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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

OCCUPY SACRAMENTO, an unincorporated
association; CHRISTINA PLUMB, DAVID
WITKIN, SEAN C. LANEY, TURQUOISE
THOMAS, SCOTT CONROY, and JOEL
USSERY,

Plaintiffs,

vs.

CITY OF SACRAMENTO; JOHN F. SHIREY,
Sacramento City Manger, in his official capacity;
JIM COMBS, Sacramento City Director of Parks
and Recreation, in his official capacity,

Defendants.

Case No. 2:11-cv-02873-MCE-GGH

**FIRST AMENDED VERIFIED COMPLAINT
FOR DECLARATORY JUDGMENT,
TEMPORARY RESTRAINING ORDER,
RELIMINARY INJUNCTION AND
PERMANENT INJUNCTION, DAMAGES AND
ATTORNEYS' FEES**

DEMAND FOR JURY TRIAL

INTRODUCTION

The Occupy Wall Street movement is sweeping the Country with sites of “occupation” present in over 1,100 cities across the country. In sympathy with and in support for the Occupy Wall Street movement, occupations are now active in cities across Europe and even in the Middle East where recently protests were held in Cairo, Egypt against the recent police violence in Oakland, California. According to the Washington Post and the Pew Research Center, the Occupy movement is now more popular than the tea party.

Since early October, persons participating in “Occupy Sacramento” have gathered in Cesar Chavez Park, in downtown Sacramento across from City Hall and, in a demonstration of grassroots democracy, have organized committees, assemblies and teach-ins centered around the profound economic inequality in this country and the deterioration of our way of life. People are being drawn to the Occupy Sacramento gatherings but Defendant CITY OF SACRAMENTO and its city manager have steadfastly refused to permit Occupy Sacramento to remain in Cesar Chavez Park past 11:00 p.m. on weekdays and midnight on weekends, and have forced those associated with Occupy Sacramento to evacuate the park, arresting those who, insisting on their constitutional rights to peacefully assemble and engage in free speech, refuse to leave the park on the ground that they are violating section 12.70.090 of the Sacramento City Code which sets park hours. To date 52 people have been arrested. The plaintiffs in this amended complaint have left Cesar Chavez Park when ordered to do so and have not been among those arrested.

This complaint seeks a declaration that the challenged section of the city code is unconstitutional and requests a temporary restraining order and a preliminary injunction against its enforcement on the principle ground that it confers unfettered discretion on the Defendants to interfere with Plaintiffs constitutional rights of freedom of assembly and of speech.

JURISDICTION

1. Jurisdiction is conferred upon this Court by 20 U.S.C. § 1331, this being a civil action arising under the Constitution and the laws of the United States. Jurisdiction is also conferred upon this Court by 28 U.S.C. § 1343(a)(3) and (4), 28 U.S.C. § 2201 and 2202 and 42 U.S.C. §§ 1983 and 1988, this being an action for declaratory judgment, equitable relief and damages authorized by law to redress

1 deprivation under color of law of rights, privileges and immunities secured by the Constitution of the
2 United States. This Court has supplemental jurisdiction of the state law claims under 28 U.S.C. §1367.

3 2. At all times pertinent to this Complaint, and in taking all of the actions described in this
4 Complaint, Defendant CITY OF SACRAMENTO, its officers, agents and employees, acted and
5 threatened to act under color of law and were effectuating, and will effect, the custom, policy and laws of
6 the CITY OF SACRAMENTO.

7 **PARTIES**

8 3. Plaintiff OCCUPY SACRAMENTO is an unincorporated association aligned with the
9 unincorporated association "Occupy Wall Street" and other occupy movements which have sprung up in
10 cities and towns across the United States. It is a peaceful assembly and forum for the expression of free
11 speech on a variety of economic and social justice issues which is venued in Cesar Chavez Park.

12 4. Plaintiffs CHRISTINA PLUMB, DAVID WITKIN, SEAN C. LANEY, TURQUOISE
13 THOMAS, SCOTT CONROY, and JOEL USSERY are natural persons who reside in the Eastern
14 District of California who have and continue to participate in Occupy Sacramento events at Cesar Chavez
15 Park in the City of Sacramento but who have been required to leave the park each night since October 7,
16 2011, when city police officers, operating under the direction and control of Defendants, enforce a
17 provision of the Sacramento City Code which limits park use to certain hours, unless the meeting or
18 event which persons are attending is sponsored or co-sponsored by the Director of Parks and Recreation.

19 5. Defendant CITY OF SACRAMENTO is a municipal corporation organized and existing
20 under the laws of the State of California. Defendant JOHN F. SHIREY, named in his official capacity
21 only, is the CITY OF SACRAMENTO's City Manager. Defendant JIM COMBS, named in his official
22 capacity only, is the CITY OF SACRAMENTO's Director of Parks and Recreation (formerly "Parks and
23 Community Services").

24 **FACTS**

25 6. Since on or around the first week of October 2011, a group of individual citizens has
26 associated together for the purpose of peaceably assembling and associating to express their political
27 opinions, petition the government for redress of grievances and engage in constitutionally protected
28 expression in Cesar Chavez Park in Sacramento, California. The group is known as "Occupy

1 Sacramento” and is a local off-shoot of the national “Occupy Wall Street” movement which has similar
2 occupations in more than 1,100 cities across the country and abroad.

3 7. Among the issues on which the members of Occupy Sacramento have expressed their
4 views are those relating to economic justice and citizen participation in government. In association with
5 other local manifestations of the “Occupy Wall Street” movement, they are planning for a national
6 convention called for July 4, 2012, in Philadelphia, Pennsylvania.

7 8. Plaintiffs have engaged in constitutionally protected expressive activity and have
8 communicated their views on these subjects and others to citizens and public officials by way of protests,
9 dialogue and other peaceable means in Cesar Chavez Park opposite the City Hall in Sacramento. They
10 also, daily, have teach-ins on subjects of public interest, show educational films and have daily “general
11 assemblies” at which important issues are discussed and voted upon. Plaintiffs desire to engage in
12 constitutionally protected political expression twenty-four hours a day in Cesar Chavez Park. Plaintiffs
13 do not seek to use the park to the exclusion of other potential users but, at the times in question, there
14 have not been any others who have wished to use the park.

15 9. Plaintiffs and others have chosen to assemble in Cesar Chavez Park because it is central to
16 public transportation, symbolically located opposite City Hall and because it is the historic site for
17 peaceable assemblies and free speech. It is a location in which their message regarding economic justice
18 and the need for political and financial reform can be articulated to a broad audience of passers-by as
19 well as to the people who come at all hours of the day or night to participate in this growing movement.

20 10. Plaintiffs seek and desire to assemble and to communicate on a continuous basis, around
21 the clock on a 24 hour basis. A continuous presence in Cesar Chavez Park, the civic heart of downtown,
22 communicates the urgency of their call for reform, their intention to persist in protected activity and their
23 solidarity with like-minded individuals in all parts of the country. The Plaintiffs and others have
24 gathered, intending to remain in Cesar Chavez Park and have participated in “live streams” of their
25 actions with groups of people occupying public squares and parks in places around the world where it is
26 daytime while it is night in Sacramento. They intend and desire to continue their demonstrations, and to
27 maintain a continuous presence in Cesar Chavez Park toward that end, indefinitely.

28 11. However, Sacramento City Code § 12.72.090 prohibits Plaintiffs from remaining in Cesar

Chavez Park and engaging in political protest, political speech and other constitutionally protected activity after 11:00 p.m. and before 5:00 a.m. each week day, and after midnight and before 5:00 a.m. on weekends. More specifically, the ordinance states:

12.72.090 Remaining or loitering in parks during certain hours prohibited.

- A. No person shall remain or loiter in any public park:
1. Between the hours of midnight Friday or Saturday and five a.m. of the following day; and
 2. Between the hours of eleven p.m. Sunday through Thursday and five a.m. of the following day.
- B. The prohibitions contained in subsections (A)(1) and (A)(2) of this section shall not apply:
1. To any person on an emergency errand;
 2. To any person attending a meeting, entertainment event, recreation activity, dance or similar activity in such park provided such activity is sponsored or co-sponsored by the department of parks and community services or a permit therefor has been issued by the department of parks and community services;
 3. To any person exiting such park immediately after the conclusion of any activity set forth in subsection (B)(2) of this section;
 4. To any peace officer or employee of the city while engaged in the performance of his or her duties.
- C. The director, with the concurrence of the chief of police, may designate extended park hours for any park when the director determines that such extension of hours is consistent with sound use of park resources, will enhance recreational activities in the city, and will not be detrimental to the public safety or welfare. The prohibitions contained in subsections (A)(1) and (A)(2) of this section shall not apply to any person present in a public park during extended park hours designated pursuant to this subsection.
- D. The chief of police, with the concurrence of the director of parks and community services, may order any park closed between sunset and sunrise when he or she determines that activities constituting a threat to public safety or welfare have occurred or are occurring in the park and that such closing is necessary to protect the public safety or welfare. At least one sign designating the sunset to sunrise closing shall be installed prominently in the park. When a park is ordered closed between sunset and sunrise, it is unlawful for any person to remain or loiter in said park during said period. (Prior code § 27.04.070)

12. On October 7, 2011, shortly after 11:00 p.m., and on succeeding nights until the present, members of the CITY OF SACRAMENTO's Police Department arrived at Cesar Chavez Park, ordered Plaintiffs and others out of the park. Plaintiffs obliged the officers and left the park but those who remained to assert their right to engage in the exercise of their rights secured by the First and Fourteenth Amendments, were arrested, ostensibly for violating Sacramento City Code § 12.72.090 prohibiting their remaining in the park after 11:00 p.m.¹ Upon information and belief the City routinely sponsors and/or co-sponsors events which are held after the hours specified in city code section 12.72.090, and there are no standards by which determinations are made and discretion is exercised as to which events are permitted to be held after such hours. OCCUPY SACRAMENTO, through its counsel, has requested permission from Defendants to remain in Cesar Chavez Park after park hours but Defendants have failed and refused to grant such permission (see letter attached hereto as "Exhibit 1").

13. As a result of the CITY OF SACRAMENTO's enforcement of Sacramento City Code § 12.72.090, Plaintiffs' peaceable assembly was disrupted and Plaintiffs are afraid to exercise their constitutional rights to peaceably assemble, to engage in constitutionally protected activity, to engage in political speech, to petition the government for redress of grievances, to freely associate with other like-minded citizens in Cesar Chavez Park after 11:00 p.m. on week days and after 12:00 a.m. midnight on weekends. Others, because they do not get off of work until after 11:00 p.m., are foreclosed from participating in OCCUPY SACRAMENTO events at all.

14. More specifically, Plaintiffs fear that their liberty will be abridged and they will be arrested, as others have, for violating Sacramento City Code § 12.72.090 if they remain in Cesar Chavez Park and engage in constitutionally protected activity after 11:00 p.m. weekdays and after 12:00 a.m. midnight on weekends. As a result of that fear, Plaintiffs have been deterred from and refrain from engaging in constitutionally protected activity.

¹ The persons arrested that night and on succeeding nights were cited not only for violating City Code Section 12.72.090 but also for violating Penal Code Section 409 (remaining at the site of an unlawful assembly) but the District Attorney of Sacramento County has refused to prosecute the persons arrested on any grounds and has stated that, in her opinion, there was no violation of state law. The City Attorney, however, has thrown the resources of her office into prosecution of those arrested for violating the park hours ordinance referenced above.

CAUSES OF ACTION

COUNT ONE

15. Plaintiffs incorporate paragraphs 1 through 14 of their Complaint as though fully rewritten.

16. Sacramento City Code § 12.72.090 is unconstitutional on its face and as applied under the First and Fourteenth Amendment for each of the following reasons:

- a. the law operates as an unconstitutional prior restraint on constitutionally protected expression;
- b. the law abridges the right to freedom of speech and expression protected by the First Amendment;
- c. the law abridges the right to freedom of assembly protected by the First Amendment;
- d. the law abridges the right to petition the government for redress of grievances protected by the First Amendment;
- e. the law confers standardless discretion on city officials to grant or deny permission to remain in Cesar Chavez Park after the hours stated in Sacramento City Code § 12.72.090;
- f. the law is impermissibly overbroad;
- g. the law is unconstitutionally vague;
- h. the law deprives Plaintiffs of equal protection of the laws;
- i. the law deprives Plaintiffs of their right to due process by imposing strict liability for engaging in innocent conduct;
- j. the law is underinclusive;
- k. the law is selectively and discriminatorily applied;
- l. the law is overinclusive; and
- m. the law operates to chill protected speech.

17. Plaintiffs are therefore entitled to a declaration that the law violates their rights secured by the First and Fourteenth Amendments to the Constitution, both on its face and as applied.

COUNT TWO

18. Plaintiffs incorporate paragraphs 1 through 17 of their Complaint as though fully rewritten.

19. Defendants' conduct and threatened conduct threatens to deprive Plaintiffs of their rights secured by the First and Fourteenth Amendments, and has caused and will cause in the future irreparable harm to Plaintiffs for which there is no adequate remedy of law.

20. By reason of Defendants' misconduct and threatened misconduct, and the irreparable harm Plaintiffs have suffered and will continue to suffer, Plaintiffs are entitled to a temporary restraining order, preliminary injunction and permanent injunction enjoining Defendants, their officers, agents, servants, attorneys, and any person acting in concert and participation with them, with actual notice of the injunction by personal service or otherwise, from enforcing Sacramento City Code § 12.72.090 against them.

COUNT THREE

21. Plaintiffs incorporate paragraphs 1 through 20 of their Complaint as though fully rewritten.

22. As a direct and proximate result of the Defendants' actions, Plaintiffs have been deprived of their rights secured by the First and Fourteenth Amendments to the Constitution; they have been prohibited from engaging in constitutionally protected expression and have been deterred from doing so and will continue to be so deprived and deterred in the future, for all of which they are entitled to recover compensatory damages.

COUNT FOUR

23. Plaintiffs incorporate paragraphs 1 through 22 of their Complaint as though fully set forth herein.

24. Based on the conduct alleged above, all Defendants, and each of them, are liable to Plaintiffs for violation of their federal and California civil rights under the *Bane Act*, California Civil Code § 52.1, in that they interfered by threats, intimidation, or coercion with the Plaintiffs' rights to freely assemble and to engage in free speech in Cesar Chavez Park, in violation of the First and

1 Fourteenth Amendments to the U.S. Constitution and in violation of Article 1, Sections 1 and 2 of the
2 California State Constitution. As a direct and proximate result of Defendants' violations of Plaintiffs'
3 civil and constitutional rights under the *Bane Act*, Plaintiffs have suffered harm. Under Civil Code §52.
4 Plaintiffs are entitled to an award of up to three times their actual damages, to exemplary damages in an
5 amount to be determined by the Jury, to a civil penalty of \$25,000 for each violation of their rights; and
6 to attorneys' fees to be determined by the Court.

7
8 **PRAYER FOR RELIEF**

9 WHEREFORE, Plaintiffs seeks Judgment as follows:

10 1. Upon Count One of their Complaint, a declaration that Sacramento City Code § 12.72.090
11 is unconstitutional under the First and Fourteenth Amendments to the United States Constitution, both on
12 its face and as applied; and,

13 2. Upon Count Two of their Complaint, a temporary restraining order, preliminary
14 injunction and permanent injunction enjoining the Defendants, their officers, agents, servants, employees
15 and those acting in concert and participation with them, who receive actual notice of the injunction by
16 personal service or otherwise, from enforcing Sacramento City Code § 12.72.090 against them; and,

17 3. Upon Count Three of the Complaint, compensatory damages in an amount to be
18 determined at trial;

19 4. Upon Count Four of the Complaint, compensatory and exemplary damages in an amount
20 to be determined at trial; and

21 5. Upon all counts of the Complaint, the costs and expenses in maintaining this action,
22 including Plaintiffs' reasonable attorneys' fees, as well as any other relief, whether legal or equitable, to
23 which Plaintiffs may be entitled.

24 **JURY TRIAL DEMAND**

25 COMES NOW Plaintiffs OCCUPY SACRAMENTO, CHRISTINA PLUMB, DAVID WITKIN,
26 SEAN C. LANEY, TURQUOISE THOMAS, SCOTT CONROY, and JOEL USSERY, by and through
27 their counsel, below listed, and hereby demands trial by jury pursuant to the terms and conditions of
28 Federal Rule of Civil Procedure 38, in regard to all issues in the above-referenced cause.

DATED: November 2, 2011

Respectfully Submitted,

/s/ "Mark E. Merin"

By: _____

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Attorneys for Plaintiffs

VERIFICATION

I, Mark E. Merin, am counsel for Plaintiffs in this action. I verify that the facts contained within this Complaint are true and accurate, except those facts asserted on information and belief, and as to those facts, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this Verification was executed on this 2nd day of November, 2011, at Sacramento, California.

/s/ "Mark E. Merin"

Mark E. Merin