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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DENNIS SEIDER and LEAH SEIDER, as Trustees of the Seider Family Trust,

Plaintiffs,

v.

CITY OF MALIBU,

Defendant.

No. 2:20-cv-8781

COMPLAINT

INTRODUCTION

1. "The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 392 (1992). That is what we have

here: a City of Malibu ordinance designed to enforce majority preferences for open and public beach for all, regardless of private ownership of the beach. Plaintiffs Dennis and Leah Seider thus challenge the ordinance because their proposed speech, as described more fully below, does nothing more than lawfully and properly demarcate the line between where the plaintiffs' property line on the beach ends and the public's right of access to the beach begins. Because Malibu's ordinance is a content-based impermissible restriction on speech, the Court must declare the ordinance unconstitutional and unenforceable. Hanging a sign on one's property to declare it private property is a tradition likely as old as the country itself, and prohibiting such a trifling amount of speech amounts to nothing short of unconstitutional conduct that the Court cannot countenance.

2. The Seiders have an oceanfront home in Malibu, California. Their property extends seaward to the mean high-tide line. The last 25 feet of the beach before the mean high-tide line is burdened by a lateral access easement for the benefit of the public, but much of the dry sand beach is unencumbered, private beach. To put trespassers on notice and protect their property against future claims of prescriptive rights, the Seiders want to put up a simple, truthful sign on their property demarcating the boundary between unencumbered private property and the easement. In the absence of a sign, members of the public have asserted the right to remain on the Seiders' private property—specifically citing the lack of signage.

3. In the Coastal Zone, California law requires a Coastal Development Permit for most signs. The City of Malibu has jurisdiction and authority for permitting. When Dennis inquired about obtaining a permit for the proposed sign, Malibu's planning director explained in no uncertain terms that Malibu could not issue a permit for such a sign because the sign would violate a provision of the city's Local Implementation Plan (LIP) for coastal development that prohibit signs "purport[ing] to identify the boundary between State tidelands and private property."

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4. The Seiders sought to apply for a permit anyway, but found that Malibu requires them, as a condition of applying, to agree to indemnify the City "from and against all liability and costs relating to the City's actions concerning [the] project, including (without limitation) any award of litigation expenses in favor of any person or entity who seeks to challenge the validity of any of the City's actions or decisions in connection with [the] project." Since the enforcement of this provision could cause Dennis and Leah significant liability even if the permit were granted, they chose not to apply and instead seek injunctive and declaratory relief.

5. In order to protect their property rights and vindicate their freedom of speech, the Seiders today bring this action seeking an injunction and a declaration that portions of Malibu's LIP are inconsistent with the First Amendment, either as a prior restraint on speech or a content-based speech restriction. This action also seeks a declaration that the indemnification clause unconstitutionally conditions Dennis and Leah's free speech rights on the agreement to pay Malibu's legal bills.

6. This case lies at the intersection between free speech and property rights. Americans should not—and do not—need government permission to mark the boundaries of their private property in order to enforce their fundamental right to exclude trespassers. Yet, Malibu's LIP demands that coastal property owners like the Seiders forfeit both their First Amendment and property rights. That much is unconstitutional.

JURISDICTION AND VENUE

7. This action arises under the First Amendment to the United States Constitution, incorporated against the States by the Fourteenth Amendment and enforced through 42 U.S.C. § 1983. The Court has jurisdiction under 28 U.S.C. §§ 1331 (federal question), 1343(a) (redress for deprivation of civil rights), and 1367 (supplemental jurisdiction). Declaratory relief is authorized by the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

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8. Venue is proper in this district under 28 U.S.C. § 1391(b)(1)-(2). Defendant, the City of Malibu, is located within this district, and a substantial part of the events giving rise to this claim have occurred in the Central District of California.

9. A live controversy exists between the parties because the City of Malibu continues to prohibit the Seiders from posting a truthful sign describing the limits of the parcel they own.

10. A live controversy also exists with respect to the indemnification requirement because the City of Malibu continues to require permit applicants to agree to indemnify the City in order to apply for a sign permit.

PARTIES

11. Plaintiff Dennis Seider is a retired attorney who practiced law in California for over 40 years. He is an inactive member of the California bar. He and his wife, Plaintiff Leah Seider, are Trustees and Trustors of the Seider Family Trust, which owns the property located at 26642 Latigo Shore Drive in Malibu, California ("the Property").

12. Defendant City of Malibu is a municipality in Los Angeles County, California. Pursuant to the Coastal Act, Defendant has had primary permitting authority for all Coastal Development Permits, including the sign permit at issue in this since, since the California Coastal Commission ("Coastal Commission") certified its Local Coastal Program in 2002.

FACTUAL ALLEGATIONS

Coastal Act and Malibu's Local Coastal Plan

13. In 1976, California enacted the Coastal Act, Cal. Pub. Res. Code § 30000, *et seq.*, in order to—among other things—"[m]aximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners." *Id.* § 30001.5(c).

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14. The Coastal Act requires municipalities such as Malibu to create "Local Coastal Programs" ("LCPs") for certification by the Coastal Commission. *See id.* § 30500(a) ("Each local government lying, in whole or in part, within the coastal zone shall prepare a local coastal program for that portion of the coastal zone within its jurisdiction."); *id.* § 30512 (describing certification procedure). When the Coastal Commission certifies an LCP, it vests the authority to grant or deny coastal development permits (CDPs) to the local government, although it retains appellate jurisdiction over permitting. *Id.* § 30519(a).

15. Malibu's LCP was certified in 2002 and it has had permitting authority along its shoreline, including authority over sign permits, ever since. Once certified, no part of an LCP can be amended without the Commission's certification.

16. One portion of an LCP is a Local Implementation Plan ("LIP"), which consists of ordinances enacted to implement the LCP. Malibu's LIP, current as of February 2019, is available here: https://www.malibucity.org/DocumentCenter/View/4421/Malibu-Local-Implementation-Plan-LIP-?bidId= (last visited Sept. 14, 2020).

Malibu LIP's Sign Permitting Scheme

17. Malibu's LIP subjects most signs to a permitting requirement. Exempted signs are listed in Section 3.15.4(D) of the LIP.

18. For those signs requiring a permit, a permit applicant must seek a CDP on a form provided by Malibu's Planning Department. Permit applicants must pay a fee and provide certain information, including current development on the property; the proposed location of the sign; the proposed design, size, and colors of the sign; how the sign will be attached; the sizes and dimensions of all other signs on the property; photographs of the sides of all buildings on the property; and "[s]uch other information as the Planning Department may require to secure compliance with this Chapter." LIP § 3.15.4(A)(9).

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19. The Planning Manager then reviews all permit applications in light of eleven criteria specified in the LIP. *Id.* § 3.15.4(B). Many of these criteria are objective, but some are not. The Planning Manager must determine, for example, that the proposed sign "is not detrimental to the public health, safety, or welfare," that "the size, shape, color, and placement of the sign is compatible with the neighborhood," and that "a proposed sign in close proximity to any residential district does not adversely affect the quality or character of such residential area." *Id.* § 3.15.4(C).

20. Certain signs are prohibited altogether, such that no permit will issue for them. LIP § 3.15.3. While most of these are content-neutral—such as the bans on "[p]rojecting signs," "[r]evolving signs," and [d]evices dispensing bubbles and free floating particles of matter"—Section 3.15.3(X) explicitly refers to the content of the sign, prohibiting "[s]igns which restrict public access to State tidelands, public vertical or lateral access easement areas, or which purport to identify the boundary between State tidelands, and private property[.]" Although arguably this portion of the LIP does not apply to the Seiders' sign, since their sign identifies a boundary between an easement over the private property and the unencumbered private property, Malibu takes the position that this portion applies to the Seiders' proposed sign.

Malibu CDP Application—Indemnification Clause

21. Malibu requires property owners to fill out a form to begin the process of applying for a CDP. The current form is available here: https://www.malibucity.org/DocumentCenter/View/13101/Application_Uniform?bidId= (last visited Sept. 14, 2020).

22. The permit application form includes an "indemnification clause," to which each applicant must agree before he or she may submit an application for a CDP. The indemnification clause reads:

> The property owners, and their successors in interest, shall indemnify and defend the City of Malibu and its officers, employees and agents from and against all liability and costs relating to the City's actions concerning this project, including (without limitation) any award of litigation expenses in favor of any person or entity who seeks to challenge the validity of any of the City's actions or decisions in connection with this project. The City shall have the sole right to choose its counsel and property owners shall reimburse the City's expenses incurred in its defense of any lawsuit challenging the City's actions concerning this project.

Background on the Property

23. In 1976, the Seiders' predecessor-in-interest, Alexander Keith, sought a permit from the then-existing South Coast Regional Commission (a predecessor agency to the Coastal Commission) to build a single-family home on the Property. The South Coast Regional Commission granted the permit on the condition that Keith record a deed restriction granting lateral public access up to 25 feet inland of the mean high tide line (except not where 25 feet inland would be within 5 feet of the permitted structure). Upon information and belief, Keith recorded the deed restriction. The permit grant is attached as Exhibit 1.

24. When the Seiders came into possession of the Property, they were initially unaware of the deed restriction due to a mistake on the part of the title insurance company. At one point, Dennis contested the validity of the lateral access easement, but he now recognizes its validity.

25. In 2018, a sign reading "PRIVATE BEACH" was positioned on the crossbeams below the Seiders' house, facing the beach, in order to establish their property ownership. A photograph of this location is attached as Exhibit 2.

26. On April 29, 2020, the Coastal Commission sent Dennis and Leah a Notice of Violation of the California Coastal Act related to the "PRIVATE BEACH" sign. The Coastal Commission stated that the sign was unpermitted, that its content was contrary to the 1976 deed restriction, and that it violated Section 3.15.3(X) of the Malibu LIP. The Coastal Commission gave Dennis and Leah until May 13, 2020,

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to remove the sign. The Seiders removed the sign. This letter is attached as Exhibit 3.

Dennis' Attempt to Apply for a Sign CDP

27. Although Dennis took down the "PRIVATE BEACH" sign, the Seiders sought to put up a replacement sign that would explain the existence of the lateral access easement so as to not run afoul of the Coastal Commission's objection.

28. Dennis and Leah needed the sign because, in the absence of signage, they have dealt with an influx of trespassers who assume the beach behind the house is entirely public. When Dennis politely informs these trespassers that much of the dry sand is private property—and that the public only has an easement over the remainder—beachgoers often appeal to the lack of signage in asserting that the beach is public. A true and accurate sign is the only practical way for Dennis and Leah to protect their property rights and avoid potential confrontations with beachgoers. Although Dennis often welcomes beachgoers to stay for a particular day, he also asserts his family's property rights and informs the beachgoers of public beaches a short distance away.

29. The current COVID-19 pandemic has exacerbated the problem. Since many public beaches are closed, more beachgoers have come onto the Property. The lack of signage has significantly hindered the Seiders' ability to enforce their property rights, including their right to exclude trespassers.

30. For these reasons, Dennis sought to apply for a CDP from Malibu. On June 1, 2020, he emailed Malibu Planning Director Bonnie Blue asking about the permit process. He inquired:

> I would like to apply for a permit to put up a sign on our house saying something like "PRIVATE PROPERTY FROM THIS SIGN __ FEET SEAWARD AFTER WHICH THE PUBLIC HAS A LATERAL ACCESS ALONG THE SHORE" or something similar that is unambiguous and is still useful to the beach going public. I will have the property surveyed so the sign is accurate. How is getting the permit best done?

This email is included as part of Exhibit 4.

31. On June 9, 2020, Blue responded that "[a]ccording to the LCP, a sign like this is not allowed. I've included the code section below. If you wanted to apply anyway, a CDP would be needed." The cited code section was LIP § 3.15.3(X), the prohibition on "[s]igns which restrict public access to State tidelands, public vertical or lateral access easement areas, or which purport to identify the boundary between State tidelands, and private property[.]" This email is included as part of Exhibit 4.

32. On June 10, 2020, Dennis again emailed Blue, noting that he

> thought the sign was worded so as to not offend the language of the LIP prohibition as it does not restrict access to tidelands or lateral access nor does it identify a boundary between our property and the tidelands but does indicate instead delineate the boundary between our unburdened property and that part of our property burdened by a public lateral access . . . .

Dennis expressed concern that "we have quite a few folks that have come to sit under our house or on the beach immediately in front of our house and when we come down to use the beach they sometimes abusive in their refusal to move, asking '. . .Where does it say this is private property; this is the Republic of California—I know my rights—I can sit wherever I want . . . etc.'" This email is also included in Exhibit 4.

33. Despite the denial, Dennis sought to apply for a CDP anyway. On June 12, 2020, he downloaded the CDP application form described above (paragraph 21) and filled out most of it. However, he stopped at the indemnification clause and refused to agree, believing that it could subject he and Leah to significant liability whether or not the permit was ultimately granted.

34. On June 15, 2020, Dennis emailed Blue and the members of the Malibu City Council to describe his problem with beachgoers trespassing on the private portion of his beach. He noted that:

> My neighbors and I have had an unusually large number of folks coming to the beach at Latigo by walking down our private street and using Tivoli Condominiums private stairs to access the sand, a series of private beaches with some deeded lateral access, because the nearest public access is blocked by the MRCA who states that it is being blocked at the order of the Los Angeles County Board of Supervisors.

He urged that the City Council repeal the prohibition on his proposed sign. This email is included in Exhibit 5. Blue wrote back on June 26 noting that any changes to the LIP would have to be approved by the Coastal Commission. That response is included in Exhibit 6.

35. On June 17 Dennis emailed Blue again, asking whether "an agreement to indemnify the city" was a "necessary part of the application for a CDP regarding a beach property sign." This email is also included in Exhibit 4. Dennis noted: "I certainly don't have the money to engage in that kind of Litigation." Blue indicated in response on June 26 that Dennis could not apply for a permit without agreeing to the indemnification provision. That response is included in Exhibit 6.

36. Due to the indemnification clause, Dennis decided not to formally apply for a permit.

37. On June 29, 2020, Dennis and Leah had the Property surveyed by Chris Nelson & Associates. The survey, which is attached as Exhibit 7, demarcates the mean high-tide line as well as the location of the lateral access easement. It shows a significant portion of dry sand beach not within the easement.

38. On September 10, 2020, Dennis emailed Blue again and proposed an alternative sign that would simply state the boundaries of the Property by reference to the mean high-tide line, rather than attempt to ascertain the location of the line. The proposed sign would have read:

> PRIVATE PROPERTY EXTENDS TO HOUSE FROM 25 FEET LANDWARD OF MEAN HIGH TIDE LINE
>
> TO INCLUDE 25 FOOT LATERAL PUBLIC ACCESS

Blue indicated that this sign, too, would run afoul of the LIP. A further email from Blue emphasized that any sign on the beach describing the boundary of Dennis's private property would violate Section 3.15.3(X) of the LIP. These emails are attached as Exhibit 8.

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39. Blue's September 10 response did invite Dennis to apply for a permit with the new language, but Dennis was still unwilling to agree to the indemnification clause. He also did not want to go through a futile permit application process.

40. Although the mean high-tide line is not a static location, it establishes by reference the true boundary of the Property. The prohibition in Section 3.15.3(X) of Malibu's LIP prohibits Dennis and Leah from informing the public as to the true and accurate boundaries of their property. They are unable to use the surveyed location of the mean high-tide line or even reference the mean high-tide line itself on a sign. As such, they have no practical way to enforce their property rights.

41. The prohibition in Section 3.15.3(X) also leaves Dennis and Leah at risk of future claims of a prescriptive easement for the benefit of the public if they are not permitted to post adequate signage demarcating their property. The Coastal Commission openly solicits from the public evidence of public use over private property as part of its ongoing efforts to obtain prescriptive rights against private landowners. *See* Public Access Prescriptive Rights, California Coastal Commission, https://www.coastal.ca.gov/access/prescriptive-rights/#:~:text=This%20is%20called%20a%20public,for%20significant%20public%20access%20benefits.

FIRST CAUSE OF ACTION

(Violation of the First Amendment — Content Based Speech Restriction)

42. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1 through 41 as though fully set forth herein.

43. The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. The Fourteenth Amendment incorporates the First Amendment's protections against the States. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

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44. Defendant City of Malibu is a "person" within the meaning of 42 U.S.C. § 1983. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). In denying Plaintiffs' request for a CDP and enforcing the indemnification clause against Plaintiffs, Defendant acted under color of state law. Defendant retains policies, as part of the LIP certified by the Coastal Commission, which effectively prohibit them from obtaining the necessary CDP.

45. The Supreme Court has held that content-based speech restrictions must satisfy strict scrutiny, "which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)). A restriction on signs is content-based when "[t]he only way to determine" whether a sign is prohibited is "to evaluate the content and substantive message of the sign." *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1078 (9th Cir. 2006).

46. Because Malibu officials must read the content of Plaintiffs' sign to determine whether it is prohibited, Section 3.15.3(X) of Malibu's LIP is a content-based speech restriction. If Plaintiffs' proposed sign read "PUBLIC WELCOME ON BEACH," it would not run afoul of any prohibition, even if it were the same size, location, and color. It is the message of Plaintiffs' sign—that their unencumbered private property extends to a particular point, where a public easement begins—that makes it illegal.

47. Malibu lacks a compelling interest in preventing Plaintiffs from posting a true and accurate sign demarcating their private property lines in order to deter trespassers.

48. Malibu's total prohibition of signs describing oceanfront property is not narrowly tailored to any interest Malibu might have, such as promoting public access to the beach.

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49. Because Section 3.15.3(X) of the Malibu LIP is a content-based restriction on speech that is not narrowly tailored to further a compelling government interest, Plaintiffs are entitled to relief in the form of a declaration that the Section is unconstitutional as applied to Plaintiffs' proposed sign demarcating the true and accurate boundaries of his property. Plaintiffs are also entitled to injunctive relief prohibiting Malibu from enforcing Section 3.15.3(X) against Plaintiffs.

SECOND CAUSE OF ACTION

(Violation of the First Amendment — Prior Restraint)

50. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1 through 41 as though fully set forth herein.

51. The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. The Fourteenth Amendment incorporates the First Amendment's protections against the States. *Gitlow*, 268 U.S. at 666.

52. Defendant City of Malibu is a "person" within the meaning of 42 U.S.C. § 1983. *Monell*, 436 U.S. at 690. In denying Plaintiffs' request for a CDP and enforcing the indemnification clause against Plaintiffs, Defendant acted under color of state law.

53. Defendant retains policies, as part of the LIP certified by the Coastal Commission, which grant Malibu officials nearly unbridled discretion to deny a sign CDP even if Plaintiffs' sign did not run afoul of Section 3.15.3(X) of the LIP.

54. "Prior restraints on speech present some of the 'most serious and the least tolerable infringement' on free speech rights." *Cuviello v. City of Vallejo*, 944 F.3d 816, 831 (9th Cir. 2019) (quoting *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976)). A sign permitting scheme is a prior restraint on speech. *Desert Outdoor Advert., Inc. v. City of Moreno Valley*, 103 F.3d 814, 818-19 (9th Cir. 1996).

55. Sign permitting criteria is an unconstitutional prior restraint on speech when such criteria is not "sufficiently specific and objective so as to effectively place

some 'limits on the authority of City officials to deny a permit.'" *Epona, LLC v. County of Ventura*, 876 F.3d 1214, 1222 (9th Cir. 2017) (quoting *Moreno Valley*, 103 F.3d at 819).

56. Several criteria listed in the Malibu LIP require "broadly subjective determinations" on the part of City officials, which renders them invalid prior restraints. *Desert Outdoor Advert., Inc. v. City of Oakland*, 506 F.3d 798, 807 (9th Cir. 2007). These criteria are: the sign is "is not detrimental to the public health, safety, or welfare," "the size, shape, color, and placement of the sign is compatible with the neighborhood," and that "a proposed sign in close proximity to any residential district does not adversely affect the quality or character of such residential area." LIP § 3.15.4(C).

57. Because these three criteria essentially grant City officials "unbridled discretion" to deny a permit based on subjective criteria, a permit requirement subject to such requirements is an unconstitutional prior restraint on speech. *Epona*, 876 F.3d at 1222.

58. In order to justify a prior restraint, Malibu must demonstrate that the restraint is justified without reference to the content of the speech, and is narrowly tailored to serve a compelling governmental interest. Such amorphous criteria have little meaning if not to regulate content—objective criteria suffice to limit the place and manner of signage—and Malibu has no compelling interest in such regulation.

59. Because Malibu may maintain a sign permitting scheme so long as the criteria for obtaining a permit are specific and objective, Plaintiffs seek only a declaration that the three criteria described in Paragraph 56 are unconstitutional both on their face and as applied to Plaintiffs' proposed sign. Plaintiffs are entitled to injunctive and declaratory relief.

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THIRD CAUSE OF ACTION

(Indemnification Clause — Unconstitutional Condition)

60. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1 through 41 as though fully set forth herein.

61. Defendant City of Malibu is a "person" within the meaning of 42 U.S.C. § 1983. *Monell*, 436 U.S. at 690. In requiring Plaintiff to agree to the indemnification clause, Defendant acted under color of state law.

62. The Supreme Court has "held that the Government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'" *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) (quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006)).

63. The indemnification clause substantially burdens Plaintiffs' free speech rights—it effectively prohibits them from even applying for a sign CDP unless they agree to pay a potentially substantial, and certainly unknown, amount of money to defend Malibu against any challenges, even frivolous challenges, that may arise as to its actions regarding the permit. On its face, the indemnification clause applies both to permits grants and denials, meaning that Plaintiffs would be forced to pay for Malibu's defense of his own suit challenging a permit denial. And even if Malibu granted a permit, Plaintiffs may have to pay a significant sum should any third-party challenge Malibu's decision to grant the permit.

64. The potential for substantial liability chills Plaintiffs' free speech rights to the point of dissuading him from applying for a CDP.

65. Because the indemnification clause unconstitutionally conditions Plaintiffs' receipt of—and even application for—a permit to speak on such uncertain and potentially substantial future liability, it is an unconstitutional condition as applied to them. Plaintiffs are therefore entitled to injunctive and declaratory relief.

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FOURTH CAUSE OF ACTION

(Indemnification Clause — Infringement on First Amendment Rights)

66. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1 through 41 as though fully set forth herein.

67. Defendant City of Malibu is a "person" within the meaning of 42 U.S.C. § 1983. *Monell*, 436 U.S. at 690. In requiring Plaintiff to agree to the indemnification clause, Defendant acted under color of state law.

68. Aside from being an unconstitutional condition on the ability to apply for a CDP, the indemnification clause is also an unconstitutional infringement on Plaintiffs' free speech rights. Even content-neutral infringements like the indemnification clause may pose First Amendment problems. Such "time, place, and manner" restrictions must be narrowly tailored to further a significant government interest. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1039-40 (9th Cir. 2009).

69. The City of Malibu may have a significant interest in protecting itself from financial liability in the form of lawsuits, but the indemnification clause is not narrowly tailored to protect that interest. Instead, it burdens far more speech than necessary and chills expression by exposing Plaintiffs to an "unknown amount of liability" *iMatter Utah v. Njord*, 980 F. Supp. 2d 1356, 1381 (D. Utah. 2013). Such liability could result merely from organizations opposed to private ownership of the beach deciding to sue Malibu should it grant the permit. *Cf. id.* ("The organization is required to defend the State against all third-party claims alleging some action by a member of the organization, even if those claims are frivolous. Third parties who disagree with the content of the organization's speech could use this tactic to punish an organization after the event.").

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70. The indemnification clause is also overbroad because it would require Plaintiffs to pay for the City's defense of *their own suit* challenging Malibu's decision to deny a sign CDP.

71. Because the indemnification clause limits Plaintiffs' free speech and is not narrowly tailored to further a significant government interest, it is unconstitutional. Plaintiffs are thus entitled to injunctive and declaratory relief.

FIFTH CAUSE OF ACTION

(Ultra Vires)

72. Plaintiffs hereby incorporate and re-allege each and every allegation contained in Paragraphs 1 through 41 as though fully set forth herein.

73. California law recognizes a cause of action where a municipality takes action contrary to its own governing laws. *See, e.g.*, *City and County of San Francisco v. Board of Permit Appeals*, 207 Cal. App. 3d 1099, 1105 (1989).

74. Section 3.15.3(X) of the LIP explicitly refers to the content of the sign, prohibiting "[s]igns which restrict public access to State tidelands, public vertical or lateral access easement areas, or which purport to identify the boundary between State tidelands, and private property[.]"

75. Should the Court conclude that the text of the LIP does not prohibit the proposed signs, then Malibu's denials constitute ultra vires action which is void under California law. In this circumstance, it is not the LIP that restricts Plaintiffs' speech, but Malibu's actions that contradict the LIP.

76. The Seiders' proposed signs do not restrict public access to State tidelands, public vertical or lateral access easement areas, or purport to identify the boundary between State tidelands and private property. The proposed signs identify the boundary between the Seiders' unencumbered property and the lateral easement area on their own private property.

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77. This Court has jurisdiction over this state law claim under 28 U.S.C. § 1367 because it is so closely related to Plaintiffs' federal claims that it forms part of the same case or controversy.

78. Because the City of Malibu's actions in prohibiting the Seiders' sign are ultra vires, Plaintiffs are entitled to injunctive and declaratory relief.

PRAYER FOR RELIEF

1. An entry of judgment declaring that Section 3.15.3(X) of the Malibu LIP, which restricts signs that "purport to identify the boundary between State tidelands and private property," is an unconstitutional content-based speech restriction, or alternatively an entry of judgment declaring that this section does not prohibit the Seiders' sign and thus any reliance upon that section by Malibu to prohibit the sign is ultra vires and unenforceable.

2. An entry of a permanent injunction prohibiting Defendant from enforcing LIP Section 3.15.3(X) against Plaintiffs.

3. An entry of judgment declaring that the provisions of Section 3.15.4(B) requiring the Malibu Planning Director to determine whether a sign "is not detrimental to the public health, safety, or welfare," that "the size, shape, color, and placement of the sign is compatible with the neighborhood," and that "a proposed sign in close proximity to any residential district does not adversely affect the quality or character of such residential area," transform Malibu's sign permitting process into an unconstitutional prior restraint and therefore are facially unconstitutional.

4. An entry of judgment declaring that the provisions of Section 3.15.4(B) referenced in the previous paragraph are unconstitutional as applied to Plaintiffs.

5. An entry of a permanent injunction prohibiting Defendant from enforcing the challenged provisions of LIP Section 3.15.4(B) against Plaintiffs.

6. An entry of judgment declaring that the indemnification clause contained in the City of Malibu's CDP application form imposes an unconstitutional condition on Plaintiffs' free speech rights.

7. An entry of judgment declaring that the indemnification clause unconstitutionally infringes Plaintiffs' First Amendment rights.

8. An entry of a permanent injunction prohibiting Defendant from requiring Plaintiffs to agree to the indemnification clause as a condition of applying for a CDP.

9. An award of attorneys' fees and costs in this action pursuant to 42 U.S.C. § 1988.

10. An award of any further legal or equitable relief this Court may deem just and proper.

DATED: September 24, 2020.

Respectfully submitted,

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