

3-1-2010

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Recommended Citation

Edan Burkett, *Coordination or Mere Registration? Single-Speaker Permits in Berger v. City of Seattle*, 2010 BYU L. Rev. 931 (2010).
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2010/iss3/13>

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Coordination or Mere Registration? Single-Speaker Permits in *Berger v. City of Seattle*

I. INTRODUCTION

In *Berger v. City of Seattle*,¹ the Ninth Circuit invalidated a Seattle permit requirement because it violated the protections of the First Amendment. At issue was whether the City of Seattle (the “City”) could constitutionally require individual street performers to obtain a permit in order to perform in the Seattle Center, a multi-use public park. The City claimed the ordinance was a valid time, place, and manner restriction designed (1) to further the City’s legitimate interest in coordination of limited public space, and (2) to reduce conflicts both among street performers and between performers and the public. However, the Ninth Circuit found the City’s interest in coordination to be non-existent, leaving only an unconstitutional speech registration system.

There is currently a circuit split on the issue of whether the First Amendment forbids “single-speaker permitting requirements for speech in a public forum.”² The majority of circuits have sided with the Ninth Circuit.³ However, this question is not without significant controversy. Indeed, the Ninth Circuit itself was bitterly divided on the question. In 2008, a three-judge panel upheld every piece of the challenged ordinance;⁴ but, in 2009, the Ninth Circuit reviewed the 2008 decision en banc and changed course by invalidating nearly the entire ordinance.⁵

This Note argues that the Ninth Circuit, sitting en banc, correctly invalidated the Seattle Center permitting scheme because it violated one of the core presumptions of the First Amendment—

1. *Berger v. City of Seattle (Berger II)*, 569 F.3d 1029 (9th Cir. 2009) (en banc).

2. *Id.* at 1039; *see also infra* note 94 and accompanying text. *Compare* *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1039 (9th Cir. 2006) (describing how a significant governmental interest for purposes of a prior restraint only arises when “large groups of people travel together on streets and sidewalks”), *with* *Hobbs v. County of Westchester*, 397 F.3d 133, 150–51 (2d Cir. 2005) (upholding single-speaker permitting requirement).

3. *See Berger II*, 569 F.3d at 1039.

4. *Berger v. City of Seattle (Berger I)*, 512 F.3d 582, 607 (9th Cir. 2008).

5. *Berger II*, 569 F.3d at 1029, 1059.

namely, that the government does not have a legitimate interest in creating a mere registration system without an accompanying interest in large group coordination. Additionally, as an alternative holding, the Ninth Circuit correctly invalidated the permit scheme because it was not narrowly tailored to substantially advance Seattle's interest in reducing conflicts.

Part II of this Note will describe the context and background of the First Amendment with regard to prior restraints and the Supreme Court's approach to permitting systems. Part III will describe the facts surrounding *Berger v. City of Seattle* and the conflicting analysis the Ninth Circuit employed in the two opportunities it had to review the case. Part IV explains why the Ninth Circuit, sitting en banc, correctly invalidated the Seattle Center permitting scheme. Part V offers a brief summary and conclusion.

II. CONTEXT & BACKGROUND

The First Amendment normally does not countenance a prior restraint on speech, such as a permitting system where a person would be required to inform the government, or worse, ask permission, before speaking. However, over time, the Supreme Court has allowed the government to create permitting systems when certain conditions are satisfied. The Court's jurisprudence in this area is complicated and recent cases have only made the doctrine murkier.

A. Prior Restraints and Permitting Schemes Generally

There are few principles of First Amendment jurisprudence more essential than the presumption against prior restraints. A prominent technique of restraint in English law after the invention of the printing press had been the licensing of printers—the submission of publications to royal officials with the power to give or withhold an imprimatur of approval.⁶ The early U.S. Founders were adamantly opposed to such prior restraints, and this opposition was at the forefront of their minds when drafting the First Amendment.⁷

Despite the general presumption against prior restraints, the Supreme Court has made certain careful allowances for various

6. *See* *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 320 (2002).

7. *See id.*

permitting schemes. The Court has attempted to reconcile the traditional presumption against prior restraints with the pragmatic reality that today's crowded world requires orderly allocation of public spaces. Even so, "precedent is clear that there must be a balance between these interests and the effect of the regulations on First Amendment rights. In order to overcome the presumption of unconstitutionality, any permit scheme has a significant hurdle to clear."⁸

B. The Supreme Court's Jurisprudence on Permitting Schemes

While there is still a presumption against prior restraints, the Supreme Court has created exceptions to the general rule. The Court has articulated a doctrine that describes when, where, and how the government may create permitting schemes that do not violate the constitution. For many years this doctrine was relatively coherent. However, the Court surprised many people in 2002 when it decided *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*.⁹ This case significantly complicated the Court's jurisprudence in this area. In the interest of clarity, this Section will attempt to summarize and explain the Court's jurisprudence prior to, and in the wake of, *Watchtower Bible*.

1. Pre-Watchtower Bible jurisprudence

In *Cox v. New Hampshire*,¹⁰ the Court (1) upheld a state statute requiring a license to conduct a parade or procession on a public street and (2) gave power to a licensing board, subject to restrictions, to evaluate the applications. The case involved a group of about sixty demonstrators who refused to obtain the necessary permit. The Court called this type of permit regulation "a traditional exercise of control by local government" and stated that the use of such power "has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend."¹¹ Later cases have upheld permitting requirements that not only cover parades and processions, but also

8. Nathan W. Kellum, *Permit Schemes: Under Current Jurisprudence, What Permits Are Permitted?*, 56 *DRAKE L. REV.* 381, 392 (2008) (internal citation omitted).

9. 536 U.S. 150 (2002).

10. 312 U.S. 569 (1941).

11. *Id.* at 574.

those that cover theatrical performances and open-air meetings held on, or abutting, public streets and ways.¹²

Despite the general acceptability of such permitting schemes, the *Cox* Court reasoned that this type of system would not be acceptable if it were discriminatory against certain speech or speakers, or if licensing boards were given “arbitrary power or an unfettered discretion.”¹³ Later cases have added a requirement that permitting statutes contain “narrow, objective, and definite standards to guide the licensing authority.”¹⁴ Later cases have also explained that permitting schemes must also be content-neutral, narrowly tailored to advance a significant governmental interest, and must leave open ample alternative means for communication.¹⁵

As another limit on the government, the *Cox* Court explained that while the government has the general power to control the use of streets for parades and processions, it may not “deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.”¹⁶ In other words, the government may not deny the use of an entire form of communication (i.e., a total medium ban),¹⁷ and it must respect the special protections afforded traditional public forums, like streets, parks, and sidewalks.¹⁸

Beyond the mere allowance of such permitting requirements, the Court has also generally supported the idea that the government can impose permitting fees based upon the size and scope of the event.¹⁹

12. *See, e.g.*, *Poulos v. New Hampshire*, 345 U.S. 395 (1953).

13. *Cox*, 312 U.S. at 576. For an example of such a system, see *Cantwell v. Connecticut*, 310 U.S. 296, 305–07 (1940) (invalidating a statute requiring charitable solicitors to obtain approval from a local council that had complete discretion to determine the merits of the charitable enterprise).

14. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969).

15. *United States v. Grace*, 461 U.S. 171, 177 (1983).

16. *Cox*, 312 U.S. at 574.

17. *See, e.g.*, *Martin v. City of Struthers*, 319 U.S. 141 (1943) (invalidating a total ban on the distribution of handbills by door-to-door canvassing); *Schneider v. New Jersey*, 308 U.S. 147 (1939) (invalidating a total ban on the distribution of all handbills on any public street, sidewalk, or park).

18. *See, e.g.*, *Hague v. CIO*, 307 U.S. 496, 515 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”).

19. *See Cox*, 312 U.S. at 576–77.

These fees are permissible if they are carried out without regard to the content of the speech. However, the Court has denied the government the right to charge a speaker “a premium in the case of a controversial political message delivered before a hostile audience.”²⁰ In other words, gauging the fee in consideration of the likely reaction to the speech is an impermissibly content-based decision, and therefore fails the time, place, and manner test.²¹

2. Watchtower Bible *considerations*

Additional considerations regarding the validity of a permitting scheme arise out of *Watchtower Bible*.²² In that case, the Court invalidated a local ordinance requiring individual canvassers to obtain a permit before entering private property to promote a cause.²³ Even though the permits were apparently issued on a routine basis at no charge, a registrant was required to fill out “a fairly detailed” registration form and was only “authorized to go upon premises that he listed on the registration form.”²⁴ The permit holder was also required to carry the permit with him and to display it upon request.²⁵

Under the pre-*Watchtower Bible* jurisprudence, the Court probably would not have invalidated this permitting scheme. After all, the government had an interest in the safety and convenience of the public—an interest that had previously satisfied the Court. The system was content-neutral in that it applied across the board to all door-to-door canvassers. It was not a total medium ban—it still allowed a means for door-to-door canvassing. The licensing

20. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 136 (1992).

21. *See id.* at 134 (“In order to assess accurately the cost of security for parade participants, the administrator ‘must necessarily examine the *content* of the message that is conveyed.’” (quoting *Ark. Writer’s Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987)) (emphasis added)).

22. *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002).

23. *Id.* at 154–55.

24. *Id.* Among other things, the registrant was required to divulge his or her name and address; a description of the nature and purpose of the cause; the name and address of any employer or affiliated organization with a description of the authority of the registrant; the length of time the canvasser needed; the specific address of each private residence the registrant wished to contact; and any other information that was reasonably necessary. *See id.* at 155 n.2.

25. *Id.* at 155.

authority was constrained by certain objective standards. Finally, the permits were issued for no charge to the registrant.

Why did the Court overwhelmingly invalidate this permit scheme? Instead of providing a clear standard of review and the exact rationale for its decision in *Watchtower Bible*, the Court offered various justifications for invalidating this registration/permit system. First, the Court looked back upon the history of cases involving Jehovah's Witnesses. The Court noted, for example, that prior cases had recognized the critical importance of "hand distribution of religious tracts," and that this type of person-to-person religious evangelism shares the general protections of the First Amendment.²⁶ It recognized the "historical importance of door-to-door canvassing and pamphleteering as vehicles for the dissemination of ideas."²⁷ And it also noted that the plight of the Jehovah's Witnesses has not always been theirs alone, but that their situation could be analogized to other marginalized speakers. In fact, the Court highlighted a prior case regarding a law requiring a permit for a labor leader to speak. In that case, the Court, after reviewing the many cases involving Jehovah's Witnesses, proclaimed: "As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly."²⁸

Besides the history of important cases involving Jehovah's Witnesses, the *Watchtower Bible* Court focused on the permitting system itself to determine the balance between the amount of speech affected and the level of governmental interest involved. The Court was extremely concerned that the registration system was not limited to purely commercial canvassing, but extended to religious and even political solicitation.²⁹ The Court then articulated three "pernicious effect[s] of such a permit requirement."³⁰ First, registration systems

26. *Id.* at 161–62.

27. *Id.* at 162.

28. *Id.* at 163–64 (quoting *Thomas v. Collins*, 323 U.S. 516, 539 (1945)).

29. *Id.* at 165–66 ("The mere fact that the ordinance covers so much speech raises constitutional concerns. It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.").

30. *Id.* at 166.

stifle the speech of those who would prefer to remain anonymous.³¹ Second, such systems may impose objective burdens on citizens who would refuse to register because of religious or patriotic views.³² Third, such systems effectively ban spontaneous speech.³³

Beyond its concern over the uneven balance against free speech, the Court also looked at the tailoring of the ordinance to the Village of Stratton's interests. Even if the Village's interests in preventing crime and protecting the privacy of residents were significant, the Court found that the ordinance was overly intrusive as well as underinclusive. The ordinance was overly intrusive because residents could simply refuse to engage with any canvassers without the need for any permit system at all.³⁴ The ordinance was underinclusive because "[t]he annoyance caused by an uninvited knock on the front door is the same whether or not the visitor is armed with a permit."³⁵

C. Reconciling Watchtower Bible with the Court's Permitting Jurisprudence

The Supreme Court's decision in *Watchtower Bible* legitimately confuses many onlookers. Since the Court failed to articulate a clear rationale for its decision—giving only a laundry list of reasons—later onlookers have puzzled over how and when to apply the *Watchtower Bible* analysis to future cases. Given the Court's lack of clarity as to its standard of review, or even its rationale, it is unclear how *Watchtower Bible* should be reconciled with the rest of the Court's permitting jurisprudence. Even so, a strong argument can be made that the Court has always had a balancing test for permitting schemes,³⁶ and that *Watchtower Bible* was consistent with the Court's general approach.

1. The various balancing tests in the Court's permitting jurisprudence

As a threshold matter, the Court weighs the value of the permitting scheme in light of the presumption against prior

31. *Id.* at 166–67 (explaining that circulators do not forfeit their anonymity interests simply because they reveal their physical presence).

32. *Id.* at 167.

33. *Id.*

34. *Id.* at 168.

35. *Id.* at 168–69.

36. *See supra* note 8 and accompanying text.

restraints. This presumption is based on the notion that a speaker has a general right of anonymity and spontaneity.³⁷ However, that presumption may be rebutted if the government has (1) a significant interest behind a law that (2) is content-neutral, (3) narrowly tailored, and (4) leaves ample alternative channels of communication.

Each of these four steps has a balancing test. First, while the government may state that it has an interest in the safety and convenience of the public, the Court will examine and weigh the validity and relative strength of this interest against the countervailing First Amendment interests of the intended speakers.³⁸ Second, even if the law is facially content-neutral, the Court will examine and weigh the relative strength of the objective factors guiding the discretion of permit administrators against any subjective factors that may otherwise persuade administrators.³⁹ Third, the Court will evaluate the relative effectiveness and reasonable fit of the law to the stated interest to make sure that the right balance is struck between the constitutional rights of the public and important governmental interests.⁴⁰ Fourth, the Court will evaluate the relative restrictiveness of the law and the availability of alternative means of

37. Judge Easterbrook noted that “[f]our decisions of the Supreme Court hold or strongly imply that the ability to speak anonymously—and thus with less concern for repercussions—is part of the ‘freedom of speech’ protected by the first amendment against governmental interference.” *Majors v. Abell*, 361 F.3d 349, 355 (7th Cir. 2004). Other courts have emphasized that there is a “strong interest in protecting the opportunity for spontaneous expression in public fora with respect to individuals or small groups,” but that it is “[l]ess conclusively decided . . . whether this First Amendment interest in spontaneous expression is similarly strong with respect to large groups or mass conduct.” *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1046 (9th Cir. 2006).

38. *See Ward v. Rock Against Racism*, 491 U.S. 781, 793 (1989) (“Any governmental attempt to serve purely esthetic goals by imposing subjective standards of acceptable sound mix on performers would raise serious First Amendment concerns, but this case provides us with no opportunity to address those questions.”).

39. *See id.* at 794 (“Since respondent does not claim that city officials enjoy unguided discretion to deny the right to speak altogether, it is open to question whether respondent’s claim falls within the narrow class of permissible facial challenges to allegedly unconstrained grants of regulatory authority.”).

40. *Id.* at 799 (“[T]he requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’” (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)) (ellipsis in original)). “The narrow tailoring requirement has been categorized as a specialized instance of the more general classification of balancing tests” Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 447 (1998).

communication to make sure that governmental interests do not entirely outweigh constitutional rights to expression.⁴¹

2. *How does Watchtower Bible fit in the time, place, and manner test?*

The Court's approach in *Watchtower Bible* seems to most affect the first consideration of the time, place, and manner test—namely, weighing the importance of the governmental interest, which is almost always “safety, order, and convenience.” The governmental interest in safety, order, and convenience only makes sense when the government needs to coordinate large groups; otherwise, the permit system looks like a bare registration system.⁴² The government cannot have a legitimate interest in merely *knowing* who plans to speak without some legitimate coordination goal. Thus, if the government sought to implement a registration system like the one invalidated in *Watchtower Bible*, it would seem that the government would fail the first prong of the time, place, and manner test.

Alternatively, *Watchtower Bible* might fit under the second consideration, weighing the reasonability of the tailoring employed to advance the legitimate governmental interest. The Court might allow the government to legitimately claim an interest in safety, order, and convenience, but closely examine whether the regulation itself substantially advances that interest. If the government failed to demonstrate a valid coordination interest, then perhaps the Court would find that the interest in safety, order, and convenience was not substantially advanced. Thus, under this approach, the stated governmental interest in safety, order, and convenience is presumptively accepted unless it becomes apparent that the

41. *Menotti v. City of Seattle*, 409 F.3d 1113, 1141–42 (9th Cir. 2005) (“In the ‘ample alternatives’ context, the Supreme Court has made clear that the First Amendment requires only that the government refrain from denying a “reasonable opportunity” for communication. . . . We recognize that our decision takes into account a balance of the competing considerations of expression and order. But we do not think the Constitution requires otherwise.” (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986))).

42. *Kellum*, *supra* note 8, at 406–07 (“One of the most frequent justifications for the use of a prior restraint is the preservation of public safety and order. This oft-cited purpose of safety and order only gains practical legitimacy, however, if the ordinance in question seeks to regulate large group activities, such as parades and rallies. Courts entertaining this issue routinely hold that a permit requirement imposed on individual or small group speech to be overly burdensome.”) (internal citations omitted); *see infra* note 94.

regulation is not narrowly tailored to substantially advance that interest.

Whether *Watchtower Bible* affects the inquiry into the governmental interest itself or merely the tailoring of that interest, it seems clear that *Watchtower Bible* does not fundamentally change the Court's jurisprudence. Instead, *Watchtower Bible* merely seems to add some additional factors into the existing balancing tests. Under this analysis, while the test in *Watchtower Bible* was the same as prior cases, the result arguably came out differently because the permitting system at issue was essentially a bare registration system.

3. *The scrutiny of bare registration systems*

Does a bare registration system result in heightened scrutiny? The Court in *Watchtower Bible* failed to articulate its standard of review, instead stating: "We find it unnecessary, however, to resolve that dispute [i.e., which standard of review to employ] because the breadth of speech affected by the ordinance and the nature of the regulation make it clear that the Court of Appeals erred in upholding it."⁴³ At least one Justice thought the Court had applied a heightened scrutiny.⁴⁴ Other Justices thought the Court had applied intermediate scrutiny.⁴⁵ It is hard to tell exactly what the Court did, except for its unambiguous invalidation of the ordinance.⁴⁶ Some lower courts have explicitly rejected the application of strict scrutiny

43. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 164 (2002).

44. *See id.* (Rehnquist, C.J., dissenting) ("The Court suggests that Stratton's regulation of speech warrants greater scrutiny. But it would be puzzling if regulations of speech taking place on *another citizen's* private property warranted greater scrutiny than regulations of speech taking place in public forums.") (internal citation omitted).

45. *See id.* at 170 (Breyer, J., concurring) ("In the intermediate scrutiny context, the Court ordinarily does not supply reasons the legislative body has not given."). Some later courts of appeals have agreed. *See, e.g.,* *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 334 (6th Cir. 2009).

46. On the one hand, there seems to be some support for the argument that the Court used heightened scrutiny. The Court stated that despite its "recognition of [the Village of Stratton's] interests as legitimate, [its] precedent is clear that there must be a balance between these interests and the effect of the regulations on First Amendment rights." *Watchtower Bible*, 536 U.S. at 163. One could take this as recognition that the governmental interest would ordinarily be sufficient under intermediate scrutiny but was insufficient under heightened scrutiny. However, the Court could be understood to have said that the articulated governmental interest would ordinarily suffice but fails when submitted to its intermediate scrutiny balancing test.

for these types of cases.⁴⁷ Whether the Court submitted the permit regulation in *Watchtower Bible* to strict scrutiny or intermediate scrutiny, any permit system that is merely a registration system will likely fail the standard set in *Watchtower Bible*.⁴⁸

III. BERGER V. CITY OF SEATTLE

In 2002—the same year the Supreme Court decided *Watchtower Bible*—the City of Seattle implemented a permitting system for street performers in a City-owned public park and entertainment complex known as the Seattle Center. The permit system was challenged by one of the street performers affected, but was upheld in 2008 by a three-judge panel of the Ninth Circuit.⁴⁹ However, the Ninth Circuit subsequently reviewed the earlier decision en banc and changed course by invalidating the permitting system.⁵⁰

A. Facts

The Seattle Center park covers eighty acres and is home to the Space Needle and various museums, sports arenas, theatres, and even

47. Goldhamer v. Nagode, 611 F. Supp. 2d 784, 789 (N.D. Ill. 2009) (“Because *Ladue* and *Watchtower Bible* are very fact-specific, we do not believe that a mandate to strictly scrutinize laws that ‘have a broad impact’ on First Amendment rights can be drawn from these decisions.”).

48. Some judges and commentators have argued that *Watchtower Bible* fundamentally turned on the fact that the government had sought to regulate speech in essentially private forums, namely private residences. *Marcavage v. City of Chicago*, 635 F. Supp. 2d 829, 841 (N.D. Ill. 2009) (“*Watchtower* . . . dealt with restraints on door-to-door canvassers who go onto private residential property—a circumstance wholly different from the establishment of reasonable and narrow constraints on the use of public property.”); Brad D. Bailey, *Solicitations After Watchtower: Brother Do You Want a Tract?*, COLO. LAW., Dec. 31, 2002, at 66 (“It may initially appear that the Court in *Watchtower* is throwing out a content-neutral regulation when it applies to religious speech, political speech, and the distribution of handbills. However, the Court actually is telling municipalities that they have no business preventing speech from occurring between private citizens.”). The implication of this argument is that *Watchtower Bible* would not apply if the government implements a permit system in strictly public forums. This argument may have some appeal. After all, previous cases upholding permit schemes involved public forums. However, reducing *Watchtower Bible* to merely a case invalidating a private forum permit scheme seems overly simplistic. *See Riel v. City of Bradford*, 485 F.3d 736, 754 (3d Cir. 2007) (“[T]he decision in *Watchtower* was not based on whether the law applied to public or private property. Rather, the Supreme Court struck down the ordinance because, although the governmental interests involved were important, the ordinance was not likely to advance those interests.”).

49. *Berger v. City of Seattle (Berger I)*, 512 F.3d 582 (9th Cir. 2008).

50. *Berger v. City of Seattle (Berger II)*, 569 F.3d 1029 (9th Cir. 2009) (en banc).

a performance hall.⁵¹ Although it is essentially only a public city park, it attracts over ten million visitors a year.⁵² The park has become an iconic place for the city ever since it was originally developed as the location for the 1962 World's Fair.⁵³

Besides the large crowds visiting the Seattle Center each day, there are also a handful of street performers who regularly use the park to ply their trade.⁵⁴ The *Berger* plaintiff, "Magic Mike" Berger, is a balloon sculptor who performed in the park.⁵⁵ Berger had performed in the Seattle Center since the 1980s, making balloon creatures and talking to his audience about the importance of reading books.⁵⁶ However, Berger had also regularly been at the epicenter of various problems in the park. Other performers had complained to the park administrators about him in connection with confrontations over who could perform in which parts of the park.⁵⁷ Park visitors had also lodged complaints against Berger for being overly aggressive in seeking donations.⁵⁸

In response to these complaints, the Seattle Center, under the authority of the City, promulgated several ordinances.⁵⁹ Rule F.1 required "street performers" to obtain a permit before performing at the Center and to wear a badge displaying the permit while performing.⁶⁰ The City defined "street performer" as "a member of the general public who engages in any performing art or the playing of any musical instrument, singing or vocalizing, with or without musical accompaniment, and whose performance is not an official part of an event sponsored by the Seattle Center or . . . [its] licensee."⁶¹ Rule F.2 set forth the terms and conditions of the street performer permit.⁶² Rule F.3.a barred street performers from

51. *Id.* at 1035.

52. *Id.* at 1060 (Kozinski, C.J., dissenting).

53. *Id.*

54. *Id.* at 1088 (Smith, J., concurring in part and dissenting in part) (mentioning that there are only about "five to eight performers who typically perform on the Seattle Center grounds at peak times").

55. *Id.* at 1034–35 (majority opinion).

56. *Berger v. City of Seattle (Berger I)*, 512 F.3d 582, 588 (9th Cir. 2008).

57. *See Berger II*, 569 F.3d at 1049, 1060.

58. *Berger I*, 512 F.3d at 588.

59. *Berger II*, 569 F.3d at 1035 n.1.

60. *Id.* at 1036–37.

61. *Id.* at 1036.

62. *Id.* at 1037.

“actively solicit[ing] donations.”⁶³ Rule F.5 limited street performers to sixteen designated locations.⁶⁴ Rule G.4 prohibited all Seattle Center visitors, not just street performers, from engaging in speech activities within thirty feet of a “captive audience.”⁶⁵ Rule C.5 defined “captive audience” as

any person or group of persons: 1) waiting in line to obtain tickets or food or other goods or services, or to attend any Seattle Center event; 2) attending or being in an audience at any Seattle Center event; or 3) seated in any seating location where food or beverages are consumed.⁶⁶

Berger sued the City of Seattle on the grounds that these rules violated his First Amendment rights. The district court agreed, granting summary judgment to Berger and concluding that the ordinances facially violated the First Amendment.⁶⁷ The City appealed to the Ninth Circuit to reverse the order of summary judgment.

B. The Panel’s Opinion

A three-judge panel of the Ninth Circuit reversed the district court, and not only concluded that the Seattle Center rules did not facially violate the First Amendment, but also that the rules did not violate the First Amendment as applied to Berger’s factual situation.⁶⁸

At the outset of the majority opinion, authored by Judge O’Scannlain, the court recognized that the Seattle Center was a “traditional public forum.”⁶⁹ The government’s right to limit expressive activity in a location so designated is “sharply circumscribed.”⁷⁰ However, even though the City’s right to regulate and restrict expressive activities in the Seattle Center were circumscribed, the court recognized that the City had the right to

63. *Id.* at 1035 (alteration in original).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 1034.

68. *See* *Berger v. City of Seattle (Berger I)*, 512 F.3d 582, 588–601 (9th Cir. 2008).

69. *Id.* at 588 (“Expressive activity must be particularly protected in a traditional public forum, such as the Seattle Center.”).

70. *Id.* at 589 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)).

enact reasonable time, place, and manner restrictions. Under that framework, the court evaluated whether the contested rules were content neutral, whether the rules were narrowly tailored to promote a significant governmental interest, and whether the rules provided for ample alternative means for communication.⁷¹ The court ultimately found that all the contested rules were valid time, place, and manner restrictions.⁷²

The panel majority thought the rules were content neutral because they served purposes unrelated to the content of expression, “even if it ha[d] an incidental effect on some speakers or messages but not others.”⁷³ The permitting requirement did not give the Seattle Center Director undue discretion because “[w]hile the Director may terminate or revoke a permit, even that decision depends upon the satisfaction of objective criteria or requires 7-day notice.”⁷⁴ There was no evidence of any censorship. In fact, the court noted that the “Director has granted permits even to street performers with a history of complaints against them, such as Berger.”⁷⁵

Judge O’Scannlain thought the City had a significant interest in protecting the “safety and convenience” of persons using a public forum.⁷⁶ Further, he pointed to the number of complaints regarding street performers. “[B]efore the performer rules went into effect . . . there were approximately 3 or 4 complaints by performers against other performers per week,” usually involving conflicts over who could perform in which places.⁷⁷ There were also general complaints by other tenants of the Seattle Center about performers blocking access or making noise.⁷⁸ Based on these facts, the panel majority determined that the City had a substantial interest in creating the performer permitting rules.⁷⁹

As to the claim of overbreadth, the majority defended the City rules. Even though the permitting rules applied to all street

71. *Id.*

72. *Id.* at 607.

73. *Id.* at 592 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

74. *Id.* at 596.

75. *Id.*

76. *Id.* at 592.

77. *Id.* (quoting *Heffron v. Int’l Soc’y of Krishna Consciousness, Inc.*, 452 U.S. 640, 650 (1981)) (ellipsis in original).

78. *Id.*

79. *Id.*

performers, and not just the ones who had been problematic, the majority thought that the rules were appropriate because the City did not have to wait for bigger problems to arise before acting.⁸⁰ Furthermore, the City would not have been able to single-out individual performers to take part in the permitting requirement because it would have destroyed the content-neutrality.⁸¹

The panel majority also rebuffed an allegation that the Seattle Center permitting requirement was underinclusive. Berger argued that the rule “targets street performers while allowing large crowds engaged in other types of expression to gather without a permit.”⁸² The court explained, however, “narrow tailoring does not require comprehensiveness” and that “a legislature may deal with one part of a problem without addressing all of it.”⁸³ The majority thought that since the “Director might have drafted a [more sweeping rule] . . . he was not required to impose further restrictions on expression.”⁸⁴

In the end, by a 2-1 decision, the panel majority held that the City’s permitting scheme was a valid time, place, and manner regulation designed to advance a substantial governmental interest.

C. En Banc Opinion

In the wake of the decision by the three-judge panel, the Ninth Circuit decided to hear the case again, en banc. In contrast to the earlier decision, the en banc court found that nearly all of the disputed ordinances facially violated the First Amendment.⁸⁵ In another twist, Judge Berzon, the lone dissenter in the panel opinion, wrote the majority en banc opinion.

1. Majority opinion

The majority staked out several key principles at the outset of its opinion. First, “[t]he protections afforded by the First Amendment are nowhere stronger than in streets and parks.”⁸⁶ The government

80. *Id.* at 593.

81. *Id.*

82. *Id.* at 595.

83. *Id.* (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975)).

84. *Id.* at 596.

85. *Berger v. City of Seattle (Berger II)*, 569 F.3d 1029, 1035 (9th Cir. 2009) (en banc).

86. *Id.* at 1035–36 (footnotes omitted).

bears the burden of showing that its regulations on expressive activity meet all three elements of the time, place, and manner test. The majority held that the government failed to meet this burden.⁸⁷

The majority explained that “[a] permitting requirement is a prior restraint on speech and therefore bears a ‘heavy presumption’ against its constitutionality.”⁸⁸ This type of prior restraint is presumptively invalid because of “the significant burden” it places on free speech, especially procedural and temporal hurdles.⁸⁹ The Supreme Court has “consistently struck down permitting systems that apply to individual speakers—as opposed to large groups—in the one context in which they have been put in place with some regularity: solicitation of private homes.”⁹⁰

The dissent challenged the majority’s application of cases like *Watchtower Bible* and *Cantwell* on the ground that they were based on wholly different situations than the facts presented in *Berger*.⁹¹ However, the majority explained that (1) performance art, like door-to-door canvassing, shares a historical importance in the dissemination of ideas; (2) the Seattle Center permitting scheme inhibits performers’ ability to engage in spontaneous speech; (3) performers do not wish to forfeit their anonymity any more than canvassers of unpopular ideas; (4) these permitting rules applied whether or not performers solicited funds; and (5) these rules applied to individual performers who “communicate their message to groups as small as two or three others.”⁹² Therefore, if the present permitting scheme were sufficiently analogous to the invalidated permit scheme in *Watchtower Bible*, then it too would also be invalidated.

Even though the majority found adequate similarities between the present facts and cases such as *Watchtower Bible*, the majority acknowledged that “the Supreme Court has not addressed the validity of single-speaker permitting requirements for speech in a public forum.”⁹³ Even so, the majority declared, “we and almost

87. *Id.* at 1035.

88. *Id.* at 1037 (quoting *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992)) (internal quotation marks omitted).

89. *Id.* at 1037–38.

90. *Id.* at 1038.

91. *Id.* at 1071–72 (Kozinski, C.J., dissenting).

92. *Id.* at 1038–39 n.5 (majority opinion).

93. *Id.* at 1039.

every other circuit to have considered the issue have refused to uphold registration requirements that apply to individual speakers or small groups in a public forum.”⁹⁴ Instead, permitting rules are only appropriate when the government has an interest in coordinating large crowds.⁹⁵

In this case, the court determined that the “Center’s permitting requirement applies to individual speakers who wish to express themselves in a public forum . . . [and] is not limited to only those performers who seek to attract (or who do, in fact, attract) a crowd of a sufficiently large size.”⁹⁶ The majority declared, “neither [the Ninth Circuit], the Supreme Court, nor most other circuit courts have ever upheld such a requirement.”⁹⁷ Even so, the majority was willing to fully analyze the Seattle Center’s permitting requirement under the time, place, and manner test.

Although the majority found the City’s stated interest in “protecting the safety and convenience of park-goers” generally appropriate, the court found the rule not narrowly tailored to advance that interest.⁹⁸ One of the major problems was that the permitting requirements did not substantially advance the stated governmental interest. The court saw “no reason [why] two street

94. *Id.*; *see, e.g.*, *Santa Monica Food Not Bombs v. City of Santa Monica* 450 F.3d 1022, 1039 (9th Cir. 2006) (describing how a significant governmental interest for purposes of a prior restraint only arises when “large groups of people travel together on streets and sidewalks”); *Cox v. City of Charleston*, 416 F.3d 281, 285 (4th Cir. 2005) (describing how application of a permitting requirement “to groups as small as two or three renders it constitutionally infirm”); *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005) (striking a permitting system that could apply to groups as small as “two or more persons”); *Parks v. Finan*, 385 F.3d 694, 698 (6th Cir. 2004) (“[T]he permitting scheme as it presently exists is invalid with respect to individuals.”); *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1259 (11th Cir. 2004) (striking an ordinance as overly broad in part because “it applies to small intimate groups that do not create a legitimate threat to the County’s interests”); *Cnty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1392 (D.C. Cir. 1990) (invalidating permit scheme because it could possibly apply to individuals and groups as small as two); *see also Douglas v. Brownell*, 88 F.3d 1511, 1524 (8th Cir. 1996) (describing, as dicta, that an ordinance as applied to groups as small as ten is not narrowly tailored); *Diener v. Reed*, 232 F. Supp. 2d 362, 386–88 (M.D. Pa. 2002), *aff’d*, 77 F. App’x. 601, 602, 605 (3d Cir. 2003) (nonprecedential) (striking an ordinance that would require even a single individual, regardless of the circumstances). *But see Hobbs v. County of Westchester*, 397 F.3d 133, 150–51 (2d Cir. 2005) (upholding single-speaker permitting requirement only if the performer planned to use “props and/or equipment”).

95. *Berger II*, 569 F.3d at 1039.

96. *Id.* at 1040.

97. *Id.*

98. *Id.* at 1041.

performers with permits would be less likely to engage in a territorial dispute than two street performers without permits.”⁹⁹ After all, there was little, if any, process to screen out hostile performers because there was “no limit on the number of permits that may be issued” and the City did “not assign particular performers to specific times or locations.”¹⁰⁰ In other words, the permitting requirement did not materially advance any conflict-reducing interests because even hostile performers could get permits. And it did not advance any coordination interests because the City had “no idea when or where a street performer intend[ed] to perform over the course of a permit year or how long any given performance [would] last.”¹⁰¹

Instead of imposing a prior restraint on communication, the court asserted that the City could have achieved “its purported goal . . . by punishing only actual wrongdoers.”¹⁰² The City argued that it needed to have the street performers’ personal information in order to better enforce the Seattle Center rules. However, the majority found this argument unpersuasive. First, the court saw it as an impermissible prior restraint to require potential speakers to register with the government.¹⁰³ Second, the court saw no practical impediment for Center employees to simply ask offending performers to identify themselves.¹⁰⁴ Finally, the court noted that the City had no real need for the registration system in the first place because it likely already knew the identities of the small number of street performers who regularly visited the park.¹⁰⁵

2. *Kozinski’s dissenting opinion*

Chief Judge Kozinski, joined by Judges Gould and Tallman, dissented from the court’s en banc decision. The dissenters marveled at the Seattle Center’s “dizzying array” of attractions and determined that “[o]perating an enterprise of this magnitude and complexity . . . calls for some basic rules, to ensure the safety and convenience of the tens of thousands of people who visit the Center

99. *Id.*

100. *Id.* at 1042.

101. *Id.*

102. *Id.* at 1044.

103. *Id.*

104. *Id.* at 1044–45.

105. *Id.* at 1045.

on an average day.”¹⁰⁶ The dissent explained that the Center had received numerous complaints regarding street performers and enacted the disputed rules in response. These rules, the dissent contended, worked as intended, “bringing peace and order to what had been a chaotic and disruptive process.”¹⁰⁷

Although the dissent recognized that the Seattle Center is fundamentally a public park, it also saw the close connection between public parks and the governmental unit that owns the land. The dissenters highlighted the City’s legitimate, possibly even vital, interest in “maintaining the character of the multi-use facility that is the crown jewel of its civic enterprise.”¹⁰⁸ In particular, the dissent noted that the City had an interest in protecting visitors from “overly aggressive street performers bent on increasing their own visibility and income by bullying those around them.”¹⁰⁹ The expressive interests of street performers had to be balanced with the substantial interest of the City in ensuring the safety and convenience of park visitors.

The dissent’s bottom line was that by “focusing on the largely imaginary First Amendment injuries which might be suffered by largely imaginary people,” the majority “impair[s] the First Amendment rights of the millions of actual people who come to the Seattle Center to see, to hear, to learn, to enjoy, without being subjected to the stress of dealing with overly-aggressive street performers who shout obscenities and send young children off crying.”¹¹⁰ Accordingly, the dissent thought this was a case where “the best thing judges can do is to butt out.”¹¹¹

IV. THE CONSTITUTIONALITY OF SINGLE-SPEAKER PERMITTING SCHEMES

As demonstrated by the sharp split in the Ninth Circuit on the applicability, meaning, and scope of key Supreme Court cases, the legal issues in *Berger* are quite controversial. Even so, the Ninth Circuit, sitting en banc, correctly held that the Seattle Center

106. *Id.* at 1060 (Kozinski, C.J., dissenting).

107. *Id.* at 1061.

108. *Id.* at 1064.

109. *Id.*

110. *Id.* at 1073–74.

111. *Id.* at 1074.

permitting scheme was not an appropriate time, place, and manner restriction. In correctly invalidating the Seattle Center ordinance, the majority accurately understood and applied the Court's permitting jurisprudence, especially regarding the threshold presumptions and the narrow tailoring of the ordinance.

A. The Majority's Analysis of the Threshold Presumptions

The majority en banc decision correctly understood and applied the Supreme Court's permitting jurisprudence. It understood that the Seattle Center ordinance violated the threshold presumptions behind the First Amendment by implementing a single-speaker permitting scheme in a traditional public forum. The majority concluded that this scheme was essentially a bare registration system that improperly took away speakers' anonymity and spontaneity, and was thus incompatible with the First Amendment's presumption against prior restraints. The majority also persuasively argued that this type of ordinance was similar enough to the scheme in *Watchtower Bible* to warrant its invalidation on that ground alone.

1. Threshold presumptions

The majority correctly identified the fundamental rights and presumptions of the First Amendment. First, as a fundamental right, the protections of the First Amendment are at their apex in streets and public parks.¹¹² Second, any prior restraint bears a "heavy presumption" against its validity.¹¹³ Considering these two principles together, the majority was required to place a heavy burden on the City of Seattle because the City had created a prior restraint in relation to speech in a public park.

Beyond the general presumption against the validity of the Seattle Center permitting scheme, the majority correctly identified the presumption against single-speaker permitting. It acknowledged that the Supreme Court has not directly addressed the issue, and that there is a split amidst the federal circuits.¹¹⁴ However, it also

112. *Hague v. CIO*, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.")

113. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

114. *Berger II*, 569 F.3d at 1039 (majority opinion).

identified solid legal support for the presumption against single-speaker permitting. There are currently at least seven circuits that have directly criticized permit schemes on the basis of their applicability to small groups and single speakers.¹¹⁵ And, while there is at least one circuit that *has* allowed single-speaker permitting, it has done so only in limited circumstances, such as when the speaker plans to use amplification devices.¹¹⁶

While the Ninth Circuit majority acknowledged that the Supreme Court had not directly confronted the issue of single-speaker permitting in a public forum, it carefully examined the Court's treatment of analogous cases. In particular, the majority examined various cases wherein the Court had struck down permit schemes that had been applied to individual solicitors attempting to visit private residences.¹¹⁷ The Ninth Circuit majority reasoned that these single-speaker permitting schemes would likely have been invalidated whether or not they had involved public or private property. Specifically, the court thought that "such [a permit scheme] would be at least as constitutionally suspect when applied to speech in a public park, where a speaker's First Amendment protections reach their zenith, than when applied to speech on a citizen's doorstep, where substantial privacy interests exist."¹¹⁸

The Ninth Circuit majority implicitly discovered that the fundamental problem with single-speaker permit schemes is the unreasonable burden it imposes on freedom of speech. The fundamental presumption against prior restraints could easily be rephrased as a presumption against speech registration. The majority clearly understood that registration impinged upon the speaker's

115. *See supra* note 94.

116. *See supra* note 94.

117. *Berger II*, 569 F.3d at 1038 ("[T]he Supreme Court has consistently struck down permitting systems that apply to individual speakers-as opposed to large groups-in the one context in which they have been put in place with some regularity: solicitation of private homes." (citing *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166-67 (2002); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 638-39 (1980) (striking down a solicitation permit requirement); *Cantwell v. Connecticut*, 310 U.S. 296, 301, 306-07 (1940) (striking down a license requirement as applied to Jehovah's Witnesses "going singly from house to house" for the purpose of religious solicitation); *Schneider v. New Jersey*, 308 U.S. 147, 163-64 (1939) (striking down a permitting scheme covering all forms of solicitation))).

118. *Id.* at 1039 (citing *Frisby v. Schultz*, 487 U.S. 474, 483-84 (1988)).

general right to be anonymous and spontaneous¹¹⁹—the limitation of which is the general problem associated with prior restraints.¹²⁰ Further, the majority correctly perceived that the government's interest in large group coordination was essentially the only means of overcoming the presumption against registration systems.¹²¹

2. *Problems with a bare registration system*

The majority correctly understood that registration itself is not the problem. Indeed, registration is necessarily a part of permissible coordination systems because the permit applicant must divulge his or her identity in order to obtain a permit. However, in the coordination context, the concerns about registration—loss of anonymity and spontaneity—are lessened by the fact that only one or two persons will have to divulge their identity (instead of each and every person attending an event).¹²² Furthermore, the concern over spontaneity is lessened in the large group context because such groups usually require a few days or weeks of preparation anyway before having a demonstration.¹²³ When these factors are taken into

119. *Id.* at 1038 n.5 (“[T]he Seattle Center’s permitting requirement . . . significantly inhibits spontaneous speech. . . . [T]here is no reason to believe that street performers are less interested in maintaining their anonymity from the government than door-to-door canvassers or other purveyors of potentially unpopular ideas.”).

120. Kellum describes that permit schemes “effectively eliminate spontaneous expression” and “[w]hen an individual is required to divulge their identity just to secure permission to speak, this is a compulsion that ‘necessarily results in a surrender of that anonymity.’” Kellum, *supra* note 8, at 384, 412 (quoting *Watchtower Bible*, 536 U.S. at 166); *see also* Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1046 (9th Cir. 2006) (“[There is a] strong interest in protecting the opportunity for spontaneous expression in public fora with respect to individuals or small groups”); *Majors v. Abell*, 361 F.3d 349, 355 (7th Cir. 2004) (Easterbrook, J., *dubitante* opinion) (“Four decisions of the Supreme Court hold or strongly imply that the ability to speak anonymously—and thus with less concern for repercussions—is part of the ‘freedom of speech’ protected by the first amendment against governmental interference.”).

121. *Berger II*, 569 F.3d at 1040 n.7 (“[A]dvance registration permits are only appropriate for larger crowds than any street performer at the Seattle Center is likely to draw at one time.” (citing *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1033 (9th Cir. 2008), *amended by* 574 F.3d 1011 (9th Cir. 2009)).

122. *See* Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1046 (9th Cir. 2006) (“[It is] [l]ess conclusively decided . . . whether this First Amendment interest in spontaneous expression is similarly strong with respect to large groups or mass conduct.”).

123. Kellum, *supra* note 8, at 407 (“No doubt, individuals and small groups are particularly vulnerable to restrictions on spontaneous speech. Large groups are not as susceptible because it takes more time for them to disseminate information about an event,

consideration, the governmental interest in coordinating the time, place, and manner of large groups trumps the minor infringement on the anonymity and spontaneity of the group speech.

However, *mere* registration is a much greater problem. In the absence of large group coordination, the governmental interest in public safety, order, and convenience starts to look much less significant. And when the permit system reaches all the way down to the single speaker, then the government's interest in coordination seems minor to non-existent. Without the large group coordination, all that is left is the nasty registration component.¹²⁴

A mere registration system is especially pernicious in the small group or single speaker context. In such a context, the core registration concerns about anonymity and spontaneity are much greater.¹²⁵ After all, the Court only begrudgingly allows registration in the large group coordination context because the governmental interest in coordination is much more significant and the deleterious effects of registration are mitigated. However, in the small group or single speaker context, many more people will have to identify themselves to the government before speaking, and spontaneous speech will be chilled.

3. Application of the threshold presumptions

In its application of the general presumptions to the *Berger* case, the Ninth Circuit came to the correct conclusion that the Seattle Center permit system was essentially a single-speaker registration system in a public forum.¹²⁶ Obviously, the ordinance applied to individual street performers in a public forum.¹²⁷ These performers were required to register with the City, disclose their identity, and

assemble, and engage in public expression.” (citing *Grossman v. City of Portland*, 33 F.3d 1200, 1206–07 (9th Cir. 1994)).

124. *Id.* at 408 (“[A] permit requirement that covers individuals and small groups should be viewed as improper because movements of such small magnitude are not significant enough to justify prior permission.”).

125. *Berger II*, 569 F.3d at 1037–38 (“The presumptive invalidity and offensiveness of advance notice and permitting requirements stem from the significant burden that they place on free speech. ‘Both the procedural hurdle of filling out and submitting a written application, and the temporal hurdle of waiting for the permit to be granted may discourage potential speakers.’ Registration requirements also dissuade potential speakers by eliminating the possibility of anonymous speech.” (quoting *Grossman*, 33 F.3d at 1206)).

126. *See id.*

127. *Id.* at 1036–37.

suspend their speech activities until the permit was granted.¹²⁸ While it is true that the City claimed an interest in coordinating the competing uses of the Seattle Center,¹²⁹ it is doubtful that the City had a legitimate interest in coordinating the activities of a handful of individuals.

The majority correctly saw the City's stated coordination interest as purely speculative. In effect, the permit scheme applied to individual street performers whether or not they intended, or ever actually succeeded, in attracting a large crowd.¹³⁰ There was only a hypothetical governmental interest in large group coordination—in other words, it was only *possibly* true that some street performers might someday attract a large crowd. The majority correctly dismissed the City's "someday" argument and thus wisely refused to defer to hypothetical coordination interests without a more substantial showing.

This analysis is correct and seems capable of withstanding likely counterarguments. For example, one concern with the majority's analysis might be that it fails to recognize both the difficulty of estimating the size of the crowd on any given day and the City's legitimate interest in dealing with potential problems before they become overwhelming.¹³¹ While this is a valid concern, it does not adequately consider the burdens of proof placed upon the government. The general presumptions are all against the City when it intends to enact a prior restraint in a public forum,¹³² and the City likely bears an even higher burden when it seeks to coordinate the speech activities of individuals instead of large groups.

To defer to the City in this case would turn the Court's permitting jurisprudence on its head. The Court has been clear that

128. *Id.* at 1036 ("Rule F.1 requires all 'street performers' to obtain a permit from the Director prior to performing on the Center's grounds.").

129. *Id.* at 1040.

130. *Id.* at n.7 ("Although street performers do, of course, hope to draw crowds, this goal is of little moment to our analysis. The individual protestors in *Rosen* and *Grossman* also undoubtedly hoped to attract crowds of people eager to learn their views. But we have emphasized that advance registration permits are only appropriate for larger crowds than any street performer at the Seattle Center is likely to draw at one time.").

131. *Id.* at 1067 (Kozinski, C.J., dissenting) ("The size of the crowd on any given day, at any particular hour, may be hard to predict, but it doesn't matter, as long as the Center reasonably believes that on *some* days, at *some* hours, a sufficiently large crowd may gather to impair the efficient operation of the Center.").

132. *Id.* at 1035–36 (majority opinion) ("The protections afforded by the First Amendment are nowhere stronger than in streets and parks.") (footnote omitted).

public parks and streets are among the most protected places for speech and that the government may not impose a prior restraint on speech without a valid governmental interest. But who decides the validity of the governmental interest? Certainly not the government itself; otherwise the fox would be guarding the First Amendment hen house. If judges merely defer to the government, or just “butt out” altogether as the dissent suggested,¹³³ then the government is essentially given a free pass to enact whatever type of regulation it likes.

4. *The applicability of Watchtower Bible*

Without a legitimate coordination interest, the Seattle Center ordinance was just a single-speaker registration system. The Ninth Circuit majority correctly saw a strong analogy to *Watchtower Bible*, a landmark case in which a local government had also implemented a single-speaker registration system. The dissent disagreed and thought that *Watchtower Bible* turned on the fact that the litigants were engaged in the dissemination of religious ideas through the historical practice of door-to-door canvassing.¹³⁴ They saw *Watchtower Bible* as inapplicable to *Berger* because the street performers here were not disseminating ideas, like religious canvassers, but rather were entertainers aggressively plying their business to the public.¹³⁵

The majority thoughtfully responded to this criticism. First, it reasoned that “performance art, like door-to-door canvassing, has historically served an important role in the dissemination of ideas” and, quoting Judge Gould’s dissenting opinion, “[s]ome of our culture’s most valued written works originated as spoken performances.”¹³⁶ But this was not the majority’s strongest argument. For one thing, the *Watchtower Bible* Court almost certainly did not hinge its decision on this point.¹³⁷ More

133. *Id.* at 1074 (Kozinski, C.J., dissenting).

134. *Id.* at 1071.

135. *Id.* at 1072.

136. *Id.* at 1038–39 n.5 (majority opinion).

137. The Court in *Watchtower Bible* mentioned the historical nature of canvassing in its extended discussion about Court cases involving Jehovah’s Witnesses. *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 161–64 (2002). When the Court actually analyzed the registration scheme in that case it balanced the governmental interest against the objective burdens on potential speakers—i.e., anonymity and spontaneity. *Id.* at 165–67. After its balancing test, it described how the registration system had also failed to substantially advance the governmental interest. *Id.* at 168. Thus, while the Court articulated

importantly, the *Berger* majority seems to easily equate street performers with the high art of yesteryear. While it is true that street performers are engaged in a form of performance art, it is a stretch to imagine that their craft has become as historically important as door-to-door canvassing. Furthermore, the street performers in *Berger* do not appear to be primarily engaged in the dissemination of ideas; instead, they are primarily providing services in exchange for donations.

In contrast to its somewhat weak argument about the historical importance of street performance in the dissemination of ideas, the majority correctly pointed to the Court's substantial concern about the burdens of registration systems. The *Watchtower Bible* Court particularly emphasized that registration systems deprive individuals of their general right to anonymity and spontaneity.¹³⁸ The *Berger* majority correctly reasoned that street performers have just as much right to anonymity and spontaneity as anyone else. Street performers are much like door-to-door canvassers; the fact that they interact with the public is insufficient to strip them of their right to anonymity.¹³⁹ While it is true that canvassers are much more despised generally than street performers, and perhaps more deserving of anonymity,¹⁴⁰ the Court did not make the right of anonymity conditional upon how much the public dislikes the type of speaker.¹⁴¹

many reasons for its decision, it is unlikely that the historical nature of canvassing was the most important.

138. *Id.* at 166–67.

139. *Id.* at 167 (“The fact that circulators revealed their physical identities did not foreclose our consideration of the circulators’ interest in maintaining their anonymity.”). The Court further explained that “[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.” *Id.* at 166 (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–342 (1995)).

140. *But see id.* at 166 n.14 (“[T]he Jehovah’s Witnesses do not themselves object to a loss of anonymity, they bring this facial challenge in part on the basis of overbreadth.”).

141. *McIntyre*, 514 U.S. at 342 (“Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent.”). In this case, however, it would seem likely that *Berger* would face a backlash from his poor behavior vis-à-vis other street performers and Seattle Center patrons. Although his identity was likely well known among other street performers and the Seattle Center management, he could have a valid interest in maintaining some measure of anonymity from the general public. However, whether or not *Berger* personally faced a loss of anonymity, the Seattle Center ordinance was vulnerable to an overbreadth analysis. *Berger II*, 569 F.3d at 1041 (“[T]he Center’s permitting rule applies, on

One remaining question is whether the presumptions of anonymity and spontaneity apply to quasi-commercial activity, like that engaged in by the street performers in *Berger*. The Court in *Watchtower Bible* expressed in dicta that the Village of Stratton ordinance might have been upheld had it applied “only to commercial activities and the solicitation of funds.”¹⁴² This would have been appropriate because the Village had clearly expressed an interest in preventing fraudulent transactions.¹⁴³ Seattle expressed no similar interest in preventing fraudulent transactions or in any other interest that depended on honest business practices. Even so, no one is seriously contending that these street performers would receive a lesser form of First Amendment protection merely because a part of their act includes a monetary donation.

While the Ninth Circuit majority did apply *Watchtower Bible* to *Berger*, it did not entirely base its decision to invalidate the Seattle Center registration scheme on the application of *Watchtower Bible*. Even though the Seattle Center’s permit scheme failed the general presumption against prior restraint since it was a single-speaker registration system without a valid coordination interest, the majority appropriately found an alternative means of invalidation—namely, a lack of narrow tailoring.

B. The Majority’s Narrow Tailoring Analysis

Besides an interest in coordination, the City of Seattle asserted an interest in reducing both performer-on-performer and performer-on-patron conflicts. The Ninth Circuit majority took a page from the *Watchtower Bible* playbook by acknowledging the City’s asserted interests as legitimate but then immediately criticizing the regulation as failing to substantially advance those legitimate interests.¹⁴⁴ In

its face, to an extraordinarily broad group of individuals, the vast majority of whom are not responsible for the ‘evil’ the City seeks to remedy.”).

142. *Watchtower Bible*, 536 U.S. at 165.

143. *See id.* at 162–63, 165.

144. *Compare id.* at 164–65 (“The Village argues that three interests are served by its ordinance: the prevention of fraud, the prevention of crime, and the protection of residents’ privacy. We have no difficulty concluding, in light of our precedent, that these are important interests that the Village may seek to safeguard through some form of regulation of solicitation activity. We must also look, however, to the amount of speech covered by the ordinance and whether there is an appropriate balance between the affected speech and the governmental interests that the ordinance purports to serve.”), *with Berger II*, 569 F.3d at 1041 (“The City asserts that the permitting requirement promotes its interest in protecting the safety and

Berger, the majority correctly determined that the ordinance at issue, as in *Watchtower Bible*, did not substantially advance the governmental interests. Furthermore, even if the ordinance somehow advanced those governmental interests, the majority correctly invalidated it because it was poorly tailored and overly intrusive.¹⁴⁵

1. Advancement of governmental interests

As described above, the Seattle Center ordinance did not significantly advance the governmental interest in coordinating multiple uses of the park.¹⁴⁶ The City required individuals to obtain permits without any adequate basis that any one of these individuals would be able to attract a group of sufficient size¹⁴⁷ to justify the strong presumption against mere registration systems. Furthermore, the permit did not specify when a performer would be at any particular location,¹⁴⁸ so the government did not have any reasonable way of coordinating the use of the park. Even though there were limits on the number of performers that could be in different places, the City would still have had no idea when any particular performer would be in any given place.

The Seattle Center ordinance also did not significantly advance Seattle's interest in reducing conflicts between performers. The majority accurately articulated that there was no reason why "two street performers with permits would be less likely to engage in a territorial dispute than two street performers without permits."¹⁴⁹

convenience of park-goers by reducing territorial disputes among performers, deterring harassment of audience members, and clarifying and coordinating potentially competing uses. . . . The City's asserted reasons for enacting the permitting regulations are thus substantial governmental interests. Unlike the restrictions in the cases just cited, however, the Center's permitting requirements do not promote those interests in any significant way." (internal citations and quotation marks omitted).

145. See *Berger II*, 569 F.3d at 1041–48.

146. *Id.* at 1042 ("[T]he permitting requirement, as currently designed, does not aid in coordinating multiple uses of the Center's grounds.").

147. *Id.* at 1040 ("The [permitting] requirement is not limited to only those performers who seek to attract (or who do, in fact, attract) a crowd of a sufficiently large size. . . . [T]he interests the City asserts . . . are no more, and perhaps less, substantial than those cited by the local governments in the door-to-door solicitation cases." (footnote omitted)).

148. *Id.* at 1042 ("[T]he Rules place no limit on the number of permits that may be issued and do not assign particular performers to specific times or locations. As a result, the Center has no idea when or where a street performer intends to perform over the course of a permit year or how long any given performance will last.").

149. *Id.* at 1041.

After all, the permit would not have reserved a specific time and place for a performer. This was significant because prior Court cases indicated a preference toward coordination based on specific times and places.¹⁵⁰ Presumably, there would still have been the inevitable rush to secure particularly desirable locations with the resulting disputes between performers concerning who would have been able to stay.

The ordinance also did not substantially advance Seattle's interest in reducing conflicts between performers and patrons. The majority correctly reasoned that the permits were freely given without any kind of background check.¹⁵¹ Even though Berger was the person about whom the City had received the majority of complaints, it still gave him a permit. Berger's possession of a permit did not prevent him from getting into trouble. After all, the licensing scheme would not have miraculously caused Berger to reform himself.

In contrast, the dissent argued that the permit system *did* substantially advance the City's interest. After the ordinance went into effect, the number of complaints went down, suggesting the law actually had advanced the City's interest in reducing conflicts.¹⁵² One problem with this argument is that its conclusion is entirely speculative. Indeed, the number of complaints may have gone down for reasons unrelated to the regulation's effectiveness. For instance, most of the previous complaints had involved Berger.¹⁵³ His improved behavior after the imposition of the regulation may be more attributable to his efforts to win his lawsuit than to the efficacy of the regulation. Without a more convincing showing, these facts only indicate unproven correlation.

However, this raises the question of how much proof the City would need to give under the majority's analysis. Is it not enough

150. The majority pointed to two Supreme Court cases in particular, *Cox v. New Hampshire*, 312 U.S. 569 (1941), and *Poulos v. New Hampshire*, 345 U.S. 395 (1953). *Id.* at 1042–43 n.10 (“[I]t is the very fact that the permitting schemes in *Cox* and *Poulos* required applicants to specify the day and hour of their gathering that ensured that the restraints at issue did, in fact, promote the government’s legitimate interest in coordinating multiple uses of a public space. In other words, the permitting requirement in *Cox* and *Poulos* accomplished more than the mere identification of potential speakers.”).

151. *Id.* at 1041–42.

152. *Id.* at 1060–61 (Kozinski, C.J., dissenting).

153. *Id.* at 1046 n.15 (majority opinion) (“The City reports that, in the year prior to the introduction of the revised Rules, 70% of the performer-related complaints it received were either generated by or were in reference to ‘Magic Mike’ Berger.”).

that the City had a legitimate interest in reducing conflicts, and that after implementing the regulation, the interest appeared to have been met? It is a difficult question that the majority apparently did not resolve. Perhaps one way to answer the question, however, is to look at the burden of proof imposed on the City by creating a prior restraint in a public forum.¹⁵⁴ It would seem reasonable that this heavier burden of proof would apply across the board, including as to whether the regulation had substantially advanced a legitimate governmental interest. However, even if it is conceded that the ordinance was somehow effective, there are still problems with how it was tailored.

2. Poor tailoring

The City worried that individual street performers might hypothetically attract a huge audience—thereby disrupting the crowd flow of the Seattle Center. However, the majority reasoned that “[u]nder the Rules, a group of as many as 99 people can gather without a permit to express their views, so long as they are not engaged in an artistic performance.”¹⁵⁵ It would seem that the City cheerfully allowed groups as large as one-hundred to gather without a permit, but demanded a permit from each individual street performer even if that performer would only attract, at most, a few dozen people.

There are two ways to look at the issue. First, the City may sincerely have worried about the size of crowds street performers normally attract. Presumably, street performers do not regularly attract crowds of more than fifty people. Under this approach, the rules were underinclusive because they would have allowed even larger groups, up to one-hundred people, to gather without a permit. Second, the City may have only been worried about crowds of one-hundred or more. In that case, the street performer ordinance would seem overly broad because it would have required street performers to obtain a permit even if they realistically would attract only a few dozen people.

154. *See supra* notes 112–13 and accompanying text.

155. *Berger II*, 569 F.3d at 1043.

3. *Overly intrusive*

Even if the City had a legitimate interest in, and was reasonably successful at, reducing conflicts among performers and between performers and patrons, the ordinance was also overly intrusive. The majority correctly noted that “even if the permitting requirement does deter and help to punish unwanted behavior, ‘there are easily available alternative modes of regulation’ that would have considerably less impact on speech than the single-speaker prospective registration system.”¹⁵⁶ In other words, if the government wanted to reduce certain types of conflict, then it presumably could have drafted rules specifically addressing those problems. Consequently, the government should not create prior restraints on speech merely to deal with conduct that can be addressed without the prior restraint.¹⁵⁷

In this case, if the City’s goal was to reduce conflicts, it presumably could have drafted rules to deal with the problem directly rather than creating a single-speaker registration system. Even if permit holders engaged in fewer conflicts than non-permit holders, the permit system was overly intrusive because it was not necessary to reduce the conflicts. The majority correctly recognized that “[t]he City does not explain why this system would not function just as well if the penalty was the suspension of the performer’s future right to perform at the Center, rather than the suspension of his permit.”¹⁵⁸ It appears that the City could punish the disorderly conduct of performer just as well without a permit system as with a permit system. Under these circumstances, the City imposed an overly intrusive and superfluous prior restraint.

V. CONCLUSION

The Ninth Circuit, sitting en banc, correctly invalidated the Seattle Center permitting scheme because the ordinance violated one of the core presumptions of the First Amendment. Specifically, the

156. *Id.* (citation omitted) (quoting *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1041 (9th Cir. 2006)); *see also* *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939) (invalidating a total ban on the distribution of all handbills that was aimed at reducing litter). The *Schneider* Court explained, “There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the street.” *Schneider*, 308 U.S. at 162.

157. *See supra* notes 112–13 and accompanying text.

158. *Berger II*, 569 F.3d at 1043 n.13.

court was correct in striking the law since the government may not impose a speech registration system—especially in a public park—without a legitimate governmental interest. While it is true that the City claimed an interest in coordinating the competing uses of the Seattle Center, the City failed to demonstrate that it had a legitimate interest in coordinating the activities of a handful of individuals. While the Supreme Court has not spoken definitively on this particular issue, a strong majority of circuits have invalidated permit schemes that apply solely to small groups or individual speakers.

Additionally, because it was not narrowly tailored to substantially advance Seattle's interest in coordinating competing uses of the park and reducing conflicts, the Ninth Circuit correctly invalidated the Seattle Center permit scheme as an alternative holding. There was no objective reason to believe street performers with permits would be less likely to engage in conflict than street performers without permits. However, even if the permit system had nominally advanced the City's interests, the regulation was poorly tailored to fit the government's interest in coordination. Moreover, the permit scheme was also overly intrusive considering that the City's interest in reducing conflicts could have easily been achieved directly, without the use of a speech registration system.

With this case, the Ninth Circuit joins the clear majority of circuits to underscore the limits of permitting schemes. Municipalities around the country are attempting to implement overly intrusive single-speaker permitting schemes, undermining the First Amendment rights of all Americans.¹⁵⁹ This case highlights the fact that while many circuits have opposed these types of schemes, there is not universal consensus that these schemes should be unconstitutional, and there is no guarantee that the current circuit majority will continue.¹⁶⁰ Should the Supreme Court choose to

159. See Kellum, *supra* note 8, at 384 (“[M]unicipalities are passing ordinances that require governmental approval for anyone who wants to use public streets and sidewalks for expressive purposes, whether it be large organizations, small groups, or even individuals. Because such schemes invoke advance notice, they effectively eliminate spontaneous expression. Moreover, many of these permit schemes even assess fees for the mere opportunity to engage in protected expression in a public forum, begging the question of whether free speech is actually free.”) (footnotes omitted).

160. For example, in 2008, the three-judge panel of the Ninth Circuit held the Seattle Center ordinance to be entirely constitutional despite clear precedent in the Ninth Circuit opposing single-speaker/small-group permitting. Even in the en banc review, the decision to strike the ordinance was strongly opposed by a vocal minority.

address the issue of single-speaker regulations, the Ninth Circuit's reasoning in *Berger* may provide a foundation in support of limiting the constitutionality of permitting schemes to legitimate large group coordination and not merely to individual or small group registration.

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