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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

SIERRA CLUB, Plaintiff, vs. **CITY OF BOISE**, an Idaho municipal corporation, Defendants.	Case No. 1:24-cv-169 **BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

The megaphone is the very symbol of public protest. For years, Boise protesters freely used megaphones throughout Boise's public places, unmolested. But recently the City of Boise has begun wielding an ancient amplified sound ordinance—one that's stood unamended in its books since before the modern era of First Amendment jurisprudence—to ticket, arrest, and jail peaceful protesters.

The Sierra Club, including its Climate Justice League comprised of young student climate activists, was among those groups that freely used megaphones in its protests before the City's new enforcement trend. But since it learned about the City's recent

crackdown on downtown Boise protesters, it has censored itself. Because its student leaders are planning a protest for noon on April 19, 2024, to march to Boise City Hall while using a megaphone, they ask this Court to preliminarily enjoin these laws.

FACTS

The City's amplified sound ordinance criminalizes using a megaphone or other "loud amplification device" when plainly audible on a street or other public right-of-way 100 feet away or more or inside a residence. Boise City Code (BCC) § 5-7-3. But the ordinance is riddled with exemptions. BCC § 5-7-4. Outdoor activities at any church or other religious facility are exempted. BCC § 5-7-4(B). Outdoor activities at all schools, both public and private, are too. *Id.* Outdoor activities on City and other public property can be exempted as well, but only if the public property owner has deigned to "authorize[]" them. *Id.* No standards constrain which activities officials may authorize or deny. *See id.* Fast food drive-through speakers and car lot PA systems, among other commercial conveniences, are exempted wherever those commercial uses are otherwise allowed. BCC § 5-7-4(G). A variety of other loud and obnoxious sounds are also exempted, including those from burglar alarms, trains and railroad equipment, and emergency vehicles, plus all fireworks, parades, and other public events—but only when they require a permit and not when they don't. BCC §§ 5-7-4(E), (D), (A), (C). This restriction and its attendant exemptions apply citywide. In this brief, this ordinance is called the "citywide megaphone restriction."

In City parks, a pair of confusingly inconsistent provisions apply. On the one hand, BCC § 7-7A-5(D)(4) prohibits "any activities which include amplified sound"

without getting a permit in advance, for which no articulated standards apply. But then BCC § 7-7A-7(C) seems to allow amplified sound up to 62 decibels at 20 feet without a permit, though again no articulated standards govern when the City must approve or may deny louder sounds. Regardless of if there's a way to make sense of these two together, BCC § 7-7A-5(D)(4) also prohibits every "meeting . . . or other public activity in a park" conducted without a permit—even meetings of just two people or public activities featuring a single individual. Violation of these ordinances, called the "park restrictions" in this brief, is a misdemeanor. See appendix for the text of all ordinances referenced in this brief.

Although violating the citywide megaphone restriction (BCC § 5-7-3) is supposed to be just an "infraction," for which nobody may be arrested under Idaho law, police in Boise are now arresting people for using megaphones in protests, contending that protesters are resisting and obstructing officers if they fail to hand over their megaphone. (Compl. ¶¶ 4, 12, 14; Luna* ¶¶ 2, 5, 6.) Not only do Boise police enforce the megaphone restriction in public forums in downtown Boise, but Idaho State Police threaten to enforce it even on the steps of the Idaho Capitol as well. (Eppink ex. A.)

The Sierra Club is a nonprofit organization engaged in public advocacy to protect the environment. In Idaho, one of the Sierra Club's primary methods of advocacy is to stage public demonstrations in Boise's streets, sidewalks, plazas, and parks. (Compl. ¶¶ 2, 3, 4; Young ¶¶ 1, 2, 3, 4, 5, 6, 10.) The Idaho Chapter's Climate Justice League, made up of high school and junior high students, is especially active in organizing these protests. (N.T.T. ¶¶ 1, 2, 4; N.R.T. ¶¶ 2, 3, 4, 6.) They were using megaphones in

violation of the City's ordinances without any issue until they learned about protesters being ticketed, jailed, and dragged off the streets just for using amplified sound while protesting. (Compl. ¶¶ 4, 5, 24, 25; Young ¶¶ 6, 7, 8, 9, 10; N.R.T. ¶¶ 6, 7, 8; N.T.T. ¶¶ 4, 5, 6.) The City's new and aggressive enforcement chilled them and they've since self-censored, scared to use a megaphone in most public places. (Compl. ¶¶ 4, 5, 24, 25; Young ¶¶ 7, 8, 9, 10; N.R.T. ¶¶ 7, 8, 9; N.T.T. ¶¶ 6, 7, 8.)

Beginning at noon on April 19, 2024, the Climate Justice League plans to march through downtown Boise to City Hall. (N.T.T. ¶ 8; N.R.T. ¶ 10; Young ¶ 12.) They want to use a megaphone and be free to meet and hold public activities in Boise parks. They ask this Court to issue a preliminary injunction preventing the City from enforcing its unconstitutional ordinances and from subjecting them to those ordinances' unconstitutional permitting schemes.

LEGAL STANDARD

The standards that apply to preliminary injunction motions challenging restrictions on First Amendment† activities are different than normal. For one thing, the familiar four-part analysis collapses into a single inquiry: whether there are serious First Amendment questions. Ordinarily, this Court would separately analyze four factors before issuing a preliminary injunction: whether the plaintiff is likely to (1) succeed on the merits and (2) suffer irreparable harm, (3) whether the balance of equities tips in the plaintiff's favor, and (4) whether an injunction serves the public interest. *American*

† This brief refers to the "First Amendment" to reference the freedom of speech, assembly, and association doctrine under both the United States Constitution and Article I, Sections 9 and 10, of the Idaho Constitution.

Beverage Association v. City & County of San Francisco, 916 F.3d 749, 754 (9th Cir. 2019). But the (2) irreparable harm, (3) balance of equities, and (4) public interest requirements are all satisfied whenever there are serious First Amendment questions. *Id.* at 758. Thus, in a case like this one, if there are any serious questions going to the merits, a preliminary injunction should be issued. *Id.*; *see also Fellowship of Christian Athletes v. San Jose Unified School District*, 82 F.4th 664, 684 (9th Cir. 2023) (en banc).

The burden to show likelihood of success on the merits is also different in First Amendment cases. Though usually the party moving for a preliminary injunction must show it is likely to succeed, where a plaintiff makes a colorable First Amendment claim, the burden lies instead on the defendant to justify its restrictions. *ACLU of Idaho v. City of Boise*, 998 F. Supp. 2d 908, 913 (D. Idaho 2014) (citing *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir.2011)).

Also, although sometimes facial challenges are disfavored, they're allowed against laws that regulate speech and expressive conduct and impose prior restraints like a permitting or other governmental permission scheme. *Spirit of Aloha Temple v. County of Maui*, 49 F.4th 1180, 1188 (9th Cir. 2022). And only "bare minimum" standing requirements apply to these challenges. *Id.*

Thus, because the Sierra Club's First Amendment claims are at least colorable and the City's ordinances impose prior restraints on speech and assembly, the City bears the burden to show that its laws are constitutional; if the City fails to meet that burden, this Court should preliminarily enjoin the ordinances. First Amendment claims must be

given "special solicitude" in general. *Charles v. City of Los Angeles*, 697 F.3d 1146, 1157 (9th Cir. 2012).

ARGUMENT

I. The First Amendment Framework

On the merits, too, First Amendment analysis is unique. This is a First Amendment case because the ordinances restrict speech, association, and assembly. Megaphones and other sound-amplifying devices are "'indispensable instruments' of public speech." *Cuviello v. City of Vallejo*, 944 F.3d 816, 825 (9th Cir. 2019) (quoting *Saia v. People of State of New York*, 334 U.S. 558, 561 (1948)). "In a crowded park or bustling intersection, where a single voice is easily drowned out, volume enables speech," and thus "[a] restriction on volume, then, can effectively function as a restriction on speech." *Id.* Volume restrictions hamper assembly and association in the same way, because amplification "is the way people are reached." *Saia*, 334 U.S. at 561; (N.T.T. ¶¶ 3, 4, 6, 7; N.R.T. ¶¶ 5, 6, 8, 9; Young ¶¶ 4, 5, 6, 9; Luna ¶¶ 12, 13.)

The ordinances here impose prior restraints on the most protected speech in the most protected places. Thus, the Court should enjoin these provisions unless the City meets its treble burden, and does so under extreme scrutiny.

A. Protected Speech, Association, and Assembly

The ordinances regulate all amplified sound as well as all public activities of any kind and size in parks. They therefore restrict the most protected First Amendment activities of all: political speech, assembly, and association during events like rallies and marches. "Activities such as demonstrations, protest marches, and picketing are clearly

protected by the First Amendment." *Collins v. Jordan,* 110 F.3d 1363, 1371 (9th Cir. 1996). Indeed, "the First Amendment applies with particular force to a march and other protest activities" like those the Sierra Club conducts. *Seattle Affiliate of Oct. 22nd Coalition to Stop Police Brutality, Repression & Criminalization of a Generation v. City of Seattle*, 550 F.3d 788, 797 (9th Cir. 2008). These activities have "always rested on the highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 467 (1980).

B. Prior Restraint

Both the citywide megaphone restriction and the park restrictions impose permit requirements on these most protected of First Amendment activities, regardless of time, location, or size. The citywide restriction allows megaphones and other amplified sound during protests to reach more than 100 feet during events like protests on public property only when "such activities have been authorized" by a public property owner or "for which a permit . . . has been obtained from the authorized governmental entity" in advance. BCC § 5-7-4(B), (C). The park restrictions sweepingly prohibit even the smallest meetings and public activities, as well as all amplified sound of any volume "without obtaining a park use permit." BCC § 7-7A-5(D)(4); *see also* BCC § 7-7A-7(C) (imposing an additional permit requirement for sound amplification louder than 62 decibels at 20 feet). These requirements are "prior restraint[s] on speech" and thus bear "a heavy presumption" against their constitutionality. *Berger v. City of Seattle*, 569 F.3d 1029, 1037 (9th Cir. 2009) (en banc); *see also Cuviello*, 944 F.3d at 826 & n.5. The Supreme Court and Ninth Circuit have both emphasized that "[e]ven if the issuance of permits by the mayor's office is a ministerial task that is performed promptly and at no

cost to the applicant, a law requiring a permit to engage in [protected] speech constitutes a dramatic departure from our national heritage and constitutional tradition." *Id.* (quoting *Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150, 166 (2002)).

C. Forum Analysis

The citywide megaphone restriction applies everywhere in the city, at all times of day. And its exemptions dispel any doubt that it applies even to political rallies and marches in the city's streets, sidewalks, plazas, and parks. BCC § 5-7-4(B), (C) (exempting only select sounds on outdoor public property or during parades and other public events). That is, the blanket restriction regulates speech and assembly in not just traditional public forums, but "quintessential" public forums for expression and assembly. *ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1099 (9th Cir. 2003). The City therefore bears "an extraordinarily heavy burden" to justify the blanket restriction. *Seattle Affiliate*, 550 F.3d at 797. This Court, accordingly, applies its "highest scrutiny" to the ordinance. *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 791 (9th Cir. 2006).

Likewise for the park restrictions, which apply throughout the City's parks, "where a speaker's First Amendment protections reach their zenith[.]" *Berger*, 569 F.3d at 1039. Parks are not just places for picnics and recreation; they are our society's cardinal venues for free speech and assembly. "Parks, in particular, 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Grossman v. City of Portland*, 33 F.3d 1200, 1204–05 (9th Cir. 1994) (quoting

Hague v. CIO, 307 U.S. 496, 515 (1939)). Critically, "parks provide a free forum for those who cannot afford newspaper advertisements, television infomercials, or billboards." *Grossman*, 33 F.3d at 1205.

II. The Blanket Restriction is Content- and Speaker-Based

On top of the particular force with which constitutional protections apply to these ordinances, the heavy presumption against them, and the extraordinarily heavy burden the City must surmount to justify them, the citywide megaphone restriction is also presumptively unconstitutional for yet a fourth reason: it regulates speech based on the identity of speaker and the content of the speech.

A speech restriction is content-based "if either the underlying purpose of the regulation is to suppress particular ideas or if the regulation, by its very terms singles out particular content for differential treatment." *ACLU of Idaho*, 998 F. Supp. 2d at 916 (quoting *Valle del Sol Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013)). "Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). "[S]peaker-based regulations are all too often content-based regulations in disguise." *Boyer v. City of Simi Valley*, 978 F.3d 618, 621 (9th Cir. 2020) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 170, 135 S.Ct. 2218, (2015) (cleaned up). So, "[w]hen a regulation makes speaker-based distinctions, we ask whether that speaker preference reflects a content preference," and if it does, it is treated the same as any other content-based regulation. *Id.* Similarly, laws that regulate speech based on "potential emotive impact on the audience," or "the communicative impact of the regulated speech" due to the nature of the speaker, are also content-based.

Arizona Attorneys for Criminal Justice v. Ducey, 638 F. Supp. 3d 1048, 1078 (D. Ariz. 2022) (cleaned up) (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988); *see also Turner Broadcasting System v. FCC*, 512 U.S. 622, 658 (1994).

Such speaker-based and content-based laws are presumptively unconstitutional. *ACLU of Idaho*, 998 F. Supp. 2d at 916. The City could only overcome its burden by showing both that "its ordinance[s are] the least restrictive means of furthering a compelling government interest and that the ordinance[s are] actually necessary to achieve that interest." *Id.* (citing *United States v. Alvarez*, 567 U.S. 709, 717 (2012)). Content-based restrictions have generally been permitted "only when confined to the few historic and traditional categories [of expression] long familiar to the bar" like obscenity, defamation, child pornography, fraud, inciting lawlessness, fighting words, and true threats. *Alvarez*, 567 U.S. at 717 (quoting *United States v. Stevens*, 559 U.S. 468, 470, 130 S.Ct. 1577, 1584 (2010)).

The citywide megaphone restriction is speaker- and content-based. It prefers and exempts amplified sounds from religious and school facilities, emergency personnel and their vehicles, railroad equipment, burglar alarms, safety warning devices, and commercial interests like car-lot PAs, and drive-throughs. BCC § 5-7-4(A), (B), (D), (E), (F), (G). These speaker preferences reflect content preferences. *Boyer*, 978 F.3d at 621; *see also Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 766 (1995) (plurality opinion) ("Of course, giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate . . . the Free Speech Clause, since it would involve content discrimination."). In *Boyer*, a city

prohibited parking mobile billboards on public streets. But "emergency vehicles" and certain commercial vehicles—those "used for construction, repair or maintenance or public or private property"—were exempt. *Id.* at 620 (cleaned up). The Ninth Circuit recognized that although this was "a prudent preference" and "a reasonable rationale," it was also "*a content-based choice* that triggers strict scrutiny." *Id.* at 623. Same here: although the City may argue that exempting emergency personnel, railroads, car dealerships, and fast food restaurants from the citywide restriction is a prudent and reasonable thing to do, it is also an unconstitutionally content-based preference.

And no matter what interest the City advances to justify the citywide restriction, it cannot show any that any interest in the restriction is compelling or that the restriction is actually necessary to achieve any interest. The exemptions do nothing to prevent anything remotely like obscenity, fraud, or other categories "long familiar to the bar" for which content-based regulations may be employed. *Alvarez*, 567 U.S. at 717. No compelling governmental interest could prefer car-lot announcements over core protected speech like the Sierra Club's protests to raise awareness of climate change, nor could it be actually necessary to restrict sounds at those protests yet allow loudspeakers at Jack in the Box to blare on unregulated.

III. All the Ordinances Give Government Too Much Discretion

Even ignoring the unconstitutional speaker-based and content-based exemptions in citywide megaphone restriction, that ordinance would still fail First Amendment scrutiny because it doesn't sufficiently constrain discretion over what sounds get

"authorized" under BCC § 5-7-4(B). The parks restrictions are unconstitutional because of the same kind of discretion problems.

A law that confers unbridled discretion on a government agent creates the danger of both self-censorship and government censorship. *Kaahumanu v. Hawaii*, 682. F.3d 789, 807 (9th Cir. 2012). Without adequate standards to guide officials' decisions, it's also difficult to detect unconstitutional viewpoint discrimination and protect the public from it. *Id.* It doesn't matter whether or not there's any evidence that officials have in fact favored some speakers and suppressed others; anytime "the potential for exercise of such power exists, . . . this discretionary power is inconsistent with the First Amendment." *Id.*; *see also United States v. Stevens*, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

The limits on officials' discretion must be explicit. *Doe v. Harris*, 772 F.3d 563, 580 (9th Cir. 2014) (quoting *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769–70 (1988)). They must provide "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151-52 (1969). Those standards must also impose adequate time limits on officials who make the decisions. *Get Outdoors II v. City of San Diego*, 506 F.3d 886, 894 (9th Cir. 2007) (citing *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990)). Also critical is some requirement that officials make a written record articulating the reasons for any denial or conditions they impose. *Seattle Affiliate*, 550 F.3d at 801–802.

The citywide megaphone restriction and the park restrictions don't have any of these sideboards. The citywide restriction exempts sounds from activities on "any outdoor Municipal, school, religious or publicly owned property of facility" whenever those activities "have been authorized by the owner of such property or facility or its agent." BCC § 5-7-4(B). That grants standardless discretion not just to government officials and their agents, but even to the whims of religious and private school staff as well. *See Bell v. City of Winter Park*, 745 F.3d 1318, 1324 (11th Cir. 2014) ("[W]e see little reason to believe that a similar grant of unrestrained discretion to private citizens" could survive First Amendment scrutiny). There are no decisional time limits on either the government or these private gatekeepers whatsoever, and no requirement that any of them articulate any reasons for denying activities or imposing conditions. The park restrictions, similarly, neither constrain the City's discretion in granting, denying, or conditioning permits, nor impose any time limits or requirements to articulate reasons for denials or conditions. BCC §§ 7-7A-5(D)(4), 7-7A-7(C). Ordinances like these that "make[] the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—[are] an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Shuttlesworth*, 394 U.S. at 151 (quoting *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958)).

The Sierra Club need not first grovel for permission pursuant to these ordinances, either. Rather, the Supreme Court has "made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of

the right of free expression for which the law purports to require a license." *Shuttlesworth*, 394 U.S. at 151. Or, instead, as the Sierra Club does here, "[a] person subject to a licensing ordinance may make a facial, First Amendment attack on that ordinance without ever applying for a permit because the threat of the prior restraint itself constitutes an actual injury." *Get Outdoors II v. City of San Diego*, 506 F.3d 886, 894 (9th Cir. 2007) (citing *City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 759 (1988)).

IV. The Ordinances are Not Narrowly Tailored to Serve Any Significant Government Interest

Any law that requires permission to use a megaphone in traditional public forums must be narrowly tailored to serve a significant governmental interest and leave open ample alternatives for First Amendment activity. *Cuviello*, 944 F.3d at 827. Although all the ordinances should be enjoined because they grant the kind of discretion that can be used to favor some speech and assemblies over others (and the citywide megaphone restriction is additionally unconstitutional because it is speaker- and content-based), the City also cannot meet its burden to show that any of these ordinances is narrowly tailored to serve a significant government interest, or that the sound restrictions leave open ample alternatives for expression and assembly.

A. No Significant Government Interest

As to the citywide megaphone restriction, its exemptions undercut any significant government interest the City could claim. The religious and school exemptions in BCC § 5-7-4(B) alone demonstrate that the City isn't truly interested in preventing amplified sound from pealing out across the town. Loud church music, sermons, and church bells,

school sports announcers, and whatever other amplified sound that churches and private schools desire may be broadcast with impunity at any time under the ordinance. Just the same, used car lots and fast food drive-throughs can blast amplified announcements at any volume across any distance, BCC § 5-7-4(G), inverting the First Amendment hierarchy by giving special preference to commercial speech over core political and protest speech. *Berger*, 569 F.3d at 1055 ("[T]he rule's preference for concessionaires and licensees leads to the odd result that purely commercial speech, which receives more limited First Amendment protection than noncommercial speech, is allowed and encouraged, while artistic and political speech is not. This bias in favor of commercial speech is, on its own, cause for the rule's invalidation."). Even the noxious car alarm gets favored treatment, BCC § 5-7-4(E), while a political protester in a quintessential public forum faces a fine—if not arrest—for calling out to a crowd and public officials through a megaphone. (Luna ¶¶ 2, 5, 6; Compl. ¶¶ 4, 10, 12, 14, 15, 16, 24.) No matter what interest the City purports the citywide restriction to serve, "if the State allows some to invade that interest, it suggests that the restriction on others is to suppress their speech rather than to vindicate a legitimate interest." *Watters v. Otter*, 986 F. Supp. 2d 1162, 1176 (D. Idaho 2013).

The park megaphone restrictions are internally inconsistent, too. Though BCC § 7-7A-5(D)(4) prohibits "any activities which include amplified sound" absent a permit, just a couple sections below BCC § 7-7A-7(C) allows amplified sound up to 62 decibels at 20 feet. Clearly there is no significant government interest in BCC § 7-7A-5(D)(4)'s blanket prior restraint when the very same chapter of the City's code allows for

amplified sound. And there can be no significant government interest justifying BCC § 7-7A-7(C)'s strict decibel restriction when parks anywhere in Boise are subject at any time to be buffeted by amplified sound at any volume from nearby churches, schools, and any other public property because BCC § 5-7-4(B) grants an unlimited exception for sounds from any outdoor activities those places choose to authorize.

The City could have no significant interest in the BCC § 7-7A-5(D)(4) prior restraint on conducting "any meeting . . . or other public activity in a park," either. Whatever interest the City may have in requiring advance notice and permitting for major events in these traditional public forums, that interest dissipates entirely when applied to smaller activities. The Ninth Circuit has long "refused to uphold registration requirements that apply to individual speakers or small groups in a public forum." *Cuviello*, 944 F.3d at 829 (quoting *Berger*, 569 F.3d at 1039). But BCC § 7-7A-5(D)(4) applies to *any* public activity, even those gathering the smallest groups or put on by a single individual. And it completely prohibits spontaneous expression, "which is often the most effective kind of expression" because "timing is of the essence in politics." *Grossman*, 33 F.3d at 1206 (quoting, in second passage, *Shuttlesworth*, 394 U.S. at 163). This prior restraint, along with the other park restrictions and the citywide restriction on amplified sound, cannot withstand First Amendment scrutiny.

B. Failure to Narrowly Tailor and Overbreadth

In examining whether a speech or assembly restriction is narrowly tailored, courts scrutinize whether the law restricts substantially more speech than necessary, whether there are obvious alternatives that would achieve the same objectives with less

speech restriction, and whether a generic regulation is nonetheless needed. *Cuviello*, 944 F.3d at 829. In *Cuviello*, the Ninth Circuit enjoined a megaphone ordinance because its broad sweep banned protesters from using a megaphone in already noisy areas, like downtown Boise during the daytime. *See id.* at 830. "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Klein v. City of Laguna Beach*, 533 Fed. Appx. 772, 774–775 (9th Cir. 2013) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972)).

The citywide and park sound restrictions are not nearly narrowly tailored enough to satisfy the severe constitutional scrutiny that restrictions on speech during rallies and marches in public forums must survive. First, the ordinances restrict substantially more speech than necessary. They effectively ban megaphones used for political protests in the busiest public forums in the whole city, even in the middle of the day on a Saturday: they are both geographically and temporally overinclusive. *Cuviello*, 944 F.3d at 829; *Klein*, 533 F. App'x at 774–775 ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972))); *see also Reeves v. McConn*, 631 F.2d 377, 384 (5th Cir. 1980) (noting that "there is probably no more appropriate place for reasonably amplified free speech than the streets and sidewalks of a downtown business district"). There are obvious alternatives that would achieve the same objectives here, as well: rather simply, the City could exempt political protests in traditional public forums and other assemblies in already noisy times and places, *see Klein*, 381 Fed. App'x at 727, instead restricting amplified sound during times and in

places where it is unreasonably disturbing. *Harman*, 261 F. Supp. 3d at 1044 (citing *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949) (three justice plurality)). It has already done just that in BCC § 5-7-4(G), allowing commercial amplified sound in particular zones of the City.

In downtown Boise, the environment is replete with sounds, amplified and otherwise, that can be heard 100 feet or more away from their source and within residences. (Young ¶ 14.) Downtown Boise's streets, sidewalks, plazas, and parks are simply "not an area of the city where people come to seek peace and quietude or to avoid distraction." *Cuviello*, 944 F.3d at 830. And, once again, the BCC § 5-7-4(B) and (C) exemptions—which allow amplified sound, even near parks, at any volume from "authorized" and other activities with a permit— further demonstrate that the City's sound restrictions are not narrowly tailored to advance any significant government interest. Although many public events, including protests, require no permit in Boise, *see, e.g.,* BCC §§ 3-17-8(B) (allowing sidewalk picketing and spontaneous events without a permit), BCC § 5-7-4(C) exempts amplified sound from fireworks, parades, and other events when they *require* a permit but not the many similar events that do not.

The BCC § 7-7A-5(D)(4) blanket prior restraint on all public activities in public parks is not tailored at all, and applies even to small groups and individuals. For the same reason that restraint could serve no government interest for many activities, it is certainly not narrowly tailored to serve any interest. *Berger*, 569 F.3d at 1039. Neither this restraint nor either the other park restrictions or the citywide megaphone restriction are sufficiently narrowly tailored because they are overinclusive; and the city

megaphone restriction is also underinclusive because its exemptions permit a slew of loud and disruptive sounds. *See Valle Del Sol*, 709 F.3d at 828 (explaining why underinclusive laws can be unconstitutional when they are "structured to target particular speech rather than a broader . . . problem."). As such, all of these ordinances are invalid as overbroad, because a substantial number of its applications—to political and social protests in traditional public forums throughout downtown Boise, especially—are unconstitutional in relation to legitimate applications. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011).

C. Unample Alternatives

The kind of marches, parades, and other public assemblies that the Sierra Club conducts "involve large crowds and significant noise." *Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 867 (9th Cir. 2001). "[I]t is often difficult to see more than a few feet in any direction, or to hear anyone who isn't standing nearby." *Id.* As the Sierra Club has experienced in self-censoring its megaphone use to avoid punishment under the sound restrictions challenged here, "individual voices cannot be heard above the din" adequately (N.T.T. ¶ 6; N.R.T. ¶¶ 8, 9), and even "hand-held signs are easily swallowed up by the crowd." *Id.*

Without megaphones, the Sierra Club and others leading protests in public forums cannot effectively and economically reach their crowds and also be heard by the public, press, and decisionmakers. (Young ¶¶ 6, 7, 8, 9, 10; N.T.T. ¶¶ 6, 7, 8; N.R.T. ¶¶ 8, 9; Luna ¶¶ 10, 12.) As the Sierra Club's Idaho Chapter director explains, "[u]sing a megaphone and other amplified sound significantly increases the public presence of a

demonstration and makes it significantly more likely that a demonstration will attract public attention and the attention of decision-makers and press." (Young ¶ 6.) Reaching across more than just a fraction of a city block is similarly crucial for effective assembly and association in public forums, because amplified sound "also helps ensure everyone at the demonstration can clearly hear the speeches and chants so they can learn about the issues and actively partake in the chanting." (*Id.*) The youth in the Sierra Club's Climate Justice League have tried to be effective while complying with Boise's ordinances, but have failed, even losing their voice while trying. (N.T.T. ¶¶ 6, 7; N.R.T. ¶¶ 8, 9.) The citywide and park megaphone restrictions do not allow for ample alternative means of communication or assembly. *Edwards*, 262 F.3d at 867.

V. Remaining Preliminary Injunction Factors

Because the Sierra Club raises serious First Amendment questions here, it has demonstrated that it will likely suffer irreparable harm, that the balance of hardships tips sharply in its favor, and that a preliminary injunction is in the public interest. *American Beverage Association*, 916 F.3d at 758. The Court should waive the FRCP 65(c) bond requirement. *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009). The Court should grant Plaintiff's motion and issue the preliminary injunction requested.

Respectfully submitted,

WREST COLLECTIVE

/s/ Richard Eppink	/s/ Casey Parsons	/s/ David A. DeRoin
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