UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

John Thomas Cooper, Jr., and Jonathan McLane, Plaintiffs, v. City of Tucson, et al., Defendants,	CV 12-208 TUC DCB (Lead Case) CV 12-781 TUC DCB (Consolidated) **O R D E R**

Plaintiffs are members of Occupy Tucson and Occupy Public Land (Occupy Tucson). Plaintiffs want to be free to gather in city parks and public sidewalks to educate the public about corporate power over governments and what they perceive as related social problems too numerous to list, including the plight of the homeless. They raise First Amendment challenges to city ordinances that govern use of the city sidewalks and parks. Plaintiffs assert the City of Tucson has precluded them from engaging in free speech by denying them a permit under a "no camping" city ordinance and threatening to arrest them and arresting Defendant McLane in contradiction of the sidewalk ordinance that allows people to freely assemble on the public sidewalks to protest.

The Tucson City Code (TCC) sections at issue in this case are sections 21-3.5: Relating to recreation– camping; 21-3.7: Miscellaneous– closed areas; 21-4: Permits, licenses and reservations– standards for issuance; 21-7: Penalties; 11-36: Sitting and lying down on public sidewalks in downtown commercial zone; 11-36.2: Prohibited conduct; exceptions; 11-35: Prohibition on obstructing public use, and 11-36.3: Penalty.

The "no camping" ordinances provide in relevant part as follows: "No person in a park shall . . . [c]amp, lodge, sleep or remain therein between the hours of <u>12 midnight and 6:00 a.m.</u>,

unless special written permit be obtained 72 hours in advance from the director." TCC § 21-3.5(4).

"The director/district administrator "shall" issue a permit . . . when he finds: 1) [] the proposed activity or use of the park will not unreasonably interfere with or detract from the general public enjoyment of the park or cause annoyance or the disturbance of any other person's reasonable use of park facilities, or cause annoyance or disturb the peace . . . , or interfere with the maintenance of the park or its facilities; 2) [] the proposed activity and use will not unreasonably interfere with or detract from the promotion of public health, welfare, safety and recreation; 3) [] the proposed activity or use is not unreasonably anticipated to incite violence, crime or disorderly conduct; 4) [] the proposed activity will not entail unusual, extraordinary or burdensome expense or police supervision by the city. If the activity requires additional expense or security, the sponsor/promoter shall pay the additional costs; 5) [] the facilities desired have not been reserved for other use at the day and hour required in the application, and 6) in the case of vendors of food and refreshments . . . required fees have been paid." TCC § 21-4(c). In addition to the "no camping" ordinance, the City precludes any person from entering an area posted as "Closed to the Public," or posted "No Trespassing," or "use or abet the use of any area in violation of posted notices. TCC § 21-3.7(3). A violation of these ordinances is a misdemeanor and punishable by community service or a fine not exceeding $250 or by imprisonment not to exceed 10 days, or both, and by probation not to exceed 1 year. The rate of substitution of community service work for a fine shall be $10 per hour. TCC § 21-7.[1]

The sidewalk ordinances provide in pertinent part as follows: "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. in the following zones: (1) The Downtown Zone . . . (2) The Fourth Avenue Business Zone . . . (3) The University Zone." TCC § 11:36.2(a). "The prohibition in subsection (a) shall not apply to any person: . . . (4) Who is exercising First Amendment rights protected by the United States

[1]Defendants' Motion to Dismiss, Ex. A: Ordinance No. 4610, reflects the original provisions adopted 1/10/1977 and the legislative intent supporting the ordinance.

Constitution, 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." TCC § 11:36.2(b)(4). A violation of the sidewalk ordinance is a misdemeanor and punishable by community service or a fine not exceeding $250, imprisonment not to exceed 10 days, or both, and by probation not to exceed 1 year. TCC § 11:36.3.

Additionally, day or night, a person may not obstruct "a 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." TCC § 16-35.

On September 17, 2013, the Defendants filed the Motion to Dismiss or in the Alternative a Motion for Summary Judgment. Defendants assert that *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), is dispositive. The City admits it denied the Plaintiffs a permit to occupy, overnight for 30 days, the De Anza Park. The City argues the Plaintiffs cannot show a violation of the First Amendment to the United States Constitution because "occupying" city parks by camping and remaining in the parks after hours is NOT protected "speech" or "expressive conduct." (MD/MSJ (Doc. 22) at 3-4.)

To be protected by the First Amendment, the Plaintiffs must demonstrate that: (1) they have an intent to convey a particularized message with their conduct, such that (2) there is a "substantial likelihood that the message will be understood by those who view it." *Spence v. Washington*, 418 U.S. 405, 409-411 (1974); *see also Clark*, 468 U.S. 288, 293 n. 5. "Where conduct lacks a particularized message, that conduct is not expressive." (MD/MSJ (Doc. 22) at 4 (citing *East Hartford Education Ass'n v. Board of Education*, 563 F.2d 838, 858 (2nd Cir. 1977)*; see e.g.*, *Clark*, 468 U.S. at 296 (noting that while sleeping had "an expressive element," it was evident that "its major value . . . would be facilitative.")). "Sleeping outdoors is not in and of itself a fundamental right, and the '[t]he act of sleeping in a public place, absent expressive content, is not constitutionally-protected conduct.'" *Id.* (quoting *Whiting v. Town of Westerly*, 942 F.2d 18, 21 (1st Cir.1991); *see also Joel v. City of Orlando*, 232 F.3d 1353, 1357 (11th

Cir.2000); *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1169 (Cal.1995)("There is no fundamental right to camp on public property").

The City argues that the Plaintiffs' grievances are so "bewilderingly comprehensive that it defies logic to assert that any particularized message could be conveyed by any particular conduct." (MD/MSJ (Doc. 22) at 4-5 (citing Complaint ¶¶ 12-18)) Additionally, Plaintiffs cannot explain how the regulated conduct of sleeping in, camping in and 'occupying' city parks conveys any part of any particularized message. *Id.* Even the plaintiffs in *Clark* had a difficult time convincing the Court that the First Amendment required a permit to allow a 24-hour vigil and the erection of tents to accommodate 150 people, but the government had allowed the vigil and only refused to allow sleeping in the tents: camping. *Clark*, 468 U.S. at 296. In *Clark*, the Supreme Court assumed the conduct involved an "expressive element." *Id.* at 293. The City asks this Court to find that the Plaintiffs fail to show the conduct of occupying and sleeping in the parks after closing time is expressive of any particularized message and, therefore, does not involve the First Amendment. Alternatively, the City argues that even if the First Amendment is invoked, the TCC provisions are reasonable time, place and manner regulations that survive constitutional scrutiny. (MD/MSJ at 6-11.)

In response, the Plaintiffs filed a combined Response and Crossmotion for Partial Summary Judgment, (Resp/CMSJ (Docs. 24/25), which seeks a judgment as to liability on all Plaintiffs' claims. The Defendants filed a Motion to Consolidate . . ., and Reply to Defendants' Response and Crossmotion for Summary Judgment (Doc. 28), which was granted in part as to consolidation. (Order of Consolidation (Doc. 33)). In combination, the two cases, CV 12-208 TUC DCB and CV 12-781 TUC DCB, challenge the "no camping" and "sidewalk" ordinances. In their Response to Plaintiffs' Crossmotion, the Defendants reurge the First Amendment arguments made in their initial motion relevant to the "no camping" ordinance in respect to the "sidewalk" ordinances. Subsequently, the Plaintiffs filed a combined Response/Reply, and Defendants filed a Reply. The dispositive motions are fully briefed and ready for disposition.

Defendants assert, without reference to any supporting case law, that if the Court finds that there is no First Amendment violation, the Plaintiffs' "corresponding"[2] "subordinate"[3] equal protection and due process claims fail too.

I. The Alleged First Amendment Violations

Plaintiffs must establish that they intend to convey a particularized message by their conduct, such that there is a substantial likelihood that the message will be understood by those who view it. *Spence*, 418 U.S. at 409-11 (1974), *Clark*, 468 U.S. at 193 n. 5. On December 9, 2011, Plaintiffs sought a "Special Permit for Use of the De Anza Park for Camping Purposes." (Plaintiffs' Statement of Undisputed Facts (Doc. 30), Ex. 1: Permit Application.)

a. The Park Permit and No Camping Ordinances

The planned conduct was "for an encampment of 15 tents, to remain 24 hours a day for 30 days, starting December 16th, 2011 and ending January 16th, 2012, . . [to] be located on the northwest corner of the park," with "no living accommodations," but "manned 24 hours a day" and never containing "more than 200 persons." *Id.* The Court finds that the "symbolic" tent city will likely convey the Plaintiffs' message, which is that because corporate power runs our governments there is a massive injustice of income inequality, (Second Amended Complaint (Doc. 16) ¶ 12), and this disparity in wealth is highlighted by the plight of the homeless, *id.* ¶ 18. The Court finds minimal value to occupying tents at night related to the successful communication of the Plaintiffs' message to the public. Even if overnight occupancy in the park, sleepless or otherwise, is expressive conduct, *Clark* is directly on point and allows the type of neutral time, place, and manner restrictions reflected in the ordinances.

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[2]MD/MSJ (Doc. 22) at 12.

[3]Resp/CMSJ (Doc 28) at 7.

The Court rejects Plaintiffs assertion that *Clark* is distinguishable because: " . . .[4] Unlike *Clark*, here Defendant City's actions are demonstrably content-based, as evinced by Defendants' use of conclusory justifications and the failure to articulate particularized facts to support the denial of overnight use. Unlike *Clark*, here Plaintiffs' permit request *never sought permission for demonstrators to sleep in City Parks.* It is clear that these two cases are completely different and that *Clark* is of little precedential value." (Resp/CMSJ (Docs. 24/25) at 11.) Plaintiffs assert this is not a "right to sleep" case.

The Plaintiffs' Petition belies this assertion as they expressly asked that the tents be manned 24 hours a day with "representatives" available to disseminate information and that at no time would the tent encampment contain more than 200 persons. Plaintiffs are, however, technically correct that the ordinance does not mention sleeping. "Camping" is defined as: "the placement of any tent, temporary shelter or structure, blanket, cloth, or other sleeping implements or park property for the purpose of protection from the elements for any persons remaining in the park." TCC § 21-1(1). Nevertheless, *Clark* applies. Even if Plaintiffs intended there be no sleeping in the tents or intended some kind of night-time vigil by only a few volunteers, the Court finds that occupying the tents at night by a few or many people, asleep or awake, if expressive conduct, it may be regulated by reasonable time, place and manner restrictions, even if the ordinances have a secondary impact on speech and because there is a substantial governmental interest, unrelated to suppression of expression, in conserving park property by precluding camping. *Clark*, 468 U.S. at 293-296, 298-99, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The Court must consider Plaintiffs' facial challenge to the City "no camping" ordinance for vagueness and over breadth. Plaintiffs argue the City has failed to define the standards of issuance for permits, which results in the Parks Director having complete discretion as to

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[4]"Unlike *Clark*, here Defendant City has created a law which *allows camping in City Parks*. Unlike *Clark*, here Defendant City has violated its own laws, changing its mind and informing Plaintiffs that under no circumstances may a park be used overnight." These arguments apply to Plaintiffs Fourteenth Amendment due process, liberty interest, claim and claim under the equal protection clause.

whether to issue a permit. The Plaintiffs have argued that the Parks Director's simple rote recitation of the ordinance "standards for issuance" for a permit failed to provide any particularized factual support for his denial and offered only conclusory justifications. (Resp/CMSJ (Docs. 24/25) at 13-14.) The Court disagrees, the "standards for issuance" in TCC § 21-4(c) are particularized. They are objective and particularized standards that expressly guide the Director in issuing permits to accomplish the legislative goal of the ordinance to: "prevent[] abuse and damage to the City parks and property," [which was a problem] "due to the vagueness of ordinances and/or lack of ordinances to cover specific problems." (Ds' SOF in Support of MD/MSJ (Doc. 23), Ex. A: Code Revision– Parks and Recreation, January 10, 1977 at 1.) The purpose of the 1977 ordinance was to "make the parks of the City safer, cleaner, and a more pleasant place to visit for all families and individuals of the City." *Id.* at 2. In adopting the ordinance, the City's Mayor and Council set out particularized reasons for granting or denying a permit, which they believed would protect the city parks. *See Clark*, 468 U.S. at 297 (expressing opinion that government has legitimate interest in ensuring that parks are adequately protected). The criteria by which the Director "shall" grant or deny a permit are particularly related to this end.

For example, overnight "camping" in a city park might unreasonably interfere with or detract from the general public enjoyment of the park or cause annoyance or the disturbance of other person's reasonable use of park facilities, or cause annoyance or disturb the peace . . . , or interfere with the maintenance of the park or its facilities; interfere with or detract from the promotion of public health, welfare, safety and recreation; possibly incite violence, crime or disorderly conduct; or entail unusual, extraordinary or burdensome expense or police supervision by the city. If so, the Director "shall" deny the permit.

Here, the Director denied the permit because the "camping" proposed by Plaintiffs would interfere with or detract from the general public enjoyment of the park, § 21-4(c)(1), detract from the promotion of public health, welfare, safety and recreation, § 21-4(c)(2), and entail unusual, extraordinary or burdensome expense for police supervision, § 21-4(c)(4).

The Court finds these were legitimate and particularized reasons directly responsive to Plaintiffs' proposal to camp in De Anza Park for 30 days and nights by not more than 200 persons. It seems obvious that camping by this number of persons for this length of time would in fact interfere or detract from the general public enjoyment of the park by others, might reasonably be expected to create a public nuisance, and involve sanitation, health, and public safety issues. Especially because Plaintiffs sought to remain in the park overnight the need for police supervision would be necessary to protect Plaintiffs, their personal possessions and tents, and any equipment such as portable toilets remaining open after dark.

Following *Clark*, this Court finds that the camping ordinance and permit provisions are reasonable time, place, or manner regulations for the city parks that withstand constitutional scrutiny. *Clark*, 468 U.S. at 298. The ordinances are, likewise, sustainable regulatory measures designed to promote a substantial government interest that is unrelated to suppression of expression. *Id.* (citing *United States v. O'Brian*, 391 U.S. 367 (1968) (explaining little difference between the two analysis: substantial government interest and time, manner, and place).

The Court finds that the ordinances are not unconstitutional on their face. The provisions are related to the ends they were designed to serve. " Damage to the parks as well as their partial inaccessibility to other members of the public can as easily result from overnight use by those seeking to exercise First Amendment rights as by nondemonstrators. In neither case must the Government tolerate it. All those who would resort to the parks, must abide by otherwise valid rules for their use, just as they must observe the traffic laws, sanitation regulations, and laws to preserve the public peace." *Clark*, 468 U.S. at 297-98.

Like all other permitees, Plaintiffs are required to pay a permit fee and secure $1 million in liability insurance. For 30 days, the permit cost $750, with a damage deposit of $500. Plaintiffs admit they could not afford the permit fee or the liability insurance. Plaintiffs assert that the City must have a fee waiver and or other provisions in place for indigent persons seeking to exercise their First Amendment rights in the city parks. Additionally, any overnight permits require the permitee to provide overnight security for equipment or materials left overnight in

the park and coordinate that security with Tucson Police Department, the Fire Department, and other City departments, such as the Department of Environment for refuse collection. Permitees must provide portable toilets.

"[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). The City does not have to finance Plaintiffs' free speech. The government is instead required to leave open ample alternative channels for communication. *Id.* at 293; *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) (citing *Heffron*, 452 U.S. at 655, *Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984)); *Clark*, 468 U.S. 293. This brings the Court to consider the City's sidewalk ordinances because the sidewalks serve as a free avenue for Plaintiff's to exercise their First Amendment rights.

b. The Sidewalk Ordinances.

The sidewalk ordinances are facially neutral, with the legitimate governmental interest of keeping the public sidewalks open. *Cf. Clark*, 468 U.S. at 296, 298 (describing keeping the parks available and accessible to other members of the public as one of the legitimate governmental interests). Specifically, the sidewalk ordinances preclude any person from obstructing "a 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." TCC § 16-35. Specifically permitted by law, a person has the right to 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. in the Downtown Zone when exercising his or her First Amendment rights; "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(b)(4).

To the extent the Plaintiffs assert the ordinances create a liberty interest under the 14th Amendment to sleep on the sidewalks for the purpose of communicating a political message, the

ordinances are not necessary to create a right to free speech. The Constitution addresses this issue. To the extent Plaintiffs mean to rely on substantive due process under the Fourteenth Amendment, "Where a particular amendment [to the Constitution] provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims." (Internal quotation marks omitted.) *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion). In other words, if a constitutional amendment exists to restrict the ability of the government to intrude upon personal liberties in an unjustified way, then that constitutional amendment provides the appropriate analytical framework for a complaint. *Id.* Consequently, Plaintiffs' substantive due process allegations function as a repeat claim of a First Amendment violation.[5]

Plaintiffs are correct that the Court reads the ordinances in combination, giving effect to every provision, but must interpret the ordinances so that no provision is rendered meaningless, insignificant, or void. (Ps' Response/Reply (Doc. 38) at 6 (citations omitted). The sidewalk ordinances are content neutral time, place, or manner restrictions implemented for the legitimate governmental purpose of keeping the public sidewalks open to the public. The ordinances are not vague nor overly broad. They are limited to serving this purpose: Plaintiffs may use of the sidewalks for free expression anytime of the day or night, except that they may not obstruct the full and free use of the sidewalk by the public, and during the day in the Downtown Zone from 7 a.m. to 10 p.m., they may not sit or lie on the sidewalk less than (8) feet from any doorway or

[5]In *Albright*, the petitioner argued that the respondent had "deprived him of substantive due process under the Fourteenth Amendment—his 'liberty interest'—to be free from criminal prosecution except upon probable cause." *Id*. at 269. The Supreme Court held that the petitioner's claim must be brought under the Fourth Amendment and not as a violation of substantive due process. *Id.* at 273–75. In the Ninth Circuit, a Fourth Amendment claim requires a seizure, which occurs when a person is held in custody by arresting officers without probable cause. *Karam v. City of Burbank*, 352 F.3d 1188, 1193 (9th Cir. 2003). Plaintiffs do not assert a claim under the Fourth Amendment.

business entrance, must leave open a five (5) foot path, and *cannot otherwise block or impede pedestrian traffic*. The Court finds no Constitutional infirmity on the face of these ordinances.[6]

Plaintiffs assert they have complied with the 5 foot path requirement and, therefore, "the City is patently violating its own laws with no legitimate purpose at all, but rather to silence the Occupy message." *Id.* at 9, *see also* (Resp/CMSJ (Docs. 24/25) at 33). Accordingly, the Court must consider the as-applied constitutionality of the ordinances. Also, the Court must consider Plaintiffs assertion that they may prevail under the Fourteenth Amendment for violations of the equal protection clause. (Resp/CMSJ (Docs. 24/25) at 14-16.) The Court finds that Plaintiffs substantive due process claim under the Fourteenth Amendment is subsumed by the First Amendment. (Resp/CMSJ (Docs. 24/25) at 14); (Response/Reply (Doc. 38) at 5.)

Defendants' Motion for Summary Judgment does not address any of the above issues. Defendants merely assert, without any supporting case law, that if the facial challenges fail then all Plaintiffs' claims, corresponding, fail. This is not true, except for the Plaintiffs' substantive due process claim.

In respect to the question of whether or not Defendants violated Plaintiffs' constitutional right to free speech as they applied the sidewalk ordinances, Plaintiffs make the following allegations.[7]

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[6]Defendants' assert that "Plaintiffs have no constitutional right to camp on the sidewalks for the same unlimited time and purpose, ..." (Motion to Consolidate . . and Reply (Doc. 28) at 6.) To the extent Defendants mean the Plaintiffs may not use the sidewalks for free expression 24 hours a day, seven days a week, 365 days a year, they are wrong. *Id.* The ordinances limit free speech on the sidewalks only to the extent it obstructs the sidewalk. *Id.* at 5 (describing "the Tucson Code [as allowing] Plaintiffs to exercise their First Amendment rights, as long as they do not . . . block the sidewalks.")

[7]To survive a motion to dismiss for failure to state a claim upon which relief can be granted, "factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true even if doubtful in fact." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007) (citations and internal quotations omitted). Under Fed. R. Civ. P. 12(b)(6), a plaintiff must provide the grounds for his entitlement to relief with more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id*. at 1964. "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id*. at

Plaintiffs allege they occupied the sidewalk at 99 S. Church Ave from December 21, 2011 to February 1, 2012. (Plaintiffs' Statement of Facts (Doc. 40) ¶ 6.) No arrests were made. *Id.* ¶ 7. The protest moved to the easement west of 1001 N. Stone Avenue, and when they were removed from there, the protest returned to the sidewalk at 99 S. Church Avenue on March 2, 2012. *Id.* ¶¶ 8-9. On March 10, 2012, Tucson Police Department (TPD) officers arrested and confiscated possessions from members of Occupy Tucson for obstructing the sidewalk at 99 S. Church Avenue. *Id.* ¶ 10.

As well, Plaintiffs participated in a protest on the red brick sidewalk to the east of Veinte de Agosto Park, including Plaintiff McLane who set up his sleeping bag and sat and lay on the sidewalk with a sign bearing the message "Occupy Public Land." *Id.* ¶¶ 11-13. At 2 a.m., Plaintiff McLane was informed he would be arrested for lying on the sidewalk. *Id.* ¶ 14. He was told that officers did not care what the ordinance said and that McLane, as a leader of Occupy Tucson, had been told he could not lie on the sidewalk, and Plaintiff McLane was arrested, jailed, and his belongings including his blanket were confiscated. *Id.* ¶¶ 15-19.

Without incident, on June 18, 2012, Plaintiff McLane and others sat and lay on the sidewalk, awake, outside of Veinte de Agosto Park with blankets. *Id.* ¶ 21. On June 19, at approximately 1 a.m. on June 20, 2012, TPD told them they had to move, *id.* ¶ 22, but after a supervisor was called, it was determined that they were not blocking the sidewalk and allowed to remain, *id.* ¶ 24.

Without incident, on June 21, 2012, the group occupied the sidewalk east of the Pima County Superior Court, north of Veinte de Agosto Park with blankets and signs. *Id.* ¶ 29 At approximately 1 a.m. on June 22, 2012, the group, except for Plaintiff McLane, were arrested and jailed in the Pima County Jail overnight. *Id.* ¶ 31.

On October 25, 2012, at 10 p.m., Plaintiff McLane participated in a protest, occupying the sidewalk east of Veinte de Agosto Park. *Id.* ¶ 32. At 11p.m., he was told that he could not lay on the sidewalk, *id.* ¶ 33, but he was not arrested, *id.* ¶ 34. At approximately 1 a.m., he was

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awake and approached by TPD officers, who told him that he was allowed to keep only his blanket with him on the sidewalk. *Id.* ¶ 35.

Without incident, on October 28, 2012, at about 8 p.m., Plaintiff McLane participated in a protest whereby he sat and laid on the red brick sidewalk located to the east of Veinte de Agosto Park. *Id.* ¶¶ 37-38.

At approximately 1 a.m. on October 29, 2012, approximately nine TPD officers told Plaintiff McLane he would be arrested for lying on the sidewalk. *Id.* ¶ 38. When he explained he was exercising his rights under the ordinance 11-36.2(b)(4), he was told that the officers did not care and they would be arresting all the people sitting on the sidewalk associated with Occupy Tucson. *Id.* ¶ 39. He was arrested, jailed, and his blankets were confiscated. *Id.* ¶¶ 40, 42. Two individuals sitting with the group, who claimed to not be part of Occupy Tucson, were not arrested. *Id.* ¶ 41.

To demonstrate First Amendment retaliation, the Plaintiffs must show that the Defendants deterred or chilled the Plaintiffs' political speech and such deterrence was a substantial or motivating factor in the Defendants' conduct. *Lacey v. Maricopa County*, 693 F.3d 896, 916 (9th Cir. 2012) (citing *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999); *Sloman v. Tadlock*, 21 F.3d 1462, 1469 (9th Cir. 1994). Plaintiffs do not need to show their speech was actually inhibited or suppressed, but only that an official's acts would chill or silence a person of ordinary firmness from engaging in future First Amendment activities. *Id.* Plaintiffs have alleged facts that might enable them to "prove the elements of retaliatory animus as the cause of injury, with causation being understood to be but-for causation." *Id.* Plaintiffs allege they engaged in a protected activity, i.e., lying on the sidewalk to protest the Government's treatment of the homeless; the City retaliated against them by threatening to and arresting them, and their protest was the substantial or motivating cause for these threats. *See Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003) (setting out the requisite elements for a retaliation claim).

The Equal Protection Clause of the Fourteenth Amendment also protects Plaintiffs against intentional, arbitrary government discrimination, whether under the express terms of a statute

or for improper implementation of a statute by the Government. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923). Plaintiffs must allege the government intentionally and without a rational basis treated them differently from others who are similarly situated. *Sioux City*, 260 U.S. at 441; *Allegheny Pittsburgh Coal Co., v. Comm'n of Webster City*, 448 U.S. 336 (1989). "Classifications should be scrutinized more carefully the smaller and more vulnerable the class is." *Seariver Maritime Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir. 2002).

Generally, city officials have broad discretion as to whom to cite for violating an ordinance, however, this discretion is subject to constitutional constraints. *Wayte v. United States*, 470 U.S. 598, 607-608 (1985). Citations may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, *including the exercise of protected statutory and constitutional rights.*" *Id.* (emphasis added) To establish a claim of impermissible selective enforcement, Plaintiffs must show that the City's enforcement of the ordinance had both a discriminatory effect and was motivated by a discriminatory purpose. *Id.*, *Lacey v. Maricopa County*, 693 F.3d 896, 920 (9th Cir. 2012), *see also United States v. Bourgeouis*, 964 F.2d 935, 938 (9th Cir. 1992); *United States v. Lee*, 786 F.2d 951, 957 (9th Cir. 1986). The right to free speech is a protected constitutional right, and Plaintiffs' state a claim under the Equal Protection Clause of the Fourteenth Amendment.

Importantly, Plaintiffs proceed under 42 U.S.C. § 1983, which provides a cause of action against any person who, under color of state law, deprives another of any rights, privileges or immunities secured by the Constitution and laws of the United States. Section 1983 is not a source of substantive rights but merely a method for obtaining relief for violations of federal rights established elsewhere. *Graham v. Connor*, 490 U.S. 386, 393-94 (1989). Plaintiffs must show 1) a right secured by the Constitution or the laws of the United States was violated and the alleged violation was committed by a person acting under color of state law. *Long v. Cnty of L.A.*, 442 F.3d 1178, 1185 (9th Cir. 2006). Both Plaintiffs' First and Fourteenth Amendment claims may be brought under 42 U.S.C. § 1983.

II. Standard of Review for Summary Judgment

On summary judgment, the moving party is entitled to judgment as a matter of law if the Court determines that in the record before it there exists "no genuine issue as to material fact." Fed.R.Civ.P. 56(c). In determining whether to grant summary judgment, the Court views the facts and inferences from these facts in the light most favorable to the non-moving party. *Matsushita Elec. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 577 (1986). A material fact is any factual dispute that might effect the outcome of the case under the governing substantive law. *Id.* at 248. A factual dispute is genuine if the evidence is such that a reasonable jury could resolve the dispute in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The facial constitutionality of the ordinances is a question of law. *Roulette v. City of Seattle*, 97 F.3d 300, 302 (9th Cir. 1996). In considering the crossmotions for summary judgment, the Court decides a pure question of law and does not weigh the evidence or judge the credibility of any witness. *Neely v. St. Paul Fire and Marine Ins. Co.*, 584 F.2d 341, 344 (9th Cir. 1978).

Accordingly,

IT IS ORDERED that Defendants' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment (Doc. 22) is GRANTED IN PART AND DENIED IN PART, as follows: granted as to the Plaintiffs facial challenge to the ordinances; denied as to Plaintiffs' claim that the park ordinances, specifically the fee provisions as applied, violate the Constitution, and denied as to Plaintiffs' claims that the sidewalk ordinances have been unconstitutionally applied to the Plaintiffs in violation of the First Amendment and the Fourteenth Amendment.

IT IS FURTHER ORDERED that the Second Cause of Action is dismissed to the extent it alleges substantive due process violations of the Fourteenth Amendment, but retained under the First Amendment.

IT IS FURTHER ORDERED that the Plaintiff's Motion for Partial Summary Judgment (Doc. 25) is DENIED.

IT IS FURTHER ORDERED that the Court's Order, issued February 1, 2013, (Doc. 43) is amended in respect to the duplicate filings stricken by the Court. The Plaintiffs' Statement of Undisputed Facts (Doc. 26) is STRICKEN, and the Plaintiffs' Statement of Undisputed Facts (Doc. 30), which included accompanying exhibits, is UN-STRICKEN.

IT IS FURTHER ORDERED that the Court shall appoint counsel to represent Plaintiffs, *pro bono* in this action. Subsequent to the appointment of counsel, the Court shall set a scheduling conference under Fed. R. Civ. P. 16.

DATED this 24th day of February, 2014.

David C. Bury
United States District Judge