UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
Seattle Division

RUSSELL JOHNSON; JENNY DONNELLY; HER VOICE MOVEMENT, INC., d/b/a TETELESTAI MINISTRIES; ROBERT DONNELLY; ROSS JOHNSTON;

Plaintiffs,

v.

CITY OF SEATTLE, WASHINGTON; BRUCE HARRELL, in his official capacity as Mayor of the City of Seattle, Washington; SHON BARNES, in his official capacity as Chief of Police for the Seattle Police Department;

Defendants.

Case No. 2:25-cv-1874-BJR

REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

ORAL ARGUMENT REQUESTED

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ARGUMENT

I. Plaintiffs are likely to succeed on the merits.

A. Defendants' permitting scheme demands a license from the government prior to engaging in protected speech, which is a classic prior restraint.

Despite Defendants' contentions that Plaintiffs are "nonsensical" in their reliance on prior restraint doctrine (dkt. 18, at 4), it is Defendants who fundamentally misunderstand a prior restraint (and misquote *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992)). For clarity: if a speaker must obtain permission from the government before engaging in protected speech, **it is a prior restraint**. Period. As the Supreme Court recognized, an "ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies in the archetype of a traditional public forum **is a prior restraint on speech**." *Id.* at 130 (emphasis added; citation modified). *See also Jersey's All-American Sports Bar, Inc. v. Washington State Liquor Control Bd.*, 55 F. Supp. 2d 1131, 1136 (W.D. Wash. 1999) ("A prior restraint is a law giving public officials the power to deny the use of a forum in advance of actual expression."). Defendants contend that a permit "for a march, parade or rally is not a prior restraint" if it satisfies the constitutional test (dkt. 18, 4), but that misconstrues the issue entirely. If a permitting scheme overcomes the "heavy presumption against its constitutional validity," *Bantam Books, Inc. v. Sullivan*, 380 U.S. 51, 57–58 (1963), by including the requisite procedural safeguards, then it survives scrutiny. But it is still a prior restraint.

Leaving Defendants' definitional misunderstanding aside, Defendants' efforts to avoid the presumptive unconstitutionality of their permitting scheme fails on the merits. Defendants contend that the permitting scheme is not a prior restraint because it is allegedly not intended to suppress speech but to regulate traffic and maintain safety. (Dkt. 18, 10.) This is precisely the argument defendants raised, and this Court rejected, in *Jersey's All-American Sports Bar*. 55 F. Supp. 2d at 1136–37. There, as here, the defendants "resist[ed] the characterization as a prior restraint" because the focus of the analysis should be "on the goal of the legislation," which defendants claimed was "unrelated to the suppression of speech or ideas" but rather about "maintaining safe conditions." *Id.*

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at 1137. This Court rightly rejected that contention as asking the wrong question. *Id.* ("The defendants' arguments are not persuasive."). If, as here (dkt. 1, ¶48), the law requires permission prior to engaging in speech, it is a prior restraint. Full stop. Just as Defendants here, the *Jersey's* defendants "ask the Court to simply ignore the means chosen by the state to advance its interest." 55 F. Supp. 2d at 1137. "But the Court may not limit its inquiry to the government's asserted goals when the means employed directly infringe rights protected by the [C]onstitution." *Id.* Indeed, just as here, "[b]ecause the state has decided to regulate the health and safety via a license to speak, that license must meet the requirements of the First Amendment" and its prior restraint doctrines. *Id.*

1. Defendants' permitting scheme violates the First Amendment by vesting unbridled discretion in the hands of the licensor.

Defendants contend that the permitting scheme does not vest unbridled discretion in the hands of government officials because it purports to limit the ability of government officials to consider the content of the message of the proposed speaker. (Dkt. 18, 11.) The permitting scheme's one line about not considering content, if it stood alone, might save Defendants' ordinance from constitutional invalidity, but the permitting scheme must be considered as a whole. First, Defendants' permitting scheme permits the official to consider "safety" and "security," as well as "other health related considerations." (Dkt. 1, ¶49.) This broadly articulated parameter is precisely what the Court found impermissible in *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988). There, the government needed only to state that "it was not in the public interest" to deny a permit, which the Court said was an "illusory constraint." *Id.* There, as here, defendants contended that a limitation on permit denial solely on the "health, safety, or welfare" of the community was sufficient to cabin the official's discretion. *Id.* The Supreme Court rejected that contention. Essentially, the government asked that the Court "presume[] the [government] will act in good faith and adhere to standards absent from the ordinance's face" by only denying permits "for reasons related to the health, safety, or welfare" *Id.* "But this is the very presumption that the doctrine forbidding unbridled discretion disallows." *Id. See also Diamond S.J. Enter., Inc. v. City*

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of San Jose, 100 F.4th 1059, 1067 (9th Cir. 2024) (noting that "the Supreme Court found that a provision allowing a mayor to deny newspaper rack permits 'for reasons related to health, safety, or welfare' conferred unbridled discretion"). Defendants' contentions to the contrary are incorrect.

Moreover, Defendants go to great lengths to contend that their permitting scheme is merely a time, place, manner restriction on speech and thus survives constitutional scrutiny. (Dkt. 18, 9.) This, too, is incorrect. "[E]ven if the government may constitutionally impose content-neutral restrictions on the manner of speech, it may not *condition* that speech on obtaining a license or permit from a government official in that official's boundless discretion." *City of Lakewood*, 486 U.S. at 763. Thus, even under Defendants' own (improper) construction of their permitting scheme as a time, place, and manner restriction, it still fails for giving the licensor unfettered discretion.

Finally, that Defendants have also farmed out some of the unbridled discretion in the permitting scheme to community businesses does not eliminate the presumptively unconstitutional vesting of unbridled discretion. "A scheme that requires permission from the government, **or its designee**, before one may engage in constitutionally-protected expression, constitutes a prior restraint." *United States v. Perelman*, 737 F. Supp. 2d 1221, 1232–33 (D. Nev. 2010) (emphasis added). Here, not only does the City itself have unbridled discretion to deny a permit, but it has compounded that facial flaw by requiring a speaker to obtain additional permission from non-government entities prior to obtaining a permit. (Dkt. 1, ¶¶58–59.) No standards apply to the non-government entities whose permission must be obtained prior to speaking in parts of Seattle, and nothing in the permitting scheme prohibits Defendants from denying a permit on the basis of the non-government entities' rejection. That is part and parcel unbridled discretion.

2. Defendants' application of the permitting scheme shows that it vests unbridled discretion in the hands of government officials.

Defendants' application of the permitting scheme also demonstrates unbridled discretion. First, and importantly, Defendant misstate entirely the record by contending that "Plaintiffs were

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not denied a permit." (Dkt. 18, 11.) This is plainly false. (*See* Dkt. 1, ¶86 (explicitly stating that Plaintiffs' requested permit for Pike Street "is being denied by the Special Events Committee.").

Defendants contend that Plaintiffs' viewpoint and content was not relevant to the permit denial. (Dkt. 18, 8). The evidence before the Court shows differently. As explicitly contemplated by the permitting scheme, Defendants farmed out approval for Plaintiffs' requested permit to non-government entities.(Dkt. 1, ¶¶76–77.) And it was the non-government entities who determined that Plaintiffs' permit would be denied. (Dkt. 1, ¶¶83, 86.) Though Defendants contend that the denial of Plaintiffs' permit was all about safety and traffic for local businesses (dkt. 18, 6–7), Plaintiffs specifically informed Defendants that "they would do whatever is necessary to ensure there was no impact on the businesses or public." (Dkt. 1, ¶84.) Plaintiffs were not given that option because Defendants and their non-government censorship designees objected to the religious event that occurred the prior year. (Dkt. 1, ¶¶70, 71, 79.) This raises the precise specter of discrimination that *City of Lakewood* forbids. There, the Court noted that the First Amendment is violated by a system that permits "the licensor [though] he does not necessarily view the text of the words about to be spoken, but can measure their probable content or viewpoint by speech already uttered." 486 U.S. at 759. The problem with this system is that "[a] speaker in this position is under no illusion regarding the effect of the licensed speech on the ability to continue speaking in the future." *Id.* at 760. Defendants' application of the permitting scheme raised this precise specter by explicitly denying Plaintiffs' proposed permit on the basis of alleged concerns over past speech. (Dkt 1, ¶¶70, 71.) In other words, the denial was content based.

3. Defendants shut down Plaintiffs' speech on the basis of listener reaction, a classic heckler's veto.

Defendants protest use of the term "heckler's veto" by suggesting that a heckler's veto only covers preemptive silencing of speech based on "speculative, prospective fears of negative reactions." (Dkt. 18, 12.) This is plainly incorrect. To be sure, "[t]he prototypical heckler's veto case is one in which the government silences *particular* speech or a *particular* speaker due to an

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anticipated disorderly or violent reaction of the audience." *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1293 (9th Cir. 2015) (emphasis original). But that is not all that a heckler's veto is. The "heckler's veto doctrine applies when particular, protected speech is 'met by violence or threats or other unprivileged retaliatory conduct." *Id.* (quoting *Zamecnik v. Indian Prairie Sch. Dist. #204*, 636 F.3d 874, 879 (7th Cir. 2011)). More fatally for Defendants, "every appellate decision applying the heckler's veto doctrine of which we are aware involved the restriction of particular speech due to listeners' **actual** or anticipated hostility to that speech." *Id.* (emphasis added). Thus, Defendants' retreat to a position that the First Amendment's prohibitions on a heckler's veto only apply in advance of the speech is plainly and demonstrably incorrect.

Defendants' contentions are quite curious when compared to *Meinecke v. City of Seattle*, 99 F.4th 514 (9th Cir. 2024), in which these **same Defendants** raised these **same contentions** to resounding defeat in the Ninth Circuit. There, Seattle resisted the characterization of its actions as a heckler's veto by "repeatedly referring to its actions as time, place, or manner restrictions." *Id.* at 523. Defendants, here, constantly resort to the same refrain. (*E.g.*, dkt. 18, 9–10.) But, as the Ninth Circuit already held against these Defendants, "incanting the words 'time,' 'place,' and 'manner' over a content-based restriction does not transmute it into one that is content neutral." 99 F.4th at 523. And, as here, content-based they were. "The City's enforcement actions against Meinecke are content-based heckler's vetoes." *Id.* at 522. "In fact, it is apparent from the facts . . . that the Seattle police directed Meinecke to leave the area because of the reaction his Bible-reading provoked at the *Dobbs* and Pride-Fest protests." *Id.* at 522–23. It was not a response to anticipated reaction that made Defendants' actions a heckler's veto, but the silencing of protected speech in response to actual violent reaction to the speaker. *Id.* at 523 (noting that the speaker was silenced to allegedly "restore public order and prevent further violence," and was "the direct result of assaults on Meinecke" and "prompted by physical altercations.").

The same is true here, and Defendants' actions must meet the same fate. At Plaintiffs' event, violent protestors assaulted Plaintiffs, their attendees, and volunteers. (Dkt. 1, ¶93.) Did Defendants'

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1 officers arrest those violating the law and assaulting those engaged in protected speech? No.
2 Defendants did exactly what they did in *Meinecke* and shut down Plaintiffs' protected speech
3 because of "violent protestors." (Dkt. 1, ¶¶94–114.) Just as in *Meinecke*, "there is no evidence of
4 any protestor being arrested for physical altercations and threats of violent behavior, including those
5 who seized and ripped his Bible, poured water on him, took his shoes, and physically carried him
6 across the street." 99 F.4th at 523. No arrests were made of the violent thugs who threw urine-filled
7 water balloons and full water bottles at Plaintiffs, sprayed them with pepper-spray and tear gas,
8 brandished weapons, ripped their banners, and destroyed their equipment. (Dkt. 1, ¶¶99, 101–114.)
9 The violence against protected speech and speakers was identical in *Meinecke* and here.
10 Defendants' response to that violence (*i.e.*, silencing a speaker) was identical in *Meinecke* and here.
11 And the result obtained should be identical to *Meinecke*. Binding Ninth Circuit precedent demands
12 a finding the Defendants' actions in silencing speech in response to violence against the speakers
13 was a "content-based heckler's veto" and a preliminary injunction. 99 F.4th at 523. "At both events,
14 the Seattle police targeted Meinecke's speech only once the audience's hostile reaction manifested.
15 **That is part and parcel of a heckler's veto**." *Id.* at 523–24 (emphasis added). Defendants'
16 contentions to the contrary are utterly lacking in merit. and must be rejected as a matter of binding
17 law. A preliminary injunction should issue.

18 **4. Defendants' post-discrimination statements prove their actions were**
19 **unconstitutionally content-based silencing of Plaintiffs' speech.**

20 Defendant Harrell's statements after the event prove Defendants' actions were content based.
21 As the sworn evidence before the Court demonstrates, Defendants blamed Plaintiffs for the violence
22 perpetrated against them, rather than punishing those who broke the law in assaulting them. (Dkt.
23 1, ¶115–116.) Defendant Harrell noted that the violence was the natural response to Plaintiffs'
24 speech because it is purportedly "inherently opposed to our city's values, in the heart of Seattle's
25 most prominent LGBTQ+ neighborhood." (Dkt. 1, ¶117.) In other words, Defendants, through their
26 chief executive, "chos[e] sides in the debate and used [the permitting scheme] to enforce its choice."
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Meinecke, 99 F.4th at 524. Defendants' actions were "a content-based burden on [Plaintiffs'] expressive activity because the City did so only in response to the actual and potential reaction of the audience." *Id.* It triggers strict scrutiny under Defendants' own admissions. (*See* dkt. 18, 7.)

5. Defendants bear the burden to demonstrate that their permitting scheme satisfies strict scrutiny.

Defendants contend that Plaintiffs bear the burden of demonstrating that they are entitled to a preliminary injunction. (Dkt. 18, 4.) No one questions that, not even Plaintiffs. (Dkt. 9, 1.) Yet, Defendants chastise Plaintiffs with "abdication of their burden of proof" and contend that Plaintiffs bear the entire burden of proof in this context. (Dkt. 18, 4, 8.) This is incorrect as a matter of law. In fact, Defendants wholly ignore the fact that "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). And, "[a]s the Government bears the burden of proof on the ultimate question of [their permitting scheme's] constitutionality, [Plaintiff] must be deemed likely to prevail unless the Government" satisfies strict scrutiny. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). "Therefore, in the First Amendment context, the moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, at which point **the burden shifts to the government to justify the restriction**." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011) (emphasis added).

Here, Plaintiffs have easily satisfied their requirement to demonstrate a colorable First Amendment claim warranting the application of strict scrutiny. As demonstrated *supra*, Defendants' silencing of Plaintiffs' speech in response to violent reaction is a content-based heckler's veto, *Meinecke*, 99 F.4th at 523, Defendants' permitting scheme impermissibly vests unbridled discretion in the hands of government officials, and Defendants admit that their actions were based on the response from those opposed to Plaintiffs' speech. (*See* dkt. 18, 12.) Defendants' actions and permitting scheme allowing such actions are content-based and thus subject to strict scrutiny. Even Defendants admit that truth. (Dkt. 18, 7.) And Defendants fail that test.

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6. Defendants' permitting scheme and application of it fails strict scrutiny.

Even assuming *arguendo* that maintaining safety and order are a compelling interest and that Defendants' actions were taken on the basis of that interest, which they were not, Defendants' permitting scheme and their application of it would still fail strict scrutiny because it was not the least restrictive means. "Curtailing speech based on the listeners' reactions is rarely—if ever—the least restrictive means to achieve the government's interest in safety." *Meinecke*, 99 F.4th at 525. "If speech provokes wrongful acts on the part of hecklers, the government must deal with those wrongful acts directly; **it may not avoid doing so by suppressing the speech**." *Id.* (quoting *Santa Monica Nativity Scenes Comm.*, 748 F,3d at 1292–93) (emphasis added).

Here, as in *Meinecke*, there were several less restrictive alternatives. Defendants could have (and should have) "warned the protestors that any sort of physical altercation would result in the perpetrators' arrest," "they could have arrested the individuals who ultimately assaulted" Plaintiffs, they could have "called for more officers," or they could have required the protestors to leave. *Id.* at 525. Just as in *Meinecke*, Defendants "**did none of those things**." *Id.* (emphasis added). (*See also* dkt. 1, ¶¶93, 96, 111.) Rather, they punished Plaintiffs and silenced their speech. That is not the least restrictive means, and it violates strict scrutiny. The injunction should issue.

B. The Free Exercise Clause is no "Hail Mary."

In perhaps their most offensive missive about their gross intrusion into Plaintiffs' constitutional rights, Defendants contend that Plaintiffs lob a "Hail Mary" at the Court to justify a likelihood of success. (Dkt. 18, 12.) The Free Exercise Clause is no "Hail Mary," and Defendants' contentions are as offensive and unconstitutional as the Mayor's condemnation of their religious expression. For one, Defendant Harrell's official statements condemning Plaintiffs for the unlawful assaults committed on them demonstrates Defendants' actions were targeted at Plaintiffs' religious expression and therefore violate the Free Exercise Clause. "[O]fficial expressions of hostility to religion [are] inconsistent with what the Free Exercise Clause requires." *Masterpiece Cakeshop v. Colorado Civil Rights Comm.*, 584 U.S. 617, 639 (2018). And when those official expressions of

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hostility are coupled with government actions demonstrating intolerance of religious expression, the violation of the Free Exercise Clause is all the more blatant. *See Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 690 (9th Cir. 2023) ("We especially note that government actions coupled with official expressions of hostility to religion are inconsistent with what the Free Exercise Clause requires and **must be set aside**." (emphasis added)). This Court has noted the same. *Etienne v. Ferguson*, 791 F. Supp. 3d 1226, 1247 (W.D. Wash. 2025) (same).

Here, rather than apologize that his religious constituents had been violently assaulted for engaging in protected speech or recognizing the failures of his city to protect its people, Defendant Harrell blamed the victim. (Dkt. 1, ¶¶115–121.) Defendant Harrell called religious speech an "Extreme Right-Wing Rally" and said Plaintiffs were responsible for having urine-filled ballons, pepper spray, and tear gas hurled at them. (*Id.*, ¶116.) If that is not an official expression of hostility, nothing would ever count. And couple Defendant Harrell's statements with Defendants' actions in silencing Plaintiffs' religious expression, and they "must be set aside." *Fellowship of Christian Athletes*, 82 F.4th at 690.

Moreover, the Free Exercise Clause prohibits taking sides in religious debate. "It hardly requires restating that government has no role in deciding or even suggesting whether the religious [expression] is legitimate or illegitimate." *Masterpiece*, 584 U.S. at 639. Defendant Harrell did precisely that in gross violation of the Free Exercise Clause. Not only did he condemn and blame Plaintiffs for the violence perpetrated against them, he trotted his band of merry henchmen from different religious faiths to condemn Plaintiffs for "weaponizing Christianity by engaging in their views," and stated that Plaintiffs' beliefs "inexcusable," "ungodly," and "vicious." (Dkt. 1, ¶¶122-36.) This is the polar opposite of neutrality towards religion, and it violates the Free Exercise Clause.

II. Plaintiffs have adequately demonstrated irreparable harm.

Defendants contend there "is no irreparable harm where there is no infringement on Plaintiffs' First Amendment rights. (Dkt. 18, 13.) Again, Defendants act as if this trope has not been tried and rejected. *See Meinecke*, 99 F.4th at 526 (same) The Ninth Circuit rejected that incorrect contention.

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Id. ("That argument does not move the needle because Meinecke has demonstrated a likelihood of First Amendment injury for the reasons explained above."). Moreover, Plaintiffs' loss of First Amendment rights for even moments is irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

III. Plaintiffs satisfy the other elements for injunctive relief.

Finally, Defendants contend that Plaintiffs cannot obtain a preliminary injunction because the balance of the equities does not tip sharply in their favor. (Dkt. 18, 13.) This is plainly correct and again was the exact argument rejected in *Meinecke*. 99 F.4th at 526 ("When a party raises serious First Amendment questions, that alone compels a finding that the balance of hardships tips sharply in its favor."). And Defendants' refrain that public order requires a denial of a preliminary injunction was likewise rejected by the Ninth Circuit because "even undeniably admirable goals must yield when they collide with the Constitution." *Id.* "That is especially true here because the City had other means of vindicating its interest." *Id.* Because the balance tips decidedly in Plaintiffs' favor, the preliminary injunction should issue.

IV. The prevention of constitutional violations cannot be conditioned on ability to pay.

Defendants' final effort to avoid the preliminary injunction that is necessary here is to assert that Plaintiffs should be required to post a security for any injunction. (Dkt. 18, 15.) This, too, is incorrect in First Amendment cases. As the Ninth Circuit has held, "the district court has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005), and "[a] bond is not required to obtain preliminary injunctive relief when a plaintiff is seeking to prevent a government entity from violating the First Amendment." *Voter Reference Found., LLC v. Balderas*, 616 F. Supp. 3d 1132, 1274 (D.N.M. 2022). The Court should issue the preliminary injunction without need of a security.

CONCLUSION

For the foregoing reasons, the preliminary injunction should issue.

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Respectfully submitted,

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