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NEWS RELEASE

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Herrera seeks dismissal of legal challenge to S.F.'s public nudity ban

Ironically, plaintiffs' equal protection claim seeks to undermine exceptions allowing nudity at permitted events like Bay to Breakers, Folsom Street Fair

SAN FRANCISCO (Dec. 13, 2012)—City Attorney Dennis Herrera today moved to dismiss a federal Constitutional challenge to the recently enacted ordinance generally banning public nudity in San Francisco, except for certain permitted events and for children under the age of five. The City's motion filed in U.S. District Court this morning comprehensively dismantles arguments by the nudism advocates who filed the lawsuit last month that the City's ordinance violates their rights under the U.S. Constitution's First and Fourteenth Amendments, and is also preempted by California law.

"Public nudity bans are a longstanding feature of municipal codes throughout the nation, and their constitutionality has been repeatedly affirmed by the courts—including the U.S. Supreme Court," said Herrera. "Ironically, the only novel legal theory plaintiffs put forward in this case is an equal protection claim that could actually undermine exceptions that allow nudity at permitted events like Bay to Breakers and the Folsom Street Fair. The nudism advocates seem to have taken the position that if they can't be naked everywhere, no one can be naked anywhere. Fortunately, the legal challenge is without a basis in the law, and we're confident the court will dismiss."

The lawsuit was filed on Nov. 14, 2012 by four nudism advocates: Mitch Hightower, whose "nude-in" events at the busy intersection of Castro and Market Streets intend to encourage "peace and fellowship among nudists"; Oxane "Gypsy" Taub, who operates a website called "mynakedtruth.tv," and purports to produce a television program on nude activism; Russell Mills who operates a website called "naked-truth.net"; and George Davis, the self-described "Naked Yoga Guy" who was a candidate for Mayor of San Francisco in 2007.

Filed nearly three weeks before San Francisco's Board of Supervisors actually passed ordinance on Dec. 4, the plaintiffs originally sought a motion for a temporary restraining order to halt the legislative process. U.S. District Court Judge Edward Chen did not hear that motion, but opted to consider the challenge instead as a petition for a preliminary injunction, once the ordinance was enacted.

The ordinance being challenge amended San Francisco's Police Code to prohibit individuals from exposing their genital region on public streets, sidewalks, and most other public rights-of-way as well as on transit vehicles and in transit stations. Policymakers created specific exceptions to allow for nudity during permitted festivals like the San Francisco LGBT Pride Parade, the Bay to Breakers foot race, and Folsom Street Fair. In adopting the legislation, which becomes operative on Feb. 1, 2013, the Board

[MORE]

found that unfettered nudity unreasonably interferes with the rights of all persons to use and enjoy public spaces, and harms members of the public who are "unwillingly or unexpectedly exposed to such conduct." Herrera's pleading notes that even such minimal clothing as a G-string would satisfy the ordinance's requirements.

The case is: *Mitch Hightower et al. v. City and County of San Francisco et al.*, United States District Court, Northern District of California, Case No. C-12-5841 EMC, filed Nov. 14, 2012.

# # #

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MITCH HIGHTOWER, OXANE "GYPSY" TAUB, GEORGE DAVIS, RUSSELL MILLS, and on behalf of all persons similarly situated,

Plaintiffs,

vs.

CITY AND COUNTY OF SAN FRANCISCO, DAVID CHIU in his official capacity only as President of the Board of Supervisors of the City and County of San Francisco, SCOTT WIENER in his official capacity only as a member of the Board of Supervisors of the City and County of San Francisco, and ANGELA CALVILLO, in her official capacity only as Clerk of the Board of Supervisors,

Defendants.

Case No. C 12 5841 EMC

DEFENDANTS CITY AND COUNTY OF SAN FRANCISCO, ET AL.'S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

Hearing Date: January 17, 2013
Time: 1:30 pm
Place: Courtroom 5, 17 Floor

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Federal Cases

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San Francisco Statutes, Codes & Ordinances

Other Authorities

NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that, at 1:30 p.m., on January 17, 2013, or as soon thereafter as this matter may be heard, in the San Francisco Division of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, in the Courtroom of the Honorable Judge Edward M. Chen, Courtroom 5 on the 17th Floor, Defendants City and County of San Francisco, David Chiu, Scott Wiener, and Angela Calvillo (collectively, "the City") will move, and hereby move, to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because the complaint fails to state a claim upon which relief can be granted.

This Motion is based on this Notice of Motion, the Memorandum of Points and Authorities submitted in support of the Motion, the Request for Judicial Notice and the exhibits thereto, the papers and pleadings on file in this action and upon such other and further matters as may be considered by the Court at the hearing on the motion.

MEMORANDUM OF POINTS AND AUTHORITIES

Bans on public nudity are common. As the Supreme Court recognized when affirming the constitutionality of a ban on public nudity in Indiana, public indecency statutes are "of ancient origin" and "presently exist in at least 47 States." *Barnes v. Glen Theatre*, 501 U.S. 560, 568 (1991). Indeed, municipalities throughout California have banned public nudity to prevent the harms caused when the public is unwillingly "exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies." *United States v. Biocic*, 928 F.2d 112, 115-16 (4th Cir. 1991); *see, e.g.*, Berkeley Municipal Code § 13.32; Los Angeles Ordinance 17.12.360; Marin County Sec.6.76.030; San Diego Municipal Code § 56.53; San Jose Municipal Code § 10.12.060.

Plaintiffs challenge San Francisco's recent efforts to address the harms to the public health, safety and general welfare caused by public nudity, which is a 7-day a week problem in neighborhoods where people live, work, shop and raise their children. Plaintiffs contend that the City's public nudity ban violates their rights to free speech under the First Amendment, violates the Equal Protection clause, amounts to an impermissible "prior restraint" on speech, and is preempted by state law. But courts – including the Supreme Court and the Northern District of California – have consistently upheld public nudity bans against the same constitutional and preemption challenges presented here.

See, e.g., City of Erie v. Pap's A.M. tdba "Kandyland," 529 U.S. 277, 289 (2000); *Moore v. City of Berkeley*, No. C 98-03589 (N.D.Cal. 2000) (Wilken, J)*; Eckl v. Davis*, 51 Cal.App.3d 831 (1975). Thus, Plaintiffs effectively ask this Court to be the first to interpret the Constitution and California statutory law to guarantee the right of adults to expose their genitals on public streets and sidewalks.

The City respectfully asks this Court to dismiss Plaintiffs' complaint. Because Plaintiffs cannot cure the complaint's legal defects, the complaint should be dismissed without leave to amend.

FACTUAL BACKGROUND

I. THE ORDINANCE BANNING PUBLIC NUDITY

On December 4, 2012, San Francisco's Board of Supervisors passed Ordinance No. 120984, which amends the City's Police Code to prohibit public nudity unless certain exceptions apply. While nudity has been – and remains – legal during permitted festivals (such as the Pride Parade, the Bay-to-Breakers foot race, and the Folsom Street Fair), the Board of Supervisors found that public nudity at other times and places (1) harms "the public unwillingly or unexpectedly exposed to such conduct" and "unreasonably interferes with the rights of all persons to use and enjoy" public spaces, (2) creates "a public safety hazard by creating distractions, obstructions, and crowds that interfere with the safety and free flow of pedestrian and vehicular traffic," and (3) "discourages members of the public from visiting or living in areas where such conduct occurs." Police Code § 154(a).

In light of those findings and to promote "the public health, safety, and general welfare of all persons in the City and County of San Francisco," the Ordinance prohibits any person from "expos[ing] his or her genitals, perineum, or anal region on any public street, sidewalk, street median, parklet, or plaza, or public right-of-way as defined in Section 2.4.4(t) of the Public Works Code, or in any transit vehicle, station, platform, or stop of any government operated transit system in the City and County of San Francisco." Police Code § 154(b). Only minimal clothing is required to satisfy the requirements of the Ordinance. Indeed, even a G-string would do. Notably, the Ordinance does not prohibit nudity on beaches or on private property. Nor does it prohibit the taking of still photography, videos or films showing nudity, or the viewing of such photos or videos.

The Ordinance contains two exceptions to its modest requirements. Police Code § 154(c). First, the Ordinance does not apply to "any person under the age of five years." *Id.* Thus, parents may

continue to change their children's clothes and diapers in public without violating the Ordinance. Second, the Ordinance does not apply at "any permitted parade, fair, or festival held under a City or other government issued permit." *Id.* Thus, people who wish to be naked in public may do so at the Pride Parade, the Bay-to-Breakers foot race, the Folsom Street Fair, and other similar events.

The Ordinance provides that any person who violates its requirements "shall be guilty of an infraction." Police Code § 154(d). A person who violates the Ordinance three or more times within a twelve month period may be charged with either an infraction or a misdemeanor in the discretion of the District Attorney. *Id.* § 154(e).

II. PLAINTIFFS AND THEIR COMPLAINT

Plaintiffs Mitch Hightower, Oxane "Gypsy" Taub, George Davis, and Russell Mills filed this action on November 14, 2012, before the Ordinance had even been introduced before the Board of Supervisors. Plaintiffs purport to sue on behalf of themselves and others "similarly situated," which Plaintiffs contend includes everyone who is "nude at various times in public spaces in San Francisco during a typical year."[1] Complt. ¶ 16.

Plaintiffs allege that they use nudity to express their beliefs. Plaintiff Mitch Hightower alleges that he has organized a "Nude-in" event in Jane Warner Plaza, in the congested center of the City's Castro District, for the purpose of encouraging "peace and fellowship among nudists." Complt. ¶¶ 7, 39. Hightower also operates a Web site called "bucknakedinpublic.com" which displays pictures of individuals who appear naked in public. Complt. ¶ 7. That website advertises itself as an "exhibitionist, voyeur and public nudity destination" appropriate for "those 21 and older." The site recognizes that the nudity displayed on the site "may not be appropriate for all viewers."[2] The website does not specify any "message" supposedly conveyed by public nudity.

Plaintiff Oxane "Gypsy" Taub is a resident of Berkeley, California, where public nudity has been banned for two decades. Complt. ¶ 8; Berkeley Municipal Code § 13.32. She operates a Web

[1] The Ordinance passed by the Board of Supervisors differs substantially from the earlier version Plaintiffs relied upon in their Complaint. For instance, the Ordinance contains findings that were not present before the measure was introduced at the Board. (See Request for Judicial Notice Ex. A.)

[2] See www.bucknakedinpublic.com, last visited December 6, 2012.

site, "mynakedtruth.tv" and "produces a television program on nude activism, including but not limited to nudity in public spaces." Complt. ¶ 8.

Plaintiff George Davis ran for Mayor of San Francisco in 2007 and for Supervisor of District 6, in both instances billing himself as the "nude candidate." He also maintains two websites in which he advocates public nudity. Complt. ¶ 9.

Plaintiff Russell Mills is a "pro-nudity activist who maintains the Web site Naked-truth.net" and an on-line fan group concerning nudity. Mr. Mills allegedly "uses nudity to campaign against the proposed Ordinance" and for other causes, which he does not identify. Complt. ¶ 10.

Plaintiffs allege the Ordinance violates the First and Fourteenth Amendments of the United States Constitution both facially and as applied, despite the fact that the Ordinance has not become operative or been "applied" to anyone.[3] Specifically, Plaintiffs allege in Count One that being nude is "entitled to First Amendment protection as expressive speech," Complt. ¶ 38, and that the Ordinance violates this right because its provisions are "overbroad and impermissibly burden speech without being tailored to the City's stated objectives." Complt. ¶ 36.

In Count Two, Plaintiffs allege that the Ordinance violates the Fourteenth Amendment's Equal Protection Clause in two ways. First, according to Plaintiffs, the Ordinance "improperly discriminates between two different groups of juveniles:" children under the age of 5 (who are exempt from the Ordinance's requirements) and children between the ages of 5 and 14 (who are not exempt). Second, the Ordinance impermissibly discriminates by allowing people to be nude at any "parade, fair, or festival held under a City or other government issued permit," while banning public nudity at other times and places. Complt. ¶¶ 44-49.

In Count Three, Plaintiffs allege that the Ordinance amounts to an "unlawful prior restraint in violation of the First Amendment" because individuals can appear nude in public if they obtain a special event permit. Plaintiffs suggest this "permitting requirement" violates the First Amendment, but they do not identify any flaws in the City's permitting process or any harm they may suffer as a result of the City's permitting requirements. Complt. ¶¶ 55, 56.

[3] The Mayor signed the Ordinance on December 6, 2012, and it will be come effective 30-days thereafter. The operative date of the Ordinance is February 1, 2013.

Finally, Plaintiffs argue the Ordinance exceeds "the City's powers under its Charter and Article XI, Sec. 7 of the California Constitution." Complt. ¶ 3. According to Plaintiffs, the Ordinance is preempted by Penal Code § 314, which prohibits a person from "lewdly" exposing his or her "private parts," and California Penal Code § 26, which provides that children under the age of 14 are not "capable of committing crimes . . . in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness."

DISCUSSION

I. COUNT ONE FAILS TO STATE A CLAIM BECAUSE THE ORDINANCE DOES NOT VIOLATE THE FIRST AMENDMENT

A. The Ordinance Regulates Conduct, Not Speech

Plaintiffs' First Amendment claim is premised on the misguided notion that being nude in public is inherently expressive speech entitled to protection under the First Amendment. Complt. ¶ 38. That argument has already been rejected by the Supreme Court, and numerous other courts which have consistently upheld laws prohibiting public nudity.

Over 50 years ago, Justice William Douglas stated that "[n]o one would suggest that the First Amendment permits nudity in public places . . ." *Roth v. United States*, 354 U.S. 476, 512 (1957) (Douglas, J., dissenting.) Since that time, the Supreme Court has consistently rejected the notion that public nudity is a form of expression. "Being 'in a state of nudity' is not an inherently expressive condition." *City of Erie v. Pap's A.M. tdba "Kandyland,"* 529 U.S. 277, 289 (2000). While nude dancing may be expressive, "nudity *per se* is not." *Barnes v. Glen Theatre*, 501 U.S. 560, 581 (1991) (Souter, J, *concurring*).[4]

Despite *Pap's A.M.* and *Barnes*, Plaintiffs contend that engaging in public nudity is "expressive speech" entitled to First Amendment protection. Complt ¶ 10. Plaintiffs offer no authority to support that contention, and indeed courts have consistently held that nudity is *conduct*, not speech protected by the First Amendment. *Pap's A.M.*, 529 U.S. at 298, 301 (upholding ban on public nudity on the grounds that it "regulates conduct, not First Amendment expression"); *Barnes*,

[4] Although Justice Souter's opinion in *Barnes* was a concurrence, it provides the narrowest vote for the result, and thus states the holding of the Court. See *Tily B., Inc. v. City of Newport Beach*, 69 Cal.App.4th 1, 16 (1999).

501 U.S. at 581 (upholding public nudity ban; explaining that nudity is "a condition" that is not inherently expressive); *D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140,144 (4th Cir. 1992) (upholding regulation of nudity because regulation focused on conduct, not expression); *South Florida Free Beaches, Inc. v. City of Miami*, 734 F.2d 608, 610 (11th Cir. 1984) ("[W]e hold that the first amendment does not clothe these plaintiffs with a constitutional right to sunbathe in the nude."); *Williams v. Kleppe*, 539 F.2d 803, 806 n.9 (1st Cir. 1976) (holding "no rights of free speech can be said to have been involved" in case where plaintiff arrested for nude sunbathing in national park); *Chapin v. Town of SouthHampton*, 457 F.Supp. 1170, 1174 (E.D.NY 1978) (upholding ban on public nudity as regulation of conduct, not First Amendment protected speech); *Elysium Institute, Inc. v. County of Los Angeles*, 232 Cal.App.3d 408, 424 (1991) ("[W]e do not consider Elysium's practice of nudism to be a form of speech protected by the federal or state constitutions."); *see also Richards v. Thurston*, 424 F.2d 1281, 1285 (1st Cir. 1970) (stating it is "obvious" that "the right to appear au natural at home is relinquished when one sets foot on a public sidewalk").

B. Plaintiffs' Facial Challenge Fails Because The Ordinance Does Not Regulate Conduct That Is "Integral To, Or Commonly Associated With, Expression"

Plaintiffs' facial, overbreadth challenge to the Ordinance fails as a matter of law because the Ordinance regulates conduct that is not "integral to, or commonly associated with, expression." *Roulette v. City of Seattle*, 97 F.3d 300, 304 (9th Cir. 1996). Like the ordinance banning public nudity upheld in *Pap's A.M.*, the Ordinance "regulates conduct alone. It does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether the nudity is accompanied by expressive activity." *Pap's A.M.*, 529 U.S. at 290. Accordingly, Plaintiffs cannot plead a facial challenge to the Ordinance. *Roulette*, 97 F.3d at 305.

The Ninth Circuit's opinion in *Roulette* in instructive here. In *Roulette*, the Ninth Circuit rejected a facial challenge to an ordinance that prohibits individuals from sitting or lying on public sidewalks. Although protesters sometimes engage in "sit-ins" to convey a political message, the Ninth Circuit held that the plaintiffs could not bring a facial challenge because the law did not target expression, but rather regulated conduct. The Court explained: "[A] facial freedom of speech attack must fail unless, at a minimum, the challenged statute 'is directed narrowly and specifically at

expression or conduct commonly associated with expression.'" *Id.* at 305. Indeed, while courts have entertained "facial freedom-of-expression challenges . . . against statutes that, by their terms, sought to regulate spoken words or patently expressive or communicative conduct such as picketing or handbilling," courts do not allow facial challenges against laws that regulate only conduct. *Id.* at 303-04 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612-13 (1973) (internal quotations and punctuation omitted); *S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1135 (9th Cir. 2004) ("[A] facial challenge is proper only if the statute by its terms seeks to regulate spoken words or patently expressive or communicative conduct, such as picketing or handbilling, or if the statute significantly restricts opportunities for expression.")

Here, as noted above, nudity is not conduct that is "integral to, or commonly associated with expression." *Roulette*, 97 F.3d at 304; s*ee also Moore v. City of Berkeley*, No. C 98-03589 at 9 (Wilken, J) [5] (holding that "nudity alone is not expressive conduct, nor is nudity integral to, or commonly associated with, expression"). To the contrary, most – indeed, the great majority – of political and artistic expression is undertaken fully clothed, and Plaintiffs can continue to express their political views about the Ordinance, or about any other topic, while wearing clothes. *See South Florida Free Beaches*, 734 F.2d at 610 ("[Plaintiffs] remain able to advocate the benefits of nude sunbathing, albeit while fully dressed."). Nor is public nudity conduct – like picketing or handbilling – that is "commonly associated with" expression. *Roulette*, 97 F.3d at 303-04; *Chapin*, 457 F.Supp. at 1173 (holding that public nudity "is not associated with dance, literature, or any other standard mode of expression"). Indeed, public nudity bears no "necessary relationship" to the ability to speak or convey one's message. *See Schneider v. New Jersey*, 308 U.S. 147, 160-61 (1939) (state may prohibit speaker from "taking his stand in the middle of a crowded street, contrary to traffic regulations . . . since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion").

Plaintiffs assert that nudity *can be* expressive in some situations. But "the fact that [nudity] can possibly be expressive . . . isn't enough to sustain plaintiffs' facial challenge." *Roulette*, 97 F.3d at

[5] See RJN Ex. B for a complete copy of Judge Wilken's order upholding Berkeley's ban on public nudity, and denying a Motion for Preliminary Injunction.

303. Nearly all conduct *could* be expressive: "One might murder certain physician to show disapproval of abortion; spike trees in a logging forest to demonstrate support for stricter environmental laws; steal from the rich to protest perceived inequities in the distribution of wealth; or bomb military research centers in a call for peace." *Id* at 305. That some may wish to violate laws as a means of protest "provide[s] no basis upon which to ground a facial freedom-of-speech attacks" on laws. *Id.*; *see also Barnes*, 501 U.S. at 577 (Scalia, J, concurring) ("We have never invalidated the application of a general law simply because the conduct was engaged in for expressive purposes . . .")

Accordingly, Plaintiffs have not – and cannot – state a facial First Amendment challenge to the Ordinance, and Count One in Plaintiffs' Complaint must be dismissed.

C. The Nudity Ordinance Does Not Violate The First Amendment As Applied.

Plaintiffs also purport to bring an as-applied challenge to the Ordinance, despite the fact that the City has not "applied" or even threatened to "apply" the Ordinance against anyone. Plaintiffs' "as-applied" challenge – brought to Court without any actual facts suggesting how the Ordinance is enforced in any particular situation – cannot be adjudicated at this time. *Hoye v. City of Oakland*, 653 F.3d 835, 859 (9th Cir. 2011) (holding that courts cannot consider "as-applied" challenges "that would require us to speculate as to prospective facts.") Accordingly, Plaintiffs' as-applied claim must be dismissed.

Even if the Court were willing to consider an "as-applied" challenge to an Ordinance that has yet to be applied, Plaintiffs' claims must be rejected. Plaintiffs assert that the Ordinance cannot be enforced against them because they are engaging in some loosely specified form of "political speech" by exposing themselves in public. Plaintiffs plead that one of them has run for office as the "nude candidate," one of them organizes a "Nude In . . . to encourage peace and fellowship among nudists," and the others are "pro nudity" activists. Complt. ¶¶ 7-10. Although nudity is not "expressive" per se, Plaintiffs take the view that the Ordinance has "transformed" all public nudity into political speech "since nudity has become the most efficient way for Plaintiffs [and others] to signal their opposition to the Ordinance." Mot. for Class Cert. at 5.

Plaintiffs fail to state an as-applied challenge under the First Amendment. First of all, the conduct identified in the Complaint is not "expressive" within the meaning of the First Amendment.

As Justice Souter (speaking for the Court) explained in *Barnes*, engaging in nudity – like every voluntary act – implies that the conduct is "appropriate," but that implication is "so common and minimal" that calling it "expressive would reduce the concept of expression to the point of meaninglessness." *Barnes*, 501 U.S. at 581. The First Amendment does not protect every action that has some expressive aspect: "It is possible to find some kernel of expression is almost every activity a person undertakes – for example walking down the street or meeting one's friends at a shopping mall – but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Indeed, "virtually every law restricts conduct and virtually any prohibited conduct can be performed for an expressive purpose – if only expressive of the fact that the actor disagrees with the prohibition." *Barnes*, 501 U.S. at 576 (Scalia, J., concurring). Such a theoretical scintilla of expressive potential is not enough to support an as-applied First Amendment challenge.

Second, the First Amendment does not guarantee Plaintiffs *carte blanche* to violate the Ordinance merely because they intend to express "opposition" to the Ordinance or some other message by doing so. A few examples suffice to illustrate the absurdity of Plaintiffs' argument. Some individuals believe that the Second Amendment protects their right to openly carry loaded firearms in public. But people cannot display loaded weapons in a courthouse, merely because they intend to express something about their Second Amendment rights by doing so. In addition, many individuals believe that smoking marijuana should be legal, and wish to protest federal and state drug laws. Yet the First Amendment does not give them the right to use marijuana with impunity to express their disagreement with drug laws. Even a candidate who likes to be called the "pot guy" and runs on a pro-marijuana platform has to follow the law. And even a "Bake-in" festival organized to "encourage peace and fellowship" among pot smokers must comply with the law. Similarly, while anarchists believe that all laws are futile and impinge on fundamental freedoms, anarchists are not permitted to engage in lawlessness, even if doing so may express something about their beliefs. *See Troster v. Pennsylvania State Department of Corrections*, 65 F.3d 1086, 1087 (3d Cir. 1995) ("[T]he First Amendment does not protect any 'right' to disobey a governmental compulsion for the sole purpose of expressing protest against the compulsion"); *see also Cox v. Louisiana*, 379 U.S. 536, 554 (1965)

("One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest.")

Nonetheless, even if Plaintiffs' nudity could be considered "expressive," Plaintiffs' challenge to the Ordinance fails under *United States v. O'Brien,* 391 U.S. 367 (1968).[6] *See Pap's A.M.*, 529 U.S. at 289 (holding that "government restrictions on public nudity should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech"). Under *O'Brien*, the Ordinance must be upheld as long as (1) it is within the constitutional powers of the government to enact, (2) it furthers an important or substantial governmental interest, (3) the government interest is unrelated to the suppression of expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *O'Brien,* 391 U.S. at 377. Each factor of the *O'Brien* test is easily satisfied here.[7]

1. The City Has The Power To Enact The Ordinance

The City had the power to enact the Ordinance. As the text of the Ordinance explains, the Ordinance seeks to promote public health, safety and general welfare. Police Code § 154(a). Because the City's "efforts to protect public health and safety are clearly within the city's police powers," the Ordinance satisfied the first factor of the *O'Brien* test. *Pap's A.M.*, 529 U.S. at 296.

2. The Ordinance Furthers Important Or Substantial Governmental Interests

The Ordinance furthers substantial governmental interests, including (1) protecting the public from being unwillingly or unexpectedly exposed to the genitals of others which "unreasonably

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[6] In *O'Brien*, the Supreme Court determined the test to be applied to content-neutral restrictions on conduct that may burden expression. The *O'Brien* test applies here because the Ordinance regulates conduct, not expression. It does not target nudity that expresses a certain message. "Rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity." *See Pap's A.M.*, 529 U.S. at 289.

[7] Plaintiffs rely on *Morris v. Municipal Court*, 32 Cal.3d 553 (1982) to suggest that the City must do more than satisfy the *O'Brien* standard. Plaintiffs' argument must be rejected because *Morris* has been abrogated by *Barnes* and *Pap's A.M*. *See Fantasyland Video, Inc. v. County of San Diego,* 373 F.Supp.2d 1094, 1120 (S.D.Cal. 2005) ("Morris is no longer good law."); *Krontz v. City of San Diego,* 136 Cal.App.4th 1126, 1139 (2006) (explaining *Morris* should not be followed because it is inconsistent with *Barnes* and *Pap's A.M.*); *Tily B, Inc.*, 69 Cal.App.4th at 18 ("*Morris* was a state court interpretation of federal constitutional law since foreclosed by *Barnes*.")

interferes with the rights of all persons to use and enjoy the public streets, sidewalks, street medians, parklets, plazas, public rights-of-way, transit vehicles, stations, platforms, and transit system stops," and (2) decreasing public safety hazards caused by "distractions, obstructions, and crowds that interfere with the safety and free flow of pedestrian and vehicular traffic." Police Code § 154(a).

a. The Ordinance Protects The Public From Being Unwillingly Or Unexpectedly Exposed To The Genitals Of Others

The Ordinance protects City residents or visitors from being unwillingly or unexpectedly exposed to the genitals of strangers while in public spaces. It has long been recognized that the government has a substantial interest in protecting individuals from the offense caused when persons expose themselves in public. *See Barnes*, 501 U.S. at 569 (noting that public decency statutes furthers a substantial governmental interest); *see also D.G. Restaurant Corp.*, 953 F.2d at 145 (same); *United State v. Biocic*, 928 F.2d 112, 115-16 (4th Cir. 1991) ("The important government interest is the widely recognized one of protecting the moral sensibilities of the substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous zones.") The Ordinance – like the public nudity ban this Court upheld in Berkeley – furthers the substantial governmental interest in "protecting unconsenting viewers of public nudity from offense." *Moore v. City of Berkeley*, C 98-03579 (Wilken, J.) at 16.[8] Indeed, even the justices who dissented in *Barnes* recognized that bans on public nudity served the important governmental interest of protecting *non-consenting* viewers "from offense." *Barnes*, 501 U.S. at 590-91 (White, J., Marshal, J., Blackmun, J., and Stevens, J., dissenting) (explaining that nude dancing performances occurring before *consenting* viewers should receive full First Amendment protections; distinguishing nudity on public streets).

Some opponents of the Ordinance have suggested that it is akin to laws that discriminate against gay individuals, but that is not correct. Tr. at 6.[9] The Ordinance does not regulate private, sexual relationships between consenting adults, and does not regulate conduct occurring on private

[8] Judge Wilken's order granting summary judgment for Defendants City of Berkeley et al. is Exhibit C to the City's Request for Judicial Notice.

[9] The transcript of the public comment before the Board is attached to the City's Request for Judicial Notice Ex. D.

property. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (declaring unconstitutional law banning intimate sexual conduct between consenting, same sex adults). Nor does the Ordinance restrict the fundamental freedoms of one disfavored group. *See, e.g.*, Proposition 8. Rather, the Ordinance is a generally applicable law that promotes civility on public streets and other public spaces that need to be shared by all members of society.

By requiring a bare minimum of clothing in public places, the Ordinance furthers important governmental interests by ensuring that streets, plazas and other public spaces remain accessible to everyone. The Board of Supervisors found that public nudity "unreasonably interferes with the rights of all persons to use and enjoy the public streets, sidewalks, . . . transit vehicles" and other public spaces, and discourages members of the public from visiting or living in areas where public nudity occurs. Police Code Sec. 154(a). The Board's conclusion is shared by numerous other jurisdictions around the country that have also found that the desire of some to expose their genitals or other private parts in public reduces the ability of other citizens to enjoy public spaces. *See, e.g.*, *Eckl*, 51 Cal.App.3d at 836 n.1.

The Board heard testimony that suggested that these important governmental interests would be furthered by the Ordinance's ban on public nudity. Numerous individuals informed the Board that they are distressed when they are unwillingly or unexpectedly exposed to the genitals of strangers on public sidewalks and in public spaces. A young mother expressed her desire to "walk down the street and buy a carton of milk without seeing someone's penis." Tr. 12. Another woman expressed dismay that the elderly and sexual assault victims have to see naked men "without a warning" when they walk down a public street. Tr. 15-16. Others expressed that they felt "violated" because "naked guys" are engaging in exhibitionism which sexualizes others without consent. Tr. 22, 26, 33-34 (explaining that public nudity in the Castro "is a sexualized version of nudity that also sexualizes the bystander without consent"), 50.

Many residents explained that, because of the public nudity in the Castro, they feel compelled to avoid that neighborhood. *See, e.g.*, Tr. 29, 43. Businesses in the Castro are suffering as a result. Indeed, Merchants of Upper Market and Castro reported that 85% of local businesses reported that "the naked guys are negatively affecting business" because members of the public are avoiding that

area. Tr. 16. Others reported that families are moving from the neighborhood.[10] Tr. 25.

By generally banning public nudity, the Ordinance protects the public from feeling distressed and "violated" by the actions of the few individuals who like to appear naked in public. It also allows others to feel free to live, work, shop and take their children to the Castro district again.

b. The Ordinance Furthers The City's Interest In Protecting Public Safety And Ensuring The Free Flow Of Traffic

The Ordinance also furthers the government's substantial interest in protecting public safety and ensuring the free flow of pedestrian and vehicle traffic. *See Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 376 (1997) (holding government has a significant and valid interest in promoting "public safety" and "the free flow of traffic on streets and sidewalks"); *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 116 (1943) (explaining government has a substantial interest in regulating "the streets to protect and insure the safety, comfort, or convenience of the public"); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1101, 1122 (9th Cir. 2009) ("Courts have recognized a somewhat greater governmental interest in regulating expressive activity on city streets because of the public safety concerns raised by vehicular traffic.")

Here, the Board of Supervisors found that public nudity "creates a public safety hazard by creating distractions, obstructions, and crowds that interfere with the safety and free flow of pedestrian and vehicular traffic." Police Code § 154(a). That conclusion is amply supported by the record before the Board. Members of the public informed the Board that nudists frequently gather at Jane Warner Plaza, located at one of the city's busiest intersections (17th Street and Market Street). Tr. 15, 21 (explaining that "a transit hub in a tourist district is not the place to break ground for public nudity"). In addition, individuals expose themselves throughout the City during events such as Critical Mass. Compl. ¶ 5; Tr. 48. The Board reasonably concluded that the presence of naked people at a busy intersection or on bikes on City streets may distract drivers and pedestrians, thus increasing the risks of vehicle accidents. *Bush*, 2010 WL 2465034 * 3 (S.D. Cal. 2010) (upholding public nudity ban, noting

[10] The Board also heard from parents and civic leaders, who expressed concern that Jane Warner Plaza, the current epicenter of public nudity in San Francisco, is located near three schools, a public library, and a Muni station used by school children. Tr. 10, 32, 50, 62. Others expressed concerns that some of the naked men specifically direct their attention to children, try to get children to look at their naked bodies, and make children uncomfortable. Tr. 26, 32.

that "[i]t is a sure bet the [Naked Bicycle Ride] will distract drivers, and distracted drivers present an obvious public safety concern."); *see also* National Highway Traffic Safety Administration (NHTSA), Distractions: In and Out of the Vehicle, *available at* www.nhtsa.gov/staticfiles/nti/teen-drivers/pdf/driverdistractions.pdf (describing the dangers posed by distractions on public streets).[11]

In addition, public nudity can cause members of the public to react in "hostile or disorderly ways" that obstruct the free flow of pedestrian traffic on the sidewalks. *Bush*, 2010 WL 2465034 * 3. As just one example, members of the public informed the Board that parents and other adults create "human barricades" to protect children from seeing the nudists, some of whom seem intent upon drawing attention to their genitals. Tr. 26, 62. Those "human barricades" obstruct the sidewalks and inhibit the free flow of pedestrians. *Id.*

By preventing public nudity, the Ordinance reduces distractions to drivers and pedestrians, and eliminates the likelihood that members of the public will block public sidewalks or otherwise impede pedestrian traffic in an effort to protect themselves or their children from unwanted exposure to the genitals of strangers. Accordingly, the Ordinance furthers the City's important and substantial interest in promoting public safety, and the free flow of traffic on sidewalks and streets.

3. The City's Interests Are Unrelated To The Suppression Of Expression

Both of the City's interests discussed above – the interest in protecting the public from unwanted or unexpected exposure to the genitals of strangers, and the interest in public safety – are unrelated to any desire to suppress "expression." Indeed, the City regulates nudity regardless of whether that nudity is accompanied by expressive activity. Accordingly, the Ordinance satisfies the third *O'Brien* factor. *Pap's A.M.*, 529 U.S. at 290, 301 (holding ordinance prohibiting public nudity satisfies third *O'Brien* factor where the ordinance regulates nudity regardless of whether it is accompanied by expressive activity); *Eckl v. Davis*, 51 Cal.App.3d 831, 846 (holding that the government's interest in regulating public nudity is "unrelated to the suppression of free expression") (internal citations and quotation marks removed).

[11] Just as the City can regulate and even ban billboards to further traffic safety by reducing driver distractions, the City can prohibit nudity on public streets because of the distractions caused by that conduct. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981).

4. Any Burden On Speech Is Necessary To Further The City's Interests

Finally, the Ordinance's burden on speech (if any) is "no greater than is essential" to further the City's interests. *O'Brien*, 391 U.S. at 377. *O'Brien's* fourth factor does not require that the City use the least restrictive means. Rather, as the Supreme Court has explained, "an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985).

Here, the City's interests in preventing the harms that flow from public nudity could not be achieved as effectively absent the Ordinance. The Ordinance bans nudity that occurs on public sidewalks, streets and other public spaces to protect non-consenting members of the public from being exposed to the genitals of strangers, and to promote public safety. The City could not protect the public from the harms caused by public nudity without prohibiting public nudity.

While the City's interests require a ban on most public nudity, the City has narrowly drawn its Ordinance to prohibit only the conduct that causes the harms identified above, while leaving open numerous avenues for engaging in nudity. Indeed, unlike numerous other jurisdictions' nudity bans (including those upheld by the Supreme Court in *Pap's A.M.* and *Barnes*), the Ordinance does not regulate nudity in strip clubs or nude dancing establishments where consenting viewers can enjoy displays of nudity. Rather, it narrowly regulates only nudity on public property where nudity causes harm, while leaving Plaintiffs and others free to practice nudism or engage in nude conduct in any private location, theater or other establishment where nudity is welcomed. Plaintiffs and others can also continue to engage in nude activities at various public events, such as Folsom Street Fair and the Pride Festival, which occur only occasionally, and where public nudity is expected by the public and there is thus less risk of unwilling exposure. Police Code § 154(c). Accordingly, the Ordinance is tailored to the harms it seeks to address by generally banning public nudity, while leaving open numerous opportunities for nudists.

In addition, the Ordinance only prohibits people from exposing their "genitals, perineum, or anal region." Police Code § 154(b). Because only minimal clothing is required to satisfy the Ordinance's requirements, any burden on expression is *de mimimis. Pap's A.M.*, 529 U.S. at 301

(holding fourth *O'Brien* factor satisfied because the requirement that dancers wear "pasties and G-strings" is a *de minimis* burden on expression that leaves ample opportunities to express a message); *Barnes*, 501 U.S. at 572 ("It is without cavil that the public indecency statute is 'narrowly tailored;' Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose.")

Accordingly, even if the Ordinance regulates expressive conduct in some situations, the Ordinance satisfies *O'Brien* and must be upheld.

II. COUNT TWO FAILS TO STATE A CLAIM BECAUSE THE ORDINANCE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

A. Exempting Children Under The Age Of Five Does Not Violate Equal Protection

Plaintiffs allege that the Ordinance violates the Equal Protection Clause by exempting persons under the age of five. According to Plaintiffs, the "Ordinance improperly discriminates between two different groups of juveniles (*i.e*. those between zero and four years of age and those between five and fourteen years of age)." Plaintiffs' claim fails because (1) Plaintiffs lack standing to challenge any alleged discrimination in the Ordinance, and (2) Plaintiffs cannot demonstrate that it was irrational for the City to treat infants and preschool children differently for purposes of a public nudity ban.

To satisfy Article III's standing requirement, Plaintiffs must demonstrate that they suffered an "injury" because of the challenged portion of the Ordinance. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Here, Plaintiffs have not alleged they have suffered any injury resulting from the Ordinance's application to children between the ages of 5 and 14. None of the Plaintiffs is within that age group. Nor have they demonstrated any of the requirements for third party standing to assert the rights of anyone below the age of 14. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004).

Even if Plaintiffs could satisfy standing requirements, Plaintiffs' claims fail as a matter of law. The Ordinance's classification of children under five is analyzed under rational basis review. *Kimel v. Florida Board of Regents*, 528 U.S. 62, 83 (2000). Under rational basis review, the City "may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest." *Id.* To be "rational," the City need not "match age distinctions and the legitimate interests they serve with razorlike precision." *Id.* Rather,

classifications based on age will be upheld "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [City's] actions were irrational." *Id.* Age classifications are "presumptively rational," and therefore Plaintiffs bear the "burden of proving that the facts upon which the classification is apparently based could not reasonably be conceived to be true by the government decisionmaker." *Id.*; *Board of Trustees v. Garrett*, 531 U.S. 356, 367 (2001).

Here, Plaintiffs have offered nothing to suggest that the Ordinance's classification is "irrational." Complt. ¶ 12. Indeed, treating infants and preschool children differently from others is entirely reasonable for purposes of a public nudity ban. The necessity of diaper-changing alone provides a rational basis for excluding infants and toddlers from a public nudity ban. In addition, nudity in infants and toddlers does not pose the public harms caused by public nudity by older people. Nudity in young children does not caused others to feel "violated" by unwanted exposure to the genitals of strangers, cause others to avoid going to public spaces in which young children may be nude, or the cause public safety harms the Ordinance sought to address. Indeed, none of the members of the public who voiced objections to public nudity expressed any concerns about nudity by young children, or suggested that nudity should be banned for individuals under five. Thus, the Board reasonably concluded that the public harms the Ordinance seeks to address could be addressed without restricting the conduct of young children.

B. The Ordinance Does Not Violate Equal Protection By Exempting Persons Attending Permitted Events.

Plaintiffs also contend that the Ordinance violates the Equal Protection clause by exempting persons attending permitted events, such as the Pride Parade, Bay-to-Breakers, and the Folsom Street Fair. There is no merit to Plaintiffs' claim.

As with their age-discrimination claim, Plaintiffs' equal protection challenge based on the different treatment of nudity at different events is subject to rational basis review because it does not concern a suspect classification or a fundamental right. *Heller v. Doe*, 509 U.S. 312, 319 (1993). Plaintiffs' equal protection challenge fails unless they can negate "any reasonably conceivable state of facts that could provide a rational basis for the classification." *Garrett*, 531 U.S. at 367.

Here, Plaintiffs have again offered nothing to "negate" the City's rational basis for excluding public nudity at permitted events from the scope of the Ordinance. Indeed, the exclusion is perfectly rational. Nudity at permitted parades, festivals and fairs – such as the Pride Parade, Bay-to-Breakers and the Folsom Street Fair – has been common for years, even decades, and has not posed the governmental harms the City seeks to address through this Ordinance. Tr. 2. Indeed, such events are generally widely publicized, and the public has come to expect public nudity at those events, and thus is not "unwillingly or unexpectedly exposed" to nudity at them. Police Code § 154(a). Further, permitted events typically involve street closures and other public safety precautions that reduce the risk that nudity will create public safety hazards. Police Code § 154(a). Finally, by excluding permitted events, the Ordinance reasonably balances the desires of individuals who wish to engage in occasional nudity at certain events, with the desires of the public to not be unwillingly and unexpectedly exposed to public nudity in their neighborhoods seven days a week, 52 weeks a year.

Plaintiffs may claim that it is somehow unfair to allow nudity at permitted events, while otherwise excluding it.[12] But the rational basis standard is not offended by "rough accommodations" or "an imperfect fit between means and ends." *Heller*, 509 U.S. at 321. Indeed, the fact that the line between permissible and impermissible conduct "might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *F.C.C. v. Beach Communications, Inc*., 508 U.S. 307, 315-16 (1993). Likewise, the equal protection clause allows governments "to approach a perceived problem incrementally." *Id.* at 316. Indeed, "mere underinclusiveness is not fatal to the validity of a law under the . . . guarantee of equal protection." *Seariver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir. 2002).

Accordingly, Plaintiffs have not pled a viable equal protection claim to the Ordinance, and their second cause of action fails as a matter of law.

[12] Indeed, Plaintiffs claim that excluding permitted events from the Ordinance "amounts to a requirement . . . that an individual . . . must forfeit their free speech rights unless they are willing and able to pay hundreds, if not thousands, of dollars in fees to a legion of City agencies and potentially wait for up to several weeks" to obtain a permit. (Complt. ¶ 50.) That contention lacks merit. As explained above, people do not have a "free speech right" to be nude in public. *Pap's A.M.*, 529 U.S. at 289; *Barnes*, 501 U.S. at 581 (Souter, J, *concurring*). In addition, Plaintiffs have not explained why any financial burdens involved in receiving a permit implicates any equal protection rights.

III. COUNT THREE FAILS TO STATE A CLAIM BECAUSE THE ORDINANCE DOES NOT CONTAIN AN IMPERMISSIBLE PRIOR RESTRAINT ON SPEECH

Plaintiffs contend that the Ordinance's exclusion of permitted parades, fairs and festivals from its requirements creates a prior restraint on speech. The term "prior restraint" refers to "administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 554, 550 (1993). A permit requirement that restricts speech may constitute an unconstitutional prior restraint if it puts undue discretion in the hands of government officials, or is not a valid time, place, or manner restriction. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *Long Beach*, 574 F.3d at 1020. Otherwise, the "government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally." *Forsyth County*, 505 U.S. at 130; *Thomas v. Chicago Park District*, 534 U.S. 316, 322 (2002) (upholding permitting requirement).

Here, Plaintiffs do not specify what they find objectionable about the City's permitting requirements. They do not identify any aspect of those requirements that vests undue discretion in the hands of governmental officials. Nor do they challenge whether the permitting requirements for parades, fairs, and festivals are valid time place and manner restrictions. Plaintiffs rely on a case that concerns permitting requirements that apply to groups as small as two or three people, but the permitting requirements at issue in the Ordinance do not. Indeed, by its terms, the Ordinance only exempts permitted fairs, parades and festivals, which are all events that involve large groups of people. In any event, Plaintiffs' challenge to the permitted event exception of the Ordinance fails as a matter of law because (1) Plaintiffs lack standing to bring the challenge, and, (2) the Ordinance regulates conduct, not speech, and thus cannot be considered a "prior restraint" on speech in a facial challenge.

A. Plaintiffs Lack Standing

Plaintiffs who seek to raise a pre-enforcement constitutional challenge to a law must demonstrate "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and ... a credible threat of prosecution thereunder." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Because "the Constitution requires something more than a hypothetical intent" to engage in conduct affected by the law, plaintiffs must

"articulate a concrete plan" to engage in conduct subject to the law "by giving details about their future speech such as when, to whom, where, or under what circumstances." *Lopez v. Candaele*, 630 F.3d 775, 787 (9th Cir 2010) (internal punctuation, quotations and citations omitted).

Here, Plaintiffs allege that the Ordinance requires Plaintiffs to "obtain a special event permit *each* time they want[ ] to exercise their First Amendment right to expressive speech" because the Ordinance allows public nudity at "any permitted parade, fair, or festival held under a City or other government issued permit." But Plaintiffs do not allege that they have ever applied for a permit for a parade, fair or festival in the past, or have any intent to do so in the future. While each Plaintiff wishes to appear nude in public, a single person engaging in prohibited conduct does not constitute a parade, fair, or festival. Rather, those words by definition connote a large gathering of people in an organized event. Plaintiffs have not alleged any intent to organize such an event, let alone provided the detailed description of the planned event that the law requires. *Lopez,* 630 F.3d at 787.

Plaintiffs have also failed to allege that they will suffer an injury if they do apply for a permit. *Lopez*, 630 F.3d at 787 (holding that standing requires plaintiffs to allege that they will likely suffer some injury as a result of the government's action). Plaintiffs have not alleged that they would be denied a permit for a "parade, fair, or festival" for any constitutionally impermissible reason if they sought to organize such an event. Plaintiffs challenge the Ordinance, but the Ordinance exempts permitted parades, fairs, or festivals held under a City or other government issued permit, and provides no basis upon which any permit application would be denied. Police Code § 154(c). While Plaintiffs complain that permits for street closures can cost hundreds of dollars, Plaintiffs do not explain why they should be exempt from the requirements that apply to everyone who wishes to obtain a permit for a parade, fair, or festival.

Accordingly, Plaintiffs have not alleged that they are likely to suffer any injury that relates to their Third Cause of Action, and this Court therefore cannot adjudicate that claim.

B. The Ordinance Does Not Restrict Speech

Even if Plaintiffs could establish standing, their facial challenge fails because the Ordinance does not restrict speech, and thus cannot amount to a "prior restraint" on speech. To allege a facial challenge to a permitting scheme on the grounds that it is a prior restraint on speech, the plaintiff must

be able to show that the challenged ordinance has a "close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." *Long Beach*, 574 F.3d at 1020. Plaintiffs cannot satisfy that requirement. *See Moore v. City of Berkeley*, No. C 98-03589 at 9 (Wilken, J) (holding that "nudity alone is not expressive conduct, nor is nudity integral to, or commonly associated with, expression").

As explained more fully above, the Ordinance regulates *conduct*, specifically the act of exposing ones "genitals, perineum, or anal region" on public streets, plazas and other public places. Police Code § 154(b). Exposing one's genitals in public is not speech. *Pap's A.M.*, 529 U.S. at 289; *Barnes*, 501 U.S. at 581 (1991). Nor does the Ordinance restrict speech. Plaintiffs remain free to shout their beliefs from the rafters. They simply must wear a minimal amount of clothing while doing so, if those rafters are located in a public place. *See South Florida Free Beaches*, 734 F.2d at 610 ("[Plaintiffs] remain able to advocate the benefits of nude sunbathing, albeit while fully dressed.").

Public nudity is also not conduct – like picketing or handbilling – that is "commonly associated with" expression. *See Roulette*, 97 F.3d at 303-04; *Moore v. City of Berkeley*, No. C 98-03589 at 9 (Wilken, J); *Chapin*, 457 F.Supp. at 1173. Indeed, public nudity bears no "necessary relationship" to the ability to speak or convey one's message. *See Schneider*, 308 U.S. at 160-61.

Plaintiffs contend that they are communicating the "appropriateness" of public nudity and their opposition to the Ordinance by engaging in public nudity. Indeed, they even contend that all public nudity – even just sitting in Jane Warner Plaza reading the paper in the nude – is "speech" entitled to First Amendment protection. But the Supreme Court has repeatedly rejected that argument. *Barnes*, 501 U.S. at 581 (Souter, J., concurring) (explaining that while every voluntary act implies a message that the conduct is appropriate, that implication is "so common and minimal" that calling it "expressive would reduce the concept of expression to the point of meaninglessness."); *Stanglin*, 490 U.S. at 25 (holding that the "kernel of expression" inherent in every voluntary act is "not sufficient to bring the activity within the protection of the First Amendment.") Again, Plaintiffs remain free to express their view that public nudity is appropriate on every street corner in the City; they simply must wear a minimal amount of clothing while doing so.

Accordingly, the Ordinance is not a prior restraint on speech. *Madsen v. Women's Health*

Center, Inc., 512 U.S. 753, 764 n 2 (1994) (injunction that regulated conduct near clinics, but did not prevent petitioners from "expressing their message in any one of several different ways" was not a prior restraint on speech); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 229 (1996) (rejecting prior restraint claim where the law restricts conduct, not speech). Even *if* some concerns could be raised if the Ordinance is applied in a particular manner, Plaintiffs' facial challenge to the Ordinance fails as a matter of law. *Long Beach*, 574 F.3d at 1020.

IV. PLAINTIFFS' PREEMPTION ARGUMENT FAILS AS A MATTER OF LAW

Although Plaintiffs have not specifically pled any state law clauses of action, Plaintiffs allege in their complaint that the Ordinance is preempted by (1) California Penal Code § 314, which prohibits a person from "lewdly" exposing his or her "private parts," and (2) California Penal Code § 26, which provides that children under the age of 14 are not "capable of committing crimes . . . in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness." Plaintiffs' preemption claims fail as a matter of law.[13]

A. California Penal Code § 314 Does Not Preempt The Ordinance

There is no merit to Plaintiffs' claim that the Ordinance is implicitly preempted by California Penal Code § 314, which prohibits people from "lewdly" exposing their "private parts" in public. Complt. ¶ 37. Although Plaintiffs claim that the California legislature "implicitly" occupied the field of public nudity law, California courts have already rejected that argument. *Eckl v. Davis*, 51 Cal.App.3d 831, 842 (1975) (holding Penal Code § 314 does not preempt public nudity ordinances).

Plaintiffs face a heavy burden when alleging that the Section 314 implicitly preempts the Ordinance. California courts follow a "presumption against preemption." *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal.4th 1139, 1149 (2006). Thus, "[t]he party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption." *Id*.

In addition, courts are reticent to conclude that the Legislature has implicitly preempted local legislation. *See San Diego Gas & Elec. Co. v. City of Carlsbad*, 64 Cal.App.4th 785, 793 (1998) (holding that "courts are cautious in applying the doctrine of implied preemption," and "preemption

[13] In addition, the Court need not exercise jurisdiction over those claims because Plaintiffs' federal causes of action fail as a matter of law.

may not be lightly found"].) As the California Court of Appeals explained, "[c]laims of implied preemption must be approached carefully, because they by definition involve situations in which there is no express preemption. Since preemption depends upon legislative intent, such a situation necessarily begs the question of why, if preemption was legislatively intended, the Legislature did not simply say so . . . ." *California Rifle & Pistol Assn. v. City of West Hollywood*, 66 Cal.App.4th 1302, 1317 (1998). "Implied preemption may properly be found . . . only when the circumstances 'clearly indicate' a legislative intent to preempt." *Horton v. City of Oakland*, 82 Cal.App.4th 580, 586 (2000) (internal quotations and citations omitted).

Here, Plaintiffs have offered nothing to suggest that the Legislature "clearly indicated" an intent to preempt local legislation when enacting Penal Code Section 314. Nor could they, as the California Court of Appeal has rejected the argument. *Eckl*, 51 Cal.App.3d at 842. While Section 314 bans *lewd* exposure, it says nothing that would limit the power of municipalities to address local harms caused by public nudity. As the *Eckl* Court explained when considering the same argument Plaintiffs present here: "[T]he fact that the Legislature has undertaken to proscribe sexually-motivated public nudity . . . does not mean that the Legislature has thereby impliedly determined that public nudity not so motivated . . . is lawful and, therefore, not subject to local regulation." *Eckl*, 51 Cal.App.3d at 842. To the contrary, "the reasonable conclusion is that the Legislature intended to reach the serious problem of sexually-motivated public nudity and to leave the matter of the control of public nudity not so motivated to the commonly accepted concept of social propriety and to local legislative bodies if particular circumstances call for appropriate action." *Id.*

A finding of implied preemption would be particularly inappropriate here given that public nudity is a matter of local concern that is likely to vary from jurisdiction to jurisdiction depending on the character and features of various communities. *Great Western Shows, Inc. v. County of Los Angeles*, 27 Cal.4th 853, 866-67 (2002) ("[W]e are reluctant to find . . . implied preemption 'when there is a significant local interest to be served that may differ from one locality to another.'") Indeed, while many jurisdictions in California restrict public nudity, some jurisdictions (like San Francisco) impose only modest restrictions, while other counties impose a comprehensive ban. *See, e.g.*, Thousand Oaks Municipal Code § 5-16.01.

Because Plaintiffs have not and cannot demonstrate that the Legislature "clearly indicated" an attempt to preempt local public nudity bans, Plaintiffs' preemption claim fails as a matter of law.

B. California Penal Code § 26 Does Not Preempt The Ordinance

Plaintiffs allege that the Ordinance is preempted by California Penal Code § 26, which sets forth general defenses applicable to all criminal offenses. As with Penal Code § 314, Plaintiffs' § 26 claim fails because Plaintiffs lack standing and § 26 does not conflict with the Ordinance.

To have standing, Plaintiffs must demonstrate that they have an "injury in fact," that there is a causal connection between the injury and the conduct of which the party complains; and that it is "likely" a favorable decision will provide redress. *Lujan*, 504 U.S. at 560. As explained above, Plaintiffs have not alleged that they have suffered any injury from the fact that the Ordinance applies to children between the ages of 5 and 14.

Even if Plaintiffs did have standing, their claim that Penal Code § 26 preempts the Ordinance fails as a matter of law. According to Plaintiffs, the Ordinance conflicts with Penal Code § 26 because the Ordinance allows children between the ages of 5 and 14 to receive citations for an "infraction" which Plaintiffs contend is a crime. Plaintiffs contend that allowing children to receive infraction citations conflicts with Penal Code § 26, which provides that a child under the age of 14 cannot commit crimes less the child knows the wrongfulness of his or her conduct.

Even assuming that infractions are "crimes" despite the authority to the contrary,[14] the Penal Code § 26 does not preempt the Ordinance. Local legislation is preempted by state law if it "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal.4th 893, 897 (1993). Here, Plaintiffs do not claim that the Ordinance duplicates or enters into an area fully occupied by Penal Code § 26. Rather, they contend only that the Ordinance contradicts Section 26.

Local legislation contradicts general law "when it is inimical thereto," *i.e.*, when it "prohibit[s] what the statute commands or command[s] what it prohibits." *Id.* at 898, 902. Here, there is no conflict between the Ordinance and Section 26. The Ordinance – like many criminal laws – proscribes

[14] California courts have held that "infractions are not crimes." *People v. Sava*, 190 Cal.App.3d 935, 939 (1987); *People v. Battle*, 50 Cal.App.3d Supp. 1 (1975).

certain conduct, but says nothing about what defenses could apply under various circumstances. Penal Code § 26, by contrast, does not prohibit any conduct, but rather sets forth defenses that apply to all crimes prosecuted in California. The Ordinance is just one of the many criminal laws to which Penal Code § 26 may supply a defense under appropriate circumstances, and the two laws are *complementary*, not in conflict. Accordingly, Plaintiffs' preemption claim fails.

CONCLUSION

For the reasons set forth above, the City asks the Court to join with the numerous other courts that have upheld public nudity bans against First Amendment, Equal Protection and preemption challenges by granting the City's motion to dismiss.

Dated: December 12, 2012

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