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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JANE DOE,
12 Plaintiff,
13 v.
14 CITY OF SAN DIEGO, et al.,
15 Defendants;

Case No.: 14cv1941-L(AGS)

16 TANYA A., et al.,
17 Plaintiffs,
18 v.
19 CITY OF SAN DIEGO, et al.,
20 Defendants.
21
22

Case No.: 14cv1942-L(AGS)

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTIONS FOR PARTIAL
JUDGMENT ON THE PLEADINGS**

23 Pending before the Court are Plaintiffs' motions for partial judgment on the
24 pleadings. The motions, filed in the above-captioned related cases, are identical.
25 Defendants filed oppositions and Plaintiffs replied. The Court decides this matter on the
26 briefs without oral argument. *See* Civ. L. R. 7.1(d.1). For the reasons stated below,
27 Plaintiffs' motions are granted in part and denied in part.
28

1 **I. BACKGROUND**

2 Plaintiffs were entertainers at Cheetahs and Expose, adult entertainment
3 establishments in San Diego. Adult entertainment establishments are regulated by the
4 San Diego Police Department. San Diego Municipal Code ("SDMC") §33.3601.¹ A
5 police permit is required to operate an adult entertainment establishment or perform as an
6 adult entertainer. (SDMC §§33.3603 & 33.3604.) Section 33.0103 (the "Inspection
7 Provision") confers authority on police officers to inspect police-regulated businesses,
8 including adult entertainment establishments. (*See also* First Am. Compl., 14cv1941,
9 doc. no. 21 ("Doe Compl.") at 5-6; Second Am. Compl., 14cv1942, doc. no. 24 ("Tanya
10 A. Compl.") at 6.)

11 According to Plaintiffs, ostensibly based on the Inspection Provision, on July 15,
12 2013 and March 6, 2014, armed police officers wearing bullet proof vests raided
13 Cheetahs and Expose. (Doe Compl. at 3; Tanya A. Compl. at 4.) The officers
14 interrogated the entertainers and photographed each in a nearly nude state claiming they
15 had to document their tattoos. (Doe Compl. at 3-4; Tanya A. Compl. at 4-5.) The
16 entertainers who objected to detention or photographs were threatened with arrest, and
17 armed officers were posted at the doors to prevent the entertainers from leaving. (Doe
18 Compl. at 3-4; Tanya A. Compl. at 4-5.) They were detained for one hour or more. (Doe
19 Compl. at 4; Tanya A. Compl. at 5.)

20 Based on these incidents, two nearly identical actions² were filed in state court
21 alleging violation of federal constitutional rights, as well as other causes of action.
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24 ¹ The Court takes judicial notice of the San Diego Municipal Code, which is
25 referenced in the operative complaints. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir.
26 2006).

27 ² Two additional related actions were filed in this Court, *Red Eyed Jacks Sports Bar,*
28 *Inc. d/b/a/ Cheetah's Nightclub*, 14cv823, and *Suzanne Coe v. City of San Diego et al.*,
16cv1447. They have been dismissed, and are therefore not addressed in this order.

1 Defendants removed both actions to this Court based on federal question jurisdiction
2 under 28 U.S.C. §§1331 and 1441. The actions were coordinated for pretrial
3 proceedings.

4 Pending before the Court are Plaintiffs' motions for partial judgment on the
5 pleadings. Plaintiffs seek judgment on their claims that the Inspection Provision on its
6 face violates the First and Fourth Amendments of the United States Constitution.³

7 **II. DISCUSSION**

8 "After the pleadings are closed -- but early enough not to delay trial -- a party may
9 move for judgment on the pleadings." Fed. R. Civ. Proc. 12(c). "Judgment on the
10 pleadings is properly granted when . . . there is no issue of material fact in dispute, and
11 the moving party is entitled to judgment as a matter of law." *Chavez v. United States*,
12 683 F.3d 1102, 1108 (9th Cir. 2012) (internal quotation marks and citation omitted).
13 However, "a plaintiff is not entitled to judgment on the pleadings if the defendant's
14 answer raises issues of fact or affirmative defenses." *Pit River Tribe v. Bureau of Land*
15 *Mgmt*, 793 F.3d 1147, 1159 (9th Cir. 2015) (citation omitted); *see also Gen. Conf. Corp.*
16 *of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d
17 228, 230 (9th Cir. 1989) ("[A] plaintiff is not entitled to judgment on the pleadings when
18 the answer raises issues of fact that, if proved, would defeat recovery. Similarly, if the
19 defendant raises an affirmative defense in his answer it will usually bar judgment on the
20 pleadings.") (citations omitted).

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24 ³ The Fourteenth Amendment protects First and Fourth Amendment rights
25 against violation by state, as opposed to federal, actors. *See Duncan v. Louisiana*, 391
26 U.S. 145, 148 (1968); *Albright v. Oliver*, 510 U.S. 266, 272-73 (1994). When "a
27 particular Amendment provides an explicit textual source of constitutional protection
28 against a particular sort of government behavior, that Amendment," and "not the more
generalized notion of substantive due process, must be the guide for analyzing these
claims." *Albright*, 510 U.S. at 273 (citation and internal quotation marks omitted).

1 Analysis of the pleadings under Rule 12(c) is substantially identical to analysis
2 under Rule 12(b)(6). *Chavez*, 683 F.3d at 1108. A motion under Rule 12(b)(6) tests the
3 sufficiency of the complaint. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A
4 plaintiff cannot prevail where the complaint lacks a cognizable legal theory. *See Shroyer*
5 *v. New Cingular Wireless Serv., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (internal
6 quotation marks and citation omitted). Alternatively, a plaintiff cannot prevail if the
7 complaint presents a cognizable legal theory, yet fails to plead essential facts under that
8 theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

9 Plaintiffs allege that the Inspection Provision is unconstitutional on its face. (Doe
10 Compl. ¶¶35 & 129-32; Tanya A. Compl. ¶36.) In their opposition, Defendants counter
11 that "the Court cannot grant the motion[s] given that there are clearly multiple factual
12 disputes by and between the parties as to how the inspections at issue were conducted."
13 (Opp'n, 14cv1941, doc. no. 70 ("Opp'n") at 3.) "A facial challenge is an attack on a
14 statute itself as opposed to a particular application." *City of Los Angeles v. Patel*, ___ U.S.
15 ___; 135 S.Ct. 2443, 2449 (2015). Accordingly, a facial attack does not raise questions of
16 fact related to the enforcement of the statute in a particular instance. *Forsyth County, Ga.*
17 *v. Nationalist Movement*, 505 U.S.123, 133 n.10 (1992) ("Facial attacks on the discretion
18 granted a decisionmaker are not dependent on the facts surrounding any particular permit
19 decision"). Defendants' denials and admissions of Plaintiffs' factual allegations regarding
20 the searches conducted at Cheetahs and Expose are irrelevant to the facial attack claims.
21 In their answers, Defendants do not dispute this. They assert that the facial attack
22 allegations "contain[] legal conclusions, legal argument, and questions of law to be
23 determined solely by the Court, to which no response is required." (Ans. to Pl.'s First
24 Am. Compl., 14cv1941, doc. no. 42 ("Doe Answer") ¶¶37⁴ & 129-32; Ans. to Pls' Second
25 Am. Compl., 14cv1942, doc. no. 25 ("Tanya A. Answer") ¶36.)

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28 ⁴ Doe's first amended complaint (doc. no. 21) and Defendants' answer (doc. no. 42)
contain paragraph numbering errors. Upon review of the entire first amended complaint

1 Further, Defendants maintain that a motion for judgment on the pleadings cannot
2 be granted if affirmative defenses are asserted. They proffer this contention in a
3 conclusory fashion without argument to show how any of their defenses could defeat
4 Plaintiffs' facial attack. (Opp'n at 2-3.) Upon review of the operative answers in both
5 actions, none of the affirmative defenses is sufficient to preclude deciding Plaintiffs'
6 motions on the merits.

7 Defendants raised lack of subject matter jurisdiction and standing as affirmative
8 defenses. (Doe Ans. ¶¶ 135 & 137; Tanya A. Ans. at 37 ¶¶ 1 & 3; *see* Opp'n at 3.)
9 Because Plaintiffs allege violations of federal law, the Court has federal question
10 jurisdiction under 28 U.S.C. §1331.⁵

11 Standing under Article III “requires federal courts to satisfy themselves that the
12 plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant
13 [her] invocation of federal-court jurisdiction.” *Summers v. Earth Island Inst.*, 555 U.S.
14 488, 493 (2009) (internal quotation marks and citation omitted, emphasis in original). A
15 plaintiff must show she has suffered an injury in fact, the injury is fairly traceable to the
16 challenged action of the defendant, and it is likely, as opposed to merely speculative, that
17 the injury will be redressed by a favorable decision. *Maya v. Centex Corp.*, 658 F.3d
18 1060, 1067 (9th Cir. 2011) (internal quotation marks and citations omitted). “In the area
19 of freedom of expression it is well established that one has standing to challenge a statute
20 on the ground that it delegates overly broad licensing discretion to an administrative
21 office, whether or not his conduct could be proscribed by a properly drawn statute, and
22 whether or not he applied for a license.” *City of Lakewood v. Plain Dealer Pub. Co.*, 486
23 U.S. 750, 764 (1988), quoting *Freedman v. Maryland*, 380 U.S. 51, 56 (1965). “This
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26 and Defendants' entire answer, it is apparent that Paragraph 37 of the answer responds to
27 Paragraph 35 of the first amended complaint.

28 ⁵ This was the basis for Defendants' removal of the actions to federal court. (*See*
case no. 14cv1941 and 14cv1942, each doc. no. 1.)

1 exception from general standing rules is based on an appreciation that the very existence
2 of some broadly written laws has the potential to chill the expressive activity of others
3 not before the court." *Forsyth County*, 505 U.S. at 129.

4 Plaintiffs, as adult entertainers, are directly affected by the Inspection Provision, as
5 they are required to be licensed, and are therefore subject to the Inspection Provision.
6 (*See* Doe Compl. ¶¶6 & 54; Tanya A. Compl. ¶¶6-8 & 56; *cf.* SDMC §§ 33.0101(b) &
7 (c), 33.3602 & 33.3604.) Defendants' argument that there is a factual dispute whether
8 Plaintiffs' constitutional rights were violated during the searches at issue (Opp'n at 3) is
9 irrelevant to the facial attack claims as well as to Plaintiffs' standing to assert them.

10 Defendants also alleged failure to state a claim. (Doe Ans. ¶136; Tanya A. Ans. at
11 37 ¶2.) They had moved twice for dismissal on this ground in each case, and the Court
12 issued orders which allowed the facial attack claims to proceed. (*See* case no. 14cv1941
13 docs. no. 18 & 35; case no. 14cv1942 docs. no. 11 & 23.) The affirmative defenses of
14 failure to state a claim therefore do not preclude Plaintiffs' motions. *See Heller Fin., Inc.*
15 *v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1294-95 (7th Cir. 1989) (affirmative
16 defenses restating a previously denied defense motion are meritless).

17 Next, Defendants alleged as an affirmative defense that Plaintiffs are not entitled to
18 declaratory or injunctive relief. (Doe Ans. ¶147; Tanya A. Ans. at 38 ¶13.) Affirmative
19 defenses are subject to the pleading requirements of Federal Rules of Civil Procedure.
20 *Heller Fin.*, 883 F.2d at 1294. Defendants alleged no facts in support of their defense,
21 and asserted no argument in the opposition brief. Defendants' answers with their bare
22 legal conclusions are insufficient to preclude ruling on the merits of Plaintiffs' motions.
23 Moreover, Plaintiffs seek injunctive and declaratory relief as remedies for their claims.
24 (Doe Compl. ¶¶131-32; Tanya A. Compl. at 17 ¶1.) The conclusory defense that
25 Plaintiffs are not entitled to declaratory or injunctive relief is a variant of Defendants'
26 contention in their answers that Plaintiffs failed to state a claim, and is insufficient for the
27 same reasons.

1 Finally, in their opposition Defendants referenced statute of limitations, res
2 judicata and qualified immunity as affirmative defenses. (Opp'n at 3.) "Qualified
3 immunity shields [government] officials from money damages." *Ashcroft v. al-Kidd*, 563
4 U.S. 731, 735 (2011); *see also Pearson v. Callahan*, 555 U.S. 223, 231 (2009) ("The
5 doctrine of qualified immunity protects government officials from liability for civil
6 damages" (quotation marks and citation omitted)). Accordingly, it does not apply when,
7 as here, the plaintiff requests declaratory relief. *See Pearson*, 555 U.S. at 242. Statute of
8 limitations and res judicata defenses are raised only in the most cursory and conclusory
9 manner. (*See Doe Ans.* ¶156; *Tanya A. Ans.* at 39 ¶22.) They are not supported by facts
10 or argument in the opposition to Plaintiffs' motions. (*See Opp'n at 3.*) They are therefore
11 insufficient to preclude addressing Plaintiffs' motions on the merits. *See Heller Fin.*, 883
12 F.2d at 1294.

13 Defendants do not reference any other affirmative defenses in their opposition.
14 The remaining defenses asserted in their answers are directed toward the conduct at issue
15 and damages, and are therefore irrelevant to the facial attack issues presented in Plaintiffs'
16 motions.

17 **A. FIRST AMENDMENT**

18 Nude dancing is expressive conduct protected by the First Amendment. *Talk of the*
19 *Town v. Las Vegas*, 343 F.3d 1063, 1068 n.11 (9th Cir. 2003); *see also City of Erie v.*
20 *Pap's A.M.*, 529 U.S. 277, 289 (2000) ("outer ambit of the First Amendment protection").
21 Plaintiffs contend that the Inspection Provision on its face violates the First Amendment
22 because it confers unbridled discretion on the Chief of Police regarding the scope and
23 manner of inspections.

1 "Although facial challenges to legislation are generally disfavored, they have been
2 permitted in the First Amendment context." *FW/PBS, Inc. v. City of Dallas*, 493 U.S.
3 215, 223 (1990).⁶

4 It is settled by a long line of [Supreme Court] decisions . . . that an ordinance
5 which . . . makes the peaceful enjoyment of freedoms which the Constitution
6 guarantees contingent upon the uncontrolled will of an official - as by
7 requiring a permit or license which may be granted or withheld in the
8 discretion of such official - is an unconstitutional censorship or prior
9 restraint upon the enjoyment of those freedoms.

10 *Id.* at 226 (internal quotations omitted, brackets and first ellipsis added). While
11 prior restraints on speech are not unconstitutional *per se*, they bear "a heavy presumption
12 against [their] constitutional validity." *Id.* at 225 (internal quotation marks and citation
13 omitted). "[T]he mere existence of the licensor's unfettered discretion, coupled with the
14 power of prior restraint, intimidates parties into censoring their own speech, even if the
15 discretion and power are never actually abused." *City of Lakewood*, 486 U.S. at 757.

16 "Therefore, a facial challenge lies whenever a licensing law gives a government
17 official or agency substantial power to discriminate based on the content or viewpoint of
18 speech by suppressing disfavored speech or disliked speakers." *City of Lakewood*, 486
19 U.S. at 759.

20 This is not to say that . . . a speaker may challenge as censorship any law
21 involving discretion to which it is subject. The law must have a close
22 enough nexus to expression, or to conduct commonly associated with
23 expression, to pose a real and substantial threat of the identified censorship
24 risks.

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26 ⁶ *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), is a plurality decision. At
27 least six justices were in agreement as to those parts of the plurality opinion which are
28 referenced herein. *See id.* at 238 (Justice Brennan's concurring opinion in which Justice
Marshall and Justice Blackmun joined).

1 *Id.* "[A] sanction imposed pursuant to a generally applicable law does not trigger First
2 Amendment scrutiny, even where the sanction results in a burden on expression." *Talk of*
3 *the Town*, 343 F.3d at 1069 (discussing *Arcara v. Cloud Books, Inc.*, 478 U.S. 697
4 (1986)) (footnote omitted). A plaintiff may not "use the First Amendment as a cloak for
5 obviously unlawful . . . conduct." *Arcara*, 478 U.S. at 705 (quoted in *Talk of the Town*,
6 343 F.3d at 1070.) To warrant a facial challenge, the burden placed on those engaged in
7 expressive activity must be more than "merely the incidental result" of enforcing a
8 generally applicable law. *See Talk of the Town*, 343 F.3d at 1072.

9 For example, in *Talk of the Town v. Las Vegas*, a facial challenge did not lie
10 against the city, where the city suspended an adult entertainment license for violating the
11 generally applicable liquor license law. 343 F.3d 1063. "[T]he burdening of expressive
12 conduct [was] merely the incidental result of the City's clear authority to enforce its
13 generally applicable liquor license requirement." *Id.* at 1072. On the other hand, in
14 *FW/PBS, Inc. v. City of Dallas*, a facial challenge could proceed, because the certificate
15 of occupancy and inspection requirement, which applied to all businesses, was more
16 onerous for adult entertainment businesses. An inspection was required not only upon
17 changing locations or structural changes to the premises, but also upon each renewal the
18 adult entertainment license. 493 U.S. at 224-25.

19 The Inspection Provision at issue here is a law of general application. It applies to
20 all police-regulated businesses listed in Chapter 3 Article 3 of the SDMC. SDMC
21 §33.0101. In addition to adult entertainment establishments, the list includes auto
22 dismantlers, promoters, ticket brokers, swap meets, holistic health practitioners, etc. *Id.*
23 §§33.0701-33.4401. Section 33.0103 was not enacted to suppress the content or
24 viewpoint of the speech associated with adult entertainment.

25 However, Plaintiffs contend that because the Inspection Provision does not delimit
26 the Police Chief's discretion over the manner and scope of inspections, it could be used to
27 single out adult entertainment establishments for harassment. (*See Mot.* at 8. 14cv1941,
28 doc. no. 66 ("Mot").) Most other police-regulated businesses are not engaged in

1 protected speech activity, and do not operate by staging shows. Plaintiffs argue that on
2 its face, the Inspection Provision does not preclude the Chief of Police from using
3 inspections as a means of disrupting adult entertainment businesses by interfering with
4 performances, and that this power has a chilling effect on the exercise of First
5 Amendment rights. As a threshold matter, this is sufficient for Plaintiffs to establish a
6 nexus between the Inspection Provision and protected speech to raise a facial challenge.

7 Defendants counter that the First Amendment claim should be denied because the
8 Inspection Provision is a content-neutral, legitimate time, place, or manner restriction. It
9 is undisputed that the City regulates adult entertainment to further significant
10 governmental interests. SDMC §33.3601. This alone does not dispose of a facial
11 challenge, however.

12 [T]he city may require periodic licensing, and may even have special
13 licensing procedures for conduct commonly associated with expression; but
14 the Constitution requires that the city establish neutral criteria to insure that
15 the licensing decision is not based on the content or viewpoint of the speech
being considered.

16 *City of Lakewood*, 486 U.S. at 760. "A government regulation that allows arbitrary
17 application is inherently inconsistent with a valid time, place and manner regulation
18 because such discretion has the potential for becoming a means of suppressing a
19 particular point of view." *Forsyth County*, 505 U.S. at 130 (internal quotation marks and
20 citation omitted). Furthermore, "even if the government may constitutionally impose
21 content-neutral prohibitions on a particular manner of speech, it may not *condition* that
22 speech on obtaining a license or permit from a government official in that official's
23 boundless discretion." *City of Lakewood*, 486 U.S. at 764 (emphasis in original). Here,
24 the permits for adult entertainment are conditioned on compliance with the Inspection
25 Provision, which states that "[t]he right of reasonable inspection to enforce the provisions
26 of this Article is a *condition* of the issuance of a police permit." SDMC §33.0103(c)
27 (emphasis added).
28

1 To prevail on a facial challenge, a plaintiff must show that there is nothing in the
2 challenged provision to prevent the decisionmaker from exercising discretion in a manner
3 that favors some speakers over others based on the content of their speech. *Forsyth*
4 *County*, 505 U.S. at 133 n.10. "[A] law subjecting the exercise of First Amendment
5 freedoms to the prior restraint of a license must contain narrow, objective and definite
6 standards to guide the licensing authority." *Id.* at 131 (internal quotation marks and
7 citations omitted).

8 In its entirety, the Inspection Provision states:

9 (a) The Chief of Police shall make, or cause to be made, regular inspections
10 of all police-regulated businesses. Any peace officer shall have free access
11 to any police-regulated business during normal operating hours. It is
12 unlawful for any permittee or employee to prevent or hinder any peace
officer from conducting an inspection.

13 (b) Any police code compliance officer assigned by the Chief of Police to
14 conduct inspections shall have free access to any police-regulated business
15 during normal operating hours. It is unlawful for any permittee or employee
16 to prevent or hinder any police code compliance officer from conducting an
inspection.

17 (c) The right of reasonable inspection to enforce the provisions of this
18 Article is a condition of the issuance of a police permit. The applicant or
19 permittee shall acknowledge this right of inspection at the time of
20 application. Refusal to acknowledge this right of inspection is grounds for
21 denial of the application. The right of inspection includes the right to
22 require identification from responsible persons or employees on the
23 premises. The refusal to allow inspection upon reasonable demand or the
24 refusal to show identification by responsible persons or employees is
grounds for the suspension, revocation, or other regulatory action against the
25 police permit.

26 The Inspection Provision provides for "regular inspections" by allowing "free access to
27 any police-regulated business during normal operating hours." SDMC §33.0103(a); *see*
28 *also id.* §33.0103(b). It further characterizes the Chief of Police's authority as "[t]he right

1 of reasonable inspection to enforce the provisions of this Article."⁷ *Id.* §33.0103(c). The
2 provision therefore specifies the place (business premises), time (normal operating
3 hours), purpose (to enforce certain Municipal Code provisions), and requires that
4 inspections be "regular." It is unclear whether the regularity refers to time intervals, or
5 the manner of inspection. Further, the provision qualifies the government's right as a
6 right to reasonable inspections, and requires permittees to grant free and unhindered
7 access to the enforcement officers. As written, the provision does not define the manner
8 or scope of the inspections.

9 In evaluating the facial challenge, the provision must be construed in context:

10 When a state law has been authoritatively construed so as to render it
11 constitutional, or a well-understood and uniformly applied practice has
12 developed that has virtually the force of a judicial construction, the state law
13 is read in light of those limits. That rule applies even if the face of the
14 statute might not otherwise suggest the limits imposed. Further, [the court]
15 will presume any narrowing construction or practice to which the law is
16 fairly susceptible.

16 *City of Lakewood*, 486 U.S. at 770 n.11 (internal quotation marks and citations omitted).

17 Defendants do not contend that the Inspection Provision has been authoritatively
18 construed, or that that there is a well-understood and uniformly applied practice. Instead,
19 they offer that the Inspection Provision should be construed in light of other Municipal
20 Code provisions. (Opp'n at 13, citing SDMC §§11.0201, 11.0206, 12.0101, 12.0102,
21 12.0103 & 12.0104; *see also id.* at 12-13.)

22 Specifically with respect to the power to inspect property, the code provides that
23 the officials

24 are authorized to enter upon any property or premises to ascertain whether
25 the provisions of the Municipal Code or applicable state codes are being
26 obeyed, and to make any examinations and surveys as may be necessary in
27 the performance of their enforcement duties. These may include the taking

28 ⁷ "Article" refers to Article 3, "Police Regulated Occupations and Businesses."

1 of photographs, samples or other physical evidence. All inspections, entries,
2 examinations and surveys shall be done in a reasonable manner.

3 SDMC §12.0104. To the extent this provision may be in conflict with the Inspection
4 Provision, "the more restrictive provision governs." *Id.* §11.0206. All provisions are
5 construed "with a view to effect its objects and to promote justice." *Id.* §11.0201.

6 The additional provisions cited by Defendants reinforce the City's right to inspect
7 for purposes of enforcing the Municipal Code provisions. SDMC §§11.0201, 12.0101,
8 12.0102 & 12.0104. Although section 12.0104 describes some of the methods the police
9 may use to conduct the inspection (taking photographs, samples and physical evidence),
10 the actual manner and scope of inspection are left to the officers' determination of what is
11 reasonable. Where it is within the government official's discretion to decide what is
12 reasonable under the ordinance imposing a prior restraint, "it simply cannot be said that
13 there are any narrowly drawn, reasonable and definite standards guiding [the official's]
14 hand . . ." *Forsyth County*, 505 U.S. at 132 (internal quotation marks and citations
15 omitted).

16 The Inspection Provision, as written and construed in context of the Municipal
17 Code sections referenced by Defendants, leaves to the Chief of Police's discretion to
18 determine how to conduct inspections, whether the inspections should entail interrupting
19 performances, detaining individuals on the premises, and any other aspect of the scope or
20 manner of inspections. The question whether the police have in fact used the Inspection
21 Provision for improper purposes is irrelevant to the facial challenge.

22 [T]he success of a facial challenge on the grounds that an ordinance
23 delegates overly broad discretion to the decisionmaker rests not on whether
24 the administrator has exercised his discretion in a content-based manner, but
25 whether there is anything in the ordinance preventing him from doing so.

26 *Forsyth County* at 133 n.10. If the statute does not "prevent[] the official from
27 encouraging some views and discouraging others through the arbitrary application of" the
28 statute, the statute is unconstitutional. *Id.* at 133. The Inspection Provision does not

1 prevent the Chief of Police from using inspections as a means of harassing and
2 discouraging adult entertainment businesses, and therefore violates the First Amendment
3 on its face.

4 **B. FOURTH AMENDMENT**

5 Plaintiffs also claim the Inspection Provision violates the Fourth Amendment on its
6 face because it allows for unreasonable warrantless searches. "[F]acial challenges can be
7 brought under the Fourth Amendment." *Patel*, 135 S.Ct. at 2447. "The Fourth
8 Amendment protects '[t]he right of the people to be secure in their persons, houses,
9 papers and effects, against unreasonable searches and seizures.'" *Id.* at 2451-52 (quoting
10 U.S. Const. IVth Amend.). "[S]ubject only to a few specifically established and well-
11 delineated exceptions," warrantless searches are "*per se* unreasonable." *Id.* at 2452
12 (internal quotation marks and citation omitted, emphasis in original). "This rule applies
13 to commercial premises as well as to homes." *Id.* (internal quotation marks and citations
14 omitted). An administrative search, *i.e.*, a search where "special needs make the warrant
15 and probable-cause requirement impracticable, and where the primary purpose of the
16 searches is distinguishable from the general interest in crime control," may be exempt
17 from the warrant requirement under certain conditions. *Id.* (internal quotation marks,
18 ellipsis and citations omitted); *see also id.* at 2452-53, 2456. The parties do not disagree
19 whether searches pursuant to the Inspection Provision constitute administrative searches.

20 "[W]hen addressing a facial challenge to a statute authorizing warrantless searches,
21 the proper focus of the constitutional inquiry is searches that the law actually authorizes,
22 not those for which it is irrelevant," for example where a warrantless search is permitted
23 due to exigent circumstances or consent. *Id.* at 2451. Defendants argue that Plaintiffs'
24 motion under the Fourth Amendment should be denied, because the inspections at issue
25 were consensual. (Opp'n at 7.) The Inspection Provision states, "The right of reasonable
26 inspection to enforce the provisions of this Article is a condition of the issuance of a
27 police permit. The applicant or permittee shall acknowledge this right of inspection at
28 the time of application." SDMC §33.0103(c) (original emphasis omitted). "[R]efus[al]

1 to consent to inspection pursuant to Section 33.0103" is grounds to deny a permit
2 application. *Id.* §33.0305(d).

3 On a facial challenge, the Court "will presume any narrowing construction or
4 practice to which the law is fairly susceptible." *City of Lakewood*, 486 U.S. at 770 n.11
5 (internal quotation marks and citations omitted). Pursuant to the plain terms of the
6 Municipal Code, everyone who holds an adult entertainment license has consented to
7 administrative searches under the Inspection Provision. Plaintiffs do not address the
8 issue of consent.

9 For the foregoing reasons, Plaintiffs' motions for judgment on the pleadings on the
10 claim that the Inspection Provision on its face violates the Fourth Amendment is denied.
11 Denial is without prejudice to raising the facial challenge again, supported by adequate
12 briefing.

13 C. REQUEST FOR PARTIAL JUDGMENTS

14 Plaintiffs prevailed on their claim that the Inspection Provision violates the First
15 Amendment on its face. With their motions, Plaintiffs do not seek to address the
16 captioned actions in their entirety. The facial attack under the First Amendment was
17 asserted as a part of the first and tenth causes of action in case no. 14cv1941, and part of
18 the first cause of action in case no. 14cv1942. Furthermore, Plaintiffs do not seek
19 injunctive relief, but request a partial judgment in each case finding that the Inspection
20 Provision is unconstitutional on its face. (*See, e.g.*, Reply at 9, 14cv1941, doc. no. 71
21 ("Reply").)

22 Partial judgments are disfavored. *See* Fed. R. Civ. Proc. 54(b); *Reiter v. Cooper*,
23 507 U.S. 258, 265 (1993); *Wood v. GCC Bend, LLC*, 422 F.3d 873, 878 (9th Cir. 2005).

24 Federal Rule of Civil Procedure 54(b) provides:

25 Judgment on Multiple Claims or Involving Multiple Parties.
26 When an action presents more than one claim relief . . . , the
27 court may direct entry of a final judgment as to one or more,
28 but fewer than all, claims . . . only if the court expressly
determines that there is no just reason for delay. . . .

1 The power to enter partial final judgment "is largely discretionary, to be exercised in light
2 of judicial administrative interests as well as the equities involved, and giving due weight
3 to the historic federal policy against piecemeal appeals." *Reiter*, 507 U.S. at 265 (1993)
4 (citations and quotation marks omitted). In *Morrison-Knudsen Co., Inc. v. Archer*, the
5 Ninth Circuit elaborated on the requirements of Rule 54(b):

6 Judgments under Rule 54(b) must be reserved for the unusual
7 case in which the costs and risks of multiplying the number of
8 proceedings and of overcrowding the appellate docket are
9 outbalanced by pressing needs of the litigants for an early and
10 separate judgment as to some claims or parties. The trial court
11 should not direct entry of judgment under Rule 54(b) unless it
12 has made specific findings setting forth the reasons for its order.
13 Those findings should include a determination whether, upon
14 any review of the judgment entered under the rule, the appellate
15 court will be required to address legal or factual issues that are
16 similar to those contained in the claims still pending before the
17 trial court. A similarity of legal or factual issues will weigh
18 heavily against entry of judgment under the rule, and in such
19 cases a Rule 54(b) order will be proper only where necessary to
20 avoid a harsh and unjust result, documented by further and
21 specific findings.

22 655 F.2d 962, 965 (9th Cir. 1981); *see also Wood*, 422 F.3d 873.

23 Plaintiffs have not addressed the absence of any just reason for delay and whether,
24 upon a partial judgment, the appellate court would be required to address legal or factual
25 issues that are similar to those contained in the claims which would remain before this
26 Court. Without facts or argument to make a determination of these issues, the Court may
27 not enter a partial judgment. *See Fed. R. Civ. Proc. 54(b)*. The Court therefore declines
28 to enter partial judgments at this time. However, the First Amendment facial attack
claims are resolved for purposes of further proceedings.

29 **III. CONCLUSION AND ORDER**

30 For the foregoing reasons, Plaintiffs' motions are granted in part and denied in part.
31 The First Amendment facial attack claims are hereby resolved in Plaintiffs' favor for

1 purposes of all further proceedings. In all other respects, Plaintiffs' motions for partial
2 judgments on the pleadings are denied. No judgment shall be entered at this time.

3 **IT IS SO ORDERED.**

4 Dated: March 16, 2018

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6 Hon. M. James Lorenz
7 United States District Judge
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