UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, SOUTHERN REGION

SOUTHERN UTAH DRAG STARS;

MITSKI AVALŌX,

Plaintiffs,

v.

CITY OF ST. GEORGE;

CITY COUNCIL OF ST. GEORGE;

COUNCILMEMBER JIMMIE HUGHES in his official capacity;

COUNCILMEMBER DANNIELLE LARKIN in her official capacity;

COUNCILMEMBER NATALIE LARSEN in her official capacity;

COUNCILMEMBER GREGG MCARTHUR in his official capacity;

COUNCILMEMBER MICHELLE TANNER in her official capacity;

MAYOR MICHELE RANDALL in her official capacity;

CITY MANAGER JOHN WILLIS in his official capacity,

Defendants.

Case No. 4:23-cv-00044-PK-DN

REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs Southern Utah Drag Stars ("Drag Stars") and Mitski Avalōx (together, "Plaintiffs") submit this Reply in support of their Motion for Preliminary Injunction (ECF No. 34).[1]

INTRODUCTION

Mitski Avalōx and Drag Stars applied for a special event permit to host a drag performance event in a public park in the City of St. George. Alarmed at the idea of having a drag show in town, Defendants flagged Plaintiffs' permit application as "sensitive" and actively researched justifications for denying the application. Meanwhile, one of the City Council's five members publicly and regularly inveighed against drag performance, and continues to do so to this day. The City eventually denied Plaintiffs' application, alleging a violation of a rule prohibiting advertising events before a permit is officially granted. This was plainly pretextual. The City now concedes that the so-called Advertising Prohibition was *never* previously enforced. Indeed, if enforced, this rule would make advance advertising for special events impossible, since permits are generally issued a day before an event.

While Plaintiffs' application was pending, the City enacted a six-month Moratorium on all special events, supposedly to let grass grow and give the City time to review its special events permitting scheme. The City then exempted recurring events as well as selected "city-sponsored" events from the Moratorium, effectively blocking Plaintiffs and any other disfavored applicant from holding public events. This is viewpoint discrimination of the most brazen kind and clearly violates Plaintiffs' core constitutional rights. As multiple courts have held, drag performance is clearly protected by the First Amendment.

In light of this undisputed evidence, Defendants' insistence that their denial of Plaintiffs'

[1] "Mot." refers to Plaintiffs' Motion (ECF No. 34). "Opp'n" refers to Defendants' Memorandum in Opposition (ECF No. 54). Capitalized terms have the same meaning as in Plaintiffs' Motion.

permit was not motivated by anti-drag sentiment is simply not plausible. Defendants' hodgepodge of justifications for their conduct do not hold water. Defendants' offensive characterizations of Plaintiffs' event as harmful to children are entirely unsupported. The City's purportedly neutral justifications for denying Plaintiffs' permit—even if they were not mere pretexts—would themselves fail to satisfy constitutional scrutiny. And Defendants' jurisdictional arguments are entirely unavailing.

The record on this Motion unquestionably establishes that Plaintiffs are entitled to the preliminary injunction they seek.

SUMMARY OF UNDISPUTED FACTS

To clarify the record and remedy Defendants' attempts to confuse and obscure the issues, Plaintiffs briefly review the key uncontroverted facts below.

1. On March 3, 2023, Plaintiffs submitted a special events permit application for a drag event, "Our Allies & Community Drag Show," to be held on April 28, 2023 in City-owned Vernon Worthen Park.[2]
2. On March 8, 2023, Special Events Coordinator Reber circulated to Councilmember Larsen and Assistant City Manager Mortensen Plaintiffs' event permit application and another LGBTQ+-related event titled "Pride 2023." Reber identified these two applications as having been treated differently "due to the sensitive nature of the events."[3]
3. On March 16, 2023, Defendants enacted a six-month Moratorium on new special event applications, around the time Defendants began investigating the possibility of denying permits to applicants who "advertised" events while their applications were pending.[4]

[2] Mot. at 4.
[3] Avalōx Decl. Ex. B-2 at 38-40, ECF No. 34-9.
[4] Mot. at 4-5; Opp'n at 8.

4. On March 21, 2023, when the City investigated whether Plaintiffs had violated the Advertising Prohibition, Plaintiffs had not issued any advertisements seeking attendees for their event. The only public statement that Plaintiffs had issued about the event at the time was on an online platform that allows event planners to solicit vendors.[5]
5. On March 23, 2023, Plaintiff Mitski Avalōx visited Reber at City Hall.[6]
6. On March 30, 2023, Plaintiffs posted to social media their first and only announcement seeking attendees for Plaintiffs' event, after the City had already conducted its review of events violating the Advertising Prohibition.[7]
7. On April 11, 2023, a majority of the City Council voted in favor of Councilmember Tanner's motion to deny Plaintiffs' appeal of their permit denial based on a purported violation of the Advertising Prohibition.[8]
8. The City concedes that it *never* enforced the Advertising Prohibition *at all* before Plaintiffs' permit application came up for review, much less used it as a basis to deny a special event permit.[9]
9. The City does not dispute that it typically issues event permits within approximately one day of the event. It is thus uncontroverted that the Advertising Prohibition would bar virtually all event advertising if it were enforced.[10]

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[5] Mot. at 5; ECF No. 34-10 at 6–12. Plaintiffs' Motion includes a typographical error at page 5. Plaintiffs did not post the vendor solicitation on March 30; as is clear from context and the record, Plaintiffs' vendor solicitation predated the March 21, 2023 list of "advertising" photos collected by the City's high school intern, which included it. *See* Avalōx Decl. Ex. A at 56, 60, 61, ECF No. 34-7.
[6] Avalōx Decl. ¶ 21, ECF No. 34-6; Opp'n at 5-6.
[7] Avalōx Decl. ¶ 24, ECF No. 34-6; Avalōx Decl. Ex. A at 29, 35, ECF No. 34-7; Mot. at 5-6; *cf.* Opp'n at 4-5 (acknowledging this record evidence, but conflating the March 30 Instagram post with the earlier vendor-facing post).
[8] Opp'n at 16.
[9] Mot. at 8, 13–14; Defs.' App'x A, ECF No. 54-14 at 4.
[10] Mot. at 7, 20; *cf.* Opp'n at 29.

10. The City Council approved an ordinance exempting recurring and "sponsored" events from the Advertising Prohibition only *after* Defendants denied Plaintiffs' permit application on the basis that Plaintiffs had violated the Advertising Prohibition.[11]

11. After Defendants denied Plaintiffs' permit application and subsequent appeal, the Moratorium prevented Plaintiffs from filing a new, separate permit application to allow them to hold an event on June 30.[12]

12. At least one member of the City Council is openly and vehemently opposed to drag performances in public.[13]

13. Plaintiffs' event was intended to be family-friendly and to promote a message of inclusion.[14] There is no evidence to suggest that Plaintiffs' event would have consisted of unprotected speech, such as obscenity. There was no such evidence at the time the City denied Plaintiffs' permit, and nothing in the record suggests that the City ever so much as asked Plaintiffs about the family-friendly nature of the event before denying Plaintiffs' permit application.

ARGUMENT

I. THE CITY'S JURISDICTIONAL ARGUMENTS FAIL.

The City raises two threshold arguments: mootness and lack of standing. Neither has merit.

A. Plaintiffs' Motion Is Not Moot.

The City's argument that, because Plaintiffs' originally requested event date has passed, the Court is unable to grant any effectual relief is plainly wrong. Plaintiffs are still actively

[11] Mot. at 6; Opp'n at 9, 15.
[12] *Cf.* Opp'n at 19–20.
[13] Avalōx Decl. ¶¶ 13-14, ECF No. 34-6; Mot. at 15 & n.53; Michelle Tanner (@michelletannerusa), Instagram (Apr. 12, 2022), https://www.instagram.com/p/Cq9PG9MtDsM/; *see* Opp'n at 30.
[14] Avalōx Decl. ¶ 17, ECF No. 34-6; Lipsyncki Decl. ¶¶ 12-15, ECF No. 34-5..

attempting to hold the event they originally planned to hold on April 28, and Defendants are actively obstructing that event. Plaintiffs' injury is ongoing as long as Defendants' web of unlawful restrictions on Plaintiffs' speech remains in place, and can be remedied if the Court grants Plaintiffs' motion. This dispute is anything but academic. Indeed, the City cites no case holding that a dispute was moot under similar circumstances. Its mootness argument rests instead on an analogy to a single case, *Fleming v Gutierrez*,[15] that is entirely inapposite. In *Fleming*, the district court ordered the defendants to conduct an election in a certain way, and the defendants complied.[16] The defendants' *appeal* from the district court's order was moot, because the election had passed and the Tenth Circuit could not retroactively change the procedures under which it was conducted.[17] Here, by contrast, no event has occurred that would make it impossible for the Court to grant the relief Plaintiffs seek.

B. Plaintiffs Have Standing.

The City's standing argument is equally meritless. There is no dispute that Plaintiffs have suffered an injury in fact (the denial of their permit), that the injury was caused by the City, and that it can be redressed by the relief Plaintiffs seek. Indeed, Defendants do not appear to contest that Plaintiffs have Article III standing to raise each claim set forth in their Complaint, and rather dispute only Plaintiffs' standing to seek prospective injunctive relief. But a plaintiff loses standing to obtain such relief only if an unconstitutional harm is complete and unlikely to repeat itself—not where, as here, the harm is ongoing and will continue until Plaintiffs are able to hold their event.[18]

Defendants' invocation of a purported requirement to file a special event application 45

[15] 785 F.3d 442 (10th Cir. 2015).
[16] *Id.* at 444.
[17] *Id.* at 445.
[18] *See, e.g.*, *Riggs v. City of Albuquerque*, 916 F.2d 582, 586 (10th Cir. 1990) (holding that standing was satisfied where plaintiffs alleged ongoing illegal surveillance of plaintiffs' activities, and contrasting cases involving completed harms where future harms were speculative).

days in advance—in addition to being unrelated to standing—is unavailing. Plaintiffs filed their application far more than 45 days before June 30, the day they are now seeking to hold their event. Defendants' insistence that Plaintiffs must file another application that would in any event be barred by the Moratorium makes no sense and is yet another example of the City weaponizing its permitting rules to ban disfavored events.

II. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR FREE SPEECH CLAIMS.

Under any standard, Plaintiffs are overwhelmingly likely to succeed on the merits of their free speech claims.[19]

A. Drag Performances Are Protected Speech.

The City's argument that Plaintiffs' event is wholly unprotected by the First Amendment cannot be credited. As explained in Plaintiffs' motion, drag falls squarely within First Amendment precedent that protects "live entertainment."[20] Indeed, courts have readily determined that drag

[19] For the reasons explained in their motion, *see* Mot. at 8 & n.34, Plaintiffs do not have to satisfy a heightened standard. *See also Evans v. Utah*, 21 F. Supp. 3d 1192, 1200-01 (D. Utah 2014) (preliminary injunction preventing State from retroactively enforcing same-sex marriage ban was prohibitory rather than mandatory since it did not require ongoing court supervision to be implemented); *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1026 (2d Cir. 1985) (applying relaxed standard where "gravamen" of Plaintiffs' claim was for prison official to "cease his interference" with delivery of mail), *overruled on other grounds*, *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). Nevertheless, Plaintiffs should prevail under even the heightened standard. Indeed, where a moving party's constitutional rights hang in the balance, heightened review is often no barrier to an injunction. *See, e.g.*, *Awad v. Ziriax*, 670 F.3d 1111, 1126 (10th Cir. 2012) (granting injunction against city for likely violation of Establishment Clause under heightened standard); *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 797–98 & n.3 (10th Cir. 2019) (equal protection); *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1226 (10th Cir. 2005) (commercial speech); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 976 (10th Cir. 2004) (religious expression), *aff'd sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

[20] *See* Mot. at 9–10 nn.37, 38 (quoting *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981)) ("[L]ive entertainment, such as musical and dramatic works fall within the First Amendment.")

performance is protected speech.[21]

Defendants' position ignores these precedents and cites no cases to the contrary. Instead, Defendants rely on inapposite cases involving "expressive conduct," like flag burning or sleeping in a national park as forms of political protest.[22] These precedents do not apply to live entertainment. Otherwise, ballet, orchestral music, and theater would be outside the First Amendment's protections unless performers could articulate a "particularized message" conveyed, for example, by *Hamlet* or a Mozart piano concerto. That makes no sense and is not the law.

Finally, Defendants' position misconstrues what drag is. Plaintiffs have assembled a record—which the City does not challenge—showing that drag communicates social and political messages about LGBTQ+ identity and belonging.[23] Plaintiffs were under no obligation to explain this to the City in their permit application, and in any event, the City cannot plausibly argue it was unaware of drag's political message, especially given the controversy months earlier surrounding the HBO show *We're Here*. Indeed, the City denied Plaintiffs' permit precisely because it disagreed with drag's message.

B. Defendants' Stated Rationales Are Pretextual and Defendants Cannot Satisfy Strict Scrutiny.

In an attempt to escape strict scrutiny, the City argues that Plaintiffs have provided insufficient evidence of pretext.[24] That is wrong. Defendants' enforcement of the Advertising

[21] *See id.* at 9 n.37 (citing *Norma Kristie, Inc. v. City of Okla. City*, 572 F. Supp. 88, 91 (W.D. Okla. 1983) (holding drag shows are protected First Amendment expression)); *see also Friends of George's, Inc. v. Tennessee*, No. 23CV02163, __ F. Supp. 3d __, 2023 WL 2755238, at *3 (W.D. Tenn. Mar. 31, 2023) (granting temporary restraining order against statute banning drag performance on First Amendment grounds).
[22] *See* Opp'n at 17–18 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (sleeping in parks) and *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning)).
[23] Opp'n. at 9–12; Mot. at 3–4.
[24] Opp'n. at 24–25.

Prohibition and adoption of the Moratorium were unprecedented[25] and occurred in the immediate wake of anti-LGBTQ+ and anti-drag organizing in the community and throughout the state.[26] Indeed, Defendants concede that concerns purportedly underlying the Moratorium were first discussed on July 14, 2022,[27] the very day the City Council threatened to fire St. George's City Manager because of his failure to stop HBO's drag event.[28] The City adopted the Moratorium and started enforcing the Advertising Prohibition just days after Plaintiffs' permit application was singled out as "sensitive."[29] The Defendants have proffered weak justifications for the Moratorium[30] and none at all for their decision to suddenly start enforcing the Advertising Prohibition.[31] These facts—in addition to Councilmember Tanner's expressly anti-drag statements—provide commanding evidence of the Defendants' intent to prevent Plaintiffs' drag performance.[32] Because the Advertising Prohibition and Moratorium were enforced against

[25] Mot. at 6–7.
[26] *Id.*
[27] Opp'n at 21.
[28] Compl. ¶ 36.
[29] Mot. at 4–5
[30] Opp'n at 4–5.
[31] The fact that non-drag events were swept into the Defendants' new enforcement of the Advertising Prohibition and Moratorium does not render those ordinances non-discriminatory. *See Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 958 (9th Cir. 2020) ("Discriminatory laws, policies, or actions will often have negative effects (whether intended or not) on individuals who do not belong to the disfavored group," yet "such laws, policies, or actions are discriminatory when they are undertaken for the purpose of harming protected individuals." (cleaned up)).
[32] Defendants' invocation of Tanner's First Amendment rights is a red herring and mischaracterizes Plaintiffs' argument. *See* Opp'n at 25. The First Amendment does not prevent Tanner's statements from being used as evidence of her expressed anti-drag intent. With respect to other Councilmembers, the timeline described above sufficiently establishes discriminatory intent, as does the fact that a majority of the Council voted to revoke HBO's permit last year and ousted the City Manager after he failed to revoke the permit. *See* Compl. ¶¶ 34, 36. Plaintiffs are not requesting that Tanner be barred from expressing her personal anti-drag views; rather, they are arguing that she, alongside other City officials, cannot constitutionally base official government decisions on their personal biases against and disdain for drag.

Plaintiffs "because of disagreement with the message the speech conveys," strict scrutiny applies.[33]

Defendants' contention that their interest in "protecting children from all kinds of harm" is sufficiently compelling to satisfy strict scrutiny is not only unavailing but offensive.[34] Drag performance in general, and Plaintiffs' proposed event specifically, pose no harm to children.[35] Plaintiffs planned an event that was family-friendly[36] and alcohol-free.[37] "No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed."[38] Defendants' offensive and wholly unfounded belief that drag performance is generally harmful cannot shield their unconstitutional conduct.[39] After all, "[s]peech that is neither obscene as to youths nor subject to some other

[33] *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015) (cleaned up).
[34] Opp'n at 25–26.
[35] Avalōx Decl. ¶ 17, ECF No. 34-6; Lipsyncki Decl. ¶¶ 12-15, ECF No. 34-5. Bizarrely, the City now cites these statements as evidence of a risk of harm to children, even though the statements say precisely the opposite.
[36] Avalōx Decl. ¶ 17, ECF No. 34-6.
[37] Avalōx Decl. Ex. A at 47, ECF No. 34-7.
[38] *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 794 (2011) (internal citations omitted).
[39] To the extent Defendants seek to rely on the Secondary Effects doctrine, *see* Opp'n at 21, 25, 28 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)), this argument is misplaced. That doctrine allows for "zoning ordinances designed to combat the undesirable secondary effects of [adult entertainment] businesses … to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." *Renton*, 475 U.S. at 49. A lower level of scrutiny applies to such zoning ordinances because they do not target the content of speech, but rather secondary "effects that are almost unique to theaters featuring sexually explicit films," including the "prevention of crime, maintenance of property values, and protection of residential neighborhoods." *Boos v. Barry*, 485 U.S. 312, 320 (1988). "Regulations that focus on the direct impact of speech on its audience . . . are not the type of 'secondary effects'" that *Renton* concerned. *Id*. at 321. Indeed, the Supreme Court has stated,

> To take an example factually close to *Renton*, if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.

legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[40]

Further, "[g]overnment justifications for interfering with First Amendment rights must be genuine, not hypothesized or invented *post hoc* in response to litigation."[41] Defendants have never before claimed that their enforcement of the Advertisement Prohibition or their adoption of the Moratorium were motivated by a desire to protect children from harm.[42] They cannot now invoke that post hoc government interest, which in any event does not rise to the level of a legitimate interest and does not pass constitutional muster.

C. The Advertising Prohibition Is Unconstitutional.

The City's attempts to defend its Advertising Prohibition are unavailing under any standard. And because the Advertising Prohibition was the only stated basis for denying Plaintiffs' permit, that denial also cannot stand.

First, the Advertising Prohibition satisfies neither strict nor intermediate scrutiny.

Id. Here, where Defendants suggest that the City has a compelling interest in protecting children from seeing drag performances, such an interest stems from the impact of the content of drag shows on children, *see* Opp'n at 26–27, and restrictions on speech pursuant to this interest must meet strict scrutiny. *See id*.

[40] *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213–14 (1975). Speech may be considered "obscenity" and thereby lose First Amendment protection only if it meets the following criteria: (a) "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest"; (b) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and (c) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973) (cleaned up). Plaintiffs' speech plainly does not fall into this category, and Defendants do not argue otherwise. While the Supreme Court has also recognized a separate category of speech that is obscene for children in light of their age and maturity, *see Ginsberg v. New York*, 390 U.S. 629, 636, 646 (1968), the government may regulate that speech to protect minors but, in doing so, may not infringe the First Amendment rights of adults for whom the speech is not obscene. *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126–31 (1989); *Reno v. ACLU*, 521 U.S. 844, 857–61, 874–79 (1997).

[41] *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2432 n.8 (2022) (cleaned up).

[42] *See* Mot. at 6–7.

Crucially, the City fails to identify a compelling or even significant government interest supporting its position. Instead, while purporting to address the Prohibition, the City invokes interests, like avoiding traffic disturbances or overuse of public parks, that at best support a special events permitting system in general but have nothing to do with a ban on advertising.[43] Elsewhere, the City gestures at vague concerns that allowing pre-permit advertising "would only raise costs and cause confusion."[44] As explained in Plaintiffs' motion, that is insufficient: the City "must demonstrate that the harms it recites are real."[45] The City has submitted no evidence of increased costs or confusion—or any harm at all—caused by pre-permit advertising in the years during which the City concedes that the Advertising Prohibition went unenforced. [46] Nor does the City offer *any* reason, let alone a content-neutral reason, to treat recurring and "City-sponsored" events differently from Plaintiffs' event. To be clear, as Defendants do not dispute, "city-sponsored" just means officially favored by the City; thus, functionally, the right to advertise a special event is entirely at the discretion of the City Council. The Constitution cannot abide such a system.

With respect to narrow tailoring, the City asserts that "Plaintiffs do not present any less

[43] *See* Opp'n at 20–21.
[44] *Id.* at 22.
[45] Mot. at 22 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993)).
[46] The City argues that "failure to enforce an ordinance in the past does not render an ordinance unenforceable." Opp'n at 29. But nonenforcement does suggest that the purported interests underlying the ordinance are not substantial; "a law cannot be regarded as protecting an interest of the highest order when it [has left] appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (cleaned up). In any event, in support of this proposition, the City quotes the *syllabus* (not an opinion) of a Supreme Court decision, and, indeed, the portion of the syllabus describing a non-binding concurrence. *See* Opp'n at 29 n.112 (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 281 (2000)). And the concurring justices noted only that "[o]ne instance of nonenforcement—against a play already in production that prosecutorial discretion might reasonably have 'grandfathered'—does not render [an] ordinance discriminatory on its face." *City of Erie*, 529 U.S. at 308–09 (Scalia, J., concurring in the judgment). That is a far cry from the facts here, where the City had not enforced the Advertising Prohibition against *anyone* for years.

restrictive alternatives,"[47] while ignoring that, as explained in Plaintiffs' motion, any conceivable interest underlying the Advertising Prohibition could be just as well served by simply "requiring advertisements to state that a permit application remains pending."[48] As for alternative means of communication, the City's assurances that the Prohibition is "limited to the time prior to permit approval" ring hollow,[49] given that, as the City does not dispute, permits typically issue only shortly before the relevant event's date. This effectively makes it impossible to advertise an event that has not been exempted from the Prohibition.[50]

Second, the Advertising Prohibition is a prior restraint under *Freedman v. Maryland*.[51] The City does not dispute that it has given itself unfettered discretion to exempt favored events from the Prohibition. This violates the rule that, as the City concedes, a permitting scheme "may not delegate overly broad licensing discretion to a government official."[52] Moreover, the City completely fails to address the fact that, as explained in Plaintiffs' motion, the Advertising Prohibition improperly gives the City complete discretion to approve or deny special event permits, not simply discretion to allow pre-permit advertising.[53] Nor does the City dispute that its permitting ordinance sets no timeline for the issuance of a permit—despite the need for a prompt decision to make compliance with the Advertising Prohibition possible—in violation of the rule that such a scheme must ensure that a permit "must be issued within a reasonable period of time."[54]

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[47] Opp'n at 22.
[48] Mot. at 22.
[49] Opp'n at 28.
[50] The City also argues that Plaintiffs are not barred from "dressing in drag in public, attending public meetings or events, [or] participating in other recurring events," Opp'n at 22, but this is nonresponsive to whether the Advertising Prohibition leaves alternative channels for promoting a special event, which it does not.
[51] 380 U.S. 51 (1965); *see* Mot. at 19.
[52] Opp'n at 27 (quoting *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992)).
[53] *See* Mot. at 20–21.
[54] *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990) (plurality opinion).

Third, the Advertising Prohibition is both overbroad and vague. It effectively bans nearly all special event advertising, thus sweeping in significantly more speech than could conceivably be justified. The fact that the City's preferred events are exempt from the Prohibition—which itself constitutes unconstitutional content and viewpoint discrimination—does not make it any less overbroad with respect to those events to which it does apply.[55] And the fact that there is an appeal process for denials is irrelevant given that the Prohibition applies even to events that never receive a denial but instead are kept on hold until the last minute.[56]

With respect to vagueness, the City's attempts to create confusion by conflating Plaintiffs' social media post[57] with their post soliciting vendors[58] themselves illustrate the vagueness of the term "advertising." While the former could be construed as an "advertisement," it was never cited by the City in its permit denial. The City does not and cannot dispute that the Advertising Prohibition is vague as to whether such posts are encompassed, and that very vagueness led to the denial of Plaintiffs' permit.

D. The Moratorium Is Unconstitutional.

The Moratorium likewise cannot stand for a variety of reasons.

First, the Moratorium fails both strict and intermediate scrutiny. There is reason to doubt that the City's interest in protecting its parks from overuse and wear-and-tear is compelling, or even substantial, given that the Moratorium exempts dozens of events that have been and are permitted to take place over the summer months.[59] But even assuming a sufficient interest, the Moratorium is not narrowly tailored because it is both under-inclusive and over-inclusive. As a

[55] *See* Opp'n at 29.
[56] *See id.*
[57] Avalōx Decl. Ex. A at 29, ECF No. 34-7.
[58] *Id.* at 58.
[59] *See* Defs.' App'x A, ECF No. 54-14.

wholesale ban on protected speech in a traditional public forum (that the City can selectively enforce), the Moratorium is over-inclusive by banning all protected speech as a default. The City makes no effort to explain why alternatives proposed by Plaintiffs, such as limiting events to specific sections of grass, are impracticable or inadequate.[60] The Moratorium's copious exemptions do not satisfy narrow tailoring, as the City argues,[61] but rather simply demonstrate that the Moratorium is under-inclusive by allowing events to go forward regardless of whether they may contribute to the wear-and-tear on City parks. This shows how the City improperly implemented the Moratorium to "*favor[]* particular kinds of speech and particular speakers through an extensive set of exemptions."[62]

Nor does the Moratorium leave open alternative channels of communication. The desultory suggestions offered by Defendants, such as "dressing in drag in public,"[63] are not adequate alternatives to a large-scale event with multiple performers designed to show public support for and foster connection in the LGBTQ+ community. Further, private venues are no substitute for traditional public fora, such as public parks, "that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions'" and thus "occupy a 'special position in terms of First Amendment protection.'"[64]

Second, the Moratorium also fails the *Freedman* test for prior restraints. Indeed, the City barely argues otherwise and instead devotes its energies to defending permitting schemes generally.[65] But the Moratorium is not a permitting scheme; it is an outright ban on special events,

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[60] *See* Mot. at 17.
[61] *See* Opp'n at 23.
[62] *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1072 (9th Cir. 2020).
[63] Opp'n at 22.
[64] *Boos*, 485 U.S. at 318 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939) and *United States v. Grace*, 461 U.S. 171, 180 (1983)).
[65] *See* Opp'n at 27–28.

to which the City can grant exemptions in its unfettered discretion. The City offers no avenue for reconciling the Moratorium with *Freedman*. Nor does the City acknowledge that, as a regulation of speech in a traditional public forum, the Moratorium is subject to particular scrutiny.[66]

Third, the Moratorium is unconstitutionally overbroad. In arguing otherwise, Defendants do little more than invoke the purported goals of the Moratorium, while failing to address whether the Moratorium sweeps in more speech than necessary to achieve those goals, which the Moratorium plainly does.[67] Defendants cite no support for the view that a sweeping six-month ban on all events in a public forum—except the favored events the City has chosen to exempt—can satisfy constitutional scrutiny.

III. THE REMAINING FACTORS SUPPORT AN INJUNCTION.

Plaintiffs have demonstrated irreparable harm. "[L]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,"[68] and "no further showing of irreparable injury is necessary."[69] The City ignores these precedents and instead devotes its energies to distinguishing a single case, *Heideman v. South Salt Lake City*,[70] that is entirely inapposite. *Heideman* involved a requirement for erotic dancers to wear "G-strings" and "pasties," which the court found to be "a minimal restriction in furtherance of the asserted government interests."[71] Here, by contrast, the restriction is anything but minimal—the City has completely barred Plaintiffs from holding a family friendly event in a traditional public forum—

[66] *See* Mot. at 11 & nn.47–50.
[67] *See* Opp'n at 29–30.
[68] *Elrod v. Burns*, 427 U.S. 347, 373 (1976).
[69] *Awad*, 670 F.3d at 1131 (cleaned up).
[70] 348 F.3d 1182, 1184 (10th Cir. 2003).
[71] *Id.* at 1190 (quoting *City of Erie*, 529 U.S. at 301) (plurality op.). Even then, the court concluded that the irreparable harm factor "tips slightly in favor of" an injunction. *Id.*

and Defendants' reliance on *Heideman* is thus misplaced.[72]

Balanced against Plaintiffs' irreparable harm, Defendants have not come close to tilting the scales. They offer no argument, much less evidence, that the City or any non-party will suffer any constitutional harm if the preliminary injunction is granted.[73] And the City has no significant lawful interest in enforcing its unconstitutional special event permitting process. In these circumstances, the public interest—as distinct from any interest the City's leadership may express—doubtless rests in favor of injunctive relief restoring Plaintiffs' rights.[74]

CONCLUSION

For the foregoing reasons and those stated in their motion, Plaintiffs respectfully request that the Court grant their motion for a preliminary injunction.

Dated: June 13, 2023 Respectfully submitted,

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[72] Defendants' alternative argument that Plaintiffs cannot show irreparable harm because of their purported delay in bringing suit is unpersuasive, particularly because Defendants do not identify any prejudice associated with the purported delay. Plaintiffs immediately appealed the permit denial, giving the City clear notice of Plaintiffs' objections. It should not be surprising that it took some time for Plaintiffs to obtain counsel, comb through the public record, and coordinate a litigation effort of this scale. Indeed, much of the evidence supporting Plaintiffs' motion derives from public records that the City released only recently, including after April 28.

[73] Plaintiffs reserve the right to respond to any additional arguments Defendants may raise on this issue in response to the Court's June 10, 2023 order. *See* ECF No. 56 ¶ 13.

[74] Defendants' repeated suggestion that Plaintiffs could have brought a challenge in state court is unavailing. Plaintiffs had no obligation to pursue available state judicial or administrative remedies before challenging a violation of constitutional rights in federal court. *See Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 516 (1982); *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled on other grounds*, *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978).

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. The electronic case filing system sent a "Notice of E-Filing" to all e-filing counsel of record in this case.

/s/ Jeremy Creelan