

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DEREK E. TURNER and MARI TOBIN
BLOME,

No. C 09-00683 MHP

Plaintiffs,

MEMORANDUM & ORDER

v.

Re: Cross-Motions for Summary Judgment;
Motions to Strike

KRIS PLAFOND; MARGARET PLANKA;
DANIEL SCHNEIDER; CALIFORNIA
HIGHWAY PATROL COMMISSIONER J.A.
FARROW; THE GOLDEN GATE BRIDGE,
HIGHWAY AND TRANSPORTATION
DISTRICT and Does 1 through 20,

Defendants.

On February 17, 2009, Derek Turner filed a Complaint against California highway Patrol (CHP) Officers LaFond and Planka, alleging various violations of Turner's state law and federal law-based civil rights. Docket No. 1 (Complaint). Plaintiff Blome was not named as a plaintiff in the original Complaint. On October 20, 2009, this court granted Turner leave to file a First Amended Complaint ("FAC"), adding as plaintiff Mari Tobin Blome and adding as defendants CHP Commissioner Farrow, the Golden Gate Bridge, Highway and Transportation District ("District") and various CHP officers. Docket No. 32 (Memorandum and Order Granting Plaintiff's Motion to Amend Complaint). Now before the court are plaintiff Blome's motion for summary judgment, defendant CHP Commissioner Farrow and CHP officers' motion for summary judgment, defendant District's motion for summary judgment, defendant District's motion to strike and plaintiff Blome's motion to strike. Having considered the parties' submissions and arguments, the court enters the

1 following memorandum and order granting plaintiff Blome’s motion for summary judgment;
2 denying District’s motion for summary judgment; granting in part and denying in part defendant
3 CHP’s motion for summary judgment; denying defendants’ motion to strike and denying plaintiff’s
4 motion to strike.

5
6 BACKGROUND

7 I. The Golden Gate Bridge

8 Unless otherwise noted, the following facts are taken from the Joint Statement of Undisputed
9 Facts (JSUF). Docket No. 97. The Golden Gate Bridge (“Bridge”) is one of the most recognizable
10 structures in the world, and it is a major tourist destination. A major arterial highway as well, it is
11 the only direct vehicular connection between Marin County, which lies to the north of the Bridge,
12 and the City and County of San Francisco, which lies to the south of the Bridge. The Bridge
13 roadway and its approaches are public highways and are governed by the District, formed pursuant
14 to Cal. Street and Highways Code §§ 27000, *et. seq.* Docket No. 71 (District’s Motion) at 3.

15 On average, the Bridge rises 220 feet above the San Francisco Bay. The Bridge is 90 feet
16 wide, and its roadway includes six traffic lanes. The four middle lanes are ten feet wide, and the two
17 outer lanes, which border each of the Bridge’s sidewalks, are eleven feet wide. There are no
18 shoulders between the Bridge’s outer roadway lanes and the Bridge’s sidewalks. Rather, the
19 Bridge’s sidewalks are bordered by moving vehicular traffic on one side and by an outside railing on
20 the other side. The four-foot high steel and wire outside railings of the Bridge’s sidewalks face the
21 San Francisco Bay to the East and the Pacific Ocean to the West. The sidewalks are separated from
22 moving traffic by a 54-inch steel public safety railing that is itself mounted on a steel barrier eleven
23 inches higher than the sidewalks. In addition, the sidewalks themselves are slightly higher in
24 elevation than the roadway.

25 The Bridge’s sidewalks are approximately ten feet at their widest points and five feet at their
26 narrowest points. The narrowest points are at the anchorages located at the north and south ends of
27 the Bridge, where the sidewalks go past concrete pylons. When open, the Bridge’s sidewalks are
28

1 available to all members of the public. Pedestrians may use the East sidewalk while bicyclists alone
2 may use the West sidewalk. Pedestrians and bicyclists share use of the East sidewalk on weekdays
3 before 3:00 p.m., when the West sidewalk is closed.

4 II. Security on the Bridge

5 Each day during daylight hours, the District's security personnel patrol the Bridge's
6 sidewalks on bicycle, on foot or on scooters, and they regularly monitor the activity on the Bridge's
7 sidewalks from patrol cars. In addition, the District uses a network of surveillance cameras to
8 continuously monitor the sidewalks, and the District operates a public address system that may be
9 used to directly address members of the public on the Bridge's sidewalks. This system includes
10 speakers at the south approach to the Bridge's sidewalks and the Bridge's emergency telephone
11 system which also functions as a P.A. system from which District employees may address persons
12 within the vicinity of any of the emergency telephones. This system is used to deliver instructions in
13 times of emergency and for crowd control purposes. The CHP has jurisdiction to police the Bridge
14 and maintains a constant and visible presence, with one or two officers deployed at the Bridge
15 twenty-four hours a day. The CHP frequently deploys additional officers to the Bridge, including a
16 regular bicycle patrol on weekends. The United States Park Police ("USPP") and the National Park
17 Service ("NPS") rangers also work on the Bridge and are in communication with the District's
18 dispatch center at all times.

19 III. The Ordinances

20 The District promulgates a Master Ordinance that regulates activity at the Bridge, including
21 expressive activity. Each individual ordinance adopted during a calendar year with continuing
22 validity is incorporated into a newly adopted Master Ordinance in the subsequent year. With respect
23 to expressive activity, the versions of the Master Ordinance in effect from 2002 through February
24 26, 2009, including the Master Ordinance 2007 which is at issue in Turner's as-applied challenge,
25 mandated that all persons and groups, including individuals and groups of less than 50 persons
26 (hereinafter "small groups"), receive a permit from the District in order to engage in expressive
27 activity. During this time, the Master Ordinance also required that permit applications for
28

1 expressive activity be submitted to the District a minimum of four business days in advance of the
2 date that the expressive activity was to take place.

3 On February 27, 2009, the District amended the Master Ordinance to allow individuals and
4 small groups to engage in expressive activity without a permit so long as there was no use of signs,
5 props or musical instruments. Any expressive activity involving the use of signs, props or musical
6 instruments, including the expressive activity of individuals and small groups, continues to require a
7 permit. The District most recently amended the Master Ordinance on September 25, 2009, and these
8 amendments are incorporated into the Master Ordinance 2010, adopted by the Board of Directors of
9 the District on May 14, 2010. *See* Docket No. 75 (Witt Decl.), Exh. K (Ordinance Amending Master
10 Ordinance 2009). No other changes were made to the District’s regulations regarding expressive
11 activity, and plaintiff Blome challenges five provisions of this version of the Master Ordinance as
12 they apply to individuals and small groups.

13 The Master Ordinance 2010 includes the following regulations, among others, that apply to
14 expressive activity: (1) a permit is required for any expressive activity involving the use of signs,
15 props or musical instruments of any kind; (2) applications for a permit to engage in expressive
16 activity must be submitted at least four business days in advance of the date that the expressive
17 activity will take place; (3) bull horns and other sound amplification devices are prohibited; (4) all
18 signs must be handheld and may not be attached to or mounted on poles, sticks or any other device
19 used to hold the sign; and (5) no permits are issued for expressive activity on weekends between the
20 hours of 2:00 p.m. and 11:59 p.m.

21 Specifically, sections F.4(a) and F.5(a) of the Master Ordinance are permitting requirements
22 applicable to individuals, small groups and large groups alike. Under section F.4(a), speakers
23 engaged in expressive activity¹ using signs, props or musical instruments must first apply for and
24 receive a permit from the District. Section F.4(a) states in relevant part: “All Expressive Activity
25 on the Bridge Sidewalks . . . that involves holding signs, props, or musical instruments requires a
26 permit regardless of the number of the participants.” Section F.5(a) further qualifies the permitting
27 requirements found in F.4(a), providing that:

1 Requests for Expressive Activity permits must be submitted at least four (4)
2 business days prior to the date the Expressive Activity will take place. Business
3 days for purposes of this section means Monday through Friday, excluding all
4 holidays recognized by the State of California. Applicants are
encouraged to request a permit for Expressive Activity with as much advance
notice prior to the activity as feasible but no more than eighteen months prior to
the date of the Expressive Activity.

5 Taken together, sections F.4(a) and F.5(a) eliminate spontaneous speech involving the use of signs,
6 props and musical instruments on the Bridge's sidewalks.

7 Section F.8(c) states in relevant part: "All signs and props must be handheld; they may not be
8 attached or mounted to poles, sticks, or other devices that are used to hold the signs or props."

9 Section F.8(b) provides: "No person may carry or use bull horns or sound amplification devices on
10 Bridge Sidewalks." Lastly, section F.6(d) provides: "Permits for Expressive Activity on the Bridge
11 Sidewalks will not be issued (1) when the Bridge Sidewalks are closed to pedestrians; (2) on
12 weekdays from 6:00 a.m. - 10:00 a.m. and 2:00 p.m. - 7:00 p.m.; or (3) on weekends and holidays
13 from 2:00 p.m. to 11:59 p.m." Plaintiff Blome alleges that these five provisions of the Master
14 Ordinance 2010 are facially unconstitutional as applied to individual speakers and small groups.

15 IV. Derek Turner

16 On April 9, 2008, the Olympic Torch Relay ("Torch Relay") passed through the City of San
17 Francisco. Derek Turner, a peace activist, traveled to AT&T Park, home of the San Francisco
18 Giants, to intercept the Torch Relay and display a sign that read, "China: Extinguish the Flames of
19 GENOCIDE in Darfur." After learning that the Torch Relay route had changed, Turner located the
20 Torch Relay route on Bay Street in San Francisco and was able to hold his sign there as the Torch
21 Relay passed by. Believing that the Torch Relay path would subsequently pass over the Bridge,
22 Derek Turner next traveled to the Bridge in order to display his sign there in protest. Turner,
23 however, had not obtained a permit from the District to engage in this expressive activity. Once at
24 the Bridge, Turner stood on the south end of the East sidewalk, just north of the Golden Gate Bridge
25 Gift Shop. Turner held aloft the sign which was approximately two to two and a half feet tall by five
26 feet wide, stood an estimated three to six inches from the concrete barrier separating the sidewalk
27 and the roadway and held his sign so that it faced the Bridge's toll plaza (located at the southern end
28

1 of the Bridge) and faced the vehicular traffic heading north on the Bridge. After determining that
2 Turner did not possess a permit as required by the Master Ordinance 2007, in effect on that date,
3 CHP Officers Planka, LaFond and Schneider approached Turner and Officer Schneider first directed
4 Turner to put his sign away. Turner refused and the CHP officers proceeded to take the sign from
5 Turner by force, putting Turner's hand in a pain-compliance control hold. Although the CHP
6 officers seized Turner's sign, Turner was not arrested and he subsequently left the scene.

7 V. The Claims

8 On October 13, 2009, Blome and Turner filed the FAC alleging the following causes of
9 action: (1) against defendant CHP officers, plaintiff Turner alleges a violation of the First and
10 Fourteenth Amendments under 42 U.S.C. § 1983; (2) against defendant CHP officers, plaintiff
11 Turner alleges a violation of Article 1, Section 2 of the California Constitution; (3) against CHP
12 Commissioner Farrow and the District, plaintiff Blome alleges a violation of the First and
13 Fourteenth Amendments to the United States Constitution under 42 U.S.C. § 1983; (4) against
14 defendant CHP officers, plaintiff Turner alleges a violation of the Fourth and Fourteenth
15 Amendments' proscription against unreasonable search and seizure under 42 U.S.C. § 1983; (5)
16 against defendant CHP officers, plaintiff Turner alleges a violation of the Fourth and Fourteenth
17 Amendments' proscription against excessive force under 42 U.S.C. § 1983; (6) against defendant
18 CHP officers, plaintiff Turner alleges a violation of the Fourteenth Amendment's proscription
19 against the deprivation of due process of law under 42 U.S.C. § 1983; (7) against defendant CHP
20 officers, plaintiff Turner alleges a violation of Article 1, Section 13 of the California Constitution;
21 (8) against defendant CHP officers, plaintiff Turner alleges a violation of Cal. Civ. Code § 52.1; (9)
22 against defendant CHP officers, plaintiff Turner alleges battery; (10) against defendant CHP
23 officers, plaintiff Turner alleges false imprisonment; (11) against all defendants, plaintiffs Blome
24 and Turner seek declaratory relief; and (12) against all defendants, plaintiffs Blome and Turner seek
25 injunctive relief. Docket No. 29 (FAC).

26
27
28

1 LEGAL STANDARD

2 Summary judgment may be granted only when, drawing all inferences and resolving all
3 doubts in favor of the non-moving party, there are no genuine issues of material fact and the moving
4 party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see generally Anderson v.*
5 *Liberty Lobby, Inc.*, 477 U.S. 242, 247–55 (1986). A fact is “material” if it may affect the outcome
6 of the proceedings, and an issue of material fact is “genuine” if the evidence is such that a
7 reasonable jury could return a verdict for the non-moving party. *Id.* at 248. The court may not make
8 credibility determinations. *Id.* at 255. The moving party bears the burden of identifying those
9 portions of the pleadings, discovery and affidavits that demonstrate the absence of a genuine issue of
10 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party meets its
11 initial burden, the non-moving party must go beyond the pleadings and, by its own affidavits or
12 discovery, set forth specific facts showing that there is a genuine issue for trial. Fed R. Civ. P. 56(e);
13 *see Anderson*, 477 U.S. at 250.

14
15 DISCUSSION

16 I. Plaintiff Blome’s Motion

17 The court first considers plaintiff Blome’s motion for summary judgment. Blome asserts that
18 she is entitled to summary judgment on her section 1983 claims regarding the five allegedly facially
19 overbroad restrictions on expressive activity found in the District’s Master Ordinance. Specifically,
20 plaintiff argues that each ordinance is unconstitutionally overbroad as applied to individuals and
21 small groups numbering less than 50 persons.

22 “In a facial overbreadth challenge, there is a broad focus on the entire range of behavior
23 affected by the statute, and whether the unconstitutional applications of a statute are substantial in
24 relation to the statute’s legitimate effect.” *Roulette v. City of Seattle*, 97 F.3d 300, 312 (9th Cir.
25 1996) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)). “Because the overbreadth must be
26 substantial, ‘the mere fact that one can conceive of some impermissible applications of a statute is
27 not sufficient to render it susceptible to an overbreadth challenge.’” *United States v. Kaczynski*, 551

1 F.3d 1120, 1126 (9th Cir. 2009) (quoting *Members of City Council of City of Los Angeles v.*
2 *Taxpayers for Vincent*, 466 U.S. 789, 800 (1984)). Rather, “[a] statute is facially overbroad when its
3 application to protected speech is substantial, not only in an absolute sense, but also relative to the
4 scope of the law’s plainly legitimate applications.” *Id.* (quoting *Humanitarian Law Project v.*
5 *Mukasey*, 509 F.3d 1122, 1136-37 (9th Cir. 2007) (quoting *Virginia v. Hicks*, 539 U.S. 113, 119-20
6 (2003))) (internal quotations marks omitted).

7 A. Standing

8 “To maintain [a] challenge to the provisions of [an ordinance,] . . . appellant[] must establish
9 constitutional standing with regard to the provisions challenged. To do so, [appellant] must allege
10 (1) a distinct and palpable injury-in-fact that is (2) fairly traceable to the challenged provision or
11 interpretation and (3) would likely ... be redressed by a favorable decision.” *Santa Monica Food Not*
12 *Bombs v. City of Santa Monica*, 450 F.3d 1022, 1033 (9th Cir. 2006) (hereinafter *Food Not Bombs*)
13 (citing *Allen v. Wright*, 468 U.S. 737, 750-51 (1984) (internal citations and quotations marks
14 omitted)). Plaintiff Blome has standing to bring this facial challenge.

15 Blome is a peace activist who lives in the Bay Area and who frequently visits the Bridge to
16 protest war and to express a message of peace. As a part of her expressive activities, Blome utilizes
17 “signs, props [and] visuals” to convey her message. Docket No. 76 (Veit Decl.), Exh. 2 (Blome
18 Depo.) at 37:2. Blome asserts that she is unable to engage in spontaneous speech using signs, props
19 or visuals on the sidewalks of the Bridge without fear that the five restrictive provisions of the
20 Master Ordinance would be enforced against her.² Accordingly, Blome’s “apprehension that” the
21 Master Ordinance “would be enforced against [her] for engaging in activities protected by the First
22 Amendment without a permit is sufficient to establish an injury-in-fact and support a facial
23 challenge.” *Food Not Bombs*, 450 F.3d at 1034 (stating additionally that the fact that a plaintiff has
24 not applied for a permit pursuant to the ordinance in question does not defeat plaintiff’s standing).
25 Blome meets the second and third elements of standing because her injury-in-fact is directly
26 traceable to the five provisions here in dispute and her grievances “would likely be redressed by a
27 decision in [her] favor.” *Id.* Thus, Blome appropriately brings this facial overbreadth challenge.

1 B. The Ordinances

2 The five ordinances in question regulate speech on the Bridge’s sidewalks. Defendants do
3 not dispute that the ordinances are governmental restrictions on speech otherwise protected by the
4 First Amendment. Accordingly, “[i]n evaluating [governmental] restrictions on speech, different
5 standards apply depending on the type of forum involved.” *Hills v. Scottsdale Unified School Dist.*
6 *No. 48*, 329 F.3d 1044, 1048-49 (9th Cir. 2003) (citing *Perry Ed. Ass’n v. Perry Local Educators’*
7 *Ass’n*, 460 U.S. 37, 45-46 (1983)). “Public fora have achieved a special status in our law; the
8 government must bear an extraordinarily heavy burden to regulate speech in such locales.” *Long*
9 *Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1022 (9th Cir. 2009) (quoting
10 *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984)). Moreover, “[t]raditional public
11 fora gain even more importance when they are host to core First Amendment speech.” *Id.* (citing
12 *Hague v. Comm. for Indus. Organization*, 307 U.S. 496, 515-16 (1939). “[S]idewalks, streets, and
13 parks generally ‘are considered, without more, to be public forums.’” *American Civil Liberties*
14 *Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1099 (9th Cir. 2003) (quoting *United States v.*
15 *Grace*, 461 U.S. 171, 177 (1983)). Indeed, sidewalks (along with streets and parks) are “public
16 places historically associated with the free exercise of expressive activities,” *Food Not Bombs*, 450
17 F.3d at 1035 (quoting *Grace*, 461 U.S. at 177), and they are “distinct forums for speech.” *Seattle*
18 *Affiliate of Oct. 22nd Coalition to Stop Police Brutality, Repression and Criminalization of a*
19 *Generation v. City of Seattle*, 550 F.3d 788, 796 (9th Cir. 2008). Defendants concede that
20 notwithstanding their unique attributes as compared to other public sidewalks generally, the Bridge’s
21 sidewalks are public fora for the purposes of First Amendment analysis. Docket No. 116 (Hearing
22 Transcript) at 18:18-21.

23 As a primary matter defendants appear to attempt to distinguish *Food Not Bombs* and *Berger*
24 *v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009), by suggesting a distinction in kind, for First
25 Amendment purposes, between sidewalks on the one hand and “public spaces” on the other hand.
26 Hearing Transcript at 30:1-12; Docket No. 90 (District’s Opposition) at 12. In *Food Not Bombs*, the
27 Ninth Circuit validated a city ordinance, as it applied to public sidewalks, that required groups of
28

1 any size to apply for a permit to engage in expressive activity on the streets and sidewalks of the
2 City of Santa Monica. The permitting ordinance there required that organizers of all groups apply
3 for a permit if the expressive activity “imped[ed], obstruct[ed], impair[ed] or interfer[ed] with the
4 free flow of traffic.” *Id.* at 1040 (internal quotation marks omitted). The court stated that the
5 ordinance “standing alone, [was] *not* narrowly tailored under [Ninth Circuit] precedents . . . because
6 it lack[ed] any specification as to the size of the group covered and contain[ed] no other sufficiently
7 close tie to the government interest in the free flow of traffic.” *Id.* (emphasis added). However,
8 enforced together with the modifying Instruction, which provided a sufficiently limiting construction
9 by making the speech restrictions applicable only where expressive activity was “‘likely to: interfere
10 with the free use of any public way ... or not comply with traffic regulations,’” the Ninth Circuit
11 ultimately upheld the ordinance as it applied to sidewalks. *Id.* at 1039.³ Because, however, there was
12 no similar limiting construction on the application of the ordinance to public spaces, the court held
13 that the ordinance as applied to public spaces other than sidewalks was not narrowly tailored to
14 serve the government’s interests. *Id.* at 1042. Thus, the difference in outcome as between the
15 ordinance relating to sidewalks and public places in *Food Not Bombs* turned on the nature of the
16 ordinances in question rather than any distinction between sidewalks and public places as public fora
17 with respect to First Amendment analysis.

18 Similarly in *Berger*, the Ninth Circuit affirmed the district court’s invalidation of several
19 ordinances that sought to limit speech by mandating, inter alia, permitting requirements in the
20 Seattle Center, which occupies 80 acres of public space. 569 F.3d at 1035. The ordinances there
21 centered on the use of the Center’s park areas, and accordingly, the opinion centered on the
22 constitutionality of restricting speech in a public park. Nowhere in the opinion, however, does the
23 court distinguish between public parks and sidewalks when considering the application of a
24 permitting requirement to a single speaker in a public forum. Rather, the court states in clear terms
25 that, “[t]his circuit has repeatedly affirmed the principle that an advance notification requirement
26 applicable to speech in a public forum must be limited to larger groups.” *Id.* at 1058.

1 Defendant points to no other authority that suggests that sidewalks, even those that line busy
2 bridge highways, are to be treated any differently as a matter of First Amendment analysis.
3 Moreover, the District acknowledges that the Bridge’s sidewalks are public fora for the purposes of
4 First Amendment analysis, and “[t]he government bears the burden of justifying the regulation of
5 expressive activity in a public forum.” *Id.* at 1035.

6 In a public forum, the government may establish time, place and manner restrictions on
7 speech activity so long as the restrictions are content-neutral, narrowly tailored to achieve a
8 substantial government interest and leave open ample alternatives for communication. *Ward v. Rock*
9 *Against Racism*, 491 U.S. 781, 791 (1989). “The failure to satisfy any single prong of this test
10 invalidates the requirement.” *Grossman v. City of Portland*, 33 F.3d 1200, 1205 (9th Cir. 1994).
11 Once challenged, the government bears the burden of showing that the ordinances are narrowly
12 tailored to achieve its substantial interests. *See Edwards v. City of Coeur d’Alene*, 262 F.3d 856, 863
13 (9th Cir. 2001). For the purposes of plaintiff Blome’s facial challenge, the parties do not dispute that
14 the regulations on speech found in the Master Ordinance are content-neutral. Nor do the parties
15 dispute that the District has a substantial interest in: (1) promoting traffic safety on the Bridge
16 roadway and on its sidewalks; (2) maintaining the free flow of traffic both on the roadway and on
17 the sidewalks; and (3) maintaining security on the Bridge. *See* Docket No. 71 (District’s Motion) at
18 15. The parties’ dispute centers on whether, as applied to individuals and small groups, the five
19 provisions of the Master Ordinance here in question, are narrowly tailored to achieve the
20 government’s stated interests and whether the restrictions, as applied to individuals and small
21 groups, leave open ample alternatives for communication. It is in this light that the court addresses
22 the five challenged ordinances.

23 1. Permitting Ordinances - F.4(a) and F.5(a)

24 Sections F.4(a) and F.5(a) of the Master Ordinance are permitting requirements applicable to
25 every individual speaker and every group, regardless of size, that seeks to use signs, props and
26 musical instruments to engage in expressive activity on the Bridge’s sidewalks. Taken together,
27 sections F.4(a) and F.5(a) impose a minimum four-day permitting requirement on any expressive
28

1 activity on the Bridges sidewalks, even as to one individual, as long as any use of a sign, prop or
2 musical instrument is involved. Individual speakers and groups of up to fifty persons do not need a
3 permit to engage in expressive activity so long as there are no signs, props or musical instruments
4 involved. Witt Decl., Exh. K (Ordinance Amending Master Ordinance 2009, § F.4(a)) at 8. The
5 Bridge manager concedes, however, that “on most occasions [a small group of fifty engaged in
6 expressive activity on the Bridge without the benefit of signs, etc.,] is probably on most occasions
7 going to just blend into the landscape.” Docket No. 80-2 (Krishnan Decl.), Exh. 1 (Witt Depo.) at
8 61:15-17. Certainly then, without the benefit of a sign, etc., a single speaker or a small group of
9 three or four persons, for example, is not likely to effectively engage in expressive activity on the
10 Bridge’s sidewalks. For single speakers and small groups then, the two permitting requirements
11 function together to eliminate spontaneous speech on the Bridge’s sidewalks.

12 “A permitting requirement is a prior restraint on speech and therefore bears a heavy
13 presumption against its constitutionality.” *Berger*, 569 F.3d at 1037 (citations and internal quotation
14 marks omitted). “This heavy presumption is justified by the fact that prior restraints on speech . . .
15 are the most serious and the least tolerable infringement on First Amendment rights.” *Long Beach*
16 *Area Peace Network*, 574 F.3d at 1023 (citations and internal quotation marks omitted).
17 Notwithstanding the Ninth Circuit’s pronouncement that, “we and almost every other circuit to have
18 considered the issue have refused to uphold registration requirements that apply to individual
19 speakers or small groups in a public forum,” *Berger*, 569 F.3d at 1039, the District argues that
20 applying the permitting ordinances to individual speakers and small groups is necessary to achieve
21 its goals, even in light of the fact that as a practical matter, the two ordinances taken together
22 eliminate effective spontaneous speech. Indeed:

23 Advance notice or permitting requirements do, by their very nature, foreclose
24 spontaneous expression. Consequently, in any particular forum, true spontaneous
25 expression and the application of an advance notice requirement are mutually
26 exclusive. Groups *may* be able to engage in expressive conduct after the notice
27 period has expired, but the change in timing will alter the potential impact of their
28 speech. For speech that is truly time sensitive, the precise spontaneous moment
will be lost. *Food Not Bombs*, 450 F.3d at 1046 (emphasis in original) (internal
citations omitted).

1 This is exemplified by plaintiff Turner’s case, in which Turner sought to respond to unfolding events
2 surrounding the Torch Relay but was unable to legally engage in effective spontaneous speech on
3 the Bridge. The only way that Turner could have legally engaged in his activities with his sign
4 would have been to wait at least four business days after the Torch Relay had long left San Francisco
5 and after his opportunity to communicate his political speech on the Bridge had disappeared.

6 The District contends, however, that “even one sign can and does cause distraction to
7 motorists” on the Bridge. District’s Motion at 18:9. Accordingly, the District argues that it needs the
8 prior notice, even as to one solitary speaker with a sign conforming to the Master Ordinance’s
9 signage limitations,⁴ because the District requires four business days to assemble the additional
10 security staff allegedly necessary to address any problems that may arise as a result of a single
11 speaker with a legal sign. The District contends that without the ability to apply the permitting
12 requirements to all speakers, the “District might find itself without adequate staff to ensure safety.”
13 District’s Motion at 18:15-16.

14 The District’s argument here is unavailing for several reasons. Firstly, even though “[a]
15 narrowly-tailored permitting regulation need not be the least restrictive means of furthering a
16 locality’s asserted interests[, t]he regulation may not . . . burden substantially more speech than
17 necessary to achieve a scheme’s important goals.” *Food Not Bombs*, 450 F.3d at 1038 (citing *United*
18 *States v. Baugh*, 187 F.3d 1037, 1043 (9th Cir.1999)). “[T]he requirement of narrow tailoring is
19 satisfied ‘so long as the ... regulation promotes a substantial government interest that would be
20 achieved less effectively absent the regulation.’” *Id.* (internal citations and quotation marks omitted).
21 Here, in regard to single speakers and small groups, the District already has in place a structure to
22 deal with potential problems that may arise. For example, the District maintains an ever-present
23 security staff whose daily job is to address problems on the sidewalks. JSUF ¶ 6. The District
24 concedes that in most cases, this security personnel are able to respond to problem spots within five
25 minutes. *Id.* ¶10. The District also maintains surveillance cameras to monitor the sidewalks and a
26 public address system that permits District staff to communicate directly with persons on the Bridge.
27 *Id.* ¶¶ 8, 11. In addition, the CHP maintains a daily presence at the Bridge and frequently deploys
28

1 additional officers, including a regular bicycle patrol on weekends. *Id.* ¶¶ 12,13. Moreover, the
2 District concedes that, “for small events like a single person holding a sign or flag, we probably
3 wouldn’t have any extra officers beyond those already on duty.” *Id.* ¶ 39. Accordingly, the evidence
4 shows that the District has the capacity to address any problems that may arise from a single speaker
5 or small group with a sign absent the application of its burdensome permitting ordinances to single
6 speakers and small groups. For staffing purposes then, it is unclear exactly why the District needs
7 four days advanced notice that a single speaker intends to bring a sign that conforms to the Bridge’s
8 own sign regulation. The Bridge’s daily security practice appears sufficient to allow the District to
9 readily address any increased danger without placing such a significant burden on spontaneous
10 speech.

11 Moreover, other regulations within the Master Ordinance present less restrictive means of
12 dealing with the dangers that a single speaker with a sign or a small group with a few signs allegedly
13 engenders. For example, section F.8(a) addresses dangerous conduct by requiring persons engaged
14 in expressive activity to walk “in a safe and orderly manner and remain on the Bridge Sidewalks at
15 all times,” and by prohibiting the holding of “any object over any portion of the vehicular roadway
16 or over the railing of the [sidewalks].” Witt Decl., Exh. K (Ordinance Amending Master Ordinance
17 2009, § F.8(a)) at 11. This ordinance directly addresses the District’s concern that a single speaker
18 with an unpermitted sign might wave the sign in the roadway, causing a traffic hazard. Section F.7
19 generally sets forth other mandates on permissible Bridge behavior that readily address the District’s
20 concerns vis-a-vis a single speaker or small group with a sign. Witt Decl., Exh. K Ordinance
21 Amending Master Ordinance 2009, § F.7) at 10-11. For example, subsection F.7(b) states:

22 No person may engage in any activity that willfully disrupts or obstructs vehicular or
23 vessel traffic on or near District Property or willfully interferes with pedestrian or
24 bicycle traffic on District Property, including but not limited to sidewalks . . . *Id.* at
25 11.

26 Accordingly, the District presently has in place the means to address problems that may arise due to
27 a single speaker with a sign without so heavily burdening spontaneous speech.

28 Secondly, the District has not presented evidence that shows beyond a purely speculative
level that a single person with a sign, or a group of four with two signs, for example, is likely to

1 cause a significant disruption on the Bridge.⁵ *Edwards*, 262 F.3d at 863 (citing *Bay Area Peace Navy*
2 *v. United States*, 914 F.2d 1224, 1227 (9th Cir. 1990) (“[T]he First Amendment demands that
3 municipalities provide tangible evidence that speech restrictive regulations are necessary to advance
4 the proffered interest in public safety.” (internal quotation marks omitted)). The District’s
5 arguments are largely couched in terms of possibilities rather than likelihoods as is implicated by the
6 lack of empirical evidence regarding single speakers engaged in expressive activity on the Bridge.
7 *Id.* at 864 (invalidating a city ordinance proscribing the use of picket signs in part because “the
8 record reveal[ed] little factual support for the City’s claim that [the ordinance was] necessary to
9 advance [the city’s goals].”)

10 For example, at the hearing, in response to the court’s query as to how advanced notice of a
11 group of ten with a sign consistent with the Master Ordinance’s limits assists the District in
12 achieving its safety and management goals, defendant’s counsel responded that “with ten people we
13 *may or may not* need extra resources with a sign, but we want to make sure that there was someone
14 available to monitor that group, even if it’s ten people with a sign.” Hearing Transcript at 15:13-16
15 (emphasis added). The Ninth Circuit has stated, however, that:

16 “‘May’ is a term of nearly infinite elasticity, given the unbounded variety of
17 human events. While many things are quite unlikely to happen, almost anything
18 physically possible ‘may’ happen. . . The term ‘may,’ in other words, simply takes
19 in too many circumstances that do not, as matters actually turn out, implicate the
20 governmental interests justifying the permitting requirement.” *Food Not Bombs*,
21 450 F.3d at 1041.

22 Moreover, the tangible evidence that does exist regarding an individual engaged in spontaneous
23 expressive activity using a sign, prop or musical instrument on the Bridge suggests no significantly
24 increased hazard. After the events of September 11, 2001, the District allowed Jeffrey Orth, without
25 a permit, to walk across the Bridge holding an approximately 11” x 17” American flag on a daily
26 basis through sometime in 2003. JSUF ¶¶ 41-42. The District presents no evidence that this
27 expressive activity caused serious problems on the Bridge or presented any particular sidewalk
28 hazard. The Bridge manager testifies that, “there were some traffic implications from time to time
as people would stop and wave and honk and show their support,” Krishna Decl., Witt Depo. at

1 130:10-12, but these consequences that do not suggest a serious problem that justifies applying the
2 permitting requirement to individuals.

3 Insofar as the District alludes to the threat of terrorism as justifying the application of the
4 permitting requirements to single speakers and small groups, the District's general policies with
5 regard to objects unrelated to expressive activity undermines the District's arguments. The District
6 concedes that it imposes no permitting requirements upon individuals or groups who bring any
7 number of items onto the Bridge. Neither backpacks, shopping trolleys, strollers, walking sticks,
8 surfboards nor any number of other objects are policed in the same manner that a sign declaring a
9 "political, religious, philosophical, or ideological opinion, view, or message that likely would be
10 understood by those who see or hear the speech, communication, or conduct to be such an opinion,
11 view, or message" is policed.⁶ *See id.* at 24-26. Yet, any TSA agent is certain to testify that these
12 District-approved, unpermitted items pose serious security threats. It is curious then that the District
13 perceives an individual engaging in expressive activity with an appropriately-sized sign as enough of
14 a threat so as to justify the denial of the basic First Amendment right to spontaneous speech in a
15 public forum, yet at least as far as the Master Ordinance reflects, sees little danger in an individual
16 with a backpack of unknown contents.⁷

17 The court also finds unavailing the District's argument that the permitting requirements are
18 justifiably applicable to individuals and small groups because signs have the potential to blow into
19 the roadway. Although this appears a legitimate concern, the District presents no evidence that
20 requiring a single person to apply four days in advance for a permit to carry a sign helps to mitigate
21 this danger. As discussed above, the District is capable of monitoring individuals on a daily basis
22 without need for additional staff. Secondly, if the winds on the Bridge are as unpredictable as the
23 District suggests, it is unclear exactly what four days' advanced knowledge that the speaker will be
24 on the Bridge with a sign will accomplish. The District does not suggest that it actually increases
25 the number of staff who stand ready to retrieve the errant sign from the roadway, so presumably any
26 increase in security staff would go towards monitoring the single speaker's use of the sign to prevent
27 it blowing away. As stated above, in fact the District is not likely to increase its staff in response to
28

1 an single speaker with a sign. JSUF ¶ 39. In light of this, the permitting requirements appear to do
2 little to address the wind problem.

3 The District also argues that the danger of driver distraction, even from one sign, renders the
4 permitting ordinances constitutionally sound. Once again, the District neither explains how
5 advanced notice of a single speaker with a sign or a small group with signs helps to address the
6 problem of driver distraction nor presents evidence that a single speaker with a sign, prop or musical
7 instrument significantly increases driver distraction.⁸ For example, the District does not assert that
8 it changes the lane configuration in response to a single speaker with a sign, and as the Bridge
9 manager testifies, probably does not summon additional staff. *Id.* The District does not announce
10 that expressive activity with signs is set to occur so from the uninformed driver’s perspective, a
11 permitted sign is just as distracting as an unpermitted sign. It is entirely unclear then how the
12 District’s advanced knowledge that an individual or small group will engage in expressive activity
13 using a sign helps to mitigate the danger of driver distraction or accomplishes anything more than to
14 allow the District “to monitor that group.” Hearing Transcript at 15:13-16.

15 The District also argues in its briefing that four business days are necessary to allow Bridge
16 officials to secure additional security staffing to address any problems that may arise as a result of
17 expressive activity of an individual speaker with a sign or a small group of protesters with signs.
18 Defendant’s evidence suggests otherwise. As reflected above, there is a significant daily law
19 enforcement presence on the Bridge, ready to address any problem that arises. The District
20 concedes that in reality, the District’s security personnel can respond to problems on the Bridge,
21 “faster than five minutes in most cases.” Krishna Decl., Witt Depo. at 31:8-10. The District argues,
22 nonetheless, that individuals and small groups are “far more disruptive of the daily activity” on the
23 Bridge and presumably require a greater security presence. District’s Opposition at 13. Yet, the
24 District presents no evidence of this assertion.

25 Nor has the District produced evidence that connects unpermitted expressive activity by
26 individuals or small groups using signs with increased traffic delays on the Bridge. While it is not
27 unreasonable to suggest that this is the case, the District does not attempt to show causation in its
28

1 proffered evidence of traffic snarls. District officials speculate that individuals with signs consistent
2 with the ordinance’s sign limits would create a problem, but presumably so do permitted signs as
3 well as a host of other conditions and events occurring both on the Bridge and in San Francisco and
4 Marin County. Defendants proffer expert evidence of traffic counts and traffic issues on the Bridge,
5 yet these experts present no comparative or empirical evidence connecting individual or small group
6 unpermitted use of signs consistent with the Master Ordinance’s sign and significantly increased
7 traffic hazards. For example, the District proffers records of an incident in which three individuals
8 climbed the Bridge and unfurled a large banner. Unsurprisingly, this resulted in a major traffic jam.
9 Plaintiffs, however, do not seek to engage in this kind of patently disruptive behavior. Indeed, it is
10 not clear how the possession of a permit prevents or deters this kind of conduct, and the District fails
11 to explain this. Accordingly, this evidence does not address the issue here, namely whether a single
12 speaker holding a sign or a small group with a few signs that are consistent with the District’s sign
13 limitations would inevitably lead to traffic problems on the Bridge. The District’s evidence does not
14 speak to this issue.

15 With regard to musical instruments, the ordinance also singles out expressive activity for
16 regulation even though non-expressive activity is likely to be just as distracting. As written, the
17 ordinance permits an individual to bring a musical instrument on the Bridge to play for pleasure, but
18 prohibits one whose intent was to play as a means of engaging in expressive activity. From an
19 objective standpoint, however, the capacity for distraction remains the same as between the two
20 players. Thus, the District appears to disfavor “expressive” playing of musical instruments even as
21 it welcomes playing for non-expressive purposes.

22 Ultimately, defendants are unable to meet their burden of showing some nexus between the
23 permitting requirements as applied to small groups and individuals and the governmental interests.
24 *See Food Not Bombs*, 450 F.3d at 1039. Even assuming that defendants’ evidence presented some
25 nexus between its permitting requirement as applied to individuals and small groups and its interest
26 in traffic safety, the District presents no evidence justifying its four-business day advanced notice
27
28

1 policy. District officials concede that four days are not necessary to address any alleged increased
2 safety or security concerns raised by a single-speaker or a small group with a sign.

3 Moreover, the District’s permitting ordinances do not leave open ample alternatives for
4 spontaneous communication with the intended audience on the Bridge. Taken together, the two
5 ordinances completely prevent a single-speaker from spontaneously expressing his views with a sign
6 on the Bridge. Defendants contend that spontaneous speech is allowed as long as the speaker does
7 not use a sign. However, defendants concede that without the benefit of a sign, a single speaker’s
8 voice would be lost amidst the multitude on the Bridge’s sidewalks and amidst the noisy Bridge
9 traffic. Defendants suggest that spontaneous speech is available in other parts of the City of San
10 Francisco, and suggest that individuals and small groups who want to engage in spontaneous speech
11 using a sign should simply go elsewhere.⁹ Defendants concede, however, that the Golden Gate
12 Bridge is a unique locale that commands a worldwide audience.¹⁰ The intended audience on the
13 Bridge, then, is not easily duplicated, even in a major American city such as San Francisco. And,
14 “[i]f an ordinance effectively prevents a speaker from reaching his intended audience, it fails to
15 leave open ample alternative means for communication.” *Edwards*, 262 F.3d at 866 (citing *Heffron*
16 *v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981).

17 The court is mindful of the notion “that the First Amendment does not guarantee the right to
18 communicate one’s views at all times and places or in any manner that may be desired.” *Int’l Soc’y*
19 *for Krishna Consciousness, Inc.*, 452 U.S. at 647. “However, an alternative mode of communication
20 may be constitutionally inadequate if the speaker’s ability to communicate effectively is threatened.”
21 *Menotti v. City of Seattle*, 409 F.3d 1113, 1138 (9th Cir. 2005) (internal citations and quotation
22 marks omitted). In *Menotti*, the Ninth Circuit considered an emergency ordinance restricting speech,
23 implemented in the wake of the first World Trade Organization (WTO) conference held in Seattle,
24 WA. The court concluded that the ordinance at issue provided protestors with ample alternatives to
25 communicate their message because although “protestors could not deliver their message directly to
26 [the WTO] delegates, . . . protestors were able to demonstrate and express their views immediately
27 outside the restricted zone, including areas directly across the street from the [WTO venues].” *Id.*

28

1 Additionally, “[t]he protestors could reasonably expect their protest to be visible and audible to
2 delegates, even if not as proximate as the protestors might have liked.” *Id.* In this case, without the
3 benefit of appropriately sized signs, props or musical instruments, single speakers and small groups’
4 ability to engage effectively in spontaneous speech on the Bridge “is threatened.” *Id.* (internal
5 citations and quotation marks omitted).

6 Taken in the light most favorable to the defendant, defendant’s evidence does not connect its
7 stated governmental interests with the prior restraint on the spontaneous speech of individuals and
8 small groups, and the District has failed to meet its burden to show that as applied to individuals and
9 small groups, sections F.4(a) and F.5(a) are narrowly tailored. “A narrowly tailored permit
10 requirement must maintain a close relationship between the size of the event and its likelihood of
11 implicating government interests.” *Food Not Bombs* at 1040. The District has not provided evidence
12 that a single speaker with a sign, prop or musical instrument implicates the government’s interests in
13 public safety so much so as to justify the usual measure of applying a prior registration regulation to
14 an individual or small group. Indeed:

15 Without a provision limiting the permitting requirements to larger groups, or
16 some other provision tailoring the regulation to events that *realistically present*
17 *serious* traffic, safety, and competing use concerns, significantly beyond those
18 presented on a daily basis by ordinary use of the streets and sidewalks, a
19 permitting ordinance is insufficiently narrowly tailored to withstand time, place,
20 and manner scrutiny. *Food Not Bombs*, 450 F.3d at 1039. (emphasis added)

21 The District has not shown that an individual or a small group with a sign amidst the multitude on
22 the Bridge’s sidewalks realistically presents a serious threat to traffic and safety on the Bridge.
23 Because here the District presents no evidence, empirical or otherwise, suggesting that individuals
24 and small groups with signs are likely to present a significant threat to Bridge safety and order, the
25 government does not meet its burden of showing that sections F.4(a) and F.5(a) are narrowly
26 tailored. Because the ordinances preclude any peaceful and law-abiding individual or small group
27 from engaging in spontaneous expressive activity with a sign on the Bridge, they “burden
28 substantially more speech than is necessary to further the government’s legitimate interests.” *Ward*,
491 U.S. at 799. Thus, the District’s permitting regime is over broad because it reaches a substantial
number of impermissible applications. Nor does a case-by-case analysis save the ordinances here

1 because as written and enforced together, the District’s permitting requirements mean that *no*
2 individual speaker may spontaneously express his or her views using a permissible sign on the
3 Bridge. *New York v. Ferber*, 458 U.S. 747, 774 (1982) (finding that a law is not substantially
4 overbroad when a case-by-case analysis can cure overbreadth.) In addition, the District’s
5 permitting ordinances effectively prevent any ample alternative for spontaneous speech on the
6 Bridge because, “they effectively prevent a message from reaching the intended audience.” *Comite*
7 *de Jornaleros de Redondo Beach v. City of Redondo Beach*, 607 F.3d 1178, 1192 (9th Cir. 2010).
8 The ordinances significantly contravene “[t]he strong interest in protecting the opportunity for
9 spontaneous expression in public fora with respect to individuals or small groups.” *Food Not Bombs*,
10 450 F.3d at 1046.

11 2. Sign on Handles - Section F.8(c)

12 Section F.8(c) states in relevant part: “All signs and props must be handheld; they may not be
13 attached or mounted to poles, sticks, or other devices that are used to hold the signs or props.” The
14 District argues that even one sign, etc., mounted on a stick or with handle (hereinafter “picket
15 signs”) poses a danger of additional use as a weapon, causes greater driver distraction and is
16 vulnerable to the unique weather conditions on the Bridge.

17 With regard to the threat of violence allegedly engendered in picket signs, defendants argue
18 that *Edwards v. City of Coeur d’Alene* does not apply here because unlike in *Edwards*, there is
19 evidence that picket signs have previously been used as weapons on the Bridge. 262 F.3d 856. In
20 *Edwards*, the plaintiff sought to enjoin the enforcement of an ordinance that banned the use of
21 supports attached to signs during parades and public assemblies in the city’s streets. *Id.* The Ninth
22 Circuit held that the ordinance was not narrowly tailored to advance the government’s interest in
23 “safeguarding its citizens against violence” in part because the city did not present empirical
24 evidence supporting its claim that the ordinance was necessary to advance its goal of preventing
25 violence. *Id.* at 863. Here, as in *Edwards*, there is little factual support for the District’s contention.
26 Defendants refer to only one incident that occurred over twenty years ago to bolster its finding that a
27 single speaker with a picket sign or a small group holding a few picket signs pose a particular threat
28

1 of violence. *See* Docket No. 76 (Veit Decl.), Exh. 4 (M. Locati Depo.) at 63:8-16.¹¹ A single, twenty
2 year-old incident, of which none of the witnesses has personal knowledge, is not sufficient to satisfy
3 the government's burden of showing a nexus between its asserted governmental interests and its
4 regulations on protected speech.

5 Neither does the District proffer evidence suggesting that even one picket sign carried by a
6 single-speaker or small group poses a particular threat in terms of driver distraction, apart from
7 proffering expert testimony that generally signs by the roadway may distract drivers. Defendants
8 argue that even a single speaker with a picket sign is especially dangerous on the Bridge because the
9 individual will wave the picket sign in order to gain the attention of drivers. As discussed above,
10 however, there are other provisions of the Master Ordinance that address the potential for sign
11 holder misconduct. Indeed, it is entirely speculative that one picket sign significantly increases the
12 danger of driver distraction so much so as to justify the District's attempts here to significantly limit
13 speech on the Bridge.

14 Defendants cite *Foti v. City of Menlo Park*, 146 F.3d 629 (9th Cir. 1998), for the proposition
15 that the government may regulate picket signs when they pose a hazard in traffic. There is, however,
16 a significant difference between the ordinance at issue in *Foti* and the ordinance at issue here. In
17 *Foti*, the city ordinance sought to regulate the use of picket signs by limiting the size and number of
18 picket signs, not by completely banning all picket signs. The plaintiffs in *Foti* were able to engage
19 in spontaneous speech using picket signs provided that the signs were consistent with the City's size
20 restrictions.¹² Here, plaintiff Blome does not dispute the District's restrictions on sign size, but
21 rather seeks to be able to use a picket sign to engage in individual and small group spontaneous
22 protest. Moreover, as mentioned above, defendants concede that without the benefit of a sign, a
23 single speaker's voice would be easily lost in the crowded and noisy Bridge sidewalks.

24 Defendants also argue that the unique and unpredictable weather on the Bridge mandates the
25 prohibition of picket signs. Specifically, defendants reference a concern for the unpredictable wind
26 patterns on the Bridge and the danger that a picket sign might blow into traffic. The record,
27 however, contains little factual support for the District's argument that the wind on the Bridge could
28

1 render an individual's use of a even a solitary picket sign a significant danger. The district argues
2 that picket signs are likely to blow into the roadway and cause accidents, but so are umbrellas, for
3 example, yet the District does not prohibit umbrellas on the Bridge simply because of the hazard
4 they certainly present of both blowing onto the roadway and/or injuring other pedestrians or
5 bicyclists. In choosing to regulate signs on handles, the District presents no comparative evidence
6 which shows why a picket sign is more likely to pose this threat, thus warranting a complete ban,
7 versus all the other unregulated objects that may readily be brought onto the Bridge by any member
8 of the public. Hats, shopping bags, umbrellas, scarves, pieces of cardboard, etc. are all similarly
9 vulnerable to the unpredictable wind on the Bridge, able to blow into the roadway and wreak havoc,
10 yet the District has only singled out picket signs for prohibition.¹³

11 Moreover, the ban significantly limits an individual speaker's ability to address her audience.
12 In the context of the sidewalks of the Bridge, which are often heavily populated with pedestrians and
13 bicycle riders, a single speaker's message may be easily drowned out. Indeed, a single voice would
14 likely go unheard "above the din," and "hand-held signs [would be] easily swallowed up by the
15 crowd." *Edwards*, 262 F.3d at 866-867. Without the benefit of a picket sign, the perspective of the
16 single speaker on the Bridge's sidewalks is likely to be all but lost, and the District does not show
17 that it gains any significant benefit in so limiting individual speech in this manner. Indeed, "the
18 [o]rdinance's total ban on sign supports has an undeniable impact on the manner in which a
19 signholder communicates with the public" on the Bridge. *Edwards*, 262 F.3d at 865. Accordingly,
20 the District's absolute ban on picket signs is not narrowly tailored to achieve the government's
21 stated interests in safety. As applied to individual protesters and small groups of protesters, the
22 ordinance restricts a significantly larger amount of speech activity than necessary to achieve the
23 District's goals, and so it is not well-fitted to address the government's stated interests in safety and
24 order.

25 3. Sound Amplification - Section F.8(b)

26 Section F.8(b) provides: "No person [engaged in expressive activity] may carry or use bull
27 horns or sound amplification devices on Bridge Sidewalks." Defendants argue that the purpose of
28

1 this ordinance is to avoid driver distraction and to promote safety on the Bridge’s sidewalks.
2 Specifically, defendants contend that the ban on even one individual’s use of a bull horn or sound
3 amplification device is necessary because the sound level generated is likely to drown out the
4 Bridge’s own loudspeaker system. According to defendants, in times of emergency, even a single
5 bull horn or sound amplification device in use would drown out law enforcement’s attempts to
6 secure the Bridge. The District, however, presents no actual evidence that one bull horn or sound
7 amplification device would in fact drown out the multiple speakers and the emergency telephones
8 that the District maintains for communication with the public on the Bridge. Nor does the District
9 present evidence showing a likelihood that a single bull horn or sound amplification device would
10 result in a significant increase in driver distraction.

11 Moreover, not all sound amplification is forbidden on the Bridge. The District concedes that
12 it places no restrictions, beyond general state laws regarding disturbing the peace, on sound
13 amplification devices *not* used for expressive activity. JSUF ¶ 34. Yet, the District offers no
14 rationale for treating expressive activity and non-expressive activity differently in this respect.
15 Presumably, the permissible non-expressive sound amplification poses the same threat of allegedly
16 drowning out the District’s speakers and P.A. system. Additionally, members of the public who do
17 not intend to do so for expressive purposes may also play radios, for example, as long as the sound is
18 kept within municipal limits on noise and so long as they do not intend to do so as part of an
19 expressive activity. Krishna Decl., Witt Depo. at 26:9-16, 158:9-23. The District does not explain
20 the difference in treatment or why similar restrictions on bull horns and sound amplification with
21 respect to expressive activity is not acceptable as a less restrictive means of addressing expressive
22 activity. *Foti*, 146 F.3d at 642-643 (“Obvious, less burdensome means for achieving the City’s aims
23 are readily and currently available by employing traditional legal methods.”) Accordingly, the court
24 concludes that this ordinance is not narrowly tailored to achieve the government interests.

25 4. Weekend Hours - Section I.F.6(d)

26 Section F.6(d) provides in relevant part: “Permits for Expressive Activity on the Bridge
27 Sidewalks will not be issued (1) when the Bridge Sidewalks are closed to pedestrians; (2) on
28

1 weekdays from 6:00 a.m. - 10:00 a.m. and 2:00 p.m. - 7:00 p.m.; or (3) on weekends and holidays
2 from 2:00 p.m. to 11:59 p.m.” Plaintiff Blome only contests the constitutionality of the Bridge’s
3 weekend restriction on speech after 2 p.m. She argues that the cutoff on Sundays precludes
4 religiously-inclined protesters, who attend religious services on Sunday morning, from participating
5 in expressive activity on the Bridge.

6 Defendants argue that the ordinance is designed to promote traffic safety on the Bridge
7 during peak traffic periods. According to the District, increased traffic during those hours heightens
8 the potential for traffic delays and driver distraction, thus making necessary the District’s complete
9 prohibition on expressive activity after 2:00 p.m. on Saturdays and Sundays. To that end, defendant
10 proffers evidence that on Friday, June 26, 2009, the District allowed the group, Bay Area for Iran, to
11 engage in expressive activity on the Bridge after 2:00 p.m. Witt Decl. ¶ 43; Exh. E (Permit
12 Agreement). Allegedly, “the incident created an immediate and significant traffic back-up that
13 congested rush hour traffic for hours.” *Id.* at ¶ 43. Given, however, that this event took place on a
14 Friday and involved up to 200 people, the evidence does not speak to the effect that expressive
15 activity involving individual speakers or small groups has on traffic during the hours in question on
16 weekends. For example, defendants evidence does not show that individual or small group
17 expressive activity after 2:00 p.m. on weekends leads to a significant increase in traffic congestion,
18 in collisions or other accidents. Rather, one of defendants’ experts appears to suggest that the
19 danger of accidents might actually *decrease* during times of increased traffic since drivers are going
20 more slowly and are less likely to become involved in accidents. Docket No. 92 (Manolius Decl.),
21 Exh. 1 (Ruzak Depo.) at 44:22-45:14.¹⁴ Ultimately, the burden rests with the District, but the
22 District has not produced evidence showing the nexus between any expressive activity by an
23 individual or a small group and its total prohibition on expressive activity on the Bridge’s sidewalks
24 after 2:00 p.m. on weekends. Thus the District’s ordinance banning all expressive activity by
25 individuals and small groups on weekends after 2:00 p.m. is not narrowly tailored to achieve its
26 interest in traffic safety.

27 5. Summary

1 Summary judgment is GRANTED in favor of plaintiff Blome as to all five of the challenged
2 ordinances, as they apply to individuals and small groups.

3 II. The District's Motion

4 The court next considers the District's Motion. Given the court's conclusions as to plaintiff
5 Blome's motion, summary judgment as to the constitutionality of the five ordinances in question is
6 DENIED.

7 A. Standing - Plaintiff Turner

8 Defendant argues that plaintiff Turner lacks standing to bring a facial challenge against the
9 District because he has not demonstrated at the Bridge since April 9, 2008, and he has stated that he
10 has "no specific plans" to demonstrate at the Bridge in the future. Veit Decl., Exh. 13 at 49:3-9.
11 Given the court's conclusion that plaintiff Blome has standing to bring a facial challenge, the court
12 finds it unnecessary to reach Turner's standing.

13 B. Turner's As-Applied Challenge

14 Defendants argue that Turner's as-applied challenge is invalid because the District's
15 ordinances are constitutional. Because the court concludes above that the District's permitting
16 ordinances are facially unconstitutional as applied to individuals engaged in speech on the Bridge's
17 sidewalks, summary judgment as to Turner's as-applied challenge is DENIED.

18 C. Summary

19 Summary judgment as to the constitutionality of the five ordinances in question is DENIED.
20 Summary judgment as to plaintiff Turner's standing to bring a claim for declaratory relief is
21 DENIED. Summary judgment as to Turner's standing to bring an as-applied challenge is DENIED.

22 III. CHP Defendants' Motion

23 A. Qualified Immunity

24 Turner seeks to hold the CHP officers personally liable for violations of his First and Fourth
25 amendment rights, however CHP defendants argue that they are entitled to qualified immunity.¹⁵ "A
26 finding of qualified immunity depends on a two-part inquiry by the court." *Peng v. Mei Chin*
27 *Penghu*, 335 F.3d 970, 976 (9th Cir. 2003) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). The
28

1 court must determine whether the facts alleged, ““taken in the light most favorable to the party
2 asserting the injury,”” show the violation of a constitutional right, and whether the right was clearly
3 established at the time of the violation. *Id.* (quoting *Saucier v. Katz*, 533 U.S. at 201); *see*
4 *Blankenhorn v. City of Orange*, 485 F.3d 463, 471 (9th Cir. 2007) (“Defendants are entitled to such
5 relief only if the facts alleged and evidence submitted . . . show that their conduct did not violate a
6 federal right; or, if it did, the scope of that right was not clearly established at the time.”). Courts
7 may independently determine the order in which to consider each prong of the qualified immunity
8 test. *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 818 (2009).

9 Citing *Grossman v. City of Portland*, 33 F.3d 1200 (9th Cir. 1994), CHP defendants argue
10 that they are entitled to qualified immunity from these claims because in seizing Turner’s sign they
11 were merely enforcing the Master Ordinance as duly promulgated by the District. In *Grossman*, the
12 Ninth Circuit considered the constitutionality of a city ordinance that required a permit for public
13 gatherings in a public park. Although finding that the ordinance was unconstitutional for lack of
14 narrow tailoring, the panel concluded that the officers who enforced the ordinance against the
15 plaintiff were entitled to qualified immunity.

16 This ordinance, which had been duly promulgated by the city council, was not so
17 obviously unconstitutional as to require a reasonable officer to refuse to enforce
18 it. City councils have authority, consistent with the First Amendment, to adopt
19 certain time, place, and manner restrictions regulating the use of public parks by
20 groups, including in some circumstances narrowly-tailored permit requirements.
21 Thus, [the officer] was reasonably entitled to rely on the city council’s judgment
22 that it was lawful to require a group desiring to use the park to obtain a permit. *Id.*
23 at 1210.

24 Similarly, in *Way v. County of Ventura*, 445 F.3d 1157 (9th Cir. 2006), the Ninth Circuit
25 considered the applicability of qualified immunity in a case where pursuant to a blanket strip search
26 policy, two officers conducted a visual cavity inspection of a female detainee under suspicion of a
27 misdemeanor drug charge. The court determined that the blanket strip search policy was
28 unconstitutional, yet concluded that the officers were entitled to qualified immunity because
“reasonable officers . . . could have believed that the [strip search policy] comported with the
Constitution.” *Id.* at 1164 (Wardlaw, J., concurring).

1 Here, the CHP officers seized Turner’s sign pursuant to the duly promulgated Master
2 Ordinance. Although, the court now concludes that the provisions under which the officers seized
3 Turner’s sign are unconstitutional, at the time of the incident it was not unreasonable for the CHP
4 officers to believe that the duly enacted ordinances were constitutional and to enforce them
5 accordingly.

6 Plaintiff also alleges that the officers engaged in viewpoint discrimination by seizing
7 Turner’s allegedly anti-China sign while permitting several others within the vicinity to wave
8 Chinese flags. Plaintiff Turner’s photographic evidence shows, however, that the persons waving
9 the Chinese flags (as well as an American flag and a flag with the Olympic rings) were not in fact
10 standing on the sidewalk, but were positioned directly above the sidewalk in what appears to be an
11 elevated grassy area. Docket No. 93 (Turner Decl.), Exh. 2 (Photograph). Apparently, the
12 permitting ordinance applies only to the Bridge’s sidewalk, and because the flagholders were not
13 standing on the sidewalk, they were not technically in violation of the Master Ordinance.¹⁶
14 Moreover, at the hearing, counsel for the plaintiff conceded that the officers made no reference to
15 the content of Turner’s sign, simply asking him to put his sign away in his backpack. Hearing
16 Transcript at 67. Accordingly, the court concludes that there is no genuine issue of material fact
17 here.

18 With respect to Turner’s Fourth Amendment claim of unlawful seizure, plaintiff Turner
19 argues that *Menotti*, should direct the outcome. 409 F.3d 1113. In *Menotti*, the Ninth Circuit
20 considered an emergency ordinance enacted in Seattle during the first WTO conference in 1999.
21 After a spate of violent and destructive protest behavior, the city enacted emergency regulations
22 which set up a limited curfew within a portion of downtown Seattle. *Id.* at 1125. Several protestors
23 filed suit alleging that the ordinance placed an unconstitutional barrier on speech within the
24 restricted area. The court ultimately concluded that the ordinance was constitutional, yet considered
25 an individual constitutional claim based on a Seattle officer’s seizure of a protest sign within the
26 restricted area. *Id.* at 1151-52. The plaintiff carried a protest sign into the restricted area in violation
27 of the curfew ordinance. The court concluded that the officer “had probable cause to arrest [the
28

1 plaintiff] because, by engaging in protest inside the restricted zone without evidence that he was
2 exempt, [the plaintiff] violated [the ordinance.]” *Id.* at 1153. The officer, however, seized the
3 plaintiff’s sign without arresting the plaintiff for the proscribed conduct, namely being the restricted
4 area. *Id.* The court concluded that the officer committed a constitutional violation by seizing the
5 sign but not arresting the plaintiff for the offense. *Id.* at 1154. (“[W]e hold that a reasonable officer .
6 . . . would have understood that his warrantless seizure of [plaintiff’s] sign without an arrest and
7 without exigency offended the guarantees of the Fourth Amendment [and] reverse the district court’s
8 grant of qualified immunity.”).

9 Here the facts are distinguishable from those in *Menotti*. In *Menotti*, the proscribed behavior
10 was the plaintiff’s presence within the restricted zone. Thus, the officer could only have reasonably
11 seized the sign incident to an arrest for violating the curfew or in response to exigent circumstances.
12 In this case, the proscribed behavior in which Turner engaged was the possession of the sign without
13 a permit. The officers’ first response was to advise Turner to put this sign away. JSUF ¶ 146. Only
14 after Turner refused to put away his sign did the officers take the sign away from him. *Id.* Thus, the
15 officer’s seizure of the sign itself without arresting Turner was reasonable because the seizure
16 directly addressed the proscribed behavior.

17 Turner also alleges that the CHP officers used excessive force when taking his sign. With
18 respect to this claim, the court first addresses whether there was a constitutional violation. “A claim
19 against law enforcement officers for excessive force is analyzed under the Fourth Amendment’s
20 ‘objective reasonableness’ standard.” *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912,
21 921 (9th Cir. 2001) (citing *Graham v. Connor*, 490 U.S. 386, 388 (1989)). The court must consider
22 “whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances
23 confronting them,” and balance “the nature and quality of the intrusion on the individual’s Fourth
24 Amendment interests against the countervailing governmental interests at stake.” *Graham*, 490 U.S.
25 at 396-97, (internal citations omitted).

26 Viewing the evidence in the light most favorable to Turner, the defendants’ use of force in
27 seizing Turner’s banner was reasonable. The officers first unsuccessfully requested that Turner put
28

1 the sign down and put it away in his backpack before they took it by force. Docket No. 68 (Devine
2 Decl.), Exh. F (Turner Depo.) at 82:21-84:1. The video evidence reveals no use of excessive force
3 given the circumstances. Devine Decl., Exh C (Video). Accordingly, there was no constitutional
4 violation here because the officers use of force was reasonable given the circumstances. Summary
5 judgment as to qualified immunity based on plaintiff's First amendment and Fourth amendment
6 claims is GRANTED in favor of the CHP defendants.

7 B. 11th Amendment Claim

8 CHP defendants argue that the Eleventh Amendment bars plaintiff Blome's claim for
9 injunctive relief against CHP Commissioner Farrow. The court has already determined that this
10 claim stands given that Blome seeks only prospective relief based on asserted federal constitutional
11 rights. Docket No. 32 (Memorandum and Order Granting Plaintiff's Motion for Leave to Amend
12 Complaint). Accordingly, summary judgment as to Blome's claim for injunctive relief is DENIED.

13 Defendants also argue that plaintiffs are not entitled to declaratory relief as to the remaining
14 CHP defendants because defendant officers have acted constitutionally. As discussed above
15 however, the five regulations in question are unconstitutional on their face. Moreover, the CHP
16 contends that its officers will continue to enforce the current Master Ordinance until otherwise
17 directed. Accordingly, because plaintiff Blome has standing to raise a claim for declaratory relief
18 and because the CHP defendants will continue to enforce the ordinances, summary judgment is
19 DENIED.

20 C. 14th Amendment Claims

21 As plaintiffs do not dispute defendants' assertion that plaintiff's Fourteenth Amendment
22 claims must be analyzed under the First and Fourth Amendments, summary judgment as to these
23 claims is GRANTED in favor of defendants.

24 D. State Law Claims

25 Plaintiff brings claims based on Art. 1, §§ 2, 13 of the California Constitution, Cal. Civ.
26 Code § 52.1(b) and tort-based false imprisonment.

27 1. Art.I, Section 2 - Liberty of Speech

1 “Under [both the federal and state constitutions] . . . , “[p]ermissible restrictions on
2 expression in public fora must be content-neutral, be narrowly tailored to serve an important
3 government interest, and leave open ample alternative channels for the communication of the
4 message.” *Kuba v. I-A Agr. Ass’n*, 387 F.3d 850, 856 (9th Cir. 2004) (quoting *Galvin v. Hay*, 374
5 F.3d 739, 746 (9th Cir. 2004)). Given the court’s conclusion above that the ordinances in question
6 are not narrowly tailored to achieve the government’s substantial interest in safety and order,
7 summary judgment as to plaintiff’s state constitutional speech claim is DENIED.

8 2. Art. I, Section 3 - Unlawful Seizure/False Imprisonment

9 Art.I, Section 13 states: “The right of the people to be secure in their persons, houses, papers,
10 and effects against unreasonable seizures and searches may not be violated . . .” “The California
11 Supreme Court has made clear . . .that ‘[t]he touchstone for all issues under the Fourth Amendment
12 and article I, section 13 of the California Constitution is reasonableness.’” *Sanchez v. County of San*
13 *Diego*, 464 F.3d 916, 928-929 (9th Cir. 2006) (quoting *Ingersoll v. Palmer*, 43 Cal.3d 1321, 1329
14 (1987)). Thus the standard for state unlawful seizure is coextensive with the federal reasonableness
15 standard. *Id.* (“[The] language indicates that the right to be free from unreasonable searches under
16 Art. I § 13 of the California Constitution parallels the Fourth Amendment inquiry into the
17 reasonableness of a search.”). Given the court’s conclusion above with respect to plaintiff’s federal
18 unlawful seizure claim, summary judgment as to plaintiff’s state unlawful seizure claim is
19 GRANTED in favor of CHP defendants.

20 3. False Imprisonment

21 “False imprisonment under California law is the ‘unlawful violation of the personal liberty of
22 another.’” *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1379 (9th Cir. 1998) (quoting *Asgari v.*
23 *City of Los Angeles*, 15 Cal.4th 744, 757 (1997)). Where “confinement [is] pursuant to lawful
24 process” however, there is no false imprisonment. *Asgari*, 15 Cal.4th at 757. Given the court’s
25 conclusion with respect to the reasonableness of the defendant officers’ enforcement of the duly
26 enacted Master Ordinance, the court concludes that the CHP’s fleeting detention of Turner was
27 lawful and summary judgment is GRANTED in favor of defendants.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

4. Cal. Civ. Code § 52.1

An action based on Cal. Civ. Code § 52.1 is supported by any violation of the federal or state constitutions. Cal. Civ. Code § 52.1(b). Because the court has denied summary judgement as to plaintiff's state and federal constitutional claims, summary judgment as to this claim is DENIED.

IV. Motion to Strike & Evidentiary Objections

The District's Motion to Strike is DENIED as MOOT as the court did not consider the evidence in question in reaching its conclusions. The District also objects to various evidentiary submissions proffered by plaintiff in support of plaintiff's opposition to defendant's motion for summary judgment. The court now addresses the two relevant objections.

The District's objection to Bridge manager Kary Witt's deposition testimony referencing the District's response time to problems on the Bridge because it is irrelevant pursuant to Fed. R. Evid. 401 and Fed. R. Evid. 402 is DENIED. Witt's testimony is relevant to the issue of whether the District's permitting requirements are narrowly tailored to address the District's ability to respond to any disturbance presented by an individual or a small group protesting on the Bridge's sidewalks with a sign.

The District's objection to Witt's deposition testimony relating to the District's experience with Jeffrey Orth and his successor, who walked across the Bridge with an American flag on a regular basis, because it is irrelevant pursuant to Fed. R. Evid. 401 and Fed. R. Evid. 402 is DENIED. Witt's testimony is relevant to the issue of whether the District's permitting requirements are narrowly tailored given the District's experience with unannounced expressive activity involving a prop. The District argues that the testimony is proffered out of context, but in considering this evidence, the court was mindful of the content and context of Witt's testimony both preceding and following the statements at issue. Thus, to the extent the court relied upon the statements in question, the court considered them in context.

The District's remaining objections are DENIED as MOOT as the court did not consider the evidence in question in reaching its conclusions.

1 Plaintiffs object to and move to strike various evidentiary submissions proffered by
2 defendants in support of defendants' respective motions for summary judgment. Plaintiff's motion
3 to strike is DENIED.

4
5
6

7 CONCLUSION

8 With respect to plaintiff Blome's motion, summary judgment is GRANTED in favor of
9 plaintiff.

10 With respect to defendant District's motion, summary judgment is DENIED.

11 With respect to defendant CHP officers', summary judgment is GRANTED in part and
12 DENIED in part.

13 Defendants' motion to strike is DENIED.

14 Plaintiff's motion to strike is DENIED.

15
16

17 IT IS SO ORDERED.

18

19 Dated: January 7, 2011

20
21
22
23
24
25
26
27
28



MARILYN HALL PATEL
United States District Court Judge
Northern District of California

ENDNOTES

1. In section F.1(a), “Expressive Activity” is defined as:

Verbal, visual, literary, or auditory speech, communication, or conduct that is intended to convey a political, religious, philosophical, or ideological opinion, view, or message that likely would be understood by those who see or hear the speech, communication, or conduct to be such an opinion, view, or message. Expressive Activity includes, for example, demonstrating, protesting, marching, assembling, distributing written materials and holding signs.

2. “I have had first-hand experience of coming [to the Bridge] without a permit and being restricted on what I can do while on the [B]ridge.” Docket No. 66 (Nazer Decl.), Exh. A (Blome Depo.) at 81:14-16.

3. “This combination of a general but narrow standard with a more specific alternative makes for a close fit with the governmental interests underlying the permitting requirement.” *Food Not Bombs*, 450 F.3d at 1042.

4. Section F.8(c) states in relevant part: “No sign may be larger than 3 feet x 2 feet.” Witt Decl., Exh. K (Ordinance Amending Master Ordinance 2009) at 11.

5. Defendants proffer various incident reports detailing instances of expressive activity that have caused problems on the Bridge. None of the reports address the issue here which is the effect of a single person or a small group with a sign demonstrating on the Bridge and the degree to which imposing a permitting requirement helps the District to mitigate those problems. For example, one report details an incident in which three individuals climbed the suspension cables of the Bridge an unfurled an oversized banner. This resulted in significant delays and disruption of Bridge traffic. This type of speech behavior does not resemble the behavior that plaintiffs seek to engage in and therefore has little bearing on the District’s contention that individual or small group speech involving signs, etc., is too dangerous absent advanced notice. Plaintiffs seek to carry signs that are in keeping with the District’s size limits and to do so in an orderly fashion. Defendants present no evidence that speaks to the particular dangers of this sort of behavior.

6. *See supra* note 1.

7. Section F.8(c) states in relevant part: “Standard and unaltered backpacks, purses, camera bags, and coolers, for example, are not considered props, unless they are used to direct or attract attention to convey a political, religious, philosophical, or ideological message.” Witt Decl., Exh. K (Ordinance Amending Master Ordinance 2009) at 11.

8. The District’s experts opine that even one sign can cause serious driver distraction without presenting any tangible survey or study showing that one sign is *likely* to cause driver distraction. For example, one expert states:

The requirement of having a permit for . . . groups utilizing signs and/or props allows the District to monitor the progress of the participants and help facilitate the flow of vehicle and pedestrian traffic on the Bridge by bringing in California Highway Patrol officers and District employees. The permit requirement also identifies participating groups that may have conflicting opinions and puts monitoring personnel on alert to prevent verbal debate or negative physical interaction that could push persons; involved or not; into traffic or otherwise cause injuries. Docket No. 72 (Cameron Decl.), Exh. 1 at 4.

Setting aside the conclusory nature of this expert’s speculative pronouncements, the expert’s statement

1 suggests that the primary benefit of the permitting requirement is to simply inform the District in
2 advance that expressive activity is going to take place. However, “the significant governmental interest
3 justifying the unusual step of requiring citizens to inform the government in advance of expressive
4 activity has always been understood to arise only when large groups of people travel together on streets
5 and sidewalks.” *Food Not Bombs*, 450 F.3d at 1039.

6 Another expert did not rely upon any personal observation of the effects of an individual with
7 a sign on the Bridge’s sidewalk, but rather avers that in writing his report, he relied in part upon “61 of
8 the District’s ‘Incident Report Form’ that were related specifically to the types of events that are the
9 subject of this report.” Docket No. 74 (Wachtel Decl.), Exh. 1 (Wachtel Report) at 11. A closer review
10 of the report does not reveal any analysis with respect to alleged distractions or safety concerns related
11 to a single speaker with a sign within the Master Ordinance’s size limitations. In addition, the notable
12 cases of expressive activity that this expert highlights often involve groups larger than 50, who are not
13 the subject of plaintiff’s Blome’s facial challenge, and makes no mention of the presence of signs or
14 their contribution to the alleged problems caused by the demonstrations. *Id.* at 11-13. With regard to
15 the District’s permitting requirement, this expert ultimately concludes that, “it is appropriate for the
16 District to subject [signs, props and musical instruments] to the permit process so that the District
17 personnel can ensure that any such sign or props comply with size and height limits ...” *Id.* at 17. Given
18 that nowhere in its arguments does the District suggest the purpose of taking the unprecedented step of
19 applying a prior restraint on speech to an individual speaker is to ensure sign size compliance, this
20 expert’s testimony does little to advance the District’s contention that this court should depart from
21 Ninth Circuit precedent.

22 This expert also states that because, “prior research and my assessment in this matter
23 demonstrate that drivers are under higher levels of cognitive demand, and have less margin for error,
24 during periods of heavy traffic, I conclude that [section F.6(d), which prohibits expressive activity after
25 2:00 p.m. on weekends] is appropriate and reasonable.” *Id.* Never mind that this assessment appears
26 to contradict another of defendants’ experts, Mr. Ruzak, who states that in times of increased traffic,
27 expressive activity might actually pose less of a risk. Docket No. 92 (Manolius Decl.), Exh. 1 (Ruzak
28 Depo.) at 44:22-45:14 (“[when the [B]ridge is congested, the expressive activity may be a lesser impact
because you’re traveling at 5 miles an hour . . . It’s more when traffic is free flowing and they’re
distracted, [that] the potential for accidents is greater than when you’re traveling 5 miles an hour
stop-and-go and moving very slowly.”)

9. The District argues that, individuals who wish to engage in spontaneous speech using signs,
props or musical instruments should pick another public forum in San Francisco, “just not[seek to do
so] on the Bridge.” District’s Opposition at 21.

10. The Bridge’s manager testifies that Jeffrey Orth’s flag-carrying across the Bridge was “featured
at least very prominently in the Bay Area media if not nationally and CNN [sic], et cetera.” Krishna
Decl., Witt Depo. at 130:3-12.

11. Defendants’ witness recounts an incident in which a Bridge Captain was allegedly hit in the head
with a picket sign some time in the 80’s or early 90’s. The witness has no personal knowledge of this
alleged event, and defendants present no other evidence that a picket sign has been used as a weapon.
Defendants’ witness also testifies to an incident in which an umbrella injured another person on the
Bridge. Veit Decl., Exh. 4 (Locati Depo.) at 62:9-12.

12. In addition, the plaintiffs in *Foti* were allowed to bring flags, crosses, and plastic babies for use
in their expressive activities. *Id.* at 634.

13. *See supra* note 5; *see also* Krishna Decl., Witt Depo. at 24-26.

14. Defendants’ rationale for imposing the time restrictions is that when there is more traffic,
expressive activity becomes more dangerous. Defendants’ expert, Edward Ruzak, however states that,
“[when the [B]ridge is congested, the expressive activity may be a lesser impact because you’re

1 traveling at 5 miles an hour . . . It's more when traffic is free flowing and they're distracted, the potential
2 for accidents is greater than when you're traveling 5 miles an hour stop-and-go and moving very
3 slowly." Thus, Ruzak's testimony contradicts the District's contention that in times of greater traffic,
4 expressive activity involving signs, props or musical instruments engenders greater safety problems.

5 15. Plaintiff Turner sues the CHP officers in both their individual and official capacities, however
6 "[a]n official sued in his official capacity has the same immunity as the state, and is entitled to eleventh
7 amendment immunity." *Pena v. Gardner*, 976 F.2d 469, 473 (9th Cir. 1992). Thus, Turner may only
8 sue the CHP officers in their individual capacities, and qualified immunity applies only insofar as they
9 are sued in their individual capacities. *Community House, Inc. v. City of Boise, Idaho*, 623 F.3d 945,
10 965-66 (9th Cir. 2010).

11 16. This is perhaps a testament to the arbitrary nature of the District's permitting requirements.
12 Much in the same way the District determines a picket sign, and not an umbrella, for example, is
13 particularly vulnerable to unpredictable wind, the District believes an unpermitted sign on the Bridge's
14 sidewalks is more likely to lead to driver distraction than a flag held aloft in what amounts to the same
15 vicinity. The photograph reveals that the bright red Chinese flags likely posed a significant distraction
16 to drivers.

17
18
19
20
21
22
23
24
25
26
27
28