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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

WILLIAM G. HAMPSMIRE,  
Plaintiff,

vs.

CITY OF SANTA CRUZ, KEVIN VOGEL in  
his official capacity as police chief for the  
CITY OF SANTA CRUZ, PATRICK  
BAYANI, in his individual and official  
capacity as a police officer for the CITY OF  
SANTA CRUZ, and CHRIS VIGIL, in his  
individual and official capacity as a police  
officer for the CITY OF SANTA CRUZ,  
Defendants.

Case No. 11-cv-3408 RMW

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTIONS FOR  
PARTIAL SUMMARY JUDGMENT**

This civil rights action arises from the arrest of plaintiff William Hampsmire ("plaintiff") for disturbing the peace while preaching on a public sidewalk in Santa Cruz, California. Plaintiff and defendants the City of Santa Cruz (the "City"), Officer Kevin Vogel, Officer Patrick Bayani and Officer Chris Vigil (the "Officer Defendants") (collectively "Defendants") have filed cross-motions for partial summary judgment. For the reasons below, the court: (1) grants plaintiff's motion as to his due process claim, concluding that the municipal ordinance under which he was cited is void for vagueness; (2) denies both motions without prejudice as to plaintiff's claims under the Fourth Amendment and the free speech clause of the First Amendment, except with respect to the City's motion under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978), which is granted;

1 (3) denies both motions without prejudice as to plaintiff's state law claims; (4) grants defendants'  
2 motion as to plaintiff's free exercise, overbreadth and equal protection claims; and (5) issues a  
3 permanent injunction against enforcement of the noise ordinance as currently drafted but grants  
4 defendants' motion as to the remainder of plaintiff's claim for injunctive relief.

### 5 I. BACKGROUND

6 Plaintiff is a "preacher of the gospel of Jesus Christ." Hampsmire Decl. ¶ 15. Based on his  
7 interpretation of certain passages in the Bible, plaintiff believes it is his religious duty to spread  
8 Jesus' teachings. *Id.* Plaintiff does not preach in a "low, conversational volume" because he feels  
9 it is more efficient, effective and consistent with the Bible's message to preach to crowds of  
10 people, some of whom are more comfortable gathering at a distance. *Id.* ¶ 16. He believes that if  
11 he were "forced to chase after groups of two or three people to preach in a normal conversational  
12 tone," he would be accused of harassment. *Id.* For at least the last seven years, plaintiff has  
13 preached two to four times per week at numerous public locations in California and elsewhere. *Id.*  
14 ¶ 15.

15 On May 30, 2010 at approximately 6 P.M., plaintiff was stationed on a public sidewalk in  
16 the downtown business district of Santa Cruz, California. *Id.* ¶ 2. He was preaching to "all  
17 present, including those across the street." *Id.* ¶ 3. Santa Cruz Police Officer Bayani ("Officer  
18 Bayani") was dispatched to the vicinity because someone had reported a noise disturbance coming  
19 from approximately seventy feet away. Bayani Decl. ¶ 4. Police dispatch advised Officer Bayani  
20 that the reporting party did not want to sign a citizen's arrest form at that time, but hoped the  
21 police could get plaintiff to be quiet. *Id.*

22 When Officer Bayani arrived in the area, he observed plaintiff holding a sign attached to a  
23 long pole and preaching at a "loud volume." Bayani Decl. ¶ 5; *see also* Pl's Exh. A, ("Video") at  
24 1:30-2:30.<sup>1</sup> Officer Bayani also saw people on the street who appeared to be yelling at plaintiff.  
25 Bayani Decl. ¶ 5. Given the proximity of plaintiff's audience, Officer Bayani "did not think

26  
27 <sup>1</sup> Plaintiff videotaped his encounter with the police and submitted the video along with his  
28 motion for summary judgment.

1 [plaintiff] needed to give his presentation that loudly, even if he was trying to reach people across  
2 the street, because sound carries very well and echoes in downtown Santa Cruz." Bayani Decl. ¶  
3 5.

4 Officer Bayani asked plaintiff to lower his voice because someone had filed a noise  
5 complaint. Bayani Decl. ¶ 6. Plaintiff responded that he had an attorney, and that he did not mind  
6 suing Officer Bayani or others for violating the First Amendment. *Id.*; Video at 173, 2:55-3:30.  
7 Officer Bayani advised plaintiff that he was not there regarding his freedom of speech, but rather  
8 his volume. Bayani Decl. ¶ 6. At this time, Officer Bayani noticed that a woman was videotaping  
9 the incident. *Id.*

10 Police dispatch then informed Officer Bayani that the reporting party wanted to sign a  
11 formal complaint. Bayani Decl. ¶ 7. The reporting party indicated that he worked in a second-  
12 floor office approximately seventy feet from plaintiff's location, and that he was unable to work  
13 because of the volume of plaintiff's "presentation." Bayani Decl. ¶ 7. The reporting party also  
14 stated that he had been listening to plaintiff for approximately one hour. *Id.* Officer Bayani met  
15 with the reporting party in front of his office and was still able to "clearly" hear plaintiff's voice.  
16 *Id.* Officer Bayani did not suggest that the reporting party close his office window, which was  
17 open, because it was summertime and the officer did not "know if [the] air conditioning in the  
18 building worked or not." Bayani Depo. at 18-22.

19 The reporting party signed a citation against plaintiff for a violation of Santa Cruz  
20 Municipal Code § 9.36.020 (the "noise ordinance"). Bayani Decl. ¶ 8. Given Officer Bayani's  
21 observations of the volume of plaintiff's presentation, the close proximity of a reasonably-sized  
22 audience, the fact that sounds travel and echo off of buildings in the downtown corridor, the  
23 reporting party's description of a prolonged disturbance, and the fact that plaintiff was not willing  
24 to moderate his behavior, Officer Bayani believed there was probable cause to cite plaintiff for  
25 violating the noise ordinance. *Id.* Officer Bayani did not believe the situation involved a clear and  
26 present danger of immediate violence. Bayani Depo. at 42:9-20.

27 Officer Bayani returned to plaintiff's location to get his identifying information and issue  
28 the citation. Bayani Decl. ¶ 9. He then asked plaintiff to move to another location so the reporting

1 party would not complain again. *Id.* Plaintiff responded that he would move to the other side of  
2 the street. *Id.* Officer Bayani told him that would not be reasonable. *Id.* At that time, plaintiff,  
3 who was previously "admonish[ed]" by the police for preaching in the same area, believed that  
4 "no matter where I moved, the Santa Cruz police were going to continue to ask me to move  
5 somewhere else or stop preaching." Hampsmire Decl. ¶¶ 13, 15.<sup>2</sup>

6 Officer Bayani gave plaintiff the choice of either lowering his volume or moving to  
7 another location. Bayani Decl. ¶ 10. Plaintiff refused, stating that "you're going to have to arrest  
8 me for preaching ... for my freedom of religion." Video at 174, 5:14. Officer Bayani said he  
9 would rather plaintiff move because he did not want to arrest him. Bayani Decl. ¶ 10. By this  
10 point, several people had gathered nearby. Some were taunting plaintiff; others appeared to be  
11 taunting Officer Bayani. Video at 174, 8:00-10:00.

12 Plaintiff took out his cell phone and indicated that he was calling his attorney. Bayani  
13 Decl. ¶ 12. While on the phone, plaintiff asked Officer Bayani what he would do if plaintiff did  
14 not leave; the officer responded that the reporting party's office was "just right there" and that he  
15 did not want to arrest plaintiff. Video at 174, 7:40-8:00. After ending his phone call, plaintiff  
16 took apart the sign he had been holding, gave his belongings to the woman who was videotaping  
17 him and resumed preaching at a "louder volume." Bayani Decl. ¶ 13; Video at 174, 7:56-10:00.<sup>3</sup>  
18 Several other police officers arrived on the scene. Video at 174, 7:00-9:00. Officer Bayani had  
19 not yet formed the opinion that a clear and present danger of immediate violence existed, but the  
20 thought was "in the back of [his] mind." Bayani Depo. 54:1-5. Officer Bayani also felt that  
21 plaintiff's behavior "was an attempt to set me or another officer up." Bayani Decl. ¶ 12.

22 Officer Bayani then called his supervisor, Sergeant Connor, and advised him of the  
23 situation. Bayani Decl. ¶ 11. He informed Sergeant Connor that the crowd appeared to be  
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25 <sup>2</sup> According to plaintiff, in 2008, he was preaching on the same corner with a friend who  
26 was cited shortly after complying with a police request to move to a different location.  
Hampsmire Decl. ¶ 4.

27 <sup>3</sup> It does not appear from the video that plaintiff increased his volume after making the  
28 phone call.

1 becoming "agitated." *Id.* Sergeant Connor authorized Officer Bayani to arrest plaintiff for a  
 2 violation of Cal. Pen. Code § 415(2). *Id.*

3 Officer Bayani handcuffed plaintiff and escorted him to Officer Vigil's patrol car. Bayani  
 4 Decl. ¶ 13. Officer Bayani met Officer Vigil at the county jail, took custody of plaintiff, and  
 5 booked him for a violation of Cal. Penal Code § 415(2). *Id.* The district attorney declined to  
 6 prosecute plaintiff, and he was released shortly thereafter. *See* Dkt. No. 35 at 2.

## 7 **II. PROCEDURAL HISTORY**

8 On July 12, 2011, plaintiff filed a complaint against the City of Santa Cruz and Officers  
 9 Bayani, Vogel<sup>4</sup> and Vigil, alleging violations of the First, Fourth and Fourteenth Amendments,  
 10 Cal. Civ. Code § 52.1, and a claim for false imprisonment. *See* Dkt. No. 1 (Compl.). He seeks  
 11 damages and an injunction preventing defendants from "interfering with [his] lawful speech or  
 12 arresting him under similar circumstances." *Id.* at 6.

13 On July 27, 2012, the parties filed cross-motions for partial summary judgment. While  
 14 plaintiff insists that he is asserting an "as-applied" challenge to defendants' enforcement of the  
 15 noise ordinance and Section 415, some of his arguments regarding the noise ordinance are better  
 16 construed as a facial attack. *See Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998)  
 17 (discussing the difference between facial and as-applied challenges). Where applicable, the court  
 18 will consider both.<sup>5</sup>

## 19 **III. DISCUSSION**

### 20 **1. FIRST AMENDMENT**

21 <sup>4</sup> Officer Vogel is the chief of the Santa Cruz Police Department.

22 <sup>5</sup> Defendants contend that because the allegations in the complaint focus on the officers'  
 23 conduct, the court should decline to consider any facial infirmities with the noise ordinance. Dkt.  
 24 No. 28 at 2-3 (citing *Calvi v. Knox County*, 470 F.3d 422, 430-31 (1st Cir. 2006)). The court  
 25 disagrees. Unlike *Calvi*, plaintiff's challenge to the constitutionality of the noise ordinance was  
 26 raised in a separate motion for summary judgment, not an opposition motion. *Compare Calvi*, 470  
 27 F.3d at 431. More importantly, the court is not persuaded by defendants' claim that they were  
 28 prejudiced by being "unable to perform as much research as [they] would otherwise deem  
 necessary." Dkt. No. 29. Defendants were free to seek additional time to respond to plaintiff's  
 motion, and their thorough, well-written brief is more than adequate to allow the court to consider  
 the issues in question.

1           **A.     Free Speech Clause**

2           Plaintiff contends that the noise ordinance and Cal. Pen. Code § 415, as applied to his  
3 preaching, infringe his right to free speech. The noise ordinance reads:

4           **9.36.020 UNREASONABLY DISTURBING NOISES**

5           No person shall make, cause, suffer or permit to be made any noises or sounds (a)  
6 which are unreasonably disturbing or physically annoying to people of ordinary  
7 sensitiveness or which are so harsh or so prolonged or unnatural or unusual in  
8 their use, time or place as to cause physical discomfort to any person, and (b)  
9 which are not necessary in connection with an activity which is otherwise  
lawfully conducted. As used in this section, "lawfully conducted activities" shall  
include, but not be limited to, any and all activities conducted by the city for  
public health, safety or welfare purposes.

10           **9.36.025 PUBLIC HEALTH AND SAFETY**

11           This chapter shall not apply to refuse collection, recyclable collection or street  
12 sweeping activities undertaken by, or pursuant to contract with, the city of Santa  
13 Cruz. Similarly, this chapter shall not apply to any other activity undertaken by  
14 the city, another governmental agency, or city contractor for public health and  
safety purposes when, in the judgment of the city or governmental agency, such  
activity cannot be undertaken effectively or efficiently in compliance with the  
regulations set forth in this chapter.

15           Cal. Pen. Code § 415 provides that "[a]ny person shall be punished . . . who maliciously  
16 and willfully disturbs another person by loud and unreasonable noise." Cal. Pen. Code § 415(2).  
17 An officer making an arrest under Section 415 based on "loud shouting" must have probable  
18 cause to believe that there is a "clear and present danger of imminent violence" or that "the  
19 purported communication is used as a guise to disrupt lawful endeavors." *In re Brown*, 9 Cal. 3d  
20 612, 621 (Cal. 1973). Although Section 415 is narrower in scope than the noise ordinance,<sup>6</sup> the

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22           <sup>6</sup> Plaintiff contends that because both Section 415 and the noise ordinance prohibit  
23 "unreasonable" noises, the court should construe the statutes to have the same scope. However,  
24 the reason Section 415 is limited to noises that are either likely to incite violence or intended to  
25 disturb is that without such a construction, the statute is "so broad as to amount to a total  
26 prohibition on loud public speech." *In re Brown*, 9 Cal. 3d 612, 620 (Cal. 1973). By contrast, the  
27 noise ordinance does not apply to merely "loud" noises, but rather those that are "unreasonably  
28 disturbing . . . to people of ordinary sensitiveness" or "cause physical discomfort." Such  
restrictions are clearly permissible under the First Amendment. *See, e.g., Kovacs v. Cooper*, 336  
U.S. 77, 83 (1949) (finding that "disturbing noises" are "nuisances well within the municipality's  
power to control").

1 parties appear to agree that for purposes of a free speech analysis, the enforcement of both  
2 statutes essentially constitutes a single act.

3 It is well-settled that "[m]embers of the public retain strong free speech rights when they  
4 venture into public streets and parks, which have immemorially ... been used for purposes of  
5 assembly, communicating thoughts between citizens, and discussing public questions." *Pleasant*  
6 *Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009) (citations omitted). Nevertheless, the  
7 government may impose reasonable restrictions on the time, place or manner of speech in a public  
8 forum. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Such restrictions must be (1)  
9 content-neutral; (2) narrowly tailored to serve a significant governmental interest; and (3) leave  
10 open ample alternative channels of communication. *One World One Family Now v. City &*  
11 *County of Honolulu*, 76 F.3d 1009, 1012 (9th Cir. 1996) (citing *Ward*, 491 U.S. at 791). The  
12 government bears the burden of showing that its regulation of speech is permissible. *See Deegan*  
13 *v. City of Ithaca*, 444 F.3d 135, 142 (2d Cir. 2006) (citing *United States v. Doe*, 968 F.2d 86, 90  
14 (D.C. Cir. 1992)).

15 As an initial matter, there is no evidence that plaintiff was arrested based on the content of  
16 his speech. Plaintiff does not dispute Officer Bayani's testimony that he "wasn't paying attention  
17 to [plaintiff's] content," but rather to "the volume and what was happening around him." Bayani  
18 Depo. at 66:8-10. There is also no merit to plaintiff's contention that the noise ordinance is  
19 content-based on its face because it exempts some "speakers," including trash collectors and street  
20 sweepers. Even if the sounds generated by such entities qualify as "speech," the exemption is  
21 plainly "speaker-based," not content-based. *Reed v. Town of Gilbert*, 587 F.3d 966, 977 (9th Cir.  
22 2009); *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1077 (9th Cir. 2006) ("That the  
23 law affects plaintiffs more than other speakers does not, in itself, make the law content based.").  
24 In addition, Officer Bayani clearly provided adequate alternatives for communication by offering  
25 plaintiff the opportunity to continue preaching at a lower volume or a different location. *See, e.g.,*  
26 *Mastrovincenzo v. City of New York*, 435 F.3d 78, 101 (2d Cir. 2006) ("The requirement that  
27 ample alternative channels exist does not imply that alternative channels must be perfect  
28 substitutes for those channels denied to plaintiffs by the regulation at hand.").



1           The dispute thus turns on whether defendants' conduct was narrowly tailored to serve a  
2 significant government interest. While the City has a significant interest in "protecting its citizens  
3 from unwelcome noise," *Ward*, 491 U.S. at 791, "the 'narrowly tailored' standard does not tolerate  
4 a time, place, or manner regulation that ... burden[s] substantially more speech than necessary to  
5 achieve its goal." *Deegan*, 444 F.3d at 143. Where protected speech is implicated, determining  
6 whether the enforcement of a noise ordinance is constitutional requires a "fact specific and  
7 situation specific inquiry." *Id.* at 142. As the Supreme Court has explained, "[a]lthough a silent  
8 vigil may not unduly interfere with a public library, making a speech in the reading room almost  
9 certainly would. That same speech should be perfectly appropriate in a park. The crucial question  
10 is whether the manner of expression is basically incompatible with the normal activity of a  
11 particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

12           In support of their position, defendants rely on *Costello v. City of Burlington*, 632 F.3d 41  
13 (2d Cir. 2011) and *Rosenbaum v. City & County of San Francisco*, 484 F.3d 1142 (9th Cir. 2007).  
14 In *Costello*, a street preacher was cited under an ordinance banning "loud or unreasonable noise"  
15 while preaching "at the top of his stentorian voice" on a pedestrian mall in Burlington, Vermont.  
16 *Costello*, 632 F.3d at 44. The preacher brought a First Amendment claim against the police, and  
17 the district court granted summary judgment for the officers on qualified immunity grounds. On  
18 appeal, the Second Circuit found that the record lacked evidence of "the character and  
19 environment of the area in which the ordinance was enforced," and remanded the case for findings  
20 as to "the activities and noise level that are 'usual and customary' in the space where the alleged  
21 violation occurred." *Costello v. City of Burlington*, 329 Fed. Appx. 330, 331 (2d Cir. 2009).

22           The defendants then supplemented the record with affidavits characterizing the area as a  
23 "tranquil" place with "negligible" vehicle traffic "where people go to walk and talk, or enjoy an  
24 outdoor meal, without having to raise their voices to be heard." *Costello v. City of Burlington*, 708  
25 F. Supp. 2d 438, 446 (D. Vt. 2010). The district court also found that the preacher's voice  
26 "dominated the marketplace" from more than 350 feet away, attracting a noise complaint from a  
27 local business owner, and that while the neighborhood sometimes hosted loud public events, such  
28 activities required permits from the city. *See id.* at 444, 448. The court held that "taking into



1 account the 'nature and purposes of [the area], along with its ambient characteristics ... [the  
2 arresting officer] did not unreasonably burden [the preacher's] protected speech." *Id.* at 447  
3 (quoting *Doe*, 968 F.2d at 91).

4 The preacher again appealed, and this time the Second Circuit affirmed. The court focused  
5 on the findings that the plaintiff's voice could be heard from great distance, "was not subsumed in  
6 any competing ambient noise" and "impinged on the use of the neighborhood by others with equal  
7 claim." *Costello*, 632 F.3d at 43. The majority rejected the argument that a second remand was  
8 necessary to determine whether nearby residents and business owners were *actually* disturbed,  
9 reasoning that "polling" such individuals was unnecessary to "confirm that people who dwell [in  
10 the area] may wish to open a window without hearing [the preacher] screaming, or that shop  
11 owners or customers prefer a scream-free environment in order to focus on their dealings, or that  
12 diners in outdoor restaurants want to listen to each other without having to talk over [the  
13 preacher]." *Id.* at 47-48. The court succinctly concluded that the officer's application of the noise  
14 ordinance was "reasonable and therefore constitutional." *Id.* at 49.

15 The Ninth Circuit confronted a slightly different scenario in *Rosenbaum*. There, police  
16 officers cited, under Section 415, two Christian evangelists who used amplified sound to conduct  
17 "religious outreach" in San Francisco, California. *Rosenbaum*, 484 F.3d at 1163. The evangelists  
18 claimed, among other things, that the officers lacked probable cause to invoke Section 415 and  
19 therefore violated the First Amendment. After a bench trial, the district court explained its  
20 findings as follows:

21 At the time of the citation ... plaintiff Rosenbaum was using amplified sound in a  
22 mixed residential/commercial neighborhood after 9:00 p.m. He did not have a  
23 permit to use amplified sound. Officer Mark Lundin, a police officer on vehicle  
24 patrol, heard the sound from a block away with his windows closed, responded  
25 and asked Rosenbaum to turn the sound down. Approximately fifteen minutes  
26 later, Officer Lundin was dispatched on a noise complaint, at which time the  
27 complainant, Joe Narvid, signed a citizen's arrest card. Narvid reported that  
28 Rosenbaum was keeping his children awake and had refused to turn the sound  
down when Narvid requested that he do so ... Based on what was reported to him,  
[the officer] had probable cause to believe Rosenbaum continued to use  
amplifiers, at a late hour and without the requisite permit, for purposes of vexing  
and annoying Narvid and not for the purpose of communication.

....

1  
2 At approximately 9:30 p.m. ... at Broadway and Columbus Avenue, [plaintiff]  
3 Livingston was preaching using amplification and had no permit for such  
4 amplification. Officer Milan Kangrga, on patrol in the North Beach area,  
5 responded to a noise complaint and requested that Livingston turn down his  
6 sound, which he did. Officer Kangrga returned, again in response to a noise  
7 complaint, at which time the volume was loud, and the complainant, Harry  
8 Wamack, who, by his address as indicated in the police report, resides near that  
9 intersection, signed a citizen's arrest card. There is no indication of any encounter  
10 between the complainant and Livingston in this instance, however, or of the  
11 particular manner in which the complainant's peace was disturbed. Nevertheless,  
12 given Livingston's lack of permit, his knowledge of a complaint, and his  
13 increasing the volume of his amplifier to a high level once the police had left the  
14 scene, it cannot be said that Officer Kangrga had no reasonable cause to believe  
15 Livingston did so not to communicate but rather to annoy the individual who had  
16 seen fit to report him.

17 *Rosenbaum v. City & County of San Francisco*, No. 96-3409 MMC, 2005 U.S. Dist. LEXIS 963,  
18 at \*52-54 (N.D. Cal. Jan. 12, 2005).

19 On appeal, the Ninth Circuit explained that for First Amendment purposes, "the question is  
20 whether a prudent person in the position of the officers who cited appellants would have believed  
21 that appellants were committing the offense of disturbing the peace under § 415, with the requisite  
22 specific intent to annoy." *Id.* In affirming the judgment below, the court reasoned that "[b]ecause  
23 [the plaintiffs were] on notice after the first warning that [their] volume was excessive, the district  
24 court could draw the permissive inference that [their] intent was to annoy or vex. No more is  
25 required to make a valid showing of probable cause." *Id.*

26 The court agrees that *Costello* and *Rosenbaum* are extremely helpful in analyzing the  
27 instant dispute. Both cases make clear that the rights of religious speakers do not trump those of  
28 people who live or work near public forums, and that courts can determine whether a noise  
ordinance is reasonably applied as a matter of law. However, they also highlight the inadequacy  
of the record currently before the court. Defendants' submissions indicate only that: (1) plaintiff's  
voice could be heard "clearly" from 70 feet away through an open window; (2) he attracted one  
noise complaint; (3) he preached for over an hour; and (4) sound "carries very well and echoes in  
downtown Santa Cruz." Bayani Decl. ¶ 5. Without any information about the activities and noise  
level typical of downtown Santa Cruz, such evidence is insufficient to show that plaintiff's volume

1 was unreasonable *under the circumstances*. Compare *Costello*, 708 F. Supp. 2d at 446  
2 (reasonable to restrict speech that could be heard from 350 feet away given the character of the  
3 area) and *Rosenbaum*, 484 F.3d at 1162 (reasonable to restrict amplified speech that could be  
4 heard from a block away with the windows closed after 9 P.M. in a mixed residential/commercial  
5 area) with *Deegan*, 444 F.3d at 143 (unreasonable to restrict speech that could be heard from 25  
6 feet away in a public square because it would prohibit "the sounds that typify the [area] and the  
7 activities it is meant to facilitate") and *Doe*, 968 F.2d at 91 (unreasonable to restrict noise  
8 exceeding 60 decibels at 50 feet in a park "exposed to every form of urban commotion - passing  
9 traffic, bustling tourists, blaring radios, performing street musicians, visiting schoolchildren").

10 In fact, plaintiff's video shows that at the time of the incident, the downtown corridor was  
11 filled with the sounds of traffic, music, clapping, and the voices of other people on the street. Of  
12 course, it is impossible to draw conclusions from the video about the typical noise level in the area  
13 or the volume of the sounds in the background. The video also says little about the kinds of  
14 activities that typify the neighborhood—plaintiff's conduct would clearly be more appropriate in a  
15 place where similar "soapbox" presentations and street performances are common. Thus, although  
16 the video does not compel a finding in plaintiff's favor, it makes it difficult to adopt defendants'  
17 view that his arrest was "necessary to maintain the usual and customary decorum" of downtown  
18 Santa Cruz. *Costello*, 708 F. Supp. 2d at 447.

19 The court also rejects defendants' contention that under *Rosenbaum*, plaintiff's arrest was  
20 constitutional simply because he refused to lower his voice after being advised of a noise  
21 complaint. First, like *Costello*, *Rosenbaum* requires an officer to determine whether a speaker's  
22 conduct is objectively unreasonable. See *Rosenbaum*, 484 F.3d at 1163 (noting that plaintiff  
23 "disregarded the initial warning and maintained his volume at an *unreasonably* loud level so as to  
24 prompt another complaint") (emphasis added). As plaintiff's speech was unamplified, occurred  
25 during daylight hours and required no permit, *Rosenbaum* does not govern this case.

26 Second, Officer Bayani did not indicate that he believed plaintiff intended to disturb the  
27 reporting party or anyone else, but rather to "set up" the police. See Bayani Decl. ¶ 12; compare  
28 *Rosenbaum*, 2005 U.S. Dist. LEXIS 963, at \*54 (police had probable cause to find the plaintiff

1 intended to "annoy the individual who had seen fit to report him"). This is an oversimplification.  
2 It is undisputed that plaintiff had been preaching for an hour before Officer Bayani arrived.  
3 Defendants also do not dispute that when plaintiff was asked to stop, he explicitly asserted what he  
4 viewed as First Amendment rights and insisted that he would preach until he was either arrested or  
5 left alone. While this may have put Officer Bayani in a difficult position, it does not follow that  
6 plaintiff's presentation was a "set up" or "merely a guise to disturb." *In re Brown*, 9 Cal. 3d at 619  
7 (emphasis added).<sup>7</sup> "The First Amendment protects verbal criticism, challenges, and profanity  
8 directed at police officers unless the speech is 'shown likely to produce a clear and present danger  
9 of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.'" *United States v. Poocha*, 259 F.3d 1077, 1080 (9th Cir. 2001) (quoting *City of Houston v. Hill*,  
10 482 U.S. 451, 461 (1987)). Put another way, unless plaintiff's conduct was objectively disturbing,  
11 his speech does not lose constitutional protection because he attracted a noise complaint or sought  
12 to challenge the enforcement of the noise ordinance.  
13

14 **i. Qualified Immunity**

15 Defendants next argue that even if they are found to have violated plaintiff's free speech  
16 rights, the officer defendants are entitled to qualified immunity because reasonable officers could  
17 disagree on whether plaintiff's arrest was lawful. "Qualified immunity protects government  
18 officials from liability for civil damages insofar as their conduct does not violate clearly  
19 established statutory or constitutional rights of which a reasonable person would have known." *Tibbetts v. Kulongoski*, 567 F.3d 529, 535 (9th Cir. 2009) (quoting *Harlow v. Fitzgerald*, 457 U.S.  
20 800, 818 (1982)). A district court must decide the issue of qualified immunity as a matter of law  
21 when "the material, historical facts are not in dispute, and the only disputes involve what  
22 inferences properly may be drawn from those historical facts." *Conner v. Heiman*, 672 F.3d 1126,  
23 1131 (9th Cir. 2012) (citation omitted). On the other hand, the court may not resolve the issue on  
24 summary judgment where "historical facts material to the qualified immunity determination are in  
25 dispute." *Id.*  
26

27 \_\_\_\_\_  
28 <sup>7</sup> According to Santa Cruz Deputy Chief of Police Steven Clark, disturbing an "officer's  
peace" cannot support a citation under the noise ordinance. Dkt. No. 24 (Clark Decl.) ¶ 4.

1 The court finds that material, historical facts are lacking here. As noted above, even with  
2 the video, the court has no information about the "usual and customary" activities and noise level  
3 in downtown Santa Cruz. *Costello*, 632 F.3d at 44. This is information that Officer Bayani, a 17-  
4 year veteran of the Santa Cruz Police Department, presumably had at the time of the arrest. *See*  
5 Bayani Decl. ¶ 2. But with no evidence in the record concerning the character of the area, the  
6 court cannot determine "whether it would be clear to a reasonable officer that [plaintiff's] conduct  
7 was unlawful." *Saucier v. Katz*, 533 U.S. 194, 202 (2001); *compare Costello*, 632 F.3d at 52  
8 (finding qualified immunity appropriate where the arresting officer, a 22-year veteran, testified  
9 that the preacher's volume was "not typical, usual, or customary" for that location, and that he  
10 believed the yelling was disruptive for other people in the area) (emphasis in original).<sup>8</sup> Plaintiff's  
11 refusal to comply with a police order, without more, plainly does not justify an arrest for  
12 disturbing the peace. *Cf. Dirks v. Grasso*, 449 Fed. Appx. 589, 591-94 (9th Cir. 2011) (no  
13 qualified immunity for the arrest under Section 415 of a man who "interjected himself" into a  
14 pending personnel matter between a police officer and a cadet but did not threaten the officer with  
15 violence or use words likely to induce violence); *Knox v. Southwest Airlines*, 124 F.3d 1103, 1109  
16 (9th Cir. 1997) ("Even if his conduct was not entirely deferential and obedient, defendants did not  
17 have a reasonable belief as a matter of law that Knox violated the disorderly conduct statute.").  
18 Accordingly, the court denies both motions without prejudice as to plaintiff's free speech claim  
19 against the officer defendants.

## 20 ii. Municipal Liability

21 The City may be held liable under Section 1983 only where one of its customs or policies  
22 caused the violation of plaintiff's constitutional rights. *Monell v. Dep't of Soc. Servs.*, 436 U.S.  
23 658, 691 (1978). In order to establish a policy or custom sufficient for *Monell* liability, plaintiff  
24 must show a constitutional violation resulting from: (1) an employee acting pursuant to an  
25 expressly adopted official policy; (2) an employee acting pursuant to a longstanding practice or  
26

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27 <sup>8</sup> It is worth noting that the plaintiff in *Costello* also videotaped his interaction with police,  
28 yet the Second Circuit reversed a grant of qualified immunity because it found the record  
insufficient. *See Costello*, 632 F.3d at 43.

1 custom; or (3) an employee acting as a "final policymaker." *Webb v. Sloan*, 330 F.3d 1158, 1164  
2 (9th Cir. 2003).

3         The City argues that it is not liable for any alleged free speech violation because its official  
4 policy requires an officer initiating an arrest pursuant to a noise complaint to examine the totality  
5 of the circumstances to determine whether "the noise they are hearing is consistent with something  
6 that could ... reasonably result in a disturbance." Clark Decl. ¶ 4. Plaintiff does not dispute that  
7 this is the City's official policy. Nor does he point to any statements by the City's Rule 30(b)(6)  
8 designee, Deputy Police Chief Steven Clark, suggesting that police officers are tacitly authorized  
9 to conduct noise-related arrests without probable cause. Although Deputy Chief Clark  
10 acknowledged that he would expect Officer Bayani to arrest plaintiff if "this same situation occurs  
11 again," Clark emphasized that an arrest would be appropriate only if "we have probable cause that  
12 ... [plaintiff's] behavior is causing a disturbance." Millen Decl., Ex. C (Clark Depo.) at 90, 94.  
13 Since this policy, properly enforced, comports with the constitution, plaintiff has failed to show  
14 that a City policy was the "moving force" behind the alleged violation of his civil rights. *Galen v.*  
15 *County of Los Angeles*, 477 F.3d 652, 667 (9th Cir. 2007); *compare Hoyer v. City of Oakland*, 653  
16 F.3d 835, 850 (9th Cir. 2011) (finding police captain's testimony that the police department  
17 enforced municipal ordinance in an unconstitutional manner sufficient to establish official policy).  
18 The court therefore grants the City's motion for partial summary judgment as to plaintiff's free  
19 speech claim.

#### 20           **B. Free Exercise Clause**

21         Plaintiff next alleges that his arrest violated the First Amendment's Free Exercise clause.  
22 That provision prevents "governmental regulation of religious *beliefs* as such." *Employment Div.*  
23 *v. Smith*, 494 U.S. 872, 877 (1990) (emphasis in original). However, the constitution "does not  
24 relieve an individual of the obligation to comply with a valid and neutral law of general  
25 applicability." *Id.* at 879. A neutral, generally applicable law "need not be justified by a  
26 compelling governmental interest even if the law has the incidental effect of burdening a particular  
27 religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531  
28 (1993).

1 Plaintiff claims that the noise ordinance is not "generally applicable," and therefore must  
2 survive strict scrutiny, because it exempts certain noises—those associated with garbage  
3 collection, street sweeping and other public health and safety activities—but does not offer a  
4 similar exemption for sounds related to the exercise of religion. *See* S.C., Cal., Municipal Code §  
5 9.36.025. In other words, plaintiff believes that since the statute excludes some conduct, it must  
6 also exclude religious conduct.

7 The court disagrees. A law is not generally applicable when the government, "in a  
8 selective manner, imposes burdens only on conduct motivated by religious belief." *Stormans, Inc.*  
9 *v. Selecky*, 586 F.3d 1109, 1134 (9th Cir. 2009) (citing *Lukumi*, 508 U.S. at 543). The "selective  
10 manner" analysis focuses on whether a law is "substantial[ly] underinclusive[]" with respect to the  
11 interests it is intended to advance. *Id.* Here, plaintiff has produced no evidence that the  
12 exemptions for health and safety-related activities have undermined the City's interest in curbing  
13 excessive noise. The court thus cannot conclude that the statute is underinclusive with respect to  
14 its stated purpose. *Cf. Stormans*, 586 F.3d at 1134 (finding that "narrow" exemptions in a law  
15 requiring pharmacies to deliver medications were "a reasonable part of the regulation of pharmacy  
16 practice, and their inclusion in the statute does not undermine the general applicability of the new  
17 rules").

18 The court also rejects plaintiff's argument that the ordinance impermissibly allows  
19 disparate "treatment of certain religious conduct and the analogous secular conduct that has a  
20 similar impact on the regulation's aims." *Lighthouse Inst. for Evangelism, Inc. v. City of Long*  
21 *Branch*, 510 F.3d 253, 266 (3d Cir. 2007); *see also Fraternal Order of Police Newark Lodge No.*  
22 *12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (applying strict scrutiny to regulation that  
23 allowed police officers to grow beards for medical reasons but not religious reasons); *Blackhawk*  
24 *v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004) (applying strict scrutiny to wildlife permitting  
25 scheme that exempted zoos and nationally recognized circuses but not religious adherents). Here,  
26 the conduct exempted by the noise ordinance relates to the provision of basic government services,  
27 not private activity. *Compare St. Mark Roman Catholic Parish Phoenix v. City of Phoenix*, No.  
28 09-1839 (D. Ariz. Mar. 3, 2010) (denying a motion to dismiss an as-applied challenge to a noise



1 ordinance exempting "pleasing melodies" broadcast from ice-cream trucks but not the sound of  
2 church bells). The statute thus does not favor secular behavior over "analogous" religious  
3 behavior, but rather evinces the common sense notion that the government may engage in certain  
4 activity that is off-limits to *all* private citizens. Adopting plaintiff's logic would effectively elevate  
5 religious actors above other private actors by, for example, requiring a law that allows police  
6 officers to trespass on private property under exigent circumstances to contain a similar exception  
7 for religious leaders who feel compelled to hold sermons in their neighbors' living rooms. The  
8 First Amendment plainly does not demand such a result. *See Smith*, 494 U.S. at 877 (rejecting the  
9 argument that the plaintiffs' "religious motivation for using peyote places them beyond the reach  
10 of a criminal law that is not specifically directed at their religious practice, and that is concededly  
11 constitutional as applied to those who use the drug for other reasons").

12 Last, the court finds unpersuasive plaintiff's contention that he raises a "hybrid rights"  
13 claim subject to strict scrutiny because his allegations involve both free speech and free exercise  
14 violations. The hybrid rights doctrine, which is based on Supreme Court dicta, theoretically  
15 applies where "a free exercise plaintiff [can] make out a 'colorable claim' that a companion right  
16 has been violated." *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999). The Ninth Circuit has  
17 recently noted that the doctrine has been "widely criticized" and that "no court has ever allowed a  
18 plaintiff to bootstrap a free exercise claim in this manner." *Jacobs v. Clark County Sch. Dist.*, 526  
19 F.3d 419, 440 n. 45 (9th Cir. 2008); *see also Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d  
20 177, 180 (6th Cir. 1993) ("We do not see how a state regulation would violate the Free Exercise  
21 Clause if it implicates other constitutional rights but would not violate the Free Exercise Clause if  
22 it did not implicate other constitutional rights."); *City of Hialeah*, 508 U.S. at 566-67 (Souter, J.,  
23 dissenting) (explaining why doctrine is "ultimately untenable" because it would create an  
24 exception "so vast as to swallow the ... rule"). The court thus declines plaintiff's invitation to  
25 break new constitutional ground here.

26 Accordingly, the noise ordinance is subject to rational basis review. The rule is valid if it  
27 is rationally related to a legitimate governmental purpose. *See Gadda v. State Bar of Cal.*, 511  
28 F.3d 933, 938 (9th Cir. 2007). To challenge a law under this standard, "[t]he burden is on the one

1 attacking the legislative arrangement to negative every conceivable basis which might support it."  
2 *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993) (alteration in original) (internal quotation marks  
3 omitted). Because plaintiff has failed to show that the noise ordinance is not rationally related to  
4 the City's legitimate interest in curbing excess noise, his claim under the free exercise clause is  
5 deficient as a matter of law. The court grants defendants' motion for partial summary judgment as  
6 to this claim.

## 7 **2. FOURTH AMENDMENT**

8 Plaintiff's Fourth Amendment claim is based on the argument that his arrest was  
9 unsupported by probable cause. "The test for probable cause is whether facts and circumstances  
10 within the officer's knowledge are sufficient to warrant a prudent person, or one of reasonable  
11 caution, to believe, in the circumstances shown, that the suspect has committed, is committing or  
12 is about to commit an offense." *Menotti v. City of Seattle*, 409 F.3d 1113, 1149 (9th Cir. 2005)  
13 (citation omitted).

14 As noted above, both the noise ordinance and Section 415, when used to restrict otherwise  
15 protected speech based solely on its volume,<sup>9</sup> require an officer to reasonably believe that the  
16 noise level "exceeds what is usual and customary in a particular setting." *Costello*, 632 F.3d at 46  
17 (quoting *Deegan*, 444 F.3d at 143). For the reasons already discussed, the court cannot determine  
18 whether Officer Bayani's could reasonably make such a finding at the time of plaintiff's arrest, but  
19 holds that any alleged violation did not result from official policy or practice. The court therefore  
20 denies both motions without prejudice as to this claim, except for the City's motion under *Monell*,  
21 which is granted.

## 22 **3. FOURTEENTH AMENDMENT**

23 Plaintiff last contends that the noise ordinance violates the Fourteenth Amendment because  
24 it is void for vagueness, overbroad, and denies him equal protection. The court considers each  
25 claim in turn.

### 26 **A. Vagueness**

27 \_\_\_\_\_  
28 <sup>9</sup> Defendants do not argue that plaintiff's arrest was justified because he created a clear and present danger of immediate violence.

1 "It is a basic principle of due process that an enactment is void for vagueness if its  
2 prohibitions are not clearly defined." *Grayned*, 408 U.S. at 108. Laws must give a "person of  
3 ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act  
4 accordingly." *Id.* A vague law both "impermissibly delegates basic policy matters to policemen,  
5 judges, and juries for resolution on an ad hoc and subjective basis" and leads "citizens to 'steer far  
6 wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'" *Id.*  
7 *Id.* at 108-09 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

8 Specifically, plaintiff attacks the language restricting "unreasonably disturbing" noises  
9 "which are not necessary in connection with an activity which is otherwise lawfully conducted."  
10 S.C., Cal., Municipal Code § 9.36.020. As he sees it, this language is unconstitutionally vague  
11 because while he "thinks that his volume level is reasonable and necessary to reach his audience,  
12 . . . someone else will think that it is not." Dkt. No. 32 at 7.

13 The court agrees that the ordinance fails to pass constitutional muster. While the  
14 prohibition on "unreasonably disturbing" noises establishes an objective standard, the "necessary"  
15 exemption is not similarly tethered to any identifiable criteria. Indeed, defendants have cited no  
16 authority, and the court has found none, upholding similar language against a vagueness  
17 challenge. *See also Jim Crockett Promotion, Inc. v. City of Charlotte*, 706 F.2d 486, 489 (4th Cir.  
18 1983) (portion of noise ordinance barring "unnecessary" noise is unconstitutionally vague);  
19 *Fratiello v. Mancuso*, 653 F. Supp. 775, 790 (D.R.I. 1987) (ordinance barring "unnecessary noises  
20 . . . which are physically annoying to persons, . . . or which are injurious to the lives, health, peace  
21 and comfort of the inhabitants of the city" is unconstitutionally vague); *Dae Woo Kim v. New*  
22 *York*, 774 F. Supp. 164, 170 (S.D.N.Y. 1991) (invalidating prohibition on "unnecessary" noise).

23 Defendants argue that the exemption is not vague because it applies only to the provision  
24 of public services. It is true that the ordinance's second sentence states: "As used in this section,  
25 'lawfully conducted activities' shall include, but not be limited to, any and all activities conducted  
26 by the city for public health, safety or welfare purposes." However, construing the "necessary"  
27 exemption to cover *only* health and safety activities would render Section 9.36.025, which  
28 excludes such activities from the reach of the ordinance all together, almost entirely superfluous.

1 "We try to avoid, where possible, an interpretation of a statute that renders any part of it  
2 superfluous and does not give effect to all of the words used by [the legislature]." *Bosley Med.*  
3 *Inst., Inc. v. Kremer*, 403 F.3d 672, 681 (9th Cir. 2005).

4 In addition, Officer Bayani's statement that given the proximity of the crowd, he "did not  
5 think [plaintiff] *needed* to give his presentation that loudly," strongly suggests that the Santa Cruz  
6 police understand the "necessary" exemption to cover First Amendment conduct. Bayani Decl. ¶ 5  
7 (emphasis added). Simply put, Officer Bayani appears to have believed that even if plaintiff's  
8 volume was "unreasonably disturbing," his speech could not be restricted if it was "necessary" to  
9 achieve a lawful end. This is consistent with the declaration of Deputy Police Chief Steven Clark,  
10 who indicated that when making an arrest under Section 415, officers must "determine what  
11 volume is reasonably necessary to communicate the message the speaker is trying to deliver."  
12 Dkt. No. 24 (Clark Decl.) ¶ 5. The court therefore construes the necessary exemption to cover any  
13 lawful activity, including public speech. So construed, the provision clearly invites "resolution on  
14 an ad hoc and subjective basis," and is thus unconstitutional. *Grayned*, 408 U.S. at 108.

15 "[T]he unconstitutionality of a part of an Act does not necessarily defeat . . . the validity of  
16 its remaining provisions." *United States v. Jackson*, 390 U.S. 570, 585 (1968). Nonetheless, the  
17 court may not strike part of the ordinance, leaving the remainder intact, if the invalid provision is  
18 "so interwoven with others, that it cannot reasonably be presumed that the legislature intended the  
19 statute to operate otherwise than as a whole." *Moore v. Fowinkle*, 512 F.2d 629, 632 (6th Cir.  
20 1975). Because the noise ordinance is conjunctive, prohibiting only those noises that are both  
21 unreasonably disturbing *and* unnecessary, the court must assume that lawmakers intended the  
22 regulation to operate as a whole. *Compare Jim Crockett*, 706 F.2d at 489 (striking prohibition on  
23 "unnecessary" noise but not "unreasonable" noise where the terms were disjunctive). The court  
24 concludes that Section 9.36.020 is invalid in its entirety, and grants plaintiff's motion as to this  
25 claim.<sup>10</sup>

26  
27 <sup>10</sup> The parties do not address whether the individual officers are liable for enforcing an  
28 ordinance the court now holds to be unconstitutionally vague. Typically, qualified immunity  
would apply under such circumstances. *See Grossman v. City of Portland*, 33 F.3d 1200, 1209

1           **B.       Overbreadth**

2           While the "necessary" clause is impermissibly vague, the court rejects the contention that it  
3 also renders the noise ordinance overbroad. A statute is unconstitutionally overbroad if it includes  
4 within its prohibitions constitutionally protected conduct. *Grayned v. City of Rockford*, 408 U.S.  
5 104, 114 (1972). As noted, the ordinance prohibits only noises that are both unreasonably  
6 disturbing and unnecessary. Thus, rather than restricting speech "delivered in a moderate tone, or  
7 even a whisper, so long as it annoys another person," *Dae Woo Kim*, 774 F. Supp. at 170, the  
8 ordinance applies only to objectively intrusive sounds. If anything, the problem with the  
9 ordinance is not that it encompasses protected speech, but that it vests police officers with  
10 unfettered discretion to exempt speech which could otherwise be constitutionally prohibited. The  
11 court thus concludes that the overbreadth doctrine does not apply.

12           **C.       Equal Protection**

13           Plaintiff last argues that the noise ordinance violates equal protection because it "gives  
14 special privileges to favored generators of noise;" i.e., providers of government services. Dkt. No.  
15 16 at 16. The court is not persuaded. As the sounds produced by garbage trucks and street  
16 sweepers are not speech, the "classifications" of which plaintiff complains do not require strict  
17 scrutiny. *See Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737, 743 (9th Cir. 2011)  
18 (equal protection claim brought by member of a non-suspect class is subject to rational basis  
19 review unless the fundamental right of free speech is implicated). Under rational basis review, an  
20 exemption enacted to facilitate the provision of health and safety-related activities easily  
21 survives.<sup>11</sup> *Cf. One World One Family Now v. City & County of Honolulu*, 76 F.3d 1009, 1013  
22 (9th Cir. 1996) ("Cities have a substantial interest in protecting the aesthetic appearance of their  
23 communities ...."). Defendants' motion for summary judgment as to this claim is granted.

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24 (9th Cir. 1994) ("An officer who acts in reliance on a duly-enacted statute or ordinance is  
25 ordinarily entitled to qualified immunity."). However, as this question has not been briefed, the  
26 court does not reach the issue of qualified immunity with respect to this claim.

27           <sup>11</sup> In its staff report, the City Council explains that it adopted the exemption because it had  
28 occasionally received noise complaints related to early-morning garbage collection and wanted to  
make it "unequivocally clear" that the noise ordinance did not apply to such activities. *See* Dkt.  
No. 31 (City Council Agenda Report, Nov. 18, 2003) at 7.

1 **4. STATE LAW CLAIMS**

2 Both parties also move for summary judgment on plaintiff's state law claims, which are  
3 based on the allegation that plaintiff was wrongly arrested in violation of his constitutional rights.  
4 Because of the factual issue described above, the motions are likewise denied without prejudice.

5 **5. INJUNCTIVE RELIEF**

6 Plaintiff seeks an injunction preventing defendants from "interfering with plaintiff's lawful  
7 speech or arresting him under similar circumstances." Compl. at 6. A law enforcement agency  
8 "may be enjoined from committing constitutional violations where there is proof that officers  
9 within the agency have engaged in a persistent pattern of misconduct." *Thomas v. County of Los*  
10 *Angeles*, 978 F.2d 504, 508 (9th Cir. 1992) (citing *Allee v. Medrano*, 416 U.S. 802, 815-16  
11 (1974)). In *Allee*, the Supreme Court upheld a permanent injunction restraining further  
12 unconstitutional conduct by various Texas state law enforcement officials who had unlawfully  
13 threatened, detained, confined, and physically assaulted union leaders engaged in organizing  
14 efforts. *Id.* at 804-05, 815. In affirming the district court's injunction, the Supreme Court found  
15 that the constitutional violations "were not a series of isolated incidents but a prevailing pattern" of  
16 police misconduct. *Id.* at 809.

17 Given the court's finding that the noise ordinance is unconstitutional on its face, it is  
18 appropriate to enjoin its enforcement. *See, e.g., Dupres v. City of Newport*, 978 F. Supp. 429, 435  
19 (D.R.I. 1997) (enjoining municipality from enforcing noise ordinance found to be  
20 unconstitutionally vague). The court declines, however, to contemplate a broader injunction in  
21 this case. Apart from plaintiff's claim that he was once with a friend who was inappropriately  
22 cited by unnamed Santa Cruz police officers while street preaching, there is no evidence  
23 whatsoever of a pattern of police misconduct. Plaintiff does not dispute that police department  
24 policy requires officers initiating noise-related arrests to first determine that the noise level is  
25 objectively unreasonable. Thus, to the extent that the officer defendants are found to have violated  
26 plaintiff's rights, there is no reason to believe his injuries were not an "isolated incident." *Allee v.*,  
27 416 U.S. at 809; *see also Rizzo v. Goode*, 423 U.S. 362 (1976) (nineteen constitutional violations  
28 in a year's time, by only a small percentage of the police, did not warrant injunctive relief); *cf.*

1 *Wilkins-Jones v. County of Alameda*, 2010 U.S. Dist. LEXIS 52834, at \*7 (N.D. Cal. May 27,  
2 2010) ("The speculative nature of any future arrest, particularly an illegal arrest, is insufficient to  
3 warrant standing for injunctive relief.").

4 Accordingly, the court grants defendants' motion for summary judgment as to plaintiff's  
5 claim for injunctive relief except insofar as he seeks to enjoin enforcement of the noise ordinance  
6 in its current form.

7 **III. ORDER**

8 For the foregoing reasons, the court orders as follows:

- 9 (1) Plaintiff's motion for summary judgment is granted as to his due process claim, denied  
10 without prejudice as to his free speech, Fourth Amendment and state law claims, and  
11 denied with prejudice as to his free exercise, overbreadth and equal protection claims.  
12 (2) The Officer Defendants' motion for summary judgment is granted as to plaintiff's free  
13 exercise, overbreadth and equal protection claims, and denied without prejudice as to  
14 his free speech, Fourth Amendment, due process and state law claims.  
15 (3) The City's motion for summary judgment is granted as to all claims except plaintiff's  
16 due process and state law claims.  
17 (4) The City is permanently enjoined from enforcing the noise ordinance as currently  
18 drafted.  
19 (5) Defendants' motion for summary judgment on the remainder of plaintiff's claim for  
20 injunctive relief is granted.

21  
22 DATED: September 28, 2012

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25 Ronald M. Whyte  
26 United States District Judge  
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