IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DAVID SHELDON, KATHLEEN HANUS, OMAR GARZA AND WILLIAM KELLY

Plaintiffs,

v.

LORI LIGHTFOOT, MAYOR OF THE CITY OF CHICAGO, and JAY ROBERT "J.B." PRITZKER, GOVERNOR OF THE STATE OF ILLINOIS,

Defendants.

Case No. 2020 CH 04727

Hon. Franklin U. Valderrama

DEFENDANT LIGHTFOOT'S MEMORANDUM IN SUPPORT OF HER MOTION TO DISMISS

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INTRODUCTION

Since March, State and City authorities have fixated on stemming the spread of COVID-19, a highly contagious virus that can cause severe illness and death. At times, stringent measures have been called for, such as closing schools and non-essential businesses, and requiring people to generally stay at home. These have undoubtedly disrupted daily life. But they have been deemed necessary by the elected officials whose fundamental charge is to protect the public's health and safety.

In this case, Plaintiff Kelly challenges one of these measures – the Governor's former requirements that people limit their gatherings to 10 people and socially distance by keeping 6 feet apart. Kelly claims that he was part of a May 25, 2020, rally in Grant Park and that Mayor Lightfoot ordered the rally to be dispersed for violating these restrictions, which violated his rights under the Illinois Constitution to free speech, peaceable assembly, and equal protection.

Kelly's claims should be dismissed. Courts have long afforded special deference to the government's efforts during an epidemic to constrain dangerous disease. Under the operative test, a measure is upheld so long as it bears a real and substantial relation to protecting public health and does not plainly invade an individual's rights. That is the case here: Breaking up a gathering of 150 people was substantially related to stopping the spread of COVID-19, and was not a plain invasion of Kelly's speech and assembly rights, especially as he had numerous other ways to express his views and join with others in doing so. The dispersal also satisfied even the heightened form of scrutiny used in normal times because the Governor's restrictions were reasonable time, place, and manner regulations.

Kelly contends that the real reason the rally was dispersed is that the Mayor disliked the rally's message – its opposition to stay at home policies – and that the City later allowed tens of

thousands of Black Lives Matter ("BLM") protesters to march in the City, even though they too were in violation of the Governor's COVID-19 restrictions. But a selective enforcement claim exists only when the government treats similarly situated entities differently, and here, the May 25 rally and BLM protests were not similarly situated, given the vast size differences between the two groups. Even more, Kelly offers no facts indicating that his rally was dispersed because of its message. If anything, the Complaint supports an obvious and neutral reason for dispersing the May 25 rally but not the BLM protests: It is more feasible to disperse a stationary group of 150 than tens of thousands marching through the streets. Officials may reasonably conclude that dispersing such an immense crowd could lead to disorder, and that police resources are better used in managing the marches, closing streets, and protecting participants and the public.

Next, all four Plaintiffs contend that they were denied equal protection because they were prevented from using lakefront parks even after a group of up to 20,000 BLM protesters were allowed in Grant Park. But the claim is conclusory; no Plaintiff identifies any instance where he or she was denied access to a park. Nor are Plaintiffs – four individuals – similarly situated to the 20,000 BLM protesters, and Plaintiffs fail to show that there was no rational reason for allowing the BLM protesters to enter a park rather than remain in the streets.

Last, Plaintiffs contend that that the City lacked the authority to issue guidelines for reopening businesses (the City's Phase III guidelines) that were stricter than those promulgated by the Governor. But the Governor's order expressly allowed cities to have stricter measures, and the City's home rule authority permitted them in any event. For all of these reasons and others explained below, the three counts against the Mayor (Counts I – III) should be dismissed.

BACKGROUND

In March 2020, the World Health Organization declared COVID-19 a pandemic, the President declared it a national emergency, and the Governor proclaimed it a disaster under the Illinois Emergency Management Agency Act. Compl. ¶¶ 7-8. To respond, the Governor issued Executive Order 2020-10 on March 20, see Compl., Ex. 2 thereto, which Plaintiffs style as the "Stay At Home" order, Compl. ¶ 9. Among other things, the Governor found that "in a short period of time, COVID-19 has rapidly spread throughout Illinois," and that urgent measures were necessary "for the preservation of public health and safety throughout the entire State of Illinois, and to ensure that our healthcare delivery system is capable of serving those who are sick." Compl., Ex. 2, at 1. To these ends, the Governor ordered non-essential businesses and operations to cease; generally required people to stay at home unless participating in essential activities or businesses, and to maintain social distancing of 6 feet from other people when outside the home; and prohibited any gathering of more than 10 people. See id. §§ 1, 2, 3.

The City also responded. Among other actions, the Commissioner of the City's Department of Public Health ("CDPH") issued Order 2020-3 on March 26, which applied the Governor's March 20 order. Compl. ¶ 44; Ex. 9 thereto.[1] The Commissioner found that some Chicagoans "have recklessly disregarded [the Governor's] directive and continue to congregate, cluster, and engage in group social and recreational activity, unacceptably placing their own health and the health of all Chicagoans in danger." Id. at 1. The Commissioner thus ordered closed all Chicago parks, beaches, walking, running and cycling paths, trails and other

[1] Prior to the Commissioner's order, the Mayor issued Emergency Executive Order No. 2020-1 on March 18. Compl., Ex. 3 thereto. The Mayor found that COVID-19 "presents an extraordinarily severe and unprecedented threat to the populace of Chicago," as it is "a new and highly communicable" virus that "continued to spread throughout Chicago and the State of Illinois" despite efforts to contain it. Id. at 1.

recreational facilities on and adjacent to the lakefront, including those on the west side of Lakeshore Drive. Id. § 1.[2]

Over a month later (on April 30), the Governor found that the 10-person cap on gatherings and the requirement to socially distance remained necessary. He issued a new Executive Order (EO 2020-32) maintaining these restrictions after finding that the virus had "continued to spread rapidly;" that modeling showed that "without extensive social distancing and other precautions, the State will not have sufficient hospital beds, ICU beds or ventilators;" and that "without a 'stay at home' order, the number of deaths from COVID-19 would be between 10 to 20 times higher." See Ex. 1 hereto, at 1-2; see also id., § 2(1), (3) (maintaining restrictions). The next day (May 1), the CDPH Commissioner amended and reissued her earlier Order 2020-3, maintaining the closure of Chicago's lakefront parks. See Ex. 2 hereto, §§ 1, 8.

These restrictions were in effect on May 25, when Plaintiff Kelly attended a rally of about 150 people in Grant Park who opposed the State and City "stay-at-home" orders. Id. ¶¶ 57-59. The Mayor ordered the police to disperse the protest. Id. ¶ 57. Then, between June 1 and 7, tens of thousands of BLM protesters marched through the streets of Chicago. Id. ¶ 63. And on June 7, between 10,000 and 20,000 of them gathered in Grant Park and Union Park. Id. ¶¶ 63, 70. According to Kelly, these events were "massive" and "at times violent." Id. ¶ 64. During this period, the operative orders still prohibited gatherings of more than 10 people and required 6 feet social distancing. Id. ¶ 61-62. Grant Park also remained closed by order of the Park District. Id. ¶ 77. Even so, the Mayor did not order these gatherings to be dispersed, allegedly because she agreed with their message. Id. ¶¶ 64, 66, 68, 70, 71.

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[2] The Chicago Park District, too, issued its own resolution (on April 8) closing these parks and found that "it is subject to EO2020-10 and the City Health Commissioner's order to close Park District playgrounds, buildings, various park locations, and the lakefront." Compl., Ex. 10, at 1.

The other three Plaintiffs – Sheldon, Hanus, and Garza – do not allege that they were at the May 25 protest or wished to engage in any speech activity. Instead, they summarily allege that their business or employment has suffered due to State and City COVID-19 orders. See id. ¶¶ 1-3. They do not offer any details about their businesses or employment or how the orders have impacted them, nor do they identify any action taken by the Governor or City against them.

ARGUMENT

I. Kelly Fails To State A Claim Based On Dispersal Of The May 25 Rally (Count I).

In Count I, Kelly claims that the dispersal of the May 25 protest in Grant Park violated his rights under the Illinois Constitution to freedom of speech, peaceable assembly, and equal protection. See Ill. Const., Art. I, §§ 2 (equal protection), 4 (speech), 5 (assembly). Kelly claims that it was unlawful to enforce the Governor's Stay At Home Order against the rally, by which he appears to mean the Governor's 10-person cap on public gatherings and the requirement to socially distance in public. See Compl. ¶¶ 9, 57-58. Kelly fails to state any of these claims.

A. Dispersal of the rally was lawful under the Jacobson standard applicable to public safety measures taken to combat the spread of dangerous disease.

In addressing Kelly's speech and assembly claims under the Illinois Constitution, the Court should apply the caselaw developed under the First Amendment to the U.S. Constitution: The Illinois speech provision generally provides the same protections as its counterpart in the First Amendment when it comes to expressive activity. See City of Chicago v. Pooh Bah Enterprises, Inc., 224 Ill. 2d 390, 447-48 (2006); People v. Austin, 2019 IL 123910, ¶ 1 (dismissing challenge to statute brought on First Amendment and Article 1, Section 4, grounds with no separate analysis of the state constitutional challenge). Likewise, the Illinois right to peaceable assembly "is to be interpreted and applied in lockstep with the federal precedents

interpreting and applying the assembly clause of the first amendment of the United States Constitution." City of Chicago v. Alexander, 2017 IL 120350, ¶ 57.

Under the federal precedents, the applicable standard for this case comes from Jacobson v. Massachusetts, 197 U.S. 11 (1905), which addressed a constitutional challenge to a public safety measure – a mandatory vaccination law – during an epidemic. Jacobson acknowledged that such laws may "prove[] to be distressing, inconvenient, or objectionable to some." Id. at 29. Nonetheless, it "[is] the duty of the constituted authorities primarily to keep in view the welfare, comfort, and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few." Id. Accordingly, under Jacobson, a law responding to a public health crisis is constitutional, even if it interferes with constitutional rights, unless the law "has no real or substantial relation" to the protection of public health and safety or is "beyond all question, a plain, palpable invasion of rights secured by fundamental law." Id. at 31. Absent this, the law is valid; details such as "[t]he mode or manner" chosen by the government to protect residents' health are left to "the discretion of the state." Id. at 25.

The Illinois Supreme Court has applied Jacobson in assessing a challenge under the Illinois Constitution to laws combatting the spread of serious communicable disease. See People v. Adams, 149 Ill. 2d 331 (1992) (upholding mandatory HIV testing of people convicted of prostitution). And numerous judges in the Northern District of Illinois have recently applied Jacobson to constitutional challenges against the Governor's COVID-19 executive orders.[3] At

[3] See Vill. of Orland Park v. Pritzker, No. 20-CV-03528, 2020 WL 4430577, at *7 (N.D. Ill. Aug. 1, 2020); Illinois Republican Party v. Pritzker, No. 20 C 3489, 2020 WL 3604106, at *3 (N.D. Ill. July 2, 2020), aff'd 2020 WL 5246656 (7th Cir. 2020); Elim Romanian Pentecostal Church v. Pritzker, No. 20 C 2782, 2020 WL 2468194, at *3 (N.D. Ill. May 13, 2020), aff'd 962 F.3d 341 (7th Cir. 2020); Cassell v. Snyders, No. 20 C 50153, 2020 WL 2112374, at *7 (N.D. Ill. May 3, 2020); see also Open Our Oregon v.

least one Illinois court has done likewise in reviewing challenges under the Illinois Constitution. See JL Props. Grp. B LLC v. Pritzker, No. 20-CH-601, slip op. at 12-16 (Ill. 12th Jud. Cir. Ct. Will Cty. July 31, 2020), attached as Ex. 3 hereto. The COVID-19 pandemic is "the very sort of extraordinary threat to public health and safety contemplated . . . in Jacobson." Vill. of Orland Park v. Pritzker, No. 20-CV-03528, 2020 WL 4430577, at *7 (N.D. Ill. Aug. 1, 2020).

Under Jacobson, Kelly's challenge to the dispersal of the May 25 protest fails as a matter of law. Enforcing the Governor's 10-person cap and social distancing requirements had a real and substantial relation to protecting public health. COVID-19 is "a novel severe acute respiratory illness" with "no known cure, no effective treatment, and no vaccine." S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (mem.) (Roberts, C.J., concurring). And "[b]ecause people may be infected but asymptomatic, they may unwittingly infect others." Id. Even more, large crowds "magnify the risk of contagion even when participants practice preventative measures." Cassell v. Snyders, No. 20 C 50153, 2020 WL 2112374, at *7 (N.D. Ill. May 3, 2020). Therefore, limiting the number of people who may gather together and requiring them to socially distance undoubtedly bears a real and substantial relation to reducing the disease's spread and saving lives. See, e.g., Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 344 (7th Cir. 2020) ("The Governor's Executive Order 2020-32 responds to an extraordinary public health emergency."); Vill. of Orland Park, 2020 WL 4430577, at *7 (finding that limitations on gathering size "undoubtedly have a real and substantial relationship to preventing the spread of COVID-19"). Indeed, as the Governor found, the number of COVID-19 deaths would have been between 10 to 20 times higher without his

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Brown, No. 6:20-CV-773-MC, 2020 WL 2542861, at *2 (D. Or. May 19, 2020) (collecting cases applying Jacobson to COVID-19 pandemic).

"Stay At Home" requirements. See supra, at 4. And for these same reasons, enforcement against the May 25 rally was not "beyond all question, a plain, palpable invasion of rights secured by fundamental law." Jacobson, 197 U.S. at 31; see also Newsom, 140 S. Ct. at 1613 (Roberts, C.J., concurring) ("The notion that it is 'indisputably clear' that the Government's limitations [on gathering size] are unconstitutional seems quite improbable."). In fact, as discussed below, see infra 10, despite the Governor's order, Kelly still had numerous other ways to express objections to the Governor's COVID-19 restrictions and to join with others in doing so.

Because the Governor's 10-peson cap and social distancing requirements satisfy the standard set out in Jacobson, their enforcement against the participants at the May 25 rally did not violate Kelly's speech or assembly rights. Under Jacobson, courts should not second-guess these reasonable responses to an acute public health crisis.

B. Dispersal was lawful under regular constitutional standards.

Kelly's speech and assembly claims fail even under the standards that apply when there is no pandemic. The 10-person cap and social distancing requirements were content-neutral regulations of conduct rather than content-based regulations of speech, as they merely regulated gathering size and how closely people could stand to each other. They are therefore subject to "time, place, and manner" analysis. See City of Chicago v. Alexander, 2015 IL App (1st) 122858-B, ¶¶ 26, 37-38 (applying time, place, and manner analysis to a regulation that prohibited gathering in parks at night), aff'd, 2017 IL 120350. This test applies equally to Kelly's speech and assembly claims. See id. (speech); Alexander, 2017 IL 120350, ¶ 66 (assembly). Under that test, a content-neutral law is valid, even if it restricts speech, so long as the law is "narrowly tailored to serve a significant governmental interest and leave[s] open alternative means for communication of the information." Alexander, 2015 IL App (1st)

122858-B, ¶ 37. The test recognizes that the Constitution "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." Id.; see also City of Chicago v. Joyce, 38 Ill. 2d 368, 371 (1967) (rights to free speech and assembly "do not mean that everybody wanting to express an opinion may plant themselves in any public place at any time . . . without regard to the inconvenience and harm it causes to the public").

The 10-person limit and social distancing requirements easily satisfy this standard. *First*, reducing the spread of COVID-19 is undoubtedly a substantial interest. See supra at 7. Kelly does not claim otherwise. *Next*, the regulations were narrowly tailored to further this interest. Narrow tailoring does not require the government to implement the "least restrictive means" possible. Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989). It requires only that the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation." Id.; see also Alexander, 2015 IL App (1st) 122858-B, ¶ 36. Here, the government's efforts to reduce the spread of COVID-19 would have been less effective if larger groups had been allowed to gather and if social distancing had not been required. See supra, at 9; see also Elim Romanian Pentecostal Church v. Pritzker, No. 20 C 2782, 2020 WL 2468194, at *4 (N.D. Ill. May 13, 2020), (concluding that 10-person limit was appropriate response as applied to religious exercise, another form of First Amendment activity); Cassell, 2020 WL 2112374, at *6-7. That was especially true at the time of the May 25 rally; community spread was particularly high and the hospital system was severely strained. See supra, at 4. Yet, as the situation improved over the summer, the Governor relaxed the gathering limit. See Compl. ¶¶ 36-37. This shows that the government's responses are sensitive to real-time conditions, which is the epitome of narrow tailoring. See Tigges v. Northam, No. 3:20-CV-410, 2020 WL 4197610, at *9 (E.D. Va. July 21, 2020) (finding COVID-19 restriction narrowly tailored where

the governor has "gradual[ly] tailor[ed] ... the prohibition based on the COVID-19 figures and how well the previous prohibitions were working").

Finally, there were ample alternative channels for Kelly to express his views despite the Governor's order. He organized an online petition effort, obtaining 138,000 signatures from Illinois residents. Compl. ¶ 4. Additionally, he could have organized or joined multiple (but separate) 10-person gatherings. He was also free to send letters to news publications or elected officials, call in to radio and television programs, or distribute his message through any number of electronic means, including email and social media.[4] An alternative "need not be [Plaintiff's] first choice . . . or require the employment of the same method of communication," Alexander, 2015 IL App (1st) 122858-B, ¶ 47, and courts have found these methods sufficient in the face of COVID-19 restrictions on the size of gatherings. See Antietam Battlefield KOA v. Hogan, No. CV CCB-20-1130, 2020 WL 2556496, at *12 (D. Md. May 20, 2020) (finding adequate alternatives where people "may still protest in groups of ten or fewer, and can also communicate information in other ways such as through the Internet, newspaper, or signs."); Geller v. Cuomo, No. 20 CIV. 4653, 2020 WL 4463207, at *11 (S.D.N.Y. Aug. 3, 2020) (concluding that plaintiff's "substantial online presence and following undercuts her contention that a protest of between 25 to 100 people is the most effective way for her to express her point of view."); Amato v. Elicker, No. 3:20-CV-464 (MPS), 2020 WL 2542788, at *11 (D. Conn. May 19, 2020) (finding ample alternatives where people "are free to communicate and express themselves in any means other than a large, in-person gathering."). Indeed, for at least the last 10 months,

[4] Indeed, Kelly maintains a website – williamkelly.org – where he voices objections to State and local COVID-19 orders. He also explains that he is the "host of the Citizen Kelly Show on AM 1590 WCGO;" launched a production company "[which] has produced programs on FOX, Comcast Sportsnet, ION, and Tribune Networks to name a few;" and "currently writes for various national publications. See https://www.williamjkelly.org/about-bill-1.

COVID-19 and the government's responses have been the foremost issue of national and local debate, even with similar crowd size restrictions across the country. Those limitations have not prevented people from expressing their views or from having those views broadly heard. For these reasons, enforcement of the 10-person cap and social distancing requirements against the May 25 rally was lawful under time, place, and manner analysis.

C. Kelly does not state a claim of content-based or selective enforcement.

Kelly also contends that the Mayor directed the May 25 rally to be dispersed because it was "criticizing her orders, policies, and actions," but that she did not later enforce the limits against BLM protesters because they were an "assembly of people she agreed with" or desired their political support. Compl. ¶¶ 66, 68, 71. Similarly, Kelly claims that while Grant Park had been ordered closed at the time of the May 25 rally (and thus off-limits to the rally), the Mayor allowed BLM protesters to gather there on June 7. Compl. ¶¶ 69-70. Kelly claims that this content-based difference in treatment violated his equal protection, speech, and assembly rights.

These allegations fail to state a selective enforcement claim. The fact that restrictions were enforced against one group but not another is not enough. Indeed, "'[s]elective, incomplete enforcement of the law is the norm in this country,'" and "[e]xacting precision and equality in enforcement of state and local laws is not required." Alexander, 2015 IL App (1st) 122858-B, at ¶ 51 (quoting Hameetman v. City of Chicago, 776 F.2d 636, 641 (7th Cir. 1985)). The government "retains 'broad discretion'" regarding enforcement choices, which are often made based on a mix of complex law enforcement and policy factors that are "not readily susceptible to the kind of analysis the courts are competent to undertake." Wayte v. U.S., 470 U.S. 598, 607 (1985). Therefore, for Kelly to succeed, he must do much more than point to a group that was not dispersed. He must establish that: (1) the other group was similarly situated to the May 25

rally; and (2) the differing treatment was based on clearly impermissible or "invidious" grounds, "such as discrimination on the basis of race, religion, the exercise of first amendment rights, or bad faith." Alexander, 2015 IL App (1st) 122858-B, at ¶ 51. Kelly does not do either.

1. The March 25 rally was not similarly situated to the BLM protests.

"Two classes are similarly situated only when they are in all relevant respects alike." In re Destiny P., 2017 IL 120796, ¶ 15; see also Purze v. Vill. of Winthrop Harbor, 286 F.3d 452, 455 (7th Cir. 2002). Here, Kelly identifies the BLM protesters as similarly situated to the March 25 rally participants, Compl., ¶ 65, but the two groups were not alike in all relevant respects.

First, they differed significantly in size. Kelly himself recognizes that the March 25 rally of 150 people was significantly less" than the BLM protestors, who numbered in the "tens of thousands," and upwards of 20,000 when allowed into Grant Park on June 7. Compl. ¶¶ 60, 63, 67, 72. Indeed, based on these numbers, the BLM protests ranged from 65 to 130 times the size of the May 25 rally. *Second*, the two groups differed in their location and activities. While Kelly's activities were stationary and within Grant Park, the BLM protesters formed "massive" gatherings that "marched through streets and neighborhoods of the City of Chicago," becoming "at times violent." Id. ¶¶ 60, 63, 64.

Because of these key differences, the May 25 rally was not similarly situated with the BLM protests, and Kelly's claim should be dismissed for this reason alone. See Alexander, 2015 IL App (1st) 122858-B, at ¶ 54 (rejecting selective enforcement claim based on one group being allowed to stay in Grant Park after it closed at night while another group was told to disperse, and noting the two groups' differing size and intentions); Geller, 2020 WL 4463207, at *13 (finding lack of merit in claim that COVID-19 restrictions were selectively applied to plaintiff but not against protestors who gathered in response to the death of George Floyd, because

plaintiff did not identify a similarly situated comparator); U.S. Labor Party v. Oremus, 619 F.2d 683, 691 (7th Cir. 1980) (upholding dismissal of selective enforcement claim).

2. Kelly does not allege a basis for concluding that the difference in treatment was based on exercise of his expressive rights.

Kelly's selective enforcement claim also fails for the separate reason that he has not alleged facts showing that the March 25 rally was dispersed because of an invidious purpose (disagreement with the rally's message). Indeed, Kelly's allegations do just the opposite: they provide legitimate reasons for dispersal of the March 25 rally but not the BLM protestors.

To support his claim of invidious purpose, Kelly points to a tweet by the Mayor stating that: "While we respect First Amendment rights, this gathering [the May 25 rally] posed an unacceptable health risk and was dispersed." Compl. ¶ 57. But this says nothing about the content of the rally and takes no position concerning the rally's opposition to stay at home orders. It merely confirms that the rally was dispersed to protect public health. Kelly also alleges that the Mayor made the following statement concerning the BLM protests:

> "To the thousands of people here in Chicago and across the country who engaged in peaceful, non-violent protests for change, I stand with you. However, I must draw a sharp line between the righteous and the wrong, the hopeful and the cynical. We cannot conflate legitimate First Amendment expression with criminal conduct. Those acts are separate." Compl. ¶ 64.

This statement, however, did not endorse any message of the BLM demonstrations. It simply distinguished "peaceful, non-violent protests" from the violent "criminal conduct" that had taken place across the City. The statement is similar to a statement made by Mayor DeBlasio of New York City: "I support and protect peaceful protest in this city. The demonstrations we've seen have been generally peaceful. We can't let violence undermine the message of this moment. It is too important and the message must be heard." Geller, 2020 WL 4463207, at *9. The court in

Geller concluded that statements like this do not "remotely suggest an attempt to suppress viewpoints against gathering restrictions, or that [d]efendants permit only protests expressing messages that they favor." Id. at *13.

Kelly therefore fails to plead facts indicating that the March 25 rally was dispersed because of its message. Neither statement indicates that the Mayor favored one group's message over another's, much less that such favor was why the March 25 rally was dispersed but the BLM protests were not. Showing this purpose is critical; it is not enough that authorities may have been aware that their actions might have a disparate effect. See Wayte, 470 U.S. at 610; ESG Watts, Inc. v. Pollution Control Board, 286 Ill. App. 3d 325, 333 (3d Dist. 1997).

What Kelly's allegations *do* support is that there was a legitimate law enforcement reason for dispersing the May 25 rally but not the BLM protests. Law enforcement could have determined that it was feasible to disperse a group of 150 people gathered at a fixed location, as a group that small could readily break up and move away through surrounding sidewalks without blocking traffic or threatening public safety. On the other hand, it was reasonable to adopt a different tactical approach for the BLM protesters: By Kelly's allegations, those groups were orders of magnitude larger, sometimes violent, and spread across a much greater geographic area, extending even into City neighborhoods. Indeed, the Court may take judicial notice that marches taking place during the first week of June 2020 were in the thick of a period of national unrest, which in Chicago involved the deployment of the National Guard, a city-wide curfew, and the closure of transportation routes to the City's Central Business District.[5] Under those

[5] See Chicago Tribune Staff, George Floyd Fallout: Here's What Happened June 1 in the Chicago Area (June 1, 2020), https://www.chicagotribune.com/news/breaking/ct-george-floyd-chicago-protests-20200601-mrgv3rsz3fgztlu5lyrsyuolr4-story.html (last visited December 16, 2020); see also People v.

circumstances, authorities could have reasonably decided in real time that it was not feasible to try to disperse a group numbering in the tens of the thousands. They could have chosen, instead, to focus police resources on maintaining order by closing streets, directing traffic, and protecting the safety of the marchers, pedestrians, and businesses. And allowing a crowd of up to 20,000 to enter a park aided these objectives by helping keep the streets clear of obstructions.

Indeed, as another court recently observed in a case raising a similar selective enforcement claim, "[o]utdoor protests involve dynamic large interactions where state officials must also consider the public safety implications of enforcement of social distancing. That is to say that such enforcement could result in greater harm than that sought to be avoided by the [executive order.]" Calvary Chapel Dayton Valley v. Sisolak, 2020 WL 4260438, at *4 (D. Nev. June 11, 2020); cf. Vodak v. City of Chicago, 639 F. 3d 738, 744-46 (7th Cir. 2011) (explaining difficulties of conveying dispersal orders to a group of 8,000 protestors marching in downtown Chicago, and of such a group dispersing into surrounding streets).

Even more, Kelly alleges that the May 25 rally was not the only time the City enforced COVID-19 restrictions; he claims that, prior to the rally, the City had dispersed other large gatherings; issued citations to 11 residents and arrested 3; issued at least 21 citations to businesses and fined 3 churches; and threatened to fine those in the City's lakefront parks and other recreation areas. Compl. ¶¶ 12, 21, 24, 41. In light of these allegations, it is not plausible to conclude that the May 25 rally was singled out for enforcement. See Wayte, 470 U.S. at 611 n. 12 (noting that "the passive enforcement system penalized continued violation of the [law],

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Roby, 202 Ill. App. 3d 143, 146 (1st Dist. 1990) ("[c]ourts may take judicial notice of matters which are commonly known").

not speech"). For all these reasons, Kelly's equal protection, speech, and assembly claims based on a selective enforcement theory should be dismissed.

II. Plaintiffs' Equal Protection Claim Based On Park Closures Fails (Count II).

In Count II, Plaintiffs contend that their equal protection rights were violated because they were prevented from using the lakefront parks and the Riverwalk. Compl. ¶¶ 77, 78, 83, 88. Count II is not based on the dispersal of the May 25 rally. Instead, it alleges that on May 29 and June 3, the Governor and CDPH Commissioner, respectively, made written determinations that had the effect of nullifying an April 8 resolution of the Park District that closed the lakefront parks, but that those parks remained closed to Plaintiffs even though BLM protesters were allowed to use Grant Park on June 7. Id. ¶¶ 78-83.

This claim fails because Plaintiffs did not plead specific facts indicating how they were denied use of the parks. "Illinois is a fact-pleading jurisdiction, and a plaintiff must allege facts sufficient to bring his claim within the cause of action asserted." Kaczka v. Ret. Bd. of the Policemen's Annuity and Ben. Fund, 398 Ill. App. 3d 702, 707 (1st Dist. 2010). "Conclusions of fact or law unsupported by any allegation of specific facts" are insufficient. Id.

Here, Plaintiffs offer only the conclusory assertion that they have been "denied the use and enjoyment of Chicago's Lakefront, beaches, adjacent parks, trails, and . . . Riverwalk." Compl. ¶ 83. They do not identify when or which of these they attempted to visit following the alleged nullification of the Park District's closure order or that they were denied access by the City. Even as to Grant Park, Plaintiffs do not allege that they wanted to use the park on the day (June 7) that BLM protesters were allowed in, much less that that they were turned away. These allegations would be necessary in any case, but they are especially important here because Plaintiffs allege that the Mayor reopened many of these facilities to the public: Grant, Lincoln,

Washington, and Jackson Parks reopened on June 8; the Riverwalk reopened on June 18; and the lakefront trail reopened on June 22. Compl. ¶¶ 85-87. In light of these reopenings, there is no basis for inferring from Plaintiffs' threadbare allegations that Plaintiffs were denied access while others were allowed entry. Plaintiffs therefore fail to allege any difference in treatment, and thus have no claim.[6]

Count II also fails on the merits. Unlike Count I, Count II alleges only that Plaintiffs wished to enjoy the parks, not that they wanted to use them for expressive activity. The claim is therefore reviewed under the rational basis standard. See Triple A Servs., Inc. v. Rice, 131 Ill. 2d 217, 226 (1989). To state a claim, Plaintiffs must allege that there are other people similarly situated to them who were treated differently and that there was no rational basis for the different treatment. See Kaczka, 398 Ill. App. 3d at 707-08. Plaintiffs, however, are not similarly situated to the BLM protesters who accessed Grant Park on June 7. As explained above, that was a group of up to 20,000 people. Plaintiffs, in contrast, are a mere four individuals. Because Plaintiffs are not similarly situated to the Grant Park protesters, their claim can be dismissed for this reason alone. See id. (affirming dismissal of claim where "plaintiff has not pled any facts to support the conclusion that there were others situated similarly to him"); People v. Whitfield, 228 Ill. 2d 502, 512 (2008) (it is a "threshold requirement" that a plaintiff show that "he and the group he compares himself to are similarly situated").

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[6] Plaintiffs also pepper the Complaint with a variety of conclusory allegations about other City actions. See, e.g., Compl. ¶ 12 (Mayor purported to issue "stay at home" order that exceeded her authority); ¶ 14 (Mayor did not submit her orders for City Council approval); ¶¶ 20-21, 24 (City discriminated against churches when enforcing orders); ¶¶ 44, 47 (CDPH Commissioner's March 26 order was beyond her authority). These allegations should be disregarded. They are undeveloped and insufficiently pled, and no Plaintiff alleges any injury from these actions. The allegations are not the basis of the claims in Counts I-III, and they are not otherwise set forth in separate counts, as required by 735 ILCS 5/2-603(b).

Even if Plaintiffs and the BLM protesters were similarly situated, Count II would still fail because any difference in treatment would have had a rational basis. The rational basis test "is the lowest level of scrutiny," Serpico v. Vill. of Elmwood Park, 344 Ill. App. 3d 203, 214 (1st Dist. 2003), and in assessing whether a rational basis exists, courts do not judge "the wisdom or desirability" of the City's decision, Triple A Services, 131 Ill. 2d at 234. Instead, courts merely ask whether "any set of facts can be reasonably conceived" to support the difference in treatment. Opyt's Amoco, Inc. v. Vill. of South Holland, 149 Ill. 2d 265, 275 (1992); see also Garcia v. City of Chicago, 240 Ill. App. 3d 199, 202 (1st Dist. 1992). Here, a rational basis is readily apparent: As explained above, allowing the BLM protesters into Grant Park was a reasonable way to reduce traffic obstructions and use police resources efficiently. Plaintiffs make no claim (nor could they) that individuals or small groups give rise to similar concerns. It would therefore have been rational for authorities to enforce park closure laws against Plaintiffs. Count II should therefore be dismissed.

III. Plaintiffs' Challenge To The City's Phase III Guidelines Should Be Dismissed (Count III).

Count III challenges the City's Phase III reopening plan, which (among other things) placed operating capacity limits on various businesses and organizations. Compl. ¶ 96. Plaintiffs contend that the City's limits were stricter than the Governor's even though the Governor did not authorize the City to have stricter limits, and that the City's guidelines were therefore *ultra vires* and *void*. See id. ¶¶ 95-98; see also Prayer for Relief, ¶¶ B, D.

At the outset, Plaintiffs do not plead sufficient facts to state a claim. The limits in the Phase III guidelines varied depending on the type of business, see Compl. ¶ 96, but no Plaintiff offers any facts identifying which business they operated or were employed by, much less which

Phase III restrictions applied to them.[7] No Plaintiff alleges how a Phase III guideline had anything to do with their particular business or job.[8]

Count III also fails as a matter of law. Count III's central claim is that the Governor's order authorizing the State's Phase III reopening plan (Executive Order 2020-38) did not permit the City to issue stricter guidelines. See Compl. ¶¶ 94-96. But the Governor's order *affirmed* the authority of local governments to have stricter measures. It states that "[n]othing in this Executive Order shall, in any way, alter or modify any existing legal authority allowing a county or *local government body* to enact provisions that are *stricter* than those in this Executive Order." Ex. 4 hereto (EO 2020-38), § 7 (Emphasis added).

And the City's existing authority allowed it to issue its Phase III guidelines. The Commissioner's Phase III order falls squarely within the home rule authority vested in the City by the Illinois Constitution, see Article VII, section 6(a), which permits the City to "exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare[.]" Ill. Const., art. VII, § 6(a). These powers include the police power, City of Evanston v. Create, Inc., 85 Ill. 2d 101, 115 (1981), which encompasses measures to protect the public from communicable disease like COVID-19, see e.g., Adams, 149 Ill.2d at 339; People ex rel.

[7] Sheldon alleges only that he has had to temporarily close his business. Compl. ¶ 1. Hanus alleges only that she is an employee of an essential business. Id. ¶ 2. Garza alleges only that he has been laid off of two jobs. Id. ¶ 3. Kelly, for his part, does not claim to have operated or been employed by any business.

[8] For these same reasons, Plaintiffs lack standing. To have standing, Plaintiffs must have suffered an "injury in fact" that is "distinct and palpable" and "fairly traceable" to the City's conduct. Greer v. Ill. Dev. Auth., 122 Ill. 2d 462, 492-93 (1988). Here, Plaintiffs allege no facts indicating how they were injured by the Phase III guidelines.

Barmore v. Robertson, 302 Ill. 422, 427 (1922).[9] And home rule allows the City to have stricter regulations than the State; the City may pursue its "own solutions" to local problems "in the face of less stringent or conflicting State regulation." Kalodimos v. Morton Grove, 103 Ill.2d 483, 503 (1984). Home rule gives municipalities "the broadest powers possible" to regulate local concerns, Scadron v. City of Des Plaines, 153 Ill. 2d 164, 174 (Ill. 1992), and "is predicated on the assumption that problems in which local governments have a legitimate and substantial interest should be open to local solution and reasonable experimentation to meet local needs," Kalodimos, 103 Ill.2d at 502. For these reasons, the Commissioner's Phase III order fell squarely within the City's home rule authority under Illinois law, authority that the Governor did not even purport to restrict.[10] Count III should therefore be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss Counts I, II, and III and dismiss the Mayor from this action.

Date: December 17, 2020

Respectfully submitted,

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[9] Count III claims that the City's Phase III guidelines were imposed by the Mayor, but they were implemented by the CDPH Commissioner. See Ex. 5 hereto (CDPH Order 2020-9), §§ 2(b), 3(a)(6), (b). The Commissioner is authorized to exercise the City's police power in a situation like this. See Municipal Code of Chicago §§ 2-112-080; 2-112-160(a)(4); 2-112-160(a)(3).

[10] The City's Phase III guidelines were also authorized under the Illinois Administrative Code. See 77 Ill. Adm. Code §§ 690.1305(a), 690.1310(c). And while General Assembly retains the power to limit or restrict a municipality's home rule authority, the Illinois Emergency Management Agency Act, 20 ILCS 3305/1 et seq., expressly states that "[n]othing in this Act shall be construed to: . . . limit any home rule unit." 20 ILCS 3305/3(d).