Case No. 24-6814

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSE ANTONIO GARCIA,

Plaintiff and Appellant,

v.

COUNTY OF ALAMEDA, and YESENIA SANCHEZ, Sheriff of Alameda County, in her official capacity,

Defendants and Appellees.

Appeal from United States District Court
Northern District of California
Hon. Richard Seeborg
U.S. District Court Case No. 3:24-cv-03997-RS

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The County's argument is a masterclass in misdirection. It attacks positions Fermoso does not take and defends an ordinance the County did not adopt. A correct understanding of the issues and relevant law shows that Fermoso is likely to prevail in this First Amendment case and the district court should be reversed.

This appeal challenges the Ordinance as applied to the speech of recording sideshows to report the news. It does not assert a freestanding right to observe events without recording them. This is a First Amendment case because the Ordinance restricts both access to a traditional public forum and the right to record events of public concern in that forum. One cannot record an event without being present with the purpose to observe it. The Ordinance directly restricts speech by prohibiting an essential element of recording events in a public forum. A law cannot escape the First Amendment because it does not use the word "speech." Freedom of speech cannot depend on wordplay. To adopt the County's contention to the contrary would empower government to choke free speech at its root.

The Ordinance reaches far more than the unruly mobs of thrill seekers colorfully depicted by the County. Its plain language criminalizes journalists who record sideshows to cover them and residents who record them to alert law enforcement. The County cannot rewrite the Ordinance to avoid its consequences, nor can it obliterate First Amendment rights by decreeing that persons recording

sideshows are "participants" in them. The government cannot treat reporters as accomplices to crimes simply for exercising their free speech right to record them.

The text of the Ordinance makes it content based because enforcement depends on the content of the recording. If one records the sideshow, one violates the Ordinance, because one has the purpose of observing it. If one records something else, one does not violate the Ordinance, because one does not have the prohibited purpose. The County cannot salvage a content-based restriction on speech by asserting its motive is benign or other forms of speech are allowed. To hold otherwise would immunize content-based censorship.

The Ordinance likely fails strict scrutiny. No one disputes sideshows can be hazardous. Indeed, that is why they are of public concern, but the County may not punish speech *about* sideshows when it can use other laws to prevent them, as other jurisdictions have done. The County's safety rationale is untenable on its own terms. Fermoso is at similar risk of harm whether he is facing the sideshow to record it or facing away to record an interview, but the Ordinance punishes only the former. The Ordinance also punishes people not at significant risk, for example those recording the sideshow from inside a building within 200 feet of the sideshow. That is absurd and unconstitutional.

Accordingly, Fermoso is likely to prevail on the merits. The district court need not consider irreparable harm, balance of equities, or public interest because

they always favor protecting freedom of speech. This Court is respectfully requested to reverse with directions to enter a preliminary injunction.

ARGUMENT

This appeal challenges the Ordinance as applied to Fermoso's speech of recording sideshows in a public forum for news reporting. ER-137, ER-157; Appellant's Opening Br. ("AOB") at 18. The Court need not explore the Ordinance's "full range of applications," as would be necessary in a facial challenge. *Moody v. NetChoice, LLC*, 603 U.S. 707, 726 (2024). This appeal addresses only "a subset of the [Ordinance's] applications, or the application of the [Ordinance] to a specific factual circumstance" of Fermoso's speech. *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011). It does not present the question whether "all observation in a public forum" unrelated to making a recording is "protected by the First Amendment."[1] Appellees' Answering Br. ("AAB") at 30.

I. THE FIRST AMENDMENT GOVERNS THE ORDINANCE.

The Ordinance is subject to First Amendment scrutiny because it restricts access to a traditional public forum and the right to engage in speech in that forum. To restrict presence with intent to observe a sideshow is to restrict an essential

[1] The County mentions but does not argue standing. AAB at 15. Fermoso has standing for the reasons explained in the district court's order and his briefing. ER-5–6, ER-33–36.

element of recording and reporting on an event of public concern, which is speech at the heart of the First Amendment.

A. Controlling Precedent Makes the Ordinance Subject to First Amendment Review as a Restriction on Access to a Public Forum.

The streets and sidewalks covered by the Ordinance are "the archetype of a traditional public forum." *Snyder v. Phelps*, 562 U.S. 443, 456 (2011). Because such places "have historically been open to the public for speech activities," the Ordinance is "subject to First Amendment scrutiny" as a law that "restricts access to traditional public fora" to persons engaging in speech, even if it "says nothing about speech on its face." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014). As a court noted in applying *McCullen*, "One cannot speak where one cannot enter." *Johnson v. Bayens*, No. 4:20-cv-306, 2020 U.S. Dist. LEXIS 260374, at *24 (S.D. Iowa Dec. 10, 2020).

There is no principled reason to distinguish *McCullen* on this point. *McCullen* and this case both concern laws that restrict speakers' access to a public forum—there, a radius of 35 feet around a reproductive health care facility; here, a radius of 200 feet around a sideshow. 573 U.S. at 471–72; Alameda County Code ("ACC") §§ 10.40.020, 10.40.030. *McCullen* mandates that the First Amendment governs this case.

The County cannot prevail by asserting *McCullen* involved speech other than recording or restricted "*all* speech" in the prohibited zone. AAB at 43. *McCullen* cannot be limited to a certain type or quantity of speech. *Kaahumanu v. Hawaii*, 682 F.3d 789, 798 (9th Cir. 2012) (holding different types of speech "command the same respect") (quoting *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984)). The right to record cannot stand on lesser footing than the right to "public discourse." AAB at 43 n.10. In any event, the right to record is essential to "citizen discourse on public issues." *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017).

It is immaterial that the law in *McCullen* covered most people and the Ordinance covers those with purpose to observe a sideshow. Both remain subject to First Amendment scrutiny no matter who is covered. *See Nunez ex rel. Nunez v. City of San Diego*, 114 F.3d 935, 950–51 (9th Cir. 1997) (holding curfew ordinance that applied only to juveniles was subject to First Amendment review).

It is also immaterial whether the Ordinance restricts access to all public forums or only portions thereof. The scope of the restriction may be relevant to whether it survives First Amendment review, but it cannot exempt the restriction from such review in the first instance, as confirmed in *McCullen* itself, which involved only a portion of a public forum. 573 U.S. at 487.

Nor is the Ordinance exempt from the First Amendment if its "purpose was protecting public safety." AAB at 45 n.11. In *McCullen* as in many cases, the government invoked "public safety" to defend a speech restriction. 573 U.S. at 486. That interest is relevant to whether a restriction survives First Amendment review, but it cannot exempt the restriction from such review.

Fermoso does not argue that the press has any constitutional "rights of access to areas closed to the general public." AAB at 46. Instead, he invokes the same right as anyone to access a public forum for speech. This case is not about "access to the scenes of crime or disaster" closed to "the general public." *Id.* (quoting *Branzburg v. Hayes*, 408 U.S. 665, 684–85 (1972)). If officers respond to an incident and establish a temporary perimeter, there may be no constitutional "right to duck under the yellow tape," *id.*, but the First Amendment guarantees the right to speak in a public forum until or unless officers arrive and give valid instructions to the contrary for a limited time.

This case does not implicate statutes that "prohibit attending illegal events" such as "animal fights," AAB at 39, because those statutes do not restrict access to or speech in a public forum. *People v. Bergen*, 883 P.2d 532, 544 (Colo. App. 1994) (rejecting challenge to prohibition on attending animal fights because it involved claim of "access to information that is not generally available to the public"). The Court need not parse *Hernández-Gotay v. United States*, 985 F.3d 71

(1st Cir. 2021), because that case likewise did not involve a public forum. Even if *Hernández-Gotay* addressed making it unlawful to "knowingly attend an animal fighting venture," 7 U.S.C. § 2156(a)(2)(A), which is not clear, the decision remains irrelevant, because that statute does not restrict access to or speech in a public forum and the court did not decide the constitutionality of such a restriction.

The County finds no support in *National Press Photographers Ass'n v. McCraw*, 90 F.4th 770 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 140 (2024), which addressed a law that restricted drone flights over private property or nonpublic forums such as "airports, petroleum refineries, power generators, and military installations," as well as "correctional facilities and detention centers" and "large sports venues." *Id.* at 778. The court rejected a claim of "access to information not available to the public generally" and did not address restrictions on public forum access. *Id.* at 792. The issue here is not whether mere "observing" is "expressive activity." AAB at 34 (citing *McCraw*, 90 F.4th 770).

In discussing the "right-of-access claim" brought in one case, a panel of this Court could not and did not silently overrule *McCullen*, *Nunez*, and the legion of cases affirming the historical right to access a traditional public forum for speech. *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 829 (9th Cir. 2020). While the panel discussed *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986), to decide the case, *Index Newspapers*, 977 F.3d at 829–31, that could not

and did not supersede longstanding traditional public forum jurisprudence. The panel was bound by "the principle of party presentation" to decide the claim before it, *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020), but this Court retains the power and duty to decide the Ordinance is governed by the First Amendment because it restricts access to a traditional public forum.

One who speaks in a traditional public forum need not satisfy the *Press-Enterprise* factors for access to "government processes." AAB at 47. By history and precedent, a traditional public forum is presumptively open to any speech without further analysis. *Frisby v. Schultz*, 487 U.S. 474, 480–81 (1988) (noting "public streets and sidewalks" have "immemorially been held in trust for the use of the public"); *ACLU v. City of Las Vegas*, 333 F.3d 1092, 1101 (9th Cir. 2003) ("[W]hen a property is used for open public access or as a public thoroughfare, we need not expressly consider the compatibility of expressive activity because these uses are inherently compatible with such activity.").

B. The Ordinance Directly Restricts the First Amendment Right to Record Events of Public Concern in a Public Forum.

The Ordinance is subject to First Amendment review because it directly infringes the right to record events of public concern in a public forum. This Court recently confirmed that making a recording "in connection with . . . newsgathering activities is protected speech within the meaning of the First Amendment." *Project*

Veritas v. Schmidt, 125 F.4th 929, 943 (9th Cir. 2025). The County concedes that "recordings, and the act of recording, are both protected by the First Amendment." AAB at 31.

That concession, necessary as it is, destroys the County's position. To restrict presence for the purpose of observing a sideshow is to restrict the right to record the sideshow, because observation is "a necessary prerequisite to recording." *Chestnut v. Wallace,* 947 F.3d 1085, 1090 (8th Cir. 2020). Presence with intent to observe the sideshow is essential to making "notes, photographs, or recordings" of it. AAB at 34 n.6. The Ordinance "operates at the front end of the speech process" by restricting an essential element of making a recording. *ACLU v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012). Therefore, the First Amendment governs the Ordinance. *See Brown v. Kemp*, 86 F.4th 745, 779 (7th Cir. 2023) ("Because the First Amendment protects conduct and activities necessary for expression," it governed provisions limiting "visual or physical proximity" to hunters, which are "essential to carry out plaintiffs' protected monitoring and recording of hunting.").

To implicate the First Amendment, the Ordinance need not say "recording, photographing, or speaking." AAB at 12. The First Amendment governs restrictions on any part of creating speech. "The Supreme Court has recognized that '[w]hether government regulation applies to creating, distributing, or

consuming speech makes no difference.'" *Project Veritas*, 125 F.4th at 943 (alteration in original) (quoting *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011)). "Laws enacted to control or suppress speech may operate at different points in the speech process." *Citizens United v. FEC*, 558 U.S. 310, 336 (2010).

For that reason, the First Amendment "safeguard[s] the right to gather information as a predicate to speech." *PETA v. N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 829 (4th Cir. 2023). The County concedes that "the act of making a recording is a step in the process of speech creation," and "direct regulation of that act trigger[s] First Amendment review." AAB at 31. This concession makes the County's position untenable. Because presence with intent to observe an event is an essential part of recording the event, the Ordinance is subject to First Amendment review.

To hold otherwise would allow the government to choke protected speech at its root. "If restrictions on speech-creation processes did not implicate the First Amendment, governments 'could effectively control or suppress speech by the simple expedient of restricting an early step in the speech process rather than the end result.'" *Project Veritas*, 125 F.4th at 943 (quoting *Alvarez*, 679 F.3d at 597). "The various links in the chain of speech creation present opportunities for suppression: Control any cog in the machine, and you can halt the whole apparatus." *Id.* (cleaned up). To control presence with intent to observe an event is

to control the right to record the event. The County's position would destroy the right to record an arrest, use of force, or any other event in a public forum.

To be present with intent to observe an event is not "attenuated" from the "speech creation" of recording the event. AAB at 31 (quoting *Project Veritas*, 125 F.4th at 944). It is an essential element of recording the event. By restricting presence with intent to observe a sideshow, the County is directly restricting the First Amendment right to record the sideshow.

The right to record cannot turn on whether the event recorded is "inherently expressive." AAB at 71 n.12. While the act of recording an event in a public forum is inherently expressive, the event recorded need not be. Otherwise, for example, there would be no right to film an officer making an arrest or using force.[2]

The right to record is essential to the public interest. For example, recordings of a fuel spill, water main break, or crime in progress are critical to informing the community, petitioning the government, and supporting law enforcement. Reporting on sideshows implicates "accountability" by empowering the public to assess the government's response. AAB at 71 n.12. Sideshows are matters of

[2] A sideshow can emerge from a "peaceful protest." Jeff McDonald, *Police Seize Nearly a Dozen Vehicles Involved in Escondido Immigration Protest*, San Diego Union-Tribune (Feb. 1, 2025, 6:44 PM), https://www.sandiegouniontribune.com/2025/02/01/police-seize-nearly-a-dozen-vehicles-involved-in-escondido-immigration-protest/.

public concern, especially as evidenced by extensive press coverage about them. Fermoso's "[s]peech on matters of public concern is at the heart of the First Amendment's protection." *Project Veritas*, 125 F.4th at 944 (alteration in original) (quoting *Snyder*, 562 U.S. at 451–52). Because the Ordinance "directly regulate[s]" Fermoso's "act of creating speech that falls within the core of the First Amendment, it triggers First Amendment scrutiny." *Id.* at 945.

II. THE COUNTY CANNOT AVOID THE FIRST AMENDMENT BY DISTORTING CASE LAW, REWRITING THE ORDINANCE, OR DECREEING THAT SPEECH IS UNLAWFUL CONDUCT.

A. The Ordinance Is Not Predicated on the Commission of Unlawful Conduct Independent of Protected Speech.

The County cannot escape the First Amendment on the assertion that the Ordinance regulates non-expressive conduct with an incidental impact on speech. This case is not about regulating "outdoor fires," "property rentals," "firearms sales," "serving alcohol without a liquor license," or conduct during a public health emergency. AAB at 28. Nor is it about the incidental impact of regulations on "emissions from paints," "logging regulations," or "speeding regulations." AAB at 38–39 & n.7. Instead, this case is about a law that directly restricts speech by expressly prohibiting an essential element of creating speech.

While "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech," the Ordinance "imposes more than an incidental burden on protected expression" because it

directly restricts the creation of pure speech. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). The act of "recording" an event in a public forum, including all elements of making the recording, is "speech-creation and, consequently, is not mere conduct," and therefore the Ordinance is "subject to the First Amendment" because it applies "specifically to the creation of speech." *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1228 (10th Cir. 2021).

Even assuming the Ordinance also applies to non-expressive conduct, it still punishes an essential element of creating speech. Therefore, it remains subject to First Amendment scrutiny. *See PETA*, 60 F.4th at 825–27 (rejecting argument that laws which "implicate a variety of conduct . . . need not pass First Amendment scrutiny even when applied to speech" and holding government "may not harness generally applicable laws to abridge speech without first ensuring the First Amendment would allow it"); *Alvarez*, 679 F.3d at 602 ("When the expressive element of an expressive activity triggers the application of a general law, First Amendment interests are in play," because "enforcement of a generally applicable law" can be "subject to heightened scrutiny under the First Amendment.") (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640 (1994)).

The County cannot rely on irrelevant cases about unlawful conduct that has nothing to do with speech. In *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), the government invoked a law defining "places of prostitution, lewdness, and

assignation as public health nuisances" to close a bookstore where "illicit sexual activities" had occurred. *Id.* at 698–99. The First Amendment was "not implicated" by enforcing the public health law because "the sexual activity carried on in this case manifests absolutely no element of protected expression" and the "legislation providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activity." *Id.* at 705, 707.

Citing *Arcara*, courts have upheld excluding individuals from parks because of previous conduct unrelated to speech. *Wright v. City of St. Petersburg*, 833 F.3d 1291, 1297 (11th Cir. 2016) (holding exclusion did not implicate First Amendment because it resulted from commission of crime that "manifest[ed] absolutely no element of protected expression") (alteration in original) (quoting *Arcara*, 478 U.S. at 705); *Doe v. City of Lafayette*, 377 F.3d 757, 763–64 (7th Cir. 2004) (holding First Amendment did not apply to exclusion of convicted sex offender who "went 'cruising' in the parks 'looking for children' to satisfy his sexual urges" because his "urges and actions 'manifest[] absolutely no element of protected expression'") (alteration in original) (quoting *Arcara*, 478 U.S. at 705).

Those holdings are irrelevant because the Ordinance directly targets an essential element of creating protected speech. Indeed, in *Arcara* itself, the Court recognized that First Amendment review is required when the act that "drew sanctions was intimately related to expressive conduct protected under the First

Amendment." 478 U.S. at 706 n.3. To be present in a public forum with the purpose of observing an event is intimately related to the protected speech of recording that event, and therefore *Arcara* confirms the Ordinance is subject to First Amendment scrutiny.

The County finds no support in *Colten v. Kentucky*, 407 U.S. 104 (1972), because that case did not involve protected speech. The defendant committed disorderly conduct with "intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof," and he "had no purpose other than to cause inconvenience and annoyance" to an officer making a stop. *Id.* at 108–09. The defendant did not merely observe or record the stop but instead attempted "to engage the issuing officer in conversation," which undermined the state's "legitimate interest in enforcing its traffic laws . . . free from possible interference or interruption from bystanders." *Id.* at 109. Such activity is not "protected by the First Amendment." *Id.* Here, the Ordinance directly restricts the protected speech of recording events in a public forum and remains subject to the First Amendment.

B. The Ordinance Punishes One Who Records a Sideshow While Merely Being Present, and It Does Not Say that One Must Seek out or Remain at a Sideshow for a Prolonged Time.

The Ordinance punishes any member of the public who records a sideshow from within 200 feet, such as (1) a journalist covering it; (2) a resident protesting it; or (3) a passerby alerting law enforcement. Uncomfortable with those

consequences, the County attempts to rewrite the Ordinance by contending that an "individual present within 200 feet of the sideshow for another purpose—e.g., to wait for a bus—may observe and record the sideshow without violating the Ordinance," because the individual "is not knowingly present for the purpose of observing the sideshow." AAB at 54. That is not what the Ordinance says.

The Ordinance makes it unlawful for anyone other than peace officers or their agents "to knowingly be a spectator at a sideshow event" or related preparations. ACC § 10.40.030. "Spectator" means "any person who is present at a sideshow event" or related preparations "for the purpose of viewing, observing, watching, or witnessing the sideshow event as it progresses." ACC § 10.40.020. 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 related preparations. *Id.* (emphasis added). "Present" means *being* in that place, if only for a moment.[3] *Cf. People v. Foley*, 56 Cal. App. 5th 401, 407 (2020) (noting dictionary definition of "present" as "being, existing, or occurring at this time or now").

The Ordinance's text contains no requirement for how or why one arrived in the restricted zone or how long one must remain there. While one must have the

[3] The Ordinance does not require a crowd. A "[s]ideshow" requires only "one" driver with the purpose of attracting "one" spectator. ACC § 10.40.020. Proof of "[t]he number of people at the scene" is "not required." ACC § 10.40.040(A)(3).

"purpose" of observing the sideshow "as it progresses," ACC § 10.40.020, that language describes the required *intent* to observe the sideshow. It does not require that one must actually *be* present for any amount of time, nor does it require intent to observe for a prolonged time.

The Ordinance also does not require that one's *sole* purpose is to observe the sideshow. Therefore, it could apply if one has dual purposes, for example to observe the sideshow and wait for a bus. *See United States v. Degan*, 229 F.3d 553, 557 (6th Cir. 2000) (holding that when act "is motivated by two or more purposes," that "will not preclude conviction" if required "intent is also present").

Accordingly, the elements of violating the Ordinance are that one is at any moment (1) knowingly; (2) present; (3) within 200 feet of a sideshow or related preparations; (4) for the purpose of observing the sideshow as it progresses. The moment that one begins recording the sideshow—filming it or taking notes—one has the purpose of observing it as it progresses, if only for a short time. The Ordinance's text criminalizes any member of the public who records a sideshow because an "individual's recording of a sideshow" is *precisely* "enough

to determine whether the individual was knowingly present for the purpose of observing the sideshow."[4] AAB at 56.

The Ordinance does not require that one must "seek out" the sideshow. AAB at 36. It punishes mere *presence* at the sideshow, not traveling to it. Indeed, it says proof of a violation "is not required to include" evidence that "[t]he person charged drove or was transported to the scene." ACC § 10.40.040(A)(7). The County's position is exactly backwards. If Fermoso "travels to an intersection to record or observe a sunset and records a sideshow while he is there," AAB at 55, he violates the Ordinance, because he is *present* at the sideshow with the purpose to observe it at that moment. Conversely, if he "travels to an intersection" with the purpose of observing the sideshow, but "once there, he records the sunset instead," *id.*, he does not violate the Ordinance, because he is *not present* with the prohibited purpose. The prohibited intent is the purpose to observe the sideshow at the moment one is "present," not before that time. ACC § 10.40.020.

The Court may not "rewrite" the Ordinance's text to avoid its plain language, because "doing so would constitute a serious invasion of the legislative domain." *United States v. Stevens*, 559 U.S. 460, 481 (2010) (cleaned up).

[4] If the legislative history noting that spectators "post sideshow videos on social media" does not show intent "to deter speech about sideshows," AAB at 58, it confirms that the Ordinance's text prohibits recording sideshows.

The County's litigation position is not a "binding judicial or administrative construction" or "a well-understood and uniformly applied practice . . . that has virtually the force of a judicial construction." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 & n.11 (1988). Even if the County's argument qualifies as an attempted "limiting construction," a court cannot "insert missing terms" or "adopt an interpretation precluded by the plain language of the ordinance." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 946 (9th Cir. 2012).

The Ordinance's text is "not reasonably susceptible" to the County's construction, which "is wholly absent from the face of the Ordinance, and we cannot rewrite the Ordinance to supply the missing concept." *Id.* at 947. The Court may not presume the County will "adhere to standards absent from the ordinance's face." *Id.* (quoting *City of Lakewood*, 486 U.S. at 770); *see also Stevens*, 559 U.S. at 480 ("[T]he 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.").

Even if the County's construction were somehow correct, it would still present a First Amendment issue, because traveling to an event with the purpose of observing it remains an essential element of recording the event for anyone not already present. For example, a law that prohibited traveling to a protest for the

purpose of observing it would restrict the First Amendment right to record the protest, because one not already present cannot record an event without traveling to observe it.

C. The Government Cannot Destroy First Amendment Rights by Labeling Protected Speech as Unlawful Conduct.

The County cannot evade the First Amendment by the *ipse dixit* of asserting that recording a sideshow is "joining a sideshow." AAB at 76. First Amendment rights cannot be obliterated by "mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963); *see also Matsumoto v. Labrador*, 122 F.4th 787, 814 (9th Cir. 2024) ("Labeling protected speech as criminal speech cannot, by itself, make that speech integral to criminal conduct."); *PETA*, 60 F.4th at 830 (noting Supreme "Court has long been wary of legislative attempts to evade First Amendment review through formalistic 'labels'").

It is not enough to assert that sideshows are unlawful and dangerous events designed to attract attention. Sideshows are not constitutionally "unique" in that respect. AAB at 12. Other events can present similar concerns. Persons might stage a spectacular protest or crime to gain attention—for example, a burning in effigy, blockade, or bombing—but that cannot eliminate the First Amendment right to record such events in a public forum. Nor can the government strip that right by labeling persons recording the event as "participants." *Santopietro v. Howell*, 73

F.4th 1016, 1025 (9th Cir. 2023) (holding Constitution prohibits "inferences of possible criminal involvement based solely on an individual's First Amendment-protected activities and associations"); *Rice v. Paladin Enters.*, 128 F.3d 233, 266 (4th Cir. 1997) (reporting on crime "could never serve as a basis for aiding and abetting liability consistent with the First Amendment"); *cf. Juan H. v. Allen*, 408 F.3d 1262, 1276 (9th Cir. 2005) ("An aider and abettor must share in the principal's criminal purpose or intent," and "neither presence at the scene of a crime nor knowledge of, but failure to prevent it, is sufficient to establish aiding and abetting its commission.") (discussing California law). The Ordinance does not require that "spectators" must "encourage" or aid and abet a sideshow, AAB at 63, and a reporter covering a sideshow cannot be treated as an accomplice to it.

To hold that recording or reporting on crime inherently "perpetuates illegal activity," AAB at 40, would gut the First Amendment. The right to record events in a public forum—lawful or unlawful—plays an essential part in informing the community, bringing crimes or abuses to public attention, and supporting law enforcement. To adopt the County's position would immunize censorship and deprive the public of a critical source of news and information.

III. BY RESTRICTING PRESENCE WITH INTENT TO OBSERVE A SIDESHOW, THE ORDINANCE IMPOSES A CONTENT-BASED RESTRICTION ON RECORDING SIDESHOWS.

The Ordinance's text restricts speech based on content. To restrict people's "location" with "the purpose of observing the sideshow" is to prohibit recording the sideshow—and only the sideshow—from that location, and therefore the Ordinance restricts the "message they intend to convey" or "topic they intend to discuss" by making the recording. AAB at 52. If Fermoso records the sideshow from within 200 feet of it, he violates the Ordinance, because he has the purpose of observing the sideshow. If he records other events at the same time and place, he does not violate the Ordinance, because he does not have the prohibited purpose. Therefore, enforcement of the Ordinance against his speech is content based because it "pivots on the content of the recording."[5] *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184, 1204 (9th Cir. 2018).

The County's contentions to the contrary are meritless. First, it does not matter if the Ordinance is "motivated by the desire to prevent people from remaining near reckless driving." AAB at 34 n.6. Because the text of the Ordinance itself imposes a content-based restriction on speech, any "benign

[5] This appeal does not address whether the Ordinance could survive intermediate scrutiny if it were content neutral. Fermoso reserves the right to do so on remand if necessary. That issue requires a complete record to decide, for example, whether recording a sideshow from more than 200 feet away is a sufficient alternative.

motive" or "innocuous justification" cannot make it content neutral. *Reed v. Town of Gilbert*, 576 U.S. 155, 165–66 (2015).

Second, the Ordinance remains content based regardless of whether one may "advocate for or against sideshows" in the prohibited zone. AAB at 53. A content-based restriction on one form of speech, such as recording, cannot be salvaged because it allows other forms of speech about the same topic. *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (noting law would be content based if it prohibited speeches but not leaflets about abortion). To hold otherwise would allow the government to launder any content-based restriction by claiming "*some* manner of communication on the subject is allowed." *Id.* This Court has foreclosed that absurdity.[6]

Third, *Project Veritas* does not show the Ordinance is content neutral. The law at issue required notice "before oral conversations may be recorded," regardless of subject or topic, and thus it placed "neutral, content-agnostic limits on the circumstances under which an unannounced recording of a conversation may be made." *Project Veritas*, 125 F.4th at 938, 950. The law was "based on the

[6] The existence of "alternative channels to communicate information about sideshows," AAB at 25, cannot save a content-based restriction. Alternative channels are relevant only to the validity of a content-neutral restriction. *McCullen*, 573 U.S. at 477. Freedom of speech in a public forum cannot be abridged merely because "it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939).

circumstances in which a recording is made, not on the content of the conversation recorded." *Id.* at 951.

Here, enforcement of the Ordinance against Fermoso depends on the content of his recording. To record the sideshow is to have the prohibited purpose to observe it; to record another event or topic is to have a different purpose. Accordingly, the Ordinance is content based because it "applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 950 (quoting *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 69 (2022)). If the Ordinance prohibited presence near a sideshow for *any* purpose and thus prohibited making *any* recordings of *any* event or topic at that location, perhaps it would be content neutral. But that is not what it says. By its terms, it imposes a content-based restriction on speech, notwithstanding the County's protestations. *Meinecke v. City of Seattle*, 99 F.4th 514, 523 (9th Cir. 2024) ("[I]ncanting the words 'time,' 'place,' and 'manner' over a content-based restriction does not transmute it into one that is content neutral.").

IV. THE ORDINANCE LIKELY FAILS STRICT SCRUTINY.

The Ordinance does not meet strict scrutiny. The County can address harms of sideshows with other laws, and the Ordinance fails to protect the safety of people who are not "spectators" while punishing "spectators" at little or no risk of harm.

A. The County Cannot Restrict Speech Based on Content When It Can Prosecute Crimes Under Other Laws.

Any "dangerous behaviors associated with sideshows," AAB at 16, cannot justify restricting speech *about* sideshows, because those behaviors can be prevented or prosecuted "by implementing or enforcing laws that do not infringe on speech." *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1125 (9th Cir. 2020). The County cannot prevail on the mere assertion that "Bay Area jurisdictions have struggled to address sideshows." ER-103. "Given the vital First Amendment interests at stake, it is not enough for [the County] simply to say that other approaches have not worked." *McCullen*, 573 U.S. at 496.

Also, the County does not refute that jurisdictions such as San Diego have prevented sideshows through enforcing conspiracy laws, nor does it explain why it has not tried similar strategies or adopted a law targeting sideshows themselves rather than journalists or others who record them. AOB at 12, 45–46. Given the existence of "several less speech-restrictive alternatives to achieve public safety," the Ordinance fails strict scrutiny. *Meinecke*, 99 F.4th at 525.

If "California Highway Patrol" data show that "sideshow activity has increased" statewide, AAB at 17, that does not justify restricting speech about sideshows. Indeed, that is why sideshows are of public concern. Also, statewide numbers do not distinguish between jurisdictions that have proactively prevented

sideshows, such as San Diego, and "Bay Area jurisdictions." AAB at 18. In any event, the First Amendment right to report on crime cannot turn on the happenstance of whether crime is rising or falling.

The County contends "spectators" commit "lawless behaviors" such as "looting and destruction of public property." AAB at 63. But the Ordinance sweeps more broadly than necessary to address that problem because it punishes mere presence with intent to observe and record the sideshow. If someone commits the "unlawful behavior" of reckless driving or causing "property damage, looting, and gun violence," ER 103–04, they may be prosecuted for those crimes, but the Constitution prohibits any "inferences of possible criminal involvement based solely on an individual's First Amendment-protected activities" such as recording a sideshow. *Santopietro*, 73 F.4th at 1025.

B. The County's Assertions about Safety Are Untenable on Their Own Terms.

The Ordinance cannot be justified on the ground of protecting the safety of "spectators." The County admitted "[s]pecators *and other passersby* may be struck by cars" at a sideshow and "[s]pectators *and others* are also at risk of injury or death" from "behaviors associated with sideshows." ER-102 (emphasis added). But the Ordinance punishes only "spectators."

That makes no sense. The Ordinance prevents Fermoso from facing the sideshow to record it as a "spectator," but it does not prevent him from turning his back "to interview residents, passersby, spectators, or even drivers, and to record these interviews." AAB at 73. In either case, he is at similar "risk of injury and death." AAB at 63.

Likewise, whether or not he is a "spectator," his presence requires law enforcement to take his "safety into account in determining whether, when, and how" to respond to a sideshow. *Id*. In either case, his presence causes the same alleged safety problem, yet the Ordinance only prevents him from facing the sideshow to record it. That is absurd.

Accordingly, the Ordinance is "underinclusive and, consequently, not narrowly tailored" to protecting safety. *Rodgers v. Bryant*, 942 F.3d 451, 457 (8th Cir. 2019). *Rodgers* cannot be distinguished. In that case, the law at issue was unconstitutional because it prohibited "charitable solicitation" but not "political or commercial" solicitation on or near roads, although each entailed similar risks of "traffic hazard or impediment." *Id.* Here, the Ordinance is unconstitutional because it prohibits recording the sideshow but not other events at the same time and place, although each entails similar risks.

The Ordinance is thus fatally underinclusive with respect to the asserted interest in preventing "individuals from remaining in close proximity to reckless

driving." AAB at 64; *see Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 451 (2015) ("Underinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*."); *Brown*, 564 U.S. at 802 (holding restriction on children's access to violent video games was "underinclusive when judged against its asserted justification" because it did not reach other portrayals of violence and allowed adult relatives to give violent video games to children); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 105 (1979) (holding restriction on publishing "names of youths charged in a juvenile proceeding" was unconstitutional where "it does not accomplish its stated purpose" because it applied only to newspapers, not "electronic media" such as "radio stations"); *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1228–29 (9th Cir. 2019) (noting "underinclusivity may show that the law does not in fact advance the state's compelling interest" and holding content-based restriction on political robocalls was unconstitutional where "political campaign" robocalls were not "inherently more intrusive" than robocalls from "apolitical nonprofit entity").

The County asserts "spectators are at greater risk than those present for other reasons," because "having sought out the sideshow, they are more likely to remain at the scene despite the dangers." AAB at 71. However, the Ordinance's text contains no requirement that a "spectator" must be a "thrill-seeker" who is more

likely to remain at a sideshow or less "likely to step back from the intersection" than anyone else. *Id.* The Ordinance therefore sweeps more broadly than necessary to address the County's asserted interest.

The Ordinance is also "seriously overinclusive" with respect to safety because it punishes persons recording the sideshow from within 200 feet who are not at significant risk. *Brown*, 564 U.S. at 805. The Ordinance says only that one must be "present" within 200 feet of a sideshow. ACC § 10.40.020. It does not say "present outdoors." The Ordinance therefore criminalizes persons who record a sideshow from inside a building within 200 feet of the sideshow because they would be "present" with the purpose of observing the sideshow. And if persons inside a building who are not recording the sideshow are at risk, the Ordinance does nothing to protect them.

If the County contends a content-based restriction is valid because it "restricts less speech" than it could, AAB at 70 (quoting *McCullen*, 573 U.S. at 482), that would be meritless. By definition, a content-based restriction covers less speech than a content-neutral restriction. That is why a content-based restriction is unconstitutional—it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. It would turn the First Amendment on its head to say a content-based restriction could be valid because it is narrower than a content-neutral restriction.

The County cannot salvage a content-based restriction by reiterating that "the Ordinance does not penalize spectators for speech or expressive conduct." AAB at 71. As explained above, the Ordinance punishes the protected speech of recording a sideshow.

For these reasons, Fermoso is likely to prevail on the merits. "Given the free speech protections at issue," the "remaining requirements for injunctive relief" are satisfied, and there is no need for "the district court to assess the likelihood of irreparable injury and to balance the equities." *Klein v. City of San Clemente*, 584 F.3d 1196, 1207 (9th Cir. 2009).

CONCLUSION

For the foregoing reasons, the district court's order should be reversed with directions to enter a preliminary injunction prohibiting enforcement of the Ordinance against Fermoso's recording of sideshows.

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Respectfully submitted,

FIRST AMENDMENT COALITION

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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