

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RODOLFO SANCHEZ and	§	
KRISTOPHER SLEEMAN,	§	
<i>Plaintiffs,</i>	§	
	§	
v.	§	Civil Action No. _____
	§	
ART ACEVEDO, MICHAEL	§	
MCDONALD, MARC OTT, LEE	§	
LEFFINGWELL, MIKE MARTINEZ,	§	
KATHY TOVO, LAURA MORRISON,	§	
SHERYL COLE, BILL SPELMAN,	§	
and CHRIS RILEY,	§	
<i>all in their official capacities,</i>	§	
	§	
and	§	
	§	
the CITY OF AUSTIN,	§	
<i>Defendants.</i>	§	

COMPLAINT

Plaintiffs Rodolfo Sanchez and Kristopher Sleeman file this suit pursuant to 42 U.S.C. §1983 against the City of Austin, Texas and several of its officials to force the Defendants to cease their unlawful prior restraint of Plaintiffs’ protected speech as participants in the Occupy Austin protests at Austin’s City Hall and prevent prospective application of the city’s policy respecting issuance of “Criminal Trespass Notices” excluding a recipient from any or all city property for a set duration. By policy and practice, the Defendants have unlawfully restricted, and will continue to restrict, the First Amendment and due process rights of

Plaintiffs, other Occupy Austin protesters, and all citizens of Austin who may desire to use city-owned property as a forum for free expression or to petition their government for redress of grievances. These constitutional defects give rise to both facial and as-applied constitutional challenges to the policies, their implementation by Defendants, and their application to Plaintiffs and others.

PARTIES

1.01 Plaintiff Rodolfo “Rudy” Sanchez is a resident of Westlake Hills, Texas who regularly attended and participated in the Occupy Austin protests on the City Hall plaza until he was banned from returning under threat of arrest by unidentified City officials through their issuance to Mr. Sanchez of a “Criminal Trespass Notice.” Mr. Sanchez desires to return to the Occupy Austin protest site on City Hall plaza to resume exercising his First Amendment rights of free expression, assembly, and petitioning his government for redress of grievances, but he cannot do so without risking arrest for criminal trespass.

1.02 Plaintiff Kristopher “Kris” Sleeman is a resident of Austin, Texas who regularly attended and participated in the Occupy Austin protests on the City Hall plaza until he was banned from returning under threat of arrest by unidentified City officials through their issuance to Mr. Sleeman of a “Criminal Trespass Notice.” Mr. Sleeman desires to return to the Occupy

Austin protest site on City Hall plaza to resume exercising his First Amendment rights of free expression, assembly, and petitioning his government for redress of grievances, but he cannot do so without risking arrest for criminal trespass.

- 1.03 Defendant Leffingwell currently serves, and at all times relevant to this action has served, as the Mayor of the City of Austin.
- 1.04 Defendant Ott currently serves, and at all times relevant to this action has served, as the City Manager of the City of Austin.
- 1.05 Defendant McDonald currently serves, and at all times relevant to this action has served, as an Assistant City Manager of the City of Austin with responsibility for public safety services, including the Austin Police Department (APD).
- 1.06 Defendant Acevedo currently serves, and at all times relevant to this action has served, as Chief of the Austin Police Department.
- 1.07 Defendants Martinez, Tovo, Morrison, Cole, Spelman, and Riley currently serve, and at all times relevant to this action have served, as members of the City Council of the City of Austin.
- 1.08 Defendant City of Austin is a municipal corporation within the State of Texas.

JURISDICTION

2.01 This Court has jurisdiction over this dispute pursuant to 28 U.S.C. §1331.

VENUE

3.01 Venue is proper before this Court because the acts of Defendants here complained of all took place in Austin, Texas, and Austin, Texas is the primary place where Defendants' business is conducted.

STATEMENT OF FACTS

A. Austin City Hall

4.01 Austin's City Hall is "a unique landmark gateway to Austin City government"¹ that was "designed to promote public participation and interaction with local government."² The City Hall building and plaza, which opened in 2004, "serve as a gathering place for public discourse and community collaboration."³ As the city's website acknowledges, the "City Hall building belongs to our citizenry and the entire design is intended to embrace the spirit and identity of Austin and reinforce the mutual respect between the [City] Council and the citizens of Austin."⁴

4.02 Fostering engagement of the public with Austin city government at City Hall was thus a key design concept of the City Hall redevelopment project from

¹ City of Austin, *Austin City Hall—About City Hall*, <http://www.ci.austin.tx.us/cityhall/about.htm>.

² City of Austin, *Austin City Hall—Arts & Culture*, <http://www.ci.austin.tx.us/cityhall/arts.htm>.

³ City of Austin, *Austin City Hall—About City Hall*, <http://www.ci.austin.tx.us/cityhall/about.htm>.

⁴ City of Austin, *Austin City Hall—Building Concept*, <http://www.ci.austin.tx.us/cityhall/concept.htm>.

its very inception. Indeed, among the goals agreed and adopted by the Austin community, City Council, and city staff to guide the redevelopment project were “[p]romot[ing] interaction, public participation and dialogue” and, specifically, “[d]esign[ing] a plaza that attracts people and promotes activities throughout the day and evening.”⁵

4.03 The City Hall plaza that resulted from these efforts “is a focal point for everyone” both in city government and in the Austin community, and the plaza serves “as a gathering place for all of its citizens and is the public’s ‘living room’ on a grand scale.”⁶ By design, the “outdoor spaces on the plaza are ideal for free expression and can accommodate large gatherings without interrupting the process inside.”⁷ But the interior spaces of City Hall are very deliberately not isolated from the plaza—both the Board and Commission Room and the Council Chambers “visually extend into the plaza with large windows as a reminder to those inside and outside of the balance of government and citizens coming together for the common pursuit of exchanging ideas and shaping policy.”⁸ The plaza “is accessible 365 days a year,”⁹ and the city’s policy regarding public use of the plaza and other

⁵ *Id.*

⁶ City of Austin, *Austin City Hall—Building Features—Plaza*, <http://www.ci.austin.tx.us/cityhall/plaza.htm>.

⁷ City of Austin, *Austin City Hall—Building Concept*, <http://www.ci.austin.tx.us/cityhall/concept.htm>.

⁸ *Id.*

⁹ City of Austin, *Austin City Hall—Building Features—Plaza*, <http://www.ci.austin.tx.us/cityhall/plaza.htm>.

areas of City Hall expressly designate s the plaza, including the mezzanine and amphitheater areas, as a “free speech venue.”¹⁰

B. The Occupy Austin Protest And Plaintiffs’ Participation

4.04 Since October 6, 2011, the City Hall plaza has been the main site of the largest continuous political protest in Austin in a generation—Occupy Austin. Occupy Austin is a protest movement focused on democracy, economic security, corporate responsibility, and financial fairness and comprised of local citizens “dedicated to non-violently reclaiming control of our governments from the financial interests that have corrupted the m.”¹¹ The mission of Occupy Austin and its participants “is to assert our rightful place within the political process, and take the reins of power away from profit-driven interests.”¹²

4.05 The hallmark of the Occupy movement, both in Austin and elsewhere, is continuous occupation of high-visibility locales associated with democracy or corporate and financial influence as protest sites. The protesters’ act of occupying these sites serves as a means of communicating their message that popular control over the means of democratic governance must be renewed.

¹⁰ City of Austin, *Austin City Hall—Guidelines for Non-City Use* at 2 (May 12, 2009), available at http://www.ci.austin.tx.us/cityhall/downloads/cityhalluse_05-12-2009.pdf.

¹¹ Occupy Austin, *Occupy Austin Wiki—Solidarity Statement*, http://occupyaustin.org/wiki/doku.php?id=groups:mission_and_values:start.

¹² Occupy Austin, *Guide to Thrive* at 3 (Oct. 2011), available at http://occupyaustin.org/wp-content/uploads/2011/10/Guide_to_Thrive.pdf.

4.06 Plaintiff Sleeman began his participation in the Occupy Austin protest by attending organizational and planning meetings held in Republic Square Park a week before the occupation of Austin City Hall plaza. Mr. Sleeman, along with his wife and four-year-old son, has attended the protest two to three times per week since then, regularly spending nights on the plaza. The message that Mr. Sleeman has sought to convey through his participation in the Occupy Austin movement is that America has sacrificed its middle class and its industrial heritage in favor of a corrupt and amoral system of crony capitalism.

4.07 Plaintiff Sanchez has likewise participated in the Occupy Austin protest at City Hall since it began on October 6, 2011. To attend the protest, he has taken multiple days off of work. The message Mr. Sanchez has attempted to convey through participation in the Occupy Austin protest is his belief, grounded in his faith as a Christian, that recent developments in our country and our economy—rewarding Wall Street greed with TARP bailouts, escalating income and healthcare inequality, and the predominance of corporate money in political campaigns—are immoral and antithetical to democratic self-governance.

C. Defendants' Banning Of Plaintiffs From City Hall

4.08 As the occupation of City Hall plaza continued through October 2011, the relationship between the city and the protesters became increasingly fractious. City staff imposed policies on the protesters' use of the plaza—thrice-weekly power washings that require relocation of every portion of the Occupy base camp, micromanagement of which portions of the plaza could be used for what activities, and others—that appeared to the protesters to have been deliberately designed to make the expressive conduct of occupation intolerable, in direct contravention of the city's stated policy of encouraging the use of the plaza for free speech and assembly purposes.

4.09 On Friday, October 28, 2011, the Defendants issued a memo imposing new restrictions on the Occupy protesters' use of City Hall plaza. Among these were prohibitions against sleeping or setting up sleeping accommodations on the mezzanine area of the plaza, exhibiting unattended protest signs, and operating the communal food tables organized and maintained by the Occupy protesters between the hours of 10:00 p.m. and 6:00 a.m. The memo was posted on a City Hall door and distributed to some protesters on the plaza on Saturday, October 29.

4.10 Less than 24 hours later, at approximately 12:30 a.m. on Sunday, October 30, Defendants moved to enforce the new prohibition on nighttime food

service, deploying a large number of Austin Police Department officers to take down the food tables and seize any food supplies that had not been put away in compliance with the new policy. In an act of nonviolent civil disobedience, some of the Occupy protesters formed a human chain around the tables and were arrested.

4.11 While the chain formed, Mr. Sanchez was videotaping events from behind the food tables. As the first arrests were occurring, he decided he did not want to be arrested and tried to move away from the tables. As he was attempting to do so, Mr. Sanchez was confronted by an APD officer who asked Mr. Sanchez if he wanted to be arrested and then, without giving Mr. Sanchez an effective opportunity to respond or leave the immediate area, arrested him. Mr. Sanchez did not resist.

4.12 Seventeen other protesters were arrested at the same time. Subsequently, an additional twenty protesters were arrested for refusing to vacate the plaza for an early-morning pressure washing. In total, thirty-eight Occupy protesters, including Mr. Sanchez, were arrested that night and charged with criminal trespass. Speaking to the press about the arrests later, defendant Acevedo acknowledged that “the vast majority of the Occupy Austin members, including those who were arrested,” had been “extremely respectful” and described himself as being “very proud of the fact that folks that chose to

challenge the rules did so in a reasonable manner without resorting to violence.”¹³

4.13 While APD officers were putting Mr. Sanchez into a police van after his arrest, he was informed by an unidentified city official that he was banned from returning to any portion of City Hall, including the plaza, for a period of two years. Mr. Sanchez was transported and booked into the Travis County jail, was charged with one count of criminal trespass, and was released approximately 16 hours later, after posting bond. While he was in jail, he was again told by an unidentified Travis County jailer that he was not allowed to return to City Hall for two years and that, if he did, he would again be arrested for criminal trespass.

4.14 On information and belief, all of the 38 Occupy protesters arrested for criminal trespass on the morning of October 30 were informed that they had been banned from returning to City Hall for a period of at least one year, and numerous others among the arrestees were told, like Mr. Sanchez, that the duration of the ban was two years.

4.15 Mr. Sleeman was also present on the City Hall plaza during the early morning hours of October 30, videotaping the protest and the conduct of APD officers taking down the protesters’ food tables and making arrests.

¹³ See Nick Hadjigeorge, *Occupy Austin Demonstrators Arrested After Law Confusion*, DAILY TEXAN (Oct. 30, 2011), available at <http://www.dailytexanonline.com/news/2011/10/31/occupy-austin-demonstrators-arrested-after-law-confusion> (quoting defendant Acevedo).

Mr. Sleeman, who was present at the protest with his son that night, did not obstruct any officers or otherwise refuse to comply with the city's policies respecting use of the plaza, and he was not among the 38 protesters arrested. Later that morning, Mr. Sleeman gave an interview to a local television news crew about the events that had transpired overnight. As part of the interview, Mr. Sleeman gave his name and a description of what he had witnessed.

4.16 That evening, Mr. Sleeman spoke at the Occupy Austin general meeting held on the plaza, expressing his views that the city should permit the protesters to move their base camp to Zilker Park and that more protesters should bring wives and children to protest. At the same time as Mr. Sleeman was addressing the general assembly, APD officers began surrounding the protesters. Fearing a clash between the protesters and APD, Mr. Sleeman set about looking for his son to ensure his safety.

4.17 While he was doing so, a police officer shouted Mr. Sleeman's name and told him to stop. Mr. Sleeman was approached by numerous police officers and placed under arrest. The arrest was based on an outstanding warrant stemming from his failure to pay a traffic ticket received for running a stop sign on his bicycle several years ago. Neither prior to nor at the time of his arrest was Mr. Sleeman given any notice that his entry or presence on the

City Hall plaza was forbidden or that he was required to depart. Mr. Sleeman did not resist arrest.

4.18 Mr. Sleeman was transported to the Travis County jail, booked on the open warrant, and additionally charged with criminal trespass and an ordinance violation. While he was being transported, he was informed by an unidentified city official that he was banned from returning to any portion of City Hall, including the plaza, for a period of one year. After being held in jail for approximately 22 hours, Mr. Sleeman was told that he had served his time on the warrant. The other charges against him were dropped, and Mr. Sleeman was released without bond.

4.19 Since their respective arrests, Mr. Sleeman's and Mr. Sanchez's inability to return to City Hall plaza and the main Occupy Austin protest site has severely restricted their ability to convey their message to Austin city officials and entirely precludes their participation in the expressive conduct—occupation of public spaces—that lies at the core of the Occupy movement. Both Mr. Sanchez and Mr. Sleeman desire and have every intention of returning to City Hall plaza to resume their protest activities if the ban on their presence is ended. In addition, both Mr. Sleeman and Mr. Sanchez desire to return to City Hall during the one- and two-year durations of their respective bans for purposes unrelated to Occupy Austin—for

example, to attend City Council meetings and other civic events, meet with their elected representatives, and engage in the many other government-citizen interactions that take place at City Hall—but they cannot do so under the terms of their criminal trespass notices without risking future arrest.

4.20 On the morning of October 31, defendants Acevedo and McDonald held a meeting at City Hall with a number of Occupy Austin protesters to discuss the events of the previous day. One day later, Defendants rescinded the policy barring food service between the hours of 10:00 p.m. and 6:00 a.m. City of Austin, *Response to Requests from Occupy Austin* 3 (Nov. 1, 2011), available at [http://alt.coxnewsweb.com/shared-blogs/austin/cityhall/upload/2011/11/city_to_occupy_austin_proteste/Notice%20of%20City%20Response%20to%20Occupy%20Austin%20110111%20\(Final\).pdf](http://alt.coxnewsweb.com/shared-blogs/austin/cityhall/upload/2011/11/city_to_occupy_austin_proteste/Notice%20of%20City%20Response%20to%20Occupy%20Austin%20110111%20(Final).pdf) (Ex. A).

However, Defendants rejected a request by protester representatives that individuals who had previously received notices be allowed to return to City Hall plaza to participate in Occupy Austin, stating that a forthcoming procedure would permit recipients of notices to request an administrative review by city officials. *Id.* at 1.

4.21 Since October 30, Defendants have enforced and threatened to enforce the criminal trespass notices issued to Occupy Austin protesters by arresting notice recipients who attempt to enter City Hall property on charges of

criminal trespass. The evening after his release from jail, Mr. Sleeman, while meeting with several Occupy Austin protesters in Margaret Hoffman Oak Park across Cesar Chavez Street from City Hall, was told by an unidentified APD officer that officers had been told to look out for Mr. Sleeman and to arrest him if he attempted to return to City Hall plaza. On information and belief, at least two other Occupy Austin protesters who had received notices have subsequently been arrested and charged with criminal trespass when they tried to return to City Hall plaza and resume protesting at the main Occupy Austin site.

D. Austin's Policy Respecting Criminal Trespass Notices

4.22 On information and belief, prior to November 1, 2011, the city had no written policy respecting issuance by city personnel of warnings or notice relating to potential criminal trespass charges, the area of exclusion to be effected by issuance of such warnings or notice, or the duration of exclusion to be effected by their issuance.

4.23 On November 1, 2011, defendant Ott, in his official capacity as City Manager, signed and caused to be promulgated a city administrative bulletin titled *Criminal Trespass Notices On City Property*. City of Austin, Administrative Bulletin 11-04, at 1 (Nov. 1, 2011), available at http://www.ci.austin.tx.us/cityclerk/downloads/Administrative_Bulletin_201

11102.pdf (Ex. B). This bulletin “establishes rules and procedures for issuing and reviewing a criminal trespass notice resulting from activities that occur in a City-owned or occupied building, or on public lands owned by the City.” *Id.* A criminal trespass notice is a verbal or written statement that an individual must depart or may not enter city property, backed up by a threat of arrest on charges of criminal trespass—effectively, a ban from some area of public property for a set amount time. *See id.* at 2.

4.24 The policy is promulgated pursuant to the City Manager’s authority, under the City Charter, “to control and maintain the City’s public buildings and lands” and “to manage and control access by the public to City Property.” *Id.* at 1, 2. The official interests purportedly served by this policy are the city’s duties (1) “to be a responsible steward of the public buildings and lands under its ownership or control,” (2) “to maintain these public buildings and lands in a manner that promotes public safety and health,” and (3) “to provide City-owned facilities where the City and the public can conduct business and other approved activities free from unlawful and disruptive interference.” *Id.* at 1.

4.25 The policy defines a “Criminal Trespass Notice” as an “oral or written communication to a person that entering by that person onto City Property is forbidden; or [that] the person must immediately depart from City Property.”

Id. at 2 (capitalization altered). The “City Property” to which such a notice applies includes “the City Hall building and surrounding property; any other City-owned building or portion of a non-City owned building over which the City has control; City park lands or other recreational areas; and all other City-owned lands,” excepting only such buildings or areas “exempted from the scope of this Administrative Bulletin in a written document signed by the City Manager.” *Id.* On information and belief, no such exemptions have been made.

4.26 The policy envisions that criminal trespass notices will be issued only by “Authorized Employees,” a category that includes “the City Manager and any other employee of the City to whom authority to issue a Criminal Trespass Notice has been delegated.” *Id.* The bulletin includes a non-exclusive delegation of authority to issue criminal trespass notices to:

- all assistant city managers;
- the City Manager’s chief of staff;
- all department directors, but limited to buildings and lands within the control or area of responsibility of their respective departments;
- other management personnel within a City Department [pursuant to an express written delegation of authority by the Department Director];
- building security employees, as designated by the appropriate Department Director in [] writing . . . ; and
- park rangers, but limited to conduct occurring on City park property.

Id. (capitalization altered). In addition, the City Manager is empowered to make additional delegations of authority “to any other City employee.” *Id.*

4.27 Under the policy, a n authorized em ployee “may i ssue a Crimin al Trespass Notice to a person for conduct occu rring on City Property t hat is unreasonably disruptive or harm ful to C ity Property, to t he conduct of City business, or to the conduct of approved non-City activities occurring on City Property, including but not lim ited to conduct that violates the Austin City Code.” *Id.* at 3. No further gui delines are provided to channel the discretion of authorized employees in determ ining whether conduct warrants issuance of a notice.

4.28 A notice “may be verbal or written” and is supposed to include “a statement of the reason(s) the person is being noti fied not to enter an area or to depart from an area,” a “description of the area from which the person is excluded,” notification of t he duration of the excl usion, and inform ation describing the administrative review process for such notices. *Id.* at 3-4. The statement of reasons “need not be detailed,” but it “should”—though not must—“relate to the grounds . . . upon which the notice is i ssued.” *Id.* at 4. The description of the area o f exclusion must be sufficien t to allow “a reasonable person [to] understand the specific area to which the person may not return.” *Id.* The policy provides no guideline s whatsoever to channel the discretion of

authorized employees in determining whether to exclude an individual from all “City Property” or only a portion thereof and, if the latter, from what portion.

- 4.29 The policy provides that a criminal trespass notice will be issued “for a time period that is based on the seriousness of the conduct” on which the notice is based. *Id.* The factors to be considered include whether the conduct at issue “involves intentional damage to City Property,” “involves intentional injury or offensive contact with any person,” or “was intentionally disruptive to City business or an authorized non-City event” and whether “the person has previously engaged in similar conduct.” *Id.* Based on those factors, the policy provides guidelines “that the Authorized Employee may use to determine the appropriate duration of a Criminal Trespass Notice.” *Id.* The suggested duration guidelines provided are as follows:

<i>Description of Conduct Suggested</i>	<i>Duration of Exclusion</i>
No harm to persons or property, some disruption to City business or other event, and no similar past conduct	0–30 days
Some harm to persons or property, no disruption of City business or other event, and no similar past conduct	30–60 days
Some harm to persons or property, or some disruption of City business or other event, and history of similar past conduct	30–120 days

Significant harm to persons or property, or significant disruption of City business or other event, and no similar past conduct	90–180 days
Significant harm to persons or property, or significant disruption of City business or other event, and history of similar past conduct	90 days–1 year
Significant harm involving serious bodily injury or the threat of serious bodily injury to a person or to property, and threat of similar future conduct	1 year–permanent

Id. The policy provides no further guidelines to channel the discretion of authorized employees in determining an appropriate duration within the specified guideline ranges or in determining in which situations not following the duration guidelines would be appropriate.

- 4.30 Under normal circumstances, a criminal trespass notice may be issued only after an individual has received prior warning “that their conduct is in violation of law or a City policy” and been given “a reasonable opportunity to cease the violation.” *Id.* at 3. If the individual “promptly ceases the conduct at issue,” the policy dictates that no criminal trespass notice should be issued. *Id.* However, the requirement of prior warning and opportunity to cease may be dispensed with under the policy if the individual’s conduct is both unreasonably disruptive or harmful *and* is either an offense under Texas law, has caused “injury to any person or damage to any property,” or “threatens to cause an imminent breach of the peace.” *Id.*

4.31 The policy further provides for administrative review of criminal trespass notices by means of an informal hearing before the director of the relevant city department, with an appeal to the City Manager. *Id.* at 4-5. The issues for decision in the administrative review are whether the notice was issued for an appropriate reason and whether the area and duration of the notice are appropriate under the circumstances. *Id.* at 5. A request for administrative review does not stay or suspend the effect of the notice. *Id.* at 4. The policy provides that the procedures for administrative review “will be available to any person who has received a Criminal Trespass Notice . . . during the ninety days prior to the effective date” of the administrative bulletin promulgating the policy. *Id.* at 5.

CAUSES OF ACTION

A. Count I – Violation of First Amendment Rights (42 U.S.C. §1983)

5.01 Plaintiffs reallege the material facts alleged in the preceding paragraphs against Defendants. Under color of state law and through a municipal policy or custom, Defendants have deprived and continue to deprive Plaintiffs of their rights to freedom of expression, including through expressive conduct, to peaceably assemble, and to freely petition for redress of grievances under the First Amendment.

5.02 The city's policy of banning individuals from City Hall is a prior restraint on the exercise of each of these rights, and its application and threatened application to Plaintiffs and other individuals exercising such rights on the City Hall plaza, a traditional public forum, is not narrowly tailored to serve any significant governmental interest and fails to leave open ample alternative channels of communicating Plaintiffs' messages.

5.03 Moreover, Defendants' invocation of the city's policy to enforce a ban of Plaintiffs and other individuals participating in the Occupy Austin protest from City Hall demonstrates that the policy is not content-neutral; rather, in application, the policy permits and encourages official discrimination among speakers based on the content of their speech and does so without being narrowly tailored to advance a compelling governmental interest. Further, to the extent that Defendants assert that the policy is in fact applied only to instances of particular types of conduct not facially enumerated in the policy, such assertion is merely pretext for content discrimination against Plaintiffs and the Occupy Austin protest.

5.04 Additionally, Defendants' policy respecting issuance of "Criminal Trespass Notices" at City Hall is unconstitutionally overbroad and vague, delegating to a wide range of city employees effectively unrestrained discretionary authority to ban any individual from any or all city property for substantial

periods, even permanently, merely because that individual's conduct is subjectively viewed by a city employee as "unreasonably disruptive or harmful." Ex. B at 3. As Plaintiffs' experiences show, the city's criminal trespass notice policy sweeps within it an unreasonably broad range of protected First Amendment activity that, despite enjoying heightened protection under federal law, could nonetheless be subjectively viewed as "unreasonably disruptive or harmful" by city employees lacking any further guidance on implementation of the policy. Further, the threat of being banned from City Hall imposes a significant chilling effect on any individual who wishes to exercise his First Amendment rights of free expression and assembly but reasonably fears significant interference with his ability to access and interface with city government should he run afoul of the vague prohibitions of the city's policy, as interpreted by city employees delegated an immense degree of discretion. The unconstitutional overbreadth and vagueness of the city's policy, coupled with its chilling effect on First Amendment rights, renders the policy facially unconstitutional and invalid in all applications.

B. Count II – Official Retaliation in Violation of First Amendment Rights (42 U.S.C. §1983)

5.05 Plaintiffs reallege the material facts alleged in the preceding paragraphs against Defendants. Defendants' actions to ban Plaintiffs and other

individuals participating in the Occupy Austin protest from City Hall constitute unlawful official retaliation against those individuals for their exercise of their First Amendment rights to free expression, peaceable assembly, and petitioning for the redress of grievances. Those retaliatory actions include, but are not limited to: (1) issuing criminal trespass notices to Occupy Austin protesters arrested at City Hall in contravention of the unwritten policy respecting such notices in force prior to November 1, 2011; (2) imposing and threatening enforcement, through criminal trespass notices, of blanket one- and two-year bans on Occupy Austin protesters entering onto City Hall property in contravention of the durational guidelines provided under the city's policy respecting issuance of such notices; and (3) applying its policy respecting issuance of criminal trespass notices only to Occupy Austin protesters at City Hall.

C. Count II – Violation of Due Process (42 U.S.C. §1983)

5.06 Plaintiffs reallege the material facts alleged in the preceding paragraphs against Defendants. Under color of state law and through a municipal policy or custom, Defendants have deprived and continue to deprive Plaintiffs of their right to substantive due process of law under the Fourteenth Amendment.

5.07 Plaintiffs possess a fundamental liberty interest, protected by the Due Process Clause, in entering and remaining in City Hall and on its plaza for the purposes of expressing protected speech or engaging in any of the myriad governmental-individual interactions that regularly take place at City Hall. Plaintiffs likewise possess a fundamental liberty interest, protected by the Due Process Clause, in loitering in public places, like the City Hall plaza, for innocent purposes. Defendants' policy of banning individuals from City Hall unconstitutionally infringes those protected fundamental liberty interests because it burdens those interests but is not narrowly tailored to advance a compelling governmental interest.

D. Count III – Declaratory Relief

5.08 Plaintiffs reallege the material facts alleged in the preceding paragraphs against Defendants. Defendants have deprived Plaintiffs of their federal constitutional rights to freedom of expression and due process of law, to peaceably assemble, and to petition their government for redress of grievances, causing irreparable harm to Plaintiffs. Through continued enforcement of the city's policy respecting issuance of "Criminal Trespass Notices," Defendants threaten further violations of those same rights. Plaintiffs are thus entitled to a declaration pursuant to 28 U.S.C. §2201 that their rights arising under the Constitution have been violated by the actions

of the Defendants and that the city's policy is facially unconstitutional and as applied to the activities of Plaintiffs.

E. Count IV – Injunctive Relief

5.09 Plaintiffs reallege the material facts alleged in the preceding paragraphs against Defendants. Plaintiffs continue to be deprived of their federal constitutional rights under the First Amendment and the Due Process Clause of the Fourteenth Amendment, causing them irreparable harm and threatening additional, immediately impending irreparable injuries. Defendants continue to maintain their policy of preventing Plaintiffs and other participants in the Occupy Austin protest from returning to City Hall through enforcement and issuance of "Criminal Trespass Notices" in violation of 42 U.S.C. §1983. Plaintiffs are thus entitled to an injunction preventing Defendants and their agents, employees, and any other persons or entities acting on their behalf, from further enforcement of (1) the "Criminal Trespass Notices" issued to them and other Occupy Austin protesters at City Hall and (2) the city policy respecting issuance of such notices.

5.10 Plaintiffs continue to be deprived of their federal constitutional rights under the First Amendment as a result of Defendants' acts in retaliation against Plaintiffs' exercise of their constitutional rights, causing them irreparable harm. Defendants' past practice of retaliation in violation of 42 U.S.C.

§1983 provides Plaintiffs with a reasonable basis to fear additional retaliatory acts by Defendants based on Plaintiffs' planned future exercise of their constitutional rights as part of the Occupy Austin protest. Plaintiffs are thus entitled to an injunction preventing Defendants and their agents, employees, and any other persons or entities acting on their behalf, from engaging in any retaliatory acts against Plaintiffs or other participants in the Occupy Austin protests based (1) on such individuals' past, present, or future exercise of rights protected under the First Amendment, or (2) based on the filing or prosecution of this or any other suit seeking to enforce such individuals' rights.

ATTORNEY'S FEES AND COSTS

- 6.01 It was necessary for Plaintiffs to hire the undersigned attorneys to file this lawsuit. Plaintiffs seek the recovery of attorney's fees incurred in the pursuit of this action pursuant to 42 U.S.C. §1988(b) and expert fees pursuant to 42 U.S.C. §1988(c).
- 6.02 Plaintiffs also seek recovery of their expenses and costs of court pursuant to 28 U.S.C. §1920.

DAMAGES

- 7.01 As a direct and proximate result of the Defendants' conduct, Plaintiffs suffered damages for the denial of due process of law and of the First

Amendment rights of free expression, peaceable assembly, and petitioning for the redress of grievances.

JURY DEMAND

8.01 Plaintiffs demand a trial by jury.

PRAYER

9.01 Plaintiffs ask for judgment against Defendants for the following:

- a. A declaration that Defendant's policy of banning individuals from City Hall through use of "Criminal Trespass Notices" violates the First and Fourteenth Amendments to the United States Constitution,
- b. Injunctive relief barring Defendants from banning individuals from City Hall and enjoining implementation of the city's policy regarding issuance of "Criminal Trespass Notices" at City Hall,
- c. Injunctive relief barring Defendants from engaging in any retaliatory acts against Plaintiffs or other participants in the Occupy Austin protests based on such individuals' past, present, or future exercise of rights protected under the First Amendment,
- d. Injunctive relief barring Defendants from engaging in any retaliatory acts against Plaintiffs or other participants in the Occupy Austin protests based on the filing or prosecution of this or any other suit seeking to enforce such individuals' rights,
- e. Such damages for denial of due process of law and of the First Amendment rights of free expression, peaceable assembly, and petitioning for the redress of grievances, as the Court finds appropriate,
- f. Pre-judgment and post-judgment interest,
- g. Reasonable attorney's fees,
- h. Costs of suit, and
- i. Any and all other relief the Court deems appropriate.

Respectfully

Ryan

rbates@yettercoleman.com
Edward

edawson@yettercolem
Anna

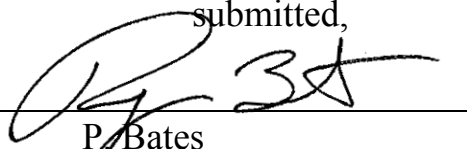
arotman@yettercoleman.com

Jam

jch@mail.utexas.edu
Brian

brian@texascivilrightsproject.org

submitted,



P. Bates
State Bar No. 24055152

C. Dawson
State Bar No. 24031999

an.com

G. Rotman
State Bar No. 24046761

YETTER COLEMAN LLP
221 West Sixth Street, Suite 750
Austin, Texas 78701
(512) 533-0150 [Tel.]
(512) 533-0120 [Fax]

es C. Harrington
State Bar No. 09048500

McGiverin
State Bar No. 24067760

TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, Texas 78741
(512) 474-5073 [Tel.]
(512) 474-0726 [Fax]

ATTORNEYS FOR PLAINTIFFS

Exhibit A



DATED 11-01-2011

CITY OF AUSTIN RESPONSE TO REQUESTS FROM OCCUPY AUSTIN

This is the City of Austin's response to requests brought to its attention in a meeting on October 31, 2011, with individuals representing the Occupy Austin event.

- 1. Request: Can persons who were issued criminal trespass notices by the City be allowed to return to City Hall Plaza to participate in the Occupy Austin event?**

Response: The City is drafting a procedure that would allow a person to request the City to conduct an administrative review of a Criminal Trespass Notice that was issued to the person. That procedure is expected to be released this week. For now, a person who was issued a Criminal Trespass Notice by the City is not allowed on the property.

When the procedure is adopted, a person who has been issued a Criminal Trespass Notice may request a review. The review process could result in a rescission, modification, or no change to the Criminal Trespass Notice, based on factors that will be set out in the procedure.

- 2. Request: Can the cleaning times for City Hall Plaza (currently Sunday, Tuesday, and Thursday, from 2 a.m. to 6 a.m.) be changed to an earlier time period?**

Response: The City agrees to accommodate the request by changing to a cleaning schedule for City Hall Plaza as follows: Sundays, Tuesdays, and Thursdays, from 10 p.m. to 2 a.m. This new cleaning schedule will begin on Thursday, November 3rd at 10 p.m.



3. Request: Can the City Hall mezzanine area be used for educational activities associated with Occupy Austin?

Response: The City has considered your request. Because of the amount of City Hall space that Occupy Austin activities are using, and the City's interest in providing some access to the general public, the City will allow the following educational activities on the mezzanine:

- Occupy Austin may use the City Hall mezzanine for educational activities after regular business hours, from 6 p.m. to 9 p.m. on evenings when no City cleaning activities are scheduled for City Hall Plaza.
- All items and equipment must be removed at the completion of the educational activity, which is to end at 9 p.m.

The mezzanine will still remain accessible to the general public. However, as previously stated, individuals who set up sleeping bags, pallets, or other sleeping accommodations on the mezzanine at any time will be asked to remove these items immediately. Individuals found sleeping in the mezzanine area will be asked to vacate the area immediately.

4. Request: Who is a point of contact with the Austin Police Department when Occupy Austin participants have difficulty getting a police response to their report of criminal activity?

Response: The points of contact for the Austin Police Department are in this order:

- First: Notify the on-site APD supervisor (a sergeant or lieutenant).
- Second: If an on-site supervisor is unavailable or unable to resolve the request, notify the APD Watch Commander at 974-7822.
- Third: If the issue is not resolved by the Watch Commander, contact Lt. Pat Connor, who is the point of contact for APD matters



related to the Occupy Austin project. Lt. Connor's phone number is 974-8614. He will respond during his normal office hours.

5. Request: Can any food tables be maintained at City Hall Plaza at all hours?

Response: The City is open to flexibility in the timing and placement of food tables, consistent with our need to address placement of the tables, health and safety issues, and maintaining some space for persons and other activities.

To accommodate this request, the City will allow the Occupy Austin event to maintain two (2) tables. Each table can be a maximum of six (6) feet in length. The tables must be kept in the amphitheatre area. They must be placed on appropriate mats that will protect the floor area from staining. The City will provide mats for this purpose. All food items must be kept either on or under the two tables. The food tables and all food items must continue to be moved out of the area during City cleaning activities.

The food area must meet all temporary food establishment requirements set forth in City Code § 10-3.

6. Request: Can the City give an additional notice to a person before an arrest is made that is based on the person not complying with a notice to move?

Response: The City will make an effort to give an additional notice to an individual before making an arrest based on the person's failure to move out of an area at City Hall. The City will continue to notify a group of people at Occupy Austin, by loudspeaker, if the City needs the group to move for a particular reason.

7. Request: Could a City park in the area be designated as an area that Occupy Austin may use for sleeping accommodations?



Response: The City's parks are for the use of all of the public, and permitted uses need to be consistent in order to be fair to all. Further, overnight use is regulated by the City Code. Therefore, we are unable to accommodate this request.

In addition, it should be understood that even though Occupy Austin is engaging in First Amendment activity, its special event activities must comply with the special events requirements of the City and the City Hall Non-City Use Guidelines. For example, the City Code (§ 9-2-11) requires a permit to use amplified sound equipment in public spaces.

More information on this may also be found in the City Hall Non-City Use Guidelines. This document is available on the City's website at http://www.ci.austin.tx.us/cityhall/downloads/cityhalluse_05-12-2009.pdf. For other questions, or to assist with future arrangements, you may also contact Building Services at (512) 974-3960 or via email at building.services@austintexas.gov.

Exhibit B

CITY OF AUSTIN ADMINISTRATIVE BULLETIN

Title **Criminal Trespass Notices On City Property**



Administrative Bulletin Number **11-04**

Effective Date **November 1, 2011**

Revised **Annually** **X** **As Needed**

Prepared by **Law Department**

Original Date **November 1, 2011** **Revised** **N/A**

City Manager's Approval

PURPOSE

The City recognizes its duty to the citizens of Austin to be a responsible steward of the public buildings and lands under its ownership or control, to maintain these public buildings and lands in a manner that promotes public safety and health, and to provide City-owned facilities where the City and the public can conduct business and other approved activities free from unlawful and disruptive interference.

The City also recognizes the right of its citizens to engage in legitimate activities protected by the First Amendment to the U.S. Constitution that may occur in or on public buildings and lands owned by the City.

Under the City's Charter, the City Manager has the authority and responsibility to control and maintain the City's public buildings and lands in accord with these interests.

In light of these interests, this Administrative Bulletin establishes rules and procedures for issuing and reviewing a criminal trespass notice resulting from activities that occur in a City-owned or occupied building, or on public lands owned by the City.

POLICY

The policy of the City of Austin is:

1. To provide notice in accord with the procedures set out in this Administrative Bulletin to a person whose entry onto City property, or continued presence on City property, is unreasonably disruptive or harmful to City Property, to the conduct of City business, or to the conduct of approved non-City activities occurring on City Property; and
2. To provide persons who receive a criminal trespass notice under the procedures in this Administrative Bulletin with the opportunity for a prompt administrative review of the terms of the criminal trespass notice.

This Administrative Bulletin is separate from, and does not affect or supersede, the authority of the City Council under the City Code to maintain order and decorum in its meetings.

DEFINITIONS

1. "Criminal Trespass Notice" means oral or written communication to a person that:
 - A. Entering by that person onto City Property is forbidden; or
 - B. The person must immediately depart from City Property.
2. "City Property" includes: the City Hall building and surrounding property; any other City-owned building or portion of a non-City owned building over which the City has control; City park lands or other recreational areas; and all other City-owned lands, unless such building or area has been exempted from the scope of this Administrative Bulletin in a written document signed by the City Manager.
3. "Authorized Employee" includes the City Manager and any other employee of the City to whom authority to issue a Criminal Trespass Notice has been delegated in accord with the Procedures for Delegation of Authority, below.

ROLES AND RESPONSIBILITIES

1. The City Manager has the authority and responsibility under the City Charter to manage and control access by the public to City Property. The City Manager may delegate this authority to other Authorized City Employees as provided in this Administrative Bulletin.
2. Authorized Employees have authority to issue a Criminal Trespass Notice to any person whose conduct on City Property violates the standards set out in Part 1 of the Criminal Trespass Notice Procedures, below.

DELEGATION OF AUTHORITY

1. The City Manager delegates the non-exclusive authority to issue a Criminal Trespass Notice under this Administrative Bulletin to:
 - All Assistant City Managers;
 - The City Manager's Chief of Staff;
 - All Department Directors, but limited to buildings and lands within the control or area or responsibility of their respective departments;
 - Other management personnel within a City Department, provided the Department Director has expressly delegated such authority to the individual manager in a writing that is filed with the City Manager's Office;
 - Building security employees, as designated by the appropriate Department Director in a writing that is filed with the City Manager's Office; and
 - Park Rangers, but limited to conduct occurring on City park property.
2. The City Manager may make a written delegation of non-exclusive authority to issue a Criminal Trespass Notice to any other City employee.
3. A delegation of authority under this Administrative Bulletin expires upon the reassignment, voluntary or involuntary termination of employment, or retirement of the designated employee, or upon revocation by the City Manager at any time on any basis.

CRIMINAL TRESPASS NOTICE PROCEDURES

1. Standards for Issuing a Criminal Trespass Notice

A. Prior Warning. Unless a person's conduct violates the standards in part C of this Section, below, an Authorized Employee should, prior to issuing a Criminal Trespass Notice to that person:

- Inform the person that their conduct is in violation of law or a City policy; and
- Give the person a reasonable opportunity to cease the violation of the law or City policy.

If the person promptly ceases the conduct at issue after receiving the warning described above, a Criminal Trespass Notice should not be issued to the person.

B. Grounds for Issuing a Criminal Trespass Notice – With Prior Warning. An Authorized Employee may issue a Criminal Trespass Notice to a person for conduct occurring on City Property that is unreasonably disruptive or harmful to City Property, to the conduct of City business, or to the conduct of approved non-City activities occurring on City Property, including but not limited to conduct that violates the Austin City Code in areas such as:

- Park and other curfew violations;
- Noise and amplified sound ordinance violations; and
- Other prohibited activities, such as camping, solicitation, sitting/lying on downtown sidewalk, urinating or defecating in public, and glass containers ordinance violations.

C. Grounds for Issuing a Criminal Trespass Notice - Exception to Prior Warning. An Authorized Employee may issue a Criminal Trespass Notice to a person without following the procedure in Part A, above, if the person has engaged in conduct that is unreasonably disruptive or harmful to City Property, to the conduct of City business, or to the conduct of approved non-City activities occurring on City Property, and either:

- i. Is an offense under Texas law, or is an attempt, solicitation or conspiracy to commit such an offense, including but not limited to conduct such as:
 - Crimes against a person, including homicide, kidnapping, unlawful restraint, sexual offenses and assaultive offenses;
 - Crimes against property, including arson, criminal mischief, robbery, burglary and criminal trespass, theft, and fraud offenses;
 - Obstructing governmental operation, including hindering proceedings by disorderly conduct, and interference with public duties;
 - Offenses against public order and decency, including disorderly conduct, obstruction of highway or other passageway, and disrupting meeting or procession;
 - Weapons offenses, public intoxication and driving while intoxicated; and
 - Possession and delivery of controlled substances (drugs).
- or –
- ii. Has resulted in injury to any person or damage to any property, or threatens to cause an imminent breach of the peace.

2. Contents of a Criminal Trespass Notice. A Criminal Trespass Notice may be verbal or written, but in either case should include:

- A. Reasons for Exclusion.** A statement of the reason(s) the person is being notified not to enter an area or to depart from an area. This statement need not be detailed, but should relate to the grounds under Part 1, above, upon which the notice is issued.
- B. Area of Exclusion.** A description of the area from which the person is excluded. The notice should describe the area or building from which the person is to be excluded so that a reasonable person may understand the specific area to which the person may not return.
- C. Duration of Exclusion.** A Criminal Trespass Notice will be for a time period that is based on the seriousness of the conduct. The duration of the Criminal Trespass Notice will be established by the Authorized Employee based on factors that include:
 - Whether the conduct involves intentional damage to City Property;
 - Whether the conduct involves intentional injury or offensive contact with any person;
 - Whether the conduct was intentionally disruptive to City business or to an authorized non-City event; and
 - Whether the person has previously engaged in similar conduct.

Following are guidelines that the Authorized Employee may use to determine the appropriate duration of a Criminal Trespass Notice:

No harm to persons or property, some disruption to City business or other event, and no similar past conduct	0 – 30 days duration
Some harm to persons or property, no disruption of City business or other event, and no similar past conduct	30 – 60 days duration
Some harm to persons or property, or some disruption of City business or other event, and history of similar past conduct	30 – 120 days duration
Significant harm to persons or property, or significant disruption of City business or other event, and no similar past conduct	90 – 180 days duration
Significant harm to persons or property, or significant disruption of City business or other event, and history of similar past conduct	90 days – 1 year duration
Significant harm involving serious bodily injury or the threat of serious bodily injury to a person or to property, and threat of similar future conduct.	1 year – Permanent

- D. Notice of Administrative Review Process.** A Criminal Trespass Notice will contain information that informs the person of the administrative review procedure described below, including the time in which to request a review and the person to whom a request for review should be addressed.

3. Administrative Review of a Criminal Trespass Notice

Request for Review. The person to whom the Criminal Trespass Notice is issued may request an administrative review of all or any part of the notice. The request must be in writing and received by the Department Director or other individual designated in the notice, not later than the 30th calendar day after the notice was received. If the person does not meet this 30-day requirement the Criminal Trespass Notice becomes final, unless the City Manager determines that good cause exists to consider a late request for review. Such a request for review does not stay or suspend the Criminal Trespass Notice.

A. Review Procedures. The Department Director, or designee, shall hold an informal review hearing promptly, but not later than the 14th day after the request for a review is received. In any such review hearing, the issues for decision shall be: (i) whether the Criminal Trespass Notice was issued for a reason set out in Section 1(B) or (C), above; and (ii) whether the area and duration of the Criminal Trespass Notice are appropriate under the facts and circumstances. At the review hearing:

- The person receiving the Criminal Trespass Notice may appear in person, or may submit information and argument in writing, and may be represented by any individual of the person's choosing.
- The burden of proof is on the person who requested the hearing.
- If an in-person hearing is convened, the management representative conducting the review hearing will provide for the recording of the hearing, and will furnish a copy of the recording to the person receiving the Criminal Trespass Notice upon request. No other audio or visual recording of the review hearing will be permitted.
- The rules of evidence as used in court do not apply, and hearsay evidence may be considered if it is deemed otherwise reliable by the individual conducting the review hearing.

The individual conducting the review hearing shall decide the issues based on the preponderance of the evidence presented, and shall make a written determination on the issues not later than the 5th business day after the hearing. The written determination shall be promptly provided to the person who requested the review hearing. The determination shall be to affirm, reverse, or modify the Criminal Trespass Notice, and shall state the reasons for the determination.

B. City Manager Review. The person receiving the Criminal Trespass Notice may request review of the determination from Part B, above, in writing to the City Manager not later than the 10th day after notice of the determination is sent to the person. The person must include a statement of the reasons for the request. Such an appeal does not stay or suspend the Department Director's determination.

The City Manager shall determine in the appeal whether the Criminal Trespass Notice was proper under the standards and procedures in this Administrative Bulletin. The City Manager may consider such information as he/she deems appropriate to the issues, and may request additional information from City management, from the person requesting the review, or from others. The City Manager shall provide a written decision on the request for review within 15 business days of receiving the request for review, unless the City Manager determines that additional time is needed based on the complexity of the issues.

The decision of the City Manager on a request for review is final.

C. Application of Review Procedures. This administrative review procedure will be available to any person who has received a Criminal Trespass Notice or after the effective date of this Bulletin, or during the ninety days prior to the effective date of this Bulletin.

4. Good Faith, Substantial Compliance. The standards set out in this Sections 1 and 2 of these procedures, above, are intended to provide consistency of process, standardized procedures, and proper delegation of management authority. The technical failure to meet one or more of the standards set out in those Sections does not invalidate a Criminal Trespass Notice, so long as that notice was issued in good faith and in substantial compliance with the standards in those Sections.

FORMS

The City Manager will provide an approved form Criminal Trespass Notice that will conform to Section 2 of the Criminal Trespass Notice Procedures, above, for use by management in the administration of this Bulletin.



Informational Bulletin

November 3, 2011

This bulletin is provided to supplement the information set out in City of Austin Administrative Bulletin 11-04, "Criminal Trespass Notices on City Property," which was issued November 2, 2011.

1. The Administrative Bulletin provides a review procedure under which an individual who receives a criminal trespass notice based on conduct occurring on City property may seek an informal administrative review of the notice.
2. Individuals who have received criminal trespass notices in connection with Occupy Austin activities will receive a written communication from the City within the next few days advising them of the process for seeking such an administrative review.
3. Pending the receipt of the written communication from the City concerning the administrative review procedure, described above, individuals who have received a criminal trespass notice in connection with the Occupy Austin event may seek an administrative review of their notices by sending a written statement requesting an administrative review to:

Mr. Eric Stockton
City of Austin
P.O. Box 1088
Austin, Texas 78767-1088

4. Beginning Friday, November 4, and extending through November 18, 2011, individuals who have received a criminal trespass notice in connection with the Occupy Austin event, and have a specific question about that notice, may call 512-974-1365 and leave a message with a call back number. A representative of the City will return the call to discuss the question.