UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

John Thomas Cooper, Jr.; Jonathan McLane, Plaintiffs, v. Fred Gray, Jr.; Kelly Gottschalk; City of Tucson, Defendants.	CV 12-208 TUC DCB (Lead Case)
Jonathan McLane, Plaintiff, v. Officer John Doe 1-20; Roberto Villasenor; Richard Miranda; Jonathan Rothschild; City of Tucson, Defendants.	CV 12-781 TUC DCB (Consolidated Case) **O R D E R**

Plaintiffs bring this action pursuant to 42 U.S.C. § 1983 for declaratory and injunctive relief and damages to redress alleged constitutional violations of the right to free speech and equal protection of the laws. Plaintiffs, members of Occupy Tucson and Occupy Public Land, allege that they have been denied overnight use of the city parks and are being harassed in the use of the public sidewalk in violation of their First Amendment rights.

On February 24, 2014, this Court granted in part and denied in part Defendant's Motion for Partial Summary Judgment. The Court found the City ordinance requiring permits for overnight camping in city parks was facially constitutional. The Court found

the City allows free exercise of speech on City sidewalks as long as the sidewalks remain unobstructed and reasoned that the sidewalks afford Plaintiffs a viable alternative to speak freely when they cannot speak in the City parks. The Court denied summary judgment in part as to Plaintiffs' allegations that city ordinances violate their rights as applied. The Court appointed counsel to represent Plaintiffs *pro bono,* and subsequently in April, the Court issued a case management schedule for discovery to end October 25 and dispositive motions to be filed by December 1, 2014.

On May 16, 2014, Plaintiffs filed a Motion for Leave to File a Third Amended Complaint (TAC). On August 14, 2014, Plaintiff filed a Motion for Preliminary Injunction.

A. Plaintiff's Motion to File Third Amended Complaint

Plaintiffs seek to add incidents of arrest and seizure and destruction of their personal property, which fall within the context of their allegations of harassment in respect to actions taken by Defendants to chill their speech. Plaintiffs go beyond simply adding new incidents of harassment. They seek to add a Fourth Amendment claim for illegally arresting Plaintiff Cooper without probable cause and their personal property has been unreasonably seized in violation of the Fourth Amendment and destroyed without due process in violation of the Fourteenth Amendment. The TAC adds an equal protection sidewalk claim: Plaintiffs assert they are now being precluded from using public tables and benches located on the sidewalk while other citizens use the tables at night without impunity. Lastly, Plaintiffs add named Defendants in place of previously named John and Jane Doe Defendants.

It is well established that freedom to amend a complaint should be freely given. Fed. R. Civ. P. 15(A)(2). "District Courts generally consider four factors in determining whether to deny a motion to amend: 'bad faith, undue delay, prejudice to the opposing party, and the futility of amendment.'" *In re Korean Air Lines Co. Ltd.*, 642 F.3d 685,

701 (9th Cir. 2011) (quoting *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994). Rule 15 of the Federal Rules of Civil Procedure provides that a party may only amend its pleading with the opposing party's written consent or the court's leave. The court should freely grant leave "when justice so requires." Fed.R.Civ.P. 15(a)(2). This policy is "to be applied with extreme liberality." *Owens v. Kaiser Found. Health Plan, Inc*., 244 F.3d 708, 712 (9th Cir. 2001) (citations omitted). While the grant or denial of leave to amend is within the discretion of the district court, refusing to grant leave without justification is an abuse of that discretion. *Forman v. Davis*, 371 U.S. 178, 182 (1962).

In determining whether to freely grant leave, a court considers the following four factors, with all inferences made in favor of the moving party: (1) undue delay, (2) prejudice to the opposing party, (3) futility, and (4) bad faith. *Griggs v. Pace American Group, Inc*., 170 F.3d 877, 880 (9th Cir. 1999); *see also Forman*, 371 U.S. at 182 (listing "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment" as relevant factors). Prejudice to the opposing party carries the greatest weight in the analysis. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

Defendants respond that the amendment is unduly delayed and will be highly prejudicial as it essentially restarts the case, and this is especially prejudicial because the last dispositive motion pared the case down, whereas, the TAC grows the case. The TAC alleges Plaintiff Cooper was arrested with Plaintiff McLane on June 21, 2012, and two other times on April 26 and June 22. In the SAC, only Plaintiff McLane alleged a Fourth Amendment claim that he was arrested without probable cause. Defendants argue that until now, they believed Cooper was admitting the legitimacy of his arrests, which occurred prior to the July 11, 2012, SAC, but were not charged therein.

Defendants object that Plaintiffs knew or should have known of these claims because: 1) in Plaintiffs' Response/Reply Plaintiffs referenced other sidewalk incidents but not the ones they seek to add now; 2) Cooper and McLane were arrested together on June 21, and 3) Cooper filed an emergency motion in this case on June 22, asking the Court to order the return of seized property, his laptop, which was confiscated during his June 21 arrest. Defendants argue that the Cooper sidewalk incident on April 26, 2012, when his property was seized and he was arrested, is time barred by a two-year statute of limitations for bringing an action under 41 U.S.C. 1983.

Conclusion:

Except for the three arrests related to Cooper, the new allegations occurred since the SAC and all the property rights allegations occurred in 2014. It appears that in January 2014, the City adopted a Homeless Protocol, which it began implementing as alleged by Plaintiffs in violation of their Fourth and Fourteenth Amendment rights. This Court ruled February 2014, counsel was appointed in March, and the Motion for Leave to File the TAC was filed May 16, 2014. Plaintiffs' counsel, appointed March 10, 2014, did not unduly delay filing the Motion for Leave to File the TAC on May 16, 2014.

The claims arising after the July 11, 2012, filing of the SAC are supplemental claims. Pursuant to Fed. R. Civ. P. 15(d), the Court may, on motion and reasonable notice and on just terms, permit a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented and the Court may permit supplementation even though the original pleading is defective in stating a claim or defense. Amendments to pleadings are allowed even during and after trial, if a party objects that evidence is not within the issues raised in the pleadings, the court may permit the amendment and should freely permit the amendment when it will aid in presenting the merits of the case.

As for the three incidents in the TAC, the arrests of Plaintiff Cooper for protesting on the sidewalk on April 26, June 21, and June 22, 2012, Plaintiffs argue that they considered Cooper to be one of "nine members of Occupy Public Land" included in the sidewalk allegations alleged in the SAC. Plaintiffs admit they should have named Cooper in the sidewalk claims just as they did McLane. Therefore, Plaintiffs argue they relate back to the SAC, July 11, 2012, and were pled within the two year statute of limitation period for the § 1983 claim. Alternatively, Plaintiff Cooper argues his criminal case was not dismissed until June 14, 2012, making it timely within the context of the Motion to File the TAC, June 6, 2014. Either way, these claims are not futile as barred by the 2-year statute of limitation.

Plaintiffs assure the Court that they do not seek to reinvigorate the facial challenges to the City's ordinances this Court has ruled to be constitutional. The Court agrees the TAC does not raise claims resolved by summary judgment for Defendant. The ruling by this Court in February, 2014, regarding the constitutionality of the City's park ordinance was based in part on the sidewalk ordinance allowing for the free exercise of First Amendment rights. The Court reasoned that a permit fee did not preclude indigent citizens from exercising First Amendment rights because free speech could be had on the public sidewalks. The Court's February 2014 ruling appears to have shifted Plaintiffs' activities from the city parks to the city sidewalks, and the City's enforcement efforts followed. Plaintiffs' Motion to File a TAC primarily tracks the City's enforcement efforts related to the sidewalks. Pursuant to Rule 15(d), Plaintiffs may supplement the SAC with allegations setting out transactions, occurrences, or events that happened after the date of the SAC: 7/11/2012. *See also Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1154 (9th Cir. 2014) (citing *Jackson v. Hayakawa* 605 F.2d 1121, 1129 (9th Cir. 1979) (finding abuse of discretion where district court should have construed matter raised in opposition to motion for summary judgment as request pursuant to Rule 15(b)).

The Court grants Plaintiffs leave to file the TAC, and resets the deadline for discovery, dispositive motions and filing of the proposed Pretrial Order. While the third amendment will delay resolving the case, the amendment is not unduly delayed in respect to the timing of the new sidewalk and property seizure claims, which did not arise until 2014, well after the filing of the SAC, July 11, 2012. Prejudice to the Defendant is addressed by continuing the case management deadlines. Plaintiffs are granted leave to file the TAC, pursuant to Rule 15(b), and the TAC properly supplements allegations arising since the SAC, pursuant to Rule 15(d).

B. Plaintiff's Motion for Preliminary Injunction, filed August 14, 2014.

"Defendant City of Tucson has doubled-down on its efforts to evict Plaintiffs and others from the sidewalk adjacent to Veinte de Agosto Park (VDA Park) since this Court issued its order, [February 24, 2014], denying Defendant's Motion for Partial Summary Judgment." (Motion for Preliminary Injunction (MPI) (Doc. 70)). Plaintiffs refer to the City's 3-B Policy to allow only a blanket, bedroll, and nonalcoholic beverage, when sitting or lying on the sidewalk. After the Court rejected Plaintiffs' facial challenge to the city ordinance precluding overnight camping[1] based in part on its reasoning that free expression could be had by Plaintiffs on city sidewalks, Plaintiffs began exercising their First Amendment rights on the sidewalk bordering the VDA Park. Defendant's enforcement efforts followed, pursuant to the 3-B Policy.

The City believes that the sidewalk areas within the VDA Park are part of the park and not public sidewalks. By this logic they may close access at night to the east-side, sidewalk which boarders the VDA Park adjacent to Church Ave, including areas where public "picnic" tables and garbage receptacles are located. A sidewalk is "an area for

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[1]TCC, Sec 21-3(5). *Relating to recreation*. No person in a park shall: (4) *Camping*. Camp, lodge or sleep therein between the hours of 10:30 p.m. and 6:00 a.m. unless special written permit be obtained seventy-two (72) hours in advance from the director.4c sidewalks clear and unobstructed.

walking along the side of the road." (Resp. (Doc. 13) (citing *Roulette v. City of Seattle*, 97 F.3d 300, 302 (9th Cir. 1996)). The City has "chosen" to treat 12 feet of sidewalk adjacent to Church Avenue from Broadway to Congress as sidewalk, subject to sidewalk ordinances, not the park-closure ordinance. The City has painted a line on the sidewalk to delineate the 12 feet it considers to be public sidewalk. The City treats areas of the sidewalk where public tables, chairs, and garbage receptacles are located as subject to the park closure ordinance.[2] *See* (Motion for PI (Doc. 70) (2/14/2014, McLane was arrested for violation of park curfew when he disposed of trash in a receptacle on this sidewalk); (2/14/2014, McLane arrested for using two tables).

As for the 12-foot sidewalk, the City enforces the 3-B Policy: It allows Plaintiffs "and their loosely-affiliated associates" to keep a bedroll, blanket, and beverage. *Id.* at 4-5. Plaintiffs are cited, arrested, or threatened with both for obstructing the sidewalk if they sit or lie down on it with more than a bedroll, backpack, and blanket. The City confiscates any personal property exceeding the 3-B restricted list of personal property as evidence of the offence, and also confiscates personal property left unattended by its owner.

Plaintiffs rely on the sidewalk ordinance applicable to downtown sidewalks when they are used for First Amendment activities, TCC § 11-36. (Reply in Support of Motion for Summary Judgment (Doc. 45) at 5.) Plaintiffs argue the 3-B Policy precludes their use of the sidewalks, pursuant to TCC § 11-36, which provides:

> (a) No person shall sit or lie down upon a public sidewalk or upon a blanket, chair, stool, or any other object placed upon a public sidewalk or median during the hours between 7:00 a.m. and 10:00 p.m. […]
>
> (b) The prohibition in subsection (a) shall not apply to any person …(4) Who is exercising First Amendment rights protected by the United States Constitution, including free exercise of religion, speech and assembly;

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[2] TCC, Sec. 21-3(7). *Relating to miscellaneous activities.* No person in a park shall: (3) *Closed areas.* Enter an area posted as "Closed to the Public" or . . . use . . . any area in violation of posted notices, ..."

> provided, however, that the person sitting or lying on the public sidewalk remains at least eight (8) feet from any doorway or business entrance, leaves open a five (5) foot path and does not otherwise block or impede pedestrian traffic.

TCC § 11-36.2. The purpose of the ordinance balanced public interests in safe pedestrian traffic and convenient access to goods and services with individual rights, noting the restriction was offset by other "numerous" places being available to accommodate sitting or lying down, including public sidewalks outside the designated hours of 7:00 a.m. through 10:00 p.m. TCC § 11-36.1(g).

The City asserts it applies the 3-B Policy to enforce the sidewalk ordinances, TCC Sec. 35 and Sec. 25-51.

> Sec. 35 provides: "No person shall obstruct any public sidewalk, street or alley in the city by placing, maintaining or allowing to remain thereon any item or thing that prevents full, free and unobstructed public use in any manner, except as otherwise specifically permitted by law."

> Sec. 25-51 provides: "No person shall obstruct any public sidewalk in the city, by placing, depositing or allowing to remain thereon, any boxes, crates, goods, wares, merchandise, hay, grain, farm produce or other thing, or prevent, in any manner, the full, free and unobstructed public use of any of the public sidewalks, . . . "

The City asserts any item placed anywhere on the sidewalk is an obstruction, but it developed the 3-B Policy in an abundance of caution to accommodate the First Amendment by allowing anyone to sit or lie on the sidewalk anytime. In this way, police officers can avoid having to make the difficult determination as to whether someone who is sitting or lying on the sidewalk is exercising First Amendment rights. "[The 3-B Policy items], in particular, allow a person to conduct First Amendment activities supported by basic necessities of food and water, clothing for inclement or difficult weather, and shelter." (Resp. (Doc. 71) at 7. In other words, the 3-B Policy provides an objective standard for defining obstruction.

The 3-B Policy is, however, no more or less objective than the 5 foot/8 feet provisions set out in TCC § 11-36.2. And, the City misses the important point that it

needs the 3-B Policy because obstruction is not defined in the ordinances it seeks to rely on here: TCC § 35 and 25-51. *See Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1155-56 (9th Cir. 2014) (describing statute as unconstitutionally vague if it leaves the public uncertain as to the conduct it prohibits or encourages arbitrary or discriminatory enforcement). "If a statute provides 'no standards governing the exercise of . . . discretion,' it becomes 'a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Id.* (quoting *Papachristou v. Jacksonville*, 405 U.S. 156, 170 (1972)). Except for the express 5 foot/8 feet standards provided for in TCC § 11-36.2(b)(4) when the sidewalks are being used in the daytime for First Amendment activities, the TCC sidewalk ordinances contain no standards nor definition for "obstruction." The City ignores an express standard, provided by the City Council for applying to all First Amendment activities conducted downtown during the day, in favor of defining "obstruction" pursuant to the 3-B Policy, which appears uniquely tailored to homeless people.

While the City suggests the 3-B Policy is designed to allow First Amendment activities, but when applied to homeless individuals it does the exact opposite. Homeless people have no where to store their personal items and must keep their personal items with them at all times, even when exercising their First Amendment rights. As applied to the homeless population, the 3-B Policy arguably precludes their free expression of First Amendment rights, especially because the park-closure ordinance closes the parks to them at night. The sidewalk is the exclusive venue available to the Plaintiffs to conduct a 24-hour vigil. Most importantly, the 3-B Policy eviscerates the 5 foot/8 feet standard *expressly* applicable to Plaintiffs' First Amendment conduct "between the hours of 7:00 a.m. and 10:00 p.m." TCC § 11-36.2. The City offers no reason why the more restrictive standard, the 3-B Policy, should apply to First Amendment rights exercised at night.

It is undisputed that the Plaintiffs comply with the 5 feet/8 feet requirements found in TCC § 11-36.2. Plaintiffs seek a preliminary injunction only in respect to their right to exercise their First Amendment rights on the public sidewalks in compliance with sidewalk ordinance Sec. 11-36.2(b)(4) by leaving open a 5 foot path and at least 8 feet from any doorway or business entrance.

Additionally, Plaintiffs ask the Court to enjoin the City from precluding Plaintiffs' use of the public table and chairs, and garbage receptacles, which are located in the area of the sidewalk the City believes is subject to the VDA Park closure ordinance. Plaintiffs allege police are selectively enforcing the park closure ordinances in respect to these areas by allowing others to sit at the tables after dusk. The City admits that it has not posted park closure signs. It relies on the black line to inform the public.

According to the Supreme Court, the proper standard for granting or denying a preliminary injunction is as follows: "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008); *American Trucking Associations, Inc. v. City or Los Angeles*, 559F.3d1046 (9th Cir. 2009).

Prior to *Winter*, the Ninth Circuit recognized an alternative sliding-scale standard requiring a plaintiff to demonstrate either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor. *Taylor v. Westly*, 488 F.3d 1197, 1200 (9th Cir. 2007). Post-*Winter*, there is no lesser standard than "likely to suffer irreparable harm," but the sliding scale test remains a viable concept within the context of the four prong test. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). To be in harmony with the "likelihood standard" adopted in *Winter* and *Stormans,*

Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009), "serious questions going to the merits" means that there is at least a reasonable probability of success on the merits. *Winnemucca Indian Colony v. United States ex rel. Dept. of Interior*, 2001 WL 4377932 * 4 (Nev. September 16, 2011) (relying on *Black's Law Dictionary* 1012 (9th ed.2009) (defining the "likelihood-of-success-on-the-merits test" more leniently as "[t]he rule that a litigant who seeks [preliminary relief] must show a reasonable probability of success...."). Injunctive relief is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. *American Trucking*, at * 4 (citing *Winter*, 129 S.Ct. at 375-76).

In Response to the Plaintiffs' Motion for Preliminary Injunction, the City asserts Plaintiffs cannot establish a likelihood of prevailing on the merits because: 1) they are not engaged in protected activities; 2) Plaintiffs cannot obstruct the sidewalk even when engaged in protected activities, and 3) the City can seize any personal property if it is obstructing the sidewalk or has been abandoned.

Defendant's first challenge fails because Plaintiffs only seek a preliminary injunction in respect to when they are engaged in protected activities. In spite of its assertions regarding difficulty, the Defendant will have to determine whether or not the Plaintiffs are exercising First Amendment rights. To assist the Defendants, the Court notes the Plaintiffs identify the First Amendment protected activities they are engaging in as: protest speech audible to passers-by, display of signs conveying Plaintiffs' political message, and when possible, dissemination of political literature pertinent to Plaintiffs' message. Plaintiffs provide affidavits from the Plaintiffs establishing that they have been arrested or threatened with arrest while engaged in protesting vocally to passers-by, displaying signs and disseminating literature. (Reply (Doc. 73), Exs. N and M.)

The test for whether an activity is protected is: Plaintiffs must have an intent to convey a particularized message with their conduct, and 2) under the surrounding

circumstances, there must be a substantial likelihood that the message will be understood by those who view it. *Spence v. Washington*, 418 U.S. 405, 409-11 (1974) (emphasis added). The First Amendment protects only conduct that conveys a particularized message that observers are likely to understand. In other words, "the nature of the activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that [Plaintiffs] engaged in a form of protected activity." *Id.* at 409, *see also Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996) (sidewalks are constitutionally protected just because sitting is conduct that can possibly be expressive); *State v. Ybarra*, 25 Or. App. 633 (Or 1976) (distinguishing between conduct serving a nonexpressive facilitative rather than demonstrative expressive purpose; rejecting protestors's argument that canopy-like tents symbolized the plight of the farm workers and finding tents and sleeping bags served to facilitate the round the clock vigil).

The City believes that as a matter of law, a person cannot engage in expressive conduct on a continuous basis. "At some point, a person has to put down a picket sign and eat, sleep, think, rest use a restroom, talk to a friend, or play; and these activities are not traditional expressive conduct." (Resp. (Doc. 71) at 7.) The City is wrong. (Order (Doc. 46) at n. 6), *see Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (round the clock vigil in Lafayette Park in Washington, D.C.). In the same way exercising First Amendment activities does not convert non-expressive facilitative activities into expressive conduct, performing non-expressive facilitative conduct does not strip expressive conduct of First Amendment protection. The *Spence* test has two prongs: 1) is there an intent by the actor to convey a particularized message with the conduct, and 2) given the surrounding circumstances is the likelihood great that the message will be understood by those who view it.

The remainder of the City's arguments rise or fall on the definition of "obstruction," which according to the City could be any item left on the sidewalk, TCC

§35 or § 25-51; any item beyond a bedroll, back pack or beverage, the 3-B Policy, or any item blocking a 5 foot path or being within 8 feet of a business doorway or entrance, TCC §11-36.2.

Conclusion

Plaintiffs are likely to prevail on the assertion that they are not obstructing the sidewalk while exercising First Amendment rights if they leave a 5 foot path open on the sidewalk and keep 8 feet open in front of business entrances. The sidewalk ordinance, TCC Sec. 11-36, allows Plaintiffs to sit or lie on the sidewalks when engaging in First Amendment protected activities in the daytime as long as a 5 foot path is left unobstructed on the sidewalk and 8 feet is left open from any doorway or business entrance. The City offers no explanation why this ordinance is not applicable to Plaintiffs' First Amendment activities, around the clock. Expressly, the ordinance applies in the daytime, and the City offers no reason why the same standard should not apply at night. The Court enjoins the City from applying the 3-B Policy, defining "obstruction" as sitting or lying on a sidewalk with more than a backpack, beverage, or blanket, when the sidewalk is being used to exercise First Amendment rights. The Court finds that Plaintiffs show a reasonable probability of success on the merits of its constitutional challenge to the City's enforcement practices pursuant to the 3-B Policy. There are serious questions going to the merits, including whether it overly burdens Plaintiffs' First Amendment rights, has a discriminatory effect on homeless people, or is a harsh enforcement tool aimed against a particular group of people, i.e., the homeless.

A preliminary injunction against the 3-B Policy will resolve Plaintiffs' concerns regarding arrests and seizure of personal property, except under circumstances where the City deems property abandoned and when made or threatened for conduct occurring beyond the arbitrarily designated 12 feet of sidewalk, which includes the sidewalk area where public tables, chairs and garbage receptacles are located.

For purposes of the preliminary injunction, the Court defines "public sidewalk" as "an area for walking along the side of the road." *Roulette*, 97 F.3d at 302. In the event the City intends to close areas falling outside this definition at night, such as where the tables and garbage receptacles are located, it must do so for all citizens. The City's failure to delineate closed park areas for all to see and understand raises questions of whether police are selectively enforcing the park closure ordinance, TCC § 21-3(7).

In the Ninth Circuit, the Fourth and Fourteenth Amendments protect homeless persons from government seizure and summary destruction of their "unabandoned," but momentarily unattended, personal property. *Lavan v. City of Los Angeles*, 693 F.3d 1022,1024 (9th Cir. 2012)."Because homeless persons' unabandoned possessions are 'property' within the meaning of the Fourteenth Amendment, the City must comport with [] due process requirements if it wishes to take and destroy them." *Id.* at 1032.

The City fails to distinguish *Lavan* as solely a discussion of the summary destruction of personal property seized by the City of Los Angeles. *See Watters v. Otter*, 955 F. Supp.2d 1178, 1189 (Idaho 2013) (in *Lavan*, the seizure was lawful but the immediate destruction of the property was not). Accurately described, the *Lavan* court couched its discussion of the lack of due process, Fourteenth Amendment concerns, in terms of "even if" the seizure of the property would have been deemed reasonable had the City held it for return to its owner instead of immediately destroying it, the City's destruction of the property rendered the seizure unreasonable." *Lavan*, 693 F.3d at 1030. *Lavan* is instructive in relationship to Plaintiffs' Fourth Amendment challenge to Plaintiffs' seizure of property for being "abandoned."

In the Ninth Circuit, the Fourth Amendment protects two types of expectations, one involving "searches," the other "seizures." A seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property. Then, Plaintiffs need not show a reasonable expectation of privacy, but only a possessory

interest in the property seized by the City. *Id.* at 1027-28. To determine whether such an interests exists, the courts look to "existing rules or understandings that stem from an independent source such as state law-rules or understandings. *Id.* at 1031. Arizona law recognizes the right of ownership of personal property; ARS 1-215(29) provides: "personal property' includes money, goods, chattels, dogs, things in action and evidences of debt."

Lavan was NOT about a constitutionally-protected property right to leave possessions abandoned on public sidewalks. *Id.* at 1027. The case was about whether homeless persons instantly and permanently lose protected property interests in their possessions by leaving them momentarily unattended in violation of a municipal ordinance. *Id.* The court held they do not, and the City can not treat "unattended" personal property of homeless persons differently than it treats an unattended car parked in a "no parking" zone. *Id.* at 1032. Describing the evidence in *Lavan* as including "a number of occasions when the City seized Appellees' possessions, Appellees and other persons were present, explained to City employees that the property was not abandoned, and implored the City to not destroy it," *id.* at 1025, the court held: "The City did not have a good-faith belief that Appellees' possessions were abandoned,"*id.*,.

Here, Plaintiffs present evidence that the City has seized personal property when a homeless person is not physically present and laying claim to property during a sweep, even when the item was not abandoned; "the items were either claimed by someone or some individual near the items at the time of seizure notified Defendants the individual was watching the items until the owner returned." (Motion for PI (Doc. 70) at 12 (citing Ex. B ¶ 17; Ex. C ¶ 6). The video recording offered by Plaintiffs shows a person informing police that he is watching personal property for others, and he identifies three people by name, but police seize the personal property of the absent persons, and one person actually returns just after the seizure to find her personal property, including

blanket, seized by police. *Id.*, Ex.70-7: Video 7:38, 17:45-55, 20-48-58, 25:26-36, 26:56. Under *Lavan*, the City must distinguish between personal property that is abandoned or simply left unattended or in the attendance of another person. Only property that in good-faith appears to be abandoned is subject to seizure.

The Court finds the Plaintiffs have shown a likelihood of prevailing on the claim that police are harassing protestors by seizing personal property that is not abandoned.[3]

Plaintiffs admit the City does not summarily destroy property. The City presented testimony at the hearing that procedures exist by which Plaintiffs may secure the return of their personal property. The preliminary injunction will not reach the question of destruction of seized property.

In the Ninth Circuit, irreparable injury occurs whenever a government entity's actions violate the Constitution, even for minimal periods of time. *Sammartano v. First Judicial District Court*, 303 F.3d 959, 973 (9th Cir. 2002) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Court grants a preliminary injunction limited to protect Plaintiffs' free exercise of rights under the First Amendment for conduct, including protest speech audible to passers-by, display of signs conveying Plaintiffs' political message, and dissemination of political literature. This does not mean that this conduct is in fact protected conduct under the First Amendment. That question remains to be answered through the adjudication of this case. This case is not about whether the City is discriminating against the homeless, pursuant to the 3-B Policy, by denying them unfettered use –for whatever reason, of the sidewalks to sit or lie on after 10pm until 7

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[3]Such harassment is extremely chilling because there is tremendous hardship for Plaintiffs from the loss of restricted items under the 3-B policy, such as an umbrella, bicycle, hand cart, panhandling sign, an extra backpack and anything an extra bag could contain (money, medicine, a nicer set of clothes for a job interview). (Reply (Doc. 73) at 10.) "Arrests and detentions put homeless people at risk of losing government-supplied benefits," (Motion for PI (Doc. 70) at 10-11); and make it difficult to secure employment, *id.* at 11.

am. This case is only about the Plaintiffs' rights under the First Amendment and their equal right to exercise those rights free from harassment.

Accordingly,

IT IS ORDERED that the Motion for Leave to File Third Amended Complaint (Doc. 61) is GRANTED.

IT IS FURTHER ORDERED that within 7 days of the filing date of this Order, Plaintiffs shall file the Third Amended Complaint, as attached as Ex. A to the Motion to Amend.

IT IS FURTHER ORDERED that the case management deadlines are continued for 3 months, as follows: discovery shall end by March 16, 2015; dispositive motions shall ve filed by April 16, 2015; the Proposed Pretrial Order is due by May 15, 2015. All other directives in the Court's Scheduling Order (Doc. 56) remain in effect.

IT IS FURTHER ORDERED that the Motion for Preliminary Injunction (Doc. 69) is GRANTED.

IT IS FURTHER ORDERED that the Preliminary Injunction applies only to Plaintiffs' free exercise of First Amendment rights on the sidewalk which runs from Broadway to Congress and boarders the VDA Park adjacent to Church Ave

IT IS FURTHER ORDERED that Defendant the City of Tucson is enjoined as follows:

1. Applying the 3-B Policy as a basis for an arrest, physical or by citation, or to threaten arrest on the basis of the 3-B Policy.
2. Applying the 3-B Policy as a basis for seizing or threatening to seize personal property.
3. Applying the 3-B Policy to define obstruction; obstruction shall be defined in accordance with TCC § 11-36.2 which allows the free exercise of First Amendment rights, including free exercise of religion, speech and assembly; provided, however, that the person sitting or lying on the public sidewalk remains at least eight (8) feet from any doorway or business

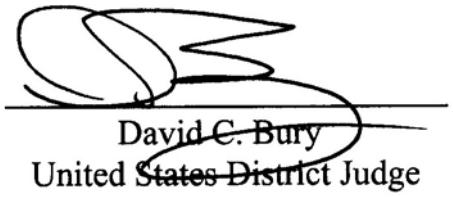
entrance, leaves open a five (5) foot path and does not otherwise block or impede pedestrian traffic.

4. Seizing any personal property that in good-faith does not appear to be abandoned.

5. Closing any area of the sidewalk, pursuant to the park closure ordinance TCC § 21-3(7) without posting it as closed to all citizens. Sidewalk shall be defined as: "an area for walking along the side of the road."

IT IS FURTHER ORDERED that this preliminary injunction does not apply to preclude the City from acting to protect the public health or safety nor adopt reasonable time, place, and manner restrictions under the First Amendment.

DATED this 19th day of December, 2014.



David C. Bury
United States District Judge