No. 26-1700

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs–Appellants

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–Appellees

On Appeal from the United States District Court
for the Western District of Washington, Case No. 2:25-cv-1874-BJR
Honorable Barbara J. Rothstein, District Judge

CIRCUIT RULE 3–3 PRELIMINARY INJUNCTION APPEAL

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

It is not entirely clear what appeal the City is responding to in its Answering Brief. It certainly is not Appellants'. The City's Answering Brief is riddled with factual inaccuracies, specious authorities, an attack on claims Appellants did not mount, a foundational misunderstanding of First Amendment law, a misidentification of the actual parties, and a wholly unfounded criticism of what Appellants assume (albeit, hesitantly) might have been their brief.

First, on every page of its Answering Brief to which Appellants are identified, the City challenges the legal arguments raised by "Telestial Ministries." Answering Br. 1–11, 13–29, 31–35. Appellants know not who or what that organization is, but it is not the one bringing this appeal.

Second, the City contends that Appellants' Certificate of Compliance "acknowledges their brief is nearly 1,000 words overlength," Answering Br. 6 n.4, and criticizes the Clerk for failure to reject it. *Id.* As support, it contends that "FRAP 38 and Circuit Advisory Committee Note to Rule 32-2" demonstrate Appellants' apparent error. *Id.* Appellants have no idea how Rule 38's sanctions for a frivolous appeal has anything to do with words limitations established by Circuit Rule 32–1. Nor, for

that matter, do Appellants understand reference to Circuit Advisory Committee Note to Rule 32–2, which explicitly states that this Court has overridden the general Fed. R. App. P. 28 limitations and "provides more generous word limits than provided by FRAP and most other Circuits." Appellants' Opening Brief is wholly compliant with the rules.

Finally, even if the Appellants were properly identified (which they are not), and even if the City had a proper understanding of the Court's rules (which it does not), the City's identification of the issues and understanding of the merits fare no better. The City misunderstands and conflates two separate First Amendment doctrines and attacks a challenge Appellants did not mount. The City ignores the actual challenge Appellants mounted below and fundamentally misconstrues the standing analysis for that claim. Having assaulted a fantom claim, the City contends precedent from the Supreme Court and this Court on Appellants' actual challenge is somehow "unrelated" and "irrelevant," Answering Br. 19, while ignoring that the appropriate descriptor for such precedent is *binding*. The City then resorts to an assault on nomenclature, contending that Appellants' use of a descriptive term ("show of hands") is not a First Amendment doctrine at all, Answering

Br. 26–27, while ignoring the actual requirement of its permitting scheme to obtain majority approval from non-government actors to be able to speak. The City is as incorrect as the district court before it, and the lower court should be reversed.

ARGUMENT

I. Facial challenges under the First Amendment are not limited to overbreadth under *Broaderick*, and the City's waiver arguments are to an assault Appellants did not mount.

A. The City misunderstands and inappropriately conflates overbreadth challenges and a facial assault to a presumptively unconstitutional prior restraint.

The City contends that Appellants have waived any argument under *Broaderick v. Oklahoma*, 413 U.S. 601 (1973) because Appellants purportedly did not address the standing requirements under that precedent. Answering Br. 9–10. The City then contends that Appellants "virtually ignore[ed] their burden of proof, mentioning overbreadth only once in passing." Answering Br. 10. To be fair, the City is correct that Appellants only mentioned the term overbreadth once in their Opening Brief, but the reason is simple: Appellants are not bringing an overbreadth claim. It is axiomatic that "[a] plaintiff is the master of his complaint." *Newtok Vill. v. Patrick*, 21 F.4th 608, 616 (9th Cir. 2021).

Though the City may have preferred to defend against a traditional overbreadth claim, with its correspondingly higher burden, that is not the claim that Appellants brought below or here. Though asking for the district court to be affirmed, the City ignores the fact that neither *Broaderick* nor the term overbreadth appears anywhere in that order either. The reason is simple: *it is not at issue*.

Perhaps the City should be forgiven for its misunderstanding of the nuances of First Amendment law. After all, its permitting scheme farms out decision-making authority over the fundamental right to speak in a traditional public forum to non-government actors in blatant violation of just about every First Amendment precedent. *See* ER-28, ¶¶58–59. But let us correct the record.

There is a difference between the prior restraint challenge Appellants mounted and the overbreadth challenge the City defends here. While "[t]here clearly may be an area of overlap between overbreadth analysis and prior restraint analysis," *Alderman v. Philadelphia Hous. Auth.*, 496 F.2d 164, n.57 (3d Cir. 1974), the doctrines are distinct and involve different "threads of First Amendment jurisprudence." *Moore v. Kilgore*, 877 F.2d 364, 377 (5th Cir. 1989)

(Goldberg, J., dissenting in part) (noting the distinction between overbreadth, substantial overbreadth, and prior restraint doctrine, even if they do sometimes present "entangled problems"). This Court's precedents, too, recognize the difference. *See, e.g.*, *Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886 (9th Cir. 2007) (analyzing, under appropriately different analysis, challenges to overbreadth and a prior restraint).

1. Appellants cannot waive argument to an overbreadth claim they did not assert.

"Only a statute that is substantially overbroad may be invalidated on its face." *City of Houston v. Hill*, 482 U.S. 451, 458 (1987).[1] A substantial overbreadth challenge requires a plaintiff to show that the

[1] Though the City describes its analysis as relating to Appellants' phantom "overbreadth" challenge, the City is actually defending a different claim altogether—substantial overbreadth. Despite the City's incorrect nomenclature, Appellants will focus their analysis on the substantial overbreadth claim that the City is actually defending against, rather than the analysis appurtenant to traditional overbreadth. *Compare Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 797–98 (1984) (traditional overbreadth requires "the conclusion that the statute could never be applied in a valid manner");, *with Broaderick*, 413 U.S. at 615 (substantial overbreadth test requires "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.").

"statute imposes a direct restriction on protected First Amendment activity," and "the defect in the statute is that the means chosen to accomplish the State's objective are too imprecise, so that in all applications the statute creates an unnecessary risk of chilling free speech." *Sec. of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 967 (1984). "[A] court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct," and if so, such a statute "may be held facially invalid even if they also have legitimate application." *City of Houston*, 482 U.S. at 459. *See also United States v. Stevens*, 559 U.S. 460, 473 (2010) (same). A challenge to an allegedly overbroad statute does not begin with a presumption of unconstitutionality, and the burden rests on the challenger to demonstrate facial invalidity. This is not the claim Appellants raise. But, even if it was, Appellants would still succeed because there is no universe in which the City can farm out decisions on an individual's right to speak to non-government actors unrestrained by any standards. *See infra* Section I.B.1.b–c.

2. Under a prior restraint challenge, Appellants need only demonstrate that the scheme exists, that it vests unbridled discretion in the hands of government decision-makers, and that it lacks procedural safeguards.

The elements of Appellants' actual challenge to a statute imposing a prior restraint on Appellants' speech is different from anything the City defends. First, contrary to substantial overbreadth, Appellants' prior restraint challenge begins with the presumption that the permitting scheme is unconstitutional and places the burden on the government to demonstrate its constitutionality. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) ("any system of prior restraint comes to this Court bearding a heavy presumption against is constitutional validity."). "The Supreme Court has espoused two definitions of a prior restraint: an ordinance that vests unbridled discretion in the hands of the licensor . . . or an ordinance that does not impose adequate time limits on the relevant public officials." *Get Outdoors II*, 506 F.3d at 894. "Our cases addressing prior restraints have identified two evils *that will not be tolerated*," *FW/PBS*, 493 U.S. at 226 (emphasis added), "a scheme that places unbridled discretion in the hands of a government official or agency [and]

[a] prior restraint that fails to place time limits on the time within which the decisionmaker must issue the license." *Id.*

Under the appropriate formulation of Appellants' actual claims, the Supreme Court has "long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755–56 (1988). To establish standing under the prior restraint doctrine, Appellants need only allege the existence of the permitting scheme that confers unbridled discretion, *id.* at 757 ("the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused"), and that the permitting scheme "ha[s] a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat that protected speech or conduct will be suppressed." *Epona v. County of Ventura*, 876 F.3d 1214, 1221 (9th Cir. 2017). Appellants did both.

As the record below demonstrates, Appellants brought a prior restraint challenge because they were required to apply for a permit

before speaking and that permitting scheme placed unbridled discretion in the hands of government officials. (*See* dkt. 9, 19.) Under binding precedent, Appellants plainly have Article III standing to bring their facial challenge under the prior restraint doctrine and seek injunctive relief. *See, e.g.*, *Real v. City of Long Beach*, 852 F.3d 929, 933 (9th Cir. 2017) ("a plaintiff has standing to vindicate his First Amendment rights through a facial challenge when he argues that an ordinance impermissibly restricts a protected activity."); *Get Outdoors II*, 506 F.3d at 895 ("one who might have had a license for the asking may challenge the licensing scheme as a prior restraint" (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)). The City's contrary contentions are in error.

B. As Appellants demonstrated in their Opening Brief and in the record below, Appellants raised a facial challenge to a prior restraint that places unbridled discretion in the hands of government officials—not to alleged overbreadth.

The City chastises Appellants for using unbridled discretion "43 times" in their Opening Brief and claims repetition is merely a "magic incantation" insufficient to satisfy Appellants' burden. Answering Br. 13. For one, the First Amendment "does not turn on that kind of numbers game," *Dr. A v. Hochul*, 142 S. Ct. 552, 556 (2021) (Gorsuch, J., dissenting), nor does Appellants' standing or likelihood of success on

merits. The substance of Appellants' contentions, not the City's descent into the fanciful, are what matter, "lest the First Amendment be reduced to a simple semantic exercise." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001). Curiously, in all the City's efforts at counting the number of times Appellants raised the unbridled discretion problems in the City's permitting scheme, it somehow failed to comprehend the correct challenge Appellants are mounting and defend against a different one. One would think the City's efforts at tallying words would have made Appellants' challenge apparent—*they didn't*.

1. Appellants' allegations of unbridled discretion are no mere "ipse dixit," as the City claims, but are demonstrated by the record below.

The City contends that Appellants offer this Court nothing more than "an *ipse dixit* allegation of unbridled discretion," and thus cannot demonstrate standing to bring their claims for injunctive relief. Answering Br. 9. This is incorrect.

For clarity: if a speaker must obtain permission from the government before engaging in protected speech, it is a prior restraint. Period. 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." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992)) (cleaned up). Rather than their own "say-so," as the City suggests, Appellants have demonstrated with record evidence that, on its face, the permitting scheme vests unbridled discretion in the hands of government and non-government decisionmakers, and that the City's actions (and those of the nongovernment decisionmakers) demonstrate that the permitting scheme does, indeed, vest unbridled discretion in the hands of decisionmakers.

a. The face of the City's permitting scheme shows unbridled discretion in City officials.

To host an event on the City's streets, sidewalks, or public parks, the City requires applicants to apply for and be granted a permit from the Special Events Committee. (ER-26, ¶¶47–48.) Specifically, "A special event permit or authorization from the Special Events Committee is required for any special event, as defined in this Chapter 15.52." (ER-26, ¶48.) Along with certain administrative conditions, Seattle's permitting scheme states that the licensor may consider *inter alia* "crowd control, traffic control, safety, and security; compliance with applicable laws and regulations; coordination with first responders, including police, fire, and

emergency personnel; and other health related considerations." (ER-26, ¶¶49 (quoting Seattle Ordinance § 15.52.050).) The permitting scheme states that the Special Events Committee may consider:

> anticipated impacts of the event based on an assessment of the event, including size, scope, complexity, location, and history; the event's or event organizer's successful implementation of conditions included in previous permits; the public's access to public places and public services; the impact on frequently-utilized special event locations or routes; and the impact on neighborhoods.

(ER-26, ¶50.) In addition, the permitting scheme provides that a permit may be denied if it would "present an unreasonable danger to the health or safety." *See* Opening Br. at 52 (citing Seattle Ordinance §15.52.060(B)).)

The City contends that Appellants' reliance on *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988) is "misplaced," because the City's permitting scheme purportedly "bears no resemblance to the unfettered discretion in *City of Lakewood*." Answering Br. 14. This is incorrect. Contrary to the City's contentions, *City of Lakewood*'s ordinance permitted the government to deny a permit for alleged concerns about "the health, safety, or welfare" of the community. 486 U.S. at 770. Those terms were not defined there, and they are not here. (ER-

28, ¶¶57–60.) And, much like here, in *City of Lakewood*, the government was essentially "ask[ing] us to presume that the mayor will deny a permit application only for reasons related to the health, safety, or welfare of Lakewood citizens, and that additional terms and conditions will be imposed only for similar reasons." *Id.* But, as the Supreme Court said, such terms are "illusory constraints" and insufficient "to constitute the standards necessary to bound a licensor's discretion." *Id.*

In fact, allowing such undefined and broadly formulated terms would render the "guarantee against censorship little more than a high-sounding ideal," because it "presumes the [government] will act in good faith and adhere to standards absent from the ordinance's face." *Id.* at 769–70. "*But this is the very presumption that the doctrine forbidding unbridled discretion disallows*." *Id.* at 770 (emphasis added). This Court, too, has found that the terms of the permitting scheme here vest unbridled discretion when solely related to the amorphous "health, safety, and welfare" of the community. *S.J. Enter., Inc. v. City of San Jose*, 100 F.4th 1059, 1067 (9th Cir. 2024).

b. The City's permitting scheme vests unbridled discretion not just in the government but also in non-government actors from whom applicants must obtain approval.

The City seeks refuge in *Thomas v. Chicago Park District*, 534 U.S. 316 (2002) for the assertion that its permitting scheme is merely a content-neutral time, place, and manner restriction that places no discretion whatsoever in the hands of government officials. Answering Br. 12–15. The City goes further to suggest that the permitting scheme in *Thomas* demonstrates that the City's permitting scheme is per se constitutional. Answering Br. 13. *Thomas* cannot do the work the City contends. Assuming *arguendo* that the permitting scheme appropriately cabins the discretion of City officials, which it does not, the City wholly omits the fact that the permitting scheme requires the approval of non-government actors who have absolutely no standards whatsoever restraining their discretion. Even if *Thomas* could save the permitting scheme as it relates to government discretion, which it does not, it provides no support whatsoever for the City's delegation of discretion to non-government actors. That *alone* is facially fatal.

On its face, the permitting scheme requires applicants to provide notice to and receive approval from non-governmental entities to obtain

a permit. (ER-28, ¶58.) The permit applicant must inform the City of the individuals and organizations in the area of the requested permit, provide contact information for those individuals to the City, and wait for "comments and objections" from the non-government entities prior to obtaining a permit. (ER-27, ¶56.) There is nothing that prohibits or restrains the non-governmental organizations from denying a permit based on the content of the speech. Even under the City's own precedent, "[a] licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited by its terms, or by nondiscriminatory practice." *Thomas*, 534 U.S. at 322–23. There are no limiting terms for the denial based on non-government actors' objections to the speech. In fact, in their correspondence with Appellants concerning the non-governmental actors' decision-making process, the City admitted that *there were no policies governing the decision by the non-government actors from whom applicants were required to obtain permission.* (ER-30, ¶77 ("The City informed Plaintiffs that the Downtown Seattle Association was 'just starting to stand up programming policies'" for those seeking a permit in downtown Seattle.) In other words, non-government actors have no policies, definitions, or standards governing

a permit decision, and those actors exercise boundless discretion to deny permits based on content. That is precisely what happened with Appellants' requested permit.

c. The record below demonstrates that the permitting scheme unbridled discretion in the hands of non-government decision-makers.

As the record below demonstrates, Appellants were indeed required to obtain permission from non-governmental actors prior to obtaining a permit. After applying for a permit, the City informed Appellants that it was "working with" its non-governmental decision-maker, the Downtown Seattle Association, to reach a determination. (ER-30, ¶76.) In denying Appellants' requested permit, the City explicitly stated that their permit was denied by of the objections of non-government actors. (*See* ER-31, ¶83 ("Our office has connected with the [non-government] Downtown Seattle Association and other partner agencies today, and we recommend that you find an alternate location for the proposed Mayday worship event."); ER-32–33, ¶86.) And, in that denial, the City informed Appellants to ask the non-government actors to find a different location. (ER-31, ¶85.) Thus, not only did the record demonstrate the City's admission that no standards exist to limit the non-government decision-

makers from objecting to the content of speech, that unbridled discretion was actually exercised to deny Appellants' requested permit. The First Amendment knows no such nonsense.

2. The City's suggestion that one line in the permitting scheme eviscerates any claim of unbridled discretion is plainly dispelled by the record.

The City suggests that one phrase in the permitting scheme suggesting that restrictions "shall not be imposed in a manner that unreasonably restricts expressive or other activity" dispels any claim of unbridled discretion. Answering Br. 15 (quoting Seattle Ordinance §15.53.060).) The City claims this makes the permitting scheme a "far cry" from unbridled discretion. This is incorrect.

First, the other terms of the permitting scheme swallow that isolated statement and provide uncabined discretion to deny a permit on the basis of "illusory constraints," *supra* Section I.B.1.a, and require permit applicants to obtain permission from non-government actors who have no limitations whatsoever on their decisions, *supra* Section I.B.1.b, The City's actions under the permitting scheme "speak louder than words," *United States v. Honeyman*, 470 F.2d 473, 475 (9th Cir. 1972), and demonstrate that the City allows unbridled non-government actors

to ignore that limitation altogether. *Supra* Section I.B.1.c. *It happened here*. Thus, any contention that the permitting scheme's self-serving and unfollowed constraint on content-discrimination is plainly dispelled by the record and the face of the permitting scheme.

C. Contrary to the City's suggestion, past injury informs threats of future enforcement.

The City contends that "a single past interaction" is insufficient to demonstrate threatened future injury. Answering Br. 17. This, too, is incorrect. For one, the permitting scheme's continued existence and the City's vigorous defense of its constitutionality demonstrate that Appellants are currently and remain subject to threatened constitutional injury. Indeed, "the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech." *City of Lakewood*, 486 U.S. at 757. Critically, "these evils engender identifiable risks to free expression that can only be effectively alleviated through a facial challenge." *Id.* Thus, Appellants have far more than a single past interaction. They have a current scheme hanging over their speech like a sword of Damocles.

Moreover, past enforcement of unconstitutional restrictions informs future threats, particularly when there is nothing to bound the

discretion of the decisionmakers. Again, the City has unfettered discretion to deny a permit on impermissible grounds (*supra* Section I.B.1.a), non-government actors who the City admits do not even have any written policies in effect have carte blanche to deny a permit for any reason or no reason (*supra* Section I.B.1.b), and the City has deployed this unconstitutional scheme to deny Appellants' requested permit. *Supra* Section I.B.1.c. "[P]ast wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury," particularly where the statute is "unconstitutional on its face." *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974).

The City's only retort to the implications of the sworn evidence and record below is to suggest that *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), precludes a finding of standing here. Answering Br. 17–18. *Lyons* is plainly inapposite. The City contends that *Lyons*—a Fourth Amendment chokehold case—is somehow "on all fours" with this case. Answering Br. 18. One searches in vain to find how that can possibly be. The issue in *Lyons* was that it was nearly impossible to plead that police officers will always act unconstitutionally and choke a person to unconsciousness without provocation. *Lyons*, 461 U.S. at 108. The Fourth

Amendment analysis is wholly inapposite here because, under the First Amendment, Appellants need not plead that government officials will always act unconstitutionally. In the First Amendment context, the presumption works the other way because "the mere existence" of the constitutionally infirm permitting scheme violates the First Amendment, "*even if the discretion and power are never actually abused*." *City of Lakewood*, 486 U.S. at 750 (emphasis added). In other words, in stark contrast to *Lyons*, the existence of an allegedly unconstitutional policy is *alone* sufficient to demonstrate threatened injury without need of alleging that the City will always apply it unconstitutionally. The injury is inherent in the existence of the permitting scheme.

The City's only other retort is to confoundingly suggest that this Court's decision in *Meinecke v. City of Seattle*, 99 F.4th 514 (9th Cir. 2024) is somehow "unrelated" and "irrelevant." Answering Br. 19. This defies logic. As this Court made plain, "we do not require plaintiffs to specify when, to whom, where, and under what circumstances they plan to violate the law" when the ordinance being challenged and that was previously enforced against them *still exists*. *Meinecke*, 99 F.4th at 520. The threat of enforcement of the City's permitting scheme is inherent in

its past silencing of Appellants' speech. *Real v. City of Long Beach,* 852 F.3d 929, 934 (9th Cir. 2017).

Here, Appellants have made clear that they have sincere religious beliefs that require them to speak out and to do so in the public square. (ER-47–48, ¶¶186–192.) Moreover, the City has unfettered discretion to deny a permit on impermissible grounds, non-government actors who the City admits do not even have any written policies in effect have carte blanche to deny a permit, and the City has deployed this unconstitutional scheme to deny Appellants' requested permit. *Supra* Section I.B.1. Thus, Appellants have plainly and plausibly demonstrated a credible threat of future enforcement sufficient to given them standing to challenge a permitting scheme that has been already unconstitutionally wielded against them to deny their religious speech. The district court's decision to the contrary was in error and should be reversed.

D. The record evidence below demonstrates that Appellants' injury was not only caused by the unconstitutional scheme, but that injunctive relief would provide sufficient redress to the irreparable injury caused by a permitting scheme.

In a final effort to escape review of their unconstitutional permitting scheme and contend that Appellants lack standing to raise a

facial challenge for injunctive relief against its constitutionally infirm permitting scheme, the City contends that any injunction from this Court would provide no redress for Appellants because it would be merely a "follow the law" injunction. Answering Br. 22. The City's contention is incorrect.

The record below easily satisfies the fairly traceable and redress requirements. *See Real*, 852 F.3d at 934 n.2. Appellants desire to conduct speech in the traditional public forums in Seattle but are subject to a permitting scheme that has been previously weaponized against them to silence their speech and deny their permit. (ER-28–33, ¶¶61–91.) And a decision finding that the permitting scheme and the City's application of it are unconstitutional would certainly redress their injuries. *Real*, 852 F.3d at 934 n.2 ("Real readily meets the second and third prongs of the standing analysis. His alleged inability to open a tattoo shop is fairly traceable to the zoning ordinances governing the locations and permitting the tattoo shops, and a decision finding those laws unconstitutional would likely redress his injury because he is able to open a tattoo shop without the current restrictive requirements.")

Redressability requires that it "be likely, as opposed to merely speculative . . . that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citation modified). The record below plainly establishes that Appellants' injuries are traceable to the City's permitting scheme and its application of it (ER-42–43, ¶¶137–146), and the injunctive relief Appellants request would redress those injuries.

The City contends that there is an insufficient nexus between the alleged harm and the requested relief because Appellants' requested relief is merely an "obey the law" injunction. Answering Br. 22. This is incorrect factually and irrelevant legally. As the City correctly noted (at 22), this Court has "not adopted a rule against 'obey the law' injunctions per se." *See F.T.C. v. EDebitPay, LLC*, 695 F.3d 938, 944 (9th Cir. 2012)). Appellants, though not strictly prohibited from doing so, do not ask for one. An "obey the law" injunction contains "[b]road, non-specific language that does not give the restrained party fair notice of what conduct will risk contempt." *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1531 (11th Cir. 1996) (cleaned up). An example of an obey the law injunction is

"Defendant shall not discharge stormwater . . . *if such discharge would be in violation of the Clean Water Act*." *Id.*

That is not what Appellants request here, and Appellants' requested injunction would clearly define the rights and obligations of the City here, namely an injunction that *inter alia* requires Defendants to amend the permitting scheme to comport with the constitutionally required minimum procedural safeguards, such as timely responses, limitations on content and viewpoint discrimination, and application of fees. (ER-54–55.) Such requested relief would, of necessity, redress Appellants' injuries from being subjected to the boundless discretion of non-government decision-makers. That is not speculative. It is concrete redress in every sense of the word. Indeed, Appellants' requested injunction articulates eight specific requirements that the City must comply with and is a far cry from "follow the law." Each one of Appellants' requested provisions in the preliminary and permanent injunctions would provide the City "an operative command capable of 'enforcement.'" *Hughey*, 78 F.3d at 1531 (quoting *Int'l Longshoremen's Ass'n, Local 1291 v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 73–74 (1967)). The City's contentions to the contrary are without merit.

II. The district court should be reversed because Appellants have demonstrated with record evidence that the City's permitting scheme and permit denials violate the First Amendment.

Though the district court never reached a decision on the merits, this Court may reverse on any grounds supported by the record. Indeed, this Court has "a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 567 (1995). *See also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) ("[I]n cases raising First Amendment issues we have repeatedly held than an appellate court has an obligation to make an independent examination of the whole record in order to ensure that the judgment does not constitute a forbidden intrusion into the field of free expression."). The City's permitting scheme is such an intrusion.

A. Appellants' reliance on binding Supreme Court precedent is neither truncated nor inapposite, but demonstrates that the City's permitting scheme is unconstitutional on its face.

In addition to claiming that Appellants cannot even get out of the starting gate with standing to request an injunction against its unconstitutional permitting scheme, the City contends that the merits do

not support one. Answering Br. 24. Specifically, the City contends that Appellants' arguments are based on a "truncate[d]" and "inapposite hodgepodge of cases." Answering Br. 24. This is absurd.

Every case cited by Appellants and relied upon for its claims for an injunction against the City's permitting scheme are binding articulations of well-established First Amendment doctrines requiring an injunction in this matter. Take, for instance, *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). There, the Supreme Court reviewed a permitting scheme that it held "is a prior restraint on speech" and came to the Court with "a heavy presumption against [its] validity." *Id.* at 130. The Court noted that such a scheme "must meet certain constitutional requirements," that "[i]t may not delegate overly broad licensing discretion to a government official," and that "[t]here are no articulated standards either in the ordinance or in the county's established practice." *Id.* at 133. Appellants have raised each of these contentions as to the City's permitting scheme. Opening Br. 47–61.

Or, consider *City of Lakewood v. Plain Dealer Publishing Company*, 486 U.S. 750 (1988). As discussed at length *supra*, there the Supreme Court faced a permitting scheme that required a speaker to apply for a

license, *id.* at 759, and that "ask[ed] us to presume that the mayor will deny a permit only for reasons related to the health, safety, or welfare." *Id.* at 770. The Court held that "this is the very presumption that the doctrine forbidding unbridled discretion disallows." *Id.* Again, Appellants raised this precise issue as it relates to the City's permitting scheme. Opening Br. 47–53.

Or take Appellants' reliance on *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990), *Rosen v. Port of Portland*, 641 F.2d 1243 (9th Cir. 1981), *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011 (9th Cir. 2009), and *Spirit of Aloha Temple v. City of Maui*, 49 F.4th 1180 (9th Cir. 2022). Every one of these cases relied upon by Appellants (Opening Br. 47–53) involved a prior restraint on protected First Amendment activity and that the scheme was alleged to lack adequate standards to guide the licensing official. *FW/PBS*, 493 U.S. at 223–25 (discussing the permissibility of facial challenges to prior restraint schemes that vest unbridled discretion in the hands of the government decisionmaker); *Rosen*, 641 F.2d at 1247 (discussing the presumptive unconstitutionality of prior restraint schemes); *Long Beach*, 574 F.3d at 1023 (same); *Sprit of Aloha Temple*, 49 F.4th at 1192 (same). Not one of

these cases is inapposite or truncated. To the contrary, each one of them articulates binding precedent that condemns the City's permitting scheme to constitutional invalidity.

B. The City's suggestion that there is no "show of hands" doctrine under the First Amendment intentionally ignores the fact that delegating licensing authority to non-government actors unbounded by any standards demands is plainly unconstitutional.

The City condemns Appellants for a "baseless" "show of hands" doctrine that it contends does not exist in First Amendment law. Answering Br. 26–27. The City essentially takes the "ostrich approach," *Pabban Dev., Inc. v. Sarl*, 673 F. App'x 612, 614 (9th Cir. 2016), by "sticking [its] head in the sand," *United States v. Lymas*, 781 F.3d 106, 111 (4th Cir. 2015), to ignore the plain implications of its permitting scheme. The record below demonstrates that Appellants were indeed required to obtain approval from a non-government business alliance (*i.e.*, a "show of hands") before speaking in downtown Seattle.

On its face, the permitting scheme requires applicants to provide notice to and receive approval from non-governmental entities tasked with reviewing permit applications for events in Seattle (ER-28, ¶58.) The permit applicant must inform the City of the individuals and

organizations in the area of the requested permit and provide contact information for those individuals to the City so that it may request "comments and objections" concerning the proposed event. (ER-27, ¶56.) There is nothing that prohibits denial of the permit based on the objections of the non-governmental organizations who may object to the issuance of a permit for speech those organizations do not like. *And that is exactly what happened to Appellants.*

Even under *Thomas*, which the City contends saves its permitting scheme from constitutional invalidity, "[a] licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited by its terms, or by nondiscriminatory practice." 534 U.S. at 322–23. There are no limiting terms for the denial based on non-government actors' objections to the speech. In fact, in their correspondence with Appellants concerning the non-governmental actors decision-making process, the City admitted that *there were no policies governing the decision by the nongovernment actors from whom applicants were required to obtain permission.* (ER-30, ¶77.) In other words, non-government actors have no policies, definitions, or standards

governing when a permit must be granted, and those actors exercised that boundless discretion to deny Appellants' requested permit.

When Appellants applied for a permit and diligently sought updates on the progress of its review, the City informed Appellants that it was "working with" its nongovernmental decisionmaker, the Downtown Seattle Association, to reach a determination. (ER-30, ¶76.) In response to Appellants' permit application, the City explicitly stated that it was because of the non-government actors' objections to Appellants' event that their permit was being denied. (*See* ER-31, ¶83 ("Our office has connected with the [nongovernment] Downtown Seattle Association and other partner agencies today, and we recommend that you find an alternate location for the proposed Mayday worship event.").) And, in that denial, the City informed Appellants that they were required to "connect with Claire Pinger from the [nongovernment] Downtown Seattle Association" to find a different location. (ER-31, ¶85.) The City further noted that its decision was based in cooperation with the non-government organizations' objections to the event. (ER-32–33, ¶86.) Thus, not only are there no standards to guide the non-government decisionmaker regarding constitutionally protected speech, which the

City admits is true, but the City and its non-government actors' boundless discretion was actually exercised to deny requested permits on the basis of nongovernment objections.

Regardless of the City's objections to the nomenclature Appellants ascribed to its unconstitutional permitting scheme, the First Amendment prohibits the City from delegating decision-making authority to non-government actors and allowing them to make that decision without any standards whatsoever. Whether it be called a "show of hands," an unconstitutional delegation, or any other descriptor, the constitutional infirmity is the same. An unconstitutional policy by any other name would smell as foul to the First Amendment.

C. The City's application of the permitting scheme—including the delegation of approval authority to non-government actors—was content based and thus subject to strict scrutiny.

The City likewise condemns Appellants for asserting that the decision to deny their permit was content-based, and claims that the permitting scheme itself is purportedly content neutral. Answering Br. 28. This is incorrect. The record evidence proves differently. The City denied Appellants' request for an event on Pike Street because it was "not ideal for [Appellants'] worship event." (ER-29, ¶67.) Indeed, time and

again, in communications with Appellants, the City made clear that the denial was based on the fact that it was a "worship service" (*i.e.*, religious event) that lead to the denial of the requested permit. (ER-29, ¶¶67, 69; ER-30, ¶¶71–74.) And the City made clear that the past religious events by other organizations lead the non-government decision-makers and the City to conclude that Pike Street was "not ideal" for a religious event. (ER-30, ¶74.)

Because of the religious viewpoint of Appellants' event, the City denied their requested permit for Appellants' desired location. Thus, based upon their "particular view about a subject," *Moss v. U.S. Secret Service*, 572 F.3d 962, 970 (9th Cir. 2009), and their "specific motivating ideology or perspective," *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 899 (9th Cir. 2018), the City denied Appellants' requested permit. That is "an egregious form of content discrimination." *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995), and "governments in this country must nearly always abstain from it." *Chiles v. Salazar*, 146 S. Ct. 1010, 1021 (2026). *See also* Opening Br. 63–65.

D. The undisputed record shows that Appellants' event was shut down on the basis of an unconstitutional heckler's veto—which also makes the City's actions content-based.

The City also astoundingly contends that Appellants were not subjected to a heckler's veto. Answering Br. 31. Its sole contention for this curious assertion is that there is purportedly a difference between shutting speech down on the basis of anticipated reaction and shutting it down based on actual reaction. Answering Br. 32–33. The record is unequivocal: Appellants' speech and event was shut down on the basis of listener reaction to their religious viewpoint. Defendants admittedly shut down Appellants' event because of the actual reaction of violent agitators and the anticipated continuance of that reaction. (ER-34, ¶¶96–98.) Specifically, City officials informed Appellants that "because of the violence and protestors, police would be forced to revoke the permit," and because the police could allegedly "no longer control" the violent protestors. (ER-34, ¶ 94–98.)

This is the archetype of a heckler's veto, and the First Amendment prohibits it. *See Ctr. for Bioethical Reform, Inc. v. L.A. Cnty. Sheriff Dept.*, 533 F.3d 780, 788 (9th Cir. 2008) ("the First Amendment does not permit a heckler's veto"). The City's attempt to draw a distinction between

shutting down speech based on anticipated reaction (which it says is prohibited) and shutting it down based on actual reaction (which it says is permissible) is wholly foreign to the First Amendment. The City's specious contention is foreclosed by this Court's binding precedent. *See Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1293 (9th Cir. 2015) ("heckler's veto doctrine applies when particular, protected speech is *met by violence* or threats or other unprivileged retaliatory conduct" (emphasis added)); *id.* ("Indeed, 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." (emphasis added)).

Though the City (at 19) pretends that *Meinecke v. City of Seattle* is somehow "irrelevant," this Court clearly held there that "the Seattle police targeted Meinecke's speech only once the audience's hostile reaction manifest. *That is part and parcel of a heckler's veto*." 99 F.4th 514, 523–24 (9th Cir. 2024) (emphasis added). Silencing of Appellants' speech based on listener reactions was content based, and Appellants are likely to prevail on the merits of that claim. *Id.* at 524 ("In short, the City's attempt to relocate Meinecke's speech—and subsequently

arresting him for failing to comply—was a content-based burden on Meinecke's expressive activity because the City did so only in response to the actual and potential reaction of the audience.").

III. Appellants satisfy the other elements of injunctive relief.

The City's sole contention that Appellants have suffered no irreparable harm is that "there is no infringement of [Appellants'] First Amendment rights" because it is not occurring. Answering Br. 32. This is incorrect. As demonstrated *supra* Section I.B.1, the mere existence of the unconstitutional permitting scheme imposes harm every day. Moreover, the remaining elements favor injunctive relief as well. *See* Opening Br. 69–71.

CONCLUSION

Because Appellants have demonstrated standing to challenge the City's unconstitutional permitting scheme and because the permitting scheme is a presumptively unconstitutional prior restraint that lacks the relevant standards, the district court should be reversed and a preliminary injunction entered.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2026, a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

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FOR THE NINTH CIRCUIT

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