Docket No. 24-6814

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE ANTONIO GARCIA
Plaintiff-Appellant,

vs.

COUNTY OF ALAMEDA and YESENIA SANCHEZ
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Case No. 3:24-CV-03997-rs

Opinion Filed September 4, 2025
John B. Owens, Mark J. Bennett, and Holly A. Thomas, Circuit Judges

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DEFENDANTS-APPELLEES' PETITION FOR REHEARING EN BANC

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RULE 40 STATEMENT

The panel's September 4 opinion ("Opinion") presents the following questions of exceptional importance:

1. Whether the First Amendment recognizes a sweeping right to observe any "matter of public interest."

2. Whether a law can be a content-based regulation of expression even if its application is unaffected by the message an individual intends to communicate or whether an individual intends to communicate at all.

INTRODUCTION

The County of Alameda found that attendance at sideshows—illegal exhibitions of dangerous stunt driving performed for a crowd—causes injury and death, including to spectators. The County thus adopted an ordinance prohibiting attendance at sideshows as a spectator. Plaintiff Jose Antonio Garcia, a reporter, argued the ordinance infringes on his First Amendment right to record matters of public interest because he must attend and observe sideshows to record them. Further, because the ordinance prohibits attendance at sideshows, Plaintiff argued that it is content-based. The panel agreed with Plaintiff, raising two significant questions about the scope of the First Amendment.

First, in concluding that Plaintiff's observation of sideshows is part of the process of recording them, the Opinion recognizes an expansive First Amendment right to *observe* any matter of public interest. This new right concerns an activity—observation—that is inherent in nearly everything humans do and that typically has no connection with expression. Moreover, the newly recognized right will render virtually any restriction

on *access* to events or places subject to First Amendment scrutiny because access is a necessary predicate to observation. Rehearing en banc is necessary to address whether the First Amendment recognizes such a sweeping right to observe.

Second, because the ordinance applies only to sideshows, the Opinion holds that it is content-based, even though it applies to individuals regardless of whether they intend to or actually do communicate a message. The ordinance allows speech on any topic, including sideshows. The prohibited conduct—joining the audience for a sideshow—does not communicate a message. By concluding that the ordinance is nevertheless content-based, the Opinion disregards the purpose of the content-based inquiry: to protect against suppression of speech about particular subjects or viewpoints. Rehearing en banc is necessary to address whether an ordinance that applies absent communication of a message may be considered content-based.

The Opinion jeopardizes commonsense measures to protect public safety. Under the Opinion, longstanding laws restricting attendance at dangerous events—not only sideshows, but animal fights, illegal boxing matches, and others—will all be subject to strict scrutiny and presumptively invalid. Moreover, the Opinion places this Circuit out of step with Supreme Court precedent and the majority of its fellow Circuits. Rehearing en banc is necessary to restore the First Amendment's proper scope.

BACKGROUND

Sideshows are exhibitions of dangerous driving for an audience. Cars spin in tight circles called donuts, usually—but not always—

narrowly missing crowds of watching teenagers and young adults. Excerpts of Record ("ER") 102 (nursing student killed by car doing donuts). Some drivers "ghost ride the whip," dancing on top of their moving cars, often with predictable consequences. The Associated Press, Today, *Hip-hop car stunt claims at least two lives* (Dec. 29, 2006), https://www.today.com/popculture/hip-hop-car-stunt-claims-least-two-lives-wbna16395647. In performing their stunts, drivers burn off their tires' traction, sending clouds of toxic smoke into the crowd. *See* ER-173 (clouds of smoke drift into nearby buildings). When police arrive, drivers and spectators speed from the scene, often colliding with spectators and others. ER-102. Beyond reckless driving, sideshows frequently involve dangerous activities including gun violence, looting, arson, and drug use. ER-102-03. Spectators face—and contribute to—significant risk of injury and death. *Id.*

In 2023, the County adopted an ordinance that prohibits participating in sideshows as a spectator ("Ordinance"). ER-101, 104. The Ordinance specifically prohibits knowingly being present within 200 feet of a sideshow or the preparations for a sideshow "for the purpose of viewing, observing, watching, or witnessing the sideshow event as it progresses." Alameda County Code ("ACC") §§ 10.40.020, 10.40.030.[1] The Ordinance emphasizes that spectators *participate* in sideshows: a "sideshow" is an event "*for one or more spectator(s)*." ACC § 10.40.020 (emphasis added).

[1] The County Code is available at https://library.municode.com/ca/alameda_county/codes/code_of_ordinances.

The Ordinance only prohibits *presence* "for the purpose" of participating in a sideshow as a spectator; it does not directly proscribe observation of a sideshow. It says nothing about recording, taking notes, or speaking about sideshows—or any other topic. And it does not prohibit publishing video of sideshows, including video recorded by spectators.

Plaintiff, a reporter who covers sideshows, challenged the Ordinance. ER-190. In seeking a preliminary injunction, Plaintiff asserted that the Ordinance is a content-based restriction on speech that fails strict scrutiny as applied to him. ER-147-51.

The district court denied the preliminary injunction. The court concluded the Ordinance is not subject to First Amendment review because it is "directed at conduct" and "locational activity"—attending a sideshow as a spectator—rather than speech production. ER-7-8. Its burden on speech is therefore only incidental. ER-8, 10. Alternatively, the court held, if the First Amendment applied, the Ordinance would satisfy intermediate scrutiny. The court concluded that the Ordinance is content-neutral because it "applies equally to silent spectators, spectators speaking or carrying signs addressing any topic and conveying any message, and spectators like [Plaintiff] who are preparing to speak in the future." ER-11-12. The court also concluded that the Ordinance was narrowly tailored to advance public safety by deterring spectating and decreasing risks posed by spectators. ER-13.

The panel reversed. Opinion at 4-5. The Opinion first concluded that observation is entitled to First Amendment protection as part of the process of creating speech. *Id.* at 11. The Opinion declined to apply the

line of cases holding that generally applicable regulations of non-expressive conduct with an incidental burden on speech are not subject to First Amendment review. *Id.* at 12 (discussing *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986)). Instead, it stated, "[e]ven if observation of a sideshow on its own terms is non-expressive conduct, because [Plaintiff] must observe sideshows in order to record them, the Ordinance 'burdens [his] First Amendment rights directly, not incidentally.'" *Id.* at 13 (quoting *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 603 (7th Cir. 2012)).

The Opinion also concluded that the Ordinance was content-based because it applies only to those present to attend *sideshows*. *Id.* at 15. The panel rejected the argument that the Ordinance proscribed attendance and not observation, stating that individuals present for purposes other than to observe sideshows are not liable. *Id.* at 16.

The Opinion concluded that the Ordinance failed strict scrutiny. *Id.* at 17-18. Because the Opinion found First Amendment harms, it directed the district court to enter a preliminary injunction. *Id.* at 19.

ARGUMENT

I. Whether the First Amendment recognizes a right to observe any matter of public interest is a question of exceptional importance.

By recognizing a First Amendment right to merely observe anything of public concern, the Opinion dramatically expands the First Amendment's scope. This Court recently recognized a First Amendment right to record newsworthy subjects. *Project Veritas v. Schmidt*, 125 F.4th 929, 943 (9th Cir. 2025) (en banc); *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203-04 (9th Cir. 2018). This Court has also previously

recognized a limited right to observe and record public police conduct as a necessary means of ensuring scrutiny of police activity. *Index Newspapers, LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 827 n.4 (9th Cir. 2020). But until now, this Court has not recognized a sweeping right to merely *observe* any occurrence of public concern.

The Opinion recognizes such a right by concluding that Plaintiff's "observation of sideshows is a predicate for, and thus inextricably intertwined with, his recording of those events." Opinion at 12. Because individuals have a right to record events, the Opinion's reasoning applies to observation of any occurrences individuals may want to record. And because the First Amendment does not favor cameras over pens or voices, the right to observe necessarily applies to occurrences individuals want to write or speak about.

As an initial matter, the Opinion need not have found a right to observe because the Ordinance only incidentally burdens any observation. The Ordinance here applies to those present for the purpose of joining the audience for sideshows, not to those speaking about sideshows, or even to those simply *observing* sideshows. Whether an individual actually observes the sideshow, let alone records it, is irrelevant to the Ordinance's application. *See* ACC §§ 10.40.020-.030. The Ordinance is thus a generally applicable regulation of non-expressive conduct—the intentional decision to attend a sideshow—that does not trigger First Amendment scrutiny, even if it incidentally burdens Plaintiff's speech. *See Arcara*, 478 U.S. at 706-07.

The Opinion concluded that the Ordinance *directly* burdens Plaintiff's speech because he must attend sideshows to observe and record them. Opinion at 13. However, the correct inquiry to identify whether the Ordinance directly or incidentally burdens speech is not whether observation is necessary to recording, but whether the Ordinance *targets* recording—i.e., whether it targets the expressive element of Plaintiff's proposed course of conduct. *Alvarez*, 679 F.3d at 602-03 (applying First Amendment scrutiny where a statute targeted use of a recording device; "[t]he law's legal sanction is directly leveled against the expressive element of an expressive activity. As such, the statute burdens First Amendment rights directly, not incidentally.").[2] Here, the Ordinance targets knowing attendance at a sideshow, not recording or even actually observing the sideshow. That targeted action is non-expressive. The Court's analysis should have ended there. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) ("[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."). The Opinion's recognition of a right to observe was thus unnecessary.

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[2] The Opinion states that observation is necessary to recording. Opinion at 13. But speeding is necessary to film a high-speed chase, setting outdoor fires is necessary to burn a flag in protest, and leaving home is necessary to operate a tattoo parlor. Yet courts have suggested that speeding laws, *see Arcara*, 478 U.S. at 708 (O'Connor, J., concurring), laws prohibiting outdoor fires, *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992), and COVID-19 stay-at-home orders, *Mitchell v. Newsom*, 509 F. Supp. 3d 1195, 1201-02 (C.D. Cal. 2020), do not trigger First Amendment scrutiny though they burden these expressive activities.

The Opinion's recognition of a right to observe is also erroneous. Observation, unlike recording, painting, printing, or other conduct that may form part of a speech creation process, is an omnipresent condition of human existence. We observe everything, all the time. A right to observe matters of public concern thus sweeps as broadly as a right to be *present* near such matters or an unlimited right to access matters of public concern to gather information. But observation is too far removed from actual expression to fall within the scope of the First Amendment, and there is no unlimited right to access information. In *Zemel v. Rusk*, 381 U.S. 1 (1965), the Supreme Court held,

> There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information … , but that does not make entry into the White House a First Amendment right. *The right to speak and publish does not carry with it the unrestrained right to gather information.*

Id. at 16-17 (emphasis added). The Opinion creates exactly that "unrestrained right."

In recognizing a right to observe, this Court would join a small minority of its fellow Circuit Courts. Only the Seventh and Tenth Circuits have recognized anything like a generalized right to observe unmoored from a right to observe official conduct. But even those Circuits' decisions addressed laws that directly *targeted* speech. *Brown v. Kemp*, 86 F.4th 745, 780 (7th Cir. 2023) (the law "was specifically intended to target the expressive activit[y] of … anti-hunting advocates," including their video recordings); *W. Watershed Project v. Michael*, 869 F.3d 1189, 1197 (10th

Cir. 2017) (the law singled out for differential treatment "individuals who create speech"). In contrast, the Supreme Court has suggested that no generalized right to observe exists. *Colten v. Kentucky*, 407 U.S. 104, 109-10 (1972) (holding that plaintiff arrested for disobeying a police officer's move-on order in a dangerous roadside strip "had no constitutional right to observe the issuance of a traffic ticket or to engage the issuing officer in conversation at that time"). Other circuits have likewise declined to recognize such a right. *Nat'l Press Photographers Ass'n v. McCraw*, 90 F.4th 770, 787-88 (5th Cir. 2024) (First Amendment scrutiny does not apply to a law prohibiting observation of certain facilities by drone, despite the argument that the law "*necessarily* prohibits photojournalists from capturing [aerial] images" of those facilities); *Molina v. City of St. Louis, Mo.*, 59 F.4th 334, 340 n.2 (8th Cir. 2023) ("It is one thing to conclude that officers cannot arrest someone … watching as they do their job.... But it is another matter to say that watching is itself expressive. Expressive of what?"). The Opinion is out of step with *Colten* and the majority of the circuit courts.

The Opinion's recognition of a broad right to observe also threatens to displace other First Amendment doctrines. For example, this Court employs a two-part test to identify "whether a member of the public has a First Amendment right to access a particular place and process," including in a public forum. *Index Newspapers*, 977 F.3d at 829 (citing *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*")). Under the *Press-Enterprise II* test, the court asks "'[1] whether the place and process have historically been open to the

press and general public' and [2] 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.* (quoting *Press-Enterprise II*, 478 U.S. at 8). If both questions are answered yes, a qualified right of access exists. *Id.* Under the Opinion, *Press-Enterprise II* is no longer necessary. Following the Opinion's reasoning, if an event is of "public concern," then the public has a First Amendment right of access to observe it.

This Court's application of *Press-Enterprise II* in *Index Newspapers* shows how the Opinion would effectively moot the *Press-Enterprise II* analysis. *Index Newspapers* found a qualified First Amendment right to access protests because (1) protests are expressive, (2) public protests and the law enforcement response have been traditionally open to the public, and (3) the press has an important role in holding government accountable and discouraging its misconduct. 977 F.3d at 830-31. By contrast, no party has claimed that sideshows are expressive activities, dangerous crime scenes have not been traditionally open to the public, and the Ordinance does not limit observation of the law enforcement response to sideshows in any way. In finding a First Amendment right to observe events of public concern, the Opinion swallows key differences between the federal government's attempts to bar journalists from covering protest activity in *Index Newspapers* and the County's efforts to deter spectators from proximity to dangerous, non-expressive illegal activity.

In practical effect, the Opinion's recognition of a right to observe will multiply the challenges facing state and local governments. The Opinion obviously threatens ordinances similar to the County's in

numerous jurisdictions, including six of California's seven largest cities. *See* City of Los Angeles Municipal Code § 47.15; City of San Diego Municipal Code § 52.5203; City of San Jose Code of Ordinances § 10.50.020; City of Fresno Code of Ordinances § 9-2610; City of Sacramento Code of Ordinances §§ 10.34.010 et seq.; City of Long Beach Municipal Code §§ 10.82.010 et seq. The Opinion also throws open the door to challenges to long-standing and ubiquitous laws that prohibit attendance at other illegal events, such as animal fights or illegal boxing matches.[3]

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[3] *See, e.g.*, 7 U.S.C. § 2156(a)(2) ("knowingly attend" animal fights); Cal. Penal Code § 413 ("willfully present as spectator at" illegal boxing match), § 597.5 ("knowingly present, as a spectator" at dog fight), 597c ("knowingly present as a spectator" at animal fight); Alaska Stat. Ann. § 11.61.145(a)(3) ("attends" animal fight); Ark. Code Ann. § 5-62-120 ("[w]itnesses an animal fight"); Conn. Gen. Stat. Ann. § 53-247(c) ("knowingly … acts as … spectator" at animal fight); (Fla. Stat. Ann. § 828.122(h) ("attending" animal fight); Ga. Code Ann. § 16-12-37(c) ("knowingly present only as a spectator" at dog fight); Ind. Code Ann. § 35-46-3-10 ("knowingly or intentionally attends" animal fight); Md. Code Ann., Crim. Law § 10-605(b) ("knowingly attend as a spectator" a cockfight); Miss. Code Ann. § 97-41-19(2) ("present, as a spectator" at dog fight); Mo. Ann. Stat. § 578.026 ("knowingly present, as a spectator" at dog fight), § 578.173 ("[k]nowingly attends" animal fight); Nev. Rev. Stat. Ann. § 574.070(3)(a) ("[k]nowingly attend" animal fight); N.J. Stat. Ann. § 4:22-24(a)(2) ("[b]e present and witness" animal fight), § 2C:33-31(a)(5) (knowingly "is present and witnesses" dog fight); N.Y. Agric. & Mkts. Law § 351(5)(b) ("knowing presence as a spectator" at animal fights); N.C. Gen. Stat. Ann. § 14-362 ("participates as a spectator" at cockfight), § 14-362.1(c) ("participates as a spectator" at animal fight); § 14-362.2(c) ("participates as a spectator" at dog fight); Ohio Rev. Code Ann. § 959.15(C) ("knowingly witness[ ]" animal fights); Or. Rev. Stat. Ann. § 167.355(1)(b) ("present as a spectator" at animal fight); 18 Pa. Cons. Stat. Ann. § 5543(6) ("attends an animal fight as a spectator"); P.R. Laws Ann. Tit. 15, § 301e ("takes part" in illegal cockfight as "spectator"); Tenn. Code

Because of the Opinion's conclusion that a law prohibiting attendance at a particular event is content-based, these laws will almost certainly be subject to strict scrutiny and presumptively invalid. This expansion of First Amendment law to encompass bans on attending animal fights, for example, will put this Court at odds with the Supreme Court's recent admonition that strict scrutiny "cannot apply to laws … which are traditional, widespread, and not thought to raise a significant First Amendment issue." *Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291, 2310 (2025).

The Opinion's expansion of First Amendment law to recognize a right to observe will make it more difficult for local governments to protect basic public safety from dangerous and illegal events that are encouraged by spectators. Spectators are not generally deterred by laws targeting the illegal conduct their attention encourages. Sideshow spectators attending on foot would not generally be deterred by laws targeting reckless driving. *See* ER-13. Nor would illegal boxing spectators be deterred by laws prohibiting fighting, or illegal fireworks spectators by laws penalizing setting off explosives. Spectators do not undertake these

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Ann. § 39-14-203(a)(4) ("Be knowingly present, as a spectator," at animal fight); Tex. Penal Code Ann. § 42.10(a)(6) ("attends as spectator" a dog fight); Utah Code Ann. § 76-13-206(2)(a) (knowingly "present as a spectator" at a dog fight), § 76-13-208 (knowingly present… as a spectator" at animal fight); Va. Code Ann. § 3.2-6571(A)(2) ("[a]ttend" animal fight); Vt. Stat. Ann. tit. 13, § 352(6) ("Acts as … spectator" at animal fights); Wash. Rev. Code Ann. § 16.52.117(1)(b) ("is a spectator of" animal fights); W. Va. Code Ann. § 61-8-19b(a) ("knowingly attend" animal fight); Wis. Stat. Ann. § 951.08(3) ("intentionally be a spectator" at an animal fight).

prohibited activities. But these activities are typically performed *for spectators*. By hindering local governments' ability to deter spectators, even though those spectators contribute to threats to public safety, ER-104, the Opinion removes a tool that could save lives.

II. The Ordinance's application is unaffected by the message an individual intends to communicate or whether an individual intends to communicate at all. Whether such a law can be a content-based regulation of expression is a question of exceptional importance.

In addition to recognizing a right to observe, the Opinion expands the First Amendment by holding that a law may be content-based even when its application is unchanged regardless of whether an individual intends to or does communicate a message. The Opinion concludes that the Ordinance is content-based because it targets presence related to "only one topic, sideshows," while allowing presence in the same location for other purposes. Opinion at 15. The Opinion rejects the County's argument that the Ordinance applies to presence, and not speech, because those present for purposes other than observing sideshows are not liable. *Id.* at 16.

The Opinion erroneously conflates the conscious decision to join a sideshow audience with mere observation of a sideshow. The Ordinance does not punish observation of sideshows. Rather, assuming *arguendo* that the Ordinance regulates expression, the Ordinance regulates the time, place, and manner of expression by prohibiting an individual from being present within 200 feet of a sideshow or preparations for one with intent to join the audience. The Ordinance applies regardless of whether

individuals with that intent actually observe the sideshow, let alone speak about sideshows or any other topic. Conversely, as long as a person near a sideshow does *not* intentionally choose to attend the event, the Ordinance does not apply to them no matter what they speak about. In short, the Ordinance's application does not depend "on what [individuals] say" or whether they say anything at all. *McCullen v. Coakley*, 573 U.S. 464, 479-80 (2014). Rather, the Ordinance applies even-handedly based on an individual's circumstances—i.e., their location and intent. When a law "draws a line based on the surrounding factual situation, not based on the content of expression," it is content-neutral. *Porter v. Martinez*, 68 F.4th 429, 441 (9th Cir. 2023) (regulation prohibiting honking a car horn absent a public safety hazard is content-neutral, notwithstanding that plaintiff honked her horn to support a political protest). That is so even if it "may disproportionately affect speech on certain topics" because of where it applies. *McCullen*, 573 U.S. at 480 (holding regulation of presence in proximity to abortion clinics not content-based).

In holding that a law that applies regardless of whether a message is communicated can be content-based, the Opinion deviates from the core principle that the purpose of the content-based analysis is to prevent government suppression of speech about a particular topic. *Project Veritas*, 125 F.4th at 946-47. The Ordinance has nothing to do with suppression of speech about sideshows. As long as an individual is not present near a sideshow to join the audience for that event, he or she may speak about sideshows, about soccer, or about sardines and not be liable under the Ordinance. Conversely, individuals who violate the Ordinance

are liable because of their presence and intent, not because of anything they say. Instead of speech suppression, the Ordinance's purpose is public safety—protecting spectators and others from increased risks of harm associated with spectating behavior.

The Opinion, however, treats the Ordinance the same as speech-suppressive laws. In doing so, the Opinion will broadly restrict local governments' ability to protect public safety from hazards associated with attendance at specified dangerous events. *See* Section I, *supra* (discussing laws prohibiting attendance of animal fights, illegal boxing matches, etc.).

Ironically, the Opinion may encourage local governments to protect public safety by burdening *more* speech. The Opinion suggests that a law prohibiting *all* presence near a particular occurrence may be content-neutral. Opinion at 16 (citing *McCullen* 573 U.S. at 479-80). Rather than adopting the Ordinance—which permits abundant speech near sideshows, including speech about sideshows—the County could have adopted a law prohibiting knowing presence near a sideshow for *any* purpose. Such a law would prevent speech about any subject within the affected zone. Under *McCullen*, that law would plainly be content-neutral. The Opinion, however, would make the Ordinance—but not a more restrictive law—presumptively invalid. Particularly where, as here, enforcement of a law does not relate to the communication of any message, let alone a viewpoint or topic, the Court should not apply the First Amendment in a manner that would encourage the suppression of more speech.

CONCLUSION

Rehearing en banc is necessary to restore the scope of the First Amendment to its previously established bounds. The County respectfully requests that an en banc panel of this Court reconsider Plaintiff's appeal and hold that the First Amendment does not recognize a right to merely observe matters of public concern. The County further requests that the en banc panel clarify that a law that applies based on an individual's circumstances, regardless of whether that individual intends to or does create speech, is content-neutral.

DATED: October 2, 2025 SHUTE, MIHALY & WEINBERGER LLP

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 24-6814

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APPENDIX A
PANEL OPINION

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE ANTONIO GARCIA, *Plaintiff - Appellant*, v. COUNTY OF ALAMEDA; YESENIA SANCHEZ, *Defendants - Appellees*.	No. 24-6814 D.C. No. 3:24-cv-03997-RS OPINION

Appeal from the United States District Court
for the Northern District of California
Richard Seeborg, Chief District Judge, Presiding

Argued and Submitted May 15, 2025
Pasadena, California

Filed September 4, 2025

Before: John B. Owens, Mark J. Bennett, and Holly A. Thomas, Circuit Judges.

Opinion by Judge H.A. Thomas

SUMMARY*

First Amendment

The panel reversed the district court's denial of a preliminary injunction and remanded with instructions to enter a preliminary injunction in favor of Jose Garcia, a reporter challenging the County of Alameda's ordinance prohibiting knowingly spectating a sideshow event conducted on a public street or highway from within 200 feet of that event.

The panel first held that Garcia had standing because his self-censorship satisfied Article III's injury-in-fact requirement.

The panel held that Garcia had shown a likelihood of success on the merits of his First Amendment as-applied challenge. The First Amendment protects Garcia's newsgathering and reporting activities, including recording events. Garcia's observation of sideshows is a predicate for, and thus inextricably intertwined with, his recording of those events. The County's prohibition on knowingly spectating a sideshow is content based because it targets only one topic, sideshows, making it a misdemeanor for any person to be present within 200 feet of a sideshow for the purpose of spectating the event. As a content-based restriction, the Ordinance is subject to strict scrutiny. The Ordinance fails strict scrutiny because the County has existing, less restrictive alternatives that address its compelling interest in public safety. Moreover, the Ordinance is underinclusive

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

because it prohibits only spectating within 200 feet of a sideshow while permitting other activities within that 200-foot radius.

Addressing the remaining preliminary injunction factors, the panel held that (1) Garcia was likely to suffer irreparable harm because loss of First Amendment freedoms constitutes irreparable harm, and (2) the balance of equities tips in Garcia's favor and issuance of an injunction is in the public interest.

COUNSEL

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Grayson Clary, Mara Gassmann, and Renee M. Griffin, Reporters Committee for Freedom of the Press, Washington, D.C., for Amici Curiae the Reporters Committee for Freedom of the Press and Los Angeles Times Communications LLC.

OPINION

H.A. THOMAS, Circuit Judge:

Driven by concerns over unmanageable crowds, property damage, noise pollution, garbage, firearms use, and reckless driving under the influence of drugs and alcohol, the Board of Supervisors of the County of Alameda, California ("County") adopted an ordinance prohibiting any person from knowingly spectating a sideshow event conducted on a public street or highway from within 200 feet of that event. Possible penalties include both imprisonment and a monetary fine. In this pre-enforcement suit, Jose Antonio Garcia, a reporter who writes about sideshows for *The Oaklandside* under the pen name Jose Fermoso, raises a First Amendment challenge to the County's prohibition as applied to his reporting activities. Although, prior to the law's passage, Garcia regularly reported on sideshows and planned to conduct on-site reporting about such events, he cancelled those plans after the ordinance went into effect for fear of citation, arrest, and criminal prosecution.

The district court denied Garcia's motion for a preliminary injunction, concluding that the First Amendment did not apply to his newsgathering and reporting activities. In the alternative, the court determined that the County's prohibition on knowingly spectating sideshows was content neutral and survived intermediate scrutiny.

We disagree. The First Amendment protects Garcia's newsgathering and reporting activities. And the County's prohibition on knowingly spectating a sideshow is content based and fails strict scrutiny. Garcia has clearly demonstrated that he is likely to succeed on the merits of his

as-applied challenge, 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 the issuance of an injunction is in the public interest. We therefore reverse the district court's denial of a preliminary injunction on Garcia's as applied challenge, and remand with instructions to enter a preliminary injunction in favor of Garcia.

I.

A.

Garcia is a reporter who covers road safety, transportation, and public health topics for *The Oaklandside*, a nonprofit journalism platform. As part of his work, Garcia reports on sideshows, "controversial event[s] where drivers take over city intersections with their cars as they skid in circles while performing stunts." Garcia relies "on photographs, as well as video and audio recordings, in order to gather news and information and keep the public informed." It is important for Garcia to be able to "photograph, film, and record audio of the [sideshow] events, within 200 feet of the intersections where they occur," in order "to convey adequately detailed visual and auditory context that can enhance readers' comprehension of the matters reported."

In 2023, the County adopted Ordinance No. 2023-31 ("Ordinance"), which makes it a misdemeanor for "any person to knowingly be a spectator at a sideshow event conducted on a public street or highway" or for "any person to knowingly be a spectator at the location of preparations for a sideshow event on a public street or highway." Alameda County Code ("ACC") § 10.40.030(A)–(B). A violation of the Ordinance is "punishable by imprisonment

not exceeding three months or by fine not exceeding one thousand dollars ($1,000.00) or by both." *Id.* § 10.40.050.

The Ordinance defines a "sideshow" 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." *Id.* § 10.40.020. 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." *Id.* 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." *Id.*

In adopting the Ordinance, the County found that sideshows "cause significant damage" to infrastructure and "create an unsafe environment" due to reckless driving and attendees who are "under the influence of drugs and alcohol." *Id.* § 10.40.10(A), (C) (findings). The County also found that sideshows have been "associated with the discharge of firearms" and cause "damage to vehicles and private and public property, reduced air quality due to the smoke released by burning rubber tires, noise pollution, and unmanageable crowds that leave behind garbage." *Id.* § 10.40.10(C), (D). The County further found that "vehicles at sideshows have caused great bodily injury and death to spectators." *Id.* § 10.40.10(F).

Before the County adopted the Ordinance, Garcia had published an article in *The Oaklandside* mapping every report of a sideshow made to Oakland police from January 2019 to November 2022. After enjoying a substantial public

response to his reporting, Garcia planned to conduct on-site reporting on sideshows, including by personally observing and recording sideshows in Oakland and unincorporated Alameda County. But Garcia cancelled these plans after the County's passage of the Ordinance. Perceiving that the definition of "spectator" in the Ordinance applied to the type of on-site reporting activities he planned to conduct, he "feared citation, arrest, and criminal prosecution" if he continued as planned. As a result, Garcia alleges that he has been "unable to engage in effective firsthand observation" and recording of Alameda County sideshows—which, despite passage of the Ordinance, continue to occur regularly.

B.

In July 2024, Garcia filed a complaint asserting that the Ordinance violates the First Amendment facially and as applied to his reporting activities. He subsequently sought a preliminary injunction on his as-applied challenge, "prohibiting the County from enforcing the Ordinance against him for observing, recording, or reporting on sideshows or related preparations in his capacity as a reporter."

The district court denied Garcia's motion. *See Garcia v. County of Alameda*, No. 24-cv-03997-RS, 2024 WL 4476659, at *7 (N.D. Cal. Oct. 11, 2024). Although the court found that Garcia had standing to pursue his claim, it held that the First Amendment did not apply to Garcia's case. *Id.* at *2–5. The court concluded that there is a First Amendment right to film matters of public interest, and that "recording is itself an inherently expressive activity," but the court found that Garcia's case did not involve an anti-recording component because the Ordinance did not specifically

prohibit the act of recording a sideshow. *Id.* at *4–5 (citation omitted). And the court found that the conduct the Ordinance did prohibit—knowingly being present for the purpose of observing a sideshow—was "less about speech production and more about locational activity," which was "not conduct with a significantly expressive element." *Id.* at *4. In the alternative, the court determined that the Ordinance is content neutral and survives intermediate scrutiny. *Id.* at *5–7. The court reasoned that the Ordinance is "concerned with the location and purpose of an actor, not whether that actor speaks (and certainly not the content of any speech that occurs)." *Id.* at *5.

II.

We have jurisdiction under 28 U.S.C. § 1292(a)(1). "We review the denial of a preliminary injunction for abuse of discretion, but we review *de novo* the underlying issues of law." *Meinecke v. City of Seattle*, 99 F.4th 514, 520 (9th Cir. 2024). We review *de novo* questions of standing. *Isaacson v. Mayes*, 84 F.4th 1089, 1095 (9th Cir. 2023).

III.

We first consider whether Garcia has alleged an injury-in-fact sufficient to establish Article III standing.

"[T]o satisfy Article III's standing requirements, a plaintiff must show (1) [he] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Jones v. L.A. Cent. Plaza LLC*, 74 F.4th 1053, 1057 (9th Cir. 2023) (first alteration in original) (quoting *Friends of the Earth,*

Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000)). To satisfy the injury-in-fact prong, a plaintiff must demonstrate "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). "[A] chilling of the exercise of First Amendment rights is, itself, a constitutionally sufficient injury." *Tingley v. Ferguson*, 47 F.4th 1055, 1067 (9th Cir. 2022) (quoting *Libertarian Party of L.A. Cnty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013)).

Although Garcia has not violated the Ordinance, he has been "forced to modify [his] speech and behavior to comply with" it by cancelling his plans to conduct on-site reporting at sideshow events. *See Ariz. Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003). Such "self-censorship" is sufficient to satisfy the injury-in-fact requirement, *id.*, and the County does not dispute that Garcia satisfies the remaining prongs of our standing analysis. The district court thus correctly determined that Garcia has standing.

IV.

We turn to whether Garcia is entitled to a preliminary injunction. "A preliminary injunction is an 'extraordinary' equitable remedy that is 'never awarded as of right.'" *Starbucks Corp. v. McKinney*, 602 U.S. 339, 345–46 (2024) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). To obtain a preliminary injunction, a plaintiff "must make a clear showing 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.'" *Id.* at 346 (quoting *Winter*, 555 U.S. at 20).

We begin with the likelihood of success on the merits, which is "the most important factor" in determining whether a preliminary injunction is warranted. *Meinecke*, 99 F.4th at 521. "An as-applied First Amendment challenge," such as Garcia brings here, "contends that a given statute or regulation is unconstitutional as it has been applied to a litigant's particular speech activity." *Legal Aid Servs. of Or. v. Legal Servs. Corp.*, 608 F.3d 1084, 1096 (9th Cir. 2010). Our analysis of whether Garcia has demonstrated a likelihood of success on the merits of his challenge proceeds in three steps: "First, we must decide whether the relevant speech 'is protected by the First Amendment'; second, 'we must identify the nature of the forum'; and third, 'we must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard.'" *Meinecke*, 99 F.4th at 521 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985)).

A.

We first consider whether Garcia's newsgathering and reporting activities constitute protected speech. "[A] government, including a municipal government vested with state authority, 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). "[P]ure speech is entitled to First Amendment protection unless it falls within one of the 'categories of speech . . . fully outside the protection of the First Amendment,'" none of which is at issue here. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058 (9th Cir. 2010) (second alteration in original) (quoting *United States v. Stevens*, 559 U.S. 460, 471 (2010)); *see also Counterman v. Colorado*, 600 U.S. 66, 73–74 (2023) (discussing unprotected categories of speech).

"The Supreme Court has recognized that newsgathering is an activity protected by the First Amendment." *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978) (citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)). And we have determined both that the First Amendment protects recording and photographing "matters of public interest," *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018), and that an organization's "recording of conversations in connection with its newsgathering activities is protected speech within the meaning of the First Amendment," *Project Veritas v. Schmidt*, 125 F.4th 929, 943 (9th Cir. 2025) (en banc).[1] These holdings compel the conclusion that Garcia's newsgathering activities—the "quintessential function of a reporter"—are protected by the First Amendment. *Safari Club Int'l v. Rudolph*, 862 F.3d 1113, 1125 (9th Cir. 2017).

The County argues that Garcia's "mere observation" of sideshows "is not expressive." But "[n]either the Supreme Court nor our court has ever drawn a distinction between the *process* of creating a form of pure speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded." *Project Veritas*, 125 F.4th at 944 (emphases added and omitted) (quoting *Anderson*, 621 F.3d at 1061); *see also Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018) ("It defies common sense to disaggregate the creation of the video from the video or audio recording itself.").[2] In other words, "[w]hether

[1] The County does not dispute that sideshows are a matter of public interest.

[2] We also explained in *Project Veritas*, however, that "*Wasden* did not conclude that every act of recording requires expressive decisions, nor

government regulation applies to creating, distributing, or consuming speech makes no difference" for purposes of our First Amendment analysis. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("[T]he creation and dissemination of information are speech within the meaning of the First Amendment.").

Here, Garcia's observation of sideshows is a predicate for, and thus inextricably intertwined with, his recording of those events. *See People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 829 (4th Cir. 2023) ("[S]cores of Supreme Court and circuit cases apply the First Amendment to safeguard the right to gather information as a predicate to speech."). If the County were permitted to carve out Garcia's observation of sideshows from his recording of those events, it could "effectively control or suppress speech by the simple expedient of restricting" a predicate for "the speech process rather than the end result." *Project Veritas*, 125 F.4th at 943 (quoting *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012)).

Citing the Supreme Court's decision in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), the County argues that *Project Veritas* is distinguishable because the County's restriction on the observation of sideshows "involves only incidental restriction of . . . speech." In *Arcara*, the Court upheld against a First Amendment challenge a nuisance statute used to authorize the closure of an adult bookstore on the grounds that the store was the site of ongoing illicit sexual activities. *See* 478 U.S. at 706–07. The Court held that

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that every act of recording implicates the First Amendment." 125 F.4th at 946.

"the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books." *Id.* at 707. The Court noted that its decision would be different if "the 'nonspeech' which drew sanction was intimately related to expressive conduct protected under the First Amendment." *Id.* at 706 n.3. But because operating an establishment where prostitution is ongoing "bears absolutely no connection to any expressive activity," the Court upheld the closure order. *Id.*

Arcara is irrelevant to this case. Although the Ordinance "may be described as directed at conduct," as applied to Garcia, "the conduct triggering coverage under the [Ordinance] consists of communicating a message." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010). Even if observation of a sideshow on its own terms is non-expressive conduct, because Garcia must observe sideshows in order to record them, the Ordinance "burdens [his] First Amendment rights directly, not incidentally." *Alvarez*, 679 F.3d at 603; *see also Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1070 n.4 (9th Cir. 2020) ("Even generally applicable laws can implicate First Amendment concerns . . . .").

The County further argues that if the panel agrees with Garcia, "a reporter could seek First Amendment review of speeding regulations preventing her from better filming car chases." But we have already made clear in *Project Veritas* that it is not the case that "any conduct related in some way to speech creation, however attenuated, is necessarily entitled to First Amendment protection." 125 F.4th at 944. "[W]e need not precisely delineate the extent and contours of First Amendment protection for each constituent act that comprises speech creation" to determine that Garcia's

conduct here—recording sideshows as a journalist for the purpose of reporting on them—falls under the ambit of the First Amendment. *Id.*

B.

We need not belabor the second step in our analysis of whether Garcia is likely to succeed on the merits of his claim, an examination of the nature of the forum at issue. The parties do not dispute that public streets are traditional public forums. *See ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1099 (9th Cir. 2003) ("The quintessential traditional public forums are sidewalks, streets, and parks."); *see also Camenzind v. Cal. Exposition & State Fair*, 84 F.4th 1102, 1108 (9th Cir. 2023) ("The First Amendment affords special protection to 'places which by long tradition or by government fiat have been devoted to assembly and debate.'" (quoting *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983))).

C.

We turn then to the final stage in our analysis of whether Garcia is likely to succeed on the merits of his claim, examining "whether the justifications for exclusion from the relevant forum satisfy the requisite standard." *Hubbard v. City of San Diego*, 139 F.4th 843, 851 (9th Cir. 2025) (quoting *Cornelius*, 473 U.S. at 797). It is true that "even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). But "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163; *see also Berger v.*

City of Seattle, 569 F.3d 1029, 1051 (9th Cir. 2009) (en banc) ("A regulation is content-based if . . . the regulation, by its very terms, singles out particular content for differential treatment.").

1.

The Ordinance is content based. It targets only one topic, sideshows, making it a misdemeanor for any person to be present within 200 feet of a sideshow for the purpose of spectating the event. ACC § 10.40.030(A); *id.* § 10.40.020. The County does not dispute that a person can observe or record any other topic within that same 200-foot radius as long as they are not "knowingly present to watch the sideshow." *See Reed*, 576 U.S. at 163 ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."); *see also Wasden*, 878 F.3d at 1204 (holding that because an anti-recording law "prohibits the filming of agricultural 'operations' but nothing else, its application explicitly pivots on the content of the recording"). A law that "require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred" in the manner required by the Ordinance here is content based. *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)); *cf. Project Veritas*, 125 F.4th at 950 ("A regulation may remain content neutral despite touching on content to distinguish between classes or types of speech—such as speech that constitutes solicitation or speech that draws neutral, location-based distinctions—so long as it does not discriminate on the basis of viewpoint or restrict discussion of an entire topic." (citations omitted)).

The County argues that "the Ordinance regulates *presence* in a particular location[,] . . . not speech." But this is incorrect. As discussed, the Ordinance does not apply to every person present within 200 feet of a sideshow. As the County has conceded, the Ordinance would not apply to Girl Scout troops who, innocent to a sideshow's occurrence, set up a table to sell cookies within 200 feet of a sideshow event. The Ordinance instead applies only to people present within that range who are knowing spectators of the sideshow. *Cf. McCullen*, 573 U.S. at 479–80 (holding that a statute creating a no-approach buffer zone around abortion clinics was content neutral where a person could "violate the [statute] merely by standing in [the] zone, without displaying a sign or uttering a word"). Because the Ordinance does not "require[] an examination of speech only in service of drawing neutral, location-based lines," it is not "agnostic as to content." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 69 (2022).

2.

Because the Ordinance is content based, it does not qualify as a valid time, place, and manner restriction, and is presumptively unconstitutional. *See Reed*, 576 U.S. at 163; *Berger*, 569 F.3d at 1036. We will uphold it only if the County meets its burden of showing that the Ordinance "furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 576 U.S. at 171 (quoting *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)). "To be narrowly drawn, a 'curtailment of free speech must be actually necessary to the solution.'" *Twitter, Inc. v. Garland*, 61 F.4th 686, 698 (9th Cir. 2023) (quoting *Brown*, 564 U.S. at 799). "If a less restrictive alternative would serve the Government's purpose, the

legislature must use that alternative." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000).

The Ordinance fails this analysis. Public safety is certainly a compelling interest, *see Meinecke*, 99 F.4th at 525, and the County cites important concerns about reckless driving, gun violence, illegal drug use, looting, destruction of public property, noise and air pollution, garbage, and traffic disruptions resulting from or accompanying sideshow events. But where a government "'has various other laws at its disposal that would allow it to achieve its stated interests while burdening little or no speech,' it fails to show that the law is the least restrictive means to protect its compelling interest." *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1126 (9th Cir. 2020) (quoting *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011) (en banc)). And, here, there are existing laws that address the County's stated concerns. *See, e.g.*, Cal. Penal Code §§ 187–89, 192 (murder or manslaughter); *id.* §§ 191.5, 192(c), 192.5 (vehicular manslaughter with or without intoxication); *id.* §§ 242–43, 245 (assault with a deadly weapon and battery); *id.* § 246.3 (discharge of firearms); *id.* § 374 (littering); *id.* § 415(2) (noise pollution); *id.* § 451 (arson); *id.* § 594 (vandalism and destroying infrastructure or other property); Cal. Veh. Code §§ 20001–02 (hit and run); *id.* § 22500 (blocking intersections); *id.* § 23103(a) (reckless driving in willful or wanton disregard for the safety of persons or property); *id.* § 23104 (reckless driving that proximately causes bodily injury or great bodily injury to a person other than the driver); *id.* § 23105 (reckless driving that injures a person other than the driver); *id.* §§ 23109, 23109.1, 23109.2 (speed contests with or without resulting injuries); *id.* § 23152 (driving under the influence

of drugs or alcohol); Cal. Penal Code § 182 (conspiracy to commit any of the foregoing offenses).

The Ordinance also "fail[s] as hopelessly underinclusive." *Reed*, 576 U.S. at 171. The County argues that "the Ordinance tries to stop people from placing themselves in the path of speeding cars, not to suppress speech about sideshows." Yet the County also acknowledges that, so long as they are not there to spectate, people can "ask for handouts," "advocate for fewer restrictions on sideshows," "stump for a candidate," or, yes, "sell girl scout cookies"—all within 200 feet of a sideshow. Indeed, the County concedes that even Garcia himself "may venture inside a 200-foot radius of a sideshow to interview residents, passersby, spectators, or even drivers, and to record these interviews."

The County contends that "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." But the County cites nothing in support of this argument, and there is no indication in the record that this is true. In particular, the County does not explain why people who might advocate for restrictions on sideshows or come to a sideshow to interview drivers would be any less likely to remain at the site of a sideshow than those there to participate in or observe the event. The lack of such evidence makes clear that the burden on speech imposed by the Ordinance is not "actually necessary to" solve the public safety problems associated with sideshows. *Brown*, 564 U.S. at 799. The Ordinance thus fails strict scrutiny, and Garcia has made a clear showing that he is likely to succeed on the merits of his as-applied First Amendment claim.

V.

We now consider the remaining *Winter* factors. "It is axiomatic that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 694 (9th Cir. 2023) (en banc) (alteration in original) (quoting *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020)). Because Garcia has demonstrated a likelihood of success on the merits of his First Amendment claim, he has satisfied the second *Winter* factor.

Garcia has also made a clear showing as to the last two *Winter* factors. "Where, as here, the party opposing injunctive relief is a government entity, the third and fourth factors—the balance of equities and the public interest—'merge.'" *Id.* at 695 (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). That Garcia "ha[s] raised serious First Amendment questions compels a finding that . . . the balance of hardships tips sharply in [his] favor." *Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (en banc) (second alteration in original) (quoting *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007)). And "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)).

VI.

Garcia is likely to prevail on his as-applied challenge to the County's prohibition on knowingly spectating sideshows. We therefore **REVERSE** the district court's denial of a preliminary injunction and **REMAND** with instructions to enter a preliminary injunction in favor of Garcia on his as-applied challenge.