IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

St. Mark Roman Catholic Parish Phoenix; Christ the King Liturgical Charismatic Church, Inc.; and First Christian Church of Phoenix, Arizona, Inc.,

Plaintiffs,

vs.

The City of Phoenix, an Arizona Municipal Corporation,

Defendant.

No. CV 09-1830-PHX-SRB

ORDER

The Court now considers Defendant City of Phoenix's Motion to Dismiss ("Def.'s Mot.") (Doc. 18). At this time, the Court will also resolve the pending Motion for Preliminary Injunction filed by Plaintiffs St. Mark Roman Catholic Parish Phoenix ("St. Mark"), Christ the King Liturgical Charismatic Church, Inc. ("CKC"), and First Christian Church of Phoenix, Arizona, Inc. ("FCC") ("Pls.' Mot.") (Doc. 2).

I. BACKGROUND

A. The Parties

Plaintiffs St. Mark, CKC, and FCC are churches located in Phoenix, Arizona. (Compl. ¶¶ 1, 14-22.) Defendant City of Phoenix ("the City") is a political subdivision of the state of Arizona. (*Id.* ¶ 23.) The Complaint states that Plaintiffs "want to ring carillon bells from their locations in the City of Phoenix as part of their religious exercise . . . ." (*Id.* ¶ 1.)

1 **1. CKC**

2 CKC is currently located at 2929 W. Greenway Road in Phoenix, having been
3 previously located on Bell Road in Phoenix. (*Id.* ¶¶ 24-26.) "In approximately 1995, CKC
4 installed an electronic carillon system on its Bell Road property and began to play the
5 carillon from its building." (*Id.* ¶ 27.) On Bell Road, CKC rang its carillon system every half
6 hour from 7:00 a.m. to 9:00 p.m., without ever receiving any complaints. (*Id.* ¶¶ 28-29.)
7 When CKC moved to Greenway Road, it installed the electronic carillon system and
8 commenced ringing the bells at the same levels as in the previous location. (*Id.* ¶ 31.) The
9 Complaint alleges:

10 > CKC's carillon is part of the Church's exercise of its religion. CKC rings carillon bells to honor and glorify God. CKC believes that ringing the carillon
11 > is a way of acknowledging God's sovereignty over time and all that exists. CKC also rings the carillon as a way of evangelizing by notifying anyone
12 > nearby that the Church is there and is a place of hope, help, and prayer. CKC also rings the carillon as a way of continuing a centuries-old church tradition
13 > of ringing bells as a way of glorifying God.

14 (*Id.* ¶¶ 34-38.)

15 CKC decided to begin ringing the carillon on Greenway Road on Palm Sunday, March
16 16, 2008. (*Id.* ¶ 39.) Before that date, CKC distributed approximately 1,000 fliers in the
17 neighborhood, informing residents of its plans. (*Id.* ¶ 40.) Beginning on March 16, 2008,
18 CKC's carillon rang from 7:00 a.m. to 9:00 p.m., tolling the time on the half hour and the
19 hour. (*Id.* ¶¶ 42-43.) Before the time tolled, the carillon played "a 16-beat melody taken from
20 Handel's *Messiah*." (*Id.* ¶ 44.) CKC's carillon also played a short song after it tolled the time
21 at 9:00 a.m., 12:00 p.m., 3:00 p.m., 6:00 p.m., and 9:00 p.m. (*Id.* ¶ 45.) On March 17, 2008,
22 Detective Daniel Cook from the City of Phoenix Police Department ("PPD") visited CKC
23 to follow up on a noise complaint about the carillon. (*Id.* ¶¶ 46-47.) At that time, Detective
24 Cook did not issue any citations to CKC. (*Id.* ¶ 49.) The following day, March 18, 2008,
25 several neighbors visited CKC to complain about the noise from the carillon, and CKC
26 subsequently arranged a meeting with the neighbors to try to negotiate a compromise. (*Id.*
27 ¶¶ 50-51.) After the meeting, CKC attempted to mitigate the problem by reducing the time
28 period of the carillon to 8:00 a.m. to 8:00 p.m., reducing the frequency from every half hour

to every hour, playing just one song a day at the noon hour (rather than five throughout the day), installing a Styrofoam buffer on the side of the speakers facing the neighbor's house, and angling the carillon speakers up instead of out. (*Id.* ¶¶ 52-57.) CKC also took decibel readings of the carillon system, recording decibel levels between 65.6 and 67.6 decibels at the property line of the closest neighbors. (*Id.* ¶¶ 59-61.)

On January 26, 2009, the City filed a misdemeanor criminal complaint against CKC's Pastor, Bishop Rick Painter, charging him with violating the Phoenix Noise Ordinance, Phoenix, Ariz., Municipal Code §§ 23-12 to 23-15 ("the Noise Ordinance"). (Compl. ¶¶ 62-63, Exs. A-B.) After a trial in Municipal Court, Bishop Painter was convicted of violating the Noise Ordinance by ringing the electronic carillon. (*Id.* ¶ 64.) "On June 3, 2009, Bishop Painter was sentenced to ten days in jail (suspended) and three years of probation . . . ." (*Id.* ¶ 65.) Since the conviction, CKC has stopped ringing its carillon system "for fear of future prosecution under the Phoenix Noise Ordinance." (*Id.* ¶ 66.)

2. St. Mark

St. Mark is located at 400 N. 30th Street in Phoenix, Arizona. (*Id.* ¶ 69.) St. Mark also rings electronic carillon bells "as an exercise of its religious beliefs" and has done so for at least 20 years. (*Id.* ¶¶ 70-71, 79.) St. Mark's carillon rings every hour from 8:00 a.m. to 8:00 p.m., beginning with a short melody followed by tolling the hour. (*Id.* ¶ 73.) At noon, St. Mark's carillon plays an Angelus, "a carillon melody that reminds parishioners to pray." (*Id.* ¶¶ 74-75.) St. Mark's carillon also rings three times before each Mass, which is held every evening and three times each Sunday. (*Id.* ¶¶ 76-77.) Every day at 7:30 p.m., St. Mark's carillon rings five times for the prayer for the dead. (*Id.* ¶ 78.) The Complaint alleges, "Ringing bells is inextricably intertwined in the life of St. Mark. Ringing bells is an expression of the sentiment of the people of St. Mark and thus cannot be silenced without silencing the voice of the entire people of the church community." (*Id.* ¶¶ 86-87.) On August 25, 2009, St. Mark representatives met with City representatives, at the request of the City Prosecutor's Office, to discuss complaints the City had received about the church's carillon.

(*Id.* ¶¶ 88, 90.) The Complaint alleges that St. Mark now fears prosecution under the Noise Ordinance. (*Id.* ¶ 97.)

3. FCC

FCC is located at 6750 N. 7th Avenue in Phoenix, in a building with a distinctive bell tower designed by Frank Lloyd Wright. (*Id.* ¶¶ 99-105.) FCC's bell tower contains an electronic carillon system, but it has been inoperative since approximately 2006. (*Id.* ¶¶ 106-07.) Before it stopped functioning, FCC's carillon would ring at 12:00 p.m. and 5:00 p.m. each day, as part of FCC's exercise of its religious beliefs. (*Id.* ¶¶ 108-09.) The Complaint states, "FCC plans to repair the bell tower so that the carillon is once again operative. FCC desires to once again commence ringing its carillon from the bell tower in the near future as part of its exercise of religion." (*Id.* ¶¶ 113-14.) However, FCC alleges that it fears prosecution under the Noise Ordinance, were it to repair the carillon system and recommence ringing. (*Id.* ¶ 115.)

B. The Noise Ordinance

The Noise Ordinance is codified at §§ 23-12 to 23-15 of the Phoenix City Code. (*See* Compl., Ex. B, Phoenix, Ariz., Municipal Code §§ 23-12 to 23-15.) Section 23-12 states, "Subject to the provisions of this article the creating of any unreasonably loud, disturbing and unnecessary noise within the limits of the City is hereby prohibited." (*Id.*) The Noise Ordinance contains a non-exhaustive list of noises that are declared to be "loud, disturbing and unnecessary" in violation of the provision. (*Id.* § 23-14.) Section 23-15 of the Noise Ordinance provides for several exemptions from the scope of the provision. (*Id.* § 23-15.) The following things are exempt from the Noise Ordinance: (1) City vehicles "while engaged upon necessary public business;" (2) street work that takes place at night where it would be impossible to work during the day; (3) "the reasonable use of amplifiers or loudspeakers" used in the course of noncommercial public addresses not made from a moving vehicle; and (4) hand-operated devices producing sounds not exceeding 70 decibels, "C" scale, measured at a distance of 50 feet from the device and emanating from a bicycle, pushcart, or vehicle or in connection with the sale of goods from a vehicle. (*Id.*) The fourth exemption, which has

been termed "the ice-cream truck exception" by the parties, requires that the device only be operated while the vehicle is in motion, play "only pleasing melodies," and not be played between 1:00 p.m. and 3:00 p.m. or 9:00 p.m. and 10:00 a.m. (*Id.*)

C. Plaintiffs' Claims

Plaintiffs' Complaint contains four causes of action. The first is for a violation of the Plaintiffs' right to free speech, guaranteed by the First Amendment to the U.S. Constitution. (Compl. ¶¶ 150-63.) Next, Plaintiffs claim that the Noise Ordinance is unconstitutionally vague, in violation of the due process clause of the Fourteenth Amendment to the U.S. Constitution. (*Id.* ¶¶ 164-74.) The Complaint also contains an as-applied First Amendment challenge to the Noise Ordinance, claiming that the City has violated the Plaintiffs' right to freely exercise their religion. (*Id.* ¶¶ 175-88.) Finally, Plaintiffs claim that the Noise Ordinance violates Arizona's Free Exercise of Religion Act ("FERA"). (*Id.* ¶¶ 189-97 (citing Ariz. Rev. Stat. ("A.R.S.") §§ 41-1493 to 41-1493.02).) Plaintiffs seek declaratory and injunctive relief, along with nominal damages for St. Mark and attorneys' fees and costs. (*Id.* at 19-20.) Plaintiffs also seek a preliminary injunction. (*See* Pls.' Mot.) Defendant now moves to dismiss the Complaint in its entirety. The Court heard oral argument on Defendant's Motion on February 1, 2010.

II. LEGAL STANDARDS AND ANALYSIS

A. Defendant's Motion to Dismiss

Defendant moves to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. (Def.'s Mot. at 1.) The Federal Rules of Civil Procedure require "only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *see also* Fed. R. Civ. P. 8(a)(2). Thus, dismissal for insufficiency of a complaint is proper if the complaint fails to state a claim on its face. *Lucas v. Bechtel Corp.*, 633 F.2d 757, 759 (9th Cir. 1980).

1. Standing

1 The City first argues that St. Mark and FCC should be dismissed from this action for
2 lack of standing. (Def.'s Mot. at 4-5.) In considering a Rule 12(b)(1) motion to dismiss for
3 lack of jurisdiction, the Court takes the allegations in the Plaintiffs' Complaint as true. *Wolfe*
4 *v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004) (citations omitted). The parties have
5 submitted evidence outside the pleadings, which the Court may consider in ruling on the
6 12(b)(1) portion of the Motion to Dismiss. *Colwell v. Dep't of Health & Human Servs.*, 558
7 F.3d 1112, 1121 (9th Cir. 2009) (citing *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir.
8 1989)). The Court may not, however, resolve any genuinely disputed facts at this stage;
9 rather, the Court must assume "the truth of the allegations in a complaint . . . unless
10 controverted by undisputed facts in the record.'" *Warren v. Fox Family Worldwide, Inc.*, 328
11 F.3d 1136, 1139-40 (9th Cir. 2003) (quoting *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th
12 Cir. 1987)). It is Plaintiffs' burden to show "that the facts alleged, if proved, would confer
13 standing upon [them]." *Id.* at 1140.

14 Plaintiffs must establish constitutional standing with regard to the provision they
15 challenge. *See Allen v. Wright*, 468 U.S. 737, 750-51 (1984). To do so, they must allege (1)
16 a "distinct and palpable" injury-in-fact that is (2) "fairly traceable" to the challenged
17 provision or interpretation and (3) would "likely . . . be redressed" by a favorable decision.
18 *Id.* at 751 (internal citations and quotations omitted). Special standing principles also apply
19 in First Amendment cases. "Facial constitutional challenges come in two varieties: First a
20 plaintiff seeking to vindicate his own constitutional rights may argue that an ordinance 'is
21 unconstitutionally vague or . . . impermissibly restricts a protected activity.'" *Santa Monica*
22 *Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1033 (9th Cir. 2006) (quoting *Foti*
23 *v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998)). In this type of challenge,
24 "[p]laintiffs may seek directly on their own behalf the facial invalidation of overly broad
25 statutes that 'create an unacceptable risk of the suppression of ideas . . . .'" *Nunez v. City of*
26 *San Diego*, 114 F.3d 935, 949 (9th Cir. 1997) (quoting *Sec'y of Md. v. Joseph H. Munson*
27 *Co.*, 467 U.S. 947, 965 n.13 (1984) (internal quotation and citation omitted)). "Second, 'an
28 individual whose own speech or expressive conduct may validly be prohibited or sanctioned

1 is permitted to challenge a statute on its face because it also threatens others not before the
2 court.'" *Santa Monica Food Not Bombs*, 450 F.3d 1022 at 1033 (quoting *Brockett v. Spokane*
3 *Arcades, Inc.*, 472 U.S. 491, 503 (1985)). The first kind of challenge, which is what Plaintiffs
4 assert here, is frequently paired with the more common as-applied challenge, wherein a
5 plaintiff argues that a law is unconstitutional as applied to his or her own speech or conduct.
6 *See id.* at 1034.

7 **a. FCC**

8 Defendant states that FCC does not have standing in this action because it does not
9 own functional church bells or an electronic carillon bell system, nor has it been threatened
10 with prosecution. (Def.'s Mot. at 5-6.) The Complaint states that FCC rang an electronic
11 carillon system in its bell tower at 12:00 noon and 5:00 p.m. from the bell tower's completion
12 in 1973 until the carillon system became inoperable in 2006. (Compl. ¶¶ 99-108.) Defendant
13 contends that these allegations demonstrate that FCC has suffered no injury in fact. (Def.'s
14 Mot. at 5-6.) Plaintiffs disagree and argue in their Response that "[t]hreats of future
15 prosecution are sufficient to establish standing when, as in this case, the threat is concrete
16 and not conjectural." (Pls.' Resp. to Def.'s Mot. ("Pls.' Resp.") at 2.)

17 The Ninth Circuit Court of Appeals has held, "[T]o establish 'a dispute susceptible
18 to resolution by a federal court,' plaintiffs must allege that they have been 'threatened with
19 prosecution, that a prosecution is likely, or even that a prosecution is remotely possible.'"
20 *Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 618 (quoting *Babbitt v.*
21 *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (requiring *at least* allegations
22 such as these)). While a plaintiff need not engage in conduct likely to lead to a prosecution
23 or undergo a criminal prosecution, standing requires at least "a credible threat of
24 prosecution" under the challenged statute. *Babbitt*, 442 U.S. at 298. In the First Amendment
25 context, a plaintiff has standing if his or her exercise of those rights is "chilled" by the
26 challenged provision. *Culinary Workers*, 200 F.3d at 618-19.

27 The Complaint alleges that FCC "rings" its carillon as "part of its exercise of
28 religion." (Compl. ¶ 109.) The Complaint further alleges that "FCC plans to repair the bell

tower so that the carillon is once again operative" and "desires to once again commence ringing its carillon . . . in the near future." (*Id.* ¶¶ 113-14.) The Complaint does not allege that, but for the Noise Ordinance, FCC would be repairing the bell tower or ringing the carillon. Plaintiffs simply claim that FCC fears prosecution in the event that it were to repair the tower and begin ringing its carillon. (*Id.* ¶ 115.) These allegations are not enough to establish standing for FCC. The situation would be different if FCC were ringing bells of some sort, were in the process of repairing the tower, or even were raising funds to pay for the tower repair or an electronic carillon system.[1] The threat of prosecution under the Noise Ordinance simply does not rise to the level of "remote" or "credible" at this juncture, since FCC is not making any bell-related noise that might be punished and has not alleged that it is being chilled in its endeavors to do so.

Plaintiffs analogize FCC's situation to that of the plaintiff in *Raich v. Gonzalez*, 500 F.3d 850 (9th Cir. 2007). (Pls.' Resp. at 4.) In *Raich*, the plaintiff was able to establish standing on the basis of "the threat that the Government will seize her medical marijuana and prosecute her for violations of federal drug law." *Raich*, 500 F.3d at 857. The difference between Angel Raich's predicament and that of FCC is that Ms. Raich was actually in possession of the substance the government had seized from other users, and her doctor testified that foregoing the medical marijuana treatment could be fatal. *Id.* at 855-56. Here, FCC is not ringing any bells, nor does it plan to do so in the immediate future. *Cf. Davidson v. Culver City*, 159 F. App'x 756, 758-59 (9th Cir. 2005) (unpublished) (holding that plaintiff did not have standing to challenge sign ordinance because there was no credible threat of prosecution); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1096 (9th Cir. 2003) (affirming dismissal of plaintiff for lack of standing to challenge election law provision

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[1] Defendant submitted deposition excerpts along with its Reply that appear to demonstrate that FCC is not raising money to repair the bell tower or to buy a new electronic carillon system. (*See* Def.'s Reply, Ex. G.) However, as this argument was raised for the first time in the Reply, the Court will not consider it, except to the extent that the Complaint does not contain allegations to the contrary. The Court does not rely on FCC's lack of funds or fundraising plans in determining that it does not have standing in this matter.

where there was no credible threat of prosecution). Moreover, FCC's interest in the Noise Ordinance could be completely represented by the other two Plaintiffs, so no significant harm will befall FCC as a result of being dismissed. Defendant's 12(b)(1) Motion to Dismiss for lack of subject matter jurisdiction is granted as to FCC.

b. St. Mark

The Court concludes differently with respect to St. Mark. The Complaint alleges that St. Mark rings its carillon as part of its exercise of religious beliefs "every hour on the hour from 8 a.m. to 8 p.m." and has done so for at least 20 years. (Compl. ¶¶ 70-72.) St. Mark's carillon also plays a melody at noon every day, rings three times before each Mass (held every evening and three times each Sunday), and rings five times every day at 7:30 p.m. (*Id.* ¶¶ 74-78.) The Complaint further alleges that a representative of the City Prosecutor's office contacted St. Mark to request a meeting regarding the bells. (*Id.* ¶ 88.) At the meeting, St. Mark learned that a neighbor had complained about the noise created by the carillon. (*Id.* ¶¶ 89, 93-94.) Representatives from the City Prosecutor's office and the PPD attended the meeting, where St. Mark was represented by its Pastor, another employee of the church, and General Counsel of the Catholic Diocese of Phoenix. (*Id.* ¶¶ 90-92.) At the meeting, the City representatives conveyed that they hoped a compromise could be reached. (*Id.* ¶ 95.) Nevertheless, the Complaint states, "St. Mark fears that it will be prosecuted under the Phoenix Noise Ordinance for ringing its carillon as a part of the exercise of its religion." (*Id.* ¶ 97.)

Defendant argues that St. Mark does not have standing because the church has been ringing the carillon for 20 years without "even one police report . . . [,] let alone a criminal prosecution." (Def.'s Mot. at 5; *see also id.*, Ex. E, Aff. of Marianne Maldonado (stating that there are no police reports related to St. Mark's carillon on file with the PPD).) Defendant points to the Affidavit of the aptly-named Sergeant Ted Music of the PPD, wherein he states that he requested and attended the meeting with St. Mark's representatives. (Def.'s Mot., Ex. G, Aff. of Ted Music ¶ 5.) Sergeant Music further says:

1 2 3 4

> No threats of prosecution of the church were made by anyone at this meeting. No one on behalf of the City ever raised the subject. However, at one point during the meeting [Diocese General Counsel] John Kelly asked if the City was thinking of prosecuting the church and he was told that the City had only one complainant and would need more complaints and more complainants and then an investigation would have to be conducted before a prosecution would even be considered.

5 (*Id.* ¶ 6.) The City contends that this testimony, coupled with the lack of further complaints
6 or police reports, demonstrates that the threat of prosecution of St. Mark under the Noise
7 Ordinance is "completely conjectural." (Def.'s Mot. at 5.)

8 The Court disagrees. As discussed above, Plaintiffs need only demonstrate a
9 "credible" threat of prosecution under the challenged provision. *Babbitt*, 442 U.S. at 298.
10 Given the prosecution and conviction of Bishop Painter under the Noise Ordinance and the
11 fact that St. Mark is currently actively ringing its carillon, the Court would conclude that the
12 Complaint adequately pleads facts in support of standing for St. Mark, even without the
13 complaints of the church's neighbor. Here, Plaintiffs' analogy to *Raich* is more apposite.
14 Defendant's 12(b)(1) Motion is denied as to St. Mark.

15 **2. Failure to State a Claim**

16 The City also moves to dismiss Plaintiffs' Complaint under Federal Rule of Civil
17 Procedure 12(b)(6). (Def.'s Mot. at 1.) "While a complaint attacked by a Rule 12(b)(6)
18 motion does not need detailed factual allegations, a plaintiff's obligation to provide the
19 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a
20 formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at
21 555 (citations omitted). A Rule 12(b)(6) dismissal for failure to state a claim can be based
22 on either (1) the lack of a cognizable legal theory or (2) insufficient facts to support a
23 cognizable legal claim. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.
24 1990); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). In
25 determining whether an asserted claim can be sustained, all allegations of material fact are
26 taken as true and construed in the light most favorable to the non-moving party. *Clegg v. Cult*
27 *Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994). "[A] well-pleaded complaint may
28 proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that

'recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). However, "for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1952 (2009)). In other words, the complaint must contain enough factual content "to raise a reasonable expectation that discovery will reveal evidence" of the claim. *Twombly*, 550 U.S. at 556.

Defendant has submitted exhibits in support of its Rule 12(b)(6) Motion. (*See* Def.'s Mot., Exs. B-D.) When matters outside the complaint are considered by the court on a motion to dismiss, the court usually must treat the motion as one for summary judgment. Fed. R. Civ. P. 12(b); *San Pedro Hotel Co., Inc. v. City of L.A.*, 159 F.3d 470, 477 (9th Cir. 1998). Generally, however, on a motion to dismiss, a court limits its review to the contents of the complaint and may only consider material that is properly presented to the court as part of the complaint. *See Lee v. City of L.A.*, 250 F.3d 668, 688-89 (9th Cir. 2001) (citation omitted). The Court declines to convert Defendant's Motion to Dismiss into one for summary judgment and will not consider any materials outside the Complaint.

a. Facial Challenge (Free Speech)

Defendant moves to dismiss Plaintiffs' first claim, a facial challenge to the Noise Ordinance, for failure to state a claim. (Def.'s Mot. at 6.) Defendant first argues that the Noise Ordinance "is directed, broadly and generally, at excessive noise only and is not directed in any way at specific conduct, such as picketing, handbilling, or any form of political speech." (*Id.*) Plaintiffs counter that "playing church bells is a means of expression." (Pls.' Resp. at 6 (citing Compl. ¶¶ 34-35, 70, 109-10).) Plaintiffs are clearly correct on this point. Church bells produce music, and courts have determined that music is expression for the purposes of First Amendment analysis. *See Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to

appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state . . . . Music, as a form of expression and communication, is protected under the First Amendment."); *Nurre v. Whitehead*, 580 F.3d 1087, 1093 (9th Cir. 2009) ("[P]urely instrumental music–i.e., music with no lyrics–is speech."); *Berger v. City of Seattle*, 569 F.3d 1029, 1037 n.4 (9th Cir. 2009) (same). Furthermore, Plaintiffs assert that the church bells play a role in their religious expression. (*See, e.g.*, Compl. ¶ 87.)

"Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). A content-based restriction applied to speech in a "public forum[]" is only permissible if it "is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)). However, the government may enforce content neutral restrictions on the time, place, and manner of otherwise protected speech. *Rosenbaum v. City & County of S.F.*, 484 F.3d 1142, 1158 (9th Cir. 2007) (citing *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 907 (9th Cir. 2007)).To enforce such a regulation, the government must show that the provision is "content neutral, [is] narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication." *Perry Educ. Ass'n*, 460 U.S. at 45 (citations omitted). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791 (1989).

The Court must first determine if the Noise Ordinance is content-based or content neutral. "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791. The Supreme Court held in *Ward* that the government's purpose in implementing the law "is the controlling consideration," and, as stated above, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral." *Id.* Therefore,

1 "[g]overnment regulation of expressive activity is content neutral so long as it is '*justified*
2 without reference to the content of the regulated speech.'" *Id.* (quoting *Clark v. Cmty. for*
3 *Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

4 The Complaint does not contain any allegations regarding the City's purpose or
5 justification for the Noise Ordinance, nor do Plaintiffs argue that the City had a
6 discriminatory motive for implementing it. Rather, Plaintiffs advance that "the City's noise
7 ordinance is content-based on its face because it requires the enforcer of the ordinance to
8 review the content of the speech to determine whether the ordinance applies." (Pls.' Resp.
9 at 7.) Essentially, Plaintiffs argue that the Noise Ordinance is rendered content-based by
10 virtue of its exceptions. (*Id.* at 7-8.) Plaintiffs point to the exemption for noncommercial
11 public addresses and devices such as those played by ice cream trucks (which are exempted
12 if they play "a pleasing melody"). (*Id.* at 8.) Plaintiffs also argue that the plain language of
13 the statute requires the enforcer to listen to the content of the noise in order to determine if
14 it is "disturbing." (*Id.*)

15 Exemptions from an otherwise apparently neutral provision can make a law content-
16 based. *See Glendale Assoc., Ltd. v. N.L.R.B.*, 347 F.3d 1145, 1155-56 (9th Cir. 2003)
17 (holding that a rule is content-based if the regulating party must examine the speech to decide
18 whether it is permissible); *Desert Outdoor Adver., Inc. v. City of Moreno Valley*, 103 F.3d
19 814, 820 (9th Cir. 1996) ("Because the exemptions require City officials to examine the
20 content of noncommercial off-site structures and signs to determine whether the exemption
21 applies, the City's regulation of noncommercial speech is content-based."); *cf. Ward*, 491
22 U.S. at 792-93 (concluding that New York City ordinance regulating noise level in Central
23 Park was content neutral because it applied to all noise regardless of content); *but see Reed*
24 *v. Town of Gilbert*, 587 F.3d 966, 978-79 (9th Cir. 2009) (reviewing town sign code and
25 observing that the "officer must read it test" for determining whether a regulation is content-
26 neutral must be applied with "common sense," otherwise every sign except a blank one
27 would be impermissible). The Noise Ordinance at issue here contains exemptions that require
28 the enforcing party to examine the expressive conduct to determine whether it falls within

the scope of the law. (*See* Compl., Ex. B at 2-3.) For instance, to decide whether a public address is noncommercial, the listener must review the content of the speech. (*Id.* at 2.) The so-called "ice cream truck exemption," § 23-15(d), also requires the enforcing party to listen to the content of the sound to determine whether it is a "pleasing melod[y]." (*Id.* at 3.) These exemptions go beyond simply quickly observing or listening to the sound, as was the situation in *Reed*. 587 F.3d at 979. To enforce the City's Noise Ordinance, an officer needs to apply subjective standards (e.g., is a melody pleasing or not?) and listen carefully to the sound (e.g., is this a commercial address or not?). On account of the character of these exemptions, the Court finds that the Noise Ordinance is content-based.[2]

Next, the Court must determine whether the Noise Ordinance withstands strict scrutiny. *See Ward*, 491 U.S. at 800 n.6 (observing that strict scrutiny applies to content-based regulations of speech); *Perry Educ. Ass'n*, 460 U.S. at 45 (holding that a content-based restriction must be shown to be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end" to be upheld). Based on the allegations in the Complaint, Plaintiffs have made out a facial challenge to the Noise Ordinance. The Complaint alleges that no compelling state interest animates the provision and that any interest the City might have in regulating noise pollution is not advanced in the least restrictive means possible. (Compl. ¶¶ 147-48, 154-55.) Defendant rejoins that the purpose

[2] At oral argument, counsel for Defendant urged the Court to look to a recent decision by the Fifth Circuit Court of Appeals, in which the court upheld a permitting scheme that contained exemptions for, among other things, church bells and cannon fire associated with historical reenactments. *S.E.I.U., Local 5 v. City of Houston*, No. 08-20616, 2010 WL 323550, at *8-9 (5th Cir. Jan. 28, 2010) (noting that ordinance was content neutral despite containing numerous exceptions). The instant case is distinguishable in several respects. First, the Phoenix Noise Ordinance is not a permitting scheme, which can be treated differently as a prior restraint on speech. *Id.* at *1. Second, the Houston ordinance contained an exception for church bells, presumably in an effort to avoid the constitutional issues raised in the instant matter, and the exception also outlined time and duration requirements for the bells. *Id.* Finally, the fact that the provision exempted church bells skirts the problem Plaintiffs in this case point out because no subjective enforcement is required to determine whether sounds qualify for exceptions to the Houston ordinance.

of the Noise Ordinance "is to preserve a tranquil environment for the City's citizens." (Def.'s Mot. at 7.) The Court must rely upon the facts alleged in the Complaint in resolving Defendant's Motion to Dismiss, but even assuming that the Noise Ordinance serves a compelling state interest,[3] the Court still finds that the Complaint alleges factual content "plausibly suggestive of a claim entitling the [P]laintiff[s] to relief." *Moss*, 572 F.3d at 969 (quoting *Iqbal*, 129 S. Ct. at 1952). As to Plaintiffs' first cause of action, Defendant's Motion to Dismiss is denied.[4]

b. Due Process Challenge (Vagueness)

The City also moves to dismiss Plaintiffs' second cause of action, wherein they allege that the Noise Ordinance is void for vagueness. (Def.'s Mot. at 10–11.) "Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." *United States v. Williams*, 553 U.S. 285, 128 S. Ct. 1830, 1845 (2008).[5] A statute subject to a vagueness challenge fails to pass muster if it does not "provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)). In the First Amendment context, plaintiffs are permitted "to argue that a statute is overbroad

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[3] In fact, the government's interest in preserving civic tranquility has been found to be compelling. *See infra* p. 26.

[4] The City makes several other arguments in support of its Motion, including urging the Court to examine the "context" of Bishop Painter's conviction and advancing that the carillon ringing is "completely secular" timekeeping. (*See* Def.'s Mot. at 7-8.) These issues are not properly raised in a Motion to Dismiss where, as discussed above, the Court focuses only on the allegations in the Complaint and any materials properly presented.

[5] The vagueness doctrine arising from the Fifth Amendment's due process clause and the First Amendment is incorporated against the states via the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the First Amendment against the states); *Great Am. Houseboat Co. v. United States*, 780 F.2d 741, 746 n.3 (9th Cir. 1986) (observing that vagueness doctrine applies to the states through the Fourteenth Amendment's due process clause).

because it is unclear whether it regulates a substantial amount of protected speech." *Id.* (citing *Reno v. A.C.L.U.*, 521 U.S. 844, 870-874 (1997); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 & nn.6-7 (1982)). Requirements for clarity are enhanced both where a statute provides for a criminal penalty and where First Amendment rights are implicated. *See Info. Providers' Coal. for the Def. of the First Amendment v. F.C.C.*, 928 F.2d 866, 874 (9th Cir. 1991) (citing *Grayned*, 408 U.S. at 109). However, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward*, 491 U.S. at 794.[6]

Turning to the allegations in the Complaint, Plaintiffs contend that certain terms in the Noise Ordinance, including "unreasonably loud," "disturbing," and "unnecessary" are undefined. (Compl. ¶¶ 119, 166.) The Complaint also states that, besides the decibel requirement outlined in the § 23-15(d) exemption, the Noise Ordinance contains no objective standards for enforcement. (*Id.* ¶¶ 132-33.) The lack of objective standards, Plaintiffs assert, allows for subjective and arbitrary enforcement of the law. (*Id.* ¶¶ 141-42, 169.) The Complaint also alleges that persons of ordinary intelligence would guess as to the scope and meaning of the Noise Ordinance. (*Id.* ¶ 167.) The Complaint further states that representatives of the City's Prosecutor's Office acknowledged that the Noise Ordinance was vague. (*Id.* ¶ 96.) Taken together, these allegations are sufficient to withstand a Rule 12(b)(6) challenge. The allegations establish that Plaintiffs have stated a claim plausibly suggestive of entitlement to relief. As to the second cause of action, Defendant's Motion to Dismiss is denied.

c. As-Applied Challenge (Free Exercise)

Plaintiffs' third cause of action is for a violation of their right to free exercise of religion under the First Amendment. (Compl. ¶¶ 175-88.) Defendant has moved to dismiss this claim as well. (Def.'s Mot. at 10-11.) The parties have not thoroughly briefed this issue,

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[6] Defendant incorrectly states the standard of review for vagueness challenges. (Def.'s Mot. at 10-11.) The Court applies the standard outlined above.

but the Court will nonetheless address it here.[7] James Madison, the author of the First Amendment, wrote that the "religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right." James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), reprinted in 8 *The Papers of James Madison* 295, 299 (Robert A. Rutland et al. eds., 1973). Thus, the government's power to interfere with or inhibit an individual's practice of his or her religious faith is extremely limited. "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg." Thomas Jefferson, *Notes on the State of Virginia* 159 (Query 17) (William Peden ed., Univ. of N.C. Press 1982) (1784).

With respect to compliance with the Free Exercise Clause, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990)). If a law is not neutral and generally-applicable, it receives strict scrutiny by courts and must be narrowly tailored to advance a compelling governmental interest. *Id.* at 531-32.

To ascertain whether a law is neutral, courts begin by examining the language of the statute. *Id.* at 532. The inquiry does not end there, however: "[f]acial neutrality is not determinative. . . . The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.* at 534. "A law is one of neutrality and general applicability if it does not aim to 'infringe upon or restrict practices because of their religious motivation,' and if it does not 'in a selective manner impose burdens only on conduct motivated by religious belief[.]'" *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1031

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[7] The City contends that the free exercise claim is "simply the first cause of action [free speech claim] under a different title. . . ." (Def.'s Mot. at 10.) This is incorrect. Free exercise analysis is distinct from free speech analysis.

(9th Cir. 2004) (quoting *Lukumi*, 508 U.S. at 533, 543). The Ninth Circuit Court of Appeals has held that rational basis review applies to determinations of whether a neutral law of general applicability "violate[s] the right to free exercise of religion even though the law incidentally burdens a particular religious belief or practice." *Id.* (quoting *Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999)).[8]

The Court finds that the Noise Ordinance is facially neutral and generally-applicable, for the purposes of free exercise analysis. The Noise Ordinance does not target religious activity on its face, just excessive noise, and the statutory language does not use religiously significant or loaded language. (*See* Compl., Ex. B at 1 ("[T]he creating of any unreasonably loud, disturbing and unnecessary noise within the limits of the City is hereby prohibited.").) However, the Complaint alleges that the law is not neutral because it lacks an exemption for religious activity. (*Id.* ¶¶ 178-81; *see also id.*, Ex. B at 3 (outlining exemptions to Noise Ordinance).) This rule is more frequently applied in situations involving individualized exemptions to general rules. *See, e.g.*, *Smith*, 494 U.S. at 879 ("[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." (internal quotation and citation omitted)); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 210-11 (3d Cir. 2004) (holding that lack of religious exemption from permit fee for member of the Lakota tribe who wanted to keep bears on his property was subject to strict scrutiny); *but see Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 364 (3d Cir. 1999) (considering

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[8] The Supreme Court stated in *Smith* that if a generally-applicable law implicates other constitutional protections along with the free exercise of religion, "such as freedom of speech," it must withstand strict scrutiny. *San Jose Christian Coll.*, 360 F.3d at 1031 (quoting *Smith*, 494 U.S. at 881). This is known as "hybrid rights" analysis. *Id.* (citing *Miller*, 176 F.3d at 1204). Plaintiffs do not argue that their Complaint involves a so-called "hybrid rights" claim, a theory that has been widely criticized. The Ninth Circuit Court of Appeals has declined to "allow[] a plaintiff to bootstrap a free exercise claim in this manner." *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 440 n.45 (9th Cir. 2008). The Court will not address this possibility.

categorical exemptions to City's no-beard policy and concluding that lack of religious exemption also triggered strict scrutiny).

Therefore, due to the exemptions to the Noise Ordinance, the Court must apply strict scrutiny to Plaintiffs' free exercise challenge as well. Plaintiffs assert that "[t]he Noise Ordinance substantially burdens [their] exercise of religion." (Compl. ¶ 177.) The Complaint alleges that the City "has no compelling government interest to justify its Noise Ordinance." (*Id.* ¶ 185.) Further, the Complaint states, "Any interest Defendant has in its Noise Ordinance is not advanced in the least restrictive means available." (*Id.* ¶ 186.) While the regulating body need not employ the least restrictive means possible to survive a Free Exercise Clause challenge, the City still must show that the Noise Ordinance is narrowly tailored to achieve a compelling state interest. *See, e.g.*, *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 218 (2003); *cf. Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 456 F.3d 978, 995 n.21 (9th Cir. 2006) (applying least restrictive means test in challenge under Religious Land Use and Institutionalized Persons Act, which only pertains to land use and prison conditions, and noting difference from traditional strict scrutiny test applicable to claims under the Free Exercise). The Complaint does not contain any allegations related to narrow tailoring of the Noise Ordinance. However, the Court concludes that under the standard established for Rule 12(b)(6) analysis in *Iqbal*, Plaintiffs have alleged facts "plausibly suggestive of a claim entitling [them] to relief." *Moss*, 572 F.3d at 969 (quoting *Iqbal*, 129 S. Ct. at 1952). The Complaint alleges that the City's system of exemptions for secular activities ought to be expanded to cover religious expression, and these allegations raise the right to relief above the speculative level. (Compl. ¶¶ 180-84.) Defendant's Motion is denied as to the Free Exercise claim in the Complaint.

d. Claim Under Arizona's FERA

Plaintiffs' final cause of action is brought pursuant to the FERA, A.R.S. §§ 41-1493 to 41-1493.02. (Compl. ¶¶ 189-97.) The City moves to dismiss this cause of action for several reasons. (Def.'s Mot. at 11-12.) First, the City argues that the claim is "abstract" because "not a single Plaintiff owns or operates a bell." (*Id.* at 11.) The Court has thoroughly

addressed standing *supra* and will not revisit the issue here. Suffice it to say, Plaintiffs CKC and St. Mark have established that they have standing to pursue the claims in the Complaint. Next, the City argues that the Complaint does not satisfy Rule 12(b)(6) with respect to this claim because the Noise Ordinance meets the "least restrictive means" test set forth in A.R.S. § 41-1493.01(C). (Def.'s Mot. at 12.)

"The legislature passed FERA in 1999 to protect Arizona citizens' right to exercise their religious beliefs free from undue governmental interference." *State v. Hardesty*, 214 P.3d 1004, 1006 (Ariz. 2009) (citing 1999 Ariz. Sess. Laws, ch. 332, § 2 (1st Reg. Sess.)). Under FERA, the government may burden the exercise of religion only if the "application of the burden to the person is both . . . [i]n furtherance of a compelling governmental interest [and] [t]he least restrictive means of furthering that compelling governmental interest." A.R.S. § 41-1493.01(C). The Arizona Supreme Court has held that a party bringing a FERA claim must establish: "(1) that an action or refusal to act is motivated by a religious belief, (2) that the religious belief is sincerely held, and (3) that the governmental action substantially burdens the exercise of religious beliefs." *Hardesty*, 214 P.3d at 1007. Once the claimant establishes those three elements, the burden shifts to the government to demonstrate that the state action is the least restrictive means of furthering a compelling governmental interest. *Id.*

The Complaint satisfies the requirements for alleging a FERA claim, first by stating that "Plaintiffs have a sincerely-held religious belief to ring bells as part of their religious exercise . . . [that] is substantially motivated by their religious beliefs." (Compl. ¶¶ 190-91.) The Complaint further alleges, "The Noise Ordinance substantially burdens the Plaintiffs' exercise of religion." (*Id.* ¶ 192.) Finally, the Complaint states that the City "has no compelling government interest to justify its Noise Ordinance," and "[a]ny interest Defendant has in its Noise Ordinance is not advanced in the least restrictive means available." (*Id.* ¶¶ 194-95.) Plaintiffs have stated a claim under FERA sufficient to withstand the City's Rule 12(b)(6) challenge. Defendant's Motion is denied as to the fourth cause of action.

3. Abstention

Defendant next argues that the Court should abstain from hearing the instant case under either the *Younger*, *Pullman*, or *Colorado River* abstention doctrines. (Def.'s Mot. at 12-15.) The Court disagrees.

a. Younger

The doctrine created by *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny counsels against federal court interference in state judicial proceedings under certain circumstances. *Moore v. Sims*, 442 U.S. 415, 423 (1979). The principles underlying *Younger* abstention include "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Middlesex County Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423, 431 (1982) (citing *Younger*, 401 U.S. at 44). While "there are limited circumstances in which . . . abstention by federal courts is appropriate, those circumstances are 'carefully defined' and 'remain the exception, not the rule.'" *Gilbertson v. Albright*, 381 F.3d 965, 969 n.2 (9th Cir. 2004) (quoting *Green v. City of Tucson*, 255 F.3d 1086, 1089 (9th Cir. 2001) (en banc) (internal quotations and citations omitted)).

The Supreme Court has articulated three elements that lead to a situation in which Younger abstention is appropriate: (1) there is an ongoing state proceeding; (2) the federal proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal issues. *Middlesex County*, 457 U.S. at 432; *accord Gartrell Constr., Inc. v. Aubry*, 940 F.2d 437, 441 (9th Cir. 1991). Here, there is an ongoing state proceeding, Bishop Painter's appeal of his criminal conviction under the Noise Ordinance, but the issues at stake in that case do not mirror those raised in the instant matter. (*See* Def.'s Mot. at 13.) Bishop Painter appeals his own conviction, which only arguably impacts the legal interests of his employer, CKC, and does not affect the interests of St. Mark at all. (Pls.' Resp. at 14-15.) The Ninth Circuit Court of Appeals held that *Younger* abstention

is only appropriate "when the relief sought in federal court would in some manner directly interfere with ongoing state judicial proceedings–and that, further, such interference is not present merely because a plaintiff chooses to instigate parallel affirmative litigation in both state and federal court." *Montclair Parkowners Ass'n v. City of Montclair*, 264 F.3d 829, 830 (9th Cir. 2001) (internal quotations omitted) (citing *Green*, 255 F.3d at 1097). Here, while relief that might be granted to Plaintiffs in the present matter could affect the outcome of Bishop Painter's appeal (for instance if this Court were to declare the Noise Ordinance unconstitutional), the relief would not directly interfere with the state court action because this case involves different Plaintiffs and more issues. The Court concludes that *Younger* abstention, a rare action for a federal court to take, is not appropriate here.

b. *Pullman*

The City next asserts that this Court should abstain on the basis that Plaintiffs failed to take advantage of an adequate state remedy, pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 499-501 (1941). (Def.'s Mot. at 13-14.) In *Pullman*, the Supreme Court held that federal courts should refrain from deciding questions of state law where a state court ruling could clarify the law and render a federal court decision unnecessary. *Id.* at 500.

> To abstain under *Pullman*, a federal court must find all three of the following factors: first, the complaint touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open; second, a definitive ruling on the state issue would terminate the controversy; and third, the possibly determinative issue of state law is doubtful.

Ripplinger v. Collins, 868 F.2d 1043, 1048 (9th Cir. 1989) (citing *McMillan v. Goleta Water Dist.*, 792 F.2d 1453, 1458 (9th Cir. 1986), *cert. denied*, 480 U.S. 906 (1987)). "In first amendment cases, the first of these factors will almost never be present because the guarantee of free expression is always an area of particular federal concern." *Id.* (citations omitted); *accord Hydrick v. Hunter*, 500 F.3d 978, 987 n.6 (9th Cir. 2007) (finding *Pullman* abstention inappropriate where "the driving force behind each of the Plaintiffs' claims is a right guaranteed by the United States Constitution, and state court clarification of state law would

not make a federal court ruling unnecessary"). *Ripplinger* and *Hydrick* are directly on point. In this case, all but one of Plaintiffs' claims arise out of federal constitutional questions and involve First Amendment issues. Furthermore, in the instant matter, a resolution of Bishop Painter's appeal will not obviate the need for a federal court to rule on Plaintiffs' federal constitutional claims. In fact, as the only party to the state court action is Bishop Painter, Plaintiff St. Mark is wholly unaffected by the outcome of the state court matter. (*See* Def.'s Mot., Exs. B-D.) The Court will not abstain under *Pullman*.

c. *Colorado River*

Finally, Defendant asserts that the Court should decline jurisdiction[9] under the doctrine set forth in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). (Def.'s Mot. at 14-15.) Where there are concurrent state court proceedings involving the same subject matter, a federal district court may refrain from adjudicating a case before it "for reasons of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colo. River*, 424 U.S. at 817. Generally, the mere fact that an action is pending in state court does not bar proceedings in a federal court that has concurrent jurisdiction, although courts should endeavor to avoid duplicative litigation. *Id.* This doctrine is a very narrow exception to "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Id.* (internal citation and quotation omitted). The *Colorado River* doctrine is only appropriate where "exceptional circumstances" are present. *Moses H. Cone*, 460 U.S. at 15-16.

Courts examine a complex set of factors in determining whether the *Colorado River* doctrine applies. They are: (1) whether either the state or federal court has exercised jurisdiction over a *res*; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5)

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[9] "The *Colorado River* doctrine is not technically an abstention doctrine, although it is sometimes referred to as one." *Holder v. Holder*, 305 F.3d 854, 867 n.4 (9th Cir. 2002) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 14-15 (1983); *Attwood v. Mendocino Coast Dist. Hosp.*, 886 F.2d 241, 243 (9th Cir. 1989)).

1 whether federal or state law controls the decision on the merits; and (6) whether the state
2 court can adequately protect the parties' rights. *See 40235 Wash. St. Corp. v. Lusardi*, 976
3 F.2d 587, 588 (9th Cir. 1992). Defendant concedes that the first factor does not apply here,
4 as no *res* is at issue, and that the second factor does not weigh in favor of this Court declining
5 jurisdiction, since all the parties are located in Phoenix, Arizona. (Def.'s Mot. at 14-15.) The
6 third factor does not indicate that this Court should not exercise jurisdiction. While the
7 resolution of this case might impact the resolution of the state court matter, the reverse is not
8 true: this Court would still need to consider Plaintiffs' constitutional claims, regardless of
9 what happens with Bishop Painter's appeal. As stated above, these Plaintiffs are not parties
10 to the state court action. Federal constitutional law controls the outcome of this case,
11 although state law will be considered with respect to Plaintiffs' FERA claim, and a state
12 statute is ultimately at issue. The state court is not capable of protecting Plaintiffs' rights
13 because, again, they are not parties to Bishop Painter's appeal. These considerations are not
14 outweighed by the fact that the state court action was initiated before the instant matter. The
15 Court finds that the *Colorado River* doctrine is inapposite. The Court has–and will
16 exercise–jurisdiction over this case.

17 **B. Plaintiffs' Motion for Preliminary Injunction**

18 Plaintiffs seek a preliminary injunction prohibiting the City from enforcing the Noise
19 Ordinance. (Pls.' Mot. at 1-2.) "A plaintiff seeking a preliminary injunction must establish
20 that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the
21 absence of preliminary relief, that the balance of equities tips in his favor, and that an
22 injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365,
23 374 (2008) (citations omitted). The Court will begin with Plaintiffs' facial challenge to the
24 Noise Ordinance.

25 **1. Likelihood of Success on the Merits**

26 As outlined above, the Court applies strict scrutiny to Plaintiffs' facial challenge to
27 the Noise Ordinance. (*See supra*, pp. 12-15.) Accordingly, the Noise Ordinance must be
28 "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end."

Perry Educ. Ass'n, 460 U.S. at 45(citing *Carey*, 447 U.S. at 461). The City first argues that the Plaintiffs' electronic carillon systems do not produce "speech" that is protected by the First Amendment. (Def.'s Resp. to Pls.' Mot. ("Def.'s Resp.") at 2-5.) This theory is unavailing. First, as discussed above, courts have long recognized that music is protected expression. *Ward*, 491 U.S. at 790 ("Music, as a form of expression and communication, is protected under the First Amendment."). Likewise, electronic means of communicating or amplifying sounds are also found to qualify for protection under the First Amendment. *See, e.g.*, *Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 803 (1996) (Kennedy, J., concurring in judgment) ("To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media."); *Saia v. People of the State of N.Y.*, 334 U.S. 558, 561 (1948) ("Loud-speakers are today indispensable instruments of effective public speech."). The Court concludes that playing electronic carillon bells amounts to speech or expression covered by the First Amendment.

The government's interest in regulating music that is likely to cause annoyance or disturbance is a compelling one. *See Ward*, 491 U.S. at 796 ("[I]t can no longer be doubted that government 'ha[s] a substantial interest in protecting its citizens from unwelcome noise.'" (quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984))); *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) ("A city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976))); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 387 (1969) ("[T]he Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech . . . ."). Nevertheless, the Noise Ordinance at issue here is not narrowly tailored and therefore fails strict scrutiny.

The Court finds, for the purposes of preliminary injunction analysis, that the Noise Ordinance is neither precise enough nor clear enough to be considered narrowly tailored. The Noise Ordinance does not contain an objective standard, such as a decibel level, under which

loud, disturbing, and unnecessary sounds are targeted to the exclusion of sounds that are not loud, disturbing, and unnecessary.[10] Also, the exemptions from the Noise Ordinance are a scattershot list, providing an exception for government vehicles, noncommercial public addresses, ice cream trucks (or other uses of hand-held devices playing "pleasing melodies"), and nighttime street work, but not considering any other types of sound to be exempt from coverage. The government's interest in preventing the disturbance of its citizens by noise could be achieved by other, less restrictive means.

2. Irreparable Harm

In the free speech context, the Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (citing *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971)); *accord Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009). The Court has concluded that Plaintiffs demonstrated a likelihood of success on the merits of their facial challenge to the Noise Ordinance for violation of their free speech rights as guaranteed by the First Amendment. That finding, coupled with the

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[10] The City pointed out at oral argument that decibel level-based restrictions are not without their own problems, namely that different parts of the City are zoned differently, so possible inequities might arise with a less flexible regulation based on decibels. (*See* Hr'g Tr. 29:7-22, Feb. 1, 2010.) In support of this argument, the City cites *People v. Lord*, 796 N.Y.S.2d 511, 511 (App. Div. 2005), wherein the Appellate Division of the New York State Supreme Court determined that a village's noise ordinance was not unconstitutionally overbroad by virtue of its lack of a decibel level standard and that a "reasonable person" standard was appropriate instead. However, numerous courts have concluded differently, finding decibel levels to be acceptable when reviewing the constitutionality of noise ordinances or concluding that noise ordinances were unconstitutional because they lacked a decibel restriction. *See, e.g.*, *Saia*, 334 U.S. at 562 ("Noise can be regulated by regulating decibels. The hours and place of public discussion can be controlled."); *McCray v. City of Citrus Heights*, No. Civ.S-99-1984WBS DAD, 2000 WL 1174728, at *7 (E.D. Cal. 2000) (finding that noise ordinance was not narrowly tailored because it lacked objective standard such as decibel limit); *Dupres v. City of Newport*, 978 F. Supp. 429, 434-35 (D.R.I. 1997) (upholding portion of noise ordinance with decibel level restriction and finding remaining sections unconstitutional). The Court is not bound by *People v. Lord* and will not follow its reasoning.

allegations in the Complaint regarding enforcement of the Noise Ordinance against CKC, demonstrate that Plaintiffs are likely to suffer irreparable harm in the absence of a preliminary injunction. The City argues that it will be harmed by not being able to enforce the Noise Ordinance, after expending time and resources responding to the complaints of CKC's neighbors. (Def.'s Resp. at 10.) While this is certainly a legitimate concern–and, as addressed above, a compelling governmental interest–the Court finds that, given the strong protections for First Amendment rights, Plaintiffs' likelihood of irreparable harm outweighs the City's.

3. Balance of Equities and Public Interest

The Court will consider the final two factors together. Plaintiffs assert that the balance of equities and the public interest favor the issuance of an injunction. (Pl.'s Mot. at 14-15.) As for the balance of equities, the Court concludes that this factor favors Plaintiffs. While the Court, as stated above, recognizes the City's interest in promoting peace and tranquility in its neighborhoods, if the Noise Ordinance is ultimately found to be unconstitutional, it will not be enforceable. Plaintiffs state that the City could pass a new ordinance that cures any deficiencies in the current statute, while they are powerless to remedy the suppression of their speech. (Pl.'s Mot. at 15.) In light of the strong protection for First Amendment Rights, Plaintiffs' free speech interest outweighs the City's interest in enforcing the Noise Ordinance.

Turning to the public interest, courts accord heavy weight to First Amendment rights. The Ninth Circuit Court of Appeals has "consistently recognized the 'significant public interest' in upholding free speech principles, as the 'ongoing enforcement of the potentially unconstitutional regulations . . . would infringe not only the free expression interests of [plaintiffs], but also the interests of other people' subjected to the same restrictions." *Klein*, 584 F.3d at 1208 (quoting *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 964 (9th Cir. 2002)) (alteration in original). However, the Court acknowledges that people in the vicinity of CKC and St. Mark who do not want to hear the electronic carillon systems have an interest in living in a quiet neighborhood. The Court finds that there are strong public interests on

both sides of this equation but concludes that the free speech and exercise interests of Plaintiffs and others who might wish to engage in religious expression subject to the Noise Ordinance outweigh the public interest in quiet neighborhoods, about which there is little in the record. For these reasons, the balance of equities and public interest tip in favor of injunctive relief.

III. CONCLUSION

In sum, the Court concludes that FCC does not have standing in this action and must be dismissed as a Plaintiff. The Court further finds that Plaintiffs' Complaint withstands Defendant's Rule 12(b)(6) challenge. The Court will not abstain from adjudicating this matter under any of the doctrines Defendant cites. Finally, Plaintiffs have demonstrated a likelihood of success on the merits, a likelihood of irreparable harm in the absence of a preliminary injunction, and that the balance of equities favors injunctive relief. As the Court concludes that Plaintiffs' free speech claim merits a preliminary injunction, it will not consider the parties' injunction-related arguments as to Plaintiffs' other claims at this time. The Court will impose a preliminary injunction tailored to the facts of this case, in an effort to acknowledge the importance of the City's interest in preserving the peace and tranquility of its neighborhoods. *See Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376-77 (1997) (examining a preliminary injunction for appropriate tailoring).

IT IS ORDERED granting in part and denying in part Defendant City of Phoenix's Motion to Dismiss (Doc. 18).

IT IS FURTHER ORDERED granting Plaintiffs St. Mark Roman Catholic Parish Phoenix, Christ the King Liturgical Charismatic Church, Inc., and First Christian Church of Phoenix, Arizona, Inc.'s Motion for Preliminary Injunction (Doc. 2).

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IT IS FURTHER ORDERED preliminarily enjoining Defendant City of Phoenix from enforcing the Noise Ordinance, Phoenix, Ariz., Municipal Code §§ 23-12 to 23-15, against sound generated in the course of religious expression.

DATED this 3rd day of March, 2010.