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Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

MARLENE BALDWIN, ROBERT GEORGE,
JR., ANDREW R. WILKENS, FOOD NOT
BOMBS,

Plaintiffs

v.

MICHELLE D'ANDREA, IN HER OFFICIAL
CAPACITY AS THE CITY ATTORNEY OF
THE CITY OF FLAGSTAFF, KEVIN
TREADWAY IN HIS OFFICAL CAPACITY AS
CHIEF OF THE FLAGSTAFF POLICE
DEPARTMENT, TOM HORNE IN HIS
OFFICIAL CAPACITY AS THE ATTORNEY
GENERAL OF THE STATE OF ARIZONA,

Defendants.

CASE NO.:

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF FOR
VIOLATION OF PLAINTIFFS'
FREE SPEECH RIGHTS**

INTRODUCTION

1. This action is brought to protect Plaintiffs' fundamental rights of speech and expression. In 2008 Defendant Flagstaff officials adopted a policy of arresting and prosecuting persons who peaceably ask for donations while in public areas including sidewalks and the downtown square. Hundreds have been arrested for using their constitutionally protected right to ask persons for money in a non-aggressive manner, whether orally or by holding a sign. Defendants' policy and arrest practices are well known, and have predictably chilled Plaintiffs and others from exercising their constitutionally protected rights of speech. Plaintiffs need the intervention of this Court to enjoin these illegal acts by Defendants.

2. The arrests are based on an Arizona state law: A.R.S. §13-2905(A)(3). This provision makes it a crime to be "present in a public place to beg." On its face it prohibits constitutionally protected speech; arrests have been made in Flagstaff as soon as an undercover police officer hears a person asking for money, even for an amount of one or two dollars to buy food. The statute is not limited in any manner, and covers requests made in any public area and at any time of the day or night. Aggressive or disruptive conduct is not a required element of this provision. This state law is directed at constitutionally protected expression and chills the exercise of this fundamental right, and should be enjoined by this Court on its face.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this action pursuant to 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 1331 and 1343. The Court can grant declaratory relief pursuant to 28 U.S.C. §§ 2201(a) and 2202.

4. Venue is proper in the District of Arizona under 28 U.S.C. § 1402(b) as all Plaintiffs reside in the District, and under 28 U.S.C. § 1391(b) as all Defendants are sued in their official capacities and official places of business are all within this District. Defendant Attorney General Horne is located in Phoenix, Arizona.

PARTIES

5. Plaintiff Marlene Baldwin is a resident of Moenkopi, Arizona. She often travels to and stays overnight in Flagstaff, Arizona.

6. Plaintiff Andrew R. Wilkenson is a resident of Flagstaff, Arizona, and does not presently have a permanent home.

7. Plaintiff Robert George, Jr, is a resident of Flagstaff, Arizona and does not have a permanent home.

8. Plaintiff Food Not Bombs is an unincorporated organization in Flagstaff, Arizona.

9. Defendant Michelle D'Andréa is the duly appointed City Attorney of the City of Flagstaff. Defendant City Attorney D'Andrea is the chief legal officer for the City of Flagstaff, Arizona with jurisdiction to enforce the criminal provisions of A.R.S. § 13-2905(A)(3); she is sued in her official capacity.

10. Defendant Kevin Treadway is the Police Chief of the Flagstaff Police Department. He is the chief law enforcement officer for the City of Flagstaff with jurisdiction to enforce A.R.S. § 13-2905(A)(3); he is sued in his official capacity.

11. Defendant Tom Horne is the duly elected Attorney General of the State of Arizona. Defendant Attorney General Horne is the chief legal officer for the State of Arizona with jurisdiction to enforce A.R.S. § 13-2905(A)(3); he is sued in his official capacity.

12. The Defendants acted under color of state law at all times relevant to this complaint.

FACTS

Flagstaff Policy and Practice

13. In 2008, Flagstaff adopted a policy to remove potential criminal violators from public streets and areas. Called “Operation 40,” as reported in the Arizona Daily Sun on July 25, 2008, the goal was to remove such persons from the public areas early in the day by arresting and charging them for petty violations including loitering and panhandling. Larry Hendricks, “Police target street drunks,” *Arizona Daily Sun*, July 25, 2008, 10:00 PM, http://azdailysun.com/article_0702b95d-4986-5922-b05f-2110bd41aa48.html.

14. As stated in the 2011 yearly Flagstaff Police Department Report, Operation 40 “was initiated to work in cooperation with local businesses to strictly enforce” quality of life criminal offenses, including pan-handling and loitering, and that police officers “met with the City Attorney’s Office to seek enhanced prosecution for these violations.” Flagstaff Police Department, “Flagstaff Police Department 2011 Annual Report,” last updated November 7, 2012, <http://www.flagstaff.az.gov/documentcenter/view/40936>. See also Flagstaff Police Department, “Flagstaff Police Department 2010 Annual Report,” last updated October 25, 2011, <http://www.flagstaff.az.gov/DocumentCenter/Home/View/14797>.

15. As reported on February 6, 2013 by Defendant Treadway to the City Council, Flagstaff utilizes A.R.S. § 13-2905(A) to arrest and prosecute for “loitering” crimes. (Attached as Ex. A)

16. Defendant Treadway has implemented a policy and practice in the Flagstaff Police Department of arresting persons who violate A.R.S. § 13-2905(A)(3) by asking persons for money in public areas in Flagstaff.

17. Defendant D’Andrea has implemented a policy and practice in the Flagstaff City Attorney’s office of prosecuting persons who violate A.R.S. § 13-2905(A)(3) by asking persons for money in public areas in Flagstaff.

1 ***The State Statute***

2 18. A.R.S. § 13-2905(A)(3) is the basis for arresting and prosecuting persons in
3 Flagstaff for “loitering to beg,” whether under Operation 40 or for other reasons.

4 19. Since commencing Operation 40 and continuing today, hundreds of persons
5 have been arrested in public areas of Flagstaff and prosecuted for violating A.R.S. § 13-
6 2905(A)(3).

7 20. For example, in the Weekly Highlights report for the week of July 13, 2009,
8 it was reported that police officers working undercover near the Bushmaster/Downtown
9 area made 66 arrests for low-level offenses, including for “loitering to beg.” City of
10 Flagstaff, “Weekly Highlights For the week of August 17, 2009,” last updated 7/15/2009,
11 <http://www.flagstaff.az.gov/DocumentCenter/Home/View/9646>.

12 21. The Flagstaff “Police Log” from December 10, 2011, stated that a woman
13 was arrested for loitering to beg after a Flagstaff officer noticed her asking persons for
14 money including the officer. “Police Log: Loitering to Beg,” *Arizona Daily Sun*,
15 December 10, 2011, 4:00 AM, [http://azdailysun.com/news/local/crime-and-courts/police-](http://azdailysun.com/news/local/crime-and-courts/police-log/article_a784273f-28e5-5d19-87d3-ae9c6f1b8725.html)
16 [log/article_a784273f-28e5-5d19-87d3-ae9c6f1b8725.html](http://azdailysun.com/news/local/crime-and-courts/police-log/article_a784273f-28e5-5d19-87d3-ae9c6f1b8725.html).

17 22. The “Police Log” on May 10, 2012 reported that a man was arrested for
18 loitering to beg and taken to jail after a Flagstaff officer “watched the man asking a
19 passer-by for money.” “Police Log: Loitering to Beg,” *Arizona Daily Sun*, May 10, 2012,
20 4:00 AM, [http://azdailysun.com/news/local/crime-and-courts/police-](http://azdailysun.com/news/local/crime-and-courts/police-log/article_90806796-9a64-11e1-9686-001a4bcf887a.html)
21 [log/article_90806796-9a64-11e1-9686-001a4bcf887a.html](http://azdailysun.com/news/local/crime-and-courts/police-log/article_90806796-9a64-11e1-9686-001a4bcf887a.html).

22 23. As reported in the Arizona Daily Sun on July 14, 2012, a homeless man was
23 arrested for begging and booked into the Coconino County jail after he asked a
24 plainclothes officer if he could spare some change and that he needed “two bucks for
25 food.” “Jailed for Panhandling,” *Arizona Daily Sun*, July 14, 2012, 4:00 AM,
26 [http://azdailysun.com/news/local/crime-and-courts/jailed-for-](http://azdailysun.com/news/local/crime-and-courts/jailed-for-panhandling/article_e2c3e2b0-5062-5533-aaf4-cd30bb56bd1a.html)
27 [panhandling/article_e2c3e2b0-5062-5533-aaf4-cd30bb56bd1a.html](http://azdailysun.com/news/local/crime-and-courts/jailed-for-panhandling/article_e2c3e2b0-5062-5533-aaf4-cd30bb56bd1a.html).

1 24. Statistics provided by the Flagstaff Police Department document that in the
2 eleven month period beginning June 1, 2012, there were 135 arrests for “loitering to beg.”

3 25. The arrests for loitering to beg did not require nor depend on observing
4 aggressive, disorderly, dangerous or other problematic conduct by the person seeking
5 money, and may be based on a peaceful request for a donation.

6 26. The Arizona state law provision relied on to make “loitering to beg” arrests
7 is violated by the act of asking for money or food in a public place, and does not require
8 that disorderly, aggressive, dangerous or other problematic conduct be exhibited by the
9 person seeking a donation. A.R.S. § 13-2905(A)(3).

10 27. The Arizona state law provision relied on to make “loitering to beg” arrests
11 applies to all public places, including sidewalks, thoroughfares and parks, and to all times
12 during the day or night. This provision contains no time, place or manner exceptions, nor
13 modifies in any way the prohibition on asking for money in public areas.

14 28. On its face, this Arizona state law provision criminalizes constitutionally
15 protected speech and expression.

16 29. Persons concerned about being arrested and jailed for violation pursuant to
17 this statutory provision will predictably be chilled and will refrain from exercising their
18 constitutional right to peaceably ask for donations from persons in public areas.

19 30. This statutory provision selectively criminalizes requests for money or food.
20 A solicitation to vote for a candidate or attend a meeting, join an organization or eat at a
21 particular restaurant, delivered in the same manner and tone as that for money would not
22 result in arrest or prosecution under the provision.

23 31. A police officer would have to listen to the words of the speaker, and the
24 content of the request being made, in order to determine if these fit the message prohibited
25 by this provision – a request for money or food.

1 ***Plaintiffs***

2 32. All of the Plaintiffs were either arrested and prosecuted under A.R.S. § 13-
3 2905(A)(3) in Flagstaff, or were aware of others in Flagstaff who were, or both. All of the
4 Plaintiffs understood that these actions by the Flagstaff Police Department and the City
5 Attorney's Office did not require that the person arrested had engaged in disorderly,
6 abusive, aggressive or disruptive behavior; they were aware that arrests and prosecutions
7 could result from peaceably asking for money or food in a public area.
8

9 ***Plaintiff Baldwin***

10 33. Prior to 2013, Plaintiff Baldwin had been arrested and jailed on two
11 occasions for "loitering to beg" in Flagstaff pursuant to A.R.S. § 13-2905(A)(3).

12 34. As seen in the Flagstaff Police Report, one arrest in 2010 resulted after she
13 was approached by an undercover officer and responded to his repeated questions that
14 "anything would help" and asked for one dollar. (Attached as Ex. B)

15 35. Recently, she was again arrested pursuant to A.R.S. § 13-2905(A)(3).

16 36. On February 22, 2013 at approximately 10:00 AM, Flagstaff Police Officer
17 Scott Ingram was working a plain clothes detail.

18 37. As Officer Ingram walked by the 4'8" tall, 77 year old Ms. Baldwin, she
19 held out her hand and asked Officer Ingram for money.

20 38. Officer Ingram asked Ms. Baldwin why she needed money and she
21 responded to get a bus pass to get home, that the bus pass cost about \$1.25 and that she
22 currently only had two cents.

23 39. Officer Ingram then arrested Ms. Baldwin for loitering to beg in violation of
24 A.R.S. § 13-2905(A)(3). She remained in jail until released the next morning on her own
25 recognizance by a Flagstaff City Court Judge. Upon motion of the Flagstaff City
26 Attorney, the criminal charge against Ms. Baldwin was dismissed without prejudice but
27 Plaintiff Baldwin still faces an imminent threat of prosecution under the same charge and
28 set of facts until the statute of limitations expires.

1 40. Plaintiff Baldwin, and all of the individual Plaintiffs, are under an imminent
2 threat of arrest and prosecution by Defendants D'Andrea and Treadway for future acts of
3 peaceably requesting money in violation of A.R.S. § 13-2905(A)(3).

4 41. Plaintiff Baldwin is now afraid to ask for help in public and will risk going
5 hungry rather than being arrested again.

6 ***Plaintiff Wilkenson***

7 42. Plaintiff Andrew Wilkenson has been unemployed for several years and
8 often sleeps in public spaces.

9 43. On several occasions in recent years he asked passersby in Heritage Square
10 in Flagstaff for money, including after reciting original poetry.

11 44. He has been threatened with arrest by Flagstaff officers on more than one
12 occasion under the loitering to beg law in the past five years. In 2012 this was done after
13 he asked persons if he could eat their leftovers.

14 45. Plaintiff Wilkenson has seen Flagstaff police officers arresting persons for
15 violating the loitering to beg law and taken to jail. He has witnessed persons detained
16 outside of grocery stores under this law for holding signs that say "Need Help" and
17 "Hungry and Broke."

18 46. He can be prosecuted by the Defendants for violating A.R.S. § 13-
19 2905(A)(3).

20 47. His fear of being arrested for loitering to beg now prevents him from asking
21 passersby for money in Flagstaff public areas. At times he has had to go hungry to avoid
22 the possibility of arrest for this crime.

23 ***Plaintiff George***

24 48. Plaintiff Robert George, Jr., served multiple tours in the U.S. Military and is
25 a veteran of three foreign conflicts.

26 49. He has fallen on hard times and is presently homeless in Flagstaff.

1 50. In recent months, he has seen Flagstaff police officers arresting and jailing
2 other homeless persons for loitering to beg in public places, mostly in downtown
3 Flagstaff.

4 51. He can be prosecuted for violating A.R.S. § 13-2905(A)(3).

5 52. Based on observations of arrests in Flagstaff and the resulting fear of being
6 arrested for this crime, Plaintiff George is afraid to peaceably ask persons for money in
7 public areas; he had done so in the past to prevent his wife from going hungry and never
8 acted in an aggressive or forceful manner.

9 53. There have now been times when he or his wife have gone hungry for lack
10 of any money and the fear of going to jail if he requested a donation. He believes that this
11 law and enforcement by Flagstaff officers violates his free speech rights.

12 ***Plaintiff Food Not Bombs***

13 54. Plaintiff Food Not Bombs (“FNB”) is an all volunteer organization devoted
14 to feeding persons in Flagstaff who are poor and hungry. Meals are free and in the warmer
15 months are served outside in a public park.

16 55. Many of the volunteers who work for the organization, including in
17 preparing and serving the food, are persons who have at times had to ask for assistance
18 from persons in the street. As a result, members of FNB have themselves been threatened
19 with arrest and arrested for requesting donations from passersby.

20 56. The language of A.R.S. § 13-2905(A)(3) and the aggressive enforcement of
21 this provision by Flagstaff Police Department and the City Attorney, have negatively
22 impacted the organization. FNB members have become hesitant to participate in
23 organizational activities and services due to the regular presence of police officers on the
24 periphery of the feeding site and to the awareness that Flagstaff is arresting and
25 prosecuting persons for asking for donations for food. FNB members who have
26 experienced threats about and arrests for begging are particularly reluctant to enter into,
27 and participate in activities in, areas with a Flagstaff Police department presence. As a
28

1 result, FNB has experienced a loss of membership and a reduction in its capacity to serve
2 the poor and hungry in Flagstaff.

3 **INJUNCTIVE RELIEF**

4
5 57. Plaintiffs are entitled to a preliminary and permanent injunction. Defendants
6 have acted and threaten to act under color of state law to deprive Plaintiffs of their
7 constitutional rights. Plaintiffs are suffering and will continue to suffer irreparable injury
8 including loss of their rights of free speech and expression as a result of the existence,
9 operation, enforcement and threat of enforcement of the challenged state law provision.
10 Plaintiffs have no plain, adequate or speedy remedy at law.

11 **DECLARATORY RELIEF**

12 58. An actual and immediate controversy exists between Plaintiffs and
13 Defendants including Plaintiffs' contention that the challenged state law provision is
14 unconstitutional as are arrests and prosecutions based solely on requesting a donation.
15 Plaintiffs are entitled to a declaration of rights with respect to this controversy. Without
16 such a declaration, Plaintiffs will be uncertain of their rights and responsibilities under the
17 law.

18 **COUNT ONE**

19 **Facial Violations of the Right to**

20 **Freedom of Speech**

21 **(Defendant Horne)**

22 59. Plaintiffs reallege and incorporate by reference as if fully set forth herein the
23 allegations in all preceding paragraphs.

24 60. The First Amendment to the United States Constitution prohibits
25 abridgment and chilling of the freedom of speech. The First Amendment is incorporated
26 against the States by the Fourteenth Amendment. Persons violating the First Amendment
27 under color of state law are liable at law and in equity under 42 U.S.C. § 1983.
28

61. A.R.S. § 13-2905(A)(3) is facially invalid under the First Amendment because it criminalizes protected speech and prohibits a substantial amount of protected speech. It is also invalid as a content-based restriction on protected speech in all public areas and is not narrowly tailored to serve a compelling state interest.

62. The Arizona Constitution, Article 2, Section 6, provides: “Every person may freely speak, write, and publish on all subjects;” this provision has been interpreted as providing greater speech protections in some contexts than the First Amendment.

63. A.R.S. § 13-2905(A)(3) is facially invalid under the Arizona Constitution because it criminalizes protected speech and prohibits a substantial amount of protected speech. It is also invalid as content based restriction on speech in all public areas and is not narrowly tailored to serve a compelling state interest.

COUNT TWO

Violations of the Right to Freedom

Of Speech As Applied

(Defendants D'Andrea and Treadway)

64. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations in all preceding paragraphs.

65. The First Amendment to the United States Constitution, and Article 2, Section 6 of the Arizona Constitution, prohibit infringement on and chilling of freedom of speech. The First Amendment is incorporated against the States by the Fourteenth Amendment. Persons violating the First Amendment under color of state law are liable under 42 U.S.C. § 1983.

66. A.R.S. § 13-2905(A)(3) is unconstitutional under the First Amendment and the Arizona Constitution as applied to Plaintiffs because they have been threatened with arrest and arrested for engaging in constitutionally protected speech, and because Plaintiffs continue to face an imminent threat of being arrested if they engage in constitutionally protected speech in public areas, and because Plaintiffs' speech has been chilled.

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- A. Issue a preliminary and permanent injunction restraining Defendants, their employees, agents and successors from enforcing A.R.S. § 13-2905(A)(3);
- B. Enter a judgment declaring that A.R.S. § 13-2905(A)(3) violates the United States Constitution and the Arizona Constitution on their face and as applied;
- C. Award Plaintiffs costs and attorneys' fees pursuant to 42 U.S.C. § 1988, and
- D. Grant such other and further relief as the Court deems just and proper.

ACLU FOUNDATION OF ARIZONA

-and-

Attorneys for Plaintiffs

EXHIBIT A

CITY COUNCIL REPORT

DATE: February 6, 2013

TO: Mayor and Councilmembers

FROM: Kevin Treadway, Police Chief

CC: Kevin Burke, Josh Copley, Jerene Watson, Leadership Team

SUBJECT: INFORMATION REGARDING ENFORCEMENT POLICY
REGARDING LOITERING STATUTE

DISCUSSION

Officers of the Flagstaff Police Department periodically enforce laws as they pertain to loitering as part of their patrol duties. When enforcement action is taken, our officers utilize Arizona Revised Statute Title 13 Criminal Code in the application of the law. Under ARS Title 13-2905: Loitering:

A. A person commits loitering if such a person intentionally:

1. Is present in a public place and in an offensive manner or in a manner likely to disturb the public peace solicits another person to engage in any sexual offense; or

2. Is present in a transportation facility and after a reasonable request to cease or unless specifically authorized to do so solicits or engages in an business, trade or commercial transactions involving the sale of merchandise or services; or

3. Is present in a public place to beg, unless specifically authorized by law; or

4. Is present in a public place, unless specifically authorized by law, to gamble with any cards, dice or other similar gambling devices; or

5. Is present in or about a school, college or university building or grounds after a reasonable request to leave and either does not have any reason or relationship involving custody of or responsibility for a pupil or student or any other specific legitimate reason for being there or does not have written permission to be there from anyone authorized to grant permission.

EXHIBIT B



Kevin Treadway
Chief of Police

Flagstaff Police Department

911 E Sawmill Rd Flagstaff AZ 86001
(928)774-1414

Case Number: **P10-03162**

Incident/Investigation Report

Notes/Narratives

NARRATIVE

Offense: PRESENT IN A PUBLIC PLACE WITH THE INTENT TO BEG, PANHANDLING
ARS Code: 13-2905A3
Connecting Report Number:
Case Status: 22

NARRATIVE:

ON 021810 OFFICER VANOOTEGHEM AND I WERE WORKING UNDERCOVER IN AN UNMARKED PATROL CAR. WE WERE IN THE AREA OF 216 W. PHOENIX AVE, THE BUS TRANSFER STATION, WHEN I OBSERVED A FEMALE SUBJECT WALKING IN THE AREA. THE FEMALE SUBJECT, WAS LATER IDENTIFIED AS MARLENE BALDWIN, WOULD WALK UP TO A PERSON AT THE TRANSFER STATION AND SPEAK WITH THEM FOR A SHORT TIME. SHE WOULD THEN WALK AWAY AND APPROACH ANOTHER PERSON AND DO THE SAME.

I GOT OUT OF MY CAR AND WALKED TO THE AREA AND MARLENE WALKED UP TO ME AND STARTED TO TALK TO ME. MARLENE ASKED IF I COULD HELP HER AND I ASKED HER WHAT SHE NEEDED. MARLENE STATED THAT SHE WAS HUNGRY AND WANTED SOME FOOD. I TOLD MARLENE THAT I DID NOT HAVE ANY FOOD AND SHE AGAIN ASKED FOR SOME FOOD. I TOLD MARLENE AGAIN THAT I DID NOT HAVE SOME FOOD AND I ASKED HER IF SHE WANTED ANYTHING ELSE. MARLENE STATED SHE WANTED A HAMBURGER AND ASKED HOW MUCH IT WOULD COST. I TOLD MARLENE I WAS NOT SURE HOW MUCH A HAMBURGER COST AND ASKED HER WHAT SHE WANTED. MARLENE THEN STATED THAT ANYTHING WOULD HELP AND ASKED FOR \$1.00.

MARLENE WAS PLACED UNDER ARREST AND TRANSPORTED TO THE COUNTY JAIL WHERE SHE WAS BOOKED IN FOR BEING IN A PUBLIC PLACE WITH THE INTENT TO BEG, PANHANDLING. THERE IS NO FURTHER

Officer: D.L. MEAD
Badge#: 95127
Supervisor: SGT. HIGGINS #709

CONTINUATION

Case Number: **P10-03162**

TO: MIK JORDAHL BY CM