Steven E. Kroll, Esq.
Nevada Bar #4309
550 Gonowabie Rd. Box 8
Crystal Bay, Nv 89402
KrollLaw@mac.com
Tel. 775-831-8281

Attorney for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

STEVEN E. KROLL,

Plaintiff,

vs.

INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT, a/k/a IVGID, a governmental subdivision of the State of Nevada; et al.,

Defendants.

Case No. 3:08-cv-00166-ECR-RAM

Plaintiff's Reply to Opposition to Emergency Motion for Injunction on Free Speech Grounds

and

Certificate of Service

The Motion now before this Court springs not from the Complaint above-captioned but from the defendants' extra-judicial attempt to moot out the First Amendment allegations in that Complaint through what they must have thought at the time was a clever maneuver, but which has backfired badly.

In adopting Policy Number 136, a self-described regulation of "Expression", IVGID introduced for the first time a specific "restriction of speech in a 'quintessential public forum'" which could be "constitutional only if it was a reasonable time, place, and manner restriction on speech." *Galvin v. Hay*, 374 F.3d 739 (9th Cir. 2004). As will be seen in the discussion of the so-called "Blue Line Area case" below, *Gerritsen v. City of Los Angeles*, 994 F.2d 570 (9th Cir. 1993), the designation of certain "free speech areas" within a larger public forum area such as a park as provided for by Policy 136 has been held to be *not* reasonable.

But in going further to forbid speakers from "violating the space of those who are not

Steven E. Kroll • Attorney at Law
P.O. Box 8 • Crystal Bay, NV 89402
Tel: 775-831-8281
eMail: KrollLaw@mac.com

interested in hearing or receiving their expression of their First Amendment rights," (see Exhibit A attached to Supplement to Plaintiff's Emergency Motion filed May 15, 2008, (document 13)), Policy 136 impermissibly focuses on the "content of the speech and the direct impact that speech has on its listeners," *Boos v. Barry*, 485 U. S. 312, 321 (1988). That, said the Supreme Court in *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803 (2000), "is the essence of content-based regulation" and as such subject to the highest standard of judicial oversight by this Court, namely "strict scrutiny". *Id.* at ¶49. As the high Court declared in *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 690 (2004)(emphasis supplied),

> Content-based prohibitions … have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat **the Constitution demands that content-based restrictions on speech be presumed invalid**, *R. A. V. v. St. Paul*, 505 U. S. 377, 382 (1992), and that **the Government bear the burden of showing their constitutionality.** *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803, 817 (2000).

This radical switch in the usual burden of going forward with the evidence changes everything. "As the Government bears the burden of proof on the ultimate question of COPA's constitutionality" said the United States Supreme Court in *Ashcroft* at ¶24,

> **respondents must be deemed likely to prevail** unless the Government has shown that respondents' proposed less restrictive alternatives are less effective than COPA. **Applying that analysis, the District Court concluded that respondents were likely to prevail.**

Furthermore, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury", *Elrod v. Burns*, 427 U.S. 347, 373 (1976), and as to Movant's standing to raise all these issues, inasmuch as Policy 136 was enacted by defendants specifically to thwart Plaintiff's First Amendment claims in the Civil Rights portion of his Complaint[1], his standing to defend himself here can not be questioned. *Cf. Virginia v. American Booksellers Assn.*,

[1]Given the sudden appearance on IVGID's April 30, 2008 Agenda of Policy 136 developed by the District's General Counsel, and the Board's unanimous agreement that it should go into effect the next day without discussion or debate, it is apparent that Policy 136 was a litigation tactic which defendants thought and intended would cut the legs out from under Plaintiff's lawsuit. Claiming that their "newly promulgated policy meets the requirements of the First Amendment [and] As such Plaintiff is unable to show a strong likelihood of success on the merits," (Opposition, document 21 at p. 6), the defendants gleefully observe that "the court reviews only the present version of an ordinance in connection with First Amendment challenge thereto" (p. 5) and finds it "beyond IVGID's comprehension how, exactly, Plaintiff contends that its new First Amendment policy will cause Plaintiff irreparable harm." (p. 7). That it is Steven Kroll, not any perceived governmental interest which is the actual target of Policy 136 is made clear when defendants again assert (again erroneously) that "Plaintiff's entire lawsuit is premised upon the complaint that IVGID has violated his constitutional rights by preventing him access to the beach properties for the purpose of conducting First Amendment activities," and declares it "simply inconceivable" that now that "IVGID has passed legislation assuring Plaintiff (and the public at large) access to the beach properties" that Plaintiff has anything more to complain about.

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P.O. Box 8 • Crystal Bay, NV 89402
Tel: 775-831-8281
eMail: KrollLaw@mac.com

484 U.S. 383, 392-93 (1988) (standing found where "the law is aimed directly at plaintiffs"). Such a direct injury is not in any event required to establish standing in the First Amendment context, where

> courts recognize that litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id*.

As the Supreme Court found in *United States v. Playboy Entertainment Group, Inc. supra* at ¶60, "It is rare that a regulation restricting speech because of its content will ever be permissible." And in the case at bar as in *Playboy*, Movant respectfully urges this Court to find that "the Government has not met the burden the First Amendment imposes." *Id*.

Silently conceding the First Amendment's applicability to the District-owned Beach Parks as had been alleged in Plaintiff's Complaint filed two months earlier, IVGID's Policy and Procedure Number 136 essentially drew a line around certain areas within the Parks (specifically the parking areas and the sidewalks and pathways adjoining them) and excluded *any* manner of First Amendment expression outside those boundaries while specifically limiting any First Amendment expression *within* the parking lot area to speech and conduct deemed acceptable to IVGID. In the words of Policy 136, that would exclude among other things any First Amendment expression that was perceived to be "inappropriate to the purpose and enjoyment of a specific real property and facility" or "results in a violation of the privacy or rights of others." According to the man charged by Ordinance 7 to interpret and implement the new Policy 136[2], General Manager Bill Horn, "violating the space of those who are not interested in hearing or receiving their expression of their First Amendment rights" would violate Policy 136, as would stepping "outside the designated area" and "getting in the way" of IVGID operations, and could result in a suspension of the violator's Recreation Card.

Except for a few details and a different cast of characters, IVGID's Policy 136 is in many ways identical to a City of Los Angeles scheme rejected by the Ninth Circuit fifteen years ago in the so-called "Blue Line Policy" case. There, a vocal community activist long a thorn in the side of the City for his anti-Mexican government protests in El Pueblo de Los Angeles State Historic

[2]Section 71 of Ordinance 7 attached in its entirety as Exhibit B to Defendants' Motion to Dismiss (at page 34 of Document 8 filed herein) declares: "The General Manager may from time to time adopt, amend, or rescind rules consistent with this ordinance. The General Manager shall hold the final authority to interpret this ordinance and rules adopted thereunder. Such authority shall include the application of this ordinance and rules to specific people, parcels, and circumstances. The day-to-day administration of this ordinance is hereby delegated to the Director of Parks and Recreation."

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P.O. Box 8 • Crystal Bay, NV 89402
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eMail: KrollLaw@mac.com

Park located in downtown Los Angeles and incorporating the Olvera Street commercial area as well as the Mexican Consulate and a Catholic Church, found his free range of that Park substantially circumscribed by a new handbill distribution regulation adopted by the City which contained two basic policies:

> **First, the so-called blue line policy prohibits all handbill distribution in certain areas of the park (indicated by blue demarcations on the pavement).** These areas include two of the park's most popular areas - the area around the Mexican Consulate and the Olvera Street merchants area. **The second policy establishes a permit scheme for limited handbill distribution in other areas of the park.** According to the regulations, "the Park Director shall issue a permit immediately on proper application" unless one of five specified grounds for denial exist. *Gerritsen v. City of Los Angeles*, 994 F.2d 570, ¶23 (9th Cir. 1993)(references are to paragraphs of the opinion; emphasis added).

As in the case at bar,

> **The City argues that the blue-line areas are distinct from the rest of the park, which they concede is a public forum**. **It claims that the Olvera Street area is a distinctive section of the park**, with a unique historic and cultural atmosphere which is designed to foster commercial exchange. **It claims that the area around the Mexican Consulate is semi-private in nature** and that **it has particular functions to carry out** which necessitate separation from activities in other areas of the park. Id. ¶43.

" We find these arguments unconvincing" declared a unanimous Ninth Circuit:

> **While the Olvera Street area may have a special ambience, it is still part of the park and it is indistinguishable from other sections of the park in terms of visitors' expectations of its public forum status.** Indeed, to many visitors, Olvera Street is the heart of El Pueblo Park. Similarly, the walkways and sidewalks leading up to and surrounding the Mexican Consulate are no different from others in the park. **We find that the blue-line areas are indistinguishable from the park as a whole, and, thus, that these areas constitute a public forum.**
>
> In this respect, our Conclusion is consistent with several cases where **the Supreme Court and the lower federal courts have found sections of public forums to be one and the same with the larger, undisputed public forum in which they exist.**" *Id*. at ¶¶ 43-44.

In the case at bar too, "the blue-line areas are indistinguishable from the park as a whole," *Id*., and with respect to IVGID's Beach Property in particular our Court of Appeals cites with approval *Naturist Society v. Fillyaw,* 958 F.2d 1515, 1522 (11th Cir. 1992) holding that "parks are traditional public forum and **beach area of state park is part of larger park and therefore a public forum**." *Id*. The legal analysis then goes as follows:

> **Given that the blue-line areas are a public forum, the ban on handbill dis-**

Steven E. Kroll • Attorney at Law
P.O. Box 8 • Crystal Bay, NV 89402
Tel: 775-831-8281
eMail: KrollLaw@mac.com

> **tribution must be a valid time, place or manner restriction if it is to pass constitutional muster.** *Ward v. Rock Against Racism*,491 U.S. 781, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989). **Such a restriction must (1) be content-neutral, (2) be narrowly tailored to serve a significant government interest, and (3) leave ample alternatives of communication.** *Id*. at 791; *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984). **The ban meets the first criterion, since it prohibits all handbills without regard to their content.** It also meets the third criterion since there are ample alternative channels of communication: Gerritsen could leaflet in other areas of the park or, presumably, he could use methods other than handbills to express his political views.
>
> **The more difficult question is whether the blue-line ban is narrowly tailored to achieve a significant government interest**. *Gerritsen v. City of Los Angeles*, *supra* at ¶¶45-46.

Before following the Appellate Court's reasoning to its conclusion that the Blue Line solution is *not* narrowly tailored thus leading to the Court's holding that

> **"the City's ban on handbill distribution in certain areas of a public park and its permit scheme for handbill distribution in other areas of the park are not valid time, place or manner restrictions on protected speech in a public forum", *Id*. ¶17,**

a significant factual distinction must be noted at this point, namely that while Blue Line's First Amendment restrictions were content neutral, the IVGID restrictions of Policy 136 are not, and as discussed above, an even more exacting standard of review will face the defendants when this prong of the three-prong *Ward vs. Rock Against Racism* test *supra* is reached. As the Supreme Court declared in *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803 (2000):

> The speech here, all agree, is protected speech; and the question is what standard the Government must meet in order to restrict it. **As we consider a content-based regulation, the answer should be clear: The standard is strict scrutiny.** Id. at ¶49.

The high Court goes on to say:

> Indeed, were we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas. **When First Amendment compliance is the point to be proved, the risk of nonpersuasion -- operative in all trials -- must rest with the Government, not with the citizen.** *Id*. at ¶60

Returning for the moment however to the 9th Circuit's reasoning in *Garretsin* and "whether the blue-line ban is narrowly tailored to achieve a significant government interest", ¶46, the opinion observes that

> "while the ban is narrow in its reach, in that it affects only these specific [Blue

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P.O. Box 8 • Crystal Bay, NV 89402
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eMail: KrollLaw@mac.com

> Line] areas, **courts rarely have upheld complete bans on a category of First Amendment expression.**" *Id*.

In the case at bar, it is not merely a complete ban on "a *category* of First Amendment expression" that is regulated by IVGID Policy 136, but a complete ban on *ALL* categories; and the geographical area reached by this total ban is not narrow but vast, including all public property which does not lie within the parking areas and adjoining sidewalks of every District venue which is not specifically made off-limits to *any* First Amendment activity through its designation as a "Non-Public Forum Area" in Exhibit 2 attached to Policy 136.

"In determining whether a permit scheme is narrowly tailored to serve a significant government interest, we look to the "fit" between the state's regulation and the stated purposes in making this determination" says the Ninth Circuit at Paragraph 54 of *Garretsin*. "Unfortunately," continues that Court,

> **we are at a loss to discern any significant government interest in proposing the permit rule. The record reveals only one express reason for the City's enacting the permit scheme - to make it more difficult for Gerritsen to distribute handbills regarding his political beliefs.**
>
> **We hold that this purpose is not a significant government interest. Moreover, it is not a legitimate government interest - it is precisely the type of viewpoint censorship which the Constitution seeks to prevent.** The Supreme Court and this court have made it clear that certain government interests are impermissible - the purpose of curtailing political speech which is controversial or anti-government is among these. *Id*. ¶¶54-55, emphasis added.

A review of the facts and chronology set forth at footnote 1 *infra* strongly supports the inference that Policy 136, like that of the City of Los Angeles in painting its Blue Line Free Speech areas, was aimed not at anything having to do with IVGID's delivery of water, sewage, and recreation services to its members, but rather, as in *Gerritsen*, **to "make it more difficult" for Kroll to speak out at the District's Beach Properties and other IVGID-owned locations regarding his political beliefs.** That is not a significant government interest much less a legitimate one, and even if it were not a content-based regulation of Speech this Court would have to reach the same conclusion regarding Policy 136 as the higher Court did in *Gerritsen*, namely:

> Since we cannot discern a significant government interest behind the permit scheme, the City cannot show that it is narrowly tailored to meet such an interest. Thus, the permit prong of the El Pueblo Park guidelines fails the test for a valid time, place or manner restriction. *Id*, ¶56.

But unlike *Garritsen*, IVGID's Policy 136 *is* clearly content-based. Any expression of speech in the "Public Forum Areas" allowed by defendant IVGID is mandated to "protect per-

Steven E. Kroll • Attorney at Law
P.O. Box 8 • Crystal Bay, NV 89402
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eMail: KrollLaw@mac.com

sons entitled to use District real property and facilities from activities or practices which would make them involuntary audiences, or which are inappropriate to the purpose and enjoyment of a specific real property and facility;" such speech must not "result in a violation of the privacy or rights of others"; it must not, according to the District's General Manager charged with interpreting and enforcing such vague standards, violate "the space of those who are not interested in hearing or receiving their expression of their First Amendment rights," and speakers under Policy 136 are otherwise subject to censure based on the reaction of their listener. But in this country,

> **Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exist**s. We are expected to protect our own sensibilities 'simply by averting [our] eyes.' *Cohen v. California,* 403 U. S. 15, 21 (1971), quoted in *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803 at ¶24 (2000),

and it has been held that

> **In order for the State ... to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint**, *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503, 509 (1969).

As discussed in detail above, unlike the analysis required of a complainant challenging narrowly drawn regulations affecting time, place, and manner, "When the Government seeks to restrict speech based on its content, **the usual presumption of constitutionality afforded congressional enactments is reversed."** *U.S. vs Playboy Enterprises, supra,* at ¶57. IVGID has supplied no explanation for the need for a policy regulating speech in the first place, nor that its Policy 136 accomplishes any legitimate government purpose. It has failed, therefore, to sustain its heavy burden of proof in this matter, and the further enforcement of this draconian restriction on District members' Free Speech must be enjoined.

Left to be discussed is the issue of IVGID's delegation of overly broad discretion to its General Manager Bill Horn in the implementation and enforcement of Policy 136, and his proposed "basic rules to support the successful execution" thereof as set forth in his General Manager's Report for May 15, 2008 (attached as Exhibit A to Movant's Supplement to Plaintiff's Emergency Motion, document 13). His basic rules would include requiring "someone desiring to express their First Amendment rights at Burnt Cedar Beach, Incline Beach and Sk Beach" to sign in at the Gate and "asked to wear a wrist band which will allow Staff to know who has been granted their request to express their First Amendment rights". This individual would be told

Steven E. Kroll • Attorney at Law
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eMail: KrollLaw@mac.com

not to "violate the space of those who are not interested in hearing or receiving their expression of their First Amendment rights" among other restrictions, and "upon leaving these three beaches, they will be asked to sign out."

Despite the unambiguous wording of General Manager Horn's "Policy 136 - First Amendment: Rules" implementing Policy 136 quoted above, Defendants' Opposition to Plaintiff's Emergency Motion (document 21 at page 5) insists that

> "The policy permits access to all individuals wishing to use the designated areas for First Amendment purposes irrespective of the content of the speech. The policy does not require any prior application or request for a permit by any person wishing to use the designated areas for First Amendment purposes. The policy does not vest any discretion in IVGID General Manager Bill Horn concerning who may, or may not, use the designated areas or how conduct of those exercising their First Amendment rights on the properties will be regulated."

To support this direct contradiction of General Manager Horn's implementing rules, defendants attach an Affidavit by the current Chair of the IVGID Board of Trustees, Bea Epstein, who declares under Penalty of Perjury that Policy 136 "vests no discretion in the General Manager of IVGID concerning how the terms and conditions of this policy will be enforced," swearing further that "there are no conditions in the policy which require an individual to sign-in or out in connection with accessing the property to exercise First Amendment rights or which require any individual to wear an identifying wrist band in connection with accessing the property to exercise their First Amendment rights."

This Court does not need any witness to give us her version of what the documents spell out clearly on their face, and in point of fact the gentle lady is mistaken in her sworn conclusions. Policy 136 specifically declares at page 3 that "The District may make additional reasonable rules and regulations for the use of each real property and facility as it determines to be necessary". And Ordinance 7 says that it is the District's General Manager, not any member of the Board of Trustees, who "may from time to time adopt, amend, or rescind rules consistent with this ordinance," granting to General Manager Horn "the final authority to interpret this ordinance and rules adopted thereunder." (See footnote 2 *infra*). Mr. Horn's "basic rules to support the successful execution of Policy 136" set forth in his General Manager's Report dated May 15, 2008 are thus fully within the authority granted him by Ordinance 7, and while he has apparently backed away from requiring First Amendment practitioners to wear a wrist band, he has never disowned his intention to require citizens to sign in and sign out when entering the Beach Parks, which is just another kind of unconstitutional content-based restriction and prior restraint on

Steven E. Kroll • Attorney at Law
P.O. Box 8 • Crystal Bay, NV 89402
Tel: 775-831-8281
eMail: KrollLaw@mac.com

speech specifically condemned in *American Civil Liberties Union of Nevada v. Heller,* 378 F.3d 979 (9th Cir. 2004) at ¶62.

The point is that First Amendment rights can not be held hostage to any government official's unbridled and standardless discretion in his interpretation and implementation of Policy 136, and the grant of such authority so woefully abused by General Manager Horn renders that policy further unreasonable and unconstitutional as a matter of law. *Compare Forsyth County v. Nationalist Movement,* 505 U.S. 123, 130 (1992).

Conclusion

Should this Court require the defendants herein to answer the Complaint by denying their Motion to Dismiss now under submission, it appears that the trial of this case will be filled with sharp differences of testimony on each of the six causes of action, and it will be through Wigmore's "greatest legal engine ever invented for the discovery of truth"[3], the cross-examination of witnesses, that the jury will determine whether General Manager Horn did or did not deny Plaintiff and others access to the Beach Properties with the specific intent of denying them their First Amendment rights; whether Ordinance 7 does or does not deny Plaintiff the Equal Protection of the Law by treating him differently from all other members of the Incline Village General Improvement District who are granted access to the Beach Properties for recreational purposes; whether the financial records of the defendants do or do not support their contention that Plaintiff has not been forced to pay for any part of the purchase or upkeep of this publicly-owned and tax-exempt property from which he has been excluded; *et cetera*.

But that is not *this* case; the issues raised in the Complaint are not the same as those raised in the instant Emergency Motion for Injunction.

What is before this Honorable Court at this moment in time is the constitutionality on its face of an official governmental Policy Number 136 which recognizes IVGID's Beach Properties as a public forum but confines the free exercise of First Amendment rights therein to certain small defined geographical areas within the Park; a Policy which spells out what speech within these designated "public forum areas" will be permitted and what prohibited, including any speech which might be "inappropriate to the purpose and enjoyment of a specific real property and facility" or any expressive activity that could "result in a violation of the privacy or rights of others";

Steven E. Kroll • Attorney at Law
P.O. Box 8 • Crystal Bay, NV 89402
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eMail: KrollLaw@mac.com

[3] 5 J. Wigmore, Evidence §1367 (J. Chadbourn rev. 1974). See also *Davis v. Alaska*, 415 U.S. 308 (1974) where the United States Supreme Court declared that "[C]ross-examination is the principle means by which the believability of a witness and the truth of his or her testimony are tested."

a Policy which leaves it to the General Manager to interpret and implement without the slightest standard for measuring what is "inappropriate", or what "privacy" within the context of a public park might mean, or what constitutes a "violation of the rights of others" among other such vague phrases; a Policy that the General Manager of defendant IVGID proposed on May 15, 2008 to implement under the powers granted him by Ordinance 7 by having persons wishing to express their First Amendment rights at the Beach Properties identify themselves and sign in and out at the gate, and "those requesting this right will be asked to wear a wrist band which will allow Staff to know who has been granted their request to express their First Amendment rights".

The strangling of First Amendment rights by Policy 136, which is the only issue before this Court right now, is not confined to the Beach Properties alone. ALL District-owned properties are covered by this draconian measure. Under Policy 136 there are ten separate venues specifically declared "Non-Public Forum Areas" where NO First Amendment-protected speech or expression can take place. Picketing the Public Works Building to protest an excess water charge would subject an IVGID resident to having his Recreation Pass pulled or even being charged with trespass. Staging a protest in front of the Sewer Pump Station on Plaintiff's narrow country road in Crystal Bay[4] would be illegal. Even the nine non-Beach IVGID venues "with designated Public Forum Areas" set out in Policy 136 are swept within a regime that limits the First Amendment to the parking lot and adjoining sidewalk and pathways. Thus, a recent public meeting held at the District-owned "Chateau" would have to have been illegal, having taken place in the "Non-Public Forum Area" outside the designated "Blue Line Area" defined by Policy 136. This example shows further that defendants' enforcement of their new Policy will apparently be completely arbitrary, a further constitutional infirmity.

Movant has no quarrel with the defendants' formulation of the law governing the propriety of injunctive relief, only with their conclusion that an injunction should not issue if the law is properly applied. "In order to be entitled to a preliminary injunction" they write at page 6 of their Opposition to this Motion (document 21),

> (1) Plaintiff must demonstrate a strong likelihood of success on the merits; (2) the possibility of irreparable harm to him if preliminary relief is not granted; (3) a balance of hardships favoring Plaintiff; and (4) advancement of the public interest. See, Save Our Sonoran, Inc. v Flowers, 408 F.3d 1113, 1120 (9th Cir. 2005). In the alternative, a court may grant a preliminary injunction if the plaintiff demonstrates ***either*** a combination of probable success on the merits

[4] See Affidavit of Steven E. Kroll dated May 6, 2008 attached to Plaintiff's Emergency Motion to Enjoin Defendant IVGID's Policy No. 136 Regulating Speech (document 11, page 14)

Steven E. Kroll • Attorney at Law
P.O. Box 8 • Crystal Bay, NV 89402
Tel: 775-831-8281
eMail: KrollLaw@mac.com

> and the possibility of irreparable harm ***or*** that serious questions are raised and the balance of hardships tips sharply in his favor. Id. The Ninth Circuit has described these two formulas as representing two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. Id. They are not to be construed as separate tests but, rather, as the "outer reaches of a single continuum." Id.

We need not enter that alternative "single continuum" world because the four criteria of the first part of this test are fully and separately met by the motion at bar, and the injunction prayed for therein should be granted as a result.

(1) With the legal presumption of Policy 136's invalidity discussed above and defendants' failure to sustain their high burden of proof that the content-based restrictions on speech pass constitutional muster upon strict scrutiny, Movant's "likelihood of success on the merits" herein must be deemed strong. (2) Movant has demonstrated not just the likelihood, but the actuality of irreparable harm in the absence of an injunction, both as a matter of law, *Elrod v Burns, supra* ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"), and as a matter of fact. (*See* Affidavit of Steven E. Kroll attached to his Emergency Motion, document 11). (3) The "balance of any hardships" must surely be said to "tip sharply in favor" of Movant herein: he is a political activist with five months to go before "the most critical presidential election in my lifetime takes place," according to his Affidavit (document 11, page 16). "I feel deeply", he writes there,

> "the weight of this Policy in officially closing off my political speech and advocacy literally everywhere in the District where citizens gather to talk and exchange ideas, except in the District's Parking Lots which are by nature transitory, not to say dangerous."

Defendants/respondents herein, on the other hand, suffer no hardship whatsoever in doing what the law requires them to do in the first place by removing the barriers to full and meaningful Free Speech within the entire Public Forum. It is well established that no one, the government included, has an interest in the enforcement of an unconstitutional law. *See ACLU v. Reno*, 929 F. Supp. 824, 849 (E.D.Pa. 1996). (4) Nothing could "advance the public interest" more than the vigorous enforcement of the first of our Constitution's Bill of Rights, guaranteeing that "Congress shall make no law abridging the Freedom of Speech or of the Press," and defending "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

On this last point, Plaintiff has denominated the matter before this Court as an "Emergency Motion," and although it may be true that the only true "emergency" is a life and death situation (which this is not), the deprivation of First Amendment rights in any time inflicts a deep

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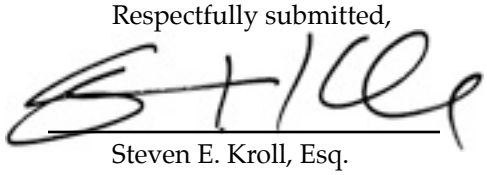
eMail: KrollLaw@mac.com

cultural injury on Plaintiff and upon the body politic. At this particularly momentous time in our history where a new President of the United States will soon be chosen and great issues of war and peace, economic survival, and the very destiny of this great nation hang in the balance, the abridgment of Free Speech rights is particularly painfully felt.

The fundamental flaws in IVGID's Policy No. 136 are palpable, obvious on their face, and utterly inconsistent with First Amendment law as declared by the Supreme Court of the United States and the Ninth Circuit Court of Appeals. Movant thus respectfully asks this Court to conclude that in the Emergency Motion now under consideration, the plaintiff has established a likelihood of success on the merits and irreparable harm, and that the balance of interests, including the interest of the public, weighs in favor of enjoining the enforcement of IVGID Policy 136 pending a trial on the merits, and that the motion of plaintiff for a preliminary injunction herein should be granted.

DATED: at Crystal Bay, Nevada this 10th day of June, 2008.

Respectfully submitted,



Steven E. Kroll, Esq.
Attorney for Plaintiff/Movant

Steven E. Kroll • Attorney at Law
P.O. Box 8 • Crystal Bay, NV 89402
Tel: 775-831-8281
eMail: KrollLaw@mac.com

CERTIFICATE OF ELECTRONIC SERVICE

Pursuant to Rule 5(b) FRCP, I certify that I am the attorney for Plaintiff in the above entitled action, and that on this date I caused a true and correct copy of the " **Plaintiff's Reply to Opposition to Emergency Motion for Injunction on Free Speech Grounds**" herein to be served upon the parties or attorneys by electronically filing the same with this Court pursuant to and in compliance with its CM/ECF filing system, to which the following named attorney for all named defendants is a signatory:

Stephen C. Balkenbush, Esq.
Thorndal, Armstrong, Delk, Balkenbush & Eisinger
6590 South McCarran Blvd. Suite B
Reno, Nevada 89509

DATED: this 10th day of June, 2008.

STEVEN E. KROLL

Steven E. Kroll • Attorney at Law
P.O. Box 8 • Crystal Bay, NV 89402
Tel: 775-831-8281
eMail: KrollLaw@mac.com