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VIA ELECTRONIC MAIL

Alameda County Board of Supervisors
1221 Oak Street, Room 536
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cbs@acgov.org

Re: Draft Ordinance Prohibiting “Spectators” at “Sideshows”

Dear Board Members:

The First Amendment Coalition (“FAC”) is a nonprofit public interest organization dedicated to advancing free speech, more open and accountable government, and public participation in civic affairs. On behalf of FAC, I write to express strong concern that the draft ordinance at item 9.2 on the Board’s agenda tomorrow would violate the First Amendment by infringing the constitutional right to observe and report on events of public concern, even if those events are unlawful. FAC takes no issue with appropriate enforcement of otherwise valid laws against unlawful conduct, but the First Amendment does not allow the government to punish the protected speech of observers or reporters as a means to address the illegal acts of others.

Summary of Draft Ordinance

The draft ordinance would make it “unlawful for any person to knowingly be a Spectator at a Side Show [sic] Event conducted on a public street or highway” or “knowingly be a Spectator at the location of preparations for a Sideshow Event on a public street or highway.”

A “Sideshow” is defined as “an occasion where one or more persons, for the purpose of performing a Street Race or Reckless Driving Exhibition for one or more Spectator(s) either blocks or impedes traffic on a street or highway or impedes access to an off-street parking facility.” A “Sideshow Event” means “a Sideshow, Street Race, or Reckless Driving Exhibition.”

A “Spectator” is defined as “any person who is present at a Sideshow Event, or the site of the Preparations for a Sideshow Event, for the purpose of viewing, observing, watching, or witnessing the Sideshow Event as it progresses.” The term “Spectator” includes, but is not limited to, “any person at the location of the Sideshow Event that may have participated in preparations and/or promoting the Sideshow Event.”

A person is “present” at a “Sideshow Event if that person is within two hundred (200) feet of the location of the Sideshow Event, or within two hundred (200) feet of the site of the Preparations for any Sideshow Event.”

Why the Draft Ordinance Would Violate the First Amendment

Because the term “Spectator” is not limited to persons participating in a “Sideshow Event,” the draft ordinance would force members of the press or public to risk punishment simply for observing, recording, or reporting on such an event. For example, it would expose the following persons to arrest and prosecution:

- a journalist investigating or reporting on the sideshow, or
- a community member observing or documenting the sideshow for purposes of informing the public, protesting the sideshow, or reporting it to law enforcement.

FAC does not take issue with appropriate enforcement of otherwise valid laws against participating in illegal conduct. The press and public, however, have the First Amendment right to observe, record, and report on events occurring in public, even if those events are illegal. Such reporting is essential to informing the public, exposing or protesting unlawful conduct, or otherwise speaking out or petitioning the government. The draft ordinance would unconstitutionally punish the exercise of these core First Amendment rights.

As one court recently noted, “The right to gather information plays a distinctly acute role in journalism. Firsthand accounts, buttressed by video evidence, enhance accuracy and credibility in reporting and increase transparency and reader trust, allowing the press to tell more complete and powerful stories.” *People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fedn., Inc.*, 60 F.4th 815, 829 (4th Cir. 2023) (citation and quotation marks omitted).

The same is true for the public in general. The Board should need no reminding of the importance of protecting the ability of persons “standing on a sidewalk” to exercise “their First Amendment rights” to record events of public concern. *Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 831 (9th Cir. 2020).

The act of recording or reporting on events of public interest is protected by the First Amendment, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018), and by necessity, so is the act of observing those events, because it is impossible to record or report without observing.

Although “Sideshow Events” may be illegal, the First Amendment protects speech about unlawful conduct, even if it describes or depicts actual crimes. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116-18 (1991); *Keenan v. Superior Court*, 27 Cal. 4th 413, 428 (2002); *cf. United States v. Stevens*, 559 U.S. 460, 469 (2010) (while government may enforce “prohibition of animal cruelty itself ... depictions of animal cruelty” are not excluded “from ‘the freedom of speech’ codified in the First Amendment”).

The draft ordinance would restrict access to public streets or sidewalks by making it unlawful to be present within 200 feet of a “Sideshow Event” for the purpose of observing it. Public streets and sidewalks are traditional public forums, and restrictions on access to such forums are subject to First Amendment scrutiny. *McCullen v. Coakley*, 573 U.S. 464, 476 (2014). “The protections afforded by the First Amendment are nowhere stronger” than in a traditional public forum. *Berger v. City of Seattle*, 569 F.3d 1029, 1035-36 (9th Cir. 2009).

The First Amendment guarantees the right to observe and record events occurring in public forums. *Askins v. United States Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). By making it unlawful merely to be present within 200 feet of a “Sideshow Event” for the purpose of “viewing, observing, watching, or witnessing the Sideshow Event as it progresses,” the draft ordinance would unduly infringe the First Amendment right to record or report on such an event, especially to the extent the prohibited zone is both vague and broad, given that it is not clear how the 200-foot perimeter is measured. In addition, however measured, a 200-foot perimeter is far broader than necessary to address any safety risks to observers, especially as to observing “Preparations,” which can include merely the arrival of one or more persons at a given location. Indeed, one could potentially be “present” within the 200-foot perimeter while observing or recording the sideshow or its preparations from indoors, further illustrating the overbreadth of such a perimeter.

To address unlawful conduct associated with sideshows, the County has “readily available alternatives” to infringing First Amendment rights, because “the penal laws” can be “used to punish such conduct directly” rather than punishing observers or reporters. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 950 (9th Cir. 2011). Indeed, the letter supporting the draft ordinance acknowledges, “California law already prohibits drivers and passengers from engaging in Sideshow Events by criminalizing illegal street racing and illegal exhibitions of reckless driving.” Other laws also prohibit the “discharge of firearms,” driving “under the influence of alcohol or drugs,” littering, “vandalism,” and “noise pollution” referred to in the letter.

The draft ordinance would also be a content-based restriction of speech because on its face it singles out the “particular subject matter” of observing a Sideshow Event, as opposed to any other topic or event. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). “Content-based restrictions on speech are subject to strict scrutiny and may only be upheld if they are the least restrictive means available to further a compelling government interest.” *Askins*, 899 F.3d at 1044 (citation and quotation marks omitted). That remains true regardless of any “benign motive” the government may have. *Reed*, 576 U.S. at 167.

While the County may have a compelling interest in preventing the hazards associated with “Sideshow Events,” it has the less restrictive alternative of punishing the unlawful conduct associated with such events rather than punishing observers for merely exercising their First Amendment rights. See, e.g., *Animal Legal Def. Fund*, 878 F.3d at 1204-05 (holding that content-based law which prohibited “recording of a defined topic” on private property failed strict scrutiny where “owners can vindicate their rights” through enforcement of other laws).

As courts have held, the proper response to unlawful and dangerous conduct is “to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.” *Index Newspapers*, 977 F.3d at 834 (quoting *Collins v. Jordan*, 110 F.3d 1363, 1373 (9th Cir. 1996)).

It is no answer to suggest the draft ordinance would only be enforced against spectators who are otherwise acting unlawfully, as was suggested at the Transportation/Planning Committee hearing about the ordinance. The draft contains no such limitation, and the constitutionality of a law depends on its language, not representations about how it will be enforced. The “First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.” *Stevens*, 559 U.S. at 480.

For all of these reasons, FAC urges the Board not to adopt the draft ordinance as written. The government may address the hazards presented by sideshows without violating the First Amendment.

Sincerely,

FIRST AMENDMENT COALITION



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cc: Alameda County Counsel