From:	Jonathan Markovitz
To:	CITY COUNCIL (INCL. CMO STAFF); supplementalcomm@surfcity-hb.org
Subject:	ACLU opposition to Ordinance No. 4319
Date:	Monday, April 15, 2024 8:32:52 AM
Attachments:	2024 04 15 ACLU letter to HB City Council on Amplification Ordinance.pdf

Dear Members of the Huntington Beach City Council:

Please see the attached letter opposing Ordinance No. 4319, which you will vote on as agenda item # 16 at Tuesday's City Council meeting.

Sincerely,

Jonathan Markovitz
Free Expression and Access to Government Staff Attorney
he/him/his
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AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Southern California

Sent via email

April 15, 2024

Honorable Members of the City Council
City of Huntington Beach
2000 Main Street
Huntington Beach, CA 92648
SupplementalComm@Surfcity-hb.org
City.Council@surfcity-hb.org

Re: April 16, 2024 City Council Agenda, Item No. 16
Opposition to Adoption of Ordinance No. 4319

Dear Members of the Huntington Beach City Council:

The American Civil Liberties Union of Southern California opposes Ordinance No. 4319, which was approved for introduction at the April 2, 2024 City Council meeting and is scheduled to be voted on as Agenda Item No. 16 on the April 16, 2024 City Council meeting because it will likely violate the First Amendment of the United States Constitution and the Liberty of Speech Clause of the California Constitution. If adopted, Section 6(A) of Ordinance No. 4319 would amend Section 13.08.270 of the Huntington Beach Municipal Code to prohibit the use or operation of any instrument, machine or device that produces, reproduces, or amplifies "sound, upon the Beach or Adjacent Beach Area, at such a volume which sound is plainly audible at fifty feet, after having been warned." Because even the smallest and least powerful commercially available bullhorns and amplifiers produce sound that can be heard fifty feet away even when turned to the lowest volume setting, Section 6(A) would impose a nearly complete prohibition on amplified sound, effectively banning myriad forms of constitutionally protected speech and expression. The limited exceptions provided by Section 6(B) of the Ordinance for sound produced by public safety personnel engaged in the performance of their duties and for activities conducted with a permit do not adequately protect the public's constitutional rights.

I understand that, because Section 6(A) allows the use of amplifiers so long as they cannot be heard beyond a 50-foot radius, it might look, or sound, like a fairly benign measure that strikes the appropriate balance between allowing free expression that is dependent on amplification, and the desire to protect the public from needless exposure to excessive noise pollution. In practice, however, the Ordinance would prevent members of the public from employing virtually any type of amplified sound.

Several years ago, a sound engineer prepared an expert report for a case the ACLU was litigating involving noise levels in and around the Crowne Plaza Hotel at Los Angeles International Airport, an area that is likely at least as noisy as the beach and adjacent areas. After taking measurements of the area around the hotel to determine the ambient noise level and testing a variety of sound amplification systems, the sound engineer determined that it was not possible to speak into a single 35 watt bullhorn using a normal voice, or to play a musical instrument plugged into a 15 watt portable amplifier with all of the amplification instruments set to their lowest volume level above zero, and be inaudible 200 feet away. The beach and adjacent areas are unlikely to have as much ambient sound as the area surrounding an open plaza at an LAX hotel. But even if there is considerably more ambient sound at the beach than there is at the airport, it is extremely unlikely that a low power amplifier set to the lowest volume would be inaudible at a distance of 50 feet at the beach if the same amplifier set to the same setting would be heard at a distance at *200* feet at the airport hotel. A prohibition against the use of amplified sound that can be heard beyond a fifty-foot radius is, therefore, really a prohibition against *any* use of amplified sound.[1]

First Amendment protections are "nowhere stronger than in streets and parks" where they "reach their zenith." *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009). Public parks like Huntington State Beach are "especially important locales for communication among the citizenry, as they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[2] *Id*. at 1036 (citations and internal quotation marks omitted). The City may not prohibit all, or almost all, non-permitted sound amplification at the beach or adjacent areas because such a prohibition is not narrowly tailored and does not leave open sufficient channels for communication. "Loud-speakers are today indispensable instruments of effective public speech." *Saia v. People of State of New York*, 334 U.S. 558, 561 (1948); *see also United Farm Workers Org. Comm., AFL-CIO v. Superior Ct.*, 254 Cal. App. 2d 768, 722 (1967) ("[T]he absolute prohibition of amplified speech . . . is a violation of the rights granted by the first amendment. . . the right to communicate includes mechanical amplification."). Cities may regulate excessive noise "by regulating decibels," but "[a]ny abuses which loud-speakers create can be controlled by narrowly drawn statutes" rather than blanket prohibitions. *Saia*, 334 U.S.. at 562.

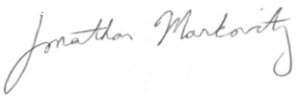
[1] To provide some sense of the impossibility of using any amplification system and ensuring that it could not be heard beyond a fifty-foot radius, consider that one court struck down a rule prohibiting "unreasonable noise" that could be heard twenty-five feet from its source because of expert findings demonstrating "the decibel level of speech that would comply with the 25 foot rule was often lower than the decibel level generated by the foot steps of a person in high heeled boots, conversation among several people, the opening and closing of a door, the sounds of a small child playing on the playground, or the ring of a cell phone." *Deegan v. City of Ithaca*, 444 F.3d 135, 143 (2d Cir. 2006). A fifty-foot radius is, admittedly, larger than a twenty-five foot radius, but if even a person's non-amplified footsteps could be heard within a twenty-five foot radius, any sound that travels through an amplifier would surely be heard beyond a fifty-foot radius.

[2] Huntington State Beach is a California State Park. *See* California Department of Parks and Recreation page on Huntington State Beach at https://www.parks.ca.gov/?page_id=643. The Ordinance defines "Beach" as including portions of the State Beach. Ordinance 4319, Section 13.08.005. Generally, beaches that are open to the public and that do not have restrictive covenants, like the Huntington Beach beaches regulated by the Ordinance, are treated as traditional public fora, like streets and parks, for First Amendment purposes. *See Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1137 (9th Cir. 2011), *Naturist Soc'y, Inc. v. Fillyaw*, 958 F.2d 1515, 1522–23 (11th Cir.1992); *Paulsen v. Lehman*, 839 F.Supp. 147, 158–61 (E.D.N.Y.1993).

Nor may the City require speakers or performers to obtain a permit before using any amplifier including hand held bullhorns or very small plug in amps. If the speakers or performers were expected to draw large crowds, or were so large that they created significant safety or traffic flow issues, there might be legitimate safety concerns that could justify a permit requirement. But there can be no such expectation for most speakers or performers who use only small amplification devices. *See, e.g., Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1034 (9th Cir. 2009) (the constitutionality of a permit requirement for a group of seventy-five people in an open space was a "close question," but "[a]dvance notice and permitting requirements applicable to smaller groups would likely be unconstitutional, unless such uses implicated other significant governmental interests, or where the public space in question was so small that even a relatively small number of people could pose a problem of regulating competing uses."); *Berger*, 569 F.3d at 1093 n.7 ("an otherwise valid, general permit requirement applicable to large groups could be applied to street performers, but only if the crowd attracted is in fact large enough to reach the minimum crowd size covered by that valid requirement."); *see also Rosen v. Port of Portland*, 641 F.2d 1243, 1247 (9th Cir. 1981) ("We find the requirement of advance registration as a condition to peaceful pamphleteering, picketing, or communicating with the public to be unconstitutional. The United States Supreme Court held more than thirty-five years ago that persons desiring to exercise their free speech rights may not be required to give advance notice to the state.") (citing *Thomas v. Collins*, 323 U.S. 516 (1944); *Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir. 1994) ("advance notice provisions . . . drastically burden free speech. Both the procedural hurdle of filling out and submitting a written application, and the temporal hurdle of waiting for the permit to be granted may discourage potential speakers.") (citations and internal quotation marks omitted). The City lacks any compelling need that could begin to justify imposing such a drastic burden on the public's free speech rights.

For all these reasons, Section 6(A) of Ordinance No. 4319 is likely unconstitutional. I therefore urge the Council not to adopt the Ordinance and expose the City to an unnecessary risk of litigation. If you would like to discuss this, please do not hesitate to contact me at jmarkovitz@aclusocal.org.

Sincerely,



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