

1 Thomas C. Seabaugh, Esq., SBN 272458
THE LAW OFFICE OF THOMAS C. SEABAUGH
2 128 North Fair Oaks Avenue
Pasadena, California 91103
3 Telephone: (818) 928-5290
Email: tseabaugh@seabaughfirm.com

4 *Attorney for Plaintiff*

5
6
7 **UNITED STATES DISTRICT COURT**
8 **CENTRAL DISTRICT OF CALIFORNIA**
9 **EASTERN DIVISION**
10

11 AMY MARSCHAK,

12 Plaintiff,

13 vs.

14 CITY OF PALM SPRINGS;
15 ERIK LARSON;
16 and DOES 1-10,

17 Defendants.

Case No. 5:17-cv-55

**COMPLAINT FOR DAMAGES,
DECLARATORY RELIEF, AND
INJUNCTIVE RELIEF**

1. Civil Rights Action (42 U.S.C. § 1983)
2. Free Speech / Substantive Due Process (42 U.S.C. § 1983)
3. Equal Protection (42 U.S.C. § 1983)
4. Municipal Liability – Unconstitutional Custom, Policy, or Practice (42 U.S.C. § 1983)
5. Municipal Liability – Policy of Inaction / Failure to Train (42 U.S.C. § 1983)
6. Municipal Liability – Ratification (42 U.S.C. § 1983)
7. California Constitution
8. California Civil Code §52.1

DEMAND FOR JURY TRIAL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COMPLAINT FOR DAMAGES

Plaintiff AMY MARSCHAK (“Plaintiff”), for her complaint against the CITY OF PALM SPRINGS, ERIK LARSON (“Larson”), and Does 1-10 (all together, “Defendants”), alleges as follows:

INTRODUCTION

1. This action is founded upon efforts by the City of Palm Springs and its police officers to suppress street performers such as Plaintiff in violation of their constitutional rights.

2. Plaintiff Amy Marschak is a published writer who performs impromptu poetry in public.

3. On March 13, 2015, Plaintiff was detained and ticketed by Defendant Larson, a City of Palm Springs police officer, while she was performing poetry in a public area. Plaintiff was told that street performances were “against the law.” She was given a ticket by Defendant Larson that cited an ordinance prohibiting “sitting or lying” on a sidewalk (which she was not doing), later amended to a citation under the local ordinance that prohibits “obstructing” a public sidewalk (which she also was not doing). Around the same period of time, Plaintiff observed that other street performers were also being persecuted by Defendant Larson and other City of Palm Springs police officers on similarly spurious grounds.

4. After Plaintiff retained an attorney and prepared her defense, she was able to secure the dismissal of the charges. However, because of this mistreatment, Plaintiff has not returned to perform in Palm Springs. Plaintiff would like to resume performances in the city, but she is afraid to do so because of what happened.

5. With this action, Plaintiff seeks to affirm and vindicate the fundamental constitutional rights of street performers to express themselves freely in the public areas of Palm Springs without fear of harassment by local police. Insofar as local ordinances would prohibit her from doing so (or would subject her to the risk of

1 arbitrary police persecution), she also seeks to challenge the constitutionality of
2 those ordinances.

3 6. Plaintiff seeks monetary compensation and attorneys' fees for the
4 violation of her constitutional rights. As a civil rights action that seeks to redress
5 violations of basic rights and challenge unconstitutional ordinances, this lawsuit is in
6 the public interest.

7
8 **PARTIES**

9 7. Plaintiff resides in the State of Colorado. The circumstances and events
10 giving rise to this action occurred in the City of Palm Springs in the State of
11 California.

12 8. Plaintiff sues in her individual capacity for violations of her own rights
13 and harm that she suffered personally.

14 9. At all relevant times, Defendants Does 1-10 (collectively, "Additional
15 Defendants") were agents or employees of the City of Palm Springs. At all relevant
16 times, they were acting under color of law within the course and scope of their
17 duties with respect to their employer. These defendants proximately caused
18 Plaintiff's damages by integrally participating or failing to intervene in the conduct
19 of which Plaintiff complains, and/or by engaging in other acts or omissions
20 described below.

21 10. Upon information and belief, at all relevant times Defendant Larson
22 resided in the City of Palm Springs, State of California.

23 11. At all relevant times, Defendant Larson was a law enforcement officer
24 employed by the City of Palm Springs. At all relevant times, Defendant Larson was
25 acting under color of law and within the course and scope of his employment. At all
26 relevant times, Defendant Larson was acting with the implied and actual permission
27 and consent of the City of Palm Springs.

1 12. Defendant City of Palm Springs is responsible for Plaintiff's injuries by
2 virtue of statutory indemnity, vicarious liability, and under principles set forth in
3 *Monell v. Department of Social Services*, 436 U.S. 658 (1978). At all relevant times,
4 Defendant City of Palm Springs was a duly organized public entity, existing under
5 the laws of the State of California. Defendant City of Palm Springs is a chartered
6 subdivision of the State of California with the capacity to sue and be sued.
7 Defendant City of Palm Springs is responsible for the actions, omissions, policies,
8 procedures, practices and customs of its various agents and agencies. At all times
9 relevant to the facts alleged herein, the City of Palm Springs was responsible for
10 assuring that the actions, omissions, policies, procedures, practices and customs of
11 its employees complied with the laws and the Constitutions of the United States and
12 of the State of California. At all relevant times, the City of Palm Springs was the
13 employer of Defendant Larson and the Additional Defendants.

14 13. Upon information and belief, in doing the acts and failing and omitting
15 to act as hereinafter described, the Additional Defendants were acting on the implied
16 and actual permission and consent of the City of Palm Springs.

17 14. The true names of Additional Defendants are unknown to Plaintiff, who
18 therefore sues these defendants by fictitious names. Plaintiff will seek leave to
19 amend this complaint to show the true names and capacities of these defendants
20 when they have been ascertained. Each of the fictitiously-named defendants is
21 responsible in some manner for the conduct and liabilities alleged herein.

22 15. On information and belief, at all relevant times, Defendant Larson and
23 Additional Defendants were residents of the State of California.

24 16. Defendant Larson and Additional Defendants are directly liable for
25 Plaintiff's injuries under federal law pursuant to 42 U.S.C. § 1983 and are sued in
26 their individual capacities for damages only.

27
28

1 **JURISDICTION AND VENUE**

2 17. This civil action is brought for the redress of alleged deprivations of
3 constitutional rights as protected by 42 U.S.C. §§ 1983, 1985, 1986, 1988, and the
4 First and Fourteenth Amendments of the United States Constitution. Jurisdiction is
5 founded on 28 U.S.C. §§ 1331, 1343, and 1367.

6 18. Venue is proper in this Court under 28 U.S.C. § 1391(b) because all
7 incidents, events, and occurrences giving rise to this action occurred in the City of
8 Palm Springs, California.

9
10 **FACTS COMMON TO ALL CLAIMS FOR RELIEF**

11 19. The foregoing allegations are incorporated as if re-alleged herein.

12 20. Plaintiff is a published writer who performs impromptu poetry in
13 public. For her one-of-a-kind street performances, she dons a Victorian dress and
14 she takes requests from her listeners. For example, a pair of lovers on their first date
15 might ask her to compose a poem on the spot to describe their meeting and their
16 feelings for one another. Alternatively, a facetious child might ask her to compose a
17 poem that includes a number of peculiar words, and she is more than happy to
18 astound such listeners by fitting all of the requested words into meter and rhyme.
19 She will also, on occasion, recite impromptu poetry about current political and
20 social issues. Her audiences frequently record her poems on their smart phones.
21 Plaintiff has been featured on local news stations, has performed in several states
22 and provinces, and makes regular appearances in Boulder, Colorado.

23 21. Plaintiff traveled to Palm Springs to perform in March of 2015. She
24 performed successfully and felt well-received by the community. Plaintiff
25 performed without incident for around five days.

26 22. Plaintiff saw Defendant Larson for the first time on or around March
27 12, 2015. While Defendant Larson observed her to be performing, Defendant Larson
28 did not approach or question her. Plaintiff usually gave a friendly wave to each

1 police officer she saw. She was not stopped or questioned during this period.
2 Plaintiff was performing on public sidewalks.

3 23. On Friday, March 13, Defendant Larson approached Plaintiff and
4 informed her that she was not allowed to perform on the sidewalk. Much of the
5 interaction between Larson and Plaintiff was captured on video. Defendant Larson
6 wrote Plaintiff a ticket that indicated that Plaintiff was “obstructing” the sidewalk
7 but that cited the local ordinance prohibiting “sitting or lying” on the sidewalk.
8 Plaintiff was never obstructing the sidewalk, nor was she ever sitting or lying on the
9 sidewalk. Defendant Larson stated that citizens were “not supposed to” perform on
10 the streets of Palm Springs, and that street performing was “against the law.”
11 Defendant Larson stated, “Go somewhere else, you can’t stay here.”

12 24. After Defendant Larson announced that he was writing Plaintiff a
13 ticket, Plaintiff asked Defendant Larson why she was not being given a warning (as
14 required by the ordinance prohibiting “sitting or lying”). On video, Defendant
15 Larson suggests that he was giving Plaintiff a ticket to punish her for questioning his
16 statements. Specifically, Defendant Larson stated that “when you were arguing
17 about your constitutional rights to be here blocking the sidewalk, that was the
18 warning,” or words to that effect. During the encounter, Plaintiff was very
19 frightened and reported that she was shaking with fear. Plaintiff felt that Defendant
20 Larson was on a mission to persecute street performers, and that her patient and
21 reasonable queries only brought about more vindictiveness and retaliation.

22 25. During the encounter, it emerged that Defendant Larson appeared to
23 ascribe to a number of peculiar beliefs about Plaintiff’s rights under the First
24 Amendment. For example, he volunteered to Plaintiff that he had not approached
25 her the previous day because he had thought that she had been hired by a business.
26 Defendant Larson also stated that if Plaintiff had a “business license” then she
27 would have been permitted to perform. However, Plaintiff is not aware of any
28 ordinance or statute that would require her to obtain (or would even provide for the

1 issuance of) any such “business license” that would authorize her to perform on the
2 streets of Palm Springs. Defendant Larson further claimed to be able to ticket
3 Plaintiff if she was in front of a business and if the business “doesn’t agree with it.”
4 When Plaintiff asked to see a supervisor, Defendant Larson identified himself as a
5 supervisor.

6 26. Defendant Larson later amended the ticket to cite the ordinance
7 prohibiting “obstructing” the sidewalk. Plaintiff was never obstructing the sidewalk.

8 27. Within a few days, Plaintiff visited the scene of the incident to measure
9 the sidewalk, with the intention of showing that the allegations by Defendant Larson
10 were unfounded. She was able to confirm that there was plenty of room for
11 pedestrians to pass and that she been standing at a location where she was not in the
12 way of any pedestrians. Around that time, Plaintiff met Lucas Schwab, another
13 street performer. Mr. Schwab was also harassed by Defendant Larson, who claimed
14 that he was “obstructing” the sidewalk. *See Figure 1, infra.*

15 28. Plaintiff contends that the regime composed of the “sitting and lying”
16 ordinance together with the “obstructing” ordinance give city police officers
17 arbitrary authority to determine what speech is allowed in public areas. If a person is
18 sitting or lying down, he or she can be ticketed for violating the former ordinance. If
19 the person is standing up, he or she can be ticketed for violating the latter.
20 Meanwhile, Plaintiff observed numerous individuals standing still or sitting down
21 who were never approached by Defendant Larson or accused of “loitering” or
22 “obstructing.” Instead, these ordinances seemed to be used arbitrarily to target street
23 performers.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Figure 1: Police claimed that Mr. Schwab, a street performer, was “obstructing” the sidewalk.

29. Defendant City of Palm Springs’ Municipal Code Section 12.12.050 (Loitering – Obstructing traffic) reads: “It is unlawful for any person to stand upon any street, sidewalk, or other public way open for pedestrian travel, or otherwise occupy any portion thereof in such a manner as to annoy or molest any pedestrian thereon, or so as to obstruct or unreasonably interfere with the free passage of pedestrians, motor vehicles, or other modes of travel.” A separate ordinance, Municipal Code Section 12.12.055, prohibits sitting or lying on public sidewalks downtown.

30. When Plaintiff and Mr. Schwab went to a coffee house to talk, they heard a commotion down the street, whereupon they observed that Defendant Larson had arrested a ukulele player. The ukulele player’s belongings were strewn across the street. A number of passers-by who had been listening to the ukulele

1 player's performance – and then had observed her apparently violent arrest –
2 appeared amazed, distressed, and in shock.

3 31. Plaintiff believes that this treatment of street performers is outrageous
4 and unlawful. She decided to attend a City Council meeting to inform the city's
5 civilian leadership about what had transpired. Plaintiff and Mr. Schwab spoke at a
6 city council meeting on March 18, 2015 about the mistreatment of street performers
7 and the violations of their rights. Video and audio recordings exist of their remarks,
8 which were also noted in the minutes. At the meeting, an exchange took place
9 among the council members that suggested that the matter would be looked into, but
10 Plaintiff was never notified of (and never observed or became aware of) any
11 changes that were implemented.

12 32. Plaintiff was prosecuted on the basis of Defendant Larson's ticket. To
13 prepare her defense, she retained a criminal defense attorney. She spent considerable
14 time and effort on her efforts to clear her name. She also disclosed the videos that
15 depict her encounter with Defendant Larson. Eventually, her criminal defense
16 attorney was able to secure the dismissal of all the charges.

17 33. The experience of being wrongfully targeted by Officer Larson was
18 distressing for Plaintiff. The encounter was very tense and unpleasant. In the period
19 immediately following the encounter, Plaintiff was crying almost every night. She
20 became fearful of resuming her street performances. She tried to resume her
21 performances in Santa Barbara, but found herself repeatedly asking other street
22 performers if it was safe to perform. In Santa Barbara, Plaintiff also met some other
23 street performers who said they had heard about Palm Springs' treatment of street
24 performers and would not perform there.

25 34. When the Plaintiff returned to Boulder, after she set up to street
26 perform, she slumped over her stool, thinking about the Palm Springs incident,
27 concerned about how this alleged misdemeanor would affect her future. Other days
28 while street performing in Boulder she was distracted by thinking about the

1 implications of a possible misdemeanor conviction and frequently thought about it
2 when she was not street performing also. She wondered: Could she continue to be
3 hired to perform in Canada? Would she still be rehired as a part-time ski instructor,
4 a job she had done for years? How would the misdemeanor affect her career and
5 reputation?

6 35. For a street performer who survives on donations, a ticket that would
7 be a substantial inconvenience to many people can signify total financial ruin.
8 Plaintiff is afraid to return to perform in Palm Springs for fear of encountering the
9 same mistreatment or receiving another ticket – or even being violently arrested,
10 with her belongings strewn across the street like the ukulele player. At the same
11 time, Plaintiff believes that she has every right to resume her performances in Palm
12 Springs.

13 36. With this action, Plaintiff seeks to affirm and vindicate the fundamental
14 constitutional rights of street performers such as herself to use the sidewalks of Palm
15 Springs without fear of harassment or persecution by local police. Insofar as the
16 local ordinance prohibiting the “obstruction” of sidewalks, together with the “sitting
17 or lying” ordinance, would prohibit her from doing so, also seeks to challenge the
18 constitutionality of those ordinances. Finally, she seeks monetary compensation and
19 attorneys’ fees for the violation of her constitutional rights.

20 37. Plaintiff timely presented her claim to the City of Palm Springs
21 pursuant to the California Government Tort Claims Act by letter on April 28, 2015.
22 The city never replied to her letter.

23
24
FIRST CLAIM FOR RELIEF

Civil Rights Action (42 U.S.C. § 1983)

(Against Defendant Larson and Does 1-10)

27
28 38. The foregoing allegations are incorporated as if re-alleged herein.

1 on public sidewalks downtown – Prohibited), together with any other applicable or
2 relevant ordinances, are unconstitutional.

3 48. Insofar as the ordinances would prohibit conduct such as Plaintiff’s in
4 this case, they are unconstitutional on their face.

5 49. Alternatively, insofar as the ordinances are vague and/or overbroad as
6 to what conduct they prohibit, the ordinances would vest undue discretion in
7 government officials to arbitrarily deem constitutionally-protected expressive
8 activity as unlawful, and are therefore unconstitutional. In other words, the terms are
9 so vague and overbroad as to encompass a limitless range of constitutionally-
10 protected expressive activity.

11 50. Defendant City of Palm Springs fails to provide adequate notice of
12 what conduct will be deemed unlawful in relation to street performers. The
13 ordinances fail to give a person of ordinary intelligence fair notice that his or her
14 contemplated conduct is forbidden by the ordinances. The ordinances encourage
15 arbitrary and erratic arrests and convictions, and provide zero safeguards against
16 arbitrary or discriminatory enforcement.

17 51. As a result, Plaintiff was harmed.

18 52. Plaintiff seeks compensatory damages, declaratory relief, injunctive
19 relief, as well as attorney fees under 42 U.S.C. § 1988.

20

21

THIRD CLAIM FOR RELIEF

22

Equal Protection (42 U.S.C. § 1983)

23

(Against City of Palm Springs)

24

53. The foregoing allegations are incorporated as if re-alleged herein.

25

26

27

28

54. Defendant City of Palm Springs’ Municipal Code Section 12.12.050
(Loitering – Obstructing traffic), Municipal Code Section 12.12.055 (Sitting or lying
on public sidewalks downtown – Prohibited), together with any other applicable or
relevant ordinances, are unconstitutional.

1 55. Insofar as the ordinances would prohibit conduct such as Plaintiff's in
2 this case, they are unconstitutional on their face and/or as applied.

3 56. The ordinances, on their face and/or as applied, single out street
4 performances to be excluded from the right to use public areas of the city. This
5 infringes on the fundamental right to free speech and obstructs the exercise of that
6 right by a class of people.

7 57. There is no compelling government interest justifying the restrictions
8 on street performers and the City cannot show that the restrictions on street
9 performers are necessary to serve any legitimate government interest.

10 58. Plaintiff was harmed.

11 59. Plaintiff seeks compensatory damages, declaratory relief, injunctive
12 relief, as well as attorney fees under 42 U.S.C. § 1988.

13

14

15

FOURTH CLAIM FOR RELIEF

16

Municipal Liability – Unconstitutional Custom, Policy, or Practice

17

(42 U.S.C. § 1983)

18

(Against City of Palm Springs)

19

60. The foregoing allegations are incorporated as if re-alleged herein.

20

21 61. The conduct of the City of Palm Springs and its agents and employees
22 amounted to deliberate indifference to the constitutional rights of Plaintiff and other
23 similarly situated street performers.

23

24 62. Defendants Larson and Does 1-10 acted under color of law and within
25 the course and scope of their employment by the City of Palm Springs.

25

26 63. Defendants Larson and Does 1-10 deprived Plaintiff of her particular
27 rights under the First, Fourth, and Fourteenth Amendments, as alleged above.

27

28

1 above. Defendant Larson and Additional Defendants acted under color of law. As a
2 result of these acts, Mrs. Marschak is afraid to exercise her rights in the City of Palm
3 Springs, and has not exercised those rights since the incidents described above.
4 Accordingly, an action lies under California Civil Code §52.1.

5 91. Defendant City of Palm Springs is vicariously liable for the wrongful
6 acts of Defendant Larson and Additional Defendants pursuant to section 815.2(a) of
7 the California Government Code, which provides that a public entity is liable for the
8 injuries caused by its employees within the course and scope of the employment if
9 the employee's act would subject him or her to liability.

10 92. Plaintiff seeks compensatory damages, injunctive relief, declaratory
11 relief, a civil penalty, as well as attorney fees.

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury.

DATED: January 12, 2017

LAW OFFICE OF THOMAS C. SEABAUGH

By _____ /s/ *Thomas C. Seabaugh*
Thomas C. Seabaugh
Attorneys for Plaintiff