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NEWS RELEASE

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Herrera opposes nudists' move to block enforcement of S.F.'s public nudity ban

Preliminary injunction requires plaintiffs to show they are 'likely to suffer irreparable harm' unless enforcement of ban is immediately halted

SAN FRANCISCO (Dec. 20, 2012)—A week after moving to dismiss the federal Constitutional challenge to San Francisco's recently enacted ban on most public nudity, City Attorney Dennis Herrera today filed the City's opposition to an unlikely procedural move by four nudism advocates to halt enforcement of the ordinance through a preliminary injunction. At stake in the litigation currently pending in U.S. District Court is whether the law will become operative on Feb. 1, as the legislation specified, or whether U.S. District Court Judge Edward Chen will order a stay for the duration of the legal action. San Francisco's ban on public nudity would apply to streets, sidewalks and public rights-of-way, with exceptions for permitted events and for children under the age of five.

Under federal case law, plaintiffs seeking a preliminary injunction must generally demonstrate to the court a likelihood to succeed on the merits of the underlying case, while also proving that such a remedy is both in the public interest and necessary to prevent irreparable harm to the plaintiffs.

"Given that San Francisco temperatures average in the 50s through February, it's difficult to imagine what irreparable harms plaintiffs would suffer if they couldn't be naked in public immediately," said Herrera. "Federal case law sets a high standard for courts to grant extraordinary relief like preliminary injunctions, and we see no absolutely no basis for it here."

The lawsuit was filed on Nov. 14, 2012—nearly three weeks before San Francisco's Board of Supervisors actually passed ordinance on Dec. 4—by four nudism advocates who alleged that the measure violates their rights under the U.S. Constitution's First and Fourteenth Amendments, and is also preempted by California law. The plaintiffs originally sought a motion for a temporary restraining order that would halt the legislative process from moving forward. Judge Chen did not hear that motion, but opted instead to consider the challenge instead as a petition for a preliminary injunction, once the ordinance was enacted.

The plaintiffs: are 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.

[MORE]

The ordinance under 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 Bay to Breakers foot race, the Folsom Street Fair and the LGBT Pride Parade. Herrera's pleading notes that even clothing as minimal 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 OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Hearing Date: January 17, 2013
Time: 1:30 p.m.
Place: Courtroom 5, 17 Floor

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INTRODUCTION

Plaintiffs asks this Court to enjoin San Francisco's public nudity ban based on legal claims that have been repeatedly rejected, assertions of irreparable harm that lack evidentiary support, and no showing at all that the public would benefit from the injunction. Plaintiffs do not even come close to satisfying their burden when moving for a preliminary injunction, and their motion should be denied.

Plaintiffs cannot demonstrate that they are likely to succeed on the merits of their claims. Plaintiffs contend that exposing their "genitals, perineum, and anal region" in public is a form of "speech" protected by the First Amendment. That argument is meritless and has been repeatedly rejected by the Supreme Court, the Northern District of California, and numerous courts around the country. *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.). Plaintiffs contend that the Ordinance violates Equal Protection by exempting children under the age of 5 and public events such as Pride Parade, the Bay-to-Breakers foot race, and the Folsom Street Fair from the Ordinance's requirements. But each of those exceptions is rational and consistent with the purposes of the public nudity ban. Plaintiffs contend that the Ordinance is preempted by California Penal Code § 314, but that argument has already been rejected as well. *Eckl v. Davis*, 51 Cal.App.3d 831 (1975).

Plaintiffs also fail to demonstrate that they will suffer irreparable harm. Plaintiffs do not even explain – let alone offer evidence to demonstrate – how the Ordinance prevents them from engaging in "political speech." Of course, the Ordinance does no such thing. Plaintiffs remain free to say whatever they want about the Ordinance or any other topic. They simply must cover their "genitals, perineum, and anal region" while they are on public streets, sidewalks and other public spaces. *South Florida Free Beaches, Inc. v. City of Miami*, 734 F.2d 608, 610 (11th Cir. 1984). Plaintiffs do not, and cannot, identify any message they are unable to express while thus (minimally) clothed.

Finally, Plaintiffs barely even try to show that the balance of equities tips in their favor or that an injunction would benefit the public. The Ordinance imposes only *de minimis* burdens on Plaintiffs; they simply must cover their "genitals, perineum, and anal region" while on public property. By contrast, an injunction would prevent the City from protecting the welfare and safety of the public. The Ordinance is necessary to protect the rights of people who simply wish to walk around their

neighborhoods without feeling sexualized by exhibitionists. The Ordinance is necessary to prevent the numerous harms to the Castro neighborhood caused by public nudity. And the Ordinance is necessary to stop behavior that distracts drivers, and that obstructs the free flow of vehicle and pedestrian traffic.

Plaintiffs' motion for a preliminary injunction must be denied.

FACTUAL BACKGROUND

I. THE ORDINANCE BANNING PUBLIC NUDITY

On December 4, 2012, San Francisco's Board of Supervisors passed an Ordinance, 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).[1]

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

[1] See Declaration of Tara Steeley ("Steeley Dec.") Ex. A.

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.

Any person who violates the Ordinance's requirements "shall be guilty of an infraction." Police Code § 154(d). The District Attorney may elect to charge a person who violates the Ordinance three or more times within a twelve month period with a misdemeanor. *Id.* § 154(e).

II. THIS ACTION

Plaintiffs Mitch Hightower, Oxane "Gypsy" Taub, George Davis, and Russell Mills filed this action on November 14, 2012. 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." Complt. ¶ 16.

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.[2] Specifically, Plaintiffs allege in Count One that being nude is "entitled to First Amendment protection as expressive speech," and that the Ordinance violates this right because its provisions are "overbroad." Complt. ¶¶ 36, 38. In Count Two, Plaintiffs allege that the Ordinance violates the Fourteenth Amendment's Equal Protection Clause by exempting children under the age of 5, and permitted parades, festivals, and fairs. Complt. ¶¶ 44-49. In Count Three, Plaintiffs allege that the Ordinance is an "unlawful prior restraint in violation of the First Amendment" because the Ordinance excludes permitted parades, festivals, and fairs. Complt. ¶¶ 55, 56. 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

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

against them, they knew its wrongfulness."

On November 15, 2012, Plaintiffs filed an Ex Parte Application for Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should Not Issue, which has been deemed Plaintiffs opening motion in support of a preliminary injunction. On December 13, 2012, the City filed a motion to dismiss, demonstrating that each of Plaintiffs' claims fail as a matter of law.

DISCUSSION

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc*., 555 U.S. 7, 20 (2008). An injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22. Plaintiffs seeking a preliminary injunction "face a difficult task in proving that they are entitled to this 'extraordinary remedy.'" *Earth Island Institute v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (quoting *Winter*, 555 U.S. at 22.) Here, Plaintiffs have not satisfied their burden on any of the requirements for obtaining a preliminary injunction. *Winter*, 555 U.S. at 22; *see also* Moore's Federal Practice § 65.21[7] ("The party moving for a preliminary injunction has the burden of persuasion on all of the prerequisites.")

I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS

A. THE ORDINANCE DOES NOT VIOLATE THE FIRST AMENDMENT

1. The Ordinance Regulates Conduct, Not Speech

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*).[3]

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*, 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").

2. Plaintiffs Are Not Likely To Succeed On Their Claim That The Ordinance Is Facially Overbroad.

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

[3] 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).

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).

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 (N.D. Cal. 1999) (Wilken, J.) (holding that "nudity alone is not expressive conduct, nor is nudity integral to, or commonly associated with, expression").[4] 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. *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

[4] See Steeley Dec. 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.

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 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 violate laws as a means of protest "provide[s] no basis upon which to ground a facial freedom-of-speech attacks" against those 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' overbreadth challenge to the Ordinance is not likely to prevail.

3. Plaintiffs' First Amendment Claims Fails On The Merits

Even if Plaintiffs could pled a facial overbreadth challenge to the Ordinance (which they cannot), Plaintiffs' First Amendment claim would still fail. Plaintiffs allege (but offer no evidence to demonstrate) that they are engaging in some loosely defined form of political speech by being nude in public. Mot. at 6. Specifically, 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 are not likely to succeed because their nudity is not "expressive" within the meaning of the First Amendment. As Justice Souter (speaking for the Court) explained, 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 a 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 wherever they go. 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. *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). *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.[5]

a. 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.

b. The Ordinance Furthers Important Or Substantial Governmental Interests

i. 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 States v. Biocic*, 928 F.2d 112, 115-16 (4th Cir. 1991) ("The important government interest is the widely recognized one of protecting . . . 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 (N.D. Cal. 2000) (Wilken, J.) at 16.[6] Indeed, even the justices who dissented in *Barnes* recognized that bans

[5] 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*.")

[6] See Steeley Dec. Ex. C.

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.[7] The Ordinance does not regulate private, sexual relationships between consenting adults, and does not regulate conduct occurring on private 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 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 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 demonstrating 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

[7] See Declaration of Tara Steeley Ex. D for a copy of the transcript.

down a public street. Tr. 15-16. Others stated that they felt "violated" because "naked guys" are engaging in exhibitionism which sexualizes others without consent. Tr. 22, 26, 33-34 (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.[8] Tr. 25.

By generally banning public nudity, the Ordinance protects the public from feeling "violated" or sexualized 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.

ii. 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"); *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. In

[8] 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.

addition, individuals expose themselves throughout the City during bike 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 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).

In addition, public nudity can cause members of the public to react in "hostile or disorderly ways" that obstruct pedestrian traffic. *Bush*, 2010 WL 2465034 * 3. As just one example, members of the public informed the Board that parents and others create "human barricades" to protect children from 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.

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

Both of the City's interests discussed above 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).

d. 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.

B. THE ORDINANCE DOES NOT VIOLATE EQUAL PROTECTION

1. Exempting Children Under The Age Of Five Is Rational

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.*; *see also 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 is not sexual and does not pose the public harms caused by public nudity by older people. Nudity in young children is less likely to cause others to feel "violated" by unwanted exposure to such childrens' genitals, to cause others to avoid going to public spaces in which young children may be nude, or to cause the public safety harms the Ordinance seeks 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 caused by public nudity could be addressed without restricting the conduct of young children.

2. 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 parades, festivals and fairs 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 much less likely to be "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 certain permitted events, the Ordinance reasonably balances the desires of individuals who wish to engage in occasional nudity, 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. 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). 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 are not likely to succeed on the merits of their Equal Protection claim.

C. 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 and obstruct or interfere with the flow of traffic. *See, e.g.*, Police Code Art. 4, § 366 (defining parade); Art. 6, § 6.6(a)(3) (defining street fair).

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.

1. 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 any intent to apply for a permit for a parade, fair or festival. 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. *See, e.g.*, Police Code Art. 4 § 366 (defining parade); Art. 6, § 6.6(a)(3) (defining street fair). 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 demonstrated 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.

2. 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 (N.D.Cal. 1999) (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). 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 (N.D.Cal. 1999) (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 "political 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.")

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.

D. THE ORDINANCE IS NOT PREEMPTED BY STATE LAW

Although Plaintiffs have not specifically pled any state law clauses of action, Plaintiffs ask the Court to enjoin the Ordinance on the grounds that it 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 are not likely to succeed on their state-law preemption claims, even assuming the Court elects to exercise supplemental jurisdiction over those claims.

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

Plaintiffs claim that the City cannot restrict public nudity because the California prohibits only *lewd* public nudity. There is no merit to Plaintiffs' claim. *Eckl v. Davis*, 51 Cal.App.3d 831, 842 (1975) (holding Penal Code § 314 does not preempt public nudity ordinances).

The California Constitution confers on the City the power to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., Art. XI, Sec. 7.) Indeed, so long as the City's power is exercised within local territorial limits and is not preempted by state law, the City's police power "is as broad as the police power exercisable by the Legislature itself." (*Id.* at p. 140; *Candid Enterps., Inc. v. Grossmont Union High School District* 39 Cal.3d 878, 885 (1985).)

Here, Plaintiffs contend that the Ordinance is implicitly preempted by California Penal Code § 314, which prohibits people from "lewdly" exposing their "private parts" in public. Complt. ¶ 37. 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 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. 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.*

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.

2. 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. 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,[9] 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 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.

II. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY RELIEF

Plaintiffs have failed to demonstrate that they will likely suffer irreparable harm in the absence of a preliminary injunction. Indeed, Plaintiffs failed to submit a single shred of evidence to suggest that they will suffer irreparable harm if the Ordinance takes effect. *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 982 (9th Cir. 2011) (denying preliminary injunction in the absence of evidence demonstrating irreparable harm).[10]

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[9] 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).

[10] Indeed, it is hard to imagine that Plaintiffs could suffer any imminent harm from a public nudity ban that takes effect in *February*, when the City's temperatures average in the 50s.

Plaintiffs claim that an injunction is necessary to allow them to "exercise their First Amendment rights" to engage in public nudity. But, as explained more fully above, Plaintiffs do not have a First Amendment right to be naked in public. *See, e.g., 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*, 501 U.S. at 581 (upholding public nudity ban); *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."); *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.").

Plaintiffs also contend that they wish to engage in some unspecified "political speech as nudists." (Mot. at 9.) Plaintiffs do not explain or submit any evidence to demonstrate that the Ordinance prevents them from engaging in political speech. Indeed, Plaintiffs remain free to express any message they want. They simply must cover their "genitals, perineum, or anal region" while on streets, sidewalks and other public places. *See South Florida Free Beaches*, 734 F.2d at 610 ("[Plaintiffs] remain able to advocate the benefits of nude sunbathing, albeit while fully dressed.")

Accordingly, Plaintiffs have not made a "clear showing" of any irreparable harm, and their motion must be dismissed. *Winter*, 555 U.S. at 22.

III. THE BALANCE OF EQUITIES TIP IN THE CITY'S FAVOR AND AN INJUNCTION IS NOT IN THE PUBLIC INTEREST

Plaintiffs have done nothing to make a "clear showing" that the balance of equities tips in their favor, or that an injunction would benefit the public. Indeed, Plaintiffs make no showing at all to demonstrate that an injunction would serve the public interest.[11] On that basis alone, Plaintiffs' motion must be denied. *Winter*, 555 U.S. at 22; Moore's Federal Practice § 65.21[7] ("The party moving for a preliminary injunction has the burden of persuasion on all of the prerequisites.")[12]

[11] With respect to the public interest, Plaintiffs state only that the Court should enjoin the City from considering enacting the Ordinance because two new Supervisors take office on or about January 8, 2013. Given that the Ordinance has already been passed, Plaintiffs' stated public interest is moot.

[12] Plaintiffs may not raise new arguments in their reply brief. Arguments not raised by a party in an opening brief are waived. *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990) ("It is well established in this circuit that '[t]he general rule is that appellants cannot raise a new issue for the first time in their reply briefs.'"); *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085,

Both the balance of the equities and the public interest favor the City. The Ordinance imposes *minimal* requirements. It requires only that people cover their "genitals, perineum, [and] anal region" in public spaces, such as streets and sidewalks. Police Code § 154(b). Plaintiffs remain free to be nude on beaches, on private property, or at any permitted parade, festival or fair (such as the Pride Parade or Folsom Street Fair) unless another law prohibits their conduct. Thus, the burden on Plaintiffs is simply that they must wear *something* that covers their genitals and anal region (even a G-string would do) while they are in the enumerated public spaces. That burden is *de minimis. Pap's A.M.*, 529 U.S. at 301 (holding burden of wearing "pasties and G-strings" is *de minimis*).[13]

By contrast, an injunction would impose substantial harms on the City and the public. An injunction would burden the rights of people who simply wish to walk around their neighborhoods without feeling violated and sexualized by exhibitionists. Tr. 12, 15-16, 22, 26, 33-34, 50. An injunction would burden the rights of children who wish to see a movie or volunteer at a pet adoption clinic in the Castro without being accosted by naked men who seem intent upon exposing themselves to children. Tr. 26, 32. An injunction would prevent the City from enforcing a ban on conduct that has caused substantial harm to the Castro neighborhood and to local businesses. *See, e.g.*, Tr. 16, 25, 29, 43. And an injunction would allow Plaintiffs and a small number of other individuals to continue to engage in behavior that jeopardizes public safety, distracts drivers, and obstructs the free flow of vehicle and pedestrian traffic. Tr. 15, 21, 26, 62. And, of course, any time the City is "enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S.Ct. 1, 3 (2012). These harms to the public more than outweigh the *de minimis* burden on Plaintiffs. *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1236 (9th Cir.1999)

1093 (9th Cir. 2007). Indeed, the City would be prejudiced if the Court considered any new arguments because the City has not had an opportunity to respond in its opposition brief.

[13] The Ordinance does not burden Plaintiffs' First Amendment rights as explained above. But, even if the Ordinance imposed some burdens on Plaintiffs' First Amendment rights, Plaintiffs have still failed to show that the equities tip in their favor. "The public interest in maintaining a free exchange of ideas, though great, has in some cases been found to be overcome by a strong showing of other competing public interests, especially where the First Amendment activities of the public are only limited, rather than entirely eliminated." *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 974 -975 (9th 2002). Here, any burden on Plaintiffs' rights is outweighed by the public interest in banning Plaintiffs' conduct.

("[W[hen a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight.").

Plaintiffs contend that the Court should turn a blind eye to the substantial harms to the City and its residents because nudity accompanied by "lewd" behavior is already illegal pursuant to California Penal Code § 314. Even so, the City enacted the Ordinance to address harms that are caused by public nudity *even when it is not accompanied by "lewd" behavior*. Penal Code § 314 has not prevented the substantial harms public nudity has caused in San Francisco or in numerous municipalities throughout the state. *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.

Finally, Plaintiffs incorrectly claim that the balance of equities tip in their favor because the Ordinance changes the status quo. The Ordinance *returns* San Francisco to the status quo where public nudity occurred at some beaches and at certain events – such as the Pride Parade and Folsom Street Fair – but was not a 7-day a week, 52 weeks a year occurrence in residential and business neighborhoods. In any event, whether or not the Ordinance changes the status quo is irrelevant. "Preliminary relief is properly sought only to avert irreparable harm to the moving party. Whether and in what sense the grant of relief would change or preserve some previous state of affairs is neither here nor there." *Chicago United Industries, Ltd. v. City of Chicago*, 445 F.3d 940, 944 (7th Cir. 2006).

Accordingly, because Plaintiffs have failed to demonstrate that the equities tip in their favor or that an injunction would be in the public's interest, their motion must be denied.

CONCLUSION

For the reasons stated above, Plaintiffs' motion for a preliminary injunction must be denied.

Dated: December 20, 2012

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