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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 Hearing Brief on Motion for Preliminary Injunction under the First Amendment, October 31, 2008 at 10:00 A.M.

and

Certificate of Service

COMES NOW plaintiff STEVEN E. KROLL, by and through his attorney undersigned, and submits his Brief in Support of his Motion for Preliminary Injunction scheduled for Hearing on October 31, 2008 commencing at 10:00 A.M. herein.

The Issue

Can defendant District sustain its heavy burden of proof under the strict scrutiny of this Court and overcome the presumption that its Policy and Procedure No. 136, which on its face regulates protected speech and expression but is not content neutral, contains no standards for evaluating what content is permissible and what not, is not narrowly drawn to address a compelling government interest but instead imposes an absolute ban on First Amendment expression outside of the parking lots and adjoining sidewalks of all District parks and other traditional public fora and disallows Free Speech

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altogether throughout all of its other public properties, and which is administered arbitrarily and capriciously by the District with implementing rules imposing a prior restraint and other chilling effects on speech, is an unconstitutional time, place, and manner restriction of Speech and Expression under the First Amendment?

The Evidence to be Offered by Plaintiff, its Relevance to Each Issue Prerequisite to a Preliminary Injunction, and the Applicable Law

(Note: because of the very limited time frame for this Hearing and because plaintiff's testimony at this juncture is believed to be undisputed and foundational, this Hearing Brief presents Plaintiff's testimonial evidence as an Offer of Proof in hopes that defendants will stipulate thereto as a time-saving device. *Cf. Miracle Blade v. Ebrands Commerce Group,* 207 F. Supp. 2d 1136 (D. Nev. 06/04/2002, Hagen, J.) ("The cases best suited to preliminary relief are those in which the important facts are undisputed, and the parties simply disagree about what the legal consequences are of those facts. The court in such a case can take the undisputed facts, apply the law to them, and fairly easily decide which party is likely to prevail."). This Hearing Brief is divided into five parts: (1) The foundational issues and evidence supporting plaintiff's Article III standing to challenge Policy 136 on its face and as applied; (2) The core constitutional issues and supporting evidence demonstrating Policy 136 is presumptively invalid as being content-based, conferring unbridled discretion on the permitting official, imposing prior restraints, and being unconstitutionally overbroad and vague; (3) A showing that Movant's case is made by demonstrating that Policy 136 is content-based and otherwise regulates protected speech and expression, whereupon the burden of persuasion and going forward with the evidence shifts to defendant; (4) The criteria for a Preliminary Injunction in the First Amendment area; and (5) Conclusion, wherein plaintiff briefly discusses additional possible evidence in rebuttal should defendants be able to sustain their "heavy burden" overcoming the presumed unconstitutionality of Policy 136's infringement on Free Speech.)

I. The Foundational Issues and Evidence

A. Movant's Article III standing to challenge Policy 136 as applied.

The Law on the issue of Standing: "Constitutional standing has three elements: 1) the plaintiff must have suffered an invasion of a legally protected interest which is both concrete and particularized, and actual or imminent; 2) there must be a causal connection between the injury and the conduct complained of; and 3) it must be likely that the injury will be redressed by a favorable decision." *Duval Ranching Co. v. Glickman*, 965 F. Supp. 1427 (D.Nev. 03/13/1997, Reed, J.).

"Plaintiff mounting a facial challenge to an ordinance may establish standing by alleging

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that he has '**modified his behavior' as a result of the ordinance,** such as 'by choosing locations other than [the areas subject to the ordinance]." *Allen v Wright,* 468 U.S. 737, 750-51 (1984).

"In evaluating an as applied First Amendment challenge, we must decide whether or not the plaintiff's activities are protected speech or conduct, whether the government restriction occurs in a public or non-public forum, and whether or not the restriction is a valid time, place or manner regulation." *United States v. Grace,461 U.S. 171, 176-182, 75 L. Ed. 2d 736, 103 S. Ct. 1702 (1983).*

"**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).

Plaintiff's Exhibit 1: IVGID Policy and Procedure 136 received by Plaintiff upon his visit to the IVGID Beach Properties on June 2, 2008.

Plaintiff's Exhibit 2: IVGID Ordinance No. 7, the "Recreation Pass Ordinance".

Plaintiff's Exhibit 3: The "Private Beach" sign at Incline Beach which had been taken down when plaintiff made his June 2, 2008 visit to the beaches.

Plaintiff's Exhibit 4: Photograph of Plaintiff with Barack Obama campaign sign at Burnt Cedar Beach snack bar area.

(Each Exhibit to be introduced through Plaintiff's testimony if the Offer of Proof submitted below can not be stipulated to.)

RELEVANCE: Shows interrelationship between Policy 136 **(Ex.1**) and IVGID's Recreation Pass Ordinance (**Exhibit 2**), with the latter constituting the legal authority granting unbridled power to IVGID's General Manager to interpret and enforce the standardless parameters of permitted speech spelled out in Policy 136, including, *e.g.*, **what is "inappropriate** to the purpose and enjoyment of a specific real property and facility", **what constitutes a "violation of the privacy or rights of others"**, whether First Amendment practitioners confined to the parking lots of IVGID's properties are "interfering with parking or the flow of traffic", **and other subjective determinations.** Ordinance 7 is also relevant on the issue of Prior Restraint of Speech, specifically illustrated in the Exhibits which follow. These Exhibits are also relevant to Plaintiff's standing, in particular proving that Plaintiff's activities on June 2, 2008 (and by extension other dates) are protected speech and con-

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duct, and the governmental restrictions which are traceable directly to Policy 136 occurred in a public forum whereat plaintiff suffered a concrete, particularized, and actual invasion of a legally protected interest, namely his right to free speech in a public park. Further proves the complexity of the Policy 136 packet given out to the public compared to the five-page original document, and the imposition of prior restraints to the exercise of free speech not found specifically in Policy 136 but authorized thereby, such as **having to check in with the beach properties Gatekeeper and request the right to exercise plaintiff's constitutional rights, and the attempt to prevent his parking** in the beach parking lot.

B. Movant's Article III standing to challenge Policy 136 on its face.

The Law on standing to challenge a regulation's constitutionality on its face. **"**Some facial challenges require courts to ignore the prudential rule that a litigant has standing to vindicate only his own constitutional rights." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118, 2125, 80 L. Ed. 2d 772 (1984).

"A litigant may contend that a statute is not only unconstitutional as applied to his conduct, but also unconstitutional on its face because "any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas."" *Id*.

A plaintiff may bring a facial challenge "when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity . . . ." *Lakewood v. Plain Dealer Publishing Co*.,486 U.S. 750, 755-56, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988). To assert this type of facial challenge, a plaintiff must meet two requirements. First, a plaintiff must satisfy the standing requirements of Article III by showing that the challenged provision or provisions apply to his conduct. Second, the challenged ordinance "must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." *City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 755-56 (1998)*

A plaintiff "need not apply for a benefit conditioned by a facially unconstitutional law," *United States v. Baugh,* 187 F.3d 1037, 1041 (9th Cir. 1999), but **must demonstrate a serious interest in subjecting himself to the challenged measure, and must demonstrate that "the defendant [is] seriously intent on enforcing[ ] the challenged measure,"** *NAACP v. City of Richmond,* 743 F.2d 1346, 1351 (9th Cir. 1984).

Plaintiff's Exhibit 5: Plaintiff's June 29, 2008 Letter to the Editor of the North Lake Tahoe Bonanza protesting his exclusion from the beaches on the Fourth of July on First Amendment grounds, among others.

Plaintiff's Exhibit 6: IVGID General Manager Report dated May 15, 2008: "Policy 136 - First Amendment: Rules" (introduced via Judicial Notice (Rule

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201, Federal Rules of Evidence).

Plaintiff's Exhibit 7: Plaintiff's email of May 13, 2008 to defendants protesting the promulgation of Exhibit 6 (introduced through plaintiff's testimony, see Offer of Proof).

Plaintiff's Exhibit 8[1]: IVGID "First Amendment Policy: Instructions to Gate Host" (authenticated by defendants' counsel's transmittal letter and introduced via Judicial Notice (Rule 201, Federal Rules of Evidence)).

Plaintiff's Exhibit 9: IVGID Beach Properties Policy 136 Incident Reports June 13-September 12, 2008 (self authenticating and introduced via Judicial Notice of a public record (Rule 201, Federal Rules of Evidence).

Plaintiff's Exhibit 10[2]: North Lake Tahoe Bonanza front page story "Cleaning up the wreckage" dated Sunday September 14, 2008 reporting seaplane crash into Lake Tahoe and exclusion of non-Incline Village press from covering the story (self-authenticating as a newspaper article under E.C. Rule 902(6)).

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[1] Plaintiff has been severely hamstrung in gathering and authenticating the evidence presented in this Motion by acts and omissions of the defendants herein which are the subject of a Motion to Compel Discovery and for Sanctions (Doc 25) and now awaiting a ruling. The existence of this Exhibit 8 was discovered only through a passing reference in one of the Beach Incident Reports (Exhibit 9) which itself was only turned over to plaintiff on Saturday October 4, 2008 – mere days before the previously scheduled October 8th hearing date herein despite many demands previously made therefor. The "Instructions to Gate Host" (Exhibit 8) was received on October 6, 2008 after being specifically requested, but it is undated and unsigned, and its author and promulgating authority have not been revealed to Plaintiff's counsel despite written requests for that and related information. Accordingly, the letter from Defendant's attorney transmitting this piece of evidence is used to authenticate it, although better ways of introducing such evidence exist. Plaintiffs seeks some latitude in strict evidentiary requirements in this and certain other of the Exhibits presented for this Hearing in light of defendants' wrongful interference with his Discovery.

[2] This newspaper article contains Hearsay under E.C. Rule 801(c), but IVGID and the other defendants have hidden and suppressed from plaintiff their Incident Report and other documents on this September 11, 2008 event. Plaintiff has learned from Mr. Rittiman, the reporter involved (see Offer of Proof) that he exchanged correspondence with IVGID's General Manager Bill Horn protesting what he felt was an unconstitutional interference with Freedom of the Press guaranteed by the First Amendment, but none of that material has been revealed to plaintiff much less turned over to him by defendants. In the face of defendants' apparent suppression of this evidence, plaintiff is forced to rely upon hearsay in this instance as evidence, among other things, of the unconstitutionality of narrow "free speech zones" within a Public Park that would prevent a reporter from doing his or her job under the First Amendment, *compare Gerritsen v. Los Angeles*, 994 F.2d 570 (9th Cir. 1993) (The Blue Line Policy Case), until plaintiff can obtain the documentation and testimony relevant to this incident from the defendants. See Motion to Compel Discovery (Doc 25) and footnote 1.

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RELEVANCE of all Exhibits: Demonstrates plaintiff's "serious interest in subjecting himself to the challenged measure" and altering his conduct to comply therewith on July 4, 2008 (**Exhibit 5)** and on other days (**Exhibits 4 and 7**), and defendants' serious intent on enforcing the challenged measure (**Exhibit 9, July 4, 2008 entry:** a First Amendment user was "not swayed with the possibility of a trespass action against him"). **Exhibits 1 and 2** prove what the unbridled discretion granted IVGID by Policy 136 and Ordinance 7 can result in and has actually produced, including implementing regulations which require persons wishing to exercise their First Amendment rights on the beach properties to identify themselves and sign in and out before being granted those rights **(Exhibit 6**); force them to wear a wrist band to "allow Staff to know who has been granted their request to express their First Amendment rights" (**Exhibit 6,** subsequently withdrawn following defendants' receipt of plaintiff's outraged protest (**Exhibit 7)** against what he saw as rules reminiscent of Nazi Germany; prohibits practitioners from "violating the space of those who are not interested in hearing or receiving their expression of their First Amendment rights" (**Exhibit 6**); requires the declaration of the magic words "I am here to exercise my First Amendment Rights" before being permitted entry to the beach properties, and "if there are more than one patron in car, all must say "First Amendment" (**Exhibit 8**), and unless those magic words are said exactly, prohibits the would-be practitioner from entry and exercise of their free speech rights (**Exhibit 9, June 19, 2008** Incident Report: "In talking with her more, she got out the words '1st Amendment Rights'. I told her that was totally different than 'wristbanding' and offered her a packet which she refused and she left the beach mad"); forces the "patron" to accept the hand-out copy of the Policy 136 "packet" as a condition for exercising First Amendment rights, and "if patron refuses to take the Policy packet then they can only enter with a valid pass" (**Exhibit 8)**; and authorizes the demand that practitioners identify themselves before exercising their rights, and have their license plate numbers and other identification recorded while upon IVGID property to exercise those rights **(Exhibit 9, July**

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5, 2008 entry). It further establishes a close "nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks" in the actual exclusion of both the plaintiff herein from full access to a public forum, and the news media itself from discharging their First Amendment right to cover the crash of a seaplane into Lake Tahoe on September 11, 2008 because outside the "Public Forum Area" of the beach properties (**Exhibit 10**).

Plaintiff's Offer of Proof in Submitting these Exhibits:

If called upon, plaintiff Steven E. Kroll would testify as follows:

My name is Steven Kroll and I am a resident of Crystal Bay, Nevada, in the County of Washoe. I am a member in good standing of the Incline Village General Improvement District and the plaintiff in this lawsuit. On June 2, 2008 I visited all three Incline Beach properties with Frank Wright and his newborn baby Kiley in the car for the purpose of exercising my First Amendment rights, in particular campaigning for Barack Obama for President and Frank Wright for IVGID Trustee. I noticed immediately that the "Private Beach" signs that were up recently when I last looked (a photo of which I took is marked **Exhibit 3** herein) had been removed. The gatekeeper at each beach venue gave me a packet of stapled papers saying Policy 136 at the top, which I stamped with my received stamp when I got home a little after noon. This has been marked **Plaintiff's Exhibit 1** in this proceeding. Just glancing quickly through the packet I was surprised to see it was different from what I was familiar with from the Board proceeding which adopted it. I was in the audience on April 30, 2008 and joined others who spoke out vigorously against Policy 136 as a fundamental violation of Freedom of Speech at that time, and I witnessed Policy 136's unanimous passage with no discussion from the Trustees. Policy 136 contained at that time five substantive pages plus some fuzzy photographs of the covered venues, but the Policy 136 handed me on June 2, 2008 (**Exhibit 1**) included additional notices and minutes of IVGID meetings which was only confusing to me. The gatekeeper at each beach venue also told me that I needed to park outside and walk in, which I said I would not do because it was not in Policy 136. The woman at Incline Beach in particular seemed surprised when I told her that parking prohibitions were not in Policy 136. "You've read it already?" she said, and I told her I had. I asked who had said no cars and she said "Bill Horn." She asked for my name which I gave without protest and I saw she was talking to someone on the phone on our way out. At Burnt Cedar Beach I had Frank Wright take a number of pictures of me with the Barack Obama signs at places covered by Policy 136, some of which I wondered if they intended to include within the permitted Speech Zones, like the snack concession area (**Exhibit 4**) which I felt was within the definition of the boundaries. At all times I was conscious of the Policy 136 parking lot/adjoining sidewalk perimeters and never stepped outside them (although what exactly they included was not always clear, particularly with reference to the "pathways"). There were no people in the parking lot but there were on the beach, and but for Policy 136 I would have carried my Obama sign out there as well, where my message would have been actually received. I thought I had videotaped all this but discovered on returning home that the battery had died. I have also been restricted in the

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full exercise of my First Amendment rights by Policy 136's prohibition on my joining my IVGID neighbors for Fourth of July fireworks and other events on the beaches, and **Exhibit 5** is a letter I wrote to the editor of the local paper protesting my exclusion and "the right to associate and talk with our neighbors and fellow taxpayers on public property". I was also directly and personally affected by the May 15, 2008 additional rules announced by the General Manager (**Exhibit 6**), particularly the new requirement that I would have to wear a wrist band when exercising my constitutional rights. To me that was "like the Jews had to wear in Germany in the 1930s" as I wrote in a strong protest letter to the Board on May 13, 2008 (**Exhibit 7**). I would never have known there was another existing IVGID regulation similar to Exhibit 6 except for a single reference to ""First Amendment Policy: Instructions to Gate Host" in the Policy 136 "Incident Reports" that I had been many times asking defendants' attorney for orally and in writing but did not finally receive until a week before the originally scheduled October 8, 2008 date for this Hearing. **Exhibit 8** is the "Instructions to Gate Host" sent me by defendants' attorney after I asked for it specifically once I learned of its existence. **Exhibit 10** is the newspaper article I read of the crash of a seaplane into Lake Tahoe on September 11, 2008, when a television reporter from Reno was barred entry onto the beach properties to cover the event despite the First Amendment's guarantee of Freedom of Press. No "incident report" on this event was included in **Exhibit 9**, and my written requests to defense counsel for all material relating to this incident have gone unanswered. However, I have recently interviewed the KTVN Channel 2 News reporter Brandon Rittiman who was the reporter involved and learned that he exchanged email correspondence on the incident with IVGID General Manager Bill Horn, but none of that correspondence has been disclosed by defendants' lawyers much less turned over to me to date, and I can find no reference to any of that correspondence in the Board's Minutes which usually describes all correspondence. Up to this point of time, therefore, I have only the newspaper article (**Exhibit 10**) as evidence of what I believe were the First Amendment violations that occurred on September 11, 2008.

II. The Core Constitutional Issues and Supporting Evidence

A. Policy 136 is content-based and presumptively invalid.

The Law: **"If the ordinance is content-based, it is presumptively invalid and we will uphold its constitutionality only if the City can demonstrate that it is the least restrictive means of furthering a compelling government interest.** *American Civil Liberties Union of Nevada v. City of Las Vegas*, 466 F.3d 784 (9th Cir. 10/20/2006) ¶50

A law is content-based rather than content-neutral if "it differentiates based on the content of speech on its face." *Id*. at 793. **A content-based regulation is generally subject to strict scrutiny. The government therefore "must show that its regulation is necessary to serve a compelling state interest,"** *Perry Educ. Ass'n*, 460 U.S. at 45, and that the regulation uses "the least restrictive means to further the articulated interest," *Foti*, 146 F.3d at 636. Id.

"**It is rare that a regulation restricting speech because of its content will ever be permissible."** *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803 ¶60 (2000).

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B. Policy 136 confers unbridled discretion on a permitting official and is presumptively invalid.

> ***The Law*:** Regulations that confer unbridled discretion on a permitting or licensing official are prohibited under the First Amendment. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). **Regulations must contain "narrow, objective, and definite standards to guide the licensing authority,"** *id*., and must require the official to "provide [an] explanation for his decision," *Forsyth County v. Nationalistic Movement, 505 U.S. 123, 133 (1992)*. The standards must be sufficient to "render [the official's decision] subject to effective judicial review." *Thomas v. Chi. Park Dist*., 534 U.S. 316, 323 (2002). ***This requirement applies to an official's "authority to condition the permit on any additional terms" not stated in the ordinance.*** *City of Lakewood*, 486 U.S. at 772.
>
> "It is apparent that the face of the ordinance itself contains no explicit limits on the mayor's discretion. ...The city asks 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. This presumes the mayor will act in good faith and adhere to standards absent from the ordinance's face. **But this is the very presumption that the doctrine forbidding unbridled discretion disallows**. E. g., Freedman v. Maryland, 380 U.S. 51 (1965). The doctrine requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice. Poulos v. New Hampshire, 345 U.S. 395 (1953); Kunz v. New York, 340 U.S. 290 (1951). **This Court will not write non-binding limits into a silent state statute."** ***Id*** at 764.

C. Policy 136 authorizes and has resulted in prior restraints on speech and is presumptively invalid.

> **"Prior restraints on speech are disfavored and carry a "heavy presumption" of invalidity.** *Forsyth County,* 505 U.S. at 130. "This heavy presumption is justified by the fact that 'prior restraints on speech . . . are the most serious and the least tolerable infringement on First Amendment rights.' " *Grossman,* 33 F.3d at 1204 (alteration in Grossman) (quoting *Neb. Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1975)); *accord Rosen v. Port of Portland,* 641 F.2d 1243, 1246-47 (9th Cir. 1981). The Supreme Court explained in *Ward v. Rock Against Racism,* "[T]he regulations we have found **invalid as prior restraints** have 'had this in common: they **gave public officials the power to deny use of a forum in advance of actual expression.'** " 491 U.S. 781, 795 n.5 (1989) (quoting *Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)). *Long Beach Area Peace Network v. City of Long Beach* (9th Cir. 04/15/2008), ¶58.
>
> "First, all advance notice requirements tend to inhibit speech. **The simple knowledge that one must inform the government of his desire to speak and must … comply with applicable regulations discourages citizens from speaking freely.**" *N.A.A.C.P., Western Region v. City of Richmond*, 743 F.2d 1346 (9th Cir. 09/28/1984)
>
> "Requiring a political communication to contain **information concerning "the identity of the speaker"** is "no different from [requiring the inclusion of] other components of the document's content that the author is free to include or exclude."" *American Civil Liberties*

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Union of Nevada v. Heller, 378 F.3d 979 (9th Cir. 2004).

"Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation -- and their ideas from suppression -- at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 356 (1995).

A "listener's reaction to speech" can not be made the basis for preventing that speech. *Forsyth County v. Nationalistic Movement,* 505 U.S. 123, 134 (1992).

D. Policy 136 is unconstitutionally overbroad and vague

"A fundamental requirement of due process is that a statute must clearly delineate the conduct it proscribes." [citing cases]. A statute must be sufficiently clear so as to allow persons of "ordinary intelligence a reasonable opportunity to know what is prohibited." Grayned, 408 U.S. at 108; see United States v. Wunsch, 84 F.3d 1110, 1119 (9th Cir. 1995). **Statutes that are insufficiently clear are void for three reasons: (1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on "arbitrary and discriminatory enforcement" by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms.** Grayned, 408 U.S. at 108-09. **Moreover, when First Amendment freedoms are at stake, an even greater degree of specificity and clarity of laws is required.** See N.A.A.C.P. v. Button, 371 U.S. 415, 432-33 (1963) ("[S]tandards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.")" *Foti v. City of Menlo Park,* 146 F.3d 629, ¶55 (9th Cir. 1998).

"In addressing such a facial overbreadth challenge, a court's first task is to ascertain **whether the enactment reaches a substantial amount of constitutionally protected conduct.** [citations]. **In making this assessment, *we consider the actual text of the statute as well as any limiting constructions that have been developed*.** [citations]." *Boos v. Barry*, 108 S. Ct. 1157, 485 U.S. 312 (U.S. 03/22/1988) ¶57

"Plaintiffs may seek, as a remedy, the facial invalidation of the solicitation ordinance if it is an **overly broad regulation that "create[s] an unacceptable risk of the suppression of ideas.**" Id. (internal quotation marks omitted). "**Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society** – to prevent the statute from chilling the First Amendment rights of other parties not before the court." Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 958 (1984). *American Civil Liberties Union of Nevada v. City of Las Vegas,* 466 F.3d 784 (9th Cir. 10/20/2006)."

Textual Extracts from Plaintiff's Exhibits with emphasis added, relevant to the quoted Law

Exhibit 1: Policy 136 --

"The District has a significant interest to … (f) reasonably **protect persons entitled to use**

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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.**"

"The District designates as **public forum area**s the following areas of the real property and facilities listed on Exhibit 1 to this Policy: **the parking lots, the walkways within and adjacent to the parking lots, and the sidewalks adjacent to any public entrance to any building open to the public located on such listed real properties** and facilities. … The designated public forum areas … are areas where **all persons may exercise the activities of expression, speech and assembly, to the extent permitted by law and this Policy and any rules and regulations which the District may adopt. Such activities** must be **consistent with the maintenance and operation of District** real properties and facilities, and **must not interfere with the intended use of such facilities, or with parking, the flow of vehicular traffic,** and ingress to and egress from the property and all buildings and facilities. **Such activities must not** create an imminent health or safety hazard or **result in a violation of the privacy or rights of others.** The location and size of the designated public forum areas with respect to each real property and facility listed on Exhibit 1 reflects an **appropriate balance of the significant interests of the District with the recognized right of expression, speech, and assembly.** … [S]ome of the real properties may have existing practical limitations. **The District may make additional reasonable rules and regulations** for the use of each real property and facility as it determines to be necessary."

"**The portions of the District real properties and facilities listed on Exhibit 1 and not designated in this Policy as a public forum area, and all other District real properties and facilities, including without limitation the real properties and facilities described in Exhibit 2, where public access may be limited or restricted, are deemed to be and are designated as "non-public forum areas."**

Exhibit 2: Ordinance 7, the Recreation Pass Ordinance

"71. Administration. **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."

Exhibit 6: IVGID General Manager May 15, 2008 "Policy 136 - First Amendment: Rules".

"**When someone desiring to express their First Amendment rights** at Burnt Cedar Beach, Incline Beach and Ski Beach **walks up to the entrance kiosk they will be *asked to sign in* and they will be handed a success list of what is allowed and what will not be allowed** along with a map showing the specific area they may express their First Amendment rights. **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.** At the end of their expression, **upon leaving these three beaches, they will be *asked to sign out.* The three *basic requirements* will be** (1) not get in the way of operations; (2) going outside of the designated area; and (3) ***violating the space of those who are not interested in hearing or receiving their expression of their First Amendment rights.*** Staff anticipates no challenges with those who desire to express their First Amendment rights."

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Exhibit 7: IVGID "First Amendment Policy: Instructions to Gate Host"[3]

- ***Patron must say*** **"I am here to exercise my First Amendment Rights".**
- Patron may drive in and park inside gate. **If there are more than one patron in car, *all must say "First Amendment."***
- Staff to hand out copy of Policy 136. **Topo map is attached. There is no designated area.**
- ***If patron refuses to take the Policy packet,*** **then they can only enter with a valid pass.**
- Staff is NOT to comment or interpret policy for individual.
- If patron asks for an interpretation, staff is to say, "We have been instructed not to interpret the Policy. **The Policy states exactly what is permitted. If you have any questions, please call our General Manager, Bill Horn, at 832-1206."**
- **Staff is NOT to comment to press** regarding this policy. Refer to Hal Paris, Director of Parks & Recreation or Bill Horn.
- In the event of a problem or a complaint, staff should document in writing …

Exhibit 8: IVGID Beach Properties Policy 136 Incident Reports June 13-September 12, 2008

Aug 28, 2008 employee Scott Dougon: "I hailed the driver and told him that he had to check in at the gate before entering, per standard gate-operating procedure. **The driver replied that no, actually, he didn't have to check-in because his First Amendment rights granted him entry. To this I responded that *he had to declare as much before entering*. (c.f. "First Amendment Policy:Instructions to Gate Host").** …

July 5, 2008 employee Trish Port: "**Driver *would not give his name***" "Trish verified that it was Frank Wright; **Car Lic # 609 NRL**

July 4, 2008 employee Annamarie Jones. "Paul Olson was walking in to the line to check in and *was telling two women to express their first amendment rights*. He got to the front of the line and **asked to express his first amendment rights. I asked Donna to get him the packet and card and went to ask Bill Horn for his assistance. As Bill Horn and I walked up to him, *he was in the process of telling three people to express their first amendment rights. Bill proceeded to tell him that he couldn't express his rights at Ski Beach because it is a boat launching facility.*** At this point the man began to argue with Bill Horn and Bill Horn escorted him as he walked down to the beach. I asked for Bill Horn's assistance because the man had done the same thing on at least two other days. ... **Mr. Olson intended to walk onto the beach and was *not swayed w/ the possibility of a trespass action against him.* ...**

June 19, 2008 employee Kathleen Shotwell. Resident Ursela Austin **refused wristband and said she was told by someone running for the board that she would be given a "packet" on wristbanding if she refused.** ... In talking with her more, ***she got out the words "1st Amendment Rights". I told her that was totally different than "wristband-***

[3] See footnote 1.

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ing" **and offered her a packet which she refused and she left the beach mad.**

June 20, 2008 SB: "resident Brenda Reeves continually refuses wristband when @".

Exhibit 9: North Lake Tahoe Bonanza front page story "Cleaning up the wreckage" dated Sunday September 14, 2008

A seaplane flipping over and sinking into Lake Tahoe Thursday brought the Incline Village General Improvement District's beach access and First Amendment policies back into the spotlight, a few week before the summer season ends for the district's beaches.

Thursday's incident was covered by the local and regional media. **District officials reiterated the policy, per Ordinance No. 7, that *Incline, Ski and Burnt Cedar beaches are "public with restrictions."* Only beach-access residents of IVGID, with their recreation pass or punch card can get into the beaches** …

The district's policy was questioned Thursday by some members of the Reno media.

Brandon Rittiman, a reporter for KTVN Channel 2 News in Reno, and a KTVN photographer tried to gain access at Burnt Cedar Beach and Ski Beach to cover the incident. However, *district beach staff and IVGID Parks and Recreation Director Hal Paris did not grant the news team access at either venue.*

"**It makes no difference whether you're a Channel 2 news photographer or a Nevada senator or just a visitor – everyone is handled the same," Paris said. "Everybody, when they come to the beaches is required to present their IVGID card. If you don't have it, you don't get in."**

…

Meanwhile, *North Lake Tahoe Bonanza* photographer Jen Schmidt and videographer CJ Drago … ***are beach-access IVGID residents, they were granted access to both beaches***. …

…

Horn said the KTVN reporters and other non beach-access members of *the media could have gained access to the defined public forum areas within Burnt Cedar and Ski beaches.*

"All anybody from the media had to say was they were reporting under the First Amendment, and they would have been handed a copy of the policy," Horn said.

…

Rittiman said he contacted IVGID General Manager Bill Horn via e-mail about the incident, asking Horn to clarify the district's beach policy in regards to the media.

"He responded that no exceptions can be made," Rittiman said.

III. Movant's case is made by showing the regulation is content-based and otherwise regulates protected speech and expression, whereupon the bur-

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den of persuasion and going forward with the evidence shifts to defendant

"When First Amendment compliance is the point to be proved, **the risk of non-persuasion -- operative in all trials -- must rest with the Government, not with the citizen.**" *United States v. Playboy Entertainment Group, Inc*., 529 U. S. 803 (2000). at ¶60

"**When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.** *Greater New Orleans Broadcasting Assn., Inc. v. United States,* 527 U. S. 173, 183 (1999) ("**[T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction**"); *Reno*, 521 U. S., at 879 ("The breadth of this content-based restriction of speech imposes **an especially heavy burden on the Government** to explain why a less restrictive provision would not be as effective ...")" *Id*. at ¶57.

"Public fora have achieved a special status in our law; **the government must bear an extraordinarily heavy burden** to regulate speech in such locales." *City of Richmond,* 743 F.2d at 1355."

IV. The criteria for a Preliminary Injunction in the First Amendment area

"As we observed in Clear Channel Outdoor, Inc. v. City of Los Angeles, "[t]he standard for granting a preliminary injunction balances the plaintiff's likelihood of success against the relative hardship to the parties." 340 F.3d 810, 813 (9th Cir. 2003). We have described two sets of criteria for preliminary injunctive relief. **Under the "traditional" criteria, a plaintiff must show "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest** (in certain cases)." Johnson v. Cal. State Bd. of Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995)." *Save Our Sonoran v. Flowers*, 408 F.3d 1113, ¶43 (9th Cir. 2005).

"… **it becomes essential to protect public places where traditional modes of speech and forms of expression can take place. There is a growing " 'nationwide trend toward the privatization of public property.'** If this trend of privatization continues – and we have no reason to doubt that it will – citizens will find it increasingly difficult to exercise their First Amendment rights to free speech, as the fora where expressive activities are protected dwindle. **"Awareness of contemporary threats to speech must inform our jurisprudence regarding public forums."** *American Civil Liberties Union of Nevada v. City of Las Vegas,* 466 F.3d 784, ¶ (9th Cir. 2006).

"**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).

"**It is rare that a regulation restricting speech because of its content will ever be permissible.** 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 non-persuasion -- operative in all trials -- must rest with the Government, not with the citizen." *United States v. Playboy Entertainment Group, Inc*., 529 U. S. 803, ¶60 (2000).

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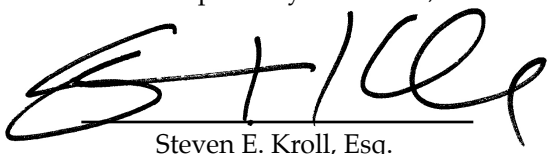
> "**As the Government bears the burden of proof on the ultimate question** of COPA's constitutionality, **respondents must be deemed likely to prevail unless the Government has shown** that respondents' proposed less restrictive alternatives are less effective than COPA. Applying that analysis, the District Court concluded that respondents were likely to prevail." *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, ¶24 (2004).

V. Conclusion

Plaintiff reserves additional exhibits to be used to rebut whatever evidence defendants introduce once the burden of proof has shifted to them to prove the constitutionality of Policy 136. This includes (1) evidence that Policy 136 was waived by IVGID for First Amendment activities conducted in Preston Field and the Chateau which are outside the "Public Forum Areas" created by that Policy, demonstrating the arbitrary and capricious application of Policy 136 in practice; (2) that although "The Supreme Court has established different levels of scrutiny for analyzing alleged First Amendment violations, depending on where the speech takes place," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983), Policy 136 applies equally across all IVGID properties without distinction for the levels of scrutiny that may apply and a determination made; (3) evidence that there was absolutely no reason much less a compelling one for the adoption of Policy 136, and that the real reason was as a litigation tactic to undercut plaintiff's Civil Rights action herein, something specifically condemned[4] by the 9th Circuit Court of Appeals in a case on all fours with this one, *Gerritsen v. Los Angeles*, 994 F.2d 570 (9th Cir. 1993) (The Blue Line Policy Case); and (4) other evidence to rebut defendants' efforts to prove that Policy 136 was ever necessary to serve a compelling state interest and used "the least restrictive means" to accomplish that.

DATED: at Crystal Bay, Nevada this 28th day of October, 2008.

Respectfully submitted,



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[4] "Thus, in order to survive, the permit scheme must (1) be content-neutral, (2) be narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels of expression. … Unfortunately, …[t]he 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. … 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. [The regulation thus] fails the test for a valid time, place or manner restriction." *Gerritsen v. Los Angeles*, 994 F.2d 570, ¶55 (9th Cir. 1993).

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 Hearing Brief on Motion for Preliminary Injunction under the First Amedment, October 31, 2008 at 10:00 A.M"** 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.
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6590 South McCarran Blvd. Suite B
Reno, Nevada 89509

DATED: this 28th day of October, 2008.

STEVEN E. KROLL