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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Roy Warden,

Plaintiff,

v.

Richard Miranda, et al.,

Defendants.

No. CV-14-02050-TUC-DCB

ORDER

April 10, 2006, was a national day of protest for workers and immigrants' rights across the United States, and an estimated 12,000-14,000 people marched in Tucson to protest the treatment of immigrants in this country. The march ended in a rally at Armory Park, which was open to all members of the public. The Plaintiff and several associates were counter-protesting that day against illegal immigrants. They went into Armory Park in the midst of the pro-immigrant marchers and burned two Mexican flags while denouncing illegal immigrants. (P's Response, SOF (Doc. 116) ¶ 6). The crowd of pro-immigration marchers became agitated and violent. According to the Plaintiff, "the 'pro-raza' participants rioted in 2006" because of "Plaintiff's *speech.*" *Id.* at ¶ 4) (emphasis in original). The police arrested several marchers, but did not arrest the Plaintiff. He was escorted away from the violent crowd. (Ds' MSJ, SOF (Doc. 102) ¶2.)

Plaintiff filed two law suits arising from the events of that day, CV 07-190 TUC CRP and CV 07-664 TUC DCB. In both, Judgement was entered against the Plaintiff.

Following the 2006 "riot," the May 1st Coalition for Worker and Immigrant Rights

(the Coalition/CWRI),[1] which organizes the annual May Day march and rally, began applying for and obtaining exclusive use permits for all future May Day rallies. "The Coalition planned to exclude Mr. Warden and any others the Coalition thought did not share [their] peaceful message of worker and immigrants' rights in order to prevent another disturbance like the one that occurred on April 10, 2006." (Ds' SOF at ¶ 5; Ex. C: Miles Decl. ¶ 3 (peacekeeping and security coordinator for the Coalition). In 2010 and 2011, Plaintiff filed a lawsuit complaining about being precluded from the May Day Armory Park rally, CV 11-460 TUC DCB (BPV), which was dismissed without leave to amend because the Plaintiff was not diligent in seeking the identity of unknown TPD officers he sought to name.[2]

On April 25, 2014, the Plaintiff filed the Complaint in this case alleging intentional and negligent violations of the First Amendment to the United States Constitution because he was refused access to Armory Park on May 1,[3] 2012. Plaintiff argues that under *Gathright v. City of Portland*, 439 F.3d 573 (9th Cir. 2006), the City of Tucson Defendants (the City), pursuant to an exclusive use permit, improperly precluded his entry to the May Day rally. On August 10, 2015, this Court denied a Motion to Dismiss filed by the City, finding the Plaintiff alleged sufficient facts to state his claim, and allowed the case to go forward for disposition on the merits. The parties have completed discovery and file cross motions for summary judgment.

The Court denies the Plaintiff's Motion for Summary Judgement and grants the Defendants' Motion for Summary Judgment. The Court denies the Defendants' Motion

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[1] The Coalition was sued as an unincorporated association, Fed. R. Civ. P.4(h), served by publication, *id.* (e)(1) (Arizona allows service by publication), and was defaulted for failing to answer. The default does not establish that the Coalition is a jural entity capable of suing or being sued under Arizona law.

[2] CV 13-283 TUC DCB remains pending before this Court, but it does not involve claims related to a Coalition May Day rally.

[3] Defendants' Motion for Summary Judgment mistakenly identifies the date as May 12, 2012. (Doc. 101 at 1.)

to Preclude Witnesses as moot. It denies the Plaintiff's Motion for Sanctions as meritless.

The Court denies the Plaintiff's request for oral argument because the parties submitted memoranda thoroughly discussing the law and evidence in support of their positions. The Court finds no material questions of fact in dispute relevant to whether Plaintiff's First Amendment rights were violated. This is a case where both sides draw different legal conclusions based on essentially the same facts. Oral argument will not aid the court's decisional process which is based on a question of law. *See Mahon v. Credit Bur. of Placer County, Inc*., 171 F.3d 1197, 1200 (9th Cir. 1999) (explaining that if the parties provided the district court with complete memoranda of the law and evidence in support of their positions, ordinarily oral argument would not be required).

For reasons explained below, the Court finds that as a matter of law, Defendants did not violate the Plaintiff's First Amendment rights nor did they retaliate against him for exercising them.

1. Standard of Review for Summary Judgment

On summary judgment, the moving party is entitled to judgment as a matter of law if the Court determines that in the record before it there exists "no genuine issue as to material fact." Fed.R.Civ.P. 56(a). When considering a summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits or declarations, if any. Fed. R. Civ. P. 56(c). The Plaintiff incorporates by reference arguments and evidence presented previously during briefing of Defendants' Motion to Dismiss. *See* (P's MSJ (Doc. 100) at 2, ¶ 2 (incorporating Response to MD (Doc. 22)). While a party may call the Court's attention to anything contained in a previous pleading or motion by incorporation by reference, LRCiv. 7.1(d)(2), "'Judges are not like pigs, hunting for truffles buried in briefs,'" *Christian Legal Soc. Chapter of Univ. of Calif. V. Wu,* 626 F.3d 483, 488 (9th Cir. 2010) (quoting *Greenwood v. FAA,* 28 F.3d 971, 977 (9th Cir. 1994) (quoting *United States v Dunkel,*

927 F.2d 955, 956 (7th Cir. 1991) (*per curiam*)). Therefore, broad generalized references do not suffice. Any incorporation by reference must be made specifically and distinctly.

Accordingly, the Court considers Plaintiff's incorporation by reference of this Court's findings and conclusions of law made in the Order denying Defendants' Motion to Dismiss. *See (*P's MSJ (Doc. 100) at 3-7, ¶¶ 4.A-H.) They are, however, not determinative of the cross motions for summary judgment. When considering the Defendants' Motion to Dismiss, this Court was applying a liberal pleading standard. Fed. R. Civ. P. 8, (Order (Doc. 29) 4-5). The Court considered only whether the Plaintiff alleged facts which plausibly suggested a constitutional violation. The Court took the facts alleged by the Plaintiff as being true, even if doubtful, and construed them in the light most favorable to the non-moving, the Plaintiff. *Id.*

The assumptions made by the Court when denying Defendants' Motion to Dismiss are not evidence. *See e.g.*, (P's MSJ (Doc. 100) at 7 ¶ 4.H, 5 (citing Court's assumptions made related to procedures for permit approval as "correct"). A motion to dismiss is filed prior to discovery, whereas summary judgment comes after the parties have marshalled the evidence through discovery to support a claim. The Defendants correctly explain that on summary judgment, the parties must "put up" their evidence. (Ds' Reply (Doc. 119) at 2.)

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, but is not required to support its motion with affidavits or other similar materials negating the opponent's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-325 (1986). In determining whether to grant summary judgment, the Court views the facts and inferences from these facts in the light most favorable to the non-moving party. *Matsushita Elec. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 577 (1986).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A material fact is any factual dispute that might affect the outcome

of the case under the governing substantive law. *Id.* at 248. A factual dispute is genuine if the evidence is such that a reasonable jury could resolve the dispute in favor of the non-moving party. *Id.*

The moving party is under no obligation to negate or disprove matters on which the non-moving party bears the burden of proof at trial. *Id.* at 325. Rather, the moving party need only demonstrate that there is an absence of evidence to support the non-moving party's case. *Id.* If the moving party meets its burden, it then shifts to the non-moving party to "designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed.R.Civ.P. 56(e)). To carry this burden, the party opposing a motion for summary judgment cannot rest upon mere allegations or denials in the pleadings or papers. *Anderson*, 477 U.S. at 252. The non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita,* 475 U.S. at 586. "The mere existence of a scintilla of evidence ... will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson*, 477 U.S. at 252.

Here, because the parties file cross motions for summary judgment, both must "put up or shut up." (Ds' Reply (Doc. 119) at 2 (quoting *Harney v. Speedway Super-America*, 526 F.3d 1099, 1104 (7th Cir. 2008)).

The Supreme Court's trilogy of cases, cited above, opened the door for the district courts to rely on summary judgment to weed out frivolous lawsuits and avoid wasteful trials. *Rand v. Rowland*, 154 F.3d 952, 956 -957 (9th Cir. 1998);10A Charles A Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure*, § 2727, at 468 (1998). As explained in *Celotex*: "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. The Judge's role on a motion for summary judgment is not to

determine the truth of the matter or to weigh the evidence, or determine credibility, but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 252.

2. Plaintiff's Motion for Summary Judgment

The Exclusive Use Permit

Plaintiff argues that "on March 14, 2012, Pancho Medina, acting under the direction of Isabel Garcia[4] and working on behalf of Defendant-in-Default May 1st Coalition [CWIR], wrote a letter to Peg Weber and Fred Gray, employed by Tucson City Department of Parks and Recreation, requesting use of Armory Park on May 1st 2012 to celebrate "International Workers Day." (P's MSJ, SOF (Doc. 100-2) ¶ 14, Ex. 3: Medina 3/14/2012 letter)

"On March 19, 2012 Pancho Medina, . . . wrote a letter to Defendants Fred Gray and Reenie Ochoa, employed by Defendant Tucson City Department of Parks and Recreation, further explaining the purpose of the Exclusive Use permit was to "prohibit people from entering the park wanting to disrupt [and] incite violence." *Id.* ¶ 19 (quoting Ex.6: Medina 3/19/2012 letter).

Plaintiff alleges that "Defendants Rankin, Miranda, Judge, Gray and Ochoa, and other Tucson City Officials conferred and came to a decision to grant an 'Exclusive Use Permit,' as per Tucson City Code 21-4(a)(b) (6) and Tucson City Code Section 21-3(7)(4), which unlawfully authorized Defendant Tucson May 1st Coalition for Worker and Immigrant Rights to bar Plaintiff's entry into Armory Park on May 1, 2012, even though Defendants Rankin, Miranda, Judge, Gray and Ochoa knew such practice was a violation of the law regarding "exclusive use permits" as set forth in *Gathright* and as stated by Defendant Rankin in his April 12, 2006, memo to Tucson City Manager Mike Hein." *Id.* ¶ 21 (citing Warden Depo. (Doc. 100-1) at 10); (P's MSJ, Ex. 1 (Doc. 100-2)).

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[4] Isabel Garcia is not a Defendant in this case and allegations against her are not relevant to the issue of whether or not the City Defendants and/or the Coalition violated the Plaintiff's constitutional right to free speech. In summarizing the facts alleged by the Plaintiff, the Court omits this repetitive charge.

On March 26, 2012, Defendant Ochoa confirmed the May 1, 2012, Armory Park reservation for a "facility rental" in a letter sent to Medina. *Id.* ¶¶ 20-22, Ex 7: Reservation Confirmation 3/26/2012.

On April 27, 2012, Defendant Ochoa sent an email to Tucson City Attorney Dennis McLaughlin and Defendants Mike Rankin & Lisa Judge regarding the May 1st Coalition Exclusive Use Permit, agreeing "it looks fine." *Id.* ¶ 22, Ex. 8. The email included "a copy of (1) an April 27, 2012 letter (aka "Exclusive Use Permit") and (2) a map of the designated area in Armory Park covered by the Exclusive Use Permit." *Id.* ¶ 23, Ex. 8: Fax cover sheet.

The "Exclusive Use Permit Letter" stated Defendant Gray (1) had reviewed Medina's request, (2) had discussed the application with Tucson Parks and Recreation staff, the Tucson Police Department and the City Attorney, and (3) further instructed Medina "it will be your responsibility to monitor access (and) in the event that you wish to deny someone access, or request someone leave the designated 'exclusive use' area, it will be your responsibility to tell them to do so. Should anyone refuse your request you would need to contact Tucson Police Department staff on site via 911." (P's MSJ (Doc. 100) at 9-10 (citing Ex. 9 (Doc. 100-2): 4/27/2012 Excusive Use Permit letter.

The "Exclusive Use Permit Letter" dated April 27, 2012, was "cc'd" to Defendants Miranda, Rankin, Judge, and Ochoa. *Id.*

<u>The May 1, 2012, Rally</u>

"On May 1, 2012, Defendants McCarthy, Sayre and Lopez, *following the identical process TPD officers used from 2008-2010*, (1) positioned themselves at the entrance to Armory Park, (2) were already in place, and (3) did block Plaintiff when he attempted to enter to speak on matters of community concern." *Id.* at 10 (citing SOF (Doc. 100-2) ¶¶ 28, 33, (Warden Depo. (Doc. 100-1) at 12.)

These procedures included: "Sometime prior to May 1, 2012 Defendant Tucson City Employees Ron Odell, Diane Salyes, Paul Patterson, Eric Hickman, Anne Beecroft, Anabel Teran, Bellamy Mong, Brian Cobb, Clas Leighton, Marco Alcantar, Ernesto

Valarde, Andy Vera and Jose Gomez, attended a "Civics Affairs Meeting" and met with Pima County Government employees Melissa Loeschen, Nina Armstrong, and Jim Faas, and Defendant-in-Default CWIR members Paul Teitelbaum, Jon Miles, and Pancho Medina and formulated a plan to deny Plaintiff entry into Armory Park on 31 May 1, 2012. (P's Response to Ds' MSJ, SOF (Doc. 116-1) at ¶ 33p, Ex. 21 (15-252COT0026): April 10, 2012 Civic Meeting Sign-up sheet).

Sometime in the early morning of May 1, 2012 just prior to the rally in Armory Park, Defendants McCarthy, Sayre and Lopez attended a "command briefing" with other high ranking Tucson Police and City Officials, whose identities are unknown, and formulated a plan to allegedly: (1) support the political objectives of Defendant-in-Default CWIR and (2) violate Plaintiff's First Amendment rights later that day in Armory Park, in spite of the "Rankin Letter" dated April 8 12, 2006 which, in sum and substance, stated, "keeping Warden out of Armory Park was illegal". *Id.* ¶ 33q, (Warden Affid. (Doc. 116-5) ¶ 54).

"Thus; on May 1, 2012, Defendants McCarthy, Sayre and Lopez, acting in accordance with the plans described in subsection q above, (1) positioned themselves at the entrance to Armory Park, (2) were already in place, and (3) did block Plaintiff when he attempted to enter Armory Park to attend a public meeting on matters of community concern. *Id.* ¶ 4, (Warden Affid. (Doc. 116-5) ¶ 55).

The Plaintiff submits that the rally was open to the public, including being advertised by a flyer as: an "open to all community members who share our commitment to social justice and peace." (P's Response to Ds' MSJ, SOF (Doc. 116-2), Ex. 2.) He admits, however, that the area was fenced, (P's MSJ, SOF, Warden Depo. (Doc. 100-3) at 18), and that rally organizers were positioned at the entrance and kept him from entering the rally, (Ds' MSJ, SOF (Doc. 100-3): Warden Depo. at 2).

According to the Plaintiff, it "was announced as a public meeting, where the public will get together and discuss the issues regarding workers' rights and immigrants' rights." (Ds' MSJ, SOF (Doc. 100-3): Warden Depo. at 22.) It was a private event held

in a public forum, free and open to the public, who just like him wanted to communicate with one another about these topics. He argues that he did not ask the Coalition to allow him to participate in the rally as a speaker, but merely wanted to communicate to the rally attendees his views regarding illegal immigration. (P's Resp. to Ds' MSJ (Doc. 116) at 9-10.)

The Plaintiff misstates the evidence. The rally announcement was not an invitation to a public meeting; the Coalition invited the public to a march and rally "that [was] free and open to all community members who share[d] [the Coalitions'] commitment to social justice and peace." (P's Resp., SOF (Doc. 116-2): Ex. 2.) The Plaintiff misrepresents his desire to participate as being non-confrontational, asserting he did not go to "protest and oppose" them but to communicate on shared worthy ideals of civil liberties and human rights, (Ds' MSJ, SOF (Doc. 100-3): Warden Depo. at 22); (D's Response (Doc. 116) at 7 ¶ 10), but he admits to stark disagreements with the leaders of the rally, and admits that he wanted to exercise his right to free speech to tell the crowd at the rally their leaders had lied to and deceived them because illegal immigration exploits and impoverishes Mexicans for the financial benefit of others, including the Defendants, (P's Resp. to D's MSJ, SOF (Doc. 116-1) ¶¶ 7-15). The Court concludes that the Plaintiff, by his own admission, sought to attend the rally to speak as a counter-protestor against illegal immigration.

The Plaintiff seeks summary judgment under *Gathright* because a private event held in a public forum, free and open to the public, does not transform the nature of free speech under the First Amendment. He alleges his First Amendment rights were violated because the City Defendants authorized, pursuant to City ordinances and permit, the Coalition to exclude him from the rally, and the City Defendants further violated his rights by enforcing the Coalition's decision to exclude him from the rally.

"In *Gathright*, the plaintiff sued the City of Portland alleging that his free speech rights were violated by a city ordinance prohibiting any person from unreasonably interfering with a permittee's use of a public park. On multiple occasions, Portland

police officers forced Gathright, a preacher, to leave open [public] events he attended because Portland police enforced the right of permit holders sponsoring an event to evict any member of the public who espoused a message contrary to the permit holder." (Order (Doc. 29) at 6 (citing *Gathright*, 439 F.3d at 575). The Ninth Circuit applied the reasonable time, place, and manner test for speech restrictions in a public forum established in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), and concluded that the City infringed Gathright's First Amendment rights because Portland's ordinance and enforcement policy was not narrowly tailored to serve a significant interest[5] in protecting the free speech rights of those who have obtained permits to use public land for events open to the public. *Gathright*, 439 F.3d at 577; *see also Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892 (9th Cir. 2008) (following *Gathright* and finding First Amendment violation where police removed a political volunteer from public sidewalk, reserved by private party, the Nugget, as a space for rib cook-off, free and open to the public, following a complaint from the Nugget).

Plaintiff also seeks summary judgment on his claim of retaliation. Plaintiff alleges that he "has publicly excoriated" the City Defendants Rankin and Miranda, and in retaliation for his speaking out against them they excluded him from the Armory Park rally. (P's Resp. to Ds' MSJ, SOF (Doc. 116-1) ¶¶20-21) (emphasis in original).

3. Defendants' Cross Motion for Summary Judgment

The Court finds no substantive difference between the relevant facts alleged by the parties, but they disagree regarding their legal conclusions, and the Defendants also object to some of Plaintiff's alleged facts as not supported by the evidence. Specifically, he offers only a self-serving affidavit and declaration to support his views regarding the plans allegedly formulated between the Defendants. For example, there is no other evidence to support Plaintiff's assertion that the City planned to support the political objectives of the Coalition or to knowingly violate the Plaintiff's First Amendment rights.

[5] The Court in *Gathright* accepted, without deciding, that the city had a significant interest in protecting free speech of permittees. *Gathright*, 439 F.3d at 577. This Court assumes the same.

The Plaintiff makes these allegations in respect to the Civic Event meeting held on April 10, 2012, to coordinate various community events with members of both the private and public sectors, (Ds' Resp. to P's MSJ, SOF (Doc. 116) ¶ 26), and in respect to what the Plaintiff calls the "command briefing" held on the morning of the rally, *id.* ¶ 60-63. His assertion that Defendants' planned to violate his First Amendment rights is based on his assertion that *Gathright* and Rankin's April 12, 2006, *Gathright* memo applied to May Day rally. The Court does not need to resolve whether the City supported the Coalition's political goals. What is important is whether *Gathright* applies to the May Day rally. Defendants admit that they planned to enforce the exclusive use permit issued to the Coalition by preventing the Plaintiff from entering the May 1, 2012, rally at Armory Park.

Tucson Police Lt . Sayre explains that "[t]he Coalition staffed the entrances to the exclusive use area with peacekeepers,[6] including [activist] Jon Miles, who was in charge of security for the May 1, 2012, event, and [Sayre] coordinated with them for a peaceful, non-violent event. Mr. Miles was in direct contact with police in the event disruptive persons showed up at the exclusive use area that he wanted removed." (Ds' MSJ, SOF (Doc. 102), Ex. D: Sayre Decl. ¶ 5.) On May 1, 2012, when Plaintiff appeared at Armory Park, he was informed by Lt. Sayre, Lt. Lopez, and Captain McCarthy, that the permit holders would not allow him entry into their exclusive use area of Armory Park. *Id.* ¶ 7.

Police allowed the Plaintiff to, and he did, counter-protest with a bull horn on the sidewalk across the street from the rally entrance for several minutes as marchers walked past him. Plaintiff's message was against open borders and not shared by the protesters at the Armory Park rally. "No members of the Tucson Police Department interfered with Mr. Warden's counter-protest and no restrictions were placed upon him." *Id.* ¶ 8.

Subsequently, Plaintiff attempted to enter into the exclusive use area of Armory Park through one of the entrances. Mr. Miles was present and denied Mr. Warden entry

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[6] Jon Miles is an activist, who organizes volunteer "peacekeepers" for marches and events. He is involved with Derechos Humanos, Veterans for Peace, and Salt of the Earth Labor College. www.keywiki.org.

to the rally. Tucson Police, including Lt. Sayers, "reinformed Plaintiff that he was not permitted entry because the permit holders had exclusive use of areas of the park and did not want him inside." *Id.* ¶ 9.

Miles had coordinated peacekeeping and security for the May 1 rallies from 2006 through May 1, 2012, and was there in 2006 when the Plaintiff entered the park at the end of the march and made comments about Mexicans which Miles perceived to be inflammatory and racist, and Plaintiff burned a Mexican flag. "[A] riot broke out resulting in violence and several arrests by the Tucson Police Department." (Ds' MSJ, SOF (Doc. 102-2), Ex. C: Miles Decl. ¶ 2.)

The Coalition obtained exclusive use permits after 2006 for the May 1 rallies in order to exclude the Plaintiff and any others the Coalition believed did not share the Coalition's belief in peaceful protest for immigrants' rights. *Id.* ¶ 3. Mr. Miles obtained, and members of the Coalition installed, orange snow fencing on the borders of the area of the park outlined by the permit. "The Coalition, with the aid of the fencing and monitored entrances, permitted only those persons sharing our message of worker and immigrant rights to enter Armory Park during our rally." *Id.* ¶ 4.

On May 1, 2012, Miles reportedly saw the Plaintiff outside the rally area as marchers arrived at the park. The Plaintiff was delivering his message via bull horn to the members of the May 1 Coalition march. His message was not consistent with the Coalition's message of worker and immigrant rights." *Id.* ¶ 6. According to Miles, he told the Plaintiff "he was not welcome inside Armory Park," and the Defendant police officers informed the Plaintiff he was not allowed inside Armory Park because the May 1 Coalition had an exclusive use permit for the park. *Id.* ¶ 7. The Plaintiff left. *Id.*

The Defendants argue that *Gathright* does not control the May 1, 2012, rally because the Coalition secured an exclusive use permit as compared to the May 1, 2006, rally, which was held pursuant to a general permit reserving Armory Park for a rally open to the public. In other words, *Gathright* controlled the 2006 rally. In 2006, Plaintiff could not be excluded, and was not excluded, from the rally. Thereafter, including in

2012, the Coalition obtained exclusive use permits for their annual rallies, fenced the rally area, controlled access to the rally, and limited it to the community that shared the Coalitions' vision of worker and immigrant rights. In other words, *Gathright* did not apply to the May 1, 2012, rally.

The Defendants seek summary judgment as a matter of law under *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557 (1995), where the Court held that the state could not require private citizens who organized a parade through public streets to include among the marchers a group imparting a message the organizers did not wish to convey. The holding turned on the rationale that a parade makes a collective point and is, therefore, expressive. "One who chooses to speak may also decide 'what not to say,'" *id.* at 573 (quoting *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal*., 475 U.S. 1, 11, (1986)), and generally "the state may not compel affirmance of a belief with which the speaker disagrees," *id.* (quoting *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 642 (1943)).

Gathright distinguished *Hurley,* finding a difference "between participating in an event and being present at the same location." *Gathright,* 439 F.3d at 577. Mere presence does make one part of the organizer's message for First Amendment purposes. *Gathright,* 439 F.3d at 577. *Hurley* does not extend to circumstances where a speaker in a public forum seeks only to be heard, not to have his speech included or possibly confused with another's." *Id.* at 578. Under *Gathright,* a private event that takes place in a traditional forum, free and open to the public, does not transform the First Amendment, and speech must be allowed if there is no risk of mistaking it as part of the message being conveyed by the organized event. *Id.* at 578. But does the *Gathright* distinction hold when the public event is a political rally?

In the Sixth Circuit, *Hurley* has been directly applied in the context of a rally. "A public rally is speech to the same extent that a parade is speech." *Sistrunk v. City of Strongsville,* 99 F.3d 194, 199 (6th Cir. 1996). "[P]articipating in the rally as a member of the audience is more akin to marching in the parade itself as one of the less visible

marchers," *id.*, as compared to standing along the parade route and protesting, *see Mahoney v. Babbitt,* 105 F.3d 1452, 1456 (D.C. Cir. 1997) (refusing to extend *Hurley* to protestors along parade route). In *Sistrunk,* the court reasoned that "the organizers of the Bush-Quayle rally sought to assemble in order to convey a pro-Bush message to the media by use of pro-Bush speakers and largely pro-Bush attendees." *Id.* In the Sixth Circuit, the law is clear that *Hurley* applies to political rallies. In *Sistrunk,* the court held that the First Amendment does not require organizers of a political rally to include counter-speech that would alter the message the organizers seek to send to the media and other observers, even if counter-protestors do not otherwise interfere with the rally. Counter-protestors need not be permitted to participate in the rally by expressing discordant views, even where the rally is held in the public town Commons. *Id.* The City of Tucson relies on *Hurley* and *Sistrunk. See also, Schwitzgebel v. Strongsville,* 898 F.Supp.1208 (Ohio 1995) (no first Amendment violation were counter-protestors were arrested after ruckus ensued when they held up anti-Bush-Quale protest signs at a Bush-Quale rally); *Bishop v. Reagan-Bush '84 Comm,* 819 F.2d 289 (6th Cir. 1987) (finding no First Amendment violation where counter-protestors required to relinquish placards before attending political rally on public commons).

Defendants McCarthy, Sayre and Lopez, the Defendant Police Officers, are all entitled to qualified immunity, which shields federal and state officials from money damages unless a Plaintiff can show that the official violated a statutory or constitutional right and that the right was clearly established at the time of the challenged conduct. *Ashcroft v. al-Kidd,* 563 U.S. 731, 737 (2011). The law must be so clear as to give an officer a "fair and clear warning of what the Constitution requires," and qualified immunity applies unless "a reasonable officer could not have believed that his actions were lawful." *Id.* at 746 (quoting *Wilson v. Layne,* 526 U.S. 603, 617 (1999). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* at 737 (quoting

Wilson, 526 U.S. at 618). In 2012, the law was not clearly established as to whether it violated the First Amendment to prevent a counter-protester from entering an exclusive permit area being used for a political rally. The Court turns to that question.

4. The First Amendment

The Plaintiff, like the plaintiff in *Gathright*, "asserts his classic right to preach in the town square." *Gathright*, 439 F.3d at 576 (citing *Hurley v. Irish–American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995) ("Our tradition of free speech commands that a speaker who takes to the street corner to express his views . . . should be free from interference by the State based on the content of what he says.")).

Pro or anti-immigration speech is political speech, the "primary object of First Amendment protection." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 410-411 (2000) (Thomas, J., dissenting). Armory Park is a traditional public forum, like a public park or street, which since "time out of mind have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983).

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech." First Amendment rights are protected from infringement by state actors under the Fourteenth Amendment. *Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947). The extent to which a person has a right to free speech depends on three things: 1) whether the speech is protected, 2) the nature of the relevant forum, and 3) the justifications proffered by the government for limiting access to the forum. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985).

The Plaintiff relies on *Gathright*, and the Ninth Circuit's invalidation of a City of Portland ordinance which made it unlawful for any person unreasonably to interfere with a permittee's use of a park and allowed permit holders sponsoring a public event to evict any member of the public who so interfered. The Court held it violated the First Amendment for the City to enforce a permittee's exclusion of a person from an open public event for unreasonable interference because the ordinance could reach protected

speech which any permittee, user, guard or police officer concluded might be unreasonable. *Gathright,* 439 F.3d at 579-580.

Here, the City of Tucson regulations preclude any person in a park from "disturb[ing] or interfer[ing] unreasonably with any person or party occupying any area, or participating in any activity, under the authority of a permit license or reservation." TCC 21-3(7.4). Further, "a permit, license or reservation for use shall be obtained from the director/district administrator by persons conducting, operating, presenting or managing any of the following activities," including "the reservation of any park facilities for a certain person or group of persons to the exclusion of others." TCC 21-4(a)-(b.6).

This case does not fit squarely within *Gathright*, where Gathright sought to speak at events being held pursuant to general permits issued to private organization to hold events open to the public. Here, the Coalition sought and was granted an exclusive use permit, pursuant to TCC 21-4(b.6) to hold a political immigrant-rights and worker's rights rally to the exclusion of anti-immigrant hate groups and the use of alcohol, drugs and weapons. (Ds' MSJ, SOF, Ex. F.1 (Doc. 102-2): Medina letter 3/19/2012.)

The City granted the permit, with a map designating the exclusive use area, and directives to the permittee that the Coalition was required to monitor access to the exclusive use area, and in the event the permittee wished to deny someone access, or request someone leave the designated area, it was the permittee's responsibility to do so. "Should anyone refuse [the] request [the Coalition] would need to contact the Tucson Police Department staff on-site via '911.'" *Id*. at Gray letter 4/27/2012. Individuals being asked to leave the exclusive use area would be allowed to remain in the public areas. A disturbance or incident in any other area of the park that disturbs the permittee's exclusive use would be handled by Parks and Recreation staff or police. *Id.*

Here, the Plaintiff was precluded from entering the May Day rally based on the Coalition's say-so. *Id.* at Ex. D (Doc. 102-2): Sayre Decl. ¶¶ 7, 9. To be clear, a permittee like the Coalition, having exclusive use of an area, need not make any finding regarding

interference—it is enough to simply want to exclude someone for any reason or no reason at all. The City ordinances and permit procedures reserve enforcement decisions to the discretion of the police. In this case, the City police enforced the exclusive use permit issued to the Coalition to exclude the Plaintiff.

It is undisputed the Plaintiff did not enter the rally, did not interfere with the permittee's exclusive use of the permitted area, and was allowed to counter-protest outside the rally. He was not excluded pursuant to TCC 21-3(7.4), the park regulation prohibiting any person in a park from "disturb[ing] or interfer[ing] unreasonably with any person or party occupying any area, or participating in any activity, under the authority of a permit license or reservation." There was no determination by either the Coalition or the police that the Plaintiff would unreasonably disturb or interfere with the rally. The Court assumes that the police would constitutionally apply the prohibitions in TCC 21-3(7.4), but its enforcement is not an issue in this case. Here, the Plaintiff was excluded from the rally because the Coalition did not want him there based on his past, present, and intended ongoing future denunciation of illegal immigration.

The question in this case is whether the Plaintiff had a First Amendment right to express his views at the time and place reserved exclusively for another event, specifically the Coalition rally which was being held to express pro-immigrant rights and protest treatment of illegal immigrants. In the Sixth Circuit, the question is answered in *Sistrunk:* no, *Hurley* applies and "the city may not constitutionally require a permittee organization to include discordant speakers in its expressive activity." *Hurley,* 515 U.S. at 198.

In the Ninth Circuit, the answer begins with the question of state action. *Villegas v. Gilroy Garlic Festival Ass'n,* 541 F.3d 950, 957 (9th Cir. 2008) (en banc). Relief under 42 U.S.C. § 1983 for a constitutional violation exists only if the challenged conduct was performed under color of state law. *Shelly v. Kramer,* 334 U.S. 1, 13 (1948). "It is generally not a constitutional violation for a police officer to enforce a private entity's rights." *Id.* It is not unconstitutional "'to exclude others from public property during the

course of a limited, permitted use'" or "'every picnic, wedding, company outing, meeting, rally, and fair held on public grounds would be subject to constitutional scrutiny.'" *Id.* (quoting with approval *Villegas*, 363 F. Supp.2d 1207, 1216 (Cal. 2005)).

The Coalition is a private entity, which can only be subject to liability under § 1983 "if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). There is no evidence to even hint at a close nexus, which depends on factors such as: 1) the organization is mostly comprised of state institutions; 2) state officials dominate decision making of the organization; 3) the organization's funds are largely generated by the state institutions, and 4) the organization is acting in lieu of a traditional state actor. *Id.* at 295-99. Cities, including Tucson, are not traditionally in the business of organizing, managing, and promoting rallies. *Id.* at 956 (citing *United Auto Workers v. Gaston Festivals, Inc.*, 43 F.3d 902, 907-908 (4th Cir. 1995) (holding festivals not within domain of functions exercised traditionally and exclusively by the government). The Plaintiff tries to make much of the various communications between the Coalition and the City but there is no evidence that the interaction between the two went beyond those necessary to request and issue the permit, and to coordinate rally logistics such as security for the event.[7] In *Villages*, the Ninth Circuit found that even where security efforts were much more comingled, a private permittee was not a state actor simply because of the permit and event related activities. *Id.* at 955-957. The Coalition is not a state actor, and there is good cause to set aside the default entered against the Coalition for failing to answer. Fed. R. Civ. P. 55(c).

[7] A conspiracy under 42 U.S.C. § 1985(3) is an agreement between two or more individuals to deprive a person of some protected right, where on individual acts in furtherance of the objective of the conspiracy, and causes an actual deprivation of a constitutional right. In addition to there being no evidentiary support for this claim, it fails because there is no constitutional violation.

For purposes of the parties' cross motions, the Court assumes there is state action by the City. Their officers, in uniform and on duty, approached Plaintiff, even before the marchers arrived at the rally site, to inform him that the Coalition intended to exclude him.[8] When he approached the Coalition-volunteer security officer at the entrance to the rally, the City police did more than just stand by. They told the Plaintiff that they would enforce the Coalition's decision to bar his entrance, if he tried to enter the rally. The permit instructed the Coalition to call police if a person refused a request to leave; only City police had authority to enforce the permit.[9] *Villegas*, 541 F.3d at 963 (Thomas, dissenting) (finding under similar facts there was no doubt police officers acted under color of law) (citing *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980) (holding off-duty officer serving as security at bank was acting under color of law when he flashed his badge during arrest).

Finding state action exists, the Court must decide whether the City violated the Plaintiff's First Amendment right to free speech by denying him entry into the May Day rally. Similarly, the question, answered *en banc* with one judge dissenting, in *Sistrunk* was whether the First Amendment "prohibits the city from issuing permits to groups seeking to make exclusive use of the Commons for expressive activity during a limited period of time." *Sistrunk*, 99 F.3d at 198. The majority in *Sistrunk* found that the

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[8] Plaintiff complains that the Coalition was told to contact police by 911 but instead police were on the scene to confront him. The Court finds no constitutional significance to this fact. It is undisputed that all parties knew: 1) the exclusive use permit was sought by the Coalition in part to exclude the Plaintiff; 2) he intended to enter the rally and speak against illegal immigration; 3) the Coalition intended to exclude him, and 4) police would be on-site, and 5 police would be required to enforce the exclusion. This was a repeat performance since 2007, the year after the May Day 2006 "riot" when the Coalition began obtaining exclusive use permits for the May Day rally. The Court finds no reason to require a 911 call.

[9] Because the Court finds there is no violation of Plaintiff's First Amendment rights, it does not need to reach the question of municipal liability, which under *Monell v. Dep't of Social Servs. of N.Y.*, 436 U.S. 658, 690 (1978), requires a municipal policy or custom to be the moving force behind the constitutional violation. *See Villegas*, 541 F.3d at 957-58 (city police annual practice of providing security at festival including removal of attendees for violations of dress code, not enough), *but see Villegas*, 541 F.3d at 965 (Thomas, J., dissenting) (triable issue of fact under *Monell* because little doubt city had policy of assisting with festival law enforcement, including dress code).

Supreme Court suggested in *Hurley* "that the city may not constitutionally require a permittee organization to *include* discordant speakers in its expressive activity." *Id.* (emphasis in original). The dissenting judge would not have applied, *Hurley.* In a case of dueling First Amendment rights, the Court will only uphold viewpoint-based restrictions when the regulation is narrowly tailored to promote a compelling state interest, *id.* at 202 (Spiegel, dissenting) (citing *Perry,* 460 U.S. at 45), pursuant to an analytical framework that considers: the nature of the relevant forum and the justifications for exclusion, *id.* at 202 (Spiegel, dissenting) (citing *Bishop v. Reagan-Bush '84 Committee*, 1987 WL 35970 (6th Cir. May 22, 1987)). The Sixth Circuit took up the question again in *Parks v. City of Columbus,* 395 F.3d 643 (6th Cir. 2005). In *Parks,* an evangelical Christian was precluded from proselytizing at a privately sponsored art fair, free and open to the public, which was held pursuant to a non-exclusive block party permit, *id.* at 647, as compared to the political rally at issue in *Sistrunk,* which was permitted for the specific use of the Republican organization and its invitees. Unlike *Sistrunk,* where the court considered the rally to be a collective expressive activity, the court in *Parks* was hard-pressed to find the art fair actually expressed any particular message, *id.* at 651. So, *Hurley* in no way applied.

In *Parks,* the court considered whether the City had the power to convert a public forum, the Commons, into a private forum. The court looked first to the nature of the forum because whether it is public or nonpublic determines the standard for assessing the extent to which the government may limit free speech. Then, the court must determine if the government's reasons for prohibiting speech satisfy the appropriate standard. *Id.* at 647.

Turning first to the nature of the forum, the court explained that "forum analysis is not completed merely by identifying the government property at issue." *Id.* at 652. The court "must also look to the access sought by the speaker." *Id.* Parks was attempting to exercise his First Amendment right to free speech at an art festival, free and open to all, which was being held on public streets in downtown Columbus, Ohio. Because Parks

wanted access, generally, to the entirety of the public property, the streets remained a traditional public forum, notwithstanding the existence of a permit for a block party. State action existed because the permit scheme allowed a permit holder unfettered discretion to exclude from the public forum someone exercising his constitutionally protected rights, with police enforcement. *Id.* at 653.

"'Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.'" *Id.* at 653 (quoting *Cornelius*, 473 U.S. at 799–800)). "Nevertheless, traditional public fora 'have been devoted to assembly and debate, [therefore] the rights of the state to limit expressive activity are sharply circumscribed.'" *Id.* (quoting *Perry*, 460 U.S. at 45). In traditional public fora, "the state may only enforce a content-based exclusion if actions meet the strictest scrutiny, and therefore must 'show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Id.* "On the other hand, 'the state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" *Id.*

The court in *Parks* concluded the preacher's removal from the art festival was based on the content of his speech, applied the strictest of scrutiny, and found the City had "not offered any interest, let alone a compelling one, to explain why it prohibited Parks from exercising his First Amendment rights in a traditional public forum." *Id.* at 654.

Parks and *Sistrunk* are important because the Ninth Circuit relied on them in *Gathright.* It rejected application of *Hurley* in a *Parks* type scenario, where Gathright, also an evangelical preacher, sought to preach outdoors to the general public, specifically at privately sponsored, city-permitted events, open to the public. But, this case is not like *Parks* or *Gathright.* This case is like *Sistrunk*, and *Hurley* applies. The City may not

constitutionally require a permittee organization, like the Coalition, to include discordant speakers in its collectively expressive activity, the May Day rally. Even if *Hurley* does not apply, this case remains distinguishable from *Parks* and *Gathright.*

Applying the analytical framework suggested in *Parks* for considering dueling First Amendment rights, the Court considers the government property at issue, Armory Park, which as previously noted is a quintessential traditional public forum. The Court must also look to the access sought by the Plaintiff to that property. Here, the Plaintiff wants access to that part of Armory Park being used exclusively by the Coalition for the May Day rally. This Court must answer the question: whether the part of Armory Park the Plaintiff seeks to access remains a traditional public forum, notwithstanding the exclusive use permit.

If so, strict scrutiny applies because the speech is political and the place is a traditional public forum, the government may restrict speech only as to time, place, and manner and only if the restriction is content neutral, narrowly tailored to achieve a significant government interest, and leaves open ample alternative channels of communication. To pass strict scrutiny, the government must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *Perry,* 460 U.S. at 45.

"Permit systems are the embodiment of time, place, and manner restrictions that have long enjoyed the approbation of the Supreme Court." *Kroll v. U.S. Capitol Police,* 847 F.2d 899, 903 (D.C. Cir. 1988) (citing *Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S. 640 (1980); *Grayned v. City of Rockford,* 408 U.S. 104 (1972); *Cox v. New Hampshire*, 312 U.S. 569 (1941)). "The rights of free speech and assembly . . . do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time" because "the constitutional guarantee of liberty itself . . . would be lost in the excesses of anarchy." *Cox,* 379 U.S. at 554. Courts have found "one of the most important reasons behind allowing for government-sponsored permit systems is to prevent a multitude of individuals with different messages

from expressing their views simultaneously, resulting in a cacophony where no one's message is heard." *Schwitzgebel v. Strongsill*, 898 F. Supp. 1208, 1216-1217 (Ohio 1995).

In *Schwitzgebel*, the court concluded that the plaintiffs, counter-protestors at a presidential campaign rally for George Bush, did not have First Amendment rights to intrude within an area reserved for another event still in progress where enforcement of the permit system left open ample alternative channels of communication for them. Plaintiffs, "'presumably would have had a fair shot . . . at obtaining a . . . permit of [their] own' to broadcast their message in the Strongsville Commons at another time." *Id.* at 1218 (quoting *Hurley*, 515 U.S. at 578). *Cf*, *Startzell v. Philadelphia*, 533 F.3d 183, 199 (3rd Cir. 2008) (finding that for gay rights street festival, held pursuant to a general permit, not an exclusive permit, the First Amendment allowed "government to arrange a public forum 'so that individuals and groups can be heard in an orderly and appropriate manner,' which is ample justification to move counter-protestors to preclude interference with permitted event, but still allow them to speak).

The City's permit ordinance, TCC § 21-4(b.6), and its issuance and enforcement of the Coalition's exclusive use permit passes this strict scrutiny test. The City restricted speech only as to time, place, and manner, and were, therefore, content neutral, narrowly tailored to achieve the significant government interest of ensuring that individuals and groups with differing views can be heard in an orderly and appropriate manner, and left open ample alternative channels for communication. On the day of the rally, the Plaintiff was allowed to speak just outside the rally and along the path of the march. Presumably, the Plaintiff would have been afforded a permit of his own to broadcast his message in Armory Park at another time.

If the area in Armory Park, permitted for the exclusive use of the Coalition's May Day rally, became a limited public forum—then a different less strict standard applies. Limited public fora are public property "limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Pleasant Grove City, Utah v. Summum*, 555

U.S. 460, 470 (2010) (citing *Perry,* 460 U.S. at 64 n. 7). In addition to time, place, and manner regulations, the state may reserve a limited public forum for its intended purpose, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. *Reza v. Pearce,* 806 F.3d 497, 503 (9th Cir. 2015) (citing *Perry,* 460 U.S. at 46). In other words, limitations on speech in limited public fora "'must be reasonable and viewpoint neutral, but that's it.'" *Id.* (quoting *Kindt v. Santa Monica Rent Control Bd.,* 67 F.3d 266, 271 (9th Cir. 1995)).

The question is whether the permitted rally area at Armory Park remained a traditional public forum on May 1, 2012, or was a limited public forum. The exclusive permit is not dispositive. It is merely some evidence that the City and the Coalition intended the use of Armory Park on May 1, 2012, between 7:00 am and 6:00 pm to be a private event, with access exclusively controlled by the Coalition.

A government may not *ipse dixit,* by magic words destroy a public forum. The Court looks to the nature and character of the event rather than the authority granted under the permit scheme. In other words, the Court applies the "[i]f it looks like a duck, and it walks like a duck, and it quacks like a duck, then it's probably a duck" test. *McMahon v. City of Panama City Beach*, 180 F. Supp.3d 1076, 1080, 1096, 1097-1099 (Flor. 2016).

In *McMahon,* the court found that a privately sponsored event, the Thunder Beach Motorcycle Rally, which was held in a traditional public park forum, was free and open to the public whereas the Gulf Coast Jam, which was a ticketed event held in the identical part of the same public park, was not. The court explained that "Thunder Beach *could* have taken steps to designate either the Site or the Thunder Beach event as a more limited forum. . . . Thunder Beach could have barricaded the event and charged admission. Even if it did not charge admission, and merely roped or otherwise demarcated the event as a purely private event (even to which all members of the public were invited), the event might be a limited forum." *Id.* at 1099. In *McMahon,* the court found that a private

event that takes place in a traditional public forum, and is free and open to the public, does not transform the nature of the forum during the event for purposes of the First Amendment. *Id.* at 1099 (citing *Gathright*, 439 F.3d at 576-577).

"*Facts matter.* It's not about what permit holders *can* do, it's about what they *do* do." *Id.* at 1099 (emphasis in original). "In order to transform a traditional forum into a more limited one, there must be some sort of visible, meaningful distinction setting the event apart from the venue on which it is held. There must be a change in the 'nature,' 'use,' 'characteristics,' 'purpose,' or 'function' of the forum." *Id.* at 1099-1100 (quoting *Bloedorn v. Grube*, 631 F.3d 1218, 1233-34 (11th Cir. 2011)) (citing *Arkansas Edu. Television Com'n v. Forbes*, 523 U.S. 666, 677 (1998); *United States v. Frandsen*, 212 F.3d 1231, 1237 (Fla. 2000)). In *McMahon*, the court suggested the following: barricades, barriers, attendants meaningfully limiting egress and ingress, and signs conveying a message to the effect of "private event—no trespassing." In short, a person should not be able to "choose to walk in to the event just as one could choose to walk to the same location on a given weekend when an event is not being held." *McMahon*, 180 F. Supp.3d at 1096.

Here, the facts reflect that the Coalition sought and obtained an exclusive use permit. The Coalition fenced the perimeter of the rally, they secured the entrance and exit points, they provided their own volunteer security people to control ingress and egress, and to remove unwanted attendees. The Plaintiff points to the Coalition's public announcement that the event is "free and open to all community members who share our commitment to social justice and peace." (P's Reply (Doc. 120-2): May Day march.) Even if the Court ignored that the invitation was limited to those sharing the Coalition's views, inviting the public, even offering free attendance, is not dispositive. The question is: whether there was some visible, meaningful distinction setting the May Day rally apart from other, free and open to the public, events at Armory Park. The answer is: yes. The public could not just walk up and enter the rally. The Coalition stationed security at the entrances to control access to the rally, including keeping people out like the Plaintiff.

Gathright does not apply because the May Day rally was sponsored by a private organization, the Coalition, and was held in a limited public forum, free and open to the Coalition's invitees: community members who shared their ideals.

The Court finds that the issuance and enforcement of the exclusive use permit was a reasonable time, place, and manner restriction on speech, reserving the rally area for its intended purpose. Plaintiff alleges, and the evidence supports, that the City issued and enforced the exclusive use permit related to the May 1, 2012, rally the same as it enforced all exclusive use permits. The permittee was responsible for asking unwanted persons to leave, with police enforcement. The exclusion from the rally was not an effort to suppress expression merely because public officials opposed the Plaintiff's views. In short, the limitations imposed by the City on Plaintiff's speech were reasonable and viewpoint neutral.

5. Conclusion

This Court finds that *Hurley* applies. The City may not constitutionally require a permittee organization like the Coalition to include discordant speakers in its rally, a collectively expressive activity. Even if *Hurley* does not apply, that area in Armory Park exclusively permitted for the rally on May 1, 2012, was a limited public forum, which pursuant to a neutral reasonable time, place, and manner regulation, the City reserved for its intended purpose. Even if Armory Park remained a traditional public forum, subject to strict scrutiny, Plaintiff's speech was subject to a neutral, time, place, and manner restriction, narrowly tailored to achieve the significant government interest in protecting the free speech rights of permittees by ensuring that these individuals and groups, having differing views, can be heard in an orderly and appropriate manner, and the City left open ample alternative channels for communication. There was no constitutional violation of Plaintiff's First Amendment rights.

Plaintiff's retaliation claim fails. He alleges the Defendants Rankin and Miranda retaliated against him for speaking out at various public civic meetings, exposing the City's engagement in an alleged "open border policy" and "cronyism." Since Defendants

did not violate Plaintiff's constitutional rights, there was no improper action taken by any Defendants to chill the Plaintiff's continuing engagement in any protected activities, including speaking out about the City's alleged "open border policy" and engagement in "cronyism." *See O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016) (elements of First Amendment retaliation claim include: 1) plaintiff engaged in a constitutionally protected activity, 2) defendant's actions would chill person of ordinary firmness from continuing to engage in protected activity, and 3) protected activity was a substantial or motivating factor in defendant's conduct).

Accordingly,

IT IS ORDERED that the Plaintiff's Motion for Summary Judgment (Doc. 99) is DENIED.

IT IS FURTHER ORDERED that the Defendants' Motion for Summary Judgment (Doc. 101) is GRANTED.

IT IS FURTHER ORDERED that all remaining motions (Docs. 104, 121, and 123) are DENIED.

IT IS FURTHER ORDERED that the entry of default against the Coalition is set aside.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter Judgment for the Defendants and against the Plaintiff.

Dated this 21st day of July, 2017.

Honorable David C. Bury
United States District Judge