a permanent encampment in Grant Park.

7. During the evening, protesters made speeches over a public announcement ("PA") system and set up tents. Around 8:45 p.m., some protesters started chanting: "The Occupation is not leaving!" At that time, there were still approximately 1,500 protesters remaining in Grant Park.

8. Periodically throughout the evening, I and other command personnel from CPD were in communication with Occupy Chicago members and attorneys from the National Lawyers Guild ("NLG") who were present and identified themselves as intermediaries between the protesters and CPD. We informed both the Occupy Chicago members and the NLG attorneys that Grant Park closed at 11:00 p.m. and that the protesters would not be allowed to remain in the park after closing hours.

9. Prior to 11:00 p.m., I gave announcement over the Long Range Acoustical Device ("LRAD") informing the remaining protesters of the following in summary: Please be advised that the park closes at 11:00 p.m. Please ensure you leave the park no later than 11:00 p.m. It is unlawful to remain in the park after 11:00 p.m. If you choose to remain in the park after 11:00 p.m., you are in violation of the law and subject to arrest. Thank you for your cooperation.

10. Subsequent to 11:00 p.m., I gave further announcement over the LRAD informing the protesters that the park is now closed, and they were subject to arrest.

11. After my announcement, many of the protesters relocated across the street to the west side of Michigan Avenue in front of Roosevelt University. Many protesters also lined up

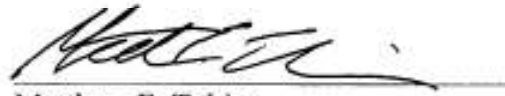
along the east sidewalk of Michigan Avenue immediately adjacent to Grant Park, but behind portable irons.

12. Protesters who remained in Grant Park after 12:45 a.m. on October 23, 2011 were individually approached by Commander Christopher Kennedy and asked if he or she wanted to leave the park or be arrested. After refusing to leave, 130 protesters were arrested for violating Chapter VII, Section B.2 of the Chicago Park District Code.

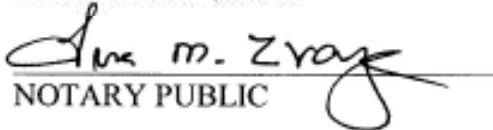
13. Since protesters disregarded all requests and warnings to leave the park, physical arrests were made in accordance with Chicago Police Department Special Order SO4-22-01, as well as other Chicago Police Department policies.

14. If called upon to testify as a witness, I could and would competently testify to the matters contained herein.

FURTHER AFFIANT SAYETH NOT.


Matthew E. Tobias

SIGNED AND SWORN TO
BEFORE ME THIS 19th DAY
OF JANUARY, 2012.


NOTARY PUBLIC



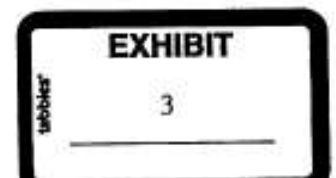
AFFIDAVIT OF ALONZO WILLIAMS

ALONZO WILLIAMS, having been first duly sworn on oath, deposes and states that, if he were called as a witness at the trial of this case, he could testify to the following facts from his personal knowledge:

1. I am the Deputy Director of Park Services for the Park District. My regular duties include granting permission to various groups that wish to make use of our parks for their private events. In my position, part of my regular duties includes ensuring that the parks remain safe, clean, attractive, and in good condition for millions of Chicago residents and visitors that use our parks each year. I am therefore familiar with the rules and requirements of proper park usage – all of which are designed to ensure the parks remain protected and are conserved for future generations. These rules and regulations include the hours of operation for the parks within the Park District's jurisdiction.

2. The park hours section of the Chicago Park District Code (Chapter VII, Section B.2) has existed in one form or another since October 16, 1934. 1934 was the year the Chicago Park District itself came into existence and on October 16, 1934, a comprehensive system of ordinances to promote patron safety and protect park property was enacted. This included not only an ordinance that today is known as Chapter VII, Section B.2 of the Code but also other protective measures, such as prohibiting sleeping overnight in parks, prohibiting patrons from starting fires outside of specially designated areas, and a blanket prohibition on rioting. Other ordinances enacted at the time banned damage to Park District property, attacking fellow park patrons, harming animals and birds that resided in the Park District, and billboards in the parks.

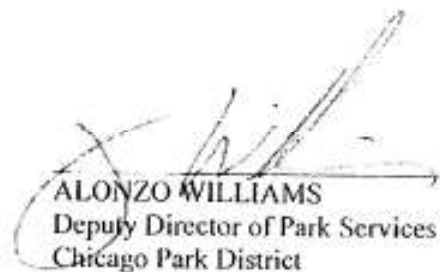
3. Though the Code has been revised many times since 1934, the Code still reflects the



mandate given to the Park District by the Illinois General Assembly: to maintain the Chicago parks in trust for the benefit of the public. My department furthers this mission by its adherence to the rules governing the hours in which the parks are closed. We have determined that in order to keep the parks safe, clean, attractive, and in good condition that the parks need to be closed to the general public from 11:00 o'clock in the evening until 6 o'clock the following morning. This does not preclude all access to the parks during this time. If a group has requested permission for an activity that extends past the Park District's hours of operation and both the group and its proposed activity comply with our permitting process (outlined in Chapter VII, Section C of the Code), the portion of our parks necessary for the activity will be made available to the group.

4. We believe the Code's standard hours of closure is necessary to properly protect and maintain our parks. The park hours of closure allow park employees to collect trash, make repairs to park facilities, and maintain the landscaping. Park employees are therefore able to make sure the parks remain sanitary and pleasing the eye with limited disruption and maximum safety to park patrons. Park closures also ensure that certain park facilities do not become over-fatigued. Further, limited access by pedestrians during park closure hours reduces crime against park patrons and park property. As we are charged with keeping Chicago's parks beautiful and vibrant for current and future generations, we have made certain rules to that effect. Round-the-clock use of the parks by the general public would not further our mandate and would instead make it impossible to uphold.

FURTHER, AFFIANT SAYETH NOT.



ALONZO WILLIAMS
Deputy Director of Park Services
Chicago Park District

SUBSCRIBED and SWORN to
Before me this 12th day
of January, 2012.



NOTARY PUBLIC

"OFFICIAL SEAL"
Katherine M Latuszek
Notary Public, State of Illinois
My Commission Expires 5/4/2014

1 Starting on Thursday, October 6, 2011, and continuing to the
2 present, the "Occupy Sacramento" participants have congregated in
3 Cesar Chavez Plaza Park ("the Park"), which is a community park,
4 approximately 2.5 acres in size, in downtown Sacramento and
5 located across the street from City Hall. On October 6, when the
6 Occupy Sacramento participants began to gather and set up
7 structures in the Park, representatives of the Sacramento Police
8 Department advised the demonstrators that the Park would close at
9 11:00 p.m. pursuant to Sacramento City Code § 12.72.090. That
10 ordinance, which was enacted in its current form in 1981, states,
11 in full:

12 **12.72.090 Remaining or loitering in parks during**
13 **certain hours prohibited.**

- 14 A. No person shall remain or loiter in any public
15 park:
- 16 1. Between the hours of midnight Friday or
17 Saturday and five a.m. of the following day;
18 and
 - 19 2. Between the hours of eleven p.m. Sunday
20 through Thursday and five a.m. of the
21 following day.
- 22 B. The prohibitions contained in subsections (A) (1)
23 and (A) (2) of this section shall not apply:
- 24 1. To any person on an emergency errand;
 - 25 2. To any person attending a meeting,
26 entertainment event, recreation activity,
27 dance or similar activity in such park
28 provided such activity is sponsored or
co-sponsored by the department of parks and
community services or a permit therefor has
been issued by the department of parks and
community services;
 3. To any person exiting such park immediately
after the conclusion of any activity set
forth in subsection (B) (2) of this section;

1 4. To any peace officer or employee of the city
2 while engaged in the performance of his or
her duties.

3 C. The director, with the concurrence of the chief of
4 police, may designate extended park hours for any
5 park when the director determines that such
6 extension of hours is consistent with sound use of
7 park resources, will enhance recreational
8 activities in the city, and will not be
detrimental to the public safety or welfare. The
9 prohibitions contained in subsections (A)(1) and
10 (A)(2) of this section shall not apply to any
11 person present in a public park during extended
12 park hours designated pursuant to this subsection.

13 D. The chief of police, with the concurrence of the
14 director of parks and community services, may
15 order any park closed between sunset and sunrise
16 when he or she determines that activities
17 constituting a threat to public safety or welfare
18 have occurred or are occurring in the park and
19 that such closing is necessary to protect the
20 public safety or welfare. At least one sign
21 designating the sunset to sunrise closing shall be
22 installed prominently in the park. When a park is
23 ordered closed between sunset and sunrise, it is
24 unlawful for any person to remain or loiter in
25 said park during said period. (Prior code §
26 27.04.070).

27 Later on October 6, attorney Mark E. Merin ("Merin"), the
28 attorney for the Plaintiffs in the present action, sought a
temporary restraining order ("TRO") in Sacramento County's
Superior Court. See Exh. B to Decl. of Brett M. Witter attached
to Defendants' Opposition ("Witter Decl."). Although not brought
on behalf of the specific Plaintiffs in this action, the ex parte
Request for TRO sought to restrain and prevent Sacramento's Chief
of Police from enforcing § 12.72.090 and from citing or arresting
persons remaining in the Park after hours. The Request averred
that unsuccessful attempts had been made to contact both the
Chief of Police and the City Manager to request an extension or a
permit granting the extension.

1 At 8:30 p.m. on October 6, Sacramento County Superior Court
2 Judge Lloyd Connelly heard oral argument on the Request from
3 Merin and Supervising Deputy City Attorney Brett Witter. See
4 Exh. C to Witter Decl. On Friday, October 7, Judge Connelly
5 issued an Order denying the Request for TRO. Id.

6 In his Order, Judge Connelly concluded that the Petitioner
7 had (1) "failed to establish that it would suffer irreparable
8 harm if the temporary restraining order was not issued, as the
9 demonstration could be held during normal park hours;" and (2)
10 "not reasonably attempted to apply for a permit to use the park
11 for camping purposes, as Petitioner made no attempt to request
12 such a permit until at least 3:30 p.m. on October 6, 2011." Id.

13 Plaintiffs contend that the City's Police Department has not
14 permitted demonstrators to remain or loiter in the Park after the
15 hours set forth in § 12.72.090. Plaintiffs assert that every
16 night before closing, they must pack up their property and move
17 out of the park or face arrest. They allege that over 50 people
18 have been arrested and taken into custody since October 6 for
19 violating § 12.72.090.

20 Plaintiffs do not allege that they attempted to obtain a
21 permit or an extension of the park hours from Sacramento's
22 Director of the Department of Parks and Recreation ("Director"),
23 as set forth in § 12.72.090(C), prior to filing this action.
24 However, on Thursday, October 24, Merin did send a letter to the
25 City Manager, the City Attorney and the City Council (hereinafter
26 "Oct. 24 Merin Letter"). See Exh. 1 to First Amended Complaint.

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1 In essence, Merin's letter stated that (1) the City's enforcement
2 of § 12.72.090 violated the demonstrators' First Amendment
3 rights; (2) he was prepared to file a lawsuit to validate those
4 rights; and (3) he encouraged these various officials to permit
5 the demonstrators to remain in the Park. Id.

6 On Wednesday, November 1, Merin filed the instant action,
7 including both the Complaint and the Motion for TRO. In both the
8 Complaint and the Motion for TRO, Plaintiffs' generally allege
9 that § 12.72.090 is unconstitutional on its face and as applied
10 to them and that Defendants have violated Plaintiffs' First and
11 Fourteenth Amendment rights by enforcing § 12.72.090.¹ The
12 Complaint seeks a TRO, a preliminary injunction, and a permanent
13 injunction. Presently before the Court is Plaintiffs' Motion for
14 a TRO. On November 2, Defendants filed their Opposition, and
15 Plaintiffs filed their Reply.

16 The Court held a hearing on Plaintiffs' Motion for TRO on
17 Thursday, November 3. Of note, at the hearing, counsel for the
18 parties advised the Court that, earlier in the day, Plaintiffs
19 filed an application for an overnight use permit for the Park
20 with the Department of Parks and Recreation and that the Director
21 had promised to review the application on an expedited basis.
22 Although the ordinary turnaround time for such an application is
23 apparently ten days, the Director promised a decision by Monday,
24 November 7. Despite the pending application, both parties
25 declined to dismiss or delay the Court's decision as to the
26 pending Motion for TRO.

27
28 ¹ Plaintiffs amended their complaint and Motion for TRO on
November 2.

1 After hearing oral argument on the issues, the Court issued
2 a verbal Order denying the Motion, but also promised a written
3 Order would follow. At the hearing, the Court also established a
4 briefing schedule and hearing date for Plaintiffs' Complaint.
5

6 **STANDARD**
7

8 The purpose of a temporary restraining order is to preserve
9 the status quo pending the complete briefing and thorough
10 consideration contemplated by full proceedings pursuant to a
11 preliminary injunction. See Granny Goose Foods, Inc. v.
12 Teamsters, 415 U.S. 423, 438-39 (1974) (temporary restraining
13 orders "should be restricted to serving their underlying purpose
14 of preserving the status quo and preventing irreparable harm just
15 so long as is necessary to hold a hearing, and no longer"); see
16 also Reno Air Racing Ass'n., Inc. v. McCord, 452 F.3d 1126, 1131
17 (9th Cir. 2006); Dunn v. Cate, 2010 WL 1558562 at *1 (E.D. Cal.
18 2010).

19 Issuance of a temporary restraining order, as a form of
20 preliminary injunctive relief, is an extraordinary remedy, and
21 Plaintiffs have the burden of proving the propriety of such a
22 remedy. See Mazurek v. Armstrong, 520 U.S. 968, 972 (1997). In
23 general, the showing required for a temporary restraining order
24 and a preliminary injunction are the same. Stuhlbarq Int'l Sales
25 Co., Inc. v. John D. Brush & Co., Inc., 240 F.3d 832, 839 n.7
26 (9th Cir. 2001).

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1 The party requesting preliminary injunctive relief must show
2 that "he is likely to succeed on the merits, that he is likely to
3 suffer irreparable harm in the absence of preliminary relief,
4 that the balance of equities tips in his favor, and that an
5 injunction is in the public interest." Winter v. Natural
6 Resources Defense Council, 555 U.S. 7, 20 (2008); Stormans, Inc.
7 v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting same).
8 The propriety of a TRO hinges on a significant threat of
9 irreparable injury that must be imminent in nature. Caribbean
10 Marine Serv. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988).

11 Alternatively, under the so-called sliding scale approach,
12 as long as the Plaintiffs demonstrate the requisite likelihood of
13 irreparable harm and show that an injunction is in the public
14 interest, a preliminary injunction can still issue so long as
15 serious questions going to the merits are raised and the balance
16 of hardships tips sharply in Plaintiffs' favor. Alliance for
17 Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-36 (9th Cir. 2011)
18 (concluding that the "serious questions" version of the sliding
19 scale test for preliminary injunctions remains viable after
20 Winter).

21 22 ANALYSIS

23 A. Procedural TRO Issues

24 1. Undue Delay

25

26 Before turning to the merits of Plaintiffs' Motion for TRO,
27 the Court finds that denial of their Motion is warranted here on
28 procedural grounds alone.

1 Plaintiffs bear the burden of showing that, among other things,
2 they are likely to suffer irreparable injury and the injury must
3 be imminent in nature. Caribbean Marine, 844 F.2d at 674. Local
4 Rule 231(b) which governs the timing of motions for TROs, states,
5 in full:

6 In considering a motion for a temporary restraining
7 order, the Court will consider whether the applicant
8 could have sought relief by motion for preliminary
9 injunction at an earlier date without the necessity for
10 seeking last-minute relief by motion for temporary
11 restraining order. Should the Court find that the
12 applicant unduly delayed in seeking injunctive relief,
13 the Court may conclude that the delay constitutes
14 laches or contradicts the applicant's allegations of
15 irreparable injury and may deny the motion solely on
16 either ground.

17 Plaintiffs' contention is that a TRO is necessary because
18 every night their First Amendment rights are being violated when
19 the Police enforce the allegedly unconstitutional regulation, §
20 12.72.090. Although the Superior Court denied a similar request
21 for TRO filed by Merin on October 7, Merin did not file the
22 instant action in this Court until November 1, some twenty-five
23 days after Judge Connelly's Order. In the interim, Plaintiffs
24 allege that approximately fifty people have been arrested for
25 violations of § 12.72.090. Plaintiffs could have sought a
26 preliminary injunction, without resorting to the extraordinary
27 form of relief that is a TRO, in the interim period between
28 October 7 and November 1.

Furthermore, Plaintiffs have not demonstrated to this
Court's satisfaction that they were pursuing their rights before
State or City officials in the interim between Judge Connelly's
Order and their filing the present action.

///

1 In their brief, they do not aver that they pursued an appeal from
2 Judge Connelly's denial of their TRO and they did not file an
3 application with the Director for a permit to extend the Park
4 hours, despite Judge Connelly's statement that Merin's failure to
5 do so was a basis for denying the Request for TRO. The only
6 evidence of action by Plaintiffs to prevent the City from
7 enforcing § 12.72.090 prior to filing this action is the Oct. 24
8 Merin Letter, in which he requested the City officials stop
9 enforcing the ordinance. That letter, however, was not directed
10 to the Director and it does not appear to be seeking a permit to
11 extend the Park hours. Furthermore, the Court was not persuaded
12 by counsel's explanation of his activities during the time
13 between Judge Connelly's order and the filing of this action,
14 which he provided at oral argument on November 3.

15 The twenty-five day lapse between Judge Connelly's Order and
16 the filing of this action, coupled with the number of arrests for
17 violations of the ordinance, and Plaintiffs' apparent failure to
18 diligently pursue other forms of relief, tends to undermine
19 their claim that the extraordinary remedy of a TRO is warranted.
20 Stated another way, the Court is of the view that the twenty-five
21 day delay between Judge Connelly's Order and the filing of this
22 action contradicts Plaintiffs' claims of irreparable injury if
23 the TRO does not issue and that under the circumstances here,
24 twenty-five days constitutes undue delay. See L.R. 231(b);
25 Caribbean Marine, 844 F.2d at 674.

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1 **2. Status Quo**
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3 The second preliminary concern for the Court relates to the
4 purpose of a TRO. Specifically, a TRO's purpose is to preserve
5 the status quo pending complete briefing by the parties and full
6 proceedings. See Dunn, 2010 WL 1558562 at *1. Here, the status
7 quo is that § 12.72.090 has been in effect since 1981 and since
8 October 6, the day that Occupy Sacramento started to congregate
9 in the Park, the City, through its Police Department, has
10 indicated its intention to enforce the ordinance and has actively
11 enforced it by arresting demonstrators who have refused to comply
12 with § 12.72.090's terms. In sum, the status quo is that there
13 is currently a thirty-year old ordinance which is being enforced
14 by the government.

15 So, Plaintiffs' Motion for TRO does not seek to maintain the
16 status quo, rather it seeks to alter the status quo: if granted,
17 the City would be precluded from enforcing § 12.72.090. Contrary
18 to the terms of the ordinance and present practice, Plaintiffs
19 would then be able to maintain an around-the-clock presence in
20 the Park. This would be a material change of position from the
21 status quo.

22 The situation here is therefore significantly different from
23 the one faced by "Occupation" demonstrators in some other cities
24 where the demonstrators have recently sought to obtain a TRO.
25 For example, in Nashville, Tennessee, officials allegedly enacted
26 a policy after demonstrators began gathering in a public space
27 that established a curfew and permit regulations on public land.
28 There, a federal district court granted Plaintiffs a TRO.

1 A similar situation appears to be unfolding in Trenton, New
2 Jersey, where officials established rules prohibiting visitors to
3 a memorial from bringing certain property onto the public land
4 after the demonstrators began congregating. Although it is not
5 yet known whether the court will grant the TRO, the Nashville and
6 Trenton cases are instructive because in both those cases, the
7 status quo was allegedly altered by the officials' enactment of
8 new rules following the arrival of the "Occupy" protestors on
9 public land.

10 In contrast, here, § 12.72.090 predates the Occupy
11 Sacramento demonstrations by thirty years, there is no allegation
12 that the City was not enforcing it prior to October 6, when
13 Plaintiffs began congregating in the Park, and there is evidence
14 that the City has been consistently enforcing the ordinance since
15 the demonstrations started. Therefore, maintaining the status
16 quo here, means continuing to enforce § 12.72.090.

17 Plaintiffs, however, assert that the status quo is their
18 constitutional right to free speech and free association and that
19 the status quo is violated when the City enforces § 12.72.090,
20 which they contend is facially unconstitutional because it
21 violates their First Amendment rights. The Court finds this
22 argument circular and unpersuasive, as it assumes the truth of
23 the matter at issue. Specifically, this argument assumes that
24 § 12.72.090 is unconstitutional, therefore every time the
25 ordinance is enforced, Plaintiffs' established rights are
26 violated. Even if the Court were to accept this logic, the
27 problem is that it has not been established at this time that §
28 12.72.090 is unconstitutional.

1 As will be discussed further below, the fact that an
2 ordinance stifles speech or expression does not necessarily lead
3 to the conclusion that it is unconstitutional: courts have
4 frequently upheld such ordinances, so the mere fact that the
5 City's enforcement of § 12.72.090 does not necessarily lead to
6 the conclusion that the ordinance is unconstitutional.
7 Therefore, the Court cannot conclude that each time the City
8 enforces § 12.72.090, the status quo is disturbed and a TRO is
9 justified.

10 In sum, the Court is also not persuaded that the purpose of
11 Plaintiffs' Motion is to maintain the status quo, which is the
12 underlying purpose of a TRO. See Dunn, 2010 WL 1558562 at *1.
13 However, the Court is loathe to deny Plaintiffs' Motion solely on
14 procedural grounds, so the Court also considers the substance of
15 Plaintiffs' Motion.

16
17 **B. Substantive TRO Issues**

18
19 Although Plaintiffs contend in their Complaint that
20 § 12.72.090 is unconstitutional both on its face and as applied,
21 at oral argument they conceded that, at this stage of the
22 litigation, they are relying solely on their facial challenge.²
23 Again, to succeed on their Motion for a TRO, Plaintiffs must
24 establish that: (1) they are likely to succeed on the merits;
25

26 ² Plaintiffs concede that they do not have evidence to
27 support an as-applied challenge at the present time, but suggest
28 that discovery may uncover evidence to support this claim.
Because Plaintiffs do not pursue this claim at the present time,
the Court does not address it here.

1 (2) they are likely to suffer irreparable harm absent preliminary
2 relief; (3) the balance of equities tips in their favor; and
3 (4) an injunction is in the public interest. Winter, 555 U.S. at
4 20. Or, in the alternative, they must satisfy the sliding scale
5 standard set forth in Cottrell. 632 F.3d at 1131-36.

6 Here, the Court concludes that Plaintiffs have failed to
7 meet their burden under either the Winter or Cottrell standard.
8 Plaintiffs have not met their burden of showing a likelihood that
9 they will succeed on the merits because § 12.72.090: appears to:
10 (1) be content neutral, (2) be narrowly-tailored, (3) support a
11 substantial government purpose; (4) provide the Director with
12 constitutionally sufficient discretion; and (5) be
13 constitutionally sufficient even though the City may be able to
14 exempt itself from the permitting regulations. Furthermore,
15 Plaintiffs have not met their burden of showing irreparable har
16 or showing that the balance of equities or public interest
17 necessitate the extraordinary remedy of a TRO.

18
19 **1. Success on the Merits**

20
21 As a general matter, a facial challenge is a challenge to an
22 entire legislative enactment or provision. Foti v. City of Menlo
23 Park, 146 F.3d 629, 635 (9th Cir. 1998) (explaining that a statute
24 is facially unconstitutional if "it is unconstitutional in every
25 conceivable application, or it seeks to prohibit such a broad
26 range of protected conduct that it is unconstitutionally
27 overbroad").

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1 "[T]he Supreme Court has entertained facial freedom-of-expression
2 challenges only against statutes that, 'by their terms,' sought
3 to regulate 'spoken words,' or patently 'expressive or
4 communicative conduct' such as picketing or handbilling."
5 Roulette v. City of Seattle, 97 F.3d 300, 303 (9th Cir. 1996)
6 (upholding an ordinance passed by Seattle that prohibited people
7 from sitting or lying on public sidewalks in certain commercial
8 areas between 7:00 a.m. and 9:00 p.m., finding that neither
9 activity "is integral to, or commonly associated with,
10 expression"). Id. at 303-304 (citation omitted).

11 The government may impose content-neutral time place and
12 manner restrictions on speech, provided that they are narrowly
13 tailored to advance a significant governmental interest, and
14 leave open ample, alternative avenues of communication. Thomas
15 v. Chicago Park Dist., 534 U.S. 316, 323 n.3 (2002); Clark v.
16 Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).
17 The level of scrutiny depends on whether the challenged ordinance
18 is "related to the suppression of free expression." Texas v.
19 Johnson, 491 U.S. 397, 403 (1989) (internal quotation marks and
20 citation omitted). "If a law hits speech because it aimed at it,
21 then courts apply strict scrutiny; but if it hits speech without
22 having aimed at it, then courts apply the O'Brien intermediate
23 scrutiny standard." Nordyke v. King, 644 F.3d 776, 792 (9th Cir.
24 2011) (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).

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1 Plaintiffs do not concede that § 12.72.090 is content-
2 neutral, but even if it is, they contend that § 12.72.090 cannot
3 survive intermediate scrutiny because it is not narrowly
4 tailored; is over-broad and under-inclusive; does not advance a
5 significant governmental interest; it provides no meaningful
6 limits on the Director's discretion; and because it exempts the
7 City from the permitting requirements, which could lead to
8 viewpoint discrimination.

9 Plaintiffs have not persuaded the Court that they are likely
10 to succeed in their facial challenge. Section 12.72.090 appears
11 to be a narrowly-tailored and content-neutral time, place and
12 manner restriction that applies to anyone who wishes to use the
13 park during certain hours.

14 First, Plaintiffs have not met their burden of demonstrating
15 that § 12.72.090 is not content-neutral. On its face,
16 § 12.72.090 appears to be content neutral: it does not make any
17 reference to speech and it merely regulates the hours that anyone
18 can remain or loiter in City parks. While § 12.72.090 does have
19 the direct effect of limiting speech and expressive activities in
20 City parks during those hours during which people are not
21 permitted to remain or loiter in the parks, "reasonable time,
22 place, or manner regulations normally have the purpose and direct
23 effect of limiting expression but are nevertheless valid."

24 Clark, 468 U.S. at 294 (citation omitted). Plaintiffs have not
25 alleged any content-based purpose behind § 12.72.090 and it is
26 unlikely that they will be able to do so.

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1 Second, Plaintiffs have not presented any compelling
2 evidence that § 12.72.090 is not narrowly-tailored. A regulation
3 of speech or speech-related conduct is overbroad-and therefore
4 facially invalid-if it punishes a substantial amount of protected
5 speech, judged in relation to the regulation's plainly legitimate
6 sweep. Virginia v. Hicks, 539 U.S. 113 (2003). The regulation
7 must be narrowly tailored to advance a government's legitimate,
8 content-neutral interest, but need not be the least restrictive
9 or least intrusive means of doing so. Ward v. Rock Against
10 Racism, 491 U.S. 781, 798 (1989). Plaintiffs argument that
11 § 12.72.090 is either over-broad or under-inclusive is not
12 compelling.

13 The ordinance is limited to City parks and limited to five
14 or six hours a day between the hours of 11:00 p.m. and 5:00 a.m.
15 Section 12.72.090 does not prevent Plaintiffs from conducting
16 their expressive activities twenty-four hours a day on adjoining
17 sidewalks or in other public spaces if they so choose. It just
18 prevents them from doing so by remaining or loitering in City
19 parks after the hours established by the ordinance if they do not
20 have a permit to do so. It is therefore not over-broad. Neither
21 is it under-inclusive. The fact that § 12.72.090 applies to
22 parks and not to sidewalks or other public places does not lead
23 inevitably to the conclusion that the hours restrictions are
24 intended to stifle free expression in City parks, as Plaintiffs
25 suggest.

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1 Third, § 12.72.090 appears to support a substantial
2 government interest. In his declaration, the Director asserted
3 the following government interests for this ordinance: (1) the
4 general public's enjoyment of park facilities; (2) the viability
5 and maintenance of those facilities; (3) the public's health,
6 safety and welfare; and (4) the protection of the City's parks
7 and public property from overuse and unsanitary conditions.
8 These interests appear to be narrowly-tailored and substantial
9 and similar to the interests the Supreme Court found
10 constitutionally sufficient in Clark. See 468 U.S. at 296.

11 The Court finds the Supreme Court's reasoning in Clark to be
12 particularly informative. In Clark, at issue were regulations
13 that stated that camping in National Parks is permitted only in
14 campgrounds designated for that purpose. Id. at 289-92. The
15 plaintiffs wanted to camp in Lafayette Park (which is located in
16 Washington, D.C., across the street from the White House) and on
17 the National Mall to demonstrate in support of the plight of the
18 homeless, however neither of these public parks were designated
19 campgrounds under the regulations at issue. Id. at 291-92.
20 Plaintiffs argued, among other things, that the regulations
21 violated the First Amendment. Id. at 293.

22 The Supreme Court, however, found that the regulations were
23 content-neutral time, place or manner restrictions. Id. at 295.
24 The Court agreed that the tents and the act of sleeping out could
25 all be expressive activity and that the regulation at issue
26 prohibited those activities in Lafayette Park or on the Mall,
27 nonetheless, the Court noted that:

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1 It is also apparent to us that the regulation narrowly
2 focuses on the Government's substantial interest in
3 maintaining the parks in the heart of our Capital in an
4 attractive and intact condition, readily available to
5 the millions of people who wish to see and enjoy them
6 by their presence. To permit camping—using these areas
7 as living accommodations—would be totally inimical to
8 these purposes, as would be readily understood by those
9 who have frequented the National Parks across the
10 country and observed the unfortunate consequences of
11 the activities of those who refuse to confine their
12 camping to designated areas.

13 Id. at 296. The Court also noted that if it were to find the
14 regulation was invalid on First Amendment grounds, "there would
15 be other groups who would demand permission to deliver an
16 asserted message by camping in Lafayette Park" and that this
17 "would present difficult problems for the Park Service." Id.

18 Although camping is not directly at issue in this case, the
19 Court finds the City's interests at issue here are substantially
20 similar to the government interests that were found to be
21 constitutionally sufficient in Clark.³

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24 ³ A similar result was obtained in Vietnam Veterans Against
25 The War/Winter Soldier Organization v. Morton, 506 F.2d 53 (D.C.
26 Cir. 1974). In that case, the appellees sought to enjoin the
27 "Superintendent of the National Capital Parks and his superiors
28 from withholding from them a permit to establish a 'symbolic
29 campsite' on the Mall" on freedom of expression grounds Id. at
30 54. The D.C. Circuit, however, rejected this argument, noting
31 that the demonstrators were given a permit on the Mall that
32 allowed them to "propound their views by assembling, speaking,
33 pamphleteering, parading, carrying banners, and erecting whatever
34 structures they deem necessary to effective communication of
35 their message." The only restriction was a ban on camping,
36 which, the court noted meant that the protestors "are only
37 prohibited from cooking and camping overnight, activities whose
38 unfettered exercise is not crucial to the survival of democracy
39 and which are thus beyond the pale of First Amendment
40 protection." Id. at 57-58.

1 Therefore, the Court is not persuaded that Plaintiffs are likely
2 to be able to succeed on the merits of their argument that there
3 is no substantial government interest behind § 12.72.090.

4 Fourth, the Court is not persuaded that Plaintiffs are
5 likely to succeed on the merits of their argument that
6 § 12.72.090 is unconstitutional because it fails to provide
7 "meaningful limits" on the discretion of the Director to
8 determine when to extend Park hours. "Where the licensing
9 official enjoys unduly broad discretion in determining whether to
10 grant or deny a permit, there is a risk that he will favor or
11 disfavor speech based on its content." Thomas, 534 U.S. at 323
12 (citing Forsyth County v. Nationalist Movement, 505 U.S. 123, 131
13 (1992)). The Supreme Court has therefore "required that a time,
14 place, and manner regulation contain adequate standards to guide
15 the official's decision and render it subject to effective
16 judicial review." Id.

17 In Thomas, the Supreme Court addressed the issue of whether
18 Chicago Park District officials had unduly broad discretion in
19 determining whether to grant or deny a permit to use a municipal
20 park. 534 U.S. at 317-18. Under the challenged city ordinance,
21 the Park District was given discretionary authority to deny a
22 permit on any of thirteen specified grounds. Id. at 318-20. For
23 example, the Park District could deny a permit if the use or
24 activity "would present an unreasonable danger to the health or
25 safety of the applicant, or other users of the park, of Park
26 District Employees or of the public." Id. at 319 n.1.

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1 The petitioners contended that the criteria set forth in the
2 ordinance were insufficiently precise because they gave the Park
3 District discretionary authority to deny applications rather than
4 specific grounds on which the application must be denied. Id. at
5 324. The Supreme Court, however, concluded that the Park
6 District's discretion was not over-broad and upheld the
7 ordinance, noting that:

8 Granting waivers to favored speakers (or, more
9 precisely, denying them to disfavored speakers) would
10 of course be unconstitutional, but we think that this
11 abuse must be dealt with if and when a pattern of
12 unlawful favoritism appears, rather than by insisting
13 upon a degree of rigidity that is found in few legal
14 arrangements. On petitioners' theory, every obscenity
15 law, or every law placing limits upon political
16 expenditures, contains a constitutional flaw, since it
17 merely permits, but does not require, prosecution. The
18 prophylaxis achieved by insisting upon a rigid,
19 no-waiver application of the ordinance requirements
20 would be far outweighed, we think, by the accompanying
21 senseless prohibition of speech (and of other activity
22 in the park) by organizations that fail to meet the
23 technical requirements of the ordinance but for one
24 reason or another pose no risk of the evils that those
25 requirements are designed to avoid. On balance, we
26 think the permissive nature of the ordinance furthers,
27 rather than constricts, free speech.

19 Id. at 325.

20 Here, § 12.72.090(C) grants the Director discretionary
21 authority, with the concurrence of the Chief of Police, to extend
22 park hours, subject to three conditions. Specifically, it
23 permits the Director to extend park hours when the Director
24 determines that (1) such extension of hours is consistent with
25 sound use of park resources, (2) the extension will enhance
26 recreational activities in the city, and (3) the extension will
27 not be detrimental to the public safety or welfare.

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1 Neither the Director's discretionary authority, nor the three
2 criteria at issue in § 12.72.090(C), appear to be materially
3 different from the type of criteria that the Supreme Court upheld
4 in Thomas.

5 Furthermore, Plaintiffs have not demonstrated that there is
6 no meaningful opportunity for judicial review of licensing
7 decisions. Plaintiffs have not presented any evidence that
8 judicial review is unavailable and Defendants have provided the
9 Court with the park use permitting process outlined in
10 §§ 12.72.160-180 (attached to the Witter Decl.), which establish
11 a process for review of the denial a park use application to the
12 City Manager. Therefore, it appears there is a process for
13 appealing the denial of an application for permit to extend time
14 in the City parks and there is no evidence that judicial review
15 is unavailable.

16 In addition, as of the date Plaintiffs filed this action,
17 they had not actually applied for a park use permit, so their
18 claims that the Director has unfettered discretion to deny
19 applications for permits remains untested. What the Director's
20 decision will be on the application that Plaintiffs submitted on
21 November 3 is unknowable. Therefore, the Court again finds that
22 Plaintiffs' have not met their burden to establish a likelihood
23 of success on the merits.

24 Fifth, Plaintiffs' have failed to demonstrate that they are
25 likely to be able to show that § 12.72.090 is unconstitutional
26 because the City exempts itself from its own permitting
27 requirements and could potentially engage in viewpoint
28 discrimination by favoring one form of speech over another.

1 However, Plaintiffs provide no evidence to support the conclusion
2 that the City has or is likely to engage in such viewpoint
3 discrimination and, in any event, the Supreme Court has upheld
4 instances where the government has favored one viewpoint over
5 another. See Pleasant Grove v. Sumnum, 555 U.S. 460 (2009); Rust
6 v. Sullivan, 500 U.S. 173 (1991). Plaintiffs have not
7 demonstrated that any hypothetical action by the City favoring
8 one viewpoint over another would necessarily be unconstitutional.

9 In sum, Plaintiffs have failed to demonstrate that they are
10 likely to succeed on the merits on their claims. Winter,
11 555 U.S. at 20. Under an intermediate level of review, it
12 appears substantially likely that § 12.72.090 is a
13 constitutionally sound, narrowly-tailored time, place or manner
14 restriction. See Nordyke, 644 F.3d 792-93. Because Plaintiffs
15 cannot show success on the merits, and must show each of the
16 requisite elements to obtain a TRO under the Winter standard,
17 their Motion fails. Winter, 555 U.S. at 20.

18 The Court will briefly discuss each of the remaining
19 elements for obtaining a TRO but concludes that under the sliding
20 scale standard, Plaintiffs have failed to establish entitlement
21 to a TRO because they have not demonstrated a likelihood of
22 irreparable harm or shown that an injunction is in the public
23 interest. Cottrell, 632 F.3d at 1131-36.

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1 **2. Irreparable Harm**

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3 Because Plaintiffs have failed to establish that they are
4 likely to succeed on the merits of demonstrating that § 12.72.090
5 is unconstitutional, they cannot show they will suffer
6 irreparable injury from the continued application and enforcement
7 of the ordinance. In addition, as discussed earlier, Plaintiffs'
8 twenty-five day delay in bringing this action, after their TRO
9 was denied by Judge Connelly, significantly undermines their
10 assertion that they will suffer irreparable injury from the
11 continued enforcement of § 12.72.090 absent a TRO. They could
12 have sought an injunction, but failed to do so.

13
14 **3. Balance of the Equities and Public Interest**

15
16 Because Plaintiffs have not met their burden to demonstrate
17 that they are likely to succeed on their argument that
18 § 12.72.090 is unconstitutional, they cannot show that the
19 balance of equities or public interest favor the granting of a
20 TRO to suspend the enforcement of a presumptively constitutional
21 statute. Furthermore, on balance Plaintiffs have not met their
22 burden of showing that whatever expressive benefit Plaintiffs may
23 derive from instituting around-the-clock activities in the Park
24 is outweighed by the public interest in the various benefits
25 derived from the hours restrictions established by § 12.72.090.

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1 CONCLUSION

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3 For the reasons set forth in this Order, the Court concludes
4 that Plaintiffs have not met their burden of showing that they
5 are entitled to the extraordinary remedy of a TRO under the
6 standards articulated in Winter and Cottrell. Plaintiffs' Motion
7 for a Temporary Restraining Order is therefore DENIED.

8 IT IS SO ORDERED.

9 Dated: November 4, 2011

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11 
12 MORRISON C. ENGLAND, JR.
13 UNITED STATES DISTRICT JUDGE
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