



June 26, 2023

**VIA ELECTRONIC MAIL**

Alameda County Board of Supervisors  
1221 Oak Street, Room 536  
Oakland, CA 94612  
[cbs@acgov.org](mailto:cbs@acgov.org)

Re: June 27 Meeting, Item 23 (Draft Ordinance Prohibiting “Spectators” at “Sideshows”)

Dear Board Members:

On behalf of the First Amendment Coalition and the Society of Professional Journalists Northern California Chapter Freedom of Information Committee, I write to express strong concern that the draft ordinance at item 23 on the Board’s agenda tomorrow would violate the First Amendment by infringing the constitutional right to observe and record events of public concern.

We take 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.

If the Board adopts the ordinance as written, it will expose the County to significant risk of litigation in which enforcement of the ordinance would be enjoined and the County would be ordered to pay substantial attorney fees and expenses.

We therefore ask the Board to refrain from adopting an ordinance that would criminalize the exercise of First Amendment rights. The County need not and should not trample on freedom of speech to protect public safety.

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

The press and public have the First Amendment right to observe, record, and report on events occurring in public, regardless of whether 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.

It would also impair the public’s right to right to “receive information and ideas” on matters of public concern. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980); *see also First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (“[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”).

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).

Accordingly, the First Amendment protects newsgathering as well as the right to record events of public interest, by reporters or otherwise. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018); *Askins v. United*

*States Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018); *Leigh v. Salazar*, 677 F.3d 892, 897 (9th Cir. 2012).

The First Amendment also protects the right to observe such events, because observing is “a necessary prerequisite to recording.” *Chestnut v. Wallace*, 947 F.3d 1085, 1090 (8th Cir. 2020); see also *Sanchez v. City of Atherton*, No. 22-cv-03106-JSW, 2023 U.S. Dist. LEXIS 3763, \*14 (N.D. Cal. 2023) (“[G]iven that the Ninth Circuit protects the recording of police engaged in official duties, it follows that the act of observing them, which would necessarily be part of recording them, would also be protected.”) cf. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010) (holding First Amendment draws no “distinction between the process of creating a form of *pure* speech ... and the product of these processes”).

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 draft ordinance would be a content-based restriction of the First Amendment right to observe and record matters in a public forum, because on its face it singles out the “particular subject matter” of sideshows, as opposed to, for example, photographing a building or a sunset. *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).

Even if the draft ordinance were content neutral, it would remain unconstitutional because it is far from “narrowly tailored to serve a significant governmental interest,” nor does it “leave open ample alternative channels” for observing and recording sideshows. *McCullen*, 573 U.S. at 477.

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 observe, protest, or

record such an event, especially to the extent it is unclear how the 200-foot perimeter is measured, given that a “Sideshow Event” and its “Preparations” are inherently fluid.

In any event, however it is measured, a 200-foot perimeter is far broader than necessary to address any 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 the sideshow or its preparations from indoors or behind a fence or barrier, further illustrating the overbreadth of the 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,” “harming or destroying” infrastructure or other property, “blocking or preventing access,” “burning rubber tires,” and “noise pollution” referred to in the letter or draft ordinance’s findings.

Under the Constitution, the proper response to unlawful conduct is appropriate action against 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)).

Perhaps it might be easier to enforce a 200-foot perimeter against anyone observing a sideshow than to single out individuals who are acting unlawfully, but the First Amendment does not permit laws restricting speech simply because they are easier to enforce. *McCullen*, 573 U.S. at 495 (striking down buffer zone that restricted speech and noting, “A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency.”).

If there is any claim the ordinance would not be abused, 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, we urge the Board not to adopt the draft ordinance as written. The County may address the hazards of sideshows without violating the First Amendment.

Sincerely,

FIRST AMENDMENT COALITION



David Loy  
Legal Director

cc: Alameda County Counsel