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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, Plaintiff, v. SARA BRADY, Defendant.	**Case No.: CR01-20-15765** **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS ON CONSTITUTIONAL GROUNDS**

COMES NOW the Defendant, Sara Brady, (hereinafter "Defendant" of "Sara"), by and through undersigned counsel and submits her Memorandum in Support of her Motion to Dismiss on Constitutional Grounds. Defendant presents her Motion to Dismiss pursuant to Rule 12(b) or in the alternative Rule 48 of the Idaho Criminal Rules. This motion is filed concurrently with a Stipulation Re: Undisputed Facts ("*Stip of Facts*" of "*Stipulated Facts*"), which both the State and Defendant have agreed and stipulated represent the undisputed facts for purposes of Defendant's motion.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant Sara was charged with one (1) count of trespassing pursuant to I.C. § 18-7008. The State's *Superseding Complaint* bases its charges on an incident that took place on April 21, 2020, at Julius M. Kleiner Memorial Park ("Kleiner Park"), a 60-acre public park located at 1900 N. Records Way, Meridian, Idaho. *Stip of Facts*, at ¶ 1. Kleiner Park is a publicly owned park, owned and operated by the City of Meridian. *Id*. at ¶ 2.

On March 23, 2020, in an effort to help curb the spread of COVID-19, Director of Meridian Department of Parks and Recreation ("Meridian Parks and Recs" or "Parks Department"), Steve Siddoway ("Director" or "Siddoway") made an operational decision to temporarily close sections of Meridian City public parks, which included sections of Kleiner Park. *Id*. at ¶ 7, Exh. B. Director Siddoway instructed Parks Department employees to wrap yellow caution tape around only the red and yellow plastic and metal playground equipment ("Playground Equipment") at Kleiner Park. *Id*. at ¶ 9.

A peaceful protest was organized by a group of moms to take down the yellow caution tape and allow their children to play on the Playground Equipment. *Id*. at ¶ 26. They were protesting the playground being closed and the Governor's order ("stay at home order"). *Id*. The moms planned this "Tear Down the Tape" event on Facebook to meet at Kleiner Park at 3:00 p.m. on April 21, 2020. *Id*. at ¶ 10. On April 21, 2020 at approximately 3:20 p.m., a group of people organized a protest and arrived at Kleiner Park. *Id*. At approximately 3:25 p.m. some children and some adults removed the yellow caution tape from the Playground Equipment. *Id*. at ¶ 11, Exh. F. Sara is not the person who took the yellow caution tape down from the Playground Equipment. *Id.* Sara arrived at Kleiner Park sometime between 3:30 p.m. and 4:00 p.m. *Id*. at ¶ 12.

Officers arrived at Kleiner Park at approximately 4:05 p.m. *Id*. at ¶ 15. Seeing the officers talking to other moms in the barked area, at approximately 4:07 p.m., Sara walked from the grassy area of the playground (adjacent to the barked area) to the barked playground area to talk to Meridian Police Officer Monte Price ("Price"). *Id*. at ¶ 15, Exh. D (Aerial view of Sara's walking route from the grass to where Officer Price and the group of moms were standing is represented by the red dashed line on the aerial map.).

Sara first redressed her grievances with Office Price. *Id*. at ¶ 18. Then, Officer Price and Sergeant Branden Fiscus ("Fiscus') both directed Sara to redress her grievance with the Parks Department employee, Roger Norberg ("Norberg"). *Id*. at ¶¶ 18-19. Sara was arrested while standing in the barked area of the park, adjacent to the Playground Equipment, redressing her grievances as instructed. *Id*. at ¶¶ 17, and 20-21, Exh. H. Sara believed the park closures to be unconstitutional actions by the government. *Id*. Sara's arrest itself was an act of expression against what she believed to be oppressive government actions. This is why she requested that the arrest be filmed. *Id*. at ¶ 20.

The State alleges the following in its *Superseding Complaint*:

> That the Defendant, SARA BRADY, on or about the 21st day of April, 2020, in the County of Ada, State of Idaho, did enter or remain on the real property of another without permission, knowing or with reason to know that her presence was not permitted, to wit: Defendant failed to depart immediately from the playground area at 1900 N. Records Avenue, Meridian, Idaho (Julius M. Kleiner Memorial Park), which is owned by the City of Meridian, after she was notified by peace officers and/or Parks and Recreation employees, employed by the City of Meridian, that the playground was closed to the public.

ISSUES

1. Is the criminal trespass statute vague as applied?
    a. Does the defined term "remains" create vagueness?

b. Is the State required to prove that Sara was not in compliance with lawful conditions imposed on access?

c. Does Sergeant Fiscus have unbridled discretion?

d. Does Meridian law enforcement have unbridled discretion?

e. Does Director Siddoway have unbridled discretion?

f. Does the prosecuting attorney have unbridled discretion?

g. Does the trespass infraction create vagueness?

2. Is the criminal trespass statute overbroad as applied?

   a. Did Sara establish expressive conduct?

   b. Did the State establish a compelling government interest?

3. Do the State's actions violate the non-delegation doctrine?

   a. Does I.C. § 18-7008(5) offend the principles of separation of powers?

   b. Do Meridian City Code § 13-2-7 and Director Siddoway's authority offend the principles of separation of powers?

4. Do Idaho Code § 18-7008(5) and Meridian City Code § 13-2-7(B) violate Sara's fundamental right to free movement and right to due process?

5. Should strict scrutiny be applied?

STANDARD OF REVIEW

The district court exercises free review over statutory interpretation because they are questions of law. *State v. Cook*, 165 Idaho 305, 309 (2019). Likewise, claims that criminal statutes are unconstitutional as applied are reviewed de novo. *Id*.

> The void-for-vagueness doctrine is premised upon the due process clause of the Fourteenth Amendment to the U.S. Constitution. This doctrine requires that a statute defining criminal conduct be worded with sufficient clarity and definiteness that ordinary people can understand what conduct is prohibited and that the statute be worded in a manner that does not allow arbitrary and discriminatory enforcement. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S.Ct. 1186 (1982). It is a basic principle of due process that an enactment is void for

> vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294 (1972). Furthermore, as a matter of due process, no one may be required at the peril of loss of liberty to speculate as to the meaning of penal statutes. *United States v. Smith*, 795 F.2d 841, 847 n.4 (9th Cir.1986), citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619 (1939), *Smith v. United States*, cert. denied, 481 U.S. 1032, 107 S.Ct. 1964 (1987).

Cook, 165 Idaho at 309 (citing *State v. Korsen*, 138 Idaho 706, 711-12 (2003), abrogated on other grounds by *Evans v. Michigan*, 568 U.S. 313 (2013).

ARGUMENT

I. IDAHO CODE § 18-7008 IS UNCONSTITUTIONAL AS APPLIED.

A. Idaho Code § 18-7008 Is Unconstitutionally Vague As Applied.

Because the meaning of the I.C. § 18-7008 cannot be determined, the statute is void for vagueness. "The void for vagueness doctrine is an aspect of due process requiring that the meaning of a criminal statute be determinable." *State v. Cobb*, 132 Idaho 195, 197 (1998). "Due process requires that all 'be informed as to what the State commands or forbids' and that 'men of common intelligence' not be forced to guess at the meaning of the criminal law." *Id*. (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)). "A statute is void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes, or if it invites arbitrary and discriminatory enforcement." *Cobb*, 132 Idaho at 197. "A statute may be challenged as unconstitutionally vague on its face or as applied to a defendant's conduct." *Korsen*, 138 Idaho at 711-12. "A void for vagueness challenge is more favorably acknowledged and a more stringent vagueness test will be applied where a statute imposes a criminal penalty . . . ." *Cobb*, 132 Idaho at 198 (citation omitted). When analyzing vagueness, "[t]he words of a statute alleged to be unconstitutionally vague should not be evaluated in the abstract, but should be considered in reference to the particular conduct of the defendant challenging the statute."

State v. Larsen, 135 Idaho 754, 757 (2001). Those words "are given their commonly understood, everyday meanings, unless the legislature has provided a definition." *Id*.

The criminal trespass statute is vague as applied because it fails to give Sara adequate notice concerning the conduct it proscribes on property open to the public and forces Sara to guess at the meaning of subsections five, six, and seven, as well as the definition of *remains* and *permission* found in subsection one. While this Court should analyze the words of a statute by their commonly understood, everyday meaning, the Court cannot give the common meaning to the term *remains* since the legislature has provided a definition. As such, the Court must apply the statutory definition of the word *remains*. Applying the statutory definition, the Court must find that Sara was not provided adequate notice of what the state commands or forbids on property open to the public.

Specifically, Sara cannot be expected to depart from property, which is open to the public, when the statute provides that she can ignore the command so long as she complies with other conditions. Additionally, she cannot be expected to understand the Fiscus/Norberg[1] departure order as a revocation as defined by subsection five. This is because subsection five–which is limited by subsection six–provides that Fiscus/Norberg's Order does not constitute a revocation as long as Sara complied with the lawful conditions imposed on access. Finally, Sara cannot be expected to determine the meaning of subsection seven or whether subsection seven limits Sara's rights to circumstances where she was not ordered to depart. The meaning of the statute cannot be determined. As such, this Court must find the criminal statute is unconstitutionally vague as applied to Sara's conduct.

[1] The *Superseding Complaint* states that "[Sara] failed to depart immediately from the playground area … after she was notified by peace officers and/or Parks and Recreation employees … that the playground was closed to the public." This can only refer to Sgt. Fiscus of Meridian Police and Roger Norberg from the Meridian Parks and Recs. *See Stip of Facts*. Because it is unclear who ordered Sara to "immediately depart" at times this brief will refer to the order to depart as the "Fiscus/Norberg Order to Depart."

1. The term "remains" creates vagueness.

Sara was charged with criminal trespass because she "remained" at Kleiner Park (a public park, open to the public) and she"failed to depart immediately … after she was notified by [the owner's agent]" to do so. Idaho Code § 18-7008 is facially vague because it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes on public property and because it invites arbitrary and discriminatory enforcement by government employees who are acting as the "owner's agent" over the public property. Additionally, it is unconstitutionally vague as applied to Sara, who was on property, which is open to the public.

Subsections two, five, six, and seven of the criminal trespass statute are ambiguous because they all use the term *remains*. The words of a statute "are given their commonly understood, everyday meanings, unless the legislature has provided a definition." *State v. Larsen*, 135 Idaho 754, 757 (2001). The term *remains* is specifically defined by the statute:

> "Remains" means to **fail to depart** from the real property of another immediately when notified to do so by the owner or his agent.

I.C. § 18-7008(1)(g) (emphasis added). The term *remains* appears in the trespass statute fourteen times. A criminal trespass is defined by the term:

> A person commits criminal trespass and is guilty of a misdemeanor …when [s]he enters or **remains** on the real property of another without permission, knowing or with reason to know that his presence is not permitted.

I.C. § 18-7008(2)(a) (emphasis added). Applying the definition of the term, a person is guilty of a misdemeanor:

> when [s]he [*fails to depart from real property of another immediately when notified to do so by the owner or his agent*] on the real property of another without permission, knowing or with reason to know that his presence is not permitted.

While the definition creates a cluttered redundancy, subsection two plainly means that a person is guilty of a misdemeanor when she *fails to depart after being notified by the owner* to do so.

a. Subsection five is vague.

In subsection five, the term *remains* is paradoxical:

> Subject to any rights or authorities described in subsection (6) of this section, a landowner or his agent may revoke permission granted under this section to another to enter or **remain** [*fail to depart after being notified to do so*] upon his property at any time, for any reason, orally, in writing, or by any other form of notice reasonably apparent to the permitted person or persons.

I.C. § 18-7008(5).

Here, a landowner may revoke a guest's permission to *remain*. In order for an owner to revoke a guest's permission to *remain*, he must have first granted the guest permission to *remain*. Thus, subsection five depicts a scenario where a landowner grants permission to an invitee to [*fail to depart after being notified to do so*].[2] If a landowner grants his guest permission to *not leave when the owner commands*, then the landowner has essentially granted permission for the guest to ignore his request to leave. However, subsection five provides that an owner can revoke this permission to ignore the owner. So when an owner grants permission for a guest to ignore a command to leave, he can revoke it at any time. The poor guest who is told she can ignore the command might think that an owner's *revocation* can be ignored. After all, she can ignore the owner's command to depart but not the owner's *revocation* of permission to ignore it. In other words, subsection five creates a perpetual loop that validates and invalidates the owner's power to authorize his guest to disobey the owner's command to depart.

For example, in the very unlikely event that an owner does grant his guest authority to disobey the owner's command to depart, the guest is not guilty of a trespass if she stays on the

[2] This prior permission to disobey is akin to purchasing an indulgence.

property against the owner's wishes. Yet, subsection five provides that the guest can be guilty under that exact scenario because the owner can revoke this free pass to ignore the owner's command. Thus, the moment the owner notifies his guest that he wishes her to depart, the guest's right to ignore the owner's command is terminated. On the other hand, if an owner grants permission to *remain* [ignore request to leave], then, any subsequent revocation of that permission is the condition precedent, triggering the guest's right to ignore the request. Therefore, the guest is not guilty of a trespass because permission to [*fail to depart after being notified to do so*] is presumably "another form of permission or invitation recognized by law." Either use of the defined term *remains*, in subsection five, leads to an absurd result.

b. Subsection six is vague.

The term *remains* creates a similar problem in subsection six:

> (6) A person shall not be guilty of trespass under this section for entering or **remaining** [*failing to depart after notice*] upon real property if the person entered or **remained** [*failed to depart after notice*] on the property pursuant to any of the following rights or authorities:
>
> > (a) An established right of entry or occupancy of the real property in question, including, but not limited to:
> >
> > > (i) An invitation, whether express or implied, to enter or **remain** [*fails to depart after notice*] on real property including, but not limited to, the right to enter property that is, at the time, open to the public, if the person is in compliance with lawful conditions imposed on access;

I.C. § 18-7008(6)(a)(i) (emphasis added). The provision is coherent where the terms *remaining* and *remained* are used. There, a person is not guilty for *failing to depart after she has been told to leave*. Given the fact that subsection six describes exclusions to criminal liability, it is not absurd that there are times a person can disobey the owner's command to leave without incurring

criminal liability. Thus, the term *remains* does not create incoherence in the first two instances of subsection six.

On the third occasion, in subparagraph (i), the term renders the provision incoherent. There, it creates an illogical and self-contradicting sentence. The provision suggests that an owner can grant permission (invitation) to an invitee to *fail to depart after the owner tells the invitee to do so*, as long as the guest is keeping the rules imposed on access. This mirrors the problem in subsection five that was discussed earlier in the brief.

c. Subsection seven is vague.

Finally, subsection seven's use of the term *remains* is head spinning:

> Examples of the exclusions in subsection (6) of this section include, but are not limited to: a customer entering and remaining [*failing to depart after being notified to do so*] in a store during business hours who has not been asked to depart by the property owner or his agent;

I.C. § 18-7008(7) (emphasis added). This example creates an irreconcilable contradiction because the invitee is ordered to depart by the owner and is not ordered to depart by the owner in the same sentence. (e.g. A customer who has been asked to depart by the owner, but *fails to do so,* shall not be guilty of trespass if she is in the store during business hours and has not been asked to depart by the owner.)

The statute's use of the defined term *remains* is incoherent. The provisions that use the term are confusing and illogical. In summary, I.C. § 18-7008 is unconstitutionally vague as applied to Sara under either test—(1) it failed to provide her with fair notice of what the word "remains" means and what would be proscribed conduct; and (2) it also failed to provide any guidelines to restrain the government actor's discretion in determining when permission can be revoked on public property. Because I.C. § 18-7008 is unconstitutionally vague as applied to

Sara (and as applied to anyone *remaining* on property open to the public), this Court must dismiss this case.

2. Either the State failed to charge an element *or* subsection 6 is vague.

a. The State did not allege that Sara failed to comply with lawful conditions.

The State failed to allege that Sara did not have any form of permission or invitation recognized by law. The absence of permission is an element of criminal trespass. Subsection six of the criminal trespass statute defines an element of the crime when the property is open to the public. I.C. § 18-7008(6). "[T]he elements of a crime are its requisite (a) conduct (act or omission to act) and (b) mental fault (except for strict liability crimes)–plus, often, (c) specified attendant circumstances, and sometimes, (d) a specified result of the conduct." *State v. Monaghan*, 116 Idaho 972, 974 (Ct. App. 1989). Courts examine the elements of a crime to determine whether the state bears the burden to prove the defendant does not fit an exception to the offense:

> [T]he general rule is that the burden is upon the state in a criminal case to negative the exception appearing in that part of the statute which defines the crime because the exception is "so incorporated with the language describing and defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted."

State v. Segovia, 93 Idaho 208, 210 (1969) (citation omitted). If the exception is integral to defining the proscribed conduct, the exception constitutes an element of the crime. *Id*. For example, the *Segovia* court concluded that the state bore the burden to prove the defendant did not have a valid prescription for the possession of a narcotic because the prescription exception defined the scope of the general prohibition.[3] *Id*. This is because "[t]he crime is defined as

[3] "Except as otherwise provided in this act, every person who possesses any narcotic **except upon the written prescription** of a physician, dentist, podiatrist, osteopath or veterinarian licensed to practice in this state, may be punished by imprisonment in the state prison for a term of not to exceed ten (10) years." I.C. § 37-3202 (repealed) (emphasis added).

possession without a valid prescription." *Id*. The absence of the prescription was so incorporated into the description of the offense as to be a material element of the crime. *Id*. Similarly, the court in *State v. Morales*, determined that the state bears the burden to prove the defendant charged with violating I.C. § 18-3302(7) and (9) is not licensed to carry a concealed weapon because the exception is an integral part of the conduct proscribed by those two subsections. 127 Idaho 951, 954 (Ct. App. 1996). In *Morales*, the subsections in question provided an exception to the crime:

> (7) Except in the person's place of abode or fixed place of business, a person shall not carry a concealed weapon without a license to carry a concealed weapon. For the purposes of this section, a concealed weapon means any dirk, dirk knife, bowie knife, dagger, pistol, revolver, or any other dangerous weapon. The provisions of this section shall not apply to any lawfully possessed shotgun or rifle.
> ….
> (9) While in any motor vehicle, inside the limits or confines of any city or inside any mining, lumbering, logging or railroad camp a person shall not carry a concealed weapon on or about his person without a license to carry a concealed weapon. This shall not apply to any pistol or revolver located in plain view whether it is loaded or unloaded. A firearm may be concealed legally in a motor vehicle so long as the weapon is disassembled or unloaded.

127 Idaho 951, (quoting I.C. § 18-3302(7) and (9) (repealed)).

Like in *Segovia* where the phrase "without a prescription" and in *Morales* where the phrase "without a license" were integral parts of the conduct proscribed, here the phrase "without permission" is an integral part of the conduct proscribed by I.C. § 18-7008(2). The statute describes the elements: "A person commits criminal trespass….when she enters or remains on the real property of another without permission." Because the elements specifically incorporate the absence of permission as an element of the crime, the State must prove the absence of permission.

As the absence of permission is an element of the crime, the State is required to allege

and prove that Sara did not have permission to enter the playground at Kleiner Park. The term "permission" as set forth by Idaho Code § 18-7008(1)(f) means "written authorization from an owner or his agent to enter private land…or another form of permission or invitation recognized by law." One example of "another form of permission or invitation recognized by law" is when a person has an established right "to enter property that is, at the time, open to the public, if the person is in compliance with lawful conditions imposed on access." I.C. § 18-7008(6). Because the absence of permission is an element of criminal trespass, the State is required to allege and prove Sara did not comply with lawful conditions imposed on her access to property that is open to the public.

The State alleges that Sara "failed to depart immediately from the playground area … after she was notified … that the playground was closed to the public." *Superseding Complaint*. This allegation does not charge all of the criminal elements. The allegation describes public property that is open to the public. Thus, Sara's permission to enter is implied by law pursuant to subsection six. Under subsection six, Sara was authorized to ignore the order to depart so long as she complied with the lawful conditions imposed on her access. However, the criminal charge does not allege that Sara failed to comply with lawful conditions. Thus, the *Superseding Complaint* does not allege all the elements of a crime. Sara is entitled to a dismissal under Rule 12(b) of the Idaho Criminal Rules.

b. Subsection 6 is vague as a defense.

Because the term *remains* creates confusion in subsections five, six, and seven, it is impossible for Sara to prove that she is not guilty under paragraph six. As discussed *supra*, an invitee is not guilty when she fails to depart, provided that she complies with lawful conditions imposed on access. I.C. § 18-7008(6). However, in the event this Court determines that

subsection six constitutes a defense rather than an element of the crime, Sara would have to prove subsection six applies to her alleged conduct. Also, as discussed *supra*, the term "remains*"* creates an ambiguous provision. Remember, the word "remains" under the statute's definition does not mean "to stay." Instead, it means to fail to depart after being ordered to do so. In other words, Sara would have to prove that she was compliant with the lawful conditions that were imposed on visitors of Kleiner Park even when she was ordered to leave:

> (6) A person shall not be guilty of trespass under this section for entering or **remaining** [*failing to depart after notice*] upon real property if the person entered or **remained** [*failed to depart after notice*] on the property pursuant to any of the following rights or authorities:
>
> > (a) An established right of entry or occupancy of the real property in question, including, but not limited to:
> >
> > > (i) An invitation, whether express or implied, to enter or **remain** [*fails to depart after notice*] on real property including, but not limited to, the right to enter property that is, at the time, open to the public, if the person is in compliance with lawful conditions imposed on access;

Id. Pay attention to subparagraph (i): An invitation to fail to depart. So, for Sara to establish she was **invited** to *remain*, she must prove that the owner's agent invited her to ignore the agent's order to depart. This would require Sara to prove that Sgt. Fiscus or Norberg told Sara to disregard their order to leave. This constitutes an absurd defense that cannot be proven under any circumstances where a defendant has been accused of *remaining* on public property. Thus, subsection six is unconstitutionally vague as applied to Sara's conduct at the Kleiner Park.

3. Meridian Police Department exercised unbridled authority therefore the laws are vague as applied.

a. Sargent Fiscus exercised unbridled authority therefore the laws are vague as applied.

Sgt. Fiscus's authority to trespass Sara under Meridian City Code §§ 13-2-7, 13-2-9, and/or 6-1-4 allows him to arbitrarily persecute dissenters. A statute is unconstitutionally vague when it "fail[s] to provide fair notice that the defendant's conduct was proscribed or fail[s] to provide sufficient guidelines such that the police ha[ve] unbridled discretion in determining whether to arrest [a person]." *State v. Martin*, 148 Idaho 31, 34-35 (Ct. App. 2009).

The State's July 1, 2019 State's *Motion in Limine* ("*State's 7/1/21 MIL*") alleges that Sgt. Fiscus trespassed Sara under Meridian City Code § 6-1-4 (while enforcing the park closure ordinance found in section 13-2-7). *State's 7/1/21 MIL*, p. 4.

> The court should also take judicial notice of the ordinance that empowered the Meridian Police Department to enforce Director Siddoway's order. Meridian City Code 6-1- 4 expressly empowers the Meridian Police Department to "enforce all penal and regulatory laws of the state and the city and to preserve order and exercise any and all powers, duties and authority of any Sheriff or other peace officer anywhere in the state within the limits of the boundaries of the city, in the same manner and with like authority as the Sheriff of any county in the state." On April 21, 2020, Meridian police officers had legal authority, pursuant to this city ordinance, to enforce Director Siddoway's order.

Id. However, Sgt. Fiscus also told Sara and the other park patrons that law enforcement could close Kleiner Park "at any time." Notice how Sgt. Fiscus advertises his personal authority to indiscriminately close the park by using the inclusive pronoun *we*:

> Alright everybody, LISTEN UP![4] The park here is closed. If you refuse to leave you will be arrested or cited for trespassing. That's your warning right now. It's a private park, **we** can close it at any time. The city owns it. It's closed, get your kids and get out of here.

Stip of Facts, ¶ 14 (emphasis added). When Sara confronted Sgt. Fiscus about his statement that Kleiner Park was a "private park" Sgt. Fiscus doubled down on his unbridled authority:

> Sara: It's not a private park, it's a public park.

[4] The letters are capitalized to reflect that Sgt. Fiscus yelled those words.

> Fiscus: It is public and **we** can close it, and **we're** closing it.
> Sara: Ok, under what grounds?
> Fiscus: I just told you. **We** can close it at any time.

Id. at ¶ 15 (emphasis added). In an email exchange shortly before Sara's arrest, Roger Norberg, Director Siddoway, and the Chief of the Meridian Police, Jeff Lavey discussed the authority of Meridian Police Department to enforce the alleged park closure. *Stip of Facts*, ¶ 10, Exh. K. At 3:56 p.m., Norberg wrote, "I told [law enforcement] not to cite. If I'm wrong let [law enforcement] know." *Id*. At 4:06 p.m., Director Siddoway replied:

> ...of course, we'd always prefer to handle it without citations if possible. But if someone truly resists the officer's instructions, that is their call. My two bits."

Id. At 4:07 p.m., Chief Lavey replied:

> We aren't citing on these unless it goes sideways fast then a cite is the least of their worries.

Id.

Here, first, if it is the Meridian Police Department who closed Kleiner Park, then law enforcement acted outside of its authority. Meridian City Code § 6-1-4 grants law enforcement the authority to enforce the laws. However, it does grant law enforcement the authority to make operational decisions such as when to close a park.

Second, the Meridian Parks Maintenance Foreman Roger Norberg instructed law enforcement "not to cite." Director Siddoway instructed law enforcement that "it [was] their call." Then, the Chief of the Meridian Police set forth the precise standard for issuing citations only if: "it goes sideways fast." Either Sgt. Fiscus disobeyed these three limiting conditions governing Sgt. Fiscus's decision to arrest the park occupants or Meridian City Code § 6-1-4 fails to provide sufficient guidelines preventing Sgt. Fiscus from exercising unbridled discretion in

determining whether to arrest the park occupants. In that case, Meridian City Code § 6-1-4 is unconstitutional as applied to Sara's conduct on April 21, 2020.

b. Meridian Police Department as a whole exercised unbridled authority to enforce the laws therefore the laws are vague as applied.

Meridian Police Department exercised unbridled discretion when they arbitrarily enforced the trespass statute at Kleiner Park on April 21, 2020. A statute is unconstitutionally vague when it "fail[s] to provide fair notice that the defendant's conduct was proscribed or fail[s] to provide sufficient guidelines such that the police ha[ve] unbridled discretion in determining whether to arrest [a person]." *State v. Martin*, 148 Idaho 31, 34-35 (Ct. App. 2009).

When asked to provide the training manuals describing when a person may have her permission revoked, the City responded as follows:

> The only written officer instructions on removing persons from a Meridian, Idaho public park consist of a copy of the Meridian City Code section 13-2-9 (Enforcement) and a copy of Idaho Code § 18-7008. *See Subpoena Response*, ¶ 3, Exh. C.

Stip of Facts,¶ 23, Exh. C.

Here, the Meridian Police Department had unbridled discretion to determine whether to arrest a trespasser at the park. They observed numerous park visitors trespass the playground equipment. However, due to arbitrary reasons, they only arrested Sara. After Sara's arrest the officers cleared the playground area and the Parks Department staff "re-taped" the playground equipment with yellow caution tape. *Stip of Facts*, ¶ 27, Exh. M.

At 4:48 p.m–40 minutes after Sara's arrest–Director Siddoway sent an email to the Chief of Police Lavey (cc'ing Roger Norberg, Mark Ford, and Mike Barton) informing the chief that patrons of the park had torn down the yellow caution tape from the playground equipment at Kleiner Park again. *Id*. At the time of this email, there were both Park's Department staff and

Meridian law enforcement still at Kleiner Park. *Id*. The officers did not approach or arrest any of the subsequent trespassers or any of the visitors who vandalized city property by tearing down the yellow tape. *Id*. Both the Parks Department staff and law enforcement simply "monitored" the situation. *Id*. It appears that Director Siddoway expected the officers to do their job. *Id*.[5] By 5:05 p.m. Director Siddoway informed his staff that since the officers had gone home, they could put the yellow caution tape up the next morning:

> If the officers have left, I think we put up the tape first thing in the morning.
>
> The Mayor and Council have been brought into the loop. I'll let you know if there's any additional direction.

Id.

The Parks Department arbitrarily decided to enforce the regulation and failed to provide the Meridian Police Department with sufficient guidelines to make an arrest. Because the Parks Department failed to provide Meridian Police Department with sufficient guidelines to determine whether to arrest the trespassers, the Meridian Police Department had unbridled authority to arrest Sara and ignore other trespass violations.

4. The closure notices are vague as applied.

a. <u>The written closure notices are vague as applied.</u>

The trespass statute's use of the term *open to the public* is vague as applied. A person is guilty of a trespass when he remains on property without permission, knowing or with reason to know that his presence is not permitted. I.C. § 18-7008(2)(a). The absence of permission is a dispositive element of the crime. Thus, a person does not commit a trespass when he has permission to occupy the property even if he has been notified that his presence is not permitted.

[5] It also appears that the Director was more concerned as to what to tell his boss, the Mayor, than what to do with the violators at the park. *Id*. ("Is it time to give [Mayor] Robert [Simison] an update?")

Id. Under the trespass statute, any form of permission or invitation recognized by law constitutes valid permission. I.C. § 18-7008(1)(f). For example, property that is open to the public implies an invitation. I.C. § 18-7008(6). In other words, occupying property that is open to the public is not a crime because an implied invitation is a valid form of permission recognized by the trespass statute.

Here, what constitutes *open to the public* is vague as applied. Sara is accused of trespassing because she allegedly did not have permission to occupy an open space adjacent to the playground equipment. Yet, Meridian City invited Sara to the *open spaces* of the park. *Stip of Facts*, ¶ 7 ("With schools closed and residents staying home as much as possible, our parks and open spaces provide an important relief during these stressful times. People are still welcome to walk, run, bike, fish and relax in our parks."). However, Sara was not invited to the closed spaces of the park. *Id*. The closed spaces were marked by yellow caution tape. *Id*. at ¶ 9. These marked closed spaces included playground equipment and exercise equipment. *Id*. at ¶ 7. The closed spaces were limited to the park's "high touch areas." *Id*. at ¶ 8. For example, while the skatepark portion of the park might be construed as *playground equipment* or *exercise equipment*, the Park Department clarified that the skatepark remained *open to the public* because the closed spaces were limited to "high touch areas." *Id*. Presumably, because the skatepark was not a "high touch area," for the purpose of the written notices, the skatepark does not constitute *playground equipment* or *exercise equipment*.

It is unknown whether the open spaces adjacent to the playground equipment constitute *pathways* or *playgrounds*. Sara was invited to the "pathways" because they were "open to the public." *Id*. at ¶ 7. "There are three sidewalks/pathways that enter and exit the barked playground area." *Id*. at ¶ 1. The City of Meridian has never defined what constitutes *open spaces*, *pathways*,

or *playgrounds*. *Id*. at ¶ 25 ("The City of Meridian does not have definitions of 'playgrounds,' 'outdoor exercise equipment,' and 'open spaces' as referenced in the City of Meridian's March 23, 2020 News Release."). The written notices do not clearly indicate what open spaces adjacent to the playground equipment or exercise equipment were closed to the public.

Similar to the skatepark area of the park, the Parks Department employees did not place yellow caution tape blocking the pathways/sidewalks entering the barked area. *Id*. at ¶ 9. The aerial view of the park infers one or more pathways that naturally flow from concrete through the area containing bark and rejoins a concrete pathway on opposite ends of the bark. *Id*. at ¶ 1, Exh. D. In other words, there are no clear boundaries delineating *pathways* intersecting the bark with the non-pathway areas also within the bark. Because there is no clear distinction between an area closed to the public and other portions that were open to the public, the trespass statute's term "open to the public" is vague as applied.

b. <u>The employee's closure notice is vague as applied.</u>

Mr. Norberg, as an agent of the Park Department, did not clarify the boundary between a closed and open area. After Sgt. Fiscus advised Sara that the "playground is closed," Sgt. Fiscus directed Sara to clarify the boundary between areas that are open to the public from those that were closed:

Sgt. Fiscus:	Hey, ma'am, whoever wants to talk. This is the parks guy. He can tell you exactly what you can and can't do. I will tell you the playground is closed. We told you. OK?
Sara:	Who has the mayor's phone number?
Cpl. Price:	Or you can talk to this gentleman. (Gesturing towards Roger Norberg from the Meridian Parks Dept.).
Sara:	So, he might be the park director though, but he's not gonna cite us and he's not gonna arrest us, or he's going to…

Sgt. Fiscus:	But he can ask me to cite or arrest you.
Sara:	Ok, so what would you be citing us for?
Fiscus:	Trespassing.
Sara:	On public property? But we have a right to peaceably assemble.
Mom 2:	So you, so it's up to you, if you decide…
Mr. Norberg:	I'm following orders.
Mom 2:	You would like to like press charges?
Mr. Norberg:	Is this a gotcha thing that you're doing?
Mom 2:	Gotcha? No we're just mom…
Mr. Norberg:	It's – We are just trying to protect people here.
Sara:	From being out in the air with the sun?
Mom 2:	Right protect us from getting Vitamin D and letting our kids play in the sunshine?
Mr. Norberg:	So, you guys haven't read that the virus stays on plastic for 72 hours or something like that?
…	
Mr. Norberg:	It's the Mayor's order.
Sara:	Well we just showed up and it doesn't look closed to us.
Mom 2: Ya.	
Sgt. Fiscus:	Hey Roger. Let's get'em out of the playground area to talk to them about all this stuff. Do I have a missing kid? I've got a…kid here. Ma'am you can film all you want you gotta get out of the playground area. I've told you, I've told you.
Sara:	We're just going to record our rights being violated.
…	
Mr. Norberg:	I'm trying to back off. So, you're supposed to be getting off the playground.
Sara:	You don't have a mask on.
Sgt. Fiscus:	Ma'am I have told you to exit numerous times. This is it. Exit the playground area. Now. And don't, I'm really trying to be a nice guy about this.

Stip of Facts, ¶ 19.

Mr. Norberg did not indicate that the area where Sara was standing constituted an area that was closed to the public. While both Mr. Norberg and Sgt. Fiscus advised Sara that she was not permitted on the "playground," Mr. Norberg also clarified that he was following the Mayor's orders. He also asked whether Sara had read about the virus's lifespan on plastic surfaces. This follow-up statement did not clarify what portion of the bark area was open and what portion was closed to the public.

Perhaps, the State will argue that a finder of fact can infer from Mr. Norberg's statements that the area containing bark was closed to the public. While a jury decides whether the area containing bark is the "playground area," the Court determines whether Mr. Norberg's communications create vagueness as applied to the criminal trespass statute's term *open to the public*. Mr. Norberg's communications do not clarify the boundary. Thus, under the criminal trespass statute, Sara's permission to occupy an area that was *open to the public* is vague as applied.

c. <u>The police officers' closure notices are vague as applied.</u>

The police officers' communications with Sara create vagueness. Sgt. Fiscus and Cpl. Price did not clarify that the area containing bark was closed to the public. While they advised Sara that the playground was closed to the public, they deferred to Mr. Norberg to define the boundary between what Sara "can and can't do." By deferring to Mr. Norberg, the police officers misguided Sara to seek clarification from Mr. Norberg rather than from the police officers. However, while Sara engaged in the dialogue solicited by the police officers, the police arrested Sara before Mr. Norberg clarified what area of the bark was open or closed to the public. Because the police officers advised Sara that Mr. Norberg had authority to inform Sara what

portion of the bark was open or closed to the public, the police officers' communications created vagueness.

d. The Meridian Police Department's communications after Sara's arrest support a finding that I.C. § 18-7008 and Meridian City Code § 13-2-9(B) are vague as applied.

Meridian Police Department emails after Sara's arrest show that even the police department was unclear what was open and what was closed. In an email ninety (90) mins after Sara's arrest, Deputy Chief of Police Tracy L. Basterrechea told an inquirer that Sara was warned that the playground equipment was closed and that the order was from the Parks Director and the Mayor. *Stip of Facts*, ¶ 28, Exh. N ("Officers told them multiple times they could play out in the park, but not on the playground equipment because it was closed by the Parks Director and Mayor."). First, only the Parks Director, not the Meridian Mayor, has authority to close the parks under Meridian City Code § 13-2-9(B). This confusion from law enforcement about where the order to close the parks originated is troubling because the orders originating from the Mayor's office do not allow for a restriction on expressive conduct (see section IV(C) of this briefing below.) Second, if the Deputy Chief of Police does not know whether the barked-area of the playground or only the equipment is closed, then how can a visitor be expected to know. Finally, after the police department had three and a half hours to wordsmith a press release, the police continue to inform the public at large that the "play structure" is closed. *Id*. at ¶ 22 ("Officers informed those gathered several times that the play structure was closed.").

The Meridian Police Department's communications after Sara's arrest support the finding that the police officers' closure notices to Sara were vague. Thus, I.C. § 18-7008 and Meridian City Code § 13-2-9(B) are vague as applied to Sara's conduct at Kleiner Park.

5. A police officer's agency authority is vague as applied.

The police officers do not have authority to define what constitutes *open to the public*. The police officer's authority to act on behalf of the City of Meridian creates vagueness when applied to the criminal trespass statute. Under Meridian City Code § 13-2-9(B), an agent is merely authorized to enforce the areas closed to the public. As a duly authorized City of Meridian representative, a police officer "shall have the authority to eject from a city park…any person acting in violation of this chapter." *Id*. The closed areas must be clearly delineated with signs or barriers:

> It shall be unlawful for any person to enter, remain in, or be present within or upon the premises of a park or park facility or any portion thereof during the hours when the park is closed to the public or enters, remains in, or is otherwise present within an area of the park clearly delineated by signs or barriers as temporarily or permanently closed to the public. Trespass in parks shall be an infraction, punishable by a penalty of fifty dollars ($50.00).

Meridian City Code § 13-2-9(C) (emphasis added).

However, the Meridian City Code does not authorize a police officer to define what constitutes a closed area. **The signs or barriers define what is open to the public.** Again, the police officer is merely authorized to enforce a boundary where the park is closed to the public. Under the criminal trespass statute, the owner or agent defines what areas are open or closed to the public.

Here, Sgt. Fiscus and Cpl. Price did not have authority to declare or clarify what portion of the area surrounding the playground equipment was considered open or closed to the public. While they may have had authority to enforce signs and barriers that clearly delineated areas closed to the public, the Meridian City Code did not authorize them to clarify the meaning of the signs or barriers. However, the police officers decided what area of the parks were closed by

confusing the playground area with the entire open area containing bark. Because the police officers invented the boundary delineating closed areas, the police officers acted outside their agency authority. As such, the officer's agency authority under the criminal trespass statute is vague when applied to their authority under Meridian City Code.

6. The criminal penalty is vague-as applied.

The criminal penalty is vague as applied to Sara at Kleiner Park because it encourages arbitrary and discriminatory enforcement. To comply with due process, a criminal statute must define behavior that constitutes a violation of that statute "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolendar v. Lawson*, 461 U.S. 352, 357 (1983). "The Court has recognized that the more important concern is the provision of concrete guidelines to police officers **and prosecutors** in order to avoid arbitrary and discriminatory enforcement of penal laws." *State v. Doe*, 148 Idaho 919, 930-931 (2010) (emphasis added).

Meridian City Code allows a prosecutor to arbitrarily decide whether to prosecute a trespass as a criminal misdemeanor or as a fifty dollar ($50.00) infraction when the conduct occurs at a Meridian City park. The infraction penalty creates vagueness with the criminal trespass statute. This is because there are no provisions of concrete guidelines for prosecutors to determine when to prosecute the conduct as an infraction and when to prosecute as a criminal misdemeanor. The lack of concrete guidelines allows prosecutors to arbitrarily discriminate whether to subject a person to a fifty dollar infraction or a five thousand dollar fine and up to six months in jail. Thus, the criminal trespass statute is vague when applied to cases prosecuting a trespass at a Meridian City park.

7. Subsection (6) is subject to at least four interpretations.

Idaho Code § 18-7008(6) is subject to at least four possible interpretations. Each interpretation requires a unique standard of conduct. "Statutory interpretation is a question of law over which this Court exercises free review." *State v. Anderson*, 145 Idaho 99, 103 (2008). "The rule of lenity states that criminal statutes must be strictly construed in favor of defendants." *Id*. In relevant part, subsection (6) reads as follows:

> (6) A person shall not be guilty of trespass under this section for entering or remaining upon real property if the person entered or remained on the property pursuant to any of the following rights or authorities:
>
> (a) An established right of entry or occupancy of the real property in question, including, but not limited to:
>
> (i) An invitation, whether express or implied, to enter or remain on real property including, but not limited to, the right to enter property that is, at the time, open to the public, if the person is in compliance with lawful conditions imposed on access;

Id. Subsection (6) refers to certain rights that a person has to be upon real property. One of those rights is an express or implied permission to enter or remain on real property that is, at the time, open to the public, as long as the patron is in compliance with lawful conditions imposed on access. The following are four of the possible interpretations afforded by the language used in subsection (6):

(1) Subsection (6) does not constitute a defense when permission is revoked;
(2) A person who enters lawfully cannot be criminally liable when his permission is revoked;
(3) A person can only be liable if he fails to comply with the original conditions as they were imposed at the time the person entered the property;
(4) A person is liable if he fails to comply with new conditions that were imposed after he had entered the property.

Each of these interpretations will be discussed below.

a. Interpretation #1: Rights, invitations, and permissions granted in subsection (6) are no defense once an owner or an agent has revoked the permission pursuant to I.C. § 18-7008(5).

The first proposed interpretation appears to be the State's contention in this case. The State does not argue that Sara *entered* an area of the park in violation of I.C. § 18-7008. *Id*. at ¶ 13. Instead, the State alleges that Sara *remained* in an area that was closed in violation of I.C. § 18-7008. *Id*.; *See also Superseding Complaint*. The State contends that Sara failed to depart from the playground at Kleiner Park after being told that it was closed. In other words, the State does not allege that Sara entered a closed area of the park. Thus, the State must prove that Sara is liable for trespassing after she lawfully entered an area of the park by failing to leave after she was notified that the area was closed. Under the first proposed interpretation, whatever permission Sara may have had when she entered the subject area was revoked when she was notified that the area was closed.

This interpretation relies on the interpretation of I.C. § 18-7008(5) and Meridian City Code § 13-2-7(B) where the owner or agent can revoke permission (or close a portion of the park) at any time and for any reason. Thus, once the visitor is notified of the revocation of permission (including the express or implied permission on property open to the public), then the visitor is guilty of a trespass if she does not immediately depart.

This interpretation ignores the limitation in subsection (5). I.C. § 18-7008(5) ("Subject to any rights or authorities described in subsection (6) of this section…"). Once real property is open to the public, subsections (5) and (6) acknowledge the "rights" of the visitors to public places. Sara does not contend that visitors can never be asked to leave property that is open to the public, her contention is that a person is not liable for criminal trespass for failing to immediately depart from property that is open to the public. The Idaho legislature specifically added

subsection (6) and made subsection (5) subject to subsection (6) in the 2018 version of the criminal trespass statute. These provisions protect visitors from criminal liability due to any sudden change to access to property open to the public. Allowing an owner or agent to suddenly change the status of the property or revoke access to the property would violate these protections that the legislature specifically added. Yet, the first interpretation ignores this protection. Thus, this first interpretation of subsection (6) is the least reasonable of the four proposed interpretations.

b. Interpretation #2: Once a visitor has entered the real property with permission, then she can never be held liable for trespassing, even if the permission is subsequently revoked.

A second interpretation of subsection (6) provides that once a visitor has entered the real property with permission, then she can never be held liable for trespassing, even if the permission is subsequently revoked.

> A person shall not be guilty of trespass … for remaining upon real property if the person entered .. on the property pursuant to … an established right of entry … including … an … express or implied [invitation], to enter … on real property … that is, at the time, open to the public, if the person is in compliance with lawful conditions imposed on access;

I.C. § 18-7008(6)(a)(i). In other words, if the visitor *entered* real property pursuant to her right to enter property open to the public, then she cannot be found guilty for *remaining* [failing to depart after notice from the owner]. This plain reading of the statute follows the rule of lenity, as it construed all of the disjunctive clauses in favor of the defendant. Because this interpretation uses the plain language of the statute, without excluding any exceptions, it is a reasonable interpretation. Again, this argument does not mean a person cannot be removed from a property just because she entered under lawful conditions. It just means that she would not be guilty for trespassing under section 7008 for failing to immediately depart.

c. Interpretation #3: A visitor can only be liable for trespassing if the visitor fails to comply with the lawful conditions which were imposed on access at the time of entry to the real property.

The third possible interpretation of subsection (6) is that a visitor can only be liable for trespassing if the visitor fails to comply with the lawful conditions which were imposed on access at the time of entry to the real property. This interpretation is similar to the second interpretation in that the visitor must enter the real property pursuant to the right to enter property open to the public. However, under the third interpretation, the visitor must continue to comply with the lawful conditions that were in place at the time of entry for the duration of the visit. For example, if a property open to the public has the single condition that visitors must wear a shirt and shoes for entry to the property, then as long as the visitor enters with shoes and a shirt, and keeps her shoes and shirt on the entire time during the visit, then the visitor cannot be guilty of criminal trespassing.

Similarly, if the only lawful condition to enter Kleiner Park were that the visitor must only enter after sunrise and depart at dusk, then the visitor cannot be held liable for trespassing during the hours in between dawn and dusk. This is the case, even if the lawful conditions upon access change after the visitor enters the real property. For example, imagine the facts from the first hypothetical where a visitor enters wearing a shirt and sandals with socks. Then, after the visitor enters, the owner adds an additional condition prohibiting visitors from wearing socks with sandals. As long as the visitor complies with the original conditions, then she cannot be held liable for trespassing if the owner commands her to depart for wearing the unfashionable socks and sandal combination. Again, this does not mean that she cannot be charged with another crime, it just means she is not guilty of a criminal trespass under section 7008.

d. Interpretation #4: A visitor can only be liable for trespassing if the visitor fails to comply with the lawful conditions which were imposed on access which were imposed subsequent to a visitor's lawful entry to the real property.

The fourth possible interpretation of subsection (6) provides that a visitor can be liable for trespassing if the visitor fails to comply with the lawful conditions which were imposed on access at the time of entry to the real property or fails to comply with any lawful conditions subsequently imposed upon access. This interpretation is similar to the third interpretation because the visitor must enter the real property pursuant to the right to enter property open to the public and the visitor must comply with the original lawful conditions imposed on access during the visit. However, under this fourth interpretation of subsection (6), a visitor can be found guilty of trespassing if the visitor fails to comply with all of the lawful conditions imposed on her access including any new conditions that are imposed after she had already entered the real property.

In order to not violate the rule of lenity, Sara requests this Court to strictly construe subsection (6) in her favor and dismiss this action because she was in compliance with the lawful conditions placed on her access. Additionally, the fact that there are so many reasonable interpretations of subsection (6) serves as evidence that the trespass statute is vague as applied to Sara's conduct.

B. Overbroad As Applied.

The evidence established that Sara's expressive conduct is constitutionally protected and that the statute infringed on her expression without adequate justification. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v.*

ACLU, 535 U.S. 564, 573 (2002). Such content-based laws "have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. ACLU ("Ashcroft II")*, 542 U.S. 656, 660 (2004). When a regulation abridges expression outside of a political convention and the expression revolves around public discourse on a social, political, or religious issue, the restriction is content-based and must survive strict scrutiny. *Cohen v. Cal.*, 403 U.S. 15 (1971); and *Tex. v. Johnson*, 491 U.S. 397 (1989). “Strict scrutiny does not change the individualized inquiry required for an as-applied claim: An ‘as-applied attack’ to a content-based restriction contends that a law's ‘application to a particular person under particular circumstances deprived that person of a constitutional right.’” *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010).

> Under strict scrutiny, a content-based restriction is "presumptively unconstitutional," and may be justified only if the Government shows that the restriction "(1) serves a compelling governmental interest; (2) is narrowly tailored to achieve that interest; and (3) is the least restrictive means of advancing that interest[.]"

Free Speech Coal., Inc. v. AG of the United States, 974 F.3d 408, 420 (3rd Cir. 2020).

In *Korsen*, the Court explained how an as-applied challenge would work against the trespassing statute. *Korsen*, 138 Idaho at 715-6. “Assuming that a criminal trespass prosecution is filed pursuant to I.C. § 18–7008(8) against a person on public property who is exercising his or her free speech rights, the statute could be attacked as applied to that constitutionally-protected conduct.” *Id*.

1. Sara was present on the barked-area to exercise protected speech.

The *Stipulated Facts* establish that Sara’s presence at the specific open area at Kleiner Park is protected First Amendment conduct. Rules implemented to govern access to the public parks “must also be examined under the strictest scrutiny because they regulate expressive

conduct taking place in a traditional public forum…" of exercising First Amendment freedoms. *Watters v. Otter*, 986 F. Supp. 2d 1162, 1173 (D. Idaho 2013) (quoting *Edwards v. South Carolina,* 372 U.S. 229, 235 (1963)). In such "quintessential public forums," the State's ability to limit expressive activity is "sharply circumscribed." *Id*. (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983)).

> The First Amendment, however, "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. International Soc. for Krishna Consciousness, Inc.,* 452 U.S. 640, 647 (1981). As already noted, even for political speech occurring in a public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the (1) restrictions are justified without reference to the content of the regulated speech, (2) they are narrowly tailored to serve a significant governmental interest, and (3) they leave open ample alternative channels for communication of the information. *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989) (internal quotation marks omitted).

Watters, 986 F. Supp. 2d at 1173.

Sara's expressive conduct was content-based (and viewpoint-based) speech protected by the First Amendment. Sara explained that her expression to peacefully occupy the barked-area of Kleiner park playground area was intended to communicate a social and political message in protest of the aggressive government regulations that were introduced during the Covid-19 crisis. Sara was expressing her frustrations about the park closures and the other measures that had been implemented to combat the COVID-19 pandemic that seemed to be arbitrarily applied to protect corporations (like Costco) without consideration of how it was affecting families and especially children. *Stip of Facts*, ¶ 19. Sara was asking questions directly to law enforcement and to the Meridian Park's supervisor in an effort to peacefully redress her grievances. *Id*. Sara's peaceful protest and assembly with the other moms in the park was intended to redress her grievances with what she believed to be unconstitutional actions by the government. *Id*. at ¶ 20. Sara's arrest

itself was an act of expression against what she believed to be oppressive government actions, which is why she requested that the arrest be filmed. *Id*. Her speech and conduct are inherently political as shown in her conversation with Mr. Norberg and Sgt. Fiscus:

> Norberg: *So, you guys you haven't read that the the virus stays on plastic for like 72 hours or something like that?*
> Sara: *So, so it doesn't stay on plastic in Costco or anywhere else places are open, with social distancing??*
> Norberg: *This is kinda a gotcha thing isn't it?*
> Sara: *No! It's…we have rights!*
> Norberg: Ya did you guys organize to do this?
> Sara: *No! We're just tired of this…*
> …
> Fiscus: Because you guys aren't listening. I just told you, exit the playground area. It's easy.
> Sara: But we aren't trespassing. Are you going to cite everyone for not social distancing over here?? Are you going to arrest people for not social distancing??
> Fiscus: Ma'am! You have 5 seconds. 4…3…
> Sara: Arrest me for being at the park. Do it. Record it.

Id. at ¶ 19.

Sara was arrested for expressive conduct because she occupied the open area adjacent to the playground equipment in protest of the arbitrary closure to the playground equipment and exercise equipment. Sara was arrested in the midst of redressing her government. As a public park, Kleiner Park is a traditional public forum. Sara had a clear right to be there to discuss a city imposed closure of the playground equipment. Sara exercised her First Amendment right to redress her grievances–to public personnel–in a public park. Therefore, Idaho Code § 18-7008 is overbroad as applied to Sara's constitutionally protected conduct.

2. The State must establish a compelling interest in restraining Sara's expressive conduct.

By criminalizing Sara's expressive conduct, the partial park closure restricted more speech than was necessary to preserve the compelling government interest. To survive a strict

scrutiny analysis the State must establish evidence that, as applied to Sara's expressive conduct at Kleiner Park, the regulation serves a compelling governmental interest.

Presumably, the compelling government interest was intended to prevent the spread of Covid-19 by forbidding skin contact with high touch plastic surfaces. Here, the only evidence on the record regarding the State's compelling interest is that they wanted to protect people from the "high-touch areas."

> Liz (citizen): Does this include skateparks?
> City of Meridian: Liz, not at this time. We are focussing on high touch areas.
> Liz (citizen): Thank you :)

Stip of Facts, at ¶ 8. This stems from the Parks Department's belief that the COVID-19 virus lives on plastic for up to 72 hours. *Id*. at ¶ 19 (Norberg: "So, you guys you haven't read that the virus stays on plastic for like 72 hours or something like that?"). This is the same messaging that Director Siddoway forwarded to Mr. Norberg on March 20, 2020 an email chain explaining the Director's research on the virus.

> I've been researching CDC guidance this morning regarding playgrounds and haven't found much. In the President's message this morning they talked about new scientific articles that show that the Covid-19 virus can live up to 72 hours on hard plastic surfaces. So, I'm trying to determine the proper response.

Stip of Facts, at ¶ 29, Exh. O.

The Parks Department could have protected the compelling interest by simply prohibiting visitors from touching plastic and other equipment. Yet, Sara was arrested for occupying an area containing bark (about 10 feet from the playground equipment). The State has not alleged that Sara ever touched any playground equipment or any other plastic surface located at the park. The criminal trespass statute, in providing a legal means for the Parks Department to rid itself of Sara, a citizen engaged in expressive conduct at a traditional public forum, precluded

significantly more of Sara's protected speech than necessary. The State's interest in protecting visitors from placing their hands on the "high-tough" plastic playground equipment does not create a compelling interest in the preventing visitors from touching bark with their feet. Thus, I.C. § 18-7008 and Meridian City Code § 13-2-7(B) are unconstitutional as applied.

3. The State must establish that the measures taken were narrowly tailored or the least restrictive means to achieve its interest when restraining Sara's expressive conduct.

The park closures and application of the criminal trespass statute against Sara were not narrowly tailored nor were they the least restrictive means available for the City to achieve its compelling interest. The State must survive a strict scrutiny analysis by showing that I.C. § 18-7008 and Meridian City Code § 13-2-7(B) are narrowly tailored or the least restrictive means to achieve its interest. In fact, when the City surveyed the country at large during this time, it observed that a complete playground closure represented an extreme position in comparison to the options taken in other communities:

> **At one extreme**, some cities across the nation have closed playgrounds altogether. At the other extreme, some cities are completely hands-off, putting the onus on personal responsibility.
>
> Alternate options include:
> · Contracted Cleanings
> · Signage
> · Hand Washing Stations

Stip of Facts, at ¶ 29, Exh. O (emphasis added).

A prohibition against the plastic playground equipment would have accomplished the exact same objective and would be less restrictive than the prohibition against walking on bark (i.e. closing all areas around the plastic structures).[6] The State's arbitrary prohibition against

[6] In fact, it appears as though a Director Siddoway only closed playground equipment rather than the open areas adjacent to the equipment as well (i.e. the barked area). Deputy Deputy Chief of Police Tracy L. Basterrechea stated in an email 90 mins after Sara's arrest that "Officers told them multiple times they could play out in the park, but not on the playground equipment because it was closed by the Parks Director and Mayor." *Stip of Facts*, ¶ 28, Exh. N. Additionally, the press release that was put out by Meridian PD stated "Officers informed those gathered several times that the play structure was closed." *Id.* at ¶ 22.

occupying an area containing bark does not justify criminalizing Sara's expressive conduct. This is not a basis countenanced by First Amendment case law.[7] Because the State failed to establish that the regulation was narrowly tailored or the least restrictive means to achieve its interest, the regulation does not survive strict scrutiny. The trespass statute, in providing a legal means for the Meridian Parks Department to rid itself of Sara, a citizen occupying a public park, precluded significantly more of Sara's protected speech than necessary. Thus, I.C. § 18-7008 and Meridian City Code § 13-2-7(B) are unconstitutional as applied.

II. SECTION 18-7008(6) APPLIES EVEN WHEN THE OWNER REVOKES PERMISSION.

A. A Compliant Invitee is Not Guilty Even When an Owner Revokes Permission.

Even when an owner or agent revokes an invitee's permission and the invitee fails to depart, the invitee shall not be guilty of trespass, so long as she complied with lawful conditions imposed on her access to property open to the public. I.C. §§ 18-7008(1)(g) and 18-7008(6)(a)(i).

While subsection five provides that a landowner may revoke permission at any time and for any reason, this right of revocation is "**subject to any rights or authorities described in**

---

[7] *Tex. v. Johnson*, 491 U.S. 397, 407-409 (1989). ("Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration. However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag. Although the State stresses the disruptive behavior of the protestors during their march toward City Hall, it admits that 'no actual breach of the peace occurred at the time of the flag burning or in response to the flag burning.' The State's emphasis on the protestors' disorderly actions prior to arriving at City Hall is not only somewhat surprising given that no charges were brought on the basis of this conduct, but it also fails to show that a disturbance of the peace was a likely reaction to Johnson's conduct. The only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag burning.

The State's position, therefore, amounts to a claim that an audience that takes serious offense at a particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' It would be odd indeed to conclude both that 'if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection,' and that the government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence. Thus, we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'").

subsection (6) of this section."

Under subsection six, a person is not guilty of trespass, even when she *remains* after being ordered to depart, provided she complies with lawful conditions imposed on her access:

> A person shall not be guilty of trespass under this section for entering or **remaining** upon real property if the person entered or **remained** on the property pursuant to any of the following rights or authorities:
>
> > (a) An established right or occupancy of the real property including, but not limited to:
> >
> > > (i) An invitation, whether express or implied, to enter or remain on real property including, but not limited to, the right to enter property that is, at the time, open to the public, if the person is in compliance with lawful conditions imposed on access.

I.C. § 18-7008(6) (emphasis added).

When subsection six uses the terms *remaining* and *remained*, these terms must be given their defined meaning. Subsection six should be read as follows:

> (6) A person shall not be guilty of trespass under this section for entering or **remaining** [failing to depart when ordered by the owner] upon real property if the person entered or **remained** [failed to depart when ordered by the owner] on the property pursuant to any of the following rights or authorities:
>
> > (a) An established right of entry or occupancy of the real property in question, including, but not limited to:
> >
> > > (i) An invitation, whether express or implied, to enter or **remain** [failed to depart when ordered by the owner] on real property including, but not limited to, the right to enter property that is, at the time, open to the public, if the person is in compliance with lawful conditions imposed on access;

I.C. § 18-7008(6)(a)(i) (emphasis added). Thus, an invitee is not guilty of trespass when she

complies with lawful conditions. This is true even if she fails to depart after being notified to do so.

The State may contend that an owner can revoke an invitee's permission without limitation, or that it does not matter whether the defendant was complying with lawful conditions upon access. However, applying the limiting condition of subsection five (that revocation is limited by subsection six) and properly defining the terms *remaining* and *remained*, this Court should conclude there is a limitation to revoking permission when the defendant is on property that is open to the public and that a defendant is not guilty when in compliance with lawful conditions.

B. Subsection Seven Does Not Limit the Scope of Subsection Six.

Subsection six is not limited to circumstances where the statute provides a specific example. The example in subsection seven illustrates that an invitee shall not be guilty of trespass under subsection six when she has not been asked to depart:

> Examples of the exclusions in subsection (6) of this section include, **but are not limited to**: a customer entering and remaining in a store during business hours who has not been asked to depart by the property owner or his agent.

I.C. § 18-7008(7) (emphasis added).

Subsection seven does not provide any example where an invitee was ordered to depart. However, just because the statute only provides one example of an exclusion related to property that is open to the public, does not mean that subsection six only applies in cases where the facts match that single example. Subsection seven explicitly states that the examples do not limit the exclusions in subsection six. *Id*. The examples "include, but are not limited to" the ones provided in subsection seven. *Id*. Thus, the Court should not limit the scope of subsection six to the single example provided in subsection seven.

III. A Trespassing Order Must Be Lawful When Property Is Open to The Public.

Sara is permitted to inquire into the lawfulness of Sgt. Fiscus's trespass order. Idaho's current trespass statute does contemplate inquiries into the lawfulness of the exclusion order that go beyond the delegated authority of the persons who can issue the direction. In 2018, the trespass statute was repealed. Prior to the repeal, Idaho appellate courts determined that an owner or agent of real property did not need to provide a reason to forbid a person from occupying the designated property. *See State v. Korsen*, 138 Idaho 706 (2003); *State v. Pentico*, 151 Idaho 906 (Ct. App. 2011); *Pentico v. State*, 159 Idaho 351 (Ct. App. 2015); and *State v. Clark*, 161 Idaho 372, 375 (2016). None of these cases examined the current statute. This is why the *Clark* court determined that Idaho's trespassing statute does not "contemplate inquiries into the lawfulness of the exclusion order that go beyond the delegated authority of the persons who can issue such an order." 161 Idaho at 375.

There, the defendant argued that Idaho should permit inquiries into the lawfulness of the notice to depart that go beyond the delegated authority of the persons who can issue the direction. *Id*. In support of Clark's argument, he relied on Oregon's rationale from an Oregon appellate decision. *Id*. (citing *State v. Koenig*, 238 Ore. App. 297 (Or. App. 2010)). The *Clark* court distinguished Idaho's (now repealed) trespass statute from Oregon's trespass statute:

> In *Koenig*, the defendant was arrested when he entered a county public services building after he had received an order excluding him from the building. The Oregon trespass statute requires that in order for a defendant to unlawfully trespass on "premises that are **open to the public**," the defendant must be "lawfully directed not to enter the premises."[8] The Oregon court concluded, based on Oregon precedent, that the **"lawfully directed"** phrase

[8] "A person commits the crime of criminal trespass in the second degree if the person enters or remains unlawfully in a motor vehicle or in or upon premises." ORS § 164.245. The Oregon statute defines *enters or remains unlawfully*: "Enter or remain unlawfully" means:...(c) To enter premises that are open to the public after being *lawfully directed* not to enter the premises[.]" ORS § 164.205(3)(c) (emphasis added).

> "contemplates inquiries into the lawfulness of the direction that go beyond the delegated authority of the person to issue the direction. **Those inquiries may include whether the order complied with particular constitutional provisions.**"
>
> The court concluded the **state was required to prove** that the notice of exclusion did not run afoul of the defendant's right to a process through which he could challenge it. Clark contends that the Oregon "lawfully directed" language is similar enough to Idaho's "authorized agent" language to require that he be afforded the same due process right.
>
> There are substantial differences between the Oregon and Idaho statutes. **The Idaho statute does not contain a separate provision pertaining to trespass on premises that are open to the public**, nor does it contemplate inquiries into the **lawfulness** of the exclusion order that go beyond the delegated authority of the persons who can issue such an order. More importantly, because Idaho has case law directly on point, there is no need to consider out-of-state decisions.

Clark, 161 Idaho at 375 (internal citations omitted)(emphasis added). In other words, in Oregon, a person shall not be guilty of trespass provided the property is **open to the public** and the notice forbidding his presence is not **lawfully directed**. ORS § 164.205(3)(c).

Unlike Idaho's repealed trespass statute, the current version of I.C. § 18-7008 is substantially similar to the Oregon statute. Idaho's statute now contains a separate provision pertaining to trespass on premises that are *open to the public* and it contemplates inquiries into the *lawfulness* of the exclusion order that go beyond the delegated authority of the persons who can issue such an order. I.C. §18-7008(6)(a) (A person is not guilty of trespass provided "the right to enter property that is, at the time, **open to the public**, if the person is in compliance with **lawful conditions** imposed on access." (emphasis added)).[9] Because the previous version of I.C.

[9] Property *open to the public* is distinguishable from public property. Private property can be *open to the public*. The conditions that are imposed upon access to private property that is *open to the public*, must be *lawful* conditions. For example, race may constitute an unlawful condition imposed on access. Hypothetically, if Ollie's Barbeque franchised an Idaho location and conditioned access to the restaurant on a person's race, a person cannot be criminally trespassed for refusing to leave on account of race. Not only would the State need to prove the manager of Ollie's Barbeque had authority to impose conditions on public access (an inquiry into the lawfulness of the delegated authority), the State would also need to prove that the notice to depart was lawful (an inquiry into whether the race based condition complied with particular constitutional provisions). This hypothetical is only roughly based

§ 18-7008 was repealed, it is presumed that the legislature intended the current version to have a meaning different from that accorded to it before the enactment of the 2018 version of I.C. § 18-7008.

Idaho's current trespass statute now models the elements that the *Clark* court observed were missing from the repealed version. This Court must assume that the Idaho Legislature was aware of the *Clark* decision when it enacted the new trespass statute. Thus, the State is required to prove that Sgt. Fiscus's order to depart did not run afoul of Sara's right to a process through which she could challenge it. A person who is ordered to depart is banned from visiting the location for a one year period under threat of criminal prosecution:

> A person commits criminal trespass and is guilty of a misdemeanor … when he … remains on the real property of another without permission, knowing or with reason to know that his presence is not permitted. A person has reason to know his presence is not permitted when … he fails to depart immediately from the real property of another after being notified by the owner or his agent to do so, or returns without permission or invitation within one (1) year, unless a longer period of time is designated by the owner or his agent.

I.C. § 18-7008(2)(a). An interpretation of I.C. § 18-7008 which does not afford a defendant due process to challenge the lawfulness of her trespass order would violate the Fourteenth Amendment. To avoid conflict with the Constitution and give it the force of law, this Court must adopt a construction where the State is required to prove that the notice of exclusion did not run afoul of Sara's due process rights. In other words, the State must prove the one year banishment complied with constitutional provisions.

Sgt. Fiscus ordered dozens of other mothers, including Sara, to immediately depart from Kleiner Park:

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on *Katzenbach v. McClung*, 379 US 294 (1964) and is not intended as a legal authority supporting constitutional arguments.

> Alright everybody, LISTEN UP! The park here is closed. If you refuse to leave you will be arrested or cited for trespassing. That's your warning right now. It's a private park, we can close it at any time. The city owns it. It's closed, get your kids and get out of here.

Stip of Facts, ¶ 14.

Based on the plain language of section 7008(2)(a) every individual occupant that received that message cannot return to Kleiner Park for one (1) year.

> A person commits criminal trespass when … after being notified by the owner or his agent to [depart immediately] … returns without permission or invitation within one (1) year.

Because the State alleges Sara violated I.C. § 18-7008, it must prove that the statute allows Sara an avenue to challenge the one (1) year statutory barment of reentry, which would have attached as soon as Sgt. Fiscus issued his order.

IV. Director Siddoway's Authority Offends the Principles of Separation of Powers.

A. Meridian City Code 13-2-7 Unconstitutionally Delegates Authority to the Director Without Constitutional Safeguards.

Director Siddoway's authority to arbitrarily close the parks is unconstitutionally delegated because he fixed the conditions upon which the city code was to operate. Meridian City Code 13-2-7 is unconstitutional because the Meridian City Counsel may not delegate any agency authority to the Director of the Meridian Parks and Recreation Department without imposing standards, guidelines, or restrictions to this grant of authority. Sara challenges section 13-2-7 as facially unconstitutional and unconstitutional as applied to her conduct.

It is well-established law that the city council cannot delegate its lawmaking powers to another authoritative body. *Emp'rs Res. Mgmt. Co. v. Kealey*, 166 Idaho 449, 454 (2020). "[T]he legislature can empower an agency or an official to ascertain the existence of facts or conditions

upon which the law becomes operative." *Id.* (*quoting Kerner v. Johnson,* 99 Idaho 433, 450-51 (1978)). "In determining whether a statute is an unconstitutional delegation of legislative power, this Court has examined whether the statute imposes guidelines on the decision-making body, or grants 'unbridled' authority to that body." *Id.*

> **Thus, the crux of the analysis is an examination of whether the statute lacks standards, guidelines, restrictions or qualifications of any sort placed in the delegating legislation.** Such a lack of legislative guidance violates the Idaho Constitution's separation of powers doctrine as an **unbridled delegation** of lawmaking power, while the presence of such guidelines and restrictions creates a proper "fact-finding" status to ascertain the facts and conditions upon which the law becomes operative. When conducting this analysis, the Court must also consider the practical context of the problem to be remedied and the policy to be served.

Id. (Internal citations omitted.) "An agency must exercise any authority granted by statute within the framework of that statutory grant. *Roberts v. Transportation Dep't*, 121 Idaho 727, 732 (Ct. App. 1991), aff'd, 121 Idaho 723 (1992). It may not exercise its sub-legislative powers to modify, alter, enlarge or diminish the provisions of the legislative act which is being administered. *Id*. Where an agency "can act only for a limited purpose in a limited manner after a finding that certain conditions exist," there "has been no unbridled discretion given to the Authority." *Bd. of Cty. Comm'rs of Twin Falls Cty. v. Idaho Health Facilities Auth.*, 96 Idaho 498, 508 (1974).

"The non-delegation doctrine bars Congress from transferring its legislative power to another branch of Government." *Gundy v. United States*, 139 S. Ct. 2116, 2121, reh'g denied, 140 S. Ct. 579 (2019). Regulations become "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations." *Am. Power & Light Co. v. Sec. & Exch. Comm'n*,

329 U.S. 90, 105 (1946)(emphasis added). Thus, a delegation of authority to an agency is only constitutional when (1) the boundaries of this delegated authority are clearly set and (2) the defendant has a right to review the government's action in court.

> Although the legislature cannot delegate its power to make a law or complete one, it can empower an agency or an official to ascertain the existence of the facts or conditions mentioned in the act upon which the law becomes operative. If the rule were otherwise, the legislature would indeed be at a great disadvantage in solving many of the complex and difficult problems with which it is confronted.
>
> The legislature must itself fix the condition or event on which the statute is to operate, but it may confide to some suitable agency the fact-finding function as to whether the condition exists, or the power to determine, or the discretion to create, the stated event. The nature of the condition is, broadly, immaterial.

Id. (Emphasis added.)

Cases permitting facial challenges to regulations that grant officials unconstrained authority to regulate speech have generally involved licensing schemes that "ves[t] unbridled discretion in a government official over whether to permit or deny expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 793 (1989). Administrative interpretation and implementation of a regulation are, of course, highly relevant to a court's analysis, for "[i]n evaluating a facial challenge to a state law, a federal court must ... consider any limiting construction that a state court or enforcement agency has proffered." An inadequacy on the face of a guideline can be more than remedied by an agency's narrowing construction. *Id*. Most importantly, the regulation must be "narrowly tailored to serve a significant governmental interest." *Id*. As noted above, if the limits are not written into the statute it is inappropriate for the court to "write nonbinding limits into a silent state statute."

When asked to provide the training manuals describing when a person may have her

permission revoked, the City responded as follows:

> The City does not have in its custody records responsive to Defendant's request for "Copy of all Meridian City parks employee training manual on when to have a person ejected or removed from a public Meridian, Idaho public park.

Stip of Facts,¶ 24, Exh. A ("*Subpoena Response*"), ¶ 5.

Here, Meridian Code sections 13-2-7(B) unconstitutionally delegates authority to the Meridian Parks Director without providing constitutional safeguards. **The Director** may declare "any section or part of any park closed to the public." There is no limit to this grant of authority. The Director may close the parks "at any time and for any interval of time, either temporarily or at regularly and/or stated intervals and either entirely or merely to certain uses." Sergeant Fiscus emphasized his unbridled authority:

> Sara: It's not a private park, it's a public park.
> Fiscus: It is public and **we** can close it, and **we're** closing it.
> Sara: Ok, under what grounds?
> Fiscus: I just told you. **We** can close it at any time.

Stip of Facts, ¶ 15. Later, Sergeant Fiscus retreated from his prior comments and explained that the police and the mayor do not have authority to close the parks:

> Fiscus: Hey, hey ma'am, whoever wants to talk. This is the parks guy. He can tell you exactly what you can and can't do. I will tell you the playground is closed. We told you. OK?
> …
> Sara: So, he might be the park director though, but he's not gonna cite us and he's not gonna arrest us, or he's not going to…
> Fiscus: But he can ask me to cite or arrest you.

Stip of Facts, ¶ 19. Officer Price also boasted of the City of Meridian's unbridled authority:

> Mom 2: Well it's a public park so I, I do wonder why it's um, being closed when it's a public park. I mean we aren't breaking a law.
> Price: Well the city closed it and the city can close the park it at

any time.
Mom 2: Under what grounds?? Under what grounds can they just come in and…
Price: The city code says they can.

Stip of Facts, ¶ 16.

Here, the State contends that section 13-2-7 grants the Director authority to close the park at will:

> In this case, the court should take judicial notice of the ordinance that was relied upon to close the playground, Meridian City Code 13-2-7. It states in relevant part: Any section or part of any park may be declared closed to the public by the Director at any time and for any interval of time, either temporarily or at regularly and/or stated intervals and either entirely or merely to certain uses, as the Director shall find reasonably necessary.

State's 7/1/21 MIL, p. 4. Missing from section 13-2-7 are any "boundaries of this delegated authority." *Am. Power & Light Co.*, 329 U.S. 90. The Meridian City Council violated the Idaho Supreme Court's long established rule that the lawmaking body must itself fix the condition or event which would permit the government actor to exercise his authority to limit a right of a citizen. Once the city council has fixed this condition it then "may confide to some suitable agency the fact-finding function as to whether the condition exists, or the power to determine, or the discretion to create, the stated event."

Like the Court in *Kealey*, this Court must look at "the crux of the analysis and examine whether the [ordinance] lacks standards, guidelines, restrictions or qualifications of any sort placed in the delegating legislation." None of these limitations are found in Meridian Code § 13-2-7. The State ignores the lack of safeguards and stands on the misguided presumption that section 13-2-7 allows the Director to bypass the non-delegation rule by closing sections of the public parks at any time and for any reason. This effectively revokes permission for park visitors to occupy the park. "Such a lack of legislative guidance violates the Idaho Constitution's

separation of powers doctrine as an unbridled delegation of lawmaking power." *Kealey*, 166 Idaho at 454.

Sara does not argue that the Meridian City Counsel can never delegate authority to a state actor to serve an agent of a state property. However, this delegation must be done within the bounds of the law. For example, Meridian Code section 13-2-9(F) grants the Parks Director the authority to exclude a patron from the park for seven (7) days. However, this section grants due process whereby the patron can appeal the expulsion along with other protections. This is an example of a limitation placed on Meridian City Council's grant of authority to the Parks Director that passes constitutional muster.

In contrast, section 13-2-7 gives unbridled delegation because (1) it fails to set any guidelines within which the Director can close an area of the park, (2) it does not require that the Director give prior notice to visitors, and (3) it does not give a way for visitors to challenge a park closure. There literally are no limits to this grant of authority. An inadequacy on the face of this city ordinance could have been more than remedied by the Park Department's narrowing construction through its internal policies. However, a review of the City's subpoena response, did not reveal any limiting or narrowing policies which described, defined, limited, or narrowed the Director's ability to close the Meridian Parks. *Stip of Facts*, ¶ 6, fn. 1.[10]

Sara has a liberty interest in her First Amendment right to assemble and associate with whom she chooses. She has the right to redress her government, to challenge the logic behind bureaucratic policies, and to speak out against authority in front of her peers. This is especially true at a traditional public forum such as a public park. These rights must be protected. Because Meridian Code 13-2-7(B) lacks constitutional safeguards, it is unconstitutional.

[10] On February 1, 2022, Sara sent a subpoena duces tecum to the City of Meridian. The City responded on February 18, 2022. Sara was not able to identify any limiting or narrowing policies in the City's response to her subpoena. The burden is on the State to establish that there were narrowing policies to the Parks Director's authority.

B. Meridian Code 13-2-7(B) Creates an Unacceptable Risk by Granting Director Siddoway With Unbridled Authority.

The Meridian Code grants Director Siddoway with unbridled authority. A city ordinance is unconstitutional when it grants a city official with unbridled authority. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 772 (1988). There, a city ordinance granted the mayor the sole discretion to issue or deny a permit to place a newspaper rack on city property. *Id*. The ordinance was unconstitutional on the grounds that it delegated overly broad licensing discretion to an administrative office. *Id*. It was unconstitutional even though the ordinance (1) required that the mayor state the reasons for any denial of a newsrack permit application and (2) it provided for a review of mayoral decisions. *Id*. The Court held that "those portions of the Lakewood ordinance giving the mayor unfettered discretion to deny a permit application and unbounded authority to condition the permit on any additional terms he deems **"necessary and reasonable,**" were unconstitutional. *Id*. (Emphasis added.) The Supreme Court refused to assume that the limitations missing from the city ordinance were implied:

> The city asks us to presume that the mayor will deny a permit application only for reasons related to the health, safety, or welfare of Lakewood citizens, and that additional terms and conditions will be imposed only for similar reasons. This presumes the mayor will act in good faith and adhere to standards absent from the ordinance's face. But this is the very presumption that the doctrine forbidding unbridled discretion disallows. E.g., *Freedman v. Maryland*, 380 U.S. 51 (1965). The doctrine requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice. *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Kunz v. New York*, 340 U.S. 290 (1951). This Court will not write nonbinding limits into a silent state statute.

City of Lakewood, 486 U.S. 770. The US Supreme Court held that a facial challenge was

appropriate[11], and that standards controlling the mayor's discretion must be required. *Id*. The Court noted that "[o]f course, the city may require periodic licensing, and may even have special licensing procedures for conduct commonly associated with expression; but the Constitution requires that the city establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered." *Id*. at 760.

Unlike the City of Lakewood's ordinance requiring the official to state the reasons for any denial of a newsrack permit application, Meridian City Code § 13-2-7(B) does not require the Parks Director to state any reason for closing sections of the park. Section 13-2-7(B) only requires the Parks Director to find the closure "reasonably necessary." This limitation is insufficient. Like the holding in *City of Lakewood*, this Court should hold that those portions of the Meridian ordinance giving the Parks Director unfettered discretion to close the parks and unbounded authority to restrict free speech as he deems "**reasonably necessary,"** is unconstitutional.

Perhaps, the City of Meridian, like the City of Lakewood, will ask this Court to presume that the Parks Director would only close the parks and revoke access to the play structures for reasons related to the health, safety, or welfare of its citizens. However, the State cannot ask this

[11] See, *e.g., Joseph H. Munson, Co.,* 467 U.S., at 965, n. 13, 104 S.Ct., at 2851, n. 13 (citing *Saia* for the proposition that where a law on its face presents an unacceptable risk of the suppression of ideas, that law may be struck on its face); *Schad v. Mount Ephraim,* 452 U.S. 61, 84 (1981) (STEVENS, J., concurring in judgment) ("Presumably, municipalities may regulate expressive activity—even protected activity—pursuant to narrowly drawn content-neutral standards; however, they may not regulate protected activity when the only standard provided is the unbridled discretion of a municipal official. Compare *Saia v. New York,* 334 U.S. 558, with *Kovacs v. Cooper,* 336 U.S. 77"); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771 (1976) (*Kovacs* and *Saia* compared in course of a string cite to illustrate that the Court approves time, place, and manner restrictions that are content neutral); *Kunz v. New York,* 340 U.S. 290, 294 (1951) (opinion of the Court by Vinson, C.J., joined by Reed, Douglas, Burton, Clark, and Minton, JJ.) (citing *Saia* for the proposition that a regulation placing unbridled discretion in the hands of a government official over the use of a loudspeaker or amplifier is unconstitutional). Nor has *Saia* been cited merely because *Kovacs* has been ignored. See, *e.g., California v. LaRue,* 409 U.S. 109, 117, n. 4, (1972) (*Kovacs* cited for the proposition that "States may validly limit the manner in which the First Amendment freedoms are exercised by forbidding sound trucks in residential neighborhoods"); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 386–387 (1969) (citing *Kovacs* for the proposition that sound trucks may be neutrally regulated); *Edwards v. South Carolina,* 372 U.S. 229, 242 (1963) (Clark, J., dissenting) (*Kovacs* cited for the proposition that there is no right to broadcast from a sound truck on public streets).

Court to presume that the Parks Director will act in good faith and adhere to standards that are facially absent from section 13-2-7. Like the holding in *City of Lakewood*, this Court should find that the good faith presumption "is the very presumption that the doctrine forbidding unbridled discretion disallows." The State has argued from the beginning that there are no limits placed on the Director's ability to close the parks at will. In other words, the Director can revoke a visitor's permission to enter or remain on the public playgrounds at will. The State maintains that the Director may do this at any time and for any reason. The U.S. Supreme Court made clear in *City of Lakewood*, that "[t]his Court will not write nonbinding limits into a silent state statute." Like in *City of Lakewood*, the Constitution requires that the City of Meridian establish neutral criteria to ensure that park closure decisions are not based on the content or viewpoint of any speech taking place at the public park. As such, the ordinance granting the Director unbridled authority is unconstitutional.

C. Director Siddoway's Decision to Close the Parks in Response to the Covid-19 Crisis Usurps the Power Granted to the Mayor Under Meridian Code Section 4-3-1(A).

The Director's decision to close the parks usurps the powers granted to the Mayor. On March 17, 2020, in response to the COVID-19 pandemic, the City of Meridian enacted Ordinance No. 20-1877, which is now codified as Chapter 3 of Title 4 of the Meridian, Idaho Code of City Ordinances. This ordinance gives the Mayor power to quickly implement certain safety measures ("Emergency Powers Ordinance"). Meridian City Code § 4-3-1(A).

> By this chapter, the City Council of the City of Meridian, authorizes the mayor to quickly implement measures necessary to protect the public health, safety and welfare in the rare event of a foreseeable, imminent, or present public health hazard, pursuant to the authority vested in the mayor by Idaho Code § 50-606.

Id. The Emergency Powers Ordinance exempted certain activities from any restrictions enacted with this Emergency Power:

> Unless otherwise specifically prohibited by a public health hazard order duly enacted by the mayor, the following activities shall be exempt from the scope of such order: Any and all expressive and associative activity that is protected by the United States and Idaho Constitutions, including speech, press, assembly, and/or religious activity."

Meridian City Code 4-3-1(B)(1).

Rather than go through the proper channels and close the parks using the City's recently passed Emergency Powers Ordinance, Director Siddoway took power into his own hands. Essentially, Director Siddoway used his section 13-2-7(B) authority to close the parks, as a means to circumvent the First Amendment protections described in section 4-3-1(B)(1). Because the Mayor's emergency powers had restrictions, and the Parks Director's powers did not, it is unknown whether the two colluded to exploit this loophole. Whatever the reason, Director Siddoway exercised his authority in a way that restricted Sara's constitutional rights to assemble, associate, and express her frustrations with the COVID lockdowns.[12]

One does not need to assume any nefarious intent in order to conclude that the park closures were unconstitutional. The very fact that it could happen – leaving citizens to "trust" that this type of government overreach will not occur – is enough to render Meridian Code section 13-2-7 unconstitutional. Because section 13-2-7 grants authority to the Director in violation of the separation of powers doctrine, Director Siddoway's March 23, 2020 playground closure decision was not a lawful condition imposed upon Sara's access to the public park. As such, Sara did not violate Idaho Code § 18-7008(2) because she was in a public park which was

[12] In response to Sara's subpoena to the Parks Department the City of Meridian produced a privilege log. The log listed 21 emails between the Mayor, the Parks Director, and various other city employees between March 22, 2020 and March 24, 2020 regarding the park closures. The City refused to disclose these emails under IRE 502(b)(4) because they were allegedly "confidential communications between City employees, forwarding message to or from City's attorney or on which attorney is copied, for the purpose of facilitating the rendition of professional legal services to the City." Further, emails from the Parks Department, Meridian Police Department, and statements from the officers at Kleiner Park seem to blur the line on if the closure was directed by the Mayor or Parks Director. *Stip of Facts*, ¶ 18.

open to the public and had complied with the lawful conditions upon her access. I.C. § 18-7008(6)(a)(i).

V. Idaho Code § 18-7008(5) Offends the Principles of Separation of Powers.

A. Idaho Code § 18-7008(5)'s Idaho Code §18-7008(5) Allows Government Actors to Define the Crime of Trespassing.

Idaho Code §18-7008(5) is unconstitutional as applied to Sara's conduct at Kleiner Park because it permits government employees unfettered authority to revoke her permission to enter or remain on public property. "Our State Constitution is a limitation, not a grant of power, and the legislature has plenary powers in all matters, except those prohibited by the Constitution." *Moore,* 161 Idaho at 169-170. "It is uniformly held that the power to **define crime** and fix punishment therefor rests with the legislature, and the legislature has great latitude in the exercise of that power." *Malloroy v. State,* 91 Idaho 914, 915 (1967) (emphasis added). "Thus, it is for the legislature … to decide what the elements of a crime should be." *See State v. Rogerson,* 132 Idaho 53, 56 (Ct. App. 1998). The Idaho Supreme Court has long held that it is the exclusive and inherent province of the legislature to define, prohibit, and punish any **act** as a crime within its territorial limits. *Franklin v. State,* 87 Idaho 291, 300-301 (1964) (emphasis added).

However, in this present case, and with this charge, the legislature has failed to identify the specific ***act*** that would allow a government employee to revoke a defendant's permission to be on public property that is open to the public. Section 18-7008(5) does not inform Sara what violation would subject her to criminal punishment. Section 18-7008(5), provides that:

> [s]ubject to any rights or authorities described in subsection (6) of this section, a landowner or his agent may revoke permission granted under this section to another to enter or remain upon his property **at any time, for any reason,** orally, in writing, or by any other form of notice reasonably apparent to the permitted person or persons.

Id. (Emphasis added.) Under this scheme, it is the **government employee**, rather than the legislature, that actually defines the specific elements and criminal *act* for which a person may have her permission revoked and incur criminal liability. Even more alarming, the **government employee** can revoke this permission "at any time [and] for any reason." This subjects the defendant to criminal liability upon her return. Based on this statute, the **government employee**, rather than the legislature, provides the specific definition of what conduct is criminal.

This specific problem with the separation of powers was noted by the Idaho Supreme Court. *State v. Herren,* 157 Idaho 722, 726, fn.1 (2014). Although the Court did not reach the issue, having resolved the case on other grounds, the Idaho Supreme Court noted the constitutional problem created when a statute violates the separation of powers doctrine:

> We invite the legislature to resolve this dispute. If we were to accept the State's interpretation of Idaho Code section 18-920, we would be holding that a judge issuing a no contact order has the power to define conduct by a particular individual which would constitute a crime other than contempt. Here, the magistrate court determined that Herren's crime was committed by knowingly remaining within 100 feet of the protected person. A different protection order might prohibit knowingly coming (as opposed to "remaining") within 300 feet of the protected person, or 600 feet, or whatever the court deemed appropriate in that particular case. We express doubt that the Legislature intended to delegate the power to promulgate criminal laws to individual judges as courts do not have the power to define crimes.

Id. (internal citations omitted).

The Idaho Supreme Court's concerns in *Herren* described the problem with the judiciary branch making law. Similarly, the statute at issue in this case violates the separation of powers doctrine because it grants the executive branch with the power to make law. The trespass statute shares all the salient features of the statute in *Herren*. Perhaps, the trespass statute is a more

egregious violation of the separation of powers doctrine because, I.C. § 18-7008(5) does not contain even the minimal description of conduct that the legislature intended to preclude.

Idaho Code § 18-7008(5) only defines the proscribed conduct at issue as "[s]ubject to any **rights** or authorities described in subsection (6) of this section." One can presume that this refers to subparagraph (6)(a)(i)'s criminal liability exclusion for property that is "at the time, open to the public, if the person is in compliance with lawful conditions imposed on access." However, because the **government employee** has no duty to explain his decision (as he can revoke at any time for any reason), it is the **government employee** not the legislature that is defining the prohibited action which would subject a person to revocation of permission and criminal trespass liability. This is the very paradigm of a separation of powers violation. *See Malloroy v. State*, 91 Idaho 914, 915 (1967); *Franklin v. State*, 87 Idaho 291, 300-301 (1964); *State v. Rogerson*, 132 Idaho 53, 56 (Ct. App. 1998). As such, the criminal trespass statute is unconstitutional because it violates the separation of powers doctrine.

B. Idaho Code § 18-7008(5) is Unconstitutional as Applied to Sara's Conduct at Kleiner Park Because it Permits Government Employees Unfettered Authority to Revoke Her Permission to Enter or Remain on Public Property.

Subsection 5 of the trespass statute unconstitutionally permits government employees with authority to revoke Sara's permission to occupy public property that is open to the public. As discussed *supra*, the Court in *Kealey*, held that in determining if a statute violates the non-delegation doctrine, courts must look at the crux of the analysis and examine whether the ordinance lacks standards, guidelines, restrictions or qualifications of any sort placed in the delegating legislation." In section 7008(5), there are none. Sgt. Fiscus and Officer Price acted as if I.C. 18-7008(5) allows them to bypass the non-delegation rule and revoke permission to remain on government property at any time and for any reason. However, like the *Kealey* Court

held, "such a lack of legislative guidance violates the Idaho Constitution's separation of powers doctrine as an unbridled delegation of lawmaking power."

Not only does Meridian City Code § 13-2-7(B) unconstitutionally grant unfettered authority to government actors to close sections of the city parks, but I.C. § 18-7008(5) unconstitutionally grants unfettered authority to government actors to determine when they will revoke permission to be on public property (at any time and for any reason). Again, as discussed *supra*, a facial defect of this city ordinance could have been remedied by the Park Department's narrow construction of its internal policies. However, the Parks Department did not adopt any limiting or narrowing policies. When asked to provide the training manuals describing when a person may have her permission revoked, the City responded as follows:

> "The City does not have in its custody records responsive to Defendant's request for "Copy of all Meridian City parks employee training manual on when to have a person ejected or removed from a public Meridian, Idaho public park."

Stip of Facts,¶ 24, Exh. A ("*Subpoena Response*"), ¶ 5. Because the City did not adopt narrow policies limiting a government employee's authority to revoke a visitor's permission, the executive branch is unconstitutionally permitted to act as a law maker. Thus, the city ordinances and the criminal trespass statute violate the separation of powers doctrine and are unconstitutional as applied to Sara.

VI. Idaho Code § 18-7008(5) and Meridian City Code § 13-2-7 Violated Sara's Right to Substantive Due Process.

A. Strict Scrutiny Should Be Applied to Idaho Code § 18-7008(5) and Meridian City Code § 13-2-7(B).

Idaho Code § 18-7008(5) and Meridian City Code § 13-2-7(B) are unconstitutional because they deny Sara her right to substantive due process, in violation of the Fourteenth Amendment, by restricting her fundamental right of free movement. Strict scrutiny should apply

because the ordinance infringes on Sara's fundamental rights protected by the Constitution. "Unquestionably ... a government practice or statute which restricts 'fundamental rights' ... is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available." *State v. Doe*, 148 Idaho 919 (2010) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1979)).

B. Sara Had a Fundamental Right to Free Movement.

The Due Process Clause provides heightened protection against government interference with fundamental rights and liberties. *Doe*, 148 Idaho at 933 (quoting *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997). In addition to the freedoms explicitly protected by the Bill of Rights, the U.S. Supreme Court has recognized that other rights may be fundamental and subject to heightened scrutiny. *Id.* In order to determine whether a right is fundamental, a two-step analysis is undertaken. *Id.* First, the right must be shown objectively to " 'be deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,' " *Id.* at 720–21 (quoting *Moore v. City of E. Cleveland,* 431 U.S. 494, 503 (1977); *Palko v. Connecticut,* 302 U.S. 319, 325 (1937)). "Second, [the Court has] required, in substantive-due-process cases, a 'careful description' of the asserted fundamental liberty interest." *Id.* In determining whether a right is fundamental, "[o]ur Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking.' " *Id.* (quoting *Collins v. City of Harker Heights,* 503 U.S. 115, 125 (1992)).

Citizens have a fundamental right of free movement, "historically part of the amenities of life as we have known them." *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972); *see also United States v. Wheeler*, 254 U.S. 281, 293 (1920) ("In all the [s]tates from the beginning down to the

adoption of the Articles of Confederation the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective [s]tates, to move at will from place to place therein, and to have free ingress thereto and egress therefrom....”). “[T]hese activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity.” *Papachristou*, 405 U.S. at 164.

The Ninth Circuit reaffirmed “an individual's ‘fundamental right of free movement,’ *Nunez*, 114 F.3d at 944, and an ‘individual's decision to remain in a public place of his choice,’ *Chicago v. Morales*, 527 U.S. 41, 55 (1999) (plurality opinion).” *Vasquez v. Rackauckas*, 734 F.3d 1025, 1042 (9th Cir. 2013).

> “Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause.” *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 780 (1978). “[T]he freedom to loiter for innocent purposes is” also “part of the ‘liberty’ protected by the Due Process Clause.” *Morales*, 527 U.S. at 53. The Constitution likewise guarantees the “fundamental right of free movement” to both adults and minors. *See Nunez*, 114 F.3d at 944 (invalidating a juvenile curfew ordinance under strict scrutiny review).

Vasquez, 734 F.3d at 1042.

Here, I.C. § 18-7008(5) violates Sara’s fundamental right of free movement while on public property. Section 7008(5) allows a state actor to “revoke permission granted under this section to another to enter or remain upon his property at any time, for any reason” even on public property. There is no restraint or narrowing construction built into this statute. This allows the state actor unfettered ability to restrict the free movement of citizens on public property. The State must prove that section 7008(5) is necessary to further a compelling government interest

and that it is not the least restrictive means to accomplish this interest. Because it is not the least restrictive means to accomplish this interest, it is unconstitutional and Sara cannot be held liable for any violation of this section.

Similarly, Meridian City Code § 13-2-7(B) allows the Parks Director to closes the parks to public access "at any time and for any interval of time, either temporarily or at regularly and/or stated intervals and either entirely or merely to certain uses." There is no narrowing construction or limitation to this unfettered authority. This restraint of the fundamental right to free movement is subject to strict scrutiny. The State must show that this section 13-2-7(B)'s grant of authority is justified by a compelling government purpose and that no less restrictive alternative is available to this broad authority. Further, the State must show that as applied to Director Siddoway's decision to close more than just the Playground Equipment, to avoid the belief the Covid-19 lived on plastic for up to 72 hours, was the least restrictive means to accomplish the City's purpose. Because section 13-2-7(B) violates Sara's fundamental right of free movement and Director Siddoway's park closure was not the least restrictive means to accomplish his purpose, then the order to close the playground was unconstitutional. Therefore, the playground was not closed to the public on April 21, 2020, and Sara cannot be held criminally liable for her conduct adjacent to the playground equipment.

C. Sara's Right to Due Process Was Violated Because of the City's Lack of Standards.

The City of Meridian's lack of standards in closing the parks violates Sara's right to due process. The lack of standards in granting a person access to a constitutionally protected right allows for a "completely arbitrary and discriminatory refusal to grant [access to that protected right]." *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951). "The right to equal protection of the laws, in the exercise of those freedoms of speech [...] protected by the First and Fourteenth

Amendments, has a firmer foundation than the whims or personal opinions of a local governing body." *Id*.

For example, in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, a statute is invalid that authorizes local bodies to regulate the use of parks and public places restraining freedom of speech. *Id*. In *Niemotko*, the Court could find no standards or guidelines regulating or prohibiting the use of the park. *Id*. at 271.

> [A]ll that is here is an amorphous "practice," whereby all authority to grant permits for the use of the park is in the Park Commissioner and the City Council. No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served. It is clear that all that has been said about the invalidity of such limitless discretion must be equally applicable here.
>
> This case points up with utmost clarity the wisdom of this doctrine. For the very possibility of abuse, which those earlier decisions feared, has occurred here. Indeed, rarely has any case been before this Court which shows so clearly an unwarranted discrimination in a refusal to issue such a license. It is true that the City Council held a hearing at which it considered the application. But we have searched the record in vain to discover any valid basis for the refusal. In fact, the Mayor testified that the permit would probably have been granted if, at the hearing, the applicants had not started to "berate" the Park Commissioner for his refusal to issue the permit. The only questions asked of the Witnesses at the hearing pertained to their alleged refusal to salute the flag, their views on the Bible, and other issues irrelevant to unencumbered use of the public parks. The conclusion is inescapable that the use of the park was denied because of the City Council's dislike for or disagreement with the Witnesses or their views. The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body.

Id. at 271-272.

Like the amorphous practice of the regulating body in *Niemotko*, the Meridian Parks Department has a practice of closing areas of the parks without regard to the constitutional rights of the patrons.

> Any section or part of any park may be declared closed to the public by the Director at any time and for any interval of time, either temporarily or at regularly and/or stated intervals and either entirely or merely to certain uses, as the Director shall find reasonably necessary.

Meridian Code § 13-2-7(B). As noted *supra*, Sara was not able to identify any limiting or narrowing policies in the City's response to her subpoena. The Parks Director has no standards or guidelines regulating or prohibiting ability to regulate use of the park. The State should be made to demonstrate any standards and guidelines which regulate the Director's authority to close the parks. If the State cannot produce evidence of limitations, then the Court should find Meridian Code § 13-2-7(B) unconstitutional as applied.

Also, like the City Council's dislike for or disagreement with the witness's views in *Niemotko*, the views of Sara and the other visitor's of Kleiner Park may have provoked discrimination. When describing the protesters at Kleiner Park, rather than refer to them as a group of moms, he tells Director Siddoway that they were part of another protest group. "This is part of the group of protesters that were at the Capital on Friday." *Stip of Facts*, ¶ 10, Exh. K. He further states that a trespassing charge might be the least of their worries. *Id.* ("We aren't citing on these unless it goes sideways fast then a cite is the least of their worries.") Whether there was actual bias against the viewpoint of these moms at the park or only potential for bias is irrelevant. The fact that there were definite standards for the officers to follow violates the principles of due process.

CONCLUSION

Sara was exercising her first amendment right to free expression and assembly as well as her right to redress her government at Kleiner Park on April 21, 2020 when she was arrested. Idaho Code § 18-7008, Meridian City Code §§ 13-2-7, and 6-1-4 are unconstitutionally vague and overbroad as applied. Additionally, Meridian city officials, law enforcement, and the prosecuting attorney all exercised unbridled authority. Also, the term "remains" creates vagueness. Moreover, Idaho Code § 18-7008(6) must be proven by the State as an element, is subject to at least four interpretations, and applies even when the owner revokes permission. Further, Idaho Code § 18-7008(5) and Director Siddoway's authority offend the principles of separation of powers. Finally, Idaho Code § 18-7008(5) and Meridian City Code § 13-2-7(B) violated Sara's fundamental right to free movement and right to due process and strict scrutiny should be applied. For these reasons, Defendant Sara Brady respectfully requests that this Court grant her motion to dismiss.

DATED this 17th day of May, 2022.

/s/ Seth Diviney
Seth Diviney
Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of May, 2022, I caused to be served a true and accurate copy of the foregoing document upon the following attorney(s) by the method indicated:

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/s/ Seth Diviney
Seth Diviney