

1 Erik W. Stanley, FL Bar No. 0183504\*  
 2 estanley@telladf.org  
 3 Dale Schowengerdt, AZ Bar No. 022684  
 4 dschowengerdt@telladf.org  
 5 Alliance Defense Fund  
 6 15192 Rosewood  
 7 Leawood, KS 66224  
 8 (913) 685-8000 - Telephone  
 9 (913) 685-8001 – Fax  
 10 *\*pro hac vice motion forthcoming*

11 Gary McCaleb, AZ Bar No. 018848  
 12 gmccaleb@telladf.org  
 13 Alliance Defense Fund  
 14 15100 North 90th Street  
 15 Scottsdale, AZ 85260  
 16 (480) 444-0020 – Phone  
 17 (480) 444-0028 – Fax

18 John J. Jakubczyk, AZ Bar No. 005894  
 19 jakeslaw@qwest.net  
 20 4643 E. Thomas Rd., Ste #5  
 21 Phoenix, AZ 85018  
 22 (602) 468-0030 - Phone  
 23 (602) 468-0053 - Fax  
 24 *Local Counsel*  
 25 *Attorneys for Plaintiffs*

**IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF ARIZONA**

26 St. Mark Roman Catholic Parish Phoenix;  
 27 Christ the King Liturgical Charismatic  
 28 Church, Inc.; and First Christian Church  
 of Phoenix, Arizona, Inc.,  
 Plaintiffs,  
 vs.  
 City of Phoenix, Arizona,  
 Defendant.

Case No.  
 Judge  
**MOTION FOR PRELIMINARY  
 INJUNCTION AND  
 MEMORANDUM IN SUPPORT**

1           The Plaintiffs, by and through their counsel, file this Motion pursuant to Rule 65  
2 of the Federal Rules of Civil Procedure, and respectfully request that this Court enter a  
3 preliminary injunction prohibiting the CITY OF PHOENIX (“Defendant”) from  
4 enforcing or applying Sections 23-12 through 23-15 of the Phoenix City Code (hereafter  
5 “Noise Ordinance”), and state as follows:

6           1.       The Facts of this case are as stated in Plaintiffs’ Verified Complaint, which  
7 is incorporated herein by reference.

8           2.       Rule 65 of the Federal Rules of Civil Procedure authorizes the District  
9 Court to grant preliminary injunctive relief.

10          3.       Plaintiffs are likely to succeed on the merits. Defendant’s Noise  
11 Ordinance is unconstitutionally vague and overbroad. The Noise Ordinance is an  
12 unconstitutional content-based restriction on speech. The Noise Ordinance does not  
13 protect against viewpoint-based enforcement. Additionally, the Noise Ordinance  
14 violates the Free Exercise Clause because it provides a categorical exemption for secular  
15 conduct, but not for conduct motivated by religious beliefs. The Ordinance also sets up  
16 a system of individualized exemptions from its requirements thereby requiring  
17 Defendant to grant Plaintiffs an exemption for their religious exercise. Finally, the  
18 Noise Ordinance violates Arizona’s Free Exercise of Religion Act (“FERA”), because it  
19 imposes a substantial burden on Plaintiffs’ exercise of religion without a compelling  
20 governmental interest advanced in the least restrictive means.

21          4.       Plaintiffs face a substantial threat of irreparable harm if this Court does not  
22 intervene. Both CKC and FCC desire to ring bells from their churches in the future, but  
23 fear prosecution and jail sentences for their leaders if they do so. Because of the Noise  
24 Ordinance’s facial unconstitutionality, Plaintiffs will continue to suffer irreparable harm  
25 until relief is granted. “The loss of First Amendment freedoms, for even minimal periods  
26 of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347,  
27 373 (1976).

28          5.       The balance of harms plainly favors the Plaintiffs in this instance. Any

1 harm to the City will be minimal, if existent at all, but the harm to Plaintiffs is  
2 irreparable. The clear and present harm to Plaintiffs outweighs any harm to Defendants  
3 and the injunction should be granted.

4 6. Granting the requested injunctive relief will serve the public interest as it  
5 will promote free speech and the free exercise of religion. The protection of  
6 constitutional rights is of the highest public interest. *See Elrod*, 427 U.S. at 373.

7 WHEREFORE, Plaintiffs respectfully request that this Court:

8 (a) Enter a preliminary injunction enjoining the Defendant, its  
9 agents, servants, employees, officials or any other person  
10 acting in concert with it or on its behalf, from enforcing the  
11 Noise Ordinance, Phoenix City Code §§23-12 – 23-15;

12 (b) Enter a preliminary injunction enjoining the Defendant, its  
13 agents, servants, employees, officials and any other person  
14 acting in concert with it or on its behalf, from applying its  
15 Noise Ordinance, Phoenix City Code §§23-12 – 23-15, to  
16 prohibit the ringing of church bells from Plaintiffs' locations.

17 (c) Grant such other and further relief as the Court deems  
18 equitable, just, and proper.

19 **MEMORANDUM OF LAW**

20 “A plaintiff seeking a preliminary injunction must establish that he is likely to  
21 succeed on the merits, that he is likely to suffer irreparable harm in the absence of  
22 preliminary relief, that the balance of equities tips in his favor, and that an injunction is  
23 in the public interest.” *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct.  
24 365, 374 (2008). In this case, Plaintiffs meet all the elements for issuance of a  
25 preliminary injunction.

26 **I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.**

27 **A. Plaintiffs' Speech is Constitutionally Protected.**

28 Playing church bells from carillon speakers mounted on a church building is

1 constitutionally-protected speech. “Loud-speakers are today indispensable instruments  
2 of effective public speech. ... It is the way people are reached.” *Saia v. People of the*  
3 *State of N.Y.*, 334 U.S. 558, 561 (1948). The First Amendment provides protection for  
4 “effective speech, not merely uttered words, and effective speech sometimes requires  
5 that ideas be transformed into musical speech, loud speech... or other forms of  
6 expression that a casual reading of the First Amendment might not reveal as ‘speech.’”  
7 *Stokes v. City of Madison*, 930 F.2d 1163, 1168-69 (7th Cir. 1991).

8         Additionally, the church bells are religious speech, because of the music that is  
9 played (religious hymns) and because the music is being played from a church as an act  
10 of worship. “[P]rivate religious speech, far from being a First Amendment orphan, is as  
11 fully protected under the Free Speech Clause as secular private expression.” *Capitol*  
12 *Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). “Indeed, in  
13 Anglo-American history, at least, government suppression of speech has so commonly  
14 been directed precisely at religious speech that a free-speech clause without religion  
15 would be Hamlet without the prince. Accordingly, we have not excluded from free-  
16 speech protections religious proselytizing, or even acts of worship.” *Id.* (citations  
17 omitted).

18         Church bells are also qualitatively different from other forms of noise given their  
19 long history. The Seventh Circuit has stated that, “Church bells on Sunday morning, for  
20 example, are a traditional and generally unobtrusive aspect of a tranquil environment.”  
21 *Stokes*, 930 F.2d at 1171. Ringing church bells is a centuries-old church tradition. The  
22 Louisiana Supreme Court recognized in 1901 that, “In this state the right to ring bells  
23 loud and long has been exercised from time immemorial. For years and years it has  
24 been exercised without question.” *State ex rel. Denis v. King*, 30 So. 101, 101-02 (La.  
25 1901). A New York held that

26  
27         Life is full of sounds.... Bells in one form or another are a tradition  
28         throughout the world. In the Koran, they are considered the music of God.  
       In the Christian world, every church is proud of its bells. The bells are rung

1 for joy, for sadness, for warnings and for worship. There are people who  
2 find total beauty in the sounds of bells in the Tower of Parliament in  
3 London or the daily ritual ringing at the Cathedral of Notre Dame in Paris.  
4 There is little question that the sound is often deafening when these bells  
start to ring, but for the general enjoyment of the public, it is considered  
acceptable.

5 *Impellizzeri v. Jamesville Federated Church*, 428 N.Y.S. 2d 550, 551 (N.Y. Sup. Ct.  
6 1979). Because of their historical and ubiquitous nature, ringing church bells is treated  
7 differently than other forms of noise. Church bells have always been accepted as part of  
8 the fabric of American life. This history and ubiquity is not something to be lightly cast  
9 aside and church bells cannot just be treated as another form of noise to be regulated.  
10 Church bells intend to and do convey a message, as they have for centuries. Plaintiffs'  
11 speech is fully protected under the First Amendment.

12 **B. The Noise Ordinance is Unconstitutionally Vague.**

13 The Phoenix Noise Ordinance is unconstitutional on its face because it is vague.  
14 The Noise Ordinance prohibits the “creating of any unreasonably loud, disturbing and  
15 unnecessary noise within the limits of the City...” Phoenix Municipal Noise Ordinance  
16 §23-12. The terms “unreasonably loud,” “disturbing,” and “unnecessary” are nowhere  
17 defined in the Ordinance and are unconstitutionally vague.

18 The vagueness doctrine ensures that “all be informed as to what the state  
19 commands or forbids.” *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). A law  
20 cannot be “so vague that men of common intelligence must necessarily guess at its  
21 meaning and differ in its application.” *Smith v. Goguen*, 415 U.S. 566, 577 (1974)  
22 (quoting *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926)); *see also*  
23 *Humanitarian Project v. Mukasey*, 552 F.3d 916, 928 (9th Cir. 2009). The prohibition  
24 against overly-vague laws protects citizens from having to voluntarily curtail their First  
25 Amendment activities because of fear that those activities could be characterized as  
26 illegal. *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). The Supreme Court  
27 has enunciated the standards under the vagueness doctrine:  
28

1 The void-for-vagueness doctrine requires that a penal statute define the criminal  
2 offense with sufficient definiteness that ordinary people can understand what  
3 conduct is prohibited and in a manner that does not encourage arbitrary and  
4 discriminatory enforcement....Although the doctrine focuses both on actual notice  
5 to citizens and arbitrary enforcement, we have recognized recently that the more  
6 important aspect of vagueness doctrine “is not actual notice, but the other  
7 principle element of the doctrine -- the requirement that a legislature establish  
8 minimal guidelines to govern law enforcement.” Where the legislature fails to  
9 provide such minimal guidelines, a criminal statute may permit “a standardless  
10 sweep [that] allows policemen, prosecutors, and juries to pursue their personal  
11 predilections.”

12 *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983) (internal citations and footnote  
13 omitted). The Ninth Circuit has also explained the dangers of a vague law:

14 Statutes that are insufficiently clear are void for three reasons: (1) to avoid  
15 punishing people for behavior that they could not have known was illegal; (2) to  
16 avoid subjective enforcement of the laws based on “arbitrary and subjective  
17 enforcement” by government officers; and (3) to avoid any chilling effect on the  
18 exercise of First Amendment freedoms.

19 *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998); *see also Humanitarian*  
20 *Project*, 552 F.3d at 928. While it is true that mathematical certainty is not required of  
21 language in a statute or ordinance, it is also true that an ordinance must not  
22 impermissibly delegate “basic policy matters to policemen, judges, and juries for  
23 resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and  
24 discriminatory application.” *See Grayned*, 408 U.S. at 109, 110.

25 The standard for judging permissible vagueness is stricter in the area of the First  
26 Amendment. “[S]tandards of permissible statutory vagueness are strict in the area of  
27 free expression. ... Because First Amendment freedoms need breathing space to survive,  
28 government may regulate in the area only with narrow specificity.” *Keyishian v. Bd. of*  
*Regents*, 385 U.S. 589, 603-04 (1967) (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-  
33 (1963)). “[W]hen First Amendment freedoms are at stake, an even greater degree of  
specificity and clarity of laws is required.” *Foti*, 146 F.3d at 628; *Humanitarian Project*,  
552 F.3d at 928; *Klein v. San Diego Cty.*, 463 F.3d 1029, 1039 (9th Cir. 2006).

1 In this case, the Phoenix Noise Ordinance suffers from both of the infirmities  
2 identified by the Supreme Court. The Ordinance contains terms that are so vague that  
3 the ordinary citizen must guess as to what is prohibited. The terms “unreasonably loud,”  
4 or “disturbing,” or “unnecessary,” are not defined anywhere in the Noise Ordinance and  
5 are not susceptible to any meaningful, objective definition. Thus, the Ordinance does  
6 nothing to protect against infringement on constitutionally protected speech by notifying  
7 individuals what conduct the Ordinance prohibits and by protecting against arbitrary and  
8 subjective enforcement of the Ordinance.

9 The Supreme Court found an ordinance to be unconstitutionally vague where it  
10 made it a criminal offense to assemble on a sidewalk in a manner that annoyed others.  
11 The Court focused on the term “annoying” in the ordinance and stated

12 Conduct that annoys some people does not annoy others. Thus, the ordinance is  
13 vague, not in the sense that it requires a person to conform his conduct to an  
14 imprecise but comprehensible normative standard, but rather in the sense that no  
15 standard of conduct is specified at all. As a result, “men of common intelligence  
must necessarily guess at its meaning.”

16 *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). In the same way, the Phoenix  
17 ordinance is unconstitutionally vague because it requires an enforcer to determine if  
18 noise is “disturbing” to others.

19 Other courts that have addressed the exact same language as found in the Phoenix  
20 Noise Ordinance have found such language to be unconstitutionally vague. In *Dupres v.*  
21 *City of Newport*, 978 F. Supp. 429 (D.R.I. 1997), the court found a noise ordinance that  
22 prohibited “unreasonably loud, disturbing or unnecessary noise” to be unconstitutionally  
23 vague. The Court stated that the noise ordinance provisions

24 do not adequately delineate their proscriptions. Instead they set forth standards of  
25 conduct which are impermissibly broad and lacking objectivity.... Under the  
26 Newport ordinance, the legality of a person’s conduct is judged solely by the  
27 subjective characteristics assigned to it by anyone exposed to it.

28 *Id.* at 433-34. Similarly, the court in *Dae Woo Kim v. City of New York*, 774 F. Supp.

1 164 (S.D.N.Y. 1991), declared unconstitutional a noise ordinance that prohibited any  
2 “unnecessary noise.” The court there stated that the ordinance “does not provide any  
3 standard to aid in determining when particular noise is ‘unnecessary.’” *Id.* at 170.  
4 “Because it provides only this subjective standard, the conduct barred by [the noise  
5 ordinance] will vary with the listener. [The ordinance’s] broad terms and lack of  
6 objective standards invite the arbitrary and discriminatory enforcement that the  
7 vagueness doctrine is designed to avoid.” *Id.* Likewise the federal district court in  
8 *Fратиello v. Mancuso*, 653 F. Supp. 775 (D.R.I. 1987), declared a noise ordinance  
9 unconstitutional that prohibited “unnecessary noises or sounds... which are physically  
10 annoying” because the ordinance did not “provide the requisite clear notice of what is  
11 prohibited.” *Id.* at 790. The court also stated that, “Attempts to comply with or to  
12 enforce the ordinance require application of a completely subjective standard.” *Id.*

13  
14 Provision of clear and explicit standards to guide law enforcement officers and  
15 triers of fact in their application of the ordinance are necessary to prevent  
16 arbitrary and discriminatory enforcement. [The noise ordinance] subordinates the  
17 exercise of First Amendment freedoms to a police officer’s entirely subjective  
18 determination of whether an actor’s speech is “unnecessary” and “annoying”. The  
19 grant of such unbridled discretion invites the suppression of ideas. The ordinance  
provides a means of preventing discussion of unpopular, controversial or  
unorthodox views. “Annoyance at ideas can be cloaked in annoyance at sound.”

20 *Id.* at 790; *see also Nichols v. City of Gulfport*, 589 So. 2d 1280, 1283 (Miss. 1991)  
21 (“The adjectives ‘unnecessary’ and ‘unusual’ modifying the noun ‘noises’ are inherently  
22 vague and elastic and require men of common intelligence to guess at their meaning.”);  
23 *Thelen v. State*, 526 S.E. 2d 60, 62 (Ga. 2000) (“By prohibiting ‘any... unnecessary or  
24 unusual noise which... annoys... others,’ the ordinance here fails to provide the requisite  
25 clear notice and sufficiently definite warning of the conduct that is prohibited.”). As the  
26 Supreme Court of Mississippi stated:

27  
28 If beauty is in the eye of the beholder, whether a noise is “unnecessary,”  
“unusual” or “annoying” certainly depends upon the ear of the listener. A statute

1 is unconstitutionally vague when the standard of conduct it specifies is dependent  
2 upon the individualized sensitivity of each complainant.

3 *Nichols*, 589 So. 2d at 1283. Just as these cases demonstrate, the Phoenix noise  
4 ordinance is unconstitutionally vague.

5 The Ordinance also provides no guidelines to govern enforcers of the law. This  
6 allows the Ordinance to be enforced in a selective or arbitrary manner based solely on  
7 the personal preferences of the enforcer. The way this Ordinance is drafted would allow  
8 a policeman to believe that Plaintiffs' bells were in violation of the Ordinance, but that  
9 some other amplification was not in violation even though it was the same noise level.  
10 Indeed, in this case, CKC's bells were measured at a distance of approximately forty feet  
11 from the source of the bells and the decibel levels registered less than decibel levels  
12 allowed in the Ordinance for vehicles measured at fifty feet. Yet despite this fact, the  
13 Bishop for CKC was criminally convicted of violating the Noise Ordinance. There is no  
14 way to determine whether different noises that are at the same noise level violate the  
15 Ordinance other than the personal preferences of the officer who happens to be  
16 enforcing the Ordinance. Does a backyard neighborhood party violate the Ordinance, or  
17 an outdoor wedding, or a garage band that practices weekly? In short, there is no way to  
18 determine what conduct violates the Ordinance and what does not. The vague terms  
19 allow for arbitrary and subjective enforcement, so the Ordinance is unconstitutionally  
20 vague.

21 **C. The Noise Ordinance Violates the Free Exercise Clause of the**  
22 **First Amendment to the United States Constitution.**

23 The Phoenix Noise Ordinance violates the Free Exercise Clause because it  
24 provides categorical exemptions to the Ordinance for certain enumerated conduct, but  
25 not religious conduct. The bells played by Plaintiffs are part of the religious exercise of  
26 the Church. Those bells are not allowed under the Noise Ordinance while other sounds  
27 at the same level or higher than Plaintiffs' bells are allowed through categorical  
28 exemptions.

A law that is neutral and generally applicable may burden religious exercise

1 without being subject to strict scrutiny by a court. *See Employment Div., Dep't of*  
2 *Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). But, laws that are not  
3 neutral or generally applicable are subject to strict scrutiny and must be justified by a  
4 compelling governmental interest that is advanced in the least restrictive means  
5 available. *See Smith*, 494 U.S. at 878; *Church of Lukumi Babalu Aye, Inc. v. Hialeah*,  
6 508 U.S. 520, 546 (1993). A law will be found to be not neutral or generally applicable  
7 if it provides for a categorical exemption for secular conduct but fails to provide a  
8 similar exemption for religious exercise. In *Fraternal Order of Police Newark Lodge v.*  
9 *City of Newark*, 170 F.3d 359 (3d Cir. 1999), the court considered a police policy that  
10 prohibited officers from wearing beards but offered exemptions to two categories: 1)  
11 officers who had medical reasons for wearing a beard; and 2) officers that were  
12 undercover. *Id.* at 360. The court held that providing a categorical exemption from the  
13 beard policy for medical reasons, but refusing to provide a similar exemption for  
14 religious reasons rendered the law not neutral or generally applicable and triggered  
15 heightened scrutiny under the Free Exercise Clause. *Id.* Likewise, in *Blackhawk v.*  
16 *Pennsylvania*, 381 F.3d 202 (3d Cir. 2004), a Lakota Indian kept two bears on his  
17 property to conduct religious ceremonies in keeping with his tribe's traditions. *Id.* at  
18 204. A state law prohibited privately keeping wildlife without paying a fee for a permit.  
19 *Id.* at 211. Nonetheless, zoos and nationally recognized circuses were exempt from the  
20 fee requirement. *Id.* The court found the law not generally applicable under *Smith* and  
21 *Lukumi* because the zoo and circus exemptions "work against the Commonwealth's  
22 asserted goal of discouraging the keeping of wild animals in captivity," and its interest in  
23 generating revenue. *Id.* Thus, Pennsylvania's decision not to grant an exemption for  
24 religious reasons was subject to strict scrutiny and declared to be unconstitutional as a  
25 violation of Free Exercise.

26 In this case, the Phoenix Noise Ordinance provides several exemptions for certain  
27 noises but does not provide a similar exemption for noises associated with religious  
28 exercise. Section 23-15 provides, *inter alia*, an exemption for (1) City vehicles engaged

1 upon necessary public business; (2) street work during the night; (3) noncommercial use  
2 of amplifiers or loudspeakers, and; (4) sounds from moving vehicles measured at less  
3 than 70 decibels fifty feet away. *See* §23-15. These exemptions are contained on the  
4 face of the Ordinance, but no similar exemption is granted on the face of the Ordinance  
5 for religious noises. The exemptions in the Ordinance render the Noise Ordinance not  
6 neutral or generally applicable.

7         The City has no compelling interest in this case. A City's interest in protecting its  
8 citizens from unwelcome noise certainly cannot be considered compelling in this case.  
9 "[A] law cannot be regarded as protecting an interest of the highest order...when it  
10 leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508  
11 U.S. at 547 (internal quotations omitted). What this means is that because the Phoenix  
12 Noise Ordinance allows for noises that are exactly as loud or louder than CKC's bells,  
13 its interest in protecting its citizens from unwelcome noise cannot be deemed  
14 compelling. The bells at CKC rang every hour at no more than 67.6 decibels measured  
15 at the nearest property line of the neighbor to the Church. Yet the Noise Ordinance, on  
16 its face, allows a vehicle to travel past the Church as many times as it wants playing  
17 music from a loudspeaker at 70 decibels without violating the Ordinance. Because the  
18 Ordinance allows for noises just as loud or louder in different contexts, the City's  
19 interest in preventing unwelcome noise cannot be deemed compelling.

20         Even if the City's interest could somehow be characterized as compelling, it  
21 certainly is not advanced in the least restrictive means available. The district court in  
22 *Dupres* held that the noise ordinance at issue in that case was not the least restrictive  
23 means available because the City could advance its interests easily by adopting a decibel  
24 level provision specifying noise levels that are prohibited. *See Dupres*, 978 F. Supp. 2d  
25 at 435. The same is true in this case. There certainly is a lesser restrictive means  
26 available to advance the City's interest in protecting its citizens from unwanted noise.  
27 The City, though, has chosen not to pursue such means thus rendering the Noise  
28 Ordinance unconstitutional under the Free Exercise Clause.

1           **D. The Noise Ordinance is Unconstitutionally Overbroad.**

2           The Noise Ordinance is unconstitutionally overbroad because it sweeps within its  
3 ambit constitutionally protected speech. *See Grayned*, 408 U.S. at 114; *Dae Woo*, 774 F.  
4 Supp. at 170; *Fратиello*, 653 F. Supp. at 791. Noise ordinances are unconstitutionally  
5 overbroad if, by their terms, they prohibit speech that is considered by the listener to be  
6 unnecessary or disturbing. In *Dae Woo*, the district court struck down as overbroad a  
7 noise ordinance that prohibited unnecessary noise that annoyed or disturbed others. *Dae*  
8 *Woo*, 774 F. Supp. at 170.

9  
10           By barring noise that is “unnecessary” because it “annoys” or “disturbs” others,  
11 however [the noise ordinance] bars sounds regardless of their volume level; by its  
12 terms, the ordinance would apply to speech delivered in a moderate tone, or even  
a whisper, so long as it annoys another person.

13 *Id.* Similarly, the district court in *Fратиello* struck down the Providence noise ordinance  
14 as overbroad because “Public discourse may not be prohibited simply because it may be  
15 deemed unnecessary and/or annoying to the listener.” *Fратиello*, 653 F. Supp. at 791.

16           In this case, the Noise Ordinance prohibits unnecessary noise and noise that is  
17 disturbing. The Ordinance is overbroad because it allows for noise that disturbs others  
18 to be prohibited no matter the volume level. As in *Dae Woo*, the Phoenix Noise  
19 Ordinance prohibits noise in a moderate voice or even a whisper if it disturbs others or is  
20 somehow deemed unnecessary. The complete lack of objective standards overly  
21 burdens the constitutionally protected speech that is subject to the provisions of the  
22 Noise Ordinance. As such, the Ordinance is overbroad and unconstitutional.

23           **E. The Noise Ordinance is an Unconstitutional Content-Based**  
24 **Restriction.**

25           The Phoenix Noise Ordinance is unconstitutional because it cannot be applied  
26 without reference to the content of the speech at issue. “The principal inquiry in  
27 determining content neutrality is whether the government has regulated speech without  
28 reference to its content.” *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 754

1 (1994) (*citing Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Therefore, if,  
2 in the regulation of speech, the government references the content of the speech, then the  
3 regulation of the speech will be considered a content-based regulation. “For the state to  
4 enforce a content based exclusion it must show that its regulation is necessary to serve a  
5 compelling state interest and that it is narrowly drawn to achieve that end.” *Perry Educ.*  
6 *Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)(*citing Carey v. Brown*,  
7 447 U.S. 455, 461 (1980)); *see also Foti v. City of Menlo Park*, 146 F.3d 629, 637 (9th  
8 Cir. 1998). Content based regulations of speech constitute “censorship in a most odious  
9 form.” *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black, J. concurring). “Content-  
10 based regulations are presumptively unconstitutional.” *Foti*, 146 F.3d at 637.

11 The Phoenix Noise Ordinance is content-based because it prohibits “unnecessary”  
12 noise, “disturbing” noise, noise that is “commercial” and allows only “pleasing  
13 melodies” from moving vehicles. *See* §§23-12, 23-15(c), 23-15(d)(2). The inclusion of  
14 these terms in the Ordinance mean that the Ordinance cannot be enforced without  
15 referencing the content of the speech to determine if it is commercial, if it is necessary, if  
16 it disturbs others,<sup>1</sup> or if the melody involved is “pleasing.”

17 The court in *Dupres* struck down the noise ordinance as content-based because  
18 the prohibition against noises that were “unnecessary” or “annoying” “invite[s] law  
19 enforcement and others to make a determination as to whether the ordinance has been  
20 violated on purely subjective, content-based criteria.” *Dupres*, 978 F. Supp. 429.  
21 Similarly the court in *Dae Woo* struck down the ordinance in that case because “the  
22 subjective definition of unnecessary noise offends basic free speech principles because it  
23

---

24 <sup>1</sup> The term “disturbing” in the Noise Ordinance also demonstrates that the Ordinance, on  
25 its face, allows for a “heckler’s veto” on constitutionally-protected speech. “Listeners’  
26 reaction to speech is not a content-neutral basis for regulation.” *Forsyth Cty. v.*  
27 *Nationalist Movement*, 505 U.S. 123, 134 (1992); *Boos v. Barry*, 485 U.S. 312, 321  
28 U.S. 123, 143 (1992); *see also Gooding v. Wilson*, 405 U.S. 518 (1972); *Terminiello v.*  
*Chicago*, 337 U.S. 1 (1949).

1 would support a conviction where the content of the speech annoys a particular listener.”  
2 *Dae Woo*, 774 F. Supp. at 170. As described above, the City has no compelling interest  
3 that is advanced in the least restrictive means available. Therefore, the Ordinance is  
4 unconstitutional.

5 **F. The Noise Ordinance Violates FERA.**

6 Defendant’s Noise Ordinance violates the Free Exercise of Religion Act  
7 (“FERA”), Arizona Revised Statutes §§ 41-1493 – 41-1493.02. FERA provides that,  
8 “Government may substantially burden a person’s exercise of religion only if it  
9 demonstrates that application of the burden to the person is both: (1) In furtherance of a  
10 compelling governmental interest; and (2) The least restrictive means of furthering that  
11 compelling governmental interest.” Ariz. Rev. Stat. Ann. §41-1493.01. There is no  
12 requirement in FERA that the law not be neutral or generally applicable before  
13 heightened scrutiny applies. *See* Ariz. Stat. Ann. §41-1493.01(B).

14 Legislative hearings reveal an intent to require that review of free exercise claims  
15 brought under FERA be conducted pursuant to the *Yoder* and *Sherbert* test. *See*  
16 Senate Fact Sheet, S.B. 1391 (Feb. 5, 1999) (“The compelling interest test, as set  
17 forth in the federal cases of [ *Yoder* ] and [ *Sherbert* ], is a workable test for  
18 striking sensible balances between religious liberty and competing governmental  
interests.”).

19 *State v. Hardesty*, 204 P.3d 407, 413 (Ariz. Ct. App. 2008). Plaintiffs have already  
20 demonstrated above how the Noise Ordinance substantially burdens their free exercise  
21 of religion and how Defendant has no compelling interest for the Noise Ordinance and  
22 that any interest is not advanced in the least restrictive means available. Therefore, the  
23 Noise Ordinance violates FERA.

24 **II. PLAINTIFFS ARE LIKELY TO SUFFER IRREPARABLE HARM IN**  
25 **THE ABSENCE OF A PRELIMINARY INJUNCTION.**

26 “The loss of First Amendment freedoms, for even minimal periods of time,  
27 unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976);  
28 *see also Wallace v. Jaffree*, 472 U.S. 38, 44 n.22 (1985); *New York Times Co. v. United*

1 *States*, 403 U.S. 713 (1971). The harm in this case is clear. The Noise Ordinance is still  
2 in effect. Plaintiff CKC's pastor has been criminally convicted for violating the Noise  
3 Ordinance by ringing church bells and St. Mark has been visited by the Phoenix  
4 Prosecutor's office and Police, who have suggested that the City will prosecute St.  
5 Mark's and/or its pastor for violating the Noise Ordinance by ringing their church bells  
6 if neighbors continue to complain. Plaintiffs also fear arrest and conviction in the future  
7 should they choose to ring church bells. Plaintiff CKC has ceased ringing church bells  
8 out of fear of prosecution under the Noise Ordinance. The certainty of arrest, jail time,  
9 and penalties for taking part in free speech and free exercise of religion makes the harm  
10 to Plaintiffs neither remote nor speculative, but actual and imminent. Moreover, the  
11 proof of irreparable harm suffered by Plaintiffs is clear and convincing. *See Nat'l.*  
12 *People's Action v. Village of Wilmette*, 914 F.2d 1008, 1013 (7th Cir. 1990)(even  
13 temporary deprivation of First Amendment rights generally sufficient to prove  
14 irreparable harm).

15 Not only has concrete irreparable harm occurred and continues to threaten the  
16 constitutional rights of Plaintiffs, the existence and application of the Ordinance creates  
17 a chilling effect on free expression of City residents and others who have heard that  
18 ringing church bells can possibly violate the Phoenix Noise Ordinance. The chill on free  
19 expression created by such an ordinance is certain, but immeasurable. Such a chilling  
20 effect on free expression itself constitutes irreparable injury. *See Dombrowski v. Pfister*,  
21 380 U.S. 479, 487 (1965).

### 22 **III. THE BALANCE OF EQUITIES TIPS IN FAVOR OF THE PLAINTIFFS.**

23 Defendant will suffer no harm should an injunction be granted. Compared to the  
24 actual and concrete harm currently existing and the threatened future harm to the  
25 Plaintiffs' constitutional rights, it is plain that the balance of equities in this case tips  
26 sharply in favor of Plaintiffs. Any harm to the Defendant is insignificant compared to  
27 the harm to constitutional rights that exists under the Noise Ordinance.

28 Defendant may claim that it will not be able to prosecute noise violations should

1 its Ordinance be enjoined. But Defendant cannot prosecute noise violations under a  
2 facially unconstitutional noise ordinance. Defendant can also pass a constitutional noise  
3 ordinance that cures the constitutional infirmities of the current Noise Ordinance. Any  
4 harm to the Defendant should an injunction be issued pales in comparison to the harm  
5 suffered by the Plaintiffs under the Noise Ordinance. The balance of equities tips in  
6 favor of granting an injunction.

#### 7 **IV. AN INJUNCTION IS IN THE PUBLIC INTEREST.**

8 The protection of constitutional rights is of the highest public interest. *See Elrod*,  
9 427 U.S. at 373. Protecting First Amendment rights is *ipso facto* in the interest of the  
10 general public. *See Machesky v. Bizzell*, 414 F.2d 283, 288-90 (5th Cir. 1969) (“First  
11 Amendment rights are not private rights...so much as they are rights of the general  
12 public.”); *see also Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir, 2005) (“Generally,  
13 public interest concerns are implicated when a constitutional right has been violated,  
14 because all citizens have a stake in upholding the Constitution.”).

15 Plaintiffs have constitutional rights that are precious and must be safeguarded  
16 against governmental encroachments. Currently, the facial unconstitutionality of the  
17 Noise Ordinance has chilled Plaintiffs’ speech and exercise of religion and has also  
18 chilled the speech and exercise of religion of others not before the Court. Enjoining an  
19 ordinance that grants the government unfettered discretion to censor speech based on its  
20 content or viewpoint is in the public interest. Enjoining an ordinance that contains  
21 vague terms where individuals must necessarily guess as to their meaning is in the  
22 public interest because it provides certainty and removes doubt as to what conduct or  
23 speech is allowed and what is prohibited. In short, an injunction in this case protects  
24 constitutional rights and is certainly within the public interest.

#### 25 **CONCLUSION**

26 Based on the foregoing, Plaintiffs respectfully request that this Court issue a  
27 preliminary injunction as requested herein.

28

1 Respectfully submitted this 2nd day of September, 2009.

2

3

4

5 /s/ Dale Schowengerdt

6 Erik W. Stanley\*

7 FL Bar No. 0183504

8 Dale Schowengerdt

9 AZ Bar No. 022684

10 Alliance Defense Fund

11 15192 Rosewood

12 Leawood, KS 66224

13 (913) 685-8000 – Phone

14 (913) 685-8001 – Fax

15 \**pro hac vice motion forthcoming*

16

17 Gary McCaleb, AZ Bar No. 018848

18 Alliance Defense Fund

19 15100 North 90th Street

20 Scottsdale, AZ 85260

21 (480) 444-0020 – Phone

22 (480) 444-0028 – Fax

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

John J. Jakubczyk

AZ Bar No. 005894

4643 E. Thomas Rd., Ste #5

Phoenix, AZ 85018

(602) 468-0030 - Phone

(602) 468-0053 - Fax

*Attorneys for Appellant*