The Fourteenth Amendment Equal Protection Claim[1]

Plaintiffs' second claim is that they were denied equal protection under the law, in violation of the Fourteenth Amendment, when, Plaintiff claims, the Defendants treated Plaintiffs differently from other persons arrested during the relevant period, thereby discriminating against them. The Fourteenth Amendment to the Constitution provides that:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to deny any person within its jurisdiction the equal protection of the laws."

In order to establish a violation of equal protection under the Fourteenth Amendment, the Plaintiffs first must prove by a preponderance of the evidence that (1) the Defendants treated them differently/discriminatorily from other similarly situated individuals, (2) this different/discriminatory treatment impermissibly infringed on the exercise of Plaintiffs' fundamental right to freedom of speech, and (3) was not necessary to serve a compelling governmental interest.[2] You do not have to find that Plaintiffs have a right to a DAT or summons in order to find a violation of the First Amendment. It is enough if Plaintiffs have demonstrated that they were denied consideration for a DAT or summons because they were involved in expressive activity. In considering whether or not the defendants' policy violated the plaintiffs' constitutional rights, it is not relevant whether or not the plaintiffs were convicted of the charges for which they were arrested.

With respect to the first element, you must determine whether the Plaintiffs were similarly situated to other people who were arrested between April 1, 1999 and July 13, 1999 for the same types of offenses as the Plaintiffs but who were not seeking to express a message when arrested.[3] You must reach your conclusion based upon the

---

[1]Derived from *Circulo* Charge.

[2]*City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Regan v. Taxation With Representation of Washington,* 461 U.S. 540, 547 (1983) ("Statutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right, such as freedom of speech."); *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981)*; Scarbrough v. Morgan County Bd. of Educ.*, --- F.3d ----, 2006 WL 3375340, at *8-9 (6th Cir. Nov. 22, 2006) ("The threshold element of an equal protection claim is disparate treatment. Once disparate treatment is shown, the equal protection analysis to be applied is determined by the classification used by government decision-makers."); *Bery v. City of New York*, 97 F.3d 689, 699 (2d Cir. 1996) ("Since the ordinance does impermissibly impinge on a fundamental right, the district court incorrectly dismissed the equal protection argument under a rational basis test.").

[3]*Harlen Associates v. Incorporated Village of Mineola*, 273 F.3d 494, 499, n.2 (2d Cir.

evidence and your common sense.

2001) ("As a general rule, whether items are similarly situated is a factual issue that should be submitted to the jury," the exception being "a court can properly grant summary judgment where it is clear that no reasonable jury could find the similarly situated prong met"); *Lunini v. Grayeb*, 395 F.3d 761, 770, n.6 (7th Cir. 2005) ("We are cognizant of the fact that, as a general matter, whether individuals are similarly situated is a factual question for the jury.")

With respect to the second element, I instruct you as a matter of law that denying Plaintiffs consideration for a DAT or summons because they were engaged in expressive activity when they were arrested, and thereby holding them in custody overnight, impinged their fundamental right to freedom of speech, regardless of whether the Defendants intended to punish or deter the Plaintiffs' expressive activity or not.[4]

As for the third element, the burden shifts to the Defendants to prove by a preponderance of the evidence that their discriminatory treatment of Plaintiffs was necessary to serve a compelling governmental interest.[5] To be a compelling interest the Defendants must show that the alleged objective was "of the highest order,"[6] that it was the Defendants' actual purpose for the discriminatory treatment, and Defendants must have had a "strong basis in evidence to support that justification before it implementedthepolicy..[7]

Defendants contend that their "compelling interest" was the need to balance preserving the public safety with limited police resources based on the individual circumstances at a particular demonstration. If you find that this interest was compellingand that denying the Plaintiffs individual consideration for DATs or summons was necessary to serve this interest, then the Defendants are not liable. However, I instruct you as a matter of law that, if you find that the plaintiffs were denied consideration for a DAT or summons merely because they engaged in expressive activity, then the individual circumstances at a particular demonstration do not constitute a compelling interest. If you find the Defendants' proposed interest was not compelling or that the discriminatory treatment of the Plaintiffs was not necessary to serve this interest, then you must return a verdict for the Plaintiffs.

---

[4]*Make The Road by Walking, Inc. v. Turner*, 378 F.3d 133, 142 (2d Cir. 2004) ("[f]reedom of expression ... is a fundamental right, essential to our democratic society") (citations omitted).

[5]*Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) ("any classification which serves to penalize the exercise of . . . [a constitutional right], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."); *Harper v. State Board of Elections*, 393 U.S. 663, 665 (1966) ("where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined").

[6]*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

[7]*Shaw v. Hunt,* 517 U.S. 899, 908 n. 4 (1996) ("To be a compelling interest the State must show that the alleged objective was the legislature's actual purpose for the discriminatory classification" and must have a "strong basis in evidence to support that justification before it implements the classification.").