CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK

Docket No's:
2013NY077230
2013NY077250
-against- 2013NY077249
2013NY077231
2013NY077248

ELLEN BARFIELD, TARAK KAUFF,
KENNETH MAYERS, MICAH TURNER,
and JAY WENK,

Defendants.

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TRIAL MEMORANDUM OF LAW

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PRELIMINARY STATEMENT

The defendants, members of Veterans For Peace, were charged with the misdemeanors of remaining in a closed New York City Park, the Vietnam Veterans Plaza at 55 Water Street (the "Park") without permission, under New York City Administrative Code Section 56 RCNY 103(a)(3); of disobeying a lawful direction or command in a park under 56 RCNY 103(c)(1); failure to comply with a park sign, 56 RCNY 1-03(c)(2), and with a disorderly conduct violation for failing to obey a lawful dispersal order under Penal Law section 240.20(6).

This Court can take notice of the following facts about the Park, which defendants will also establish by testimony at trial. The Park occupies a large, open sidewalk plaza between Water Street and South Street, and is not fenced or enclosed in any way. On each side of the Park, there is one small sign communicating the purported 10 p.m. closure. The sign on the Water Street side is placed more than fifty feet from the sidewalk, almost at ground level, towards the southern end of the Park. It is possible for pedestrians to wander through the Park following many possible trajectories without ever seeing one of these signs on either side. No attempt is made by the City to place barriers or enclose the Park after hours. The Park is therefore a large, inviting, public space which is in constant use by pedestrians, dogwalkers and other people at all hours, including after 10 p.m. Defendants expect to be able to show at trial that the only arrests within the park for curfew violations are of demonstrators exercising free speech rights-- that other kinds of after hours uses are widely tolerated without police

activity. The defendants maintain that they were in fact singled out for arrest precisely because of their First Amendment-protected activities.

ARGUMENT

Point One

The Ordinance is Facially Unconstitutional

Defendants were engaged in a First Amendment-protected activity when arrested, participating in a memorial for the war dead of Vietnam, Iraq and Afghanistan. The People must carry the extremely heavy burden of establishing that the 10 p.m. curfew is a valid "time, place and manner" restriction, *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288 (1984); *Snyder v. Phelps* 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

Park curfew rules that force protected activities to cease arbitrarily at a certain hour have repeatedly been found unconstitutional. The Circuit Court of Illinois in the recent case of *City of Chicago v. Tieg Alexander,* 11 MC1-237718 (2012), invalidated an 11 p.m. curfew under the Chicago Park District Code, as applied to an Occupy Wall Street demonstration. The Court reviewed the ordinance under the "narrowly tailored" standard, which allows it to survive constitutional review only if "narrowly tailored to serve a significant government interest" while allowing "ample alternative channels for communication of the [First Amendment-protected] information", citing *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). "Government must tread carefully when restricting assembly in parks because they have traditionally been the place for public assembly." (For the importance of parks to First Amendment activities, also see *Grossman v. City of Portland*, 33 F.3d 1200, 1205 (9th Cir. 1994): "[The] venerable tradition of the park as public forum has--as suggested by the attendant image of the speaker on a soapbox--a very practical side to it as well: parks provide a free forum for those who cannot afford newspaper advertisements, television infomercials, or billboards.")

The Park is a large open sidewalk plaza connecting Water Street and South Street, in no way fenced or enclosed. "[S]peech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum." *Schenck v. Pro-Choice Network,* 519 U.S. 357 (1997). "The classic examples of traditional public forum are streets, sidewalks, and parks, which are properties that have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hotel Emples. & Rest. Emples. Union, Local 100 v. City of N.Y. Dept. of Parks and Recreation,* 311 F.3d 534 (2d Cir. 2002)(quotation marks omitted).

The Illinois Circuit Court noted the First Amendment significance of late night assemblies: "Because so many expressive activities take place at night, government actions that curtail night-time assemblies necessarily impose a burden on expressive First Amendment conduct." The Court gave as examples demonstrations associated with an election the outcome of which has been announced at night, a late night legislative session, women's safety at night in parks, or a midnight execution. It notes that "Political movements often employ all night vigils because of their commemorative power...."

Defendants will show at trial that the Veterans For Peace commenced their memorial about 7 p.m., and of necessity needed to continue it past 10 p.m. because of the amount of time it takes to read the names of thousands of the dead aloud. Also, the Park was clearly the appropriate forum for a remembrance of the war dead, which could not appropriately be expected or required to be held elsewhere.

The Illinois Circuit Court concluded:

> Under the First Amendment, if the burdens imposed on expressive activity are greater than necessary to serve the substantial government interest, it is inadequate to claim that the citizenry could engage in protected activity during the ample daylight hours or during late night hours in other places.(quotes and brackets omitted).

The City of Chicago argued that the ordinance protected the important government interest of cleaning the park. The Circuit Court held that the City had completely failed to produce evidence below as to the number of hours required to clean Grant Park at night, and expressed skepticism that 49 hours a week were required to do so. Similarly, the Court noted circumstances in which the City had arbitrarily allowed uses of the park during curfew hours, which also undermined its argument that strict observation of the curfew hours protected an important governmental interest.

In this case, it will be impossible for the People to establish, or even convincingly argue, that the Park—a public plaza fronted by three buildings, situated between two heavily used streets---needs to be closed eight hours a night to justify *any* important governmental interest.

In *City of Cleveland v. McArdle,* 2012-Ohio-5749 (2012), the Ohio Court of Appeals similarly invalidated a 10 p.m. curfew the City sought to enforce against Occupy Wall street demonstrators in a public plaza downtown known as the "Tom L. Johnson" quadrant of the Public Square. The Court of Appeals held:

> When balancing the City's need to clean the park with the right of appellants to engage in a communicative activity, the latter should always prevail. Consequently, we believe the City's law targets and eliminates more than the evil it seeks to remedy, which it claims is convenience and sanitation.

The Veterans For Peace use of the Park for their peaceful and moving First Amendment-protected ceremony far outweighs any interest New York City may have in closing the Park at 10 p.m.

Point Two

The Ordinance Is Also Unconstitutional As Applied

Facially neutral ordinances become suspect when authorities choose to enforce them selectively, permitting certain uses of a park while prohibiting others. The NYPD's arrest of the Veterans For Peace was treatment not applied to the numerous other individuals who pass through or use the Park after hours. In other words, the police single out people entering the Park to engage in

First Amendment activities for arrest, while tolerating people using the Park for non-speech-related activities.

Ordinances which are apparently facially neutral, but are actually applied in a discriminatory fashion to prevent activity by certain groups, are unconstitutional as applied; *Yick Wo v. Hopkins,* 118 U.S. 356 (1886) (San Francisco ordinance purportedly regulating laundries was only enforced against Chinese citizens). *Doe v. Vill. of Mamaroneck,* 462 F. Supp. 2d 520 (SDNY 2006) held unconstitutional a village's extremely selective enforcement of its park regulations only to exclude suspected Latino day laborers, while permitting identical "loitering" by residents who did not appear to be Latino. In *City of Chicago v. Alexander*, supra, the Court, having held the curfew facially unconstitutional, also held it unconstitutional as applied; when 500,000 exultant citizens poured into Grant Park late at night to celebrate President Obama's election in 2008, none were arrested, while all 303 Occupy Wall Street demonstrators remaining in Grant Park after 11 pm were taken into custody. The Court noted that therefore, "they received different treatment than others similarly situated.....based on their exercise of First Amendment rights."

This is exactly what happened to the Veterans For Peace demonstrators as well: they were singled out for arrest because they were exercising free speech rights. Therefore, the 10 p.m. curfew was unconstitutional as applied.

Point Three

The Order to Disperse Was Not Lawful

Given the defendants' exercise of protected rights of free speech as detailed in Points One and Two, the two charges based on failure to obey a lawful order must also necessarily fall, as interference with protected First Amendment expression is not lawful police activity, *People v. Leonard,* 62 N.Y.2d 404 (1984) ("Therefore, a decision to exclude that is predicated on or impermissibly inhibits a

constitutionally or a statutorily protected activity will not be lawful"); *People v. Benjamin*, 185 Misc. 2d 466 (N.Y. County 2000) *(*56 RCNY 1-03 (c) (1) case involving peaceful gathering in City Hall Park; "Not every police instruction constitutes a 'lawful' order to leave"); *People v. Millhollen*, 5 Misc. 3d 810 (City Court Ithaca 2004) (police order to defendant to cease peaceful First Amendment-protected tree-sitting was unlawful); *People v. Ailey,* 76 Misc. 2d 589 (City Court Buffalo 1974) ("The defendants were seen doing nothing more than exercising their presumptively constitutional First Amendment rights").

Point Four

The Defendants Did Not Intend to Cause Public Inconvenience, Annoyance or Alarm

The charges under Penal Law section 240.20(6) and 56 RCNY 1-03 (c) (1) must also be dismissed because the defendants, members of the Veterans For Peace engaging in a peaceful, First Amendment-protected ceremony reading the names of the war dead, lacked any intention to cause public inconvenience, annoyance or alarm. *People v Stewart (Gillian),* 32 Misc. 3d 133A (2d Dept. 2011), *leave to appeal denied* 938 N.Y.S.2d 869 (2011) (defendants actions did not reach "a point where they had become a potential or immediate public concern" (citing *People v Munafo*, 50 NY2d 326, 331, 406 N.E.2d 780, 428 N.Y.S.2d 924 (1980)); *People v. Jackson (Evelyn),* 2008 NY Slip Op 50169U (1st Dept. 2008), *appeal denied* 859 N.Y.S.2d 400 (2008) ("evidence does not establish that defendant's conduct was intended to or recklessly created a substantial risk of a potential or immediate public problem"); *People v. Square,* 2008 NY Slip Op 51632U (New York County 2008) ("no risk of public inconvenience, annoyance, or alarm"); *People v Adilovic (Hamed),* 34 Misc. 3d 159A (2d Dept. 2012) ("no evidence that Defendant had any intent to cause public inconvenience, annoyance or alarm"); *People v. Weaver*, 16 N.Y.3d 123 (2011); *People v. Bollander*, 156 A.D.2d 456 (2d Dept. 1989) *appeal denied* 553 N.Y.S.2d 298 (1990); *People v. M.R.,* 12 Misc. 3d 671 (New York County 2006) (no evidence of "culpable mental state"); *People v. Grullon,* 9 Misc. 3d 1120A (New York County 2005);

People v. Gonzalez-Muniz, 2001 NY Slip Op 40182U (New York County 2001) (People did not "establish a real or potential public disorder"); *People v. Stephen*, 153 Misc. 2d 382 (New York County 1992); *People v. Dolson,* 140 Misc. 2d 240 (Syracuse, 1987) ("it was unclear if any public disturbance resulted.")

Point Five

The Charges Should Be Dismissed Pursuant to the International Covenant on Civil and Political Rights

The Veterans For Peace ceremony reading the names of the fallen assured that the latter were respected and humanized, making the protest more powerful to those present than stating mere statistics. The wars which claimed the lives of their compatriots implicated the United Nations Charter and *jus ad bellum*, (laws governing when it is legally permissible to go to war) and *jus en bellum*, (laws governing the conduct of war also known as International Humanitarian Law). It is fitting therefore, that this court should consider the international law which protects this rally and those who participated in it from being found guilty. We are therefore asking this Court to consider the facts in light of the International Law obligations imposed on the United States' and all States and municipalities..

In 1992, the United States ratified a treaty known as the International Covenant on Civil and Political Rights. (Hereinafter ICCPR or Covenant)[1] This Covenant and its companion, the International Covenant on Economic Social and Cultural Rights (ICESCR) were written to give binding effect to the rights declared to be Universal in the Universal Declaration of Human Rights in 1948.

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1 International Covenant on Civil and Political Rights opened for signature Dec. 16, 1966, 99 U.N.T.S. 171,(entered into force Mar. 23, 1976) The U.S. ratified the ICCPR on June 8, 1992. See, United Nations Treaty Collection, Status of Ratifications, Reservations, and Declarations, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV 4&chapter=4&lang=en.

The ICCPR contains provisions protecting many rights specifically referenced in the First Amendment to the United States Constitution. The right to freedom of speech is referenced in Article 19 on the rights to freedom of opinion and expression. The right to peaceably assemble is contained in Article 21 on freedom of assembly.

These rights are universally respected and acknowledged. They are recognized in all major human rights treaties.[2] As a state party the United States US Government has binding International legal obligations to respect, protect, promote and fulfill these rights.

Until the present, Courts have not been asked to address the impact of the ratification of the ICCPR on First Amendment jurisprudence, and in particular on "time place and manner" restrictions on exercise of the rights to speech and assembly. This case presents an opportunity for the Court to address this issue. As will be argued more fully herein, this Court must hold that it was impermissible under the standards articulated in the ICCPR for the police to have demanded defendants leave the park after 10 pm, such that the cases against them should be dismissed.

New York State courts are required to apply law contained in treaties ratified by the United States. Article VI Clause 2 of the United States Constitution states:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all **treaties made**, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

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2 In addition to the Articles 19 and 21 of the ICCPR, these rights are recognized in the Universal Declaration of Human Rights UDHR, art. 19, the Organization of American States, American Convention on Human Rights, art. 13, (1144 U.N.T.S. 143 (Nov. 21, 1969); Organization of American States, American Declaration on the Rights and Duties of Man, art. IV, OEA/Ser.L./V.II.23, doc. 21, rev 6 (1948); European Convention on Human Rights, art. 10, 213 U.N.T.S. 221 (Nov. 4, 1950); Organization of African Unity, African Charter on Human and Peoples' Rights, art. 9.2, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (June 27, 1981) (entered into force Oct. 21, 1986). The ICCPR has been signed or ratified by 167 Countries representing the overwhelming majority of the world's population.

This Clause, known as the Supremacy Clause, requires this Court to not only apply federal law but also ratified treaties in their opinions. While the Senate declared the Covenant not to be self-executing, the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739. (2004) found the ICCPR to "bind the United States as a matter of international law".[3] Whether the ICCPR has become part of U.S. domestic law[4] via the Supremacy Clause, or international law binding on the United States, this court should evaluate whether the New York Ordinance on park closures can be used to restrict freedom of expression and assembly in conformity with the required by the applicable provisions of the ICCPR.[5]

A. Provisions of the ICCPR at Issue in the Case

Articles 19 and 21 of the ICCPR cover the instant case as the case involves freedom of

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3 In *Sosa supra*, the plaintiff claimed under the ICCPR and other instruments that his arrest and detention violated the ICCPR's prohibition on arbitrary detention, giving him a cause of action under the Alien Tort Statute (ATS), 28 U.S.C. 1350. While the Court ruled against him on the facts and limited the ATS jurisdiction to violation of well-established international norms, it found the ICCPR binding on the US as a matter of international law.

4 New York Courts have applied International Law even in cases of ungratified treaties. See e.g. *In re Mark C.H.* 28 Misc.3d 765, 906 N.Y.S.2d 419. N.Y.Sur.,2010. *In re Mark C.H.* court used international human rights law as one justification for its conclusion. It found that the Convention and Optional Protocol on the Rights of Persons with Disabilities (the Disabilities Convention), which President Obama signed and recommended for ratification, supports monitoring of guardians. Though the Treaty has not been ratified, the United States still has an obligation under the Vienna Convention on the Law of Treaties to "refrain from acts which would defeat [the Disability Convention's] object and purpose.

5 Under U.S. law, the "Charming Betsy Canon" provides that domestic laws should be interpreted to comply with international law. See THE OPPORTUNITY AGENDA, LEGAL AND POLICY ANALYSIS: HUMAN RIGHTS IN STATE COURTS 2011 4 (2011), at http://www.ncdsv.org/images/OppAgenda_HumanRightsInStateCourts_FullReport_8-2011.pdf (citing *Murray v Schooner Charming Betsy,* 6 U.S. 64, 118 (1804) ("It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction

expression and freedom of assembly.

Article 19 of the ICCPR states:

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 21 of the ICCPR states:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

B. Interpretation of these ICCPR Provisions by the Human Rights Committee

By their wording, these sections of the ICCPR make restrictions on these rights subject to a very high bar. That is, any laws restricting them must be **necessary** for "protecting national security" public order, public health or morals. The Human Rights Committee, the treaty body which interprets the ICCPR provisions has held in its interpretive comments at General Comment 10, as follows: with respect to this language:

Paragraph 3 (of Article 19) expressly stresses that the exercise of the right to freedom of expression carries with it special duties and responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole. However, when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Paragraph 3 lays down conditions **and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the purposes set out in**

remains")).

subparagraphs (a) and (b) of paragraph 3; and they must be justified as being "necessary" for that State party for one of those purposes. (General Comment 10 paragraph 4).

Similarly General Comment 34, states: there are two exceptions that allow restrictions of the right of freedom of opinion and expression: (1) "to respect the rights and reputations of others" or (2) "to the protection of national security or of public order . . . or of public health or morals." (General Comment 34 at paragraph 6). These exceptions rely on a three part test that is common to all the major human rights instruments: (1) These restrictions may only be imposed if "the restrictions [are] 'provided by law'", (2) are imposed for one of the two grounds; and (3) **"conform to the strict tests of necessity and proportionality."** (General Comment 34 at paragraph 7.) **Moreover, "restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated."** (General Comment 34 at paragraph 22) (emphasis added).

While Article 21 adds language that any restrictions on the right to peaceful assembly are those which are **necessary** in a democratic society, this language in fact increases the burden on the state to justify the restrictions as the right to protest, assembly and expression rights are recognized as vital elements of democracy, and necessary for democratic participation, personal and social development, the expression and exchange of ideas, and for protecting other core rights.[6]

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6 The Human Rights Committee has been aided in its work by the Siracusa Principles which were developed in 1984 by a group of 31 experts in international law, convened by the International Commission of Jurists, the International Association of Penal law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights and the International Institute of Higher Studies in Criminal Sciences. These experts met Siracusa, Sicily, to consider the limitation and derogation provisions of the International Covenant on Civil and Political Rights. The participants were agreed upon the need for a close examination of the conditions and grounds for permissible limitations and derogations enunciated in the Covenant in order to achieve and effective implementation of the rule of law. As frequently emphasized by the General Assembly of the United Nations, a uniform interpretation of limitations on the rights in the Covenant is of great importance.

Thus, ICCPR permits restrictions on protest rights only for the following limited legitimate grounds: national security, public safety, public order, the protection of public health or morals, or the protection of the rights of others.

• **National security** restrictions may only be invoked to protect the existence of the nation against force or the threat of force and cannot be invoked in response to "merely local or relatively isolated threats to law and order."[7]

• **Public safety** means the protection "against danger to the safety of persons, to their life or physical integrity, or serious damage to their property." Public safety cannot be used to impose "vague or arbitrary limitations."[8]

• **Public order** often overlaps with public safety, and is the "sum of rules which ensure the functioning of society".[9] Neither the "hypothetical risk of public disorder nor the presence of a hostile audience" is a legitimate basis for restricting assembly rights.[10]

• **Public health** may be "invoked as a ground for limiting certain rights in order to allow a state to take

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7 Siracusa Principles at ¶¶ 29-31

8 Siracusa Principles at ¶ 33; see also ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, GUIDELINES ON FREEDOM OF PEACEFUL ASSEMBLY 51, ¶ 74 (2d ed. 2010) (where safety is a concern, "extra precautionary measures should generally be preferred to restriction."); and Siracusa Principles at ¶ 34.

9 Siracusa Principles at ¶ 22.

10 See also, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, OFFICE

measures dealing with a serious threat" to health, and the measures must be "specifically aimed at preventing disease or injury or providing care for the sick and injured."[11]

• **If Rights of others** are clearly harmed or threatened, necessary and proportionate restrictions may be justified. Any restrictions imposed must be the least restrictive to secure other rights.

C. Applying These Principles to This Case.

The Veterans For Peace were peaceably assembled, exercising their right to freedom of expression reading the names of the soldiers killed in war. The arrests were made based on an ordinance on Park closures. This regulation was imposed by the New York Police Department to justify a restriction on the rights of these defendants to freedom of expression and to peacefully assemble. Under the ICCPR the government has the burden of justifying the restriction on these rights with a park closing ordinance. The government cannot meet this burden as the use of this ordinance to restrict speech and assembly does not meet the requirements of the ICCPR for a legitimate restriction. That is, the ordinance's is in no way connected to protecting the existence of the United States or the State of New York from the threat of force. As it was not connected to protecting the national security, the ordinance could not be considered necessary to achieving this goal. Neither can the ordinance be said to be necessary to protect public safety as use of the park to read names did not threaten the life or property of anyone. Further the ordinance cannot be said to be required or necessary to maintain public order. The protest was peaceful. The ordinance is also not necessary to protect public health. There

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FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, GUIDELINES ON FREEDOM OF PEACEFUL ASSEMBLY 50, ¶ 71 (2d ed. 2010);

11 Siracusa Principles at ¶ 25; see also ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, GUIDELINES ON FREEDOM OF PEACEFUL ASSEMBLY 51, ¶¶ 76-77 (2d

were no threats to health that can be said to be implicated by reading names of the war dead. The ordinance was not necessary to protect the rights of others. In light of these facts, this Court may not rely on the ordinance in question to justify the arrests of these defendants.

Under framework of the ICCPR, Courts do not make distinctions between content related restrictions or time place and manner restrictions on freedom of expression and assembly since any restrictions must be found to be necessary to the protection of national security, public safety, order or morals. Under the circumstances the charges should be dismissed.

CONCLUSION

For the reasons given, all charges herein should be dismissed against all defendants.

Dated: New York, New York
March 9, 2014

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