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 REPLY BRIEF

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SUMMARY OF ARGUMENT

As Mr. Cuviello demonstrated in his opening brief, the City of Vallejo's amendments to its sound-amplification permit ordinance have not rendered his preliminary injunction appeal moot. The City agrees that the key question in assessing mootness based on the intervening legislative change is whether Chapter 8.56 remains sufficiently similar to the version before the district court, such that the conduct for which Mr. Cuviello sought a preliminary injunction continues. The differences between the parties on mootness stem largely from how to apply that standard to this case. The City points to some differences between the two versions of the ordinance, and states repeatedly that the ordinance was "completely rewritten." Supplemental Resp. Br. 10. But the City never effectively refutes Mr. Cuviello's point that the permitting scheme still includes some of the very same features challenged by Mr. Cuviello and addressed by the district court, including 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 or pose a likely hazard to public safety.

The City's other arguments regarding mootness largely boil down to the contention that the City, by adding new "findings" to the ordinance, mooted Mr. Cuviello's request for a preliminary injunction. Those "findings" do not, however, change what the ordinance *does*, and as the City effectively concedes, they simply

confirm the ordinance's longstanding purpose. The City had an opportunity in the district court to present evidence to support its permit regime and that regime's application to Mr. Cuviello specifically, and it presented *nothing* on that front. The City's attempt to get a second bite at the apple through the mootness doctrine should be rejected.

This Court should also hold that Mr. Cuviello is entitled to a preliminary injunction against the enforcement of Chapter 8.56 because the ordinance on its face and as applied is not a reasonable time, place, or manner restriction on speech in a public forum. The City ignores contrary authority in this Circuit and elsewhere requiring a governmental entity defending a time, place, or manner restriction to demonstrate that its asserted interests in the restriction are threatened by the speech activity subject to regulation. The City has not done so here. It instead relies on speculation regarding how permittees using sound-amplifying equipment (who cannot, by law, cause a noise disturbance, as defined in the City code) may nevertheless endanger public safety or disturb peaceful surroundings. That speculation cannot stand in for real evidence, and cannot overcome the City's prior concession that it has no significant interest in "maintaining quietude" at "noisy places" like Six Flags. Orig. Resp. Br. 43, 9th Cir. ECF No. 23.

The City also relies heavily on an interest in advance notice of the use of sound-amplifying equipment so that it can supply necessary city services. But in this

respect it points only to arranging for a police presence at the site of sound amplification. Indeed, the City admits that it seeks to use the ordinance to monitor protests where, for example, local businesses and patrons do not appreciate the protestors' presence. A permit requirement with this goal would, of course, be patently unconstitutional were it applied to individuals or small groups without sound-amplifying equipment, and the same is true here. In any event, as the City concedes through its discussion of what is required to apply for a permit, the permit process is not designed to seek information relevant to furthering an interest in providing a police presence to monitor demonstrations that may involve potential breaches of the peace.

Mr. Cuviello has also demonstrated that he meets the other three prongs of the standard for issuance of a preliminary injunction. The City's argument as to why Mr. Cuviello has not demonstrated irreparable harm rests on its contention, belied by the facts, that there is no credible threat of enforcement in this case and its sweeping assertion that Mr. Cuviello's First Amendment interests remain protected because he can still engage in speech that the City has *not* regulated. The City's discussion of the balance of hardships and public interest ignores the interest of Vallejo residents in avoiding an unconstitutional permit requirement. The City also glosses over its failure to introduce *any* evidence regarding a hardship to it if it were

prevented from enforcing Chapter 8.56, particularly in light of the City's noise disturbance ordinance, which would remain enforceable.

ARGUMENT

I. MR. CUVIELLO'S APPEAL IS NOT MOOT.

As Mr. Cuviello has explained, his motion for a preliminary injunction was based on the argument that Chapter 8.56 is unconstitutional on its face and as applied to him. Although some provisions providing bases on which Mr. Cuviello challenged Chapter 8.56 have now been removed from the ordinance, the permit requirement—and the insufficiency of the City's tailoring of that requirement to meet its interests—remains.[1] Because that requirement continues to harm Mr. Cuviello in the same fundamental way, his appeal is not moot.

The City's response quibbles with Mr. Cuviello's assertion that the City bears a "'heavy burden of establishing that there is no effective relief remaining for' this Court to provide" on appeal. Supplemental Opening Br. 16 (quoting *United States v. D.M.*, 869 F.3d 1133, 1137 (9th Cir. 2017)). Relying on cases such as *Chemical Producers & Distributors Ass'n v. Helliker*, 463 F.3d 871 (9th Cir. 2006), the City

[1] The City incorrectly suggests that Mr. Cuviello's pro se opening brief on appeal did not challenge Chapter 8.56's tailoring. *See* Supplemental Resp. Br. 4. Even leaving aside the point that pro se papers should be given a liberal reading, that briefing, like Mr. Cuviello's motion for a preliminary injunction, clearly argued that Chapter 8.56 is insufficiently tailored to serve the City's interests and is unnecessary in light of Chapter 7.84. *See* Orig. Opening Br. 2, 33-40, 9th Cir. ECF No. 4-1.

contends that the applicable standard is instead whether a new law is "sufficiently similar" to a previous one that it is "permissible to say that the government's challenged conduct continues." Supplemental Resp. Br. 10 (internal quotation marks omitted).

The City misunderstands the mootness doctrine. The "no effective relief" standard is the guiding star for mootness analysis, including in appeals involving preliminary injunctions, *see, e.g.*, *Garcia v. Lawn*, 805 F.2d 1400, 1402 (9th Cir. 1986), and cases that seek only injunctive or declaratory relief, *see, e.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 284, 287 (2000); *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 10 (1992); *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1061 (9th Cir. 2002). The *Chemical Producers* standard—on which Mr. Cuviello also relied, *see* Supplemental Opening Br. 17—is an *application* of the general standard for mootness to situations in which there has been an intervening change in a law that the challenger seeks to enjoin. If a new law is not "sufficiently similar" to a previous one, "the government's challenged conduct" does not "continue[]," *Chem. Producers*, 463 F.3d at 875 (internal quotation marks and alteration omitted), and a request for injunctive relief is moot because it is no longer possible to grant effective relief against the challenged conduct. In contrast, where—as here—an amended law *is* sufficiently similar to its original form, the challenged

conduct does continue, and the court necessarily may grant effective relief that precludes a finding of mootness.

The City argues that the ordinance is no longer substantially similar to the version reviewed by the district court because the ordinance was "completely rewritten" and "altered in all respects material to this appeal." Supplemental Resp. Br. 10-11; *see also id.* at 5-6. The City did not, however, rescind the earlier ordinance. It "amend[ed]" it and left some provisions in place. Vallejo Ordinance No. 1797 N.C. (2d), *as reproduced at* Supplemental Opening Br. 7a-10a. Although the City points to provisions originally challenged by Mr. Cuviello that have now been omitted, it concedes, as it must, that its ordinance continues to require Mr. Cuviello to obtain a permit for his protest activity involving a bullhorn and, in so doing, give advance notice to the City of his free-speech activities. *See* Supplemental Resp. Br. 12; *see also id.* at 6, 14.

The City argues that the appeal is nevertheless moot because the provisions of the ordinance "have changed to become less restrictive." Supplemental Resp. Br. 13. But that is not the standard for assessing mootness, *see supra* p. 5, and the City's contention runs headlong into *Northeastern Florida Chapter of Associated General Contractors v. Jacksonville*, 508 U.S. 656 (1993). 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 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.* at 662. It therefore held that the challenge was not moot.

The City's response offers only a recitation of the facts of *Northeastern Florida Chapter* without any discussion of the legal principle that the case established. A city ordinance regarding sound amplification permits is necessarily distinct from an ordinance on set-asides for minority-owned businesses. But the City offers no compelling rebuttal to Mr. Cuviello's argument that an appeal over an amended ordinance that harms him "in the same fundamental way," *id.*, as the original one is not moot.

The City also dismisses *Smith v. Executive Director of Indiana War Memorials Commission*, 742 F.3d 282 (7th Cir. 2014), on the ground that the government there made "only minor changes" to a challenged policy. Supplemental Resp. Br. 14. But the Seventh Circuit's rationale was not based on some "minor-change" theory. Rather, the court of appeals held that the appeal from the denial of a preliminary injunction was not moot because the amended permit policy for special event gatherings (1) "still require[d] permits for many smaller events" that drew fewer than 15 people, (2) still required permits for events that drew more than 15 people, and (3) continued to vest broad discretion in government staff to grant or deny permits, charge fees for those permits, and require insurance. *Smith*, 742 F.3d

at 288. The permit requirement continued to harm the plaintiff, even though it had been narrowed; for *that* reason, the appeal was not moot. *See also* Supplemental Opening Br. 17-18 (citing additional cases to which the City does not respond).

Here, although the City has narrowed the challenged ordinance, it continues to require individuals like Mr. Cuviello to obtain a permit to use sound-amplifying equipment on nearly all public property, including where individuals are not creating a noise disturbance and regardless whether the individuals are engaging in any other activities, such as large parades or assemblies, that might independently require permits and the provision of city services. The challenged ordinance remains sufficiently similar to its previous iteration to keep Mr. Cuviello's request for a preliminary injunction alive and to permit this Court to grant effective relief in Mr. Cuviello's favor.

The City also urges this Court to hold that the appeal is moot because the City "could not possibly have introduced evidence" in the district court to support the purportedly new ordinance. Supplemental Resp. Br. 15. It argues, in particular, that it should have an opportunity to support new "findings" set forth in Chapter 8.56. *See* Supplemental Resp. Br. 16; *see also id.* at 19-20.[2]

[2] In this context, the City's reliance on footnote 6 in Mr. Cuviello's supplemental opening brief is misplaced. That footnote did not fault the City for making new arguments based on the amendments. Rather, it explained that the amendments foreclose the City's *previous* argument that the original ordinance

As an initial matter, it is not true that the City had no opportunity to put on evidence relevant to this appeal. Despite bearing "the burden of justifying [its] restriction on speech," *Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009), the City produced *no* evidence in the district court to support Chapter 8.56's tailoring, *see generally* ER 51-52, Decl. of Frank Splendorio in Supp. of Defs.' Opp'n to Prelim. Injunction Mot.

More fundamentally, the added "findings" do not change what the ordinance *does* to injure Mr. Cuviello; accordingly, Mr. Cuviello's appeal is not moot. Were it otherwise, whenever a district court found that the government had not met its burden of demonstrating that a law was narrowly tailored, the government could moot any First Amendment appeal involving only declaratory or injunctive relief by adding findings or a statement of purpose to the statute. Mootness doctrine does not supply government defendants with this kind of second bite at the evidentiary apple.

The amended ordinance's findings also do not alter the *justification* for the ordinance, but instead confirm the ordinance's essential purpose. Specifically, in the absence of any asserted interest by the City, Mr. Cuviello assumed, and the district court accepted, that the ordinance's purpose was to prevent "noise disturbances." ER

"facilitate[d] speech while guarding against excessive disturbances of the peace" because that version of the ordinance permitted sound amplification that would otherwise have constituted a forbidden noise disturbance under Chapter 7.84. Supplemental Opening Br. 35 n.6 (citing Orig. Resp. Br. 21, 9th Cir. ECF No. 23).

18. The focus of the "findings" on protecting "health, welfare, and safety," along with "public peace and comfort" that may otherwise be "disturb[ed]" by sound amplification, Mun. Code § 8.56.010(A) (as amended), aligns with the prevention of "noise disturbances," which the City has defined in its municipal code. Specifically, a "noise disturbance" is 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." *Id.* § 7.84.020. With or without the new "findings," the City had every reason to produce evidence in the district court supporting the permit requirement's tailoring as a means to prevent noise disturbances, and to do so on terms equally applicable to the statute as amended. It did not do so.

The City also suggests that dismissing Mr. Cuviello's appeal as moot should not concern this Court because Mr. Cuviello can submit another motion for preliminary injunction on remand. That outcome—besides being legally unwarranted—would significantly prejudice Mr. Cuviello. By the time this appeal is submitted, nearly two years, if not more, will have passed since Mr. Cuviello filed his preliminary injunction motion. A return to the district court that thought an even more restrictive version of the ordinance passed constitutional muster will likely produce the same outcome. As a result, Mr. Cuviello could be back here in another two years making the same argument he makes today.

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

The parties agree that permitting schemes for sound-amplifying equipment are analyzed as "time, place, or manner" restrictions under both the First Amendment and the California Constitution's liberty-of-speech clause, and that public sidewalks constitute a public forum. *See* Supplemental Opening Br. 23; Supplemental Resp. Br. 17. They also agree that to be reasonable, such restrictions on a public forum's use must (1) be "content-neutral," (2) 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). Mr. Cuviello and the City part ways with respect to whether the City demonstrated that its ordinance is, in fact, narrowly tailored to serve a significant governmental interest. The district court's conclusion that the ordinance is likely to pass constitutional muster is legally erroneous and therefore an abuse of its discretion. *See Foti v. City of Menlo Park*, 146 F.3d 629, 641 (9th Cir. 1998), *as amended on denial of reh'g* (July 29, 1998).

A. Mr. Cuviello does not contest that the City's interest in "preventing noise disturbances," including ones that threaten public health or safety, is significant. Supplemental Opening Br. 26. The City likewise has a significant interest in advance notice of activities that require the City to provide "additional public safety and other services." *Long Beach Area Peace Network v. City of Long*

Beach, 574 F.3d 1011, 1034 (9th Cir. 2009). However, the City cannot "merely invok[e]" these interests; it "must also show that the proposed communicative activity endangers" them. *Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 859 (9th Cir. 2004); *see also, e.g.*, *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227 (9th Cir. 1990) (government "bears the burden of" justifying a permit requirement). Although the City argues that *Kuba*—one case on which Mr. Cuviello relied for this proposition—has been "factually distinguished a number of times," Supplemental Resp. Br. 22-23, it does not contest that this legal principle from *Kuba* remains good law.

The City has not demonstrated that its asserted interests are threatened by the use of sound-amplifying equipment regulated by Chapter 8.56. The City instead speaks in terms of *possible* dangers, contending that the use of sound-amplifying equipment could "potentially result in injuries" from distracted drivers and "may disturb the public peace and enjoyment of public spaces." *Id.* at 20. It also states that advance notice of such use allows the City to arrange for "appropriate" city services. *Id.* More is required to link the City's interests with the restricted speech, particularly where, as here, the permit regime adds nothing to, and indeed incorporates, the existing ban on noise disturbances. *See* Supplemental Opening Br. 27-28; *cf. Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000) (stating that the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative

judgments will vary up or down with the novelty and plausibility of the justification"); *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 475 (1995) ("[A] reasonable burden on expression requires a justification far stronger than mere speculation about serious harms." (internal quotation marks omitted)).

The City's constitutional justification for Chapter 8.56 as applied to Mr. Cuviello is even weaker. The City points to the fact that he seeks to use sound-amplifying equipment to get the attention of patrons driving into the park and that police have previously been present. *See* Supplemental Resp. Br. 20-21. Those facts are true, but they do not connect the permit requirement with the City's asserted interests. An individual speaking about an issue of public concern always seeks to get the attention of others, and although police have been present at some protests attended by Mr. Cuviello, the only apparent connection between that presence and Mr. Cuviello's use of a bullhorn relates to the City's monitoring of Mr. Cuviello's compliance with the sound-amplification permit ordinance. The City cannot justify its permit requirement with the circular reasoning that a police presence is necessary to enforce that same requirement.

The City also states without any citation to the record:

> Loud[,] unexpected noises created by a bullhorn are likely to startle drivers and attract the attention of pedestrians. Further, the large number of pedestrians walking into through [sic] the parking lot to the Six Flags entrance as drivers are arriving makes the risk of accidents caused or contributed to by distracted drivers and pedestrians higher than it would be in other areas. Advance notice of protest activities like

> those engaged in by Mr. Cuviello also provide the City an opportunity to send police to monitor the protest to keep the peace between protestors and individuals with opposing viewpoints, or Six Flags staff who do not appreciate their presence.

Id. at 20-21. The City's assertions with respect to sound that "startle[s]" drivers is at odds with the City's previous concession that its "interest in maintaining quietude is reduced" in "noisy places like Six Flags." Orig. Resp. Br. 43, 9th Cir. ECF No. 23. Indeed, although the City previously argued that its "interest in regulating amplified sound in locations *other than Six Flags* is indisputably significant," it did not make the same contention as applied to Mr. Cuviello's use of sound-amplifying equipment at the park. *Id.* at 52 (emphasis added). The City does not acknowledge these previous concessions, much less overcome them.

The City's other justifications for connecting the permit ordinance and the City's interests are likewise unavailing. There is no reason to believe that a single bullhorn is likely to startle drivers where ambient park noise—including the "sounds of the Park's roller coasters and the screams of patrons riding them"—can be heard at the demonstration site. SER 3, Cuviello Decl. ¶ 10; *see also* ER 56-57 (site map). The City also has not demonstrated that a "large number of pedestrians" mill about outside Six Flags. Mr. Cuviello, for example, has indicated that "the vast majority of Six Flags' patrons arrive by automobile and park on-site," so he "can no longer physically approach" them from the public sidewalk. SER 3, Cuviello Decl. ¶ 8. Likewise, the City's suggestion that advance notice of Mr. Cuviello's sound

amplification is necessary so that the City can "send police to monitor the protest" to keep the peace between protestors and others who may not "appreciate" their presence is unsupported. Supplemental Resp. Br. 20. There is no evidence that there has ever been a need for police due to a clash between bullhorn-using protestors and individuals with opposing viewpoints at Six Flags or elsewhere in Vallejo, or that *bullhorn use* was the cause of any such disagreement.

Bullhorn use—standing alone—also does not require city services for any other reason. As the City concedes, anyone using sound amplification equipment is prohibited from creating a "noise disturbance," Mun. Code § 7.84.020, a prohibition expressly incorporated into the permit regime. A permit requiring advance notice of free-speech activities must be narrowly tailored to "events that realistically present *serious*" concerns, such as those involving "traffic, safety, and competing use[s]" of public space, "significantly beyond those presented on a daily basis by ordinary use of the streets and sidewalks." *Food Not Bombs*, 450 F.3d at 1039. Bullhorn use that does not create a noise disturbance, as defined broadly by the City, does not pose such concerns. Under those circumstances, a permit requirement for such "everyday public discourse" is "offensive" to First Amendment values. *Berger v. City of Seattle*, 569 F.3d 1029, 1037 (9th Cir. 2009) (en banc) (quoting *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 165-66 (2002)).

If anything, the City's use of the permit scheme to target protestors makes the ordinance less, not more, constitutionally defensible. *See* Supplemental Opening Br. 30-31 (citing *Grossman v. City of Portland*, 33 F.3d 1200, 1207 (9th Cir. 1994)). The City states that "[p]rotest activities like those engaged in by Mr. Cuviello—protesting the practices of a particular business, in front of the business, and in a manner intended to attract the attention of customers and deter them from patronizing the business—have the potential to result in conflicts and present a traffic hazard." Supplemental Resp. Br. at 27. But if the City wanted to impose a permit requirement on a small group of individuals speaking their minds in a similar way *without* sound-amplifying equipment, that permit requirement would surely be unconstitutional: 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.*, *Food Not Bombs*, 450 F.3d at 1046 (discussing the "strong interest in protecting the opportunity for spontaneous expression in public fora with respect to individuals or small groups"); *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."). The City's admission (at 20-21) that it seeks to use sound-amplifying equipment as a

proxy to impose such a requirement on protestors whose presence may not be "appreciate[d]" therefore does not save its ordinance from constitutional infirmity.

B. Mr. Cuviello has consistently argued that Chapter 8.56 is not narrowly tailored to advance the City's interests in preventing noise disturbances because a separate ordinance, Chapter 7.84, forbids the use of sound-amplifying equipment to cause such disturbances. The City concedes that Chapter 8.56, as a condition on a permittee, requires that volume "be controlled such that it does not constitute a noise disturbance in violation of Chapter 7.84." Supplemental Resp. Br. 21 (citing Mun. Code § 8.56.060(C) (as amended)). But it argues that Chapter 7.84 "is a general ordinance intended to cover a broad range of conduct that disturbs the peace," while Chapter 8.56 "is addressed to the more specific interests of providing advance notice to the City of activities where a police presence or other services would be helpful, minimizing traffic hazards," and "ensuring residents' ability to peacefully enjoy public spaces." *Id.* at 22.

The City's portrayal of Chapter 7.84 as a general ordinance unconcerned with sound-amplifying equipment in particular is belied by the text of that provision. Chapter 7.84 imposes a general prohibition on certain "loud, unnecessary, and unusual noise" or noise that "causes discomfort or annoyance to any reasonable person of normal sensitiveness residing in the area." Mun. Code § 7.84.010. But it imposes "[s]pecific prohibitions" as well. *Id.* § 7.84.020. Although the City refers to

Chapter 7.84's prohibition on certain noise from power tools or pets, Supplemental Resp. Br. 21-22, the more relevant subsection makes it unlawful to use "any mechanical or electronic device for the intensification of any sound or noise into the public streets which causes a noise disturbance," Mun. Code § 7.84.020(A), where "noise disturbance" is a term defined broadly to sweep in interests in protecting health, safety, and property, *id.* § 7.84.020. Chapter 7.84 thus already covers noise that threatens—as the City puts it—"residents' ability to peacefully enjoy public spaces" or that poses "traffic hazards" that may endanger pedestrians, drivers, and vehicles. Supplemental Resp. Br. 22. The City's permit requirement is therefore not narrowly tailored to serve this interest.

C. The City resists Mr. Cuviello's argument that Chapter 8.56 is not narrowly tailored by pointing to *Saia v. People of State of N.Y.*, 334 U.S. 558 (1948). It argues that the City's ordinance is more narrowly drawn than the *Saia* ordinance in terms of regulating hours, locations, and volume for the use of amplified sound equipment. Supplemental Resp. Br. 24. But those features cannot save a time, place, or manner restriction for which the significant government interest at stake is not threatened by the regulated conduct. *See Watchtower Bible*, 536 U.S. at 166.

For example, imagine that a city adopts a sign permit requirement that applies only to hand-held signs no larger than ten-inches by twenty-inches, and it justifies the requirement on the ground that sign permits are necessary to manage competing

uses of public space and prevent driver distraction. Under the terms of the ordinance, permittees can use their signs between 10:00 a.m. and 8 p.m., and the City will respond to a permit request within three days. Those "narrowing" aspects of the ordinance could not save the ordinance from constitutional infirmity because the government interests—no doubt significant—are not actually threatened by use of the tiny, hand-held signs being regulated. *Cf. Foti*, 146 F.3d at 641 (upholding a regulation restricting sign size without suggesting that a similar restriction could be appropriate for smaller signs not posting a similar traffic hazard).

The City also points to *Rosenbaum v. City & County of San Francisco*, 484 F.3d 1142 (9th Cir. 2007), arguing that this Court upheld a permit requirement for sound-amplifying equipment there, despite a "parallel noise ordinance prohibiting 'amplification of sound or human voice in such a manner as to produce raucous noises or … disturb the peace, quiet and comfort of persons in the neighborhood or with volume louder than … necessary for convenient hearing." Supplemental Resp. Br. 25-26 (quoting *Rosenbaum*, 484 F.3d at 1160). The City contends the Court should do the same here.

As Mr. Cuviello has explained, however, *Rosenbaum*, 484 F.3d 1142, dealt only with the plaintiffs' as-applied challenge to a permit requirement based on contentions that "the City engaged in viewpoint discrimination" through its permitting discretion and imposed an "unconstitutional prior restraint" by rejecting

"permit applications based on [the plaintiffs'] non-compliance with conditions attached to" previous permits. *Id.* at 1157-58, 1164. Although *Rosenbaum* stated in dicta that the "statutory framework governing eligibility for loudspeaker permits" was "facially valid," *id.* at 1158, it did not so hold. Rather, it noted that the plaintiffs' "claim of facial invalidity" had been dismissed, *id.* at 1158 n.12, and that the plaintiffs did "not facially attack the governing framework for permit issuance" on appeal, *id.* at 1161.

Rosenbaum thus had no reason to address the argument made here with respect to Chapter 8.56's tailoring. Moreover, there is no indication that *Rosenbaum* would have come out as it did had the argument been made in that appeal. Under the then-current ordinance in *Rosenbaum*, "individuals or groups seeking to use amplified sound that might exceed volume levels" otherwise prohibited by law were required to "apply for permits." *Id.* at 1147; *see also id.* at 1161 (noting that users of amplified sound could be "granted permission" through a permit to produce otherwise "unreasonably loud and raucous" noise, *e.g.*, "for larger events"). The City in this case, of course, has expressly disavowed that possibility, instead requiring a permit for people who, under the terms of the permit, will *not* produce unreasonably loud and raucous noise.[3]

[3] In 2017, San Francisco's loudspeaker-permitting ordinance was replaced with San Francisco Police Code Article 15.1. *See* San Francisco Ord. 163-17, File

The City unconvincingly attempts to distinguish *Long Beach Area Peace Network*, 574 F.3d 1011, on which Mr. Cuviello relied to demonstrate why Chapter 8.56 is not narrowly tailored. In that case, the Court demanded specificity with respect to assertions that a permit requirement was necessary to protect the city's interest in advance notice to provide city services. *Id.* at 1034-36. Such record support for the asserted interests is lacking here. The City's only response is to say that the two ordinances are factually distinct: The one at issue in *Long Beach* was a permit requirement for "large gatherings in public spaces," while the one here deals with "the use of sound amplification devices and lighting equipment." Supplemental Resp. Br. 28. That observation is true but largely irrelevant. In *Long Beach* and in this case, the government asserted an interest in advance notice of regulated activity in order to provide city services. In this case, as in *Long Beach*, this Court should demand more than a speculative or vague assertion that city services of some kind will become necessary in order to find that the ordinance is narrowly tailored.

To the extent that the factual distinction between *Long Beach* and this case *is* relevant, it actually underscores why Chapter 8.56 is not narrowly tailored. It is at least plausible that a group of 75 or more people in a public place—the type of gathering at issue in *Long Beach*—might require city services, such as "crowd

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No. 170443, App. 7/27/2017, *available at* https://sfbos.org/sites/default/files/o0163-17.pdf.

control," even though this Court found the ordinance wanting as to this rationale. 574 F.3d at 1036. In contrast, the City attempts to justify its ordinance here based on the provision of undefined city services to conduct involving a single person.

The City's attempt to distinguish *Wollam v. City of Palm Springs*, 379 P.2d 481 (Cal. 1963), is similarly unavailing. There, the California Supreme Court held that a permit requirement for sound trucks that required 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 a "volume limitation and requir[ing] that the sound be so controlled that it w[ould] not be disturbing or a nuisance." *Id.* at 482. In response, the City states that its "ordinance is addressed to the potential problems associated with use of sound amplification devices," not "loud or unusual noise in general." Supplemental Resp. Br. 28. But *Wollam* dealt with the constitutionality of a statute that specifically regulated sound trucks, 379 P.2d at 482, not all loud or unusual noise. The City also contends that bullhorns are "more likely to distract drivers and pedestrians," or "disturb the peaceful enjoyment of public spaces," than other loud sounds, Supplemental Resp. Br. 28, but that unsupported assertion could as easily have been made regarding the sound truck at issue in *Wollam*.

D. As Mr. Cuviello has explained, his facial challenge to Chapter 8.56 rests on an assertion that the ordinance is overbroad. *See* Supplemental Opening Br.

33-39. First, he pointed to the fact that Chapter 8.56 requires a permit even for individual use as strong evidence of the ordinance's overbreadth. *See, e.g.*, *Berger*, 569 F.3d at 1037-38; *Watchtower Bible*, 536 U.S. at 166. The City responds only that this "Court upheld an individual permit requirement in *Rosenbaum*." Supplemental Resp. Br. 29. As noted above, however, *Rosenbaum* did not involve a facial challenge on appeal, *see* 484 F.3d at 1161, so it necessarily did not address overbreadth.

Second, Mr. Cuviello argued that Chapter 8.56 is overbroad because it requires an individual seeking to use sound-amplifying equipment audible beyond 50 feet to obtain 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. The City responds by stating that an "'ordinance is facially unconstitutional only if it is unconstitutional in every conceivable application, or … seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad.'" Supplemental Resp. Br. 29 (quoting *Klein v. San Diego County*, 463 F.3d 1029, 1033 (9th Cir. 2006)). That recitation of the applicable standard does not refute Mr. Cuviello's position that Chapter 8.56 does, in fact, prohibit an overly broad range of protected speech. *See also Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011) (asking whether a "substantial number" of a law's "applications are unconstitutional,

judged in relation to" any "legitimate sweep" (internal quotation marks omitted)). Further, the City makes no attempt to distinguish *Klein v. City of Laguna Beach*, 381 F. App'x 723 (9th Cir. 2010), which held that a sound-amplification permit ordinance was overbroad, or to distinguish the many other cases holding provisions similar to those in Chapter 8.56 overbroad or otherwise not narrowly tailored. *See* Supplemental Opening Br. 36-39.

Third, as to Mr. Cuviello's arguments regarding Chapter 8.56's hour-of-day and wattage restrictions, the City again refers without elaboration to the standard for assessing unconstitutional overbreadth. *See* Supplemental Resp. Br. 30. And it says only slightly more about Chapter 8.56's provision prohibiting the use of sound-amplifying equipment within 100 yards—or 300 feet—of certain designated sites, such as schools and courthouses. *See* Mun. Code § 8.56.060(B) (as amended). The City ignores Mr. Cuviello's contention that, because the ordinance applies to any equipment that can be heard beyond 50 feet, the provision creates up to a 250-foot buffer zone around key public sites, shielding them from protestors with sound-amplifying equipment even where there is no realistic probability that sound will reach them. The City states only that it has "a clear governmental interest in ensuring that sound amplification devices are not used in areas where they are likely to be significantly disruptive." Supplemental Resp. Br. 29. However, a bullhorn cannot possibly be disruptive where it cannot be heard. The City also contends that Mr.

Cuviello did not specifically challenge in his motion for a preliminary injunction the blanket prohibition on sound within 300 feet of enumerated sites, such as schools and city buildings. But Mr. Cuviello did argue that the ordinance is overbroad, *see* Pl.'s Mot. for Prelim. Injunction 14, Dist. Ct. ECF No. 18, and he may permissibly use this provision as one example among many within Chapter 8.56 that underscore its overbreadth.

Fourth, Mr. Cuviello argued that the existence of obvious alternatives to enforcement of Chapter 8.56 demonstrates the ordinance's overbreadth (and the City's more general failure to narrowly tailor it). *See* Supplemental Opening Br. 40-41. The City does not respond to this contention.

III. MR. CUVIELLO HAS SATISFIED THE OTHER REQUIREMENTS FOR A PRELIMINARY INJUNCTION.

Mr. Cuviello has also satisfied the other three considerations relevant to issuance of a preliminary injunction: likelihood of irreparable harm, balance of hardships, and the public interest. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008). The City's contrary argument rests on a mischaracterization of the district court's order and a misunderstanding of relevant law.

A. The City argues that the district court found no likelihood of irreparable harm because the City had not taken enforcement action against Mr. Cuviello or other protestors using bullhorns without a permit. Supplemental Resp. Br. 30. It ignores the court's primary rationale that, because Mr. Cuviello had not shown a

likelihood of success on his claims, the other factors relevant to a preliminary injunction, including the likelihood of irreparable harm, supported denying relief. ER 19-20 (citing *Winter*, 555 U.S. at 22). In any event, irreparable injury is not measured by actual past enforcement and uniformity of application. 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); *accord Foti*, 146 F.3d at 643.

The City agrees with that standard, but takes the position that "the threat of enforcement was not credible" here. Supplemental Resp. Br. 32. It observes that in *Elrod*, employees claimed a credible threat of enforcement because other employees had already been discharged for refusing to affiliate with a particular political party. Mr. Cuviello need not show, however, that other protestors have been cited for violating Chapter 8.56 where the City has directly threatened to enforce the provision against *him* and he has, in response, stopped engaging in the protected conduct to avoid enforcement. *See* SER 3-4, 6, Cuviello Decl. ¶¶ 16-18, 21, 31; *see also* Supplemental Resp. Br. 32 (recognizing that "confiscation of Mr. Cuviello's bullhorn" would have constituted "enforce[ment]"). In this respect, Mr. Cuviello's situation is akin to that of class members in *Elrod* who "had agreed to provide support for the Democratic Party in order to avoid discharge." 427 U.S. at 374.

The City argues that "even if the ordinance had been enforced, confiscation of Mr. Cuviello's bullhorn would not have quashed his expressive conduct altogether." Supplemental Resp. Br. 32. It will usually be the case in a challenge to a time, place, or manner restriction that a speaker will have *some* other alternative route for conveying his message. Yet the issuance of preliminary injunctions in such cases is commonplace. *See, e.g.*, *S.O.C., Inc. v. Cty. of Clark*, 152 F.3d 1136, 1148 (9th Cir.), *amended*, 160 F.3d 541 (9th Cir. 1998); *Foti*, 146 F.3d at 642.

The City also seems to suggest (at 4, 31) that the delay in Mr. Cuviello's lawsuit and motion for a preliminary injunction casts doubt on his need for preliminary relief. Until this appeal, however, Mr. Cuviello proceeded pro se and endeavored to file legally compelling documents compliant with the district court's rules. The timing of his suit was reasonable in this context.

B. The balance of hardships and public interest also favor a preliminary injunction. *See* Supplemental Opening Br. 41-43. The City selectively quotes Mr. Cuviello's supplemental opening brief to suggest that he relies only on "common sense" with respect to the balance of hardships. Supplemental Resp. Br. 32. In fact, the brief argues that, given the showing of irreparable harm to First Amendment rights, the City had an obligation to "'establish[] through admissible evidence that it would endure hardship if challenged provisions of the amplified sound ordinance were enjoined.'" Supplemental Opening Br. 43 (quoting *Klein v. City of Laguna*

Beach, 381 F. App'x at 727). Mr. Cuviello pointed out that the City had not done so "[a]nd common sense suggest[ed]" that the City could not if it tried. *Id.* The City does not explain why *Laguna Beach*'s admonition that the City had an obligation to present evidence of hardship to it is inapplicable here. And it does not dispute that Mr. Cuviello's abstention from using his bullhorn is a hardship to him; rather, it argues that it is not reasonable for Mr. Cuviello to believe that the City will actually take enforcement action. *See* Supplemental Resp. Br. 33. As explained above, at p. 26, however, Mr. Cuviello's worry is eminently reasonable in light of the City's previous threat of enforcement and its vigorous defense of the permit requirement's application to him.

The City also argues that it has a "strong interest in public safety and in having advance notice of activities that may require a police presence or other services." Supplemental Resp. Br. 33. However, as discussed in Part II, the ordinance is not narrowly tailored to further those interests. And, as was true in *Laguna Beach*, for example, the City still has at its fingertips an ordinance prohibiting noise disturbances, including those endangering human health and safety or property. *See* 381 F. App'x at 727. Moreover, the City ignores the countervailing interest of Vallejo residents in being free of an unconstitutional restriction on speech. *See Klein v. City of San Clemente*, 584 F.3d at 1208 (recognizing "the significant public interest in upholding free speech principles" (internal quotation marks omitted)).

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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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 6,972 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

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 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
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