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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

RED EYE JACKS SPORTS BAR INC. )  
dba CHEETAH'S NIGHTCLUB., )

Plaintiffs, )

v. )

CITY OF SAN DIEGO; SHELLEY )  
ZIMMERMAN, in her official capacity )  
as Chief of Police, and DOES 1-50, )

Defendants. )

Case No. 14-cv-00823-L (RBB)

**ORDER DENYING MOTION TO  
DISMISS FIRST AMENDED  
COMPLAINT**

Before the Court is Defendants' motion to dismiss for failure to state a claim. The motion has been fully briefed. Under Civil Local Rule 7.1.d.1, the Court determines this motion on the papers submitted without oral argument. For the reasons below, the Court **DENIES** Defendants' motion to dismiss.

**I. BACKGROUND**

The background of this case has been extensively recounted in the Court's previous Order. (Order Granting in Part First MTD, ECF No. 10.) Plaintiff Red Eye Jacks Sports Bar Inc. d.b.a. Cheetah's Nightclub ("Plaintiff"), operates a "nude entertainment business," as defined by San Diego Municipal Code § 33.602, located in San Diego. (First Am. Compl. ¶4 ECF No. 17.) On July 14, 2013 and March 6, 2014,

1 the vice unit of San Diego Police Department conducted inspections of Cheetah's that  
2 lasted four and two and a half hours respectively. (*Id.* ¶¶ 8, 10.)  
3 Plaintiff brought suit against the City of San Diego ("San Diego") and Shelley  
4 Zimmerman ("Zimmerman") in her official capacity as Chief of Police (collectively  
5 "Defendants"). Plaintiff alleged that the inspections violated its constitutional rights  
6 guaranteed by the First, Fourth, and Fourteenth Amendments. (*Id.* at 5-7.) Further,  
7 Plaintiff alleged that as a result of the inspections they have suffered a loss of business.  
8 (*Id.* ¶¶ 15-17.)

9 Defendants brought a motion to dismiss Plaintiff's Complaint. (First Motion to  
10 Dismiss ECF No. 3.) The Court granted the motion in part, with leave to amend. (Order  
11 Granting in Part First MTD at 10.) Plaintiff filed an amended complaint, and Defendants  
12 now move to dismiss the amended complaint. (FAC, ECF No. 17; MTD, ECF No. 18.)

13 Defendants argue that Plaintiff's claims are barred by the statute of limitations.  
14 (MTD at 6.) Defendants also contend that the statute at issue does not implicate the First  
15 Amendment and the inspections did not have any adverse effects on Plaintiff's First  
16 Amendment rights. (*Id.* at 7, 9.) Further, Defendants assert that the ratification claim  
17 and challenges under the Fourth and Fourteenth Amendments are inadequately pleaded.  
18 Plaintiff opposes the motion, maintaining that the statute of limitations has not run, their  
19 First Amendment rights were infringed, and their other claims are adequately pleaded.  
20 (Opp'n 2-4, 7, 9, 11, ECF No. 19.)

## 21 22 **II. LEGAL STANDARD**

### 23 **Rule 12(b)(6) - Motion to Dismiss - Failure to State a Claim**

24 The court must dismiss a cause of action for failure to state a claim upon which  
25 relief can be granted. FED. R. CIV. P. 12(b)(6). A motion to dismiss under Rule  
26 12(b)(6) tests the legal sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729,  
27 732 (9th Cir. 2001). The court must accept all allegations of material fact as true and  
28 construe them in light most favorable to the nonmoving party. *Cedars-Sinai Med. Ctr. v.*

1 *Nat'l League of Postmasters of U.S.*, 497 F.3d

2 972, 975 (9th Cir. 2007). Material allegations, even if doubtful in fact, are assumed to be  
3 true.

4 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). However, the court need not  
5 "necessarily assume the truth of legal conclusions merely because they are cast in the  
6 form of factual allegations." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136,  
7 1139 (9th Cir. 2003) (internal quotation marks omitted). In fact, the court does not need  
8 to accept any legal conclusions as true. *Ashcroft v. Iqbal*, 556 U.S. 662, -, 129 S. Ct.  
9 1937, 1949 (2009)

10 "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need  
11 detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his  
12 'entitlement to relief' requires more than labels and conclusions, and a formulaic  
13 recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555  
14 (internal citations omitted). Instead, the allegations in the complaint "must be enough to  
15 raise a right to relief above the speculative level." *Id.* Thus, "[t]o survive a motion to  
16 dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a  
17 claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*,  
18 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual  
19 content that allows the court to draw the reasonable inference that the defendant is liable  
20 for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability  
21 requirement,' but it asks for more than a sheer possibility that a defendant has acted  
22 unlawfully."

23 *Id.* A complaint may be dismissed as a matter of law either for lack of a cognizable legal  
24 theory or for insufficient facts under a cognizable theory. *Robertson v. Dean Witter*  
25 *Reynolds, Inc.*, 749  
26 F.2d 530, 534 (9th Cir. 1984).

27 Generally, courts may not consider material outside the complaint when ruling on  
28 a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542,

1 1555 n.19

2 (9th Cir. 1990). However, documents specifically identified in the complaint whose  
3 authenticity is not questioned by parties may also be considered. *Fecht v. Price Co.*, 70  
4 F.3d 1078, 1080 n.1

5 (9th Cir. 1995) (superseded by statutes on other grounds). Moreover, the court may  
6 consider the full text of those documents, even when the complaint quotes only selected  
7 portions. *Id.* It may also consider material properly subject to judicial notice without  
8 converting the motion into one for summary judgment. *Barron v. Reich*, 13 F.3d 1370,  
9 1377 (9th Cir. 1994).

### 10 11 **III. DISCUSSION**

#### 12 **A. Defendant's Request for Judicial Notice**

13 Defendant requests the Court take judicial notice of three documents: (1) excerpts  
14 from City Ordinance O-16822, (2) excerpts from City Ordinance O-18885, and (3)  
15 various San Diego Municipal Code provisions regarding adult entertainment business  
16 and nude entertainment businesses. (RJN 1-2, ECF No. 18-3). The Court may take  
17 notice of facts that are "not subject to reasonable dispute in that [they are] . . . capable of  
18 accurate and ready determination by resort to sources whose accuracy cannot be  
19 reasonably questioned." FED. R. EVID. 201(b)(2). Because Plaintiff does not object to  
20 these requests, and the documents are not subject to reasonable dispute, the Court  
21 **GRANTS IN PART** Defendant's RJN with respect to these documents.

22 Defendant also requests the Court take judicial notice of the following facts:

- 23 • "individuals in modern American society can change their hair color,  
24 style and length; eye color (with contact lenses); weight; body  
25 fat/muscle composition, and facial appearance (with makeup)";
- 26 • "individuals attempting to conceal their identities sometimes use false  
27 names or aliases;" and
- 28 • "a nude entertainer cannot change or conceal large ink tattoos on her

1 skin as easily as she can change her hair color, style and length, eye  
2 color; weight; body fat/muscle composition; and facial appearance."  
3 (RJN 2.) Plaintiff opposes these factual requests because "the alleged 'facts' are  
4 irrelevant at this stage of the proceedings because they go to the merits of Plaintiff's  
5 claims." (Opp'n 1 n. 1.) However, Plaintiff does not dispute the accuracy of these  
6 "facts." It is generally known that people can change their appearance and that  
7 individuals attempting to conceal their identities sometimes use false names or aliases, so  
8 the Court **GRANTS IN PART** Defendant's RJN with respect to these facts. However,  
9 the Court **DENIES IN PART** the RJN with respect to the alleged fact that it is not as  
10 easy to conceal a tattoo as it is to otherwise alter someone's appearance, as this is not  
11 generally known, nor does Defendant provide any explanation as to why this is true.  
12

### 13 **B. Plaintiff's Claims Are Not Time Barred**

14 Defendants first contend that Plaintiff's facial challenges under the First, Fourth,  
15 and Fourteenth Amendments are time barred.<sup>1</sup> (MTD 6, 13.) Plaintiff disagrees,  
16 suggesting that this issue has already been decided in a previous order and Defendants'  
17 cited authority is inappropriate. (Opp'n 2-3.) The Court agrees with Plaintiff.

18 The Court has previously ruled that the facial challenge on First Amendment  
19 grounds is not barred by the statute of limitations. (Order Granting in Part First MTD  
20 8-9.) The Court finds the same logic applies to Plaintiff's facial challenges under the  
21 Fourth and Fourteenth Amendments in claims one and four.

22 As explained in the Court's previous order, the Ninth Circuit doubts that a First  
23 Amendment facial challenge can ever be barred by a statute of limitations. *Maldonado v.*  
24 *Harris*, 370 F.3d 945, 955 (9th Cir. 2004). The Northern District of California has held  
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26 <sup>1</sup>Though Defendants' motion states that the facial and as-applied challenges under the First and  
27 Fourteenth Amendments in Plaintiff's first claim are time barred, the motion only discusses the facial  
28 challenges. In regards to Plaintiff's Fourth and Fourteenth amendment challenges in the fourth claim,  
Defendants' motion only makes a statute of limitations argument about the facial challenge. All three  
facial challenges are considered together.

1 that infringement of First Amendment rights results in ongoing harm that precludes a  
2 statute of limitations from taking effect. *Napa Valley Publishing Co. v. City of*  
3 *Calistoga*, 225 F. Supp. 2d 1176, 1184 (N.D. Cal. 2002). Here, like in *Maldonado* and  
4 *Napa*, Plaintiff alleges violations of their Fourth and Fourteenth Amendment rights,  
5 resulting in a continuous harm to Plaintiffs as long as they are subject to the statute.  
6 Therefore, the logic which was applied to the First Amendment facial challenge in the  
7 Court's earlier order extends to the Fourth and Fourteenth Amendment facial challenges  
8 here.

9 Further, the cases on which Defendants' rely to assert that a statute of limitations  
10 begins running at the enactment of the ordinance involve the Takings Clause of the Fifth  
11 Amendment rather than any of the amendments at issue here. *Levald v. City of Palm*  
12 *Desert*, 998 F.2d 680 (9th Cir. 1993); *Colony Cove Properties, LLC v. City of Carson*,  
13 640 F.3d 948 (9th Cir. 2011). In *Levald*, the Ninth Circuit drew a clear distinction  
14 between takings claims and other kinds of harm and held that unlike other constitutional  
15 violations, takings are a discrete single harm. *Levald*, 998 F.2d at 688. Therefore,  
16 precedent based on Takings Clause jurisprudence does not apply here.

17 For the foregoing reasons, the Court finds that the facial challenges under the  
18 First, Fourth, and Fourteenth Amendments are not time barred. Therefore Defendant's  
19 motion on this basis is **DENIED**.

20  
21 **C. Plaintiff's First Amended Complaint is Sufficient to Allege that SDMC**  
22 **§ 33.0103 May Have First Amendment Implications**

23 Defendants next argue that Plaintiff has not made allegations sufficient to  
24 implicate the First Amendment for either the facial or as-applied challenge to SDMC §  
25 33.0103. (Motion to Dismiss 7, 9.) Plaintiff responds that they have made valid  
26 challenges both to the facial unconstitutionality of SDMC § 33.0103 and to the  
27 unconstitutional nature of the specific inspections carried out by the San Diego Police.  
28 (Opp'n 6.) The Court agrees with Plaintiff.

1           The threshold question in a First Amendment free speech case is whether the  
2 challenged law is content-based, that is, whether the law regulates speech based on the  
3 ideas or messages it expresses. "Content-based regulations are presumptively invalid."  
4 *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).  
5 On the other hand, government is given much more leeway when its content-neutral  
6 regulations happen to limit some speech. *See United States v. Wilson*, 154 F.3d 658, 663  
7 (7th Cir.1998) ("If a statute is content-based, it must survive strict scrutiny to be  
8 constitutional. If a statute is content-neutral, it is subject only to intermediate scrutiny.").  
9 Therefore, government may impose reasonable time, place, and manner restrictions if  
10 they are "justified without reference to the content of the regulated speech." *Ward v.*  
11 *Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)  
12 (internal quotation marks omitted).

13           The Supreme Court applies a specific analysis to the category of speech at issue  
14 here: sexually explicit, non-obscene materials. Because this speech is not obscene,  
15 government may not simply proscribe it. *See Schad v. Borough of Mt. Ephraim*, 452  
16 U.S. 61, 66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("[A]n entertainment program [may  
17 not] be prohibited solely because it displays the nude human figure."). But because these  
18 materials border on the obscene, they are entitled to less First Amendment protection  
19 than non-sexually-explicit materials. *See Young v. American Mini Theatres, Inc.*, 427  
20 U.S. 50, 70-71 (1976) (plurality) ("Even though the First Amendment protects  
21 communication in this area from total suppression, we hold that the State may  
22 legitimately use the content of these materials as the basis for placing them in a different  
23 classification from other motion pictures."). So in *City of Renton v. Playtime Theatres,*  
24 *Inc.*, 475 U.S. 41, 49 (1986), the Court held that "at least with respect to businesses that  
25 purvey sexually explicit materials, zoning ordinances designed to combat the undesirable  
26 secondary effects of such businesses are to be reviewed under the standards applicable to  
27 'content-neutral' time, place, and manner regulations." (Footnote omitted.)

28           In *Renton*, the Supreme Court considered a constitutional challenge to a zoning

1 ordinance prohibiting adult movie theaters from locating within 1,000 feet of any  
2 residential zone. 475 U.S. at 43. Citing its decision in *Young v. American Mini*  
3 *Theatres, Inc.*, 427 U.S. 50 (1976), the Court established a now familiar three-part  
4 analytical framework for evaluating the constitutionality of sexually-oriented business  
5 regulations, or what Professor Tribe has described rather aptly as "erogenous zoning  
6 laws." Laurence H. Tribe, *American Constitutional Law* 934 (2d ed. 1988). First, the  
7 Court asked whether the ordinance was a complete ban on adult theaters. *Id.* at 46.  
8 Because the ordinance was not a total ban, it was properly analyzed as a time, place and  
9 manner regulation. *Id.* Second, the Court considered whether the ordinance was content  
10 neutral or content based. The Court held that, because the ordinance at issue was aimed  
11 not at the content of the films shown at adult theaters, but rather at the secondary effects  
12 such theaters have on the surrounding community, it was properly classified as content  
13 neutral. *Id.* at 47. Third, given this finding, the final step is to ask whether the ordinance  
14 is designed to serve a substantial government interest and that reasonable alternative  
15 avenues of communication remain available. *Id.* at 50, 106 S.Ct. 925. The Supreme  
16 Court recently reaffirmed the Renton framework in *City of Los Angeles v. Alameda*  
17 *Books, Inc.*, 535 U.S. 425 (2002).

18         Neither party has applied the proper *Renton* standard in their papers. This is  
19 understandable because, as the Sixth and Seventh Circuit have pointed out, there is  
20 confusion with respect to the Supreme Courts' First Amendment analysis of regulations  
21 of sexually explicit material and adult-oriented establishments. *See Richland Bookmart,*  
22 *Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir.1998); *DiMa Corp. v. Town of Hallie*, 185  
23 F.3d 823, 827-28 (7th Cir. 1999). The problem stems from the fact that Court in *Renton*  
24 treats these types of regulations as content-neutral regulations for some purposes, even  
25 though they are in fact content-based. Thus when courts and litigants fall into the  
26 shorthand of simply referring to regulations like the one here as "content-neutral," they  
27 can find themselves arguing about irrelevancies. *DiMa Corp.*, 185 F.3d at 828. Here,  
28 the ordinance obviously singles out adult-oriented establishments for different treatment



1 based on the content of the materials they sell or display. And under *Renton*, the  
2 ordinance is constitutional so long as it satisfies the requirements of a reasonable time,  
3 place, and manner restriction. *See id.*; *see Center For Fair Public Policy v. Maricopa*  
4 *County, Arizona*, 336 F.3d 1153, 1159-60 (9th Cir. 2003).

5 Although neither party expressly addresses the proper standard for which to  
6 analyze Plaintiff's claim, it appears clear that only the third element of the *Renton* test is  
7 in question: whether the ordinance "is designed to serve a substantial government interest  
8 and that reasonable alternative avenues of communication remain available." Here,  
9 Plaintiff has alleged that the vagueness of the ordinance gives "the Chief of Police  
10 [complete discretion] to determine the scope and method of an inspection, allowing  
11 inspections that are in fact warrantless raids[.]" Further, Plaintiff alleges that the  
12 unconstitutional inspections executed pursuant to the ordinance caused Plaintiff to cease  
13 business operations which included activity protected by the First Amendment. (*Id.* ¶¶  
14 20, 26.) Essentially, Plaintiff suggests that the language of the ordinance permits no  
15 alternative avenues of communication, which would establish a First Amendment  
16 violation if proven.

17 Therefore, Defendants' motion to dismiss on these grounds is **DENIED**.

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19 **D. Plaintiff has Sufficiently Pleaded a Ratification Claim**

20 Defendants move to dismiss Plaintiff's ratification claim on the grounds that  
21 Plaintiff has alleged insufficient facts to show that Defendant Zimmerman ratified the  
22 actions of the officers who carried out the inspections. (MTD 13.) Plaintiff maintains  
23 their ratification claim is sufficient because they allege that Zimmerman either personally  
24 made the decision to conduct the raids in the manner they were conducted or delegated  
25 the authority to do so. (Opp'n 10.) The Court agrees with Plaintiff.

26 A Court may properly take judicial notice of facts outside the pleading. *Mack v.*  
27 *South Bay Beer Distributors, Inc.*, 798 F.2d 1279 (9th Cir. 1986). Accordingly, the  
28 Court takes notice of the fact that Defendant Zimmerman became Chief of Police on

1 March 4, 2014. *About the Chief*, CITY OF SAN DIEGO,  
2 <http://www.sandiego.gov/police/about/chiefofpolice.shtml> (last visited July 7, 2015).  
3 However, Plaintiff's First Amended Complaint names Shelley Zimmerman in her official  
4 capacity. (First Am. Compl. 1.) Therefore, it is irrelevant when Defendant Zimmerman  
5 assumed office because the suit against Zimmerman represents claims against the Chief  
6 of Police of San Diego as an entity, not Defendant Zimmerman as an individual. *Will v.*  
7 *Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989).

8 A plaintiff can demonstrate liability of an entity "by showing that an official with  
9 final policymaking authority either delegated the authority to, or ratified the decision of,  
10 a subordinate." *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 985 (9th Cir.  
11 2002). The ordinance at issue here provides that "The Chief of Police shall make, or  
12 cause to be made, regular inspections of all police-regulated businesses." SDMC §  
13 33.0103(a). Since the ordinance gives the Chief of Police final authority to carry out  
14 inspections of establishments such as those run by Plaintiff, the inspections at issue were  
15 necessarily undertaken at the direction of either the Chief of Police or some subordinate  
16 to whom the Chief of Police had delegated authority. Thus, although Plaintiff has not  
17 made extensive allegations in regards to the ratification claim, Plaintiff has stated a valid  
18 claim.

19 For the foregoing reasons, Defendants' motion to dismiss on these grounds is  
20 **DENIED.**

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1           **E. Plaintiff's Challenges Under the Fourth and Fourteenth Amendments**

2           Defendants do not appear to challenge the sufficiency of Plaintiff's as-applied  
3 challenge to this claim. Defendants contend that Plaintiff's Fourth and Fourteenth  
4 Amendment facial challenges are improper.<sup>2</sup> (MTD 13-14.) Defendants argument is  
5 based on their assertion that a constitutional facial challenge may only succeed "where  
6 no set of circumstances exists under which [SDMC Section 33.0103] would be valid."  
7 (MTD 14) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Specifically,  
8 Defendants argue that Plaintiff's Fourth Amendment facial challenge fails because the  
9 statute "does not expressly mention searches of private business records or non-public  
10 areas" and the City "can inspect Plaintiff's business without inspecting private business  
11 records or searching non-public areas of Plaintiff's business, [the statute] can be  
12 administered in a valid manner." (MTD 14.) Plaintiffs oppose on the grounds that they  
13 have asserted sufficient facts to sustain an as-applied challenge.

14           The Ninth Circuit has cast doubt on whether the *Salerno* "no set of circumstances"  
15 standard of review for facial challenges "is to be generally applied to facial challenges"  
16 or whether it is dicta. *Sierra Club v. Bosworth*, 510 F.3d 1016, 1023 (9th Cir. 2007).<sup>3</sup> In  
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18           <sup>2</sup>In the heading of section "E" of the Motion to Dismiss, Defendants assert that Plaintiff  
19 has not alleged sufficient facts to support a facial challenge under the Fourth and Fourteenth  
20 Amendments. However, in the body of the section, Defendants only make arguments based on  
21 the merit of the argument, not the allegations of the First Amended Complaint. Defendants'  
22 Reply is silent as to the factual allegations of the claim.

23           <sup>3</sup>*See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 55 n. 22 (1999) (plurality opinion)  
24 ("To the extent we have consistently articulated a clear standard for facial challenges, it is not  
25 the *Salerno* formulation, which has never been the decisive factor in any decision of this  
26 Court."); *Washington v. Glucksberg*, 521 U.S. 702, 740 (1997) (Stevens, J., concurring)  
27 (commenting on Court's failure to apply *Salerno* standard even though challenge to assisted  
28 suicide ban was facial challenge, and stating that "I do not believe the Court has ever actually  
applied such a strict standard, even in *Salerno* itself" (footnote omitted)); *Janklow v. Planned  
Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996) (Stevens, J., concurring in denial of  
cert.) (stating that *Salerno* "no set of circumstances" standard "does not accurately characterize  
the standard for deciding facial challenges," and that this "rigid and unwise dictum has been  
properly ignored in subsequent cases even outside the abortion context"); *Planned Parenthood  
of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992) (statute facially invalid as "substantial obstacle" to  
exercise of right in "large fraction" of cases); *id.* at 972-73, (Rehnquist, C.J., concurring in  
judgment in part and dissenting in part) (arguing that "no set of circumstances" dictum should  
have led to different result); *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin.*, 505 U.S.

1 fact, the Supreme Court sustained a Fourth Amendment facial challenge to a state statute  
2 that required candidates for elective office to submit to drug testing, holding that the  
3 state's interest in drug free officials was not a special need that rendered the intrusion  
4 reasonable. *Chandler v. Miller*, 520 U.S. 305, 323 (1997). If the *Salerno* "no set of  
5 circumstances" standard had been applied, the statute would have survived the challenge  
6 because there were likely some circumstances under which the statute would have been  
7 constitutional, such as when the statute was applied to candidates with a known drug  
8 problem. *See id.* Nonetheless, the Supreme Court did not even mention the *Salerno* test  
9 in the opinion.

10 Here, Defendants fail to acknowledge the shaky ground on which the *Salerno* rule  
11 sits. Nor do Defendants present any argument as to why this rule should apply here. At  
12 this point in the proceedings, and in light of the legal landscape surrounding *Salerno*, the  
13 Court refuses to apply the "no set of circumstances" rule. In light of this, neither party  
14 provides a framework under which the Court can evaluate the pending motion with  
15 respect to Plaintiff's Fourth Amendment facial challenge.<sup>4</sup> Nonetheless, it appears that  
16 Plaintiff's facial challenge is sufficiently pleaded.

17 Searches of private property conducted "without prior approval by judge or  
18 magistrate, are per se unreasonable under the Fourth Amendment[.]" *Katz v. United*  
19 *States*, 389 U.S. 347, 357 (1967). Plaintiff alleges that SDMC § 33.0103 allows searches  
20 of private business records and non-public areas of its premises without a warrant. (First  
21 Am. Compl. 32.) Plaintiffs also allege that during the inspections at issue, San Diego

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23 71, 82-83 (1992) (Rehnquist, C.J., dissenting) (arguing that tax statute was facially valid because  
24 it would be constitutional under certain facts); *Bowen v. Kendrick*, 487 U.S. 589, 602  
25 (1988) (statute facially invalid under Establishment Clause only if, *inter alia*, law's "primary  
26 effect" is advancement of religion, or if it requires "excessive entanglement" between church  
and state); *id.* at 627 n. 1 (Blackmun, J., dissenting) (pointing out and agreeing with majority's  
rejection of "no set of circumstances" dictum); Michael C. Dorf, *Facial Challenges to State and*  
*Federal Statutes*, 46 Stan. L.Rev. 235, 236, 238 (1994).

27  
28 <sup>4</sup>The Court notes that the proper standard to evaluate this claim may be found in *New*  
*York v. Burger*, 482 U.S. 691 (1987), wherein the Supreme Court explains the protections of the  
Fourth Amendment with respect to "closely regulated" industries.

1 Police officers entered "into the private women's dressing rooms and into the private  
2 office of the manager." *Id.* at 9. Defendant has not highlighted how these allegations  
3 fail to establish either an as-applied or facial challenge. Consequently, the Court deems  
4 Plaintiff's claims under the Fourth and Fourteenth Amendment to be valid.

5 Therefore, Defendants' motion to dismiss on these grounds is **DENIED**.

6  
7 **IV. CONCLUSION & ORDER**

8 In light of the foregoing, the Court **DENIES** Defendants' motion to dismiss  
9 Plaintiff's First Amended Complaint.

10 **IT IS SO ORDERED.**

11 DATED: July 7, 2015

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14 M. James Lorenz  
15 United States District Court Judge  
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