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**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)

AMENDED O R D E R

This matter is currently pending before the Ninth Circuit Court of Appeals. Generally, an appeal divests a district court of jurisdiction as to any matters involved in the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *McClatchy Newspapers v. Central Valley Typo., etc.*, 686 F.2d 731, 734 (9th Cir. 1982). This is a “judge-made doctrine designed to avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time. It should not be employed to defeat its purpose nor to induce needless paper shuffling.” *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730, 734 (9th Cir. 1988).

1 Here, the Court acts pursuant to Federal Rule Civil Procedure, Rule 62(c), and
2 amends its Order which granted a preliminary injunction to Plaintiffs. The Order (Doc.
3 90), issued on December 22, 2014, is amended to add the word “NOT” to correct a
4 typographical error. The amendment is made at page 12 line 7 of the original Order,
5 which is page 12 line 21, here.

6 **AMENDED ORDER**

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

13 On February 24, 2014, this Court granted in part and denied in part Defendant’s
14 Motion for Partial Summary Judgment. The Court found the City ordinance requiring
15 permits for overnight camping in City parks was facially constitutional. The Court found
16 the City allows free exercise of speech on City sidewalks as long as the sidewalks remain
17 unobstructed and reasoned that the sidewalks afford Plaintiffs a viable alternative to speak
18 freely when they cannot speak in the City parks. The Court denied summary judgment in
19 part as to Plaintiffs’ allegations that city ordinances violate their rights as applied. The
20 Court appointed counsel to represent Plaintiffs *pro bono*, and subsequently in April, the
21 Court issued a case management schedule for discovery to end October 25 and dispositive
22 motions to be filed by December 1, 2014.

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

26 A. Plaintiff’s Motion to File Third Amended Complaint

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

12 It is well established that freedom to amend a complaint should be freely given.
13 Fed. R. Civ. P. 15(A)(2). “District Courts generally consider four factors in determining
14 whether to deny a motion to amend: ‘bad faith, undue delay, prejudice to the opposing
15 party, and the futility of amendment.’” *In re Korean Air Lines Co. Ltd.*, 642 F.3d 685,
16 701 (9th Cir. 2011) (quoting *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994). Rule
17 15 of the Federal Rules of Civil Procedure provides that a party may only amend its
18 pleading with the opposing party’s written consent or the court’s leave. The court should
19 freely grant leave “when justice so requires.” Fed.R.Civ.P. 15(a)(2). This policy is “to be
20 applied with extreme liberality.” *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d
21 708, 712 (9th Cir. 2001) (citations omitted). While the grant or denial of leave to amend
22 is within the discretion of the district court, refusing to grant leave without justification is
23 an abuse of that discretion. *Forman v. Davis*, 371 U.S. 178, 182 (1962).

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

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

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

23 Conclusion:

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

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

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

24 Plaintiffs assure the Court that they do not seek to reinvigorate the facial
25 challenges to the City's ordinances this Court has ruled to be constitutional. The Court
26 agrees the TAC does not raise claims resolved by summary judgment for Defendant. The
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1 ruling by this Court in February, 2014, regarding the constitutionality of the City's park
2 ordinance was based in part on the sidewalk ordinance allowing for the free exercise of
3 First Amendment rights. The Court reasoned that a permit fee did not preclude indigent
4 citizens from exercising First Amendment rights because free speech could be had on the
5 public sidewalks. The Court's February 2014 ruling appears to have shifted Plaintiffs'
6 activities from the city parks to the city sidewalks, and the City's enforcement efforts
7 followed. Plaintiffs' Motion to File a TAC primarily tracks the City's enforcement
8 efforts related to the sidewalks. Pursuant to Rule 15(d), Plaintiffs may supplement the
9 SAC with allegations setting out transactions, occurrences, or events that happened after
10 the date of the SAC: 7/11/2012. *See also Desertrain v. City of Los Angeles*, 754 F.3d
11 1147, 1154 (9th Cir. 2014) (citing *Jackson v. Hayakawa* 605 F.2d 1121, 1129 (9th Cir.
12 1979) (finding abuse of discretion where district court should have construed matter
13 raised in opposition to motion for summary judgment as request pursuant to Rule 15(b)).

14 The Court grants Plaintiffs leave to file the TAC, and resets the deadline for
15 discovery, dispositive motions and filing of the proposed Pretrial Order. While the third
16 amendment will delay resolving the case, the amendment is not unduly delayed in respect
17 to the timing of the new sidewalk and property seizure claims, which did not arise until
18 2014, well after the filing of the SAC, July 11, 2012. Prejudice to the Defendant is
19 addressed by continuing the case management deadlines. Plaintiffs are granted leave to
20 file the TAC, pursuant to Rule 15(b), and the TAC properly supplements allegations
21 arising since the SAC, pursuant to Rule 15(d).

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

23 "Defendant City of Tucson has doubled-down on its efforts to evict Plaintiffs and
24 others from the sidewalk adjacent to Veinte de Agosto Park (VDA Park) since this Court
25 issued its order, [February 24, 2014], denying Defendant's Motion for Partial Summary
26 Judgment." (Motion for Preliminary Injunction (MPI) (Doc. 70)). Plaintiffs refer to the
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1 City's 3-B Policy to allow only a blanket, bedroll, and nonalcoholic beverage, when
2 sitting or lying on the sidewalk. After the Court rejected Plaintiffs' facial challenge to the
3 city ordinance precluding overnight camping¹ based in part on its reasoning that free
4 expression could be had by Plaintiffs on city sidewalks, Plaintiffs began exercising their
5 First Amendment rights on the sidewalk bordering the VDA Park. Defendant's
6 enforcement efforts followed, pursuant to the 3-B Policy.

7 The City believes that the sidewalk areas within the VDA Park are part of the park
8 and not public sidewalks. By this logic they may close access at night to the east-side,
9 sidewalk which borders the VDA Park adjacent to Church Ave, including areas where
10 public "picnic" tables and garbage receptacles are located. A sidewalk is "an area for
11 walking along the side of the road." (Resp. (Doc. 13) (citing *Roulette v. City of Seattle*,
12 97 F.3d 300, 302 (9th Cir. 1996)). The City has "chosen" to treat 12 feet of sidewalk
13 adjacent to Church Avenue from Broadway to Congress as sidewalk, subject to sidewalk
14 ordinances, not the park-closure ordinance. The City has painted a line on the sidewalk to
15 delineate the 12 feet it considers to be public sidewalk. The City treats areas of the
16 sidewalk where public tables, chairs, and garbage receptacles are located as subject to the
17 park closure ordinance.² See (Motion for PI (Doc. 70) (2/14/2014, McLane was arrested
18 for violation of park curfew when he disposed of trash in a receptacle on this sidewalk);
19 (2/14/2014, McLane arrested for using two tables).

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

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

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

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

12 (a) No person shall sit or lie down upon a public sidewalk or upon a
13 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. [...]

14 (b) The prohibition in subsection (a) shall not apply to any person ... (4)
15 Who is exercising First Amendment rights protected by the United States
16 Constitution, including free exercise of religion, speech and assembly;
17 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.

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

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

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

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

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

15 The 3-B Policy is, however, no more or less objective than the 5 foot/8 feet
16 provisions set out in TCC § 11-36.2. And, the City misses the important point that it
17 needs the 3-B Policy because obstruction is not defined in the ordinances it seeks to rely
18 on here: TCC § 35 and 25-51. *See Desertrain v. City of Los Angeles*, 754 F.3d 1147,
19 1155-56 (9th Cir. 2014) (describing statute as unconstitutionally vague if it leaves the
20 public uncertain as to the conduct it prohibits or encourages arbitrary or discriminatory
21 enforcement). “If a statute provides ‘no standards governing the exercise of . . .
22 discretion,’ it becomes ‘a convenient tool for harsh and discriminatory enforcement by
23 local prosecuting officials, against particular groups deemed to merit their displeasure.’”
24 *Id.* (quoting *Papachristou v. Jacksonville*, 405 U.S. 156, 170 (1972)). Except for the
25 express 5 foot/8 feet standards provided for in TCC § 11-36.2(b)(4) when the sidewalks
26 are being used in the daytime for First Amendment activities, the TCC sidewalk
27 ordinances contain no standards nor definition for “obstruction.” The City ignores an
28 express standard, provided by the City Council for applying to all First Amendment

1 activities conducted downtown during the day, in favor of defining “obstruction” pursuant
2 to the 3-B Policy, which appears uniquely tailored to homeless people.

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

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

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

25 According to the Supreme Court, the proper standard for granting or denying a
26 preliminary injunction is as follows: “A plaintiff seeking a preliminary injunction must
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1 establish that he is likely to succeed on the merits, that he is likely to suffer irreparable
2 harm in the absence of preliminary relief, that the balance of equities tips in his favor, and
3 that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 129
4 S. Ct. 365, 374 (2008); *American Trucking Associations, Inc. v. City of Los Angeles*,
5 559F.3d1046 (9th Cir. 2009).

6 Prior to *Winter*, the Ninth Circuit recognized an alternative sliding-scale standard
7 requiring a plaintiff to demonstrate either a combination of probable success on the merits
8 and the possibility of irreparable injury or that serious questions are raised and the
9 balance of hardships tips sharply in his favor. *Taylor v. Westly*, 488 F.3d 1197, 1200 (9th
10 Cir. 2007). Post-*Winter*, there is no lesser standard than “likely to suffer irreparable
11 harm,” but the sliding scale test remains a viable concept within the context of the four
12 prong test. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir.
13 2011). To be in harmony with the “likelihood standard” adopted in *Winter* and *Stormans,*
14 *Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), “serious questions going to the merits”
15 means that there is at least a reasonable probability of success on the merits. *Winnemucca*
16 *Indian Colony v. United States ex rel. Dept. of Interior*, 2001 WL 4377932 * 4 (Nev.
17 September 16, 2011) (relying on *Black's Law Dictionary* 1012 (9th ed.2009) (defining
18 the “likelihood-of-success-on-the-merits test” more leniently as “[t]he rule that a litigant
19 who seeks [preliminary relief] must show a reasonable probability of success....”).
20 Injunctive relief is an extraordinary remedy that may only be awarded upon a clear
21 showing that the plaintiff is entitled to such relief. *American Trucking*, at * 4 (citing
22 *Winter*, 129 S.Ct. at 375-76).

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

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

13 The test for whether an activity is protected is: Plaintiffs must have an intent to
14 convey a particularized message with their conduct, and 2) under the surrounding
15 circumstances, there must be a substantial likelihood that the message will be understood
16 by those who view it. *Spence v. Washington*, 418 U.S. 405, 409-11 (1974) (emphasis
17 added). The First Amendment protects only conduct that conveys a particularized
18 message that observers are likely to understand. In other words, "the nature of the
19 activity, combined with the factual context and environment in which it was undertaken,
20 lead to the conclusion that [Plaintiffs] engaged in a form of protected activity." *Id.* at
21 409, *see also Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996) (sidewalks are NOT
22 constitutionally protected just because sitting is conduct that can possibly be expressive);
23 *State v. Ybarra*, 25 Or. App. 633 (Or 1976) (distinguishing between conduct serving a
24 nonexpressive facilitative rather than demonstrative expressive purpose; rejecting
25 protestors's argument that canopy-like tents symbolized the plight of the farm workers
26 and finding tents and sleeping bags served to facilitate the round the clock vigil).

1 offers no reason why the same standard should not apply at night. The Court enjoins the
2 City from applying the 3-B Policy, defining “obstruction” as sitting or lying on a
3 sidewalk with more than a backpack, beverage, or blanket, when the sidewalk is being
4 used to exercise First Amendment rights. The Court finds that Plaintiffs show a
5 reasonable probability of success on the merits of its constitutional challenge to the City’s
6 enforcement practices pursuant to the 3-B Policy. There are serious questions going to
7 the merits, including whether it overly burdens Plaintiffs’ First Amendment rights, has a
8 discriminatory effect on homeless people, or is a harsh enforcement tool aimed against a
9 particular group of people, i.e., the homeless.

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

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

21 In the Ninth Circuit, the Fourth and Fourteenth Amendments protect homeless
22 persons from government seizure and summary destruction of their “unabandoned,” but
23 momentarily unattended, personal property. *Lavan v. City of Los Angeles*, 693 F.3d
24 1022,1024 (9th Cir. 2012). “Because homeless persons’ unabandoned possessions are
25 ‘property’ within the meaning of the Fourteenth Amendment, the City must comport with
26 [] due process requirements if it wishes to take and destroy them.” *Id.* at 1032.

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

11 In the Ninth Circuit, the Fourth Amendment protects two types of expectations,
12 one involving “searches,” the other “seizures.” A seizure of property occurs when there
13 is some meaningful interference with an individual’s possessory interests in that property.
14 Then, Plaintiffs need not show a reasonable expectation of privacy, but only a possessory
15 interest in the property seized by the City. *Id.* at 1027-28. To determine whether such an
16 interests exists, the courts look to “existing rules or understandings that stem from an
17 independent source such as state law-rules or understandings. *Id.* at 1031. Arizona law
18 recognizes the right of ownership of personal property; ARS 1-215(29) provides:
19 “personal property’ includes money, goods, chattels, dogs, things in action and evidences
20 of debt.”

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

6 Here, Plaintiffs present evidence that the City has seized personal property when a
7 homeless person is not physically present and laying claim to property during a sweep,
8 even when the item was not abandoned; “the items were either claimed by someone or
9 some individual near the items at the time of seizure notified Defendants the individual
10 was watching the items until the owner returned.” (Motion for PI (Doc. 70) at 12 (citing
11 Ex. B ¶ 17; Ex. C ¶ 6). The video recording offered by Plaintiffs shows a person
12 informing police that he is watching personal property for others, and he identifies three
13 people by name, but police seize the personal property of the absent persons, and one
14 person actually returns just after the seizure to find her personal property, including
15 blanket, seized by police. *Id.*, Ex.70-7: Video 7:38, 17:45-55, 20-48-58, 25:26-36, 26:56.
16 Under *Lavan*, the City must distinguish between personal property that is abandoned or
17 simply left unattended or in the attendance of another person. Only property that in good-
18 faith appears to be abandoned is subject to seizure.

19 The Court finds the Plaintiffs have shown a likelihood of prevailing on the claim
20 that police are harassing protestors by seizing personal property that is not abandoned.³
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23 ³Such harassment has an extreme chilling because there is tremendous hardship for
24 Plaintiffs from the loss of restricted items under the 3-B policy, such as an umbrella,
25 bicycle, hand cart, panhandling sign, an extra backpack and anything an extra bag could
26 contain (money, medicine, a nicer set of clothes for a job interview). (Reply (Doc. 73) at
27 10.) “Arrests and detentions put homeless people at risk of losing government-supplied
28 employment, *id.* at 11.

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

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

18 **Accordingly,**

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

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

24 **IT IS FURTHER ORDERED** that the case management deadlines are continued
25 for 3 months, as follows: discovery shall end by March 16, 2015; dispositive motions
26
27

1 shall ve filed by April 16, 2015; the Proposed Pretrial Order is due by May 15, 2015. All
2 other directives in the Court’s Scheduling Order (Doc. 56) remain in effect.

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

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

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

- 10 1. Applying the 3-B Policy as a basis for an arrest, physical or by citation, or
11 to threaten arrest on the basis of the 3-B Policy.
- 12 2. Applying the 3-B Policy as a basis for seizing or threatening to seize
13 personal property.
- 14 3. Applying the 3-B Policy to define obstruction; obstruction shall be defined
15 in accordance with TCC § 11-36.2 which allows the free exercise of First
16 Amendment rights, including free exercise of religion, speech and
17 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.
- 18 4. Seizing any personal property that in good-faith does not appear to be
19 abandoned.
- 20 5. Closing any area of the sidewalk, pursuant to the park closure ordinance
21 TCC § 21-3(7) without posting it as closed to all citizens. Sidewalk shall be
22 defined as: “an area for walking along the side of the road.”

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