No. 17-16948

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH CUVIELLO,
Plaintiff-Appellant,

v.

CITY OF VALLEJO, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
Case No. 2:16-CV-02584-KJM-KJN

SUPPLEMENTAL BRIEF FOR APPELLANT

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September 19, 2018

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INTRODUCTION

This appeal involves the denial of a preliminary injunction against a City of Vallejo ordinance that requires individuals to obtain an advance permit to use a bullhorn or other sound-amplifying equipment on nearly all public property in the city, including—as applied to this case—the sidewalk in front of Six Flags Discovery Kingdom. The ordinance applies to individuals who are not creating a noise disturbance, as defined elsewhere in the city code to include sound that annoys or disturbs a reasonable person, or that endangers property or human health or safety. Indeed, because the ordinance absolutely bars permittees from creating a noise disturbance, the only individuals who can use permits consistent with their terms are individuals who pose no threat of disturbance to others nearby, or to the health and safety of Vallejo's residents. Moreover, the ordinance applies to individuals or small groups whether or not they are engaging in any other activities, such as large parades or assemblies, that might independently require permits and the provision of city services.

Although the City amended the ordinance in some respects while this appeal was pending, the crux of the plaintiff's claims remains the same: Facially and as applied here, the permit requirement is not a reasonable time, place, and manner restriction and is therefore unconstitutional under the First Amendment and an analogous provision of the California Constitution. The district court erred in

denying a preliminary injunction against the ordinance's enforcement during the pendency of this litigation.

STATEMENT OF JURISDICTION

The district court had federal-question jurisdiction over plaintiff's Section 1983 claim under 28 U.S.C. §§ 1331 and 1343 and supplemental jurisdiction over plaintiff's state-law claims under 28 U.S.C. § 1367. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). The district court entered its order denying plaintiff's motion for a preliminary injunction on September 1, 2017. Plaintiff filed a timely notice of appeal on September 25, 2017. *See* Fed. R. of App. Proc. 4(a)(1)(A).

STATEMENT OF THE ISSUE

Whether the district court erred in holding that plaintiff Joseph Cuviello is not entitled to a preliminary injunction enjoining the City's enforcement of Chapter 8.56's permit requirement applicable to sound-amplifying equipment based on its conclusions that Mr. Cuviello is not likely to prevail on his First Amendment and state-law challenges to that ordinance and that other relevant factors do not support issuance of preliminary injunctive relief.

PROVISIONS INVOLVED

Vallejo Municipal Code Chapter 8.56, as it existed before and after amendments in June 2018, and Chapter 7.84 are reproduced in full in the statutory addendum to this brief.

STATEMENT OF THE CASE

Plaintiff-appellant Joseph Cuviello is an animal-rights protestor who has participated in peaceful demonstrations in or near Six Flags Discovery Kingdom, an amusement park in Vallejo, California, for more than a decade. At these monthly demonstrations, Mr. Cuviello seeks to raise awareness of the park's mistreatment of animals that appear in its exhibitions. SER 2, 4, Decl. of Joseph Cuviello in Supp. of Pl.'s Corrected Mot. for Preliminary Injunction (Cuviello Decl.) ¶¶ 2-5, 21.

Between 2006 and 2014, Mr. Cuviello "always demonstrated on-site—on Six Flags property—near the entrance of Six Flags." SER 2, *id.* ¶ 6. While there, he was "able to physically approach Six Flags' patrons." *Id.* ¶ 8. However, Six Flags now maintains rules prohibiting "protests or similar expressive activities, whether orally or in writing," on all of its property in Vallejo and threatens violators with punishment for criminal trespass. ER 35, Ex. A to Declaration of Joseph P. Cuviello in Supp. of Prelim. Injunction Reply (Supplemental Cuviello Decl.). It has obtained an injunction to bar demonstrators from protesting on its property. SER 2, Cuviello Decl. ¶ 6. Six Flags instead requires that any "protests or similar expressive activity, if conducted, … be done from the public sidewalks in front of Discovery Kingdom." *Id.*; *see also* ER 37, Ex. B to Supplemental Cuviello Decl. (Six Flags' map identifying public sidewalks surrounding the park).

Since Six Flags obtained an injunction against on-site demonstration activities, Mr. Cuviello and his colleagues "have only demonstrated on the public sidewalk" that "borders Six Flags park boundary and is off-site." SER 2, First Cuviello Decl. ¶ 7. The sidewalk "is not close to any hospitals, clinics, churches, residential areas, animal care facilities, schools, courthouses, or public libraries." SER 3, ¶ 9. It is across the street from a "large parking lot." *Id.*; *see also* ER 56-57 (site map). The "sounds of the Park's roller coasters and the screams of patrons riding them" are audible on the public sidewalk where Mr. Cuviello demonstrates. SER 3, Cuviello Decl. ¶ 10.

Because "the vast majority of Six Flags' patrons arrive by automobile and park on-site," Mr. Cuviello "can no longer physically approach them." *Id.* ¶ 8. As a result, he "decided to utilize a bullhorn so that [he] could at least audibly reach Six Flags' patrons as they are driving by into the park." *Id.*

In June 2015, during a protest at Six Flags, Mr. Cuviello used an electric bullhorn. *Id.* ¶ 14. A fellow activist told Mr. Cuviello that a Vallejo police officer had said a permit was required to use the device. *Id.* The officer then showed Mr. Cuviello the text of Chapter 8.56 of the City's Municipal Code as it existed at that time. *Id.* ¶ 15. It provided, as it does today, that it is unlawful for any person "to operate or cause to be operated any sound amplifying" device "upon any public street, parkway, thoroughfare, or on privately or publicly owned property, without

first obtaining Sound and Light permit from the chief of police." Mun. Code § 8.56.030 (as amended June 2018); Mun. Code § 8.56.010 (previous version omitting reference to "Sound and Light"). Because Mr. Cuviello feared enforcement of the ordinance against him and did not want to be arrested, he stopped using his bullhorn on that occasion. SER 3, Cuviello Decl. ¶ 16.

The following month, on July 4, Mr. Cuviello attended another demonstration at Six Flags. Because the organizer "wanted the demonstration to be unannounced," Mr. Cuviello did not apply for a permit so as to avoid putting "Six Flags and the City … on notice of the planned demonstration." *Id.* ¶ 17. Mr. Cuviello did not attempt to use a bullhorn because he did not want to be arrested. *Id.*

Later in July, four days before another demonstration, Mr. Cuviello did submit an application by fax for a permit to use his electric bullhorn, to which the City did not respond. *Id.* ¶ 18. Mr. Cuviello, again fearing arrest, abstained from using the bullhorn. *Id.*

In September 2015, Mr. Cuviello wrote to various city officials, including the Chief of Police, stating that he believed that Chapter 8.56 was an unconstitutional restriction on his right to free speech. *Id.* ¶¶ 22-23. He notified the City that he therefore planned to use a bullhorn at a Six Flags demonstration the following day without seeking a permit. *Id.* ¶ 22. Mr. Cuviello emphasized that his use of the bullhorn would not violate Municipal Code Chapter 7.84, *id.* ¶ 23, a separate

provision prohibiting the use of an "electronic device for the intensification of any sound or noise into the public streets" that causes a "noise disturbance," a term that the City in turn defines as a sound that "(1) endangers or injures the safety or health of humans or animals; (2) annoys or disturbs a reasonable person of normal sensitiveness; or (3) endangers or injures personal or real property." Mun. Code § 7.84.020.[1]

The City Attorney responded to Mr. Cuviello that the City believed Chapter 8.56 was a permissible time, place, and manner restriction. SER 5, Cuviello Decl. ¶ 24; *see also* SER 14 (email correspondence). Mr. Cuviello did not agree, so he used a bullhorn at the following day's demonstration. SER 5, Cuviello Decl. ¶ 25. Although a Vallejo police officer approached Mr. Cuviello at that demonstration, he did not ask Mr. Cuviello about a permit. *Id.*

The following month, however, Mr. Cuviello attended another Six Flags demonstration where he used a bullhorn. *Id.* ¶ 26. A Vallejo police officer asked Mr. Cuviello if he had a permit to use the device and, when Mr. Cuviello responded that he did not, the officer said that Mr. Cuviello could not use it. *Id.* The officer

[1] Vallejo's Municipal Code is also available on the City's website at http://www.ci.vallejo.ca.us/city_hall/departments_divisions/city_attorney/vallejo_municipal_code/.

threatened to confiscate the bullhorn as evidence of a crime if Mr. Cuviello did not end the use. *Id.*

Acting pro se, Mr. Cuviello subsequently brought as-applied and facial challenges to Chapter 8.56 in a lawsuit against the City of Vallejo and city officials. He asserted claims under 42 U.S.C. § 1983; Article 1, Section 2(a), of the California Constitution; and California Civil Code Section 52.1 (the Bane Civil Rights Act), which provides a cause of action to challenge certain types of interference with an individual's rights under federal or state law. ER 99-107, Compl. ¶¶ 61-96. His complaint identified multiple aspects of Chapter 8.56 that rendered the ordinance unconstitutional under the First Amendment, including (1) a content-based provision of the ordinance requiring that individuals seeking a permit for sound-amplifying equipment agree in advance not to engage in "profane, lewd, indecent, or slanderous" speech, (2) a requirement that permit-holders not amplify any sounds beyond human speech or music, and (3) a failure to include in the ordinance any definition for sound-amplifying equipment or to specify a deadline for submission of permit requests, leaving the ordinance vague and thus open to arbitrary enforcement. ER 104-05, *id.* ¶¶ 87-90.

The complaint also challenged Chapter 8.56's permit requirement on the ground that it was not appropriately tailored to satisfy the City's purported interests, particularly in light of Chapter 7.84's outright prohibition on "noise disturbances,"

including those caused by sound-amplifying equipment. Mr. Cuviello contended that Chapter 8.56's permit requirement was "unnecessary and unduly burdensome," ER 103-04, *id.* ¶ 79, and that its purpose was "not to regulate sound, which is already regulated by Chapter 7.84, but to regulate speech, sound used to attract public attention, and a means of exercising speech," ER 104, *id.* ¶ 82. He contended that "none of the City's interests" was "significant enough to require a permit" for his use of "a bullhorn at a small demonstration on a public street." ER 106, *id.* ¶ 92.

Because Mr. Cuviello desires to use a bullhorn at future demonstrations in front of Six Flags, SER 6, Cuviello Decl. ¶ 31, his complaint sought a declaration "that Chapter 8.56 is unconstitutional on its face and as applied" to him and injunctive relief, ER 107-08, Compl. 17-18 (Prayer for Relief). He also sought damages, a civil penalty of $25,000 for each violation of the Bane Act, and costs. *Id.*

Mr. Cuviello moved for a preliminary injunction against enforcement of Chapter 8.56. The district court, accepting the findings and recommendations of a magistrate judge over the objections of Mr. Cuviello, denied that motion. It first "addresse[d] the likelihood of success on the merits of [Mr. Cuviello's] facial and as-applied challenges to Chapter 8.56 on First Amendment grounds," ER 10, and held that Mr. Cuviello was not likely to succeed on his argument that the permit requirement was content-based or that it was vague, ER 12-17.

The court also rejected Mr. Cuviello's "argu[ment] that the [permit] restriction [was] not narrowly tailored" to meet the government's interest in "preventing noise disturbances," as required to constitute a reasonable time, place, and manner restriction. ER 18. It did not examine this argument in the context of an overbreadth challenge, which—like vagueness—could justify invalidation of Chapter 8.56 on its face. *See Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984). It stated instead that plaintiff did not "appear to assert" such a challenge to Chapter 8.56. ER 10. *But see* Pl.'s Mot. for Prelim. Injunction 14, Dist. Ct. ECF No. 18 (preliminary injunction motion expressly arguing that Chapter 8.56 is "overbroad"). The Court then concluded that although Chapter 8.56 and the City's separate noise disturbance ordinance (Chapter 7.84) "may appear to have a similar ultimate aim, the reduction of noise disturbances within the City of Vallejo, Chapter 8.56 targets a particular source of potential noise disturbance and adds a layer of additional regulation, i.e., the permit requirement and additional time, place, and manner restrictions on use, that is narrowly tailored to address the potential for noise disturbances that could likely result from that type of source." ER 18. The court also concluded that Chapter 8.56 left "open ample alternative channels for communication," another factor relevant to the constitutionality of a time, place, and manner restriction. *Id.* The district court thus determined that Mr. Cuviello had not demonstrated a likelihood of success on his First Amendment challenge or any other

claims, which the court believed would "rely entirely on [Mr. Cuviello's] facial and as-applied challenges to Chapter 8.56." ER 19.

The court then held that, because Mr. Cuviello had not shown a likelihood of success on his claims that Chapter 8.56 was an unconstitutional time, place, and manner restriction, the other factors relevant to a preliminary injunction—the likelihood of irreparable harm, the balance of hardships, and the public interest—supported denying relief. ER 19-20 (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). It also concluded that Mr. Cuviello had not demonstrated irreparable harm because the City had only threatened to confiscate his bullhorn for use without a permit, and had not uniformly enforced Chapter 8.56 against him and other protestors. ER 19. The court held that Mr. Cuviello therefore suffered no "immediate threatened injury." *Id.*

Mr. Cuviello, still acting pro se, appealed the denial of his preliminary injunction, and the parties filed merits briefs. On April 4, 2018, this Court sua sponte ordered the appointment of pro bono counsel for Mr. Cuviello and directed his counsel to file replacement or supplemental briefing. Order Directing Pro Bono Appointment, 9th Cir. ECF No. 29. That order indicated that, "[i]n addition to any other issues the parties address in their briefs, they shall address whether Vallejo City Ordinance Section 8.56 places unconstitutional restrictions on speech." *Id.*

During the pendency of the appeal, the district court denied the City's motion for partial summary judgment, which had argued that the sidewalk on which Mr. Cuviello demonstrates is private, not public, property. *See* Order Denying Summ. J. Mot., Dist. Ct. ECF No. 48. The district court subsequently stayed further proceedings before it, pending the outcome of this Court's decision on the preliminary injunction appeal. Stay Order of May 5, 2018, Dist. Ct. ECF No. 51.

In June 2018, the City amended Chapter 8.56. The amendments address some specific arguments raised by Mr. Cuviello in this litigation by (1) removing the provision forbidding the amplification of sound beyond human speech or music, (2) eliminating the requirement that permit-holders agree not to engage in "profane, lewd, indecent, or slanderous" speech; (3) defining "sound amplifying device" broadly to "refer to all mechanical and electrical devices used to amplify sound in a manner that can be heard more than 50 feet from the device," Mun. Code § 8.56.020(A) (as amended); and (4) changing the time period within which the police chief must approve a permit request from ten days to three days, *see id.* § 8.56.080(A) (as amended).

The City left in place, however, the requirement that individuals seeking to use a sound amplifying device on public property obtain a permit from the police chief. *See* Mun. Code § 8.56.030 (as amended); Mun. Code § 8.56.010 (previous version). The amendments confirm that a permit-holder may not produce sound

through amplification that would constitute a "noise disturbance" under Chapter 7.84, Mun. Code § 8.56.060(C) (as amended), so that Mr. Cuviello's earlier statement to the City that he did not intend to violate Chapter 7.84 would still not avoid the necessity of obtaining a permit under the ordinance as amended.

The City also largely left in place other restrictions applicable to the permitting scheme. Most notably, it continued to provide that a permit-holder could not operate sound-amplifying equipment "with an excess of fifteen watts of power in the last stage of amplification"; could not use sound-amplifying equipment except from 10 a.m. to 8 p.m. except, with the chief of police's approval, in public parks, the waterfront, or in other unspecified "special circumstances"; and could not use such equipment to produce sound within 100 yards of various sites, such as schools, courthouses, and libraries, at any time of day. Mun. Code § 8.56.060(A), (B), (D) (as amended).[2] The City also added a statement of findings that the use of sound amplifying equipment "may be detrimental to the health, welfare and safety" of

[2] These limitations are slightly narrower in the amended version of the ordinance. The previous ordinance had generally prohibited sound amplification from 10 a.m. to sunset, instead of 8 p.m. *See* Mun. Code § 8.56.030(B) (previous version). It also contained no exception to the 100-yard buffer around enumerated public sites, including schools, courthouses, or public libraries, *id.* § 8.56.030(D), whereas the revised version exempted the public stairs adjacent to city hall, *see* Mun. Code § 8.56.060(B) (as amended).

Vallejo's inhabitants and may "disturb the public peace and comfort and peaceful enjoyment" of public places. *Id.* § 8.56.010.

The City subsequently moved to dismiss this appeal as moot in light of the intervening change in the ordinance. This Court denied that motion without prejudice to the City's renewal of the arguments in its answering brief. Order of Aug. 20, 2018, 9th Cir. ECF No. 45.

SUMMARY OF ARGUMENT

The City of Vallejo's amendments to its sound-amplification permit ordinance have not rendered Mr. Cuviello's preliminary injunction appeal moot. The key question in assessing mootness is whether the ordinance, Chapter 8.56, remains "sufficiently similar" to the version before the district court that the conduct for which Mr. Cuviello sought a preliminary injunction continues. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 n.3 (1993). The City's permitting scheme still includes some of the very same features challenged by Mr. Cuviello and addressed by the district court, such as the requirement that Mr. Cuviello obtain a permit for the use of sound-amplifying equipment that neither threatens to nor actually does disturb surrounding residents. Because this Court could still order effective relief with respect to Mr. Cuviello's request for a preliminary injunction, the appeal is not moot.

On the merits, this Court should hold that Mr. Cuviello is entitled to a preliminary injunction against the enforcement of Chapter 8.56 because, under either the First Amendment or the California Constitution's liberty-of-speech clause, the ordinance on its face and as applied is not a reasonable time, place, or manner restriction on speech in a public forum. Even at the preliminary-injunction stage, the government has the burden of demonstrating that speech impinged on by its restriction actually endangers a significant interest, and that its restriction does not burden substantially more speech than necessary to serve that interest. It has not done so here. In the district court, the government did not even identify an interest served by Chapter 8.56, much less submit evidence to show that the ordinance served that interest. Moreover, by Chapter 8.56's express language, the only individuals who can use a permit consistent with its terms are those who will *not* produce sound that causes a noise disturbance—the prevention of which served as the interest on which the district court focused. Chapter 8.56 is also overbroad in numerous other ways, including because the requirement to obtain a permit applies without regard to the nature of the space in which an individual seeks to amplify sound. If the City wishes to prevent noise disturbances, it can enforce its existing law that prohibits them. It can also adopt and apply other measures targeted at special events that use sound amplification, which—unlike the use of sound amplification by individuals or

small groups—might actually pose a threat to public safety or property or call for the provision of city services.

The other three factors relevant to a preliminary injunction—irreparable harm, a balance of hardships—the likelihood of irreparable harm, the balance of hardships, and the public interest—also support issuance of relief. Mr. Cuviello has demonstrated that there is a credible threat of Chapter 8.56's enforcement against him, which is sufficient to show likely irreparable harm where an individual's First Amendment rights are at stake. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). In addition, the City has not established through evidence that it will endure any hardship if Chapter 8.56 is enjoined, and common sense does not suggest otherwise. The City can, for example, continue to enforce Chapter 7.84, the ordinance prohibiting noise disturbances. And this Court has repeatedly recognized the public interest in protecting free speech principles. A preliminary injunction would do that here, not just for Mr. Cuviello, but also for anyone in Vallejo seeking to express express their views through the use of sound-amplifying equipment.

STANDARD OF REVIEW

This Court generally reviews the denial of a preliminary injunction for "abuse of discretion," but it reviews the district court's "interpretation of the underlying legal principles" de novo. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1286 (9th Cir. 2013) (internal quotation marks omitted). It also "conduct[s] an

independent review of the facts" on issues arising under the First Amendment. *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1019 (9th Cir. 2009). In a First Amendment case, although the plaintiff "has the general burden of establishing the elements necessary to obtain injunctive relief, the [government] has the burden of justifying the restriction on speech." *Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009); *see also Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 744 (9th Cir. 2012) (so providing in a preliminary injunction appeal). It has not done so here.

ARGUMENT

I. MR. CUVIELLO'S CLAIMS ARE NOT MOOT.

Article III of the U.S. Constitution requires a "live controversy" in this Court at the time of appeal. *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1166 (9th Cir. 2011) (per curiam) (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969)). Mr. Cuviello's preliminary injunction appeal is not moot because, even as amended, Chapter 8.56 is subject to challenges raised in his preliminary injunction motion that are sufficient to justify the requested relief. The City has a "heavy burden of establishing that there is no effective relief remaining for" this Court to provide with respect to Mr. Cuviello's request for a preliminary injunction. *United States v. D.M.*, 869 F.3d 1133, 1137 (9th Cir. 2017) (internal quotations omitted). It cannot do so.

Specifically, Mr. Cuviello's complaint sought, among other relief, "declaratory and injunctive relief declaring that Chapter 8.56 is unconstitutional on its face and as applied" to him. ER 107-08, Compl. 17-18 (Prayer for Relief). His motion for a preliminary injunction made arguments in support of that relief, including, for example, arguments regarding the insufficient tailoring of Chapter 8.56 to serve the City's purported interests under any level of First Amendment scrutiny. *See, e.g.*, Pl.'s Mot. for Prelim. Injunction 17-19, Dist. Ct. ECF No. 18 (arguing that Chapter 8.56 "cannot survive any level of scrutiny" and contending that "Chapter 7.84 renders Chapter 8.56 more restrictive than necessary" (capitalization omitted)). The district court ruled on those contentions in the course of rejecting Mr. Cuviello's motion for a preliminary injunction. It concluded that the ordinance was a reasonable time, place, and manner restriction, including that it was sufficiently tailored to address the City's interest in preventing noise disturbances. ER 17-18.

The key question here is whether Chapter 8.56 as it stands today is "sufficiently similar" to the version before the district court "that it is permissible to say that the challenged conduct" for which Mr. Cuviello sought a preliminary injunction "continues." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 n.3 (1993); *see Chem. Producers & Distrib. Ass'n v. Helliker*, 463 F.3d 871, 875 (9th Cir. 2006) (restating this test); *see also*,

e.g., *Lamar Advert. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 379 (2d Cir. 2004) (Sotomayor, J.) (holding that a plaintiff's claims challenging a local ordinance were moot with respect to the assertion that the ordinance failed to include a statement of purpose, but not with respect to other "claims against the ordinance based on vagueness, the allegedly excessive discretion given to the Town Board, or the fee provisions"); *Horton v. City of St. Augustine*, 272 F.3d 1318, 1326 (11th Cir. 2001) (stating that "post-judgment [legislative] alterations may moot a case to the extent they remove certain challenged features, but do not moot a case if they leave other challenged features substantially undisturbed"); *cf. Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1031 (9th Cir. 2006) (quoting with approval another circuit's holding that "[w]here a law is amended so as to remove its challenged features, the claim for injunctive relief becomes moot *as to those features*" (emphasis added) (internal quotations omitted)).

The City's permitting scheme continues to include some of the very same features challenged by Mr. Cuviello and addressed by the district court—features that Mr. Cuviello contended, and still contends, are by themselves sufficient to justify the preliminary injunctive relief sought. For example, the permit requirement under Chapter 8.56—in its original form and as amended—requires Mr. Cuviello to obtain a permit even when he is not creating a noise disturbance while using sound amplifying equipment. *See* Mun. Code § 8.56.030(F) (previous version) (prohibiting

amplification of sound that is "unreasonably loud, raucous, jarring, disturbing, or nuisance to persons within the area of audibility"); Mun. Code § 8.56.060(C) (as amended) (confirming that a permit for sound amplifying equipment does not entitle a permit-holder to create a "noise disturbance" under Chapter 7.84). The City's policy continues to impose significant burdens on Mr. Cuviello, including by requiring that he give advance notice of his regular demonstration plans. *See Berger v. City of Seattle*, 569 F.3d 1029, 1039 (9th Cir. 2009) (en banc) (describing burdens of "single-speaker permitting requirements for speech in a public forum"). And it does so without furthering the City's purported interests in preventing noise disturbances. Because the "crux" or "gravamen" of Mr. Cuviello's arguments for preliminary relief as to some aspects of the ordinance remains, this Court could still grant effective relief. *Chem. Producers*, 463 F.3d at 876. Thus, the appeal is not moot.

The Supreme Court's decision in *Northeastern Florida Chapter of Associated General Contractors*, 508 U.S. 656, is particularly instructive. There, the Supreme Court considered whether a challenge to an ordinance giving city contract preferences to minority-owned businesses was moot after the ordinance was amended. The Supreme Court held that the "gravamen" of the complaint remained the same because the plaintiff's members were still "disadvantaged in their efforts to obtain city contracts" as a result of the ordinance. *Id.* at 662. The Court

acknowledged that the "new ordinance may disadvantage [the members] to a lesser degree than the old one," but concluded that "it disadvantage[d] them in the same fundamental way." *Id.* The Court therefore held that the challenge was not moot.

In *Smith v. Executive Director of Indiana War Memorials Commission*, 742 F.3d 282 (7th Cir. 2014), the Seventh Circuit applied that same principle in a case procedurally on all fours with this one. In that case, the plaintiff challenged on First Amendment grounds a local commission's policy of requiring a permit for individuals and groups to use the commission's property for certain purposes left undefined by the commission. *Id.* at 286. The district court denied the plaintiff's motion for a preliminary injunction on the ground that the plaintiff was unlikely to succeed on the merits of his claim. *Id.* While the appeal was pending, the local commission changed its permit policy, including by adding some exceptions to the policy for "informal use" by groups of fewer than fifteen people. *Id.* at 287. The Seventh Circuit held that the plaintiff's preliminary injunction appeal was not moot because the new policy retained the same problematic features, challenged in the request for preliminary relief, as the old policy. *Id.* at 288. The court held that the plaintiff had met the requirements for a preliminary injunction and remanded to the district court to determine "the proper scope of the injunction." *Id.* at 290. This Court should do the same here.

II. MR. CUVIELLO'S CLAIMS ARE LIKELY TO SUCCEED ON THE MERITS.

To warrant a preliminary injunction, a plaintiff must establish that he is likely to succeed on the merits. *Klein v. City of San Clemente*, 584 F.3d 1196, 1199 (9th Cir. 2009); *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). Here, in denying a preliminary injunction against Chapter 8.56's enforcement, the district court erroneously interpreted First Amendment principles and abused its discretion in concluding that Mr. Cuviello was unlikely to prevail. Contrary to the district court's conclusion, Mr. Cuviello is likely to succeed on the merits of his facial and as-applied challenges on the ground that Chapter 8.56 violates both the First Amendment to the U.S. Constitution, and Article 1, Section 2(a) of the California Constitution.[3]

Specifically, under both the First Amendment and Article I, Section 2(a), the use of sound-amplifying equipment to engage in speech is protected. *See Saia v. New York*, 334 U.S. 558 (1948) (striking down ordinance that forbade the use of sound-amplifying equipment without permission of the chief of police, to which unfettered discretion applied); *Rosenbaum v. City & County of San Francisco*, 484 F.3d 1142, 1167-68 (9th Cir. 2007) (applying Article I, Section 2(a), of the California

[3] Although Mr. Cuviello asserted other claims against defendants, this Court need only consider on appeal his claims grounded in free-speech violations.

Constitution to a restriction on sound amplification (citing *Wollam v. City of Palm Springs*, 379 P.2d 481, 482 (Cal. 1963)).[4] Chapter 8.56 broadly requires a permit for use of sound-amplifying equipment—and thus regulates speech—on any "public street, parkway, thoroughfare, or on … publicly owned property." Mun. Code § 8.56.030 (as amended). Given their history as a site for "public assembly and debate" *Frisby v. Schultz*, 487 U.S. 474, 480 (1988), sidewalks are the "archetype of a traditional public forum," *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 945 (9th Cir. 2011) (en banc) (internal quotation marks omitted). And "regulations affecting speech" in a traditional public forum are "presumptively invalid." *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1021 (9th Cir. 2009); *see also Gaudiya Vaishnava Soc'y v. City & Cty. of San Francisco*, 952 F.2d 1059, 1065 (9th Cir. 1990) ("[T]he government's authority to restrict speech is at its minimum" in the "traditional public fora" of "public streets."). That is so because "[g]overnment restrictions on the use of public

[4] The First Amendment prohibits the making of any law that "abridg[es] the freedom of speech," U.S. Const. amend. I, and has been incorporated by the Fourteenth Amendment to apply to local governments, *see ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784, 788 (9th Cir. 2006). It is enforceable against localities and their officials through a cause of action under 42 U.S.C. § 1983. Similarly, Article 1, section 2(a) of the California Constitution guarantees that "[e]very person may freely speak, write and publish his or her sentiments on all subjects" and forbids any law that "restrain[s] or abridge[s] liberty of speech or press." It provides its own cause of action for declaratory and injunctive relief. *See Degrassi v. Cook*, 58 P.3d 360, 363 (Cal. 2002).

places such as streets, sidewalks, and parks risk placing speech on topics of public importance within the purview of only the wealthy or those who enjoy the support of local authorities." *Long Beach Area Peace Network*, 574 F.3d at 1022.

The government can, however, "impose reasonable restrictions on the time, place, or manner of protected speech" in a public forum. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Long Beach Area Peace Network*, 574 F.3d at 1023. Permitting schemes for sound-amplifying equipment are analyzed as "time, place, and manner" restrictions under both the First Amendment and the California Constitution's liberty-of-speech clause. *Rosenbaum*, 484 F.3d at 1167.[5]

Specifically, to be reasonable, such restrictions must (1) be "content-neutral," (1) be "narrowly tailored to serve a significant governmental interest," and (3) "leave open ample alternatives for communication." *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1037 (9th Cir. 2006); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Kaahumanu v. Hawaii*, 682 F.3d 789, 803 (9th Cir. 2012); *see also Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 857-58 (9th Cir. 2004) (stating that this Court applies "federal time, place and manner standards" to claims under California's liberty-of-speech clause). "The

[5] California and federal law diverge, however, with respect to what constitutes a public forum for free-speech purposes. *See Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980).

failure to satisfy any single prong of this test invalidates the requirement." *Grossman v. City of Portland*, 33 F.3d 1200, 1205 (9th Cir. 1994).

For Mr. Cuviello to prevail on his as-applied claims under this standard, Chapter 8.56 must be unconstitutional only as "to his particular speech activity," even if "the law may be capable of valid application to others." *Kuba*, 387 F.3d at 856 (quoting *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998)). In contrast, Mr. Cuviello's facial challenge to Chapter 8.56, which rests on an assertion that the ordinance is overbroad, *see Taxpayers for Vincent*, 466 U.S. at 796 (permitting such challenges), may succeed where "'a substantial number" of Chapter 8.56's "applications are unconstitutional, judged in relation to" any "legitimate sweep," *Comite de Jornaleros*, 657 F.3d at 944 (internal quotation marks omitted).

On its face and as applied to Mr. Cuviello, Chapter 8.56 is not narrowly tailored to advance the City's interests and, therefore, cannot constitute a reasonable time, place, and manner restriction. Importantly, even in the context of a preliminary injunction, the City "bears the burden of" justifying the permit requirement. *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227 (9th Cir. 1990); *see also S.O.C., Inc. v. Cty. of Clark*, 152 F.3d 1136, 1147 (9th Cir.), *amended*, 160 F.3d 541 (9th Cir. 1998) (preliminary injunction appeal); *accord Sanders Cty. Republican Cent. Comm.*, 698 F.3d at 744. It has not done so here.

As an initial matter, despite Mr. Cuviello's having raised an argument regarding the tailoring of Chapter 8.56, the City did not identify in the district court proceedings *any* interest served by the ordinance. *See generally* City's Opp'n to Prelim. Injunction Mot., ECF No. 19. Mr. Cuviello thus assumed, and the district court accepted, that the purpose of the ordinance was to prevent "noise disturbances." ER 18.

During the pendency of this appeal, the City added "findings" to Chapter 8.56 that confirm the ordinance's essential purpose. They state that the use of sound-amplifying equipment "at any location out of doors in the City may be detrimental to the health, welfare, and safety of the inhabitants of the City, in that such use … diverts the attention of pedestrians and vehicle operators in the public streets and places, thus increasing traffic hazards and potentially causing injury to life and limb." Mun. Code § 8.56.010(A) (as amended). The findings also state that sound-amplifying equipment "may disturb the public peace and comfort and the peaceful enjoyment by the people of their rights to use the public streets and places for public purposes, and may disturb the peace, quiet, and comfort of the neighboring inhabitants." *Id.* The findings' focus on furthering health and safety, along with public peace and comfort, aligns with the prevention of "noise disturbances," which the City has defined in its municipal code as sound that "(1) endangers or injures the safety or health of humans or animals; (2) annoys or disturbs a reasonable person of

normal sensitiveness; or (3) endangers or injures personal or real property." Mun. Code § 7.84.020.

Mr. Cuviello does not doubt that the City's interest in "preventing noise disturbances," including ones that threaten public health or safety, is significant. *See, e.g.*, *Ward*, 491 U.S. at 796; *McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014); *Kuba*, 387 F.3d at 859. However, "merely invoking [this] interest[] … is insufficient" to meet the government's burden of demonstrating that Chapter 8.56 is narrowly tailored. *Kuba*, 387 F.3d at 859. The City "must *also* show that the proposed communicative activity endangers" its asserted interest, *id.* (emphasis added), and that the "regulation achieve[s] its ends without restricting substantially more speech than necessary," *Long Beach Area Peace Network*, 574 F.3d at 1024; *see also, e.g.*, *McCullen*, 134 S. Ct. at 2535 (stating that the government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals" (internal quotation marks omitted)). The City has not done so.

A. Speech covered by Chapter 8.56 does not endanger the City's interests.

On its face and as applied to Mr. Cuviello, Chapter 8.56's permitting regime does not further the City's interest in preventing noise disturbances. A separate provision of the municipal code, Chapter 7.84, already forbids such disturbances outright, and Chapter 8.56, in both its previous and current iterations, makes clear

that a permit for sound-amplifying equipment does not entitle the holder to violate Chapter 7.84. Specifically, the previous version of the ordinance provided that even with a permit, the "volume of sound" for sound-amplifying equipment "shall be controlled so that it … is not unreasonably loud, raucous, jarring, disturbing, or nuisance to persons within the area of audibility." Mun. Code § 8.56.030(F) (previous version). Likewise, the amended version directly invokes Chapter 7.84's prohibition against "noise disturbance[s]" as a limitation on the volume of sound produced by sound-amplifying equipment for which a permit is required. *Id.* § 8.56.060(C) (as amended).

Put another way, under Chapter 8.56's express terms, the only individuals who may use a permit consistent with its terms are individuals who will *not* produce sound through amplification that "annoys or disturbs a person of normal sensitiveness," or that "endangers" human "safety or health" or "property." Mun. Code § 7.84.020. The City has produced no evidence showing that the facts on the ground require a different conclusion than the statute's express terms do, despite its burden to do so. *See Kuba*, 387 F.3d at 859 (holding that governmental defendant "failed to meet its burden of proving that demonstrators handing out leaflets and carrying signs on the parking lots and walkways outside [a particular facility] would cause the congestion and danger to safety" alleged). Chapter 8.56 thus operates as a "speech restrictive blanket with little or no factual justification," which "flies in the

face of preserving one of our most cherished rights." *Id.* (internal quotation marks omitted).

In this respect, Chapter 8.56 suffers from a flaw similar to the ordinance at issue in *American-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F.3d 600 (6th Cir. 2005). That case held unconstitutional an ordinance that "required small groups to seek a permit in the first instance; only *after* a permit was sought was the city council authorized to issue permits to those events that it found would not '*unnecessarily interfere* with the public use of the streets, sidewalks, parks and public areas.'" *Food Not Bombs*, 450 F.3d at 1040 (quoting *City of Dearborn*, 418 F.3d at 603). As this Court acknowledged in describing *City of Dearborn*, the ordinance there "presumed an interference with government interests, even when common sense would dictate otherwise." *Id.* In that case, as here, the city failed to show that the speech burdened by its regulation endangered its asserted interest and, therefore, that the ordinance was narrowly tailored.

Similarly, in *Wollam v. City of Palm Springs*, 379 P.2d 481, the California Supreme Court held that a permit requirement for sound trucks that required such trucks to remain ambulatory was not narrowly tailored to further a city's interest in "prevent[ing] prolonged distraction and annoyance" because the "identical purpose [was] achieved by" a separate provision imposing "volume limitation and requir[ing] that the sound be so controlled that it will not be disturbing or a nuisance to persons

within the area of audibility." *Id.* at 482; *see also Long Beach Area Peace Network*, 574 F.3d at 1035 (recognizing "a permitting requirement [for special events] would be valid to the extent that the event was *likely* to pose a threat to public safety" (emphasis added)); *cf. Reeves v. McConn*, 631 F.2d 377, 386 (5th Cir. 1980) (upholding against vagueness challenge a prohibition on amplification of sound that is "disturbing … to persons within the area of audibility" only because it interpreted the provision to incorporate an objective standard focused on "actual or imminent interference with peace or good order" (internal quotation marks and alteration omitted)).

The district court attempted to find utility in Chapter 8.56 by stating that, although this chapter and Chapter 7.84 "may appear to have a similar ultimate aim, the reduction of noise disturbances within the City of Vallejo, Chapter 8.56 targets a particular source of potential noise disturbance and adds a layer of additional regulation, i.e., the permit requirement and additional time, place, and manner restrictions on use, that is narrowly tailored to address the potential for noise disturbances that could likely result from that type of source." ER 18. This reasoning falls flat. Without more, saying that the permit requirement adds an additional layer of regulation is just another way of saying that it is an additional burden, but it does nothing to explain how the additional layer promotes the noise-protection goals that are already protected by Chapter 7.84. Chapter 8.56 does *not* promote those goals

since it explicitly prohibits the granting of a permit that would excuse compliance with Chapter 7.84. Although the City argued to the contrary in its initial brief to this Court, *see* Response Br. 21, 9th Cir. ECF No. 23; *infra* n.6, the City's amendments to Chapter 8.56 have ruled out that rationale.

If anything, the "layer of additional regulation" for sound-amplifying equipment on which the district court relied to justify the ordinance makes the law more, not less, constitutionally vulnerable because of the close nexus between sound-amplifying equipment and speech. For example, the City would not require Mr. Cuviello to obtain a permit if he wanted to pound on a plastic bucket as long as he did not violate the noise ordinance, but when he seeks to use sound amplification—a means that is most commonly used to enhance protected expression to make the same amount of noise—he is required to undergo an additional burden. These circumstances are similar to those in *Grossman v. City of Portland*, 33 F.3d 1200, in which this Court held that an ordinance preventing "persons from making any address or participating in any organized entertainment, demonstration, or public gathering in the park without a permit" was not narrowly tailored and instead was actually "tailored so as to preclude speech." *Id.* at 1207 (internal alterations and quotation marks omitted). It observed, for example, that a "group of 100 family members and friends could have had a noisy picnic in the park secure in the knowledge that they would be unimpeded by law enforcement officers,

while [the plaintiff's] small group silently carrying signs or wearing T-shirts would have been classified as law-breakers and subject to forcible removal by armed police." *Id.* Just as the ordinance in *Grossman* burdened groups that assembled for expressive purposes more than other groups, Chapter 8.56 burdens individuals producing speech-related sound more heavily than those producing other noises.

Nor can the City's permit regime for sound-amplifying equipment be justified on the ground, never advanced by the City in litigation, that advance notice is required to permit the City "to provide necessary protection and other services to groups and individuals using the devices and to those who may be affected by them." Mun. Code § 8.56.010(B) (as amended). To be sure, notice requirements are sometimes upheld in the context of ordinances regulating parades, demonstrations, or other special events likely to draw a large crowd or encroach upon traffic patterns and thus necessitate the provision of city services. But Chapter 8.56 applies irrespective of actual or anticipated provision of services, and the City has provided no evidence of which services are at issue or how they could possibly apply to the circumstances of Mr. Cuviello's sound-amplification use with a small group of demonstrators in a non-residential area next to an amusement park. *See* ER 56-57, Ex. A to Declaration of Frank Splendorio in Supp. of Defs.' Opp'n to Prelim. Injunction Mot. (site map).

This Court rejected a similar argument with respect to narrow tailoring in *Long Beach Area Peace Network*, 574 F.3d 1011. In that case, the Court held that the city had not met its burden of demonstrating that a permit requirement for certain types of "special events" was narrowly tailored to serve the government's interest in arranging city services for such events. Although the provision applied only to organized activity of 75 or more individuals in a public space, and only where services might actually be necessary, this Court demanded specificity and evidence with respect to the services at issue. *Id.* at 1034-35. It rejected an interest in providing litter abatement as "sufficient to justify a prior restraint on an expressive activity through a permitting requirement," and held that it could not determine on the record available whether an interest in construction and crowd control would be sufficiently related to the restriction. *Id.* at 1036. If the government's showing in *Long Beach* was insufficient to demonstrate the challenged law's narrow tailoring, the City's evidence-free showing in this case necessarily fails as well.

B. Even assuming Chapter 8.56 serves a significant interest, it sweeps far too broadly.

Even if this Court were to find an attenuated connection between the City's asserted interest and Chapter 8.56's permitting requirement, Chapter 8.56 would not be narrowly tailored to serve that interest because "a substantial portion of [its] burden on speech does not serve to advance [the City's] goals." *McCullen*, 134 S. Ct. at 2535 (internal quotation marks omitted). A narrowly tailored "regulation must

focus on the source of the evils the city seeks to eliminate and eliminate them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." *Comite de Jornaleros*, 657 F.3d at 947 (internal quotation marks and alterations omitted). Chapter 8.56 does not do so.

First, the fact that Chapter 8.56 requires a permit even for individual use is strong evidence that it is overbroad. As this Court recognized in *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009) (en banc), advance notice and permitting requirements impose both a "procedural hurdle of filling out and submitting a written application, and the temporal hurdle of waiting for the permit to be granted," which "may discourage potential speakers." *Id.* at 1037 (internal quotation marks omitted); *see also* SER 4, Cuviello Decl. ¶ 18 (describing burden on Mr. Cuviello to submit an application). "Registration requirements also dissuade potential speakers by eliminating the possibility of anonymous speech" and foreclosing "spontaneous" speech. *Berger*, 569 F.3d at 1038; *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 166 (2002) ("The requirement that a canvasser must be identified in a permit application filed in the mayor's office and available for public inspection necessarily results in a surrender of … anonymity."); *see also* SER 4, Cuviello Decl. ¶ 17 (describing Mr. Cuviello's decision not to use a bullhorn because the demonstration organizer "wanted the demonstration to be unannounced"). Because of the "significant burden that registration requirements

place on speakers," this Court "and almost every other circuit to have considered the issue have refused to uphold registration requirements that apply to individual speakers or small groups in a public forum." *Berger*, 569 F.3d at 1039 (collecting cases); *see also, e.g.*, *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 608 ("Permit schemes and advance notice requirements that potentially apply to small groups are nearly always overly broad and lack narrow tailoring.").

Second, Chapter 8.56 is overbroad with respect to its geographic scope. *See Comite de Jornaleros*, 657 F.3d at 949 (considering whether ordinance was "geographically overinclusive" in the context of a "narrow tailoring" analysis). An individual seeking to use sound-amplifying equipment audible beyond 50 feet would need a permit to do so on any public property in the city, including streets, sidewalks, and parks, regardless whether that property is situated in a business, residential, or industrial zone. Mr. Cuviello's situation illustrates the permit requirement's undue breadth: It requires him to seek a permit to use his bullhorn in a non-residential area abutted by a theme park and a "large parking lot" and where ambient park noise—including the "sounds of the Park's roller coasters and the screams of patrons riding them"—can be heard from the demonstration site. SER 3, Cuviello Decl. ¶ 10; *see also* ER 56-57 (site map). As the City conceded in its original brief to this Court, its "interest in maintaining quietude is reduced" in "noisy places like Six Flags," and it distinguished for this Court between those locations and others "where the need for

quiet is heightened." Response Br. 43, 9th Cir. ECF No. 23; *see also id.* at 52 (contending only that "the City's interest in regulating amplified sound in locations *other than Six Flags* is indisputably significant" (emphasis added)).[6] Yet Chapter 8.56 reflects no such distinction in its permit regime, a sign that it is overbroad. *See Food Not Bombs*, 450 F.3d at 1039 (holding that a permit ordinance was insufficiently tailored to withstand time, place, and manner scrutiny where it did not limit the requirement to obtain a permit to "*serious* traffic, safety, and competing use concerns[] significantly beyond those presented on a daily basis by ordinary use of the streets and sidewalks")).

[6] The City made this concession in the course of arguing that Chapter 8.56 was narrowly tailored not because of its ability to *prevent* noise disturbances (as the district court had incorrectly concluded), but because it *permitted* sound amplification that would otherwise constitute a forbidden noise disturbance under Chapter 7.84. *See* Response Br. 21, 9th Cir. ECF No. 23 ("The nuisance ordinance prohibits all bothersome noise with no exception for expressive speech, while the loudspeaker-permitting ordinance expressly *permits* the use of loudspeakers subject to specific, clear limitations. In this way, the City's ordinance is narrowly tailored to facilitate speech while guarding against excessive disturbances of the peace."). The City's reading of Chapter 8.56 before its amendment was inconsistent with its language, which made clear that sound amplification still could not be "unreasonably loud, raucous, jarring, disturbing, or nuisance to persons within the area of audibility." Mun. Code § 8.56.030(F) (previous version). Regardless, the argument the City advanced on appeal to justify Chapter 8.56 is quite clearly not applicable to the amended law. *See* Mun. Code § 8.56.060(C) (as amended) (prohibiting permittees from amplifying sound that would constitute a noise disturbance under Chapter 7.84)

Chapter 8.56's geographic overinclusivity is further evidenced by its inclusion within the permit terms of a prohibition on permit-holders using sound-amplifying equipment within one hundred yards—that is, 300 feet—of certain enumerated public sites ("hospitals, clinics, animal care facilities, schools, churches, courthouses, or public libraries"). Mun. Code § 8.56.060(B) (as amended). As the Fifth Circuit has held, "there can be no valid state interest in prohibiting all sound amplification within 100 yards of schools, courthouses, and churches outside the normal hours of use," as Chapter 8.56 does here. *Reeves*, 631 F.2d at 385. And if one of these buildings is "located in an area characterized by noise and activity at a certain hour, amplified free speech may participate in that noise and cannot be absolutely prohibited" within a 100-yard "protective zone." *Id.*; *see also Klein v. City of Laguna Beach*, 381 F. App'x 723, 727 (9th Cir. 2010) (finding "no evidence that use of a bullhorn within 100 yards of City Hall would significantly disrupt or impede government activity"); *United States v. Doe*, 968 F.2d 86, 90-91 (D.C. Cir. 1992) (holding that prohibition on any noise louder than 60 decibels at 50 feet was not narrowly tailored as applied to a city park in Washington, DC where "even electric generators operating in the park … made noise that exceeded those levels"); *Deegan v. City of Ithaca*, 444 F.3d 135, 139 (2d Cir. 2006) (holding that a noise regulation prohibiting speech audible beyond 25 feet was not narrowly tailored where it could prohibit "most normal human activity," including a "conversation

among several people, the opening and closing of a door, the sounds of a small child playing on the playground, or the ring of a cell phone" (internal quotation marks omitted)); *U.S. Labor Party v. Pomerleau*, 557 F.2d 410, 413 (4th Cir. 1977) (holding that noise ordinance barring sound amplification above certain decibel level was unconstitutional where it "prohibits amplification that creates no more noise than a person speaking slightly louder than normal"). The same is true for the more numerous sites (hospitals, clinics, animal care facilities, schools, churches, courthouses, or public libraries) identified in Chapter 8.56.

Moreover, Chapter 8.56's prohibition on the use of a sound-amplifying device within 300 feet of designated locations applies to individuals whose sound "can be heard more than 50 feet from the device." Mun. Code § 8.56.020(B) (as amended). It thus effectively creates up to a 250-foot buffer zone around key public sites, shielding those sites from protestors with sound-amplifying equipment even where there is no realistic probability that the sound produced by the permittees will even reach those sites. Notably and in contrast to Chapter 8.56, Vallejo's noise disturbance ordinance makes it unlawful only to create any "noise disturbance within the vicinity" of certain designated buildings, and it imposes time frames that correspond to those buildings' use. *See* Mun. Code § 7.84.020(H) (prohibiting "noise disturbance" near any "hospital, church during hours of worship services, court house during hours of operation, or school during school hours").

Third, Chapter 8.56's prohibition against permit-holders' operation of sound amplifying equipment "with an excess of fifteen watts of power in the last stage of amplification" is also overbroad. Mun. Code § 8.56.060(D) (as amended). As the Fifth Circuit has held, sound amplification in excess of this wattage limitation "could be non-disruptive." *Reeves*, 631 F.2d at 386-87 (involving ordinance that had a 20-watt limitation). This type of limitation is particularly unwarranted in areas like Six Flags, where there are already loud noises from other sources of sound.

Fourth, there is no justification for a nearly citywide ban, without reference to the character of particular locations, on sound amplification between the hours of 10 a.m. and 8 p.m. Mun. Code § 8.56.070(A) (as amended); *see, e.g.*, *Beckerman v. City of Tupelo*, 664 F.2d 502, 515-16 (5th Cir. 1981) (holding that ordinance requiring a permit for use of sound amplification equipment was overbroad because it prohibited the use of such equipment in all residential neighborhoods and during the hours of 6:00 p.m. to 9:00 a.m.).

In assessing whether Chapter 8.56 is overbroad and not narrowly tailored, this Court should follow the persuasive rationale set forth in *Klein v. City of Laguna Beach*, 381 F. App'x 723. *Klein* held that an ordinance requiring a permit for sound-amplifying equipment was overbroad where it included a "blanket prohibition on the use of a bullhorn within 100 yards of [a] school 30 minutes before or after the dismissal bell," and within 100 yards of the city hall. *Id.* at 726. This Court

emphasized that the city had "failed to offer evidence that any amplified sound would significantly exceed the ambient noise in the commercial district in which City Hall is located or would penetrate City Hall from a sidewalk 15 to 20 yards from the building." *Id.* at 727. Likewise, here, Vallejo has offered no evidence that use of amplified sound would significantly exceed ambient noise in locations like the sidewalks near Six Flags and the many other areas where the permit requirement applies.

As to a separate prohibition on the use of sound-amplifying equipment after 5 p.m., the Court in *Klein* concluded that this provision also was not narrowly tailored, and pointed as one example to the absence of "evidence that residential and commercial areas are so interwoven that use of amplified sound in any area would necessarily disturb evening privacy in the home." *Id.* It concluded that the plaintiffs were likely to succeed on their overbreadth argument because the city had "failed to present evidence that the amplified sound ordinance is narrowly tailored to its interests." *Id.* at 726. It thus held that a district court had erred in denying a preliminary injunction against the ordinance's enforcement.[7]

[7] Although this Court upheld another permit requirement applicable to sound-amplifying equipment in *Rosenbaum*, 484 F.3d 1142, the plaintiffs' facial challenge was not at issue on appeal. *See id.* at 1158 & n.12; *see also id.* at 1161. Rather, plaintiffs argued that "the City engaged in viewpoint discrimination" and imposed an "unconstitutional prior restraint in rejecting several permit applications based on

C. Obvious alternatives to Chapter 8.56 confirm that it is not narrowly tailored.

The presence of "obvious alternatives" to Chapter 8.56 "that would achieve the same objectives with less restriction of speech" is an additional indicator that the ordinance is not narrowly tailored. *Long Beach Area Peace Network*, 574 F.3d at 1025; *Berger*, 569 F.3d at 1041.

For example, rather "than requiring all speakers to pre-register with the government as a prerequisite to engaging in communicative activity, the City could simply enforce its existing rules against those who actually exhibit unwanted behavior." *Id.* at 1043. The City has at its disposal Chapter 7.84, which prohibits noise disturbances outright, and it could enforce that provision against actual lawbreakers instead of law-abiding users of sound-amplifying equipment. *See*, *e.g.*, *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 612 (concluding that city had "a host of laws dealing with disturbances on public rights of way at its disposal—breach of the peace, disorderly conduct, or laws penalizing non-cooperation with official commands—to protect the public safety and welfare" without parade permit ordinance applicable even to small groups of individuals); *McCullen*, 134 S. Ct. at 2537-38 (holding that a law imposing "buffer zones" around the entrances to clinics

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appellants' non-compliance with conditions attached to sound permits issued in the past." *Id.* at 1157-58, 1164.

providing abortion was not narrowly tailored and pointing to other alternatives, including enforcement of an existing law that forbade blocking access to a reproductive health facility and adoption of a more protective anti-harassment statute); *Comite de Jornaleros*, 657 F.3d at 949 (pointing, in a case that challenged a solicitation ban, to laws against jaywalking and standing in a roadway if such activity interferes with the lawful movement of traffic).

Moreover, to the extent the City believes that sound-amplifying equipment is associated with larger crowds, the City could require permits for the assembly of large groups that are likely to interfere with traffic or have other deleterious effects. *See Kuba*, 387 F.3d at 862 (pointing out that government, instead of relegating protestors to free-speech zones far from building, could have furthered its interest in preventing congestion and addressing traffic safety by adopting measures such as "prohibiting protestors within a certain distance from the entrance to the building, or limiting the overall number of demonstrators in certain areas closer to the entrance, or requiring that protestors stand a certain distance from each other").

III. MR. CUVIELLO HAS SATISFIED THE OTHER REQUIREMENTS TO JUSTIFY ISSUANCE OF A PRELIMINARY INJUNCTION.

The district court held that, because Mr. Cuviello had not shown a likelihood of success on his claims that Chapter 8.56 was unconstitutional, the other factors relevant to a preliminary injunction—the likelihood of irreparable harm, the balance of hardships, and the public interest—supported denying relief. ER 19-20 (citing

Winter, 555 U.S. at 22). As discussed above, however, Mr. Cuviello *has* demonstrated a likelihood of success on his free-speech claims. Moreover, independent considerations relevant to the other three preliminary-injunction factors weigh in favor of Mr. Cuviello.

First, Mr. Cuviello has demonstrated that, without a preliminary injunction, he is likely to suffer—and indeed, is suffering—irreparable harm during the pendency of this litigation. The district court held otherwise in part on the ground that the City had only threatened to confiscate Mr. Cuviello's bullhorn for use without a permit, and had not uniformly enforced Chapter 8.56 against him and other protestors. ER 15. Actual enforcement, and uniformity of its application, is not the standard by which irreparable injury is measured. A credible threat of enforcement where an individual's First Amendment rights are at stake is sufficient. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (finding irreparable injury in a First Amendment case based in part on "threatened" adverse action against employees who had refused to affiliate with political party of current sheriff); *accord Foti*, 146 F.3d at 643. As Mr. Cuviello has explained, he has refrained from using a bullhorn at the monthly Six Flags protests without a permit based on his fear of arrest, a fear that is well-founded given the City's previous threat of enforcement. SER 3-4, 6, Cuviello Decl. ¶¶ 16-18, 21, 31.

Second, the balance of hardships weighs in favor of preliminary relief. In contrast to the harm to Mr. Cuviello's First Amendment rights, the City has not "establish[ed] through admissible evidence that it would endure hardship if challenged provisions of the amplified sound ordinance were enjoined." *Klein v. City of Laguna Beach*, 381 F. App'x at 727. And common sense suggests no hardship to the City. For example, Chapter 7.84, the ordinance prohibiting noise disturbances, including those endangering human health and safety or property, will remain in effect and enforceable. *See id.* (relying on the continued application of a city's general noise ordinance to hold that a preliminary injunction against an amplified-sound ordinance would not result in a hardship to the city).

Finally, the public interest tips sharply in favor of a preliminary injunction. This Court has repeatedly recognized "the significant public interest in upholding free speech principles." *Klein v. City of San Clemente*, 584 F.3d at 1208 (internal quotation marks omitted). Chapter 8.56 "infringes on the free speech rights not only of" Mr. Cuviello, "but also of anyone seeking to express their views" through the use of sound-amplifying equipment in the City of Vallejo. *Id.*

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's denial of Mr. Cuviello's motion for a preliminary injunction and remand to the district court for further proceedings, including the issuance of an appropriate injunction.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Appellant is not aware of any related cases currently pending in this Court within the meaning of Ninth Circuit Rule 29-2.6.

/s/ Julie A. Murray
Julie A. Murray

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 10,516 words and complies with the Court's order of April 4, 2018, which did not identify a word-count limit for supplemental briefing. I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it was prepared in a proportionally spaced, 14-point typeface, Times New Roman.

/s/ Julie A. Murray
Julie A. Murray

ADDENDUM OF PROVISIONS INVOLVED

Chapter 7.84 - REGULATION OF NOISE DISTURBANCES
City of Vallejo Municipal Code

7.84.010 - General prohibition—Loud unnecessary and unusual noise.

Notwithstanding any other provisions of the Vallejo Municipal Code and in addition thereto, it shall be unlawful for any person to willfully make or continue, or cause to be made or continued, any loud, unnecessary, and unusual noise which disturbs the peace or quiet of any neighborhood or which causes discomfort or annoyance to any reasonable person of normal sensitiveness residing in the area. The standard which may be considered in determining whether a violation of the provisions of this chapter exist may include, but not be limited to, the following:

A. The level of noise;

B. Whether the nature of the noise is usual or unusual;

C. whether the origin of the noise is natural or unnatural;

D. The level and intensity of the background noise, if any;

E. The proximity of the noise to residential sleeping facilities;

F. The nature and zoning of the area within which the noise emanates;

G. The density of the inhabitation of the area within which the noise emanates;

H. The time of the day and night the noise occurs;

I. The duration of the noise;

J. Whether the noise is recurrent, intermittent, or constant; and

K. Whether the noise is produced by a commercial or noncommercial activity.

7.84.020 - Specific prohibitions.

In addition to and separate from the prohibition set forth in Section 7.84.010 above, the following acts, and the causing or permitting thereof, are hereby declared to be in violation of this ordinance. As used in this section, the term "noise disturbance" means any sound which (1) endangers or injures the safety or health of humans or animals; (2) annoys or disturbs a reasonable person of normal sensitiveness; or (3) endangers or injures personal or real property. The listing of specific prohibited activities in this section is not intended to limit the city's authority to regulate any and all loud, unnecessary and unusual noise pursuant to Section 7.84.010. Any noise not falling within the specific prohibitions set forth in this section is subject to regulation under the provisions of Section 7.84.010 above.

A. Mechanical or (Electronic Devices. It shall be unlawful to use or permit to be used any mechanical or electronic device for the intensification of any sound or noise into the public streets which causes a noise disturbance.

B. Advertisement. It shall be unlawful to use or permit to be used any instrument, whistle, drum, bell, or to make any other noise disturbance for the purpose of advertising, announcing, or otherwise calling attention to any goods, wares, merchandise, or any show, entertainment, or event. The provisions of this subsection shall not be construed to prohibit the selling by outcry of merchandise, food, or beverages at lawfully permitted sporting events, parades, fairs, circuses or other similarly permitted entertainment events.

C. Animals and Birds. It shall be unlawful for any person owning, possessing, or harboring any animal or bird to allow said animal or bird to howl, bark, meow, squawk, or make other annoying noises continuously and/or incessantly for an unreasonable period of time so as to create a noise disturbance across a residential real property line. For purposes of this subsection, the animal or bird noise shall not be deemed a noise disturbance if a person is trespassing or threatening to trespass upon private property in or upon which the animal or bird is situated, or is using any other means to tease or provoke the animal or bird. This provision shall not apply to a zoo or animal theme park.

D. Emergency Signalling Device. It shall be unlawful to intentionally sound or permit the sounding outdoors of any fire, burglar, or civil defense alms, siren, whistle or similar stationary emergency signalling device, except for

emergency purposes or for testing, as provided in subsections D 1 and 2 below.

1. The testing of a stationary emergency signalling device shall not occur before seven a.m. or after nine p.m. Any such testing shall use only the minimum cycle test time, and in no case shall such test time exceed sixty seconds.

2. The testing of the complete emergency signalling system, including the functioning of the signalling device, and personnel response to the signalling device, shall not occur before seven a.m. or after nine p.m. In no case shall such test exceed ten minutes.

E. Burglar or Fire Alarm. It shall be unlawful to intentionally sound or permit the sounding, or fail to take reasonable actions to prevent the sounding of any exterior burglar, security or fire alarm or any motor vehicle burglar or security alarm which is not terminated within ten minutes of activation.

F. Loading and Unloading. It shall be unlawful to load, unload, open, close, or to do other handling of boxes, crates, containers, building materials, garbage cans, or similar objects between the hours of nine p.m. and seven a.m. in such a manner as to cause a noise disturbance across a residential real property boundary. This subsection shall not apply to the collection and disposal of garbage and recyclable materials by the city's franchises.

G. Domestic Power Tools. It shall be unlawful to operate or permit the operation of any mechanically powered saw, drill, sander, grinder, lawn, or garden tool, lawnmower, or other similar device between nine p.m. and seven a.m. so as to create a noise disturbance across a residential real property boundary.

H. Sensitive Uses. It shall be unlawful to create or permit to be created within the city any noise disturbance in the vicinity of any hospital, church during hours of worship services, court house during hours of operation, or school during school hours.

7.84.030 - Violations and penalties; violations deemed a public nuisance.

A. Any person who violates or causes or permits another person to violate any provision of this chapter is subject to, but not limited to, the fines and

penalties specified in Chapter 1.12 of the Vallejo Municipal Code, and the administrative fines and administrative citations authorized pursuant to Chapter 1.15 of the Vallejo Municipal Code.

B. As an alternative to the procedures set forth in subsection A, a person violating any provision of this chapter may be given a written or verbal warning to abate the noise violation as an intermediate enforcement measure. If the noise violation persists for more than five minutes after the warning is given or recurs within a one week period from the warning, a citation may be given in place of the warning. It is not a prerequisite to the enforcement of any provision of this chapter or the establishment of a violation of any provision of this chapter that a written or verbal warning to abate the noise violation be given to the person(s) responsible for such violation.

C. In addition to the penalties herein provided, any condition caused or permitted to exist in violation of any of the provisions of this chapter is a threat to the public health, safety and welfare, and is declared and deemed a public nuisance.

7.84.040 - Remedies not exclusive.

The remedies under this chapter are in addition to and do not supersede or limit any and all other remedies, civil or criminal. The remedies provided for herein shall be cumulative and not exclusive.

7.84.050 - Exceptions; public entities.

The prohibitions contained in this chapter shall not apply to the activities of any public entity, including but not limited to, the Greater Vallejo recreation district and the Vallejo City unified school district.

(Ord. 1377 N.C. (2d) § 1 (part), 1997.)

Chapter 8.56 - OPERATION OF SOUND AMPLIFYING, LOUDSPEAKER, OR LIGHTING EQUIPMENT (Prior to Amendment in June 2018)

8.56.010 - Permit required.

It is unlawful for any person, firm, corporation, association, club, partnership, society, or any other organization, to operate or cause to be operated any sound amplifying or loudspeaking device, or any lighting equipment used to attract public attention, upon any public street, parkway, thoroughfare, or on privately or publicly owned property, without first obtaining a permit from the chief of police to do so.

8.56.020 - Permit—Application.

The person applying for a permit shall file with the chief of police an application in writing on forms provided by him for that purpose giving the information required.

8.56.030 - Permit—Issuance conditions.

The chief of police shall issue a permit for the operation of sound amplifying or loudspeaker equipment within ten days after receipt of the application therefor, which shall be subject to the following regulations:

A. The only sounds permitted are music or human speech;

B. The permitted hours of operation shall be between the hours of ten a.m. and sunset. In the case of events or activities occurring at public parks or the waterfront or in special circumstances, applications for the use of sound amplifying or loudspeaker equipment for hours other than those specified above may be approved by the chief of police;

C. If mounted upon a vehicle, sound amplifying equipment shall not be operated unless the vehicle upon which such equipment is mounted is operated at a speed of at least five miles per hour except when said vehicle is stopped or impeded by traffic. Where stopped by traffic the sound amplifying equipment shall not be operated for longer than one minute at each such stop;

D. Sound shall not be issued within one hundred yards of hospitals, clinics, animal care facilities, schools, churches, courthouses, or public libraries;

E. The human speech and music amplified shall not be profane, lewd, indecent, or slanderous;

F. The volume of sound shall be controlled so that it will not be audible for a distance in excess of one hundred feet from the sound truck and so that said volume is not unreasonably loud, raucous, jarring, disturbing, or nuisance to persons within the area of audibility;

G. No sound amplifying equipment shall be operated with an excess of fifteen watts of power in the last stage of amplification.

8.56.040 - Permit—Issuance when not deleterious.

The chief of police shall issue a permit for operation of lighting equipment which shall be subject to the following regulation:

Operation which shall not be, in the considered judgment of the chief of police, deleterious to the persons residing or traveling in the vicinity.

8.56.050 - Permit—Display.

The person to whom a permit is issued shall keep such permit available at the location or in the vehicle from which such equipment is being operated, and the permit shall be promptly displayed and shown to a police officer or inspector of the city of Vallejo upon request.

(Ord. 145 N.C.(2d) § 7 (part), 1973: Ord. 32 N.C.(2d) § 17.05, 1971.)

ORDINANCE NO. 1797 N.C. (2d)

AN ORDINANCE AMENDING VALLEJO MUNICIPAL CODE CHAPTER 8.56 RELATED TO THE OPERATION OF SOUND AMPLIFYING OR LIGHTING EQUIPMENT

THE COUNCIL OF THE CITY OF VALLEJO DOES ORDAIN AS FOLLOWS:

SECTION 1. Chapter 8.56 of the Vallejo Municipal Code is hereby amended to read as follows:

Chapter 8.56 – OPERATION OF SOUND AMPLIFYING DEVICE, OR LIGHTING EQUIPMENT

8.56.010 – Findings.

A. The use or operation of sound amplifying devices and lighting equipment to project light and sound outside of any building or at any location out of doors in the City may be detrimental to the health, welfare, and safety of the inhabitants of the City, in that such use or operation diverts the attention of pedestrians and vehicle operators in the public streets and places, thus increasing traffic hazards and potentially causing injury to life and limb. Further, such use or operation may disturb the public peace and comfort and the peaceful enjoyment by the people of their rights to use the public streets and places for public purposes, and may disturb the peace, quiet, and comfort of the neighboring inhabitants.

B. Advance notice of the use of sound amplifying devices and lighting equipment allows the City to provide necessary protection and other services to groups and individuals using the devices and to those who may be affected by them.

C. As a result, while sound amplifying devices and lighting equipment are recognized instruments of effective public speech, appropriate time, place, and manner restrictions on the use of such equipment are necessary to protect the public peace and welfare.

8.56.020 – Definitions.

As used in this chapter, the terms:

A. Sound amplifying device shall refer to all mechanical and electrical devices used to amplify sound in a manner that can be heard more than 50 feet from the device.

B. Lighting equipment shall refer to any electric equipment that uses light for the purpose of drawing attention to a place, person, or thing, or that uses light to depict or project any image or message in a manner that can be legibly perceived more than 50 feet from the equipment.

8.56.030 – Permit required.

Except as stated in Section 8.56.040, it is unlawful for any person or organization to operate or cause to be operated any sound amplifying device or lighting equipment upon any public street, parkway, thoroughfare, or on privately or publicly owned property, without first obtaining a Sound and Light permit from the chief of police.

8.56.040 – Exceptions.

A. No Sound and Light Permit is required to use a sound amplifying device or lighting equipment to engage in expressive conduct in response to an occurrence whose timing did not reasonably allow the applicant to file a timely application and the imposition of this time limitation would place an unreasonable restriction on free speech. A person or organization seeking to use a sound amplifying device or lighting equipment pursuant to this exception must make a reasonable effort to advise the chief of police of the time, place, and nature of the anticipated use at the earliest possible opportunity and in any event no later than one hour before commencing use of such a device.

B. No Sound and Light Permit is required for use on private property or within a privately owned structure, with permission of the owner of the property or structure, where the sound does not exceed 40 decibels from the nearest point of any neighboring property.

8.56.050 – Permit – Application.

The person applying for a permit shall file with the chief of police, or his or her designee, an application in writing on forms provided for that purpose giving the following information: (1) the name, address and contact information of the applicant; (2) the proposed time and date of the use of a sound amplifying device or lighting equipment; (3) the proposed location of such use; (4) if the proposed location is on private property, evidence of permission by the property owner; (5) a description of the sound amplifying device or lighting equipment to be used; and (6) the identification of any other permits or pending permit applications relating to the use.

8.56.060 – Sound Amplifying Devices – Conditions of Use.

Use of sound amplification devices pursuant to a Sound and Light Permit is subject to the following regulations:

A. The permitted hours of operation shall be between the hours of ten a.m. and 8 p.m. In the case of events or activities occurring at public parks or the waterfront or in special circumstances, applications for the use of sound amplifying or loudspeaker equipment for hours other than those specified above may be approved by the chief of police;

B. Sound shall not be issued within one hundred yards of hospitals, clinics, animal care facilities, schools, churches, courthouses, or public libraries with the exception of sound issued on the public stairs adjacent to Vallejo City Hall;

C. The volume of sound shall be controlled so that it does not constitute a noise disturbance as defined by Chapter 7.84.;

D. No sound amplifying equipment shall be operated with an excess of fifteen watts of power in the last stage of amplification.

8.56.070 – Lighting Equipment – Conditions of Use.

A. The permitted hours of operation shall be between the hours of ten a.m. and eight p.m. In the case of events or activities occurring at public parks or the waterfront or in special circumstances, applications for the use of lighting equipment for hours other than those specified above may be approved by the chief of police.

B. Operation of lighting equipment must not be deleterious to the persons residing or traveling in the vicinity.

8.56.080 – Approval, Conditional Approval, Grounds for Denial.

A. Except as stated in subsection C, the police chief must approve or conditionally approve any complete Sound and Light Permit application within three days of receipt.

B. The chief of police may approve any Sound and Light Permit application conditioned on compliance with additional reasonable requirements concerning the time, place or manner of the use as are necessary to coordinate multiple uses of public property, assure preservation of public property and public places, prevent dangerous, unlawful or impermissible uses, protect the safety of persons and property, and to control vehicular and pedestrian traffic in and around the proposed use, provided that such requirements shall not be imposed in a manner that will unreasonably restrict expressive or other activity protected by the California or United States constitutions.

C. The chief of police may deny a permit if 1) the application is incomplete; 2) the application contains materially false information, or 3) the application violates a condition of use imposed by this ordinance.

D. Upon request by the applicant, the chief of police must, within 24 hours, provide the applicant with a written statement explaining any conditions of approval or the grounds for the denial of any application.

8.56.090 – Permit application – No Fee.

Notwithstanding any provision to the contrary, there shall be no fee to apply for a Sound and Light permit under this chapter.

8.56.100 – Appeal.

A. An applicant may appeal the denial of a permit application or any condition of approval to the City Manager and within five days of the receipt of the permit or the written statement provided pursuant to Section 8.56.080(D), whichever is later.

B. The appeal must be in writing and include a copy of the application, and set forth the grounds for the appeal.

C. The City Manager must issue a decision within three days after receiving an appeal under this section, and that decision is final. Failure to file a timely appeal constitutes a failure to exhaust administrative remedies.

8.56.110 – Permit – Display.

The person to whom a permit is issued shall keep such permit available at the location or in the vehicle from which such equipment is being operated, and the permit shall be promptly displayed and shown to a police officer or inspector of the city of Vallejo upon request.

SECTION 2. Severability.

If any section, subsection, sentence, clause, phrase or word of this Ordinance is for any reason held to be invalid by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have passed and adopted this Ordinance, and each and all provisions hereof, irrespective of the fact one or more provisions may be declared invalid.

SECTION 3. Effective Date.

This Ordinance shall take effect and be in full force and effect from and after 30 days of its final passage.

Adopted by the City Council of the City of Vallejo as an emergency ordinance at a regular meeting held on June 12, 2018 by the following vote:

AYES:	Mayor Sampayan, Vice Mayor Miessner, Councilmembers Dew-Costa, Malgapo, McConnell, Sunga, and Verder-Aliga
NOES:	None
ABSENT:	None
ABSTAIN:	None

Bob Sampayan
BOB SAMPAYAN, MAYOR

ATTEST:

Dawn G. Abrahamson
DAWN G. ABRAHAMSON, CITY CLERK

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2018, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. All parties in the case are represented by registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Julie A. Murray
Julie A. Murray