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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MITCH HIGHTOWER, *et al.*,

No. C-12-5841 EMC

Plaintiffs,

v.

**ORDER GRANTING DEFENDANTS’  
MOTION TO DISMISS, AND DENYING  
PLAINTIFFS’ MOTION FOR A  
PRELIMINARY INJUNCTION**

CITY AND COUNTY OF SAN  
FRANCISCO, *et al.*,

Defendants.

**(Docket Nos. 5, 15)**

Plaintiffs Mitch Hightower, Oxane “Gypsy” Taub, George Davis, and Russell Mills have filed a class action against Defendants the City and County of San Francisco, two members of the Board of Supervisors (in their official capacities only), and the clerk of the Board of Supervisors (in her official capacity only), alleging that the recent passage of a San Francisco ordinance that bans nudity on, *e.g.*, public streets and sidewalks violates their constitutional rights, in particular, those protected by the First Amendment and equal protection clause. Currently pending before the Court are two motions: (1) Defendants’ motion to dismiss and (2) Plaintiffs’ motion for a preliminary injunction.

Having considered the parties’ briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **GRANTS** Defendants’ motion to dismiss and **DENIES** Plaintiffs’ motion for a preliminary injunction. As discussed below, the Court concludes that the Ordinance does not conflict with state law, that Plaintiffs’ facial challenge to the Ordinance based on the First Amendment lacks merit because nudity is not inherently expressive and because the

1 Ordinance is not substantially overbroad, and that Plaintiffs' equal protection claim as pled fails to  
 2 state a Fourteenth Amendment claim under the rational basis test.

### 3 **I. FACTUAL & PROCEDURAL BACKGROUND**

4 At issue in this case is the validity of San Francisco Police Code § 154 which bans nudity on,  
 5 *e.g.*, public streets and sidewalks. Plaintiffs initiated this lawsuit before the Ordinance was formally  
 6 adopted. However, since the filing of the lawsuit, the Board of Supervisors adopted the Ordinance,  
 7 which provides as follows:

- 8 (a) The Board of Supervisors finds that a person's public exposure  
 9 of his or her private parts invades the privacy of members of  
 10 the public who are unwillingly or unexpectedly exposed to such  
 11 conduct and unreasonably interferes with the rights of all  
 12 persons to use and enjoy the public streets, sidewalks, street  
 13 medians, parklets, plazas, public rights-of-way, transit  
 14 vehicles, stations, platforms, and transit system stops, (2)  
 15 creates a public safety hazard by creating distractions,  
 16 obstructions, and crowds that interfere with the safety and free  
 17 flow of pedestrian and vehicular traffic, and (3) discourages  
 18 members of the public from visiting or living in areas where  
 19 such conduct occurs. The Board of Supervisors has enacted  
 20 the provisions of this Section 154 for the purpose of securing  
 21 and promoting the public health, safety, and general welfare of  
 22 all persons in the City and County of San Francisco.
- 23 (b) A person may not expose his or her genitals, perineum, or anal  
 24 region on any public street, sidewalk, street median, parklet,  
 25 plaza, or public right-of-way as defined in Section 2.4.4(t) of  
 26 the Public Works Code, or in any transit vehicle, station,  
 27 platform, or stop of any government operated transit system in  
 28 the City and County of San Francisco.
- (c) The provisions of this chapter shall not apply to (1) any person  
 under the age of five years or (2) any permitted parade, fair, or  
 festival held under a City or other government issued permit.  
 Notwithstanding this exemption, all persons participating in or  
 attending permitted parades, fairs or festivals shall comply  
 with Section 1071.1(b)(2) of the San Francisco Police Code.[<sup>1</sup>]
- (d) Any person who violates this Section 154 shall be guilty of an  
 infraction and upon conviction thereof such person shall be  
 punished by a fine not to exceed one hundred dollars (\$100)  
 for a first violation, and not to exceed two hundred dollars  
 (\$200) for a second violation within twelve months of the first  
 violation.

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<sup>1</sup> Section 1071.1 governs public nudity in restaurants and public seating areas.

1 (e) Upon the third or subsequent conviction under this Section 154  
 2 within twelve months of the first violation, such person shall  
 3 be guilty of an infraction or a misdemeanor. The complaint  
 4 charging such violation shall specify whether, in the discretion  
 5 of the District Attorney, the violation is an infraction or a  
 6 misdemeanor. If charged as an infraction, upon conviction, the  
 violator shall be punished by a fine not to exceed \$500. If  
 charged as a misdemeanor, upon conviction, the violator shall  
 be punished by a fine not to exceed \$500 or by imprisonment  
 in the County Jail for a period of time not to exceed one year or  
 by both such fine and imprisonment.

7 (f) This Section shall not supersede or otherwise affect existing  
 8 laws regulating nudity under the San Francisco Municipal  
 9 Code, including but not limited to the Park Code, Police Code,  
 10 and Port Code. But in the event of a conflict between this  
 Section 154 and Police Code 1071.1(b)(2), this Section 154  
 shall prevail.

11 (g) A violation of this Section does not require lewd or sexually  
 12 motivated conduct as required under the indecent exposure  
 provisions of California Penal Code Section 314 or for  
 purposes of California Penal Code 290(c).

13 S.F. Police Code § 154.

14 Plaintiffs contend that § 154 violates their constitutional rights as protected by the First  
 15 Amendment and the equal protection clause. In their complaint, Plaintiffs intimate that the  
 16 Ordinance should, at the very least, include an exemption for individuals who are nude and whose  
 17 nudity is combined with and related to political speech. *See* Compl. ¶ 40 (noting that the  
 18 “[o]rdinance contains no exclusion for political speech”). Plaintiffs also claim that they are  
 19 individuals who engage in expressive activity while they are nude. *See* Compl. ¶¶ 7-10. For  
 20 example, during a City meeting held in November 2012, members of the public were given an  
 21 opportunity to express their opinions on the proposed Ordinance, and Ms. Taub made comments in  
 22 opposition and also disrobed at the same time. *See* Compl. ¶ 8.

23 In their complaint, Plaintiffs assert the following claims:

- 24 (1) That the Ordinance at issue is invalid because it conflicts with state law. *See* Compl. ¶ 32.
- 25 (2) That the Ordinance at issue violates their First Amendment rights because (a) it is overbroad  
 26 and (b) “impermissibly burdens speech without being tailored to the City’s stated  
 27 objectives.” Compl. ¶ 36.
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1 (3) That the Ordinance violates their right to equal protection because (a) it improperly  
2 discriminates between two categories of children – those between 0-4 years and those  
3 between 5-14 years, *see* Compl. ¶ 48, and (b) it improperly discriminates between persons  
4 who are nude at a permitted event and those who are nude in a public place other than at a  
5 permitted event. *See* Compl. ¶ 44.

## 6 II. DISCUSSION

7 As noted above, there are two motions currently pending before the Court: (1) Defendants’  
8 motion to dismiss and (2) Plaintiffs’ motion for a preliminary injunction. The issues raised in the  
9 motions have significant overlap. This is because, in order for Plaintiffs to prevail on their motion,  
10 they have to establish a likelihood of success on the merits (or at least serious questions going to the  
11 merits), and Defendants’ motion to dismiss goes directly to the merits of Plaintiffs’ case.<sup>2</sup> If  
12 Defendants are successful on their motion to dismiss, then Plaintiffs’ motion for preliminary  
13 injunction must be denied as moot. Accordingly, the Court first addresses Defendants’ motion.

### 14 A. Defendants’ Motion to Dismiss

#### 15 1. Legal Standard

16 Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss based on the  
17 failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). A motion to  
18 dismiss based on Rule 12(b)(6) challenges the legal sufficiency of the claims alleged. *See Parks*  
19 *Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). In considering such a motion, a court  
20 must take all allegations of material fact as true and construe them in the light most favorable to the  
21 nonmoving party, although “conclusory allegations of law and unwarranted inferences are  
22 insufficient to avoid a Rule 12(b)(6) dismissal.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir.  
23 2009). While “a complaint need not contain detailed factual allegations . . . it must plead ‘enough  
24 facts to state a claim to relief that is plausible on its face.’” *Id.* “A claim has facial plausibility when  
25 the plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
26 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *see*

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28 <sup>2</sup> Because of the significant overlap, the Court does not agree with Plaintiffs that it was improper for Defendants to make the motion to dismiss.

1 also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). “The plausibility standard is not akin to  
2 a ‘probability requirement,’ but it asks for more than sheer possibility that a defendant acted  
3 unlawfully.” *Iqbal*, 129 S. Ct. at 1949.

4 In their opposition, Plaintiffs suggest that Defendants’ motion is not really a 12(b)(6) motion  
5 because Defendants are asking the Court to take judicial notice of facts that may not be judicially  
6 noticed – more specifically, a transcript of the November 5, 2012, special meeting of the City  
7 Operations & Neighborhood Services Committee. *See* Defs.’ RJN, Ex. D (transcript). Contrary to  
8 Plaintiffs’ argument, Federal Rule of Evidence 201 does not bar the Court from considering the  
9 transcript. As Plaintiffs note, Federal Rule of Evidence 201 does provide that the “rule governs  
10 judicial notice of an adjudicative fact only, not a legislative fact.”<sup>3</sup> Fed. R. Evid. 201(a). But, Rule  
11 201 does not bar a court from taking notice of a legislative fact. “It simply means that notice of  
12 ‘legislative facts’ is left unregulated by Rule 201.” Wright, *et al.*, Fed. Prac. & Proc. § 5103.2. The  
13 Wright treatise goes on to explain that “[f]ederal courts have [in fact] judicially noticed various  
14 ‘legislative facts.’ Such facts are noticed when construing or applying the Constitution. Federal  
15 courts also notice ‘legislative facts’ when construing statutes, including determining the validity of  
16 administrative regulations.” *Id.* The transcript in question is part of the legislative history of the  
17 challenged Ordinance and is subject to judicial notice. *See, e.g., Territory of Alaska v. American*  
18 *Can. Co.*, 358 U.S. 224, 226-27 (1959) (taking judicial notice of the legislative history of a bill);  
19 *Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012) (stating that “[l]egislative history is  
20 properly a subject of judicial notice”).

21 2. Conflict with State Law

22 Plaintiffs argue first that the Court need not entertain their constitutional challenge to the  
23 Ordinance at issue because the Court can invalidate the Ordinance on an independent ground – *i.e.*,  
24 because § 154 conflicts with state law. *See* Cal. Const., Art. XI, § 7 (providing that “[a] county or  
25 city may make and enforce within its limits all local, police, sanitary, and other ordinances and  
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27 <sup>3</sup> The advisory committee notes reflect that “[a]djudicative facts are simply the facts of the  
28 particular case” while “[l]egislative facts . . . are those which have relevance to legal reasoning and  
the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court  
or in the enactment of a legislative body.” Fed. R. Evid. 201, advisory committee notes.

1 regulations not in conflict with general laws”); Cal. Gov’t Code § 37100 (providing that “[t]he  
 2 legislative body may pass ordinances not in conflict with the Constitution and laws of the State or  
 3 the United States”); *O’Connell v. City of Stockton*, 41 Cal. 4th 1061, 1067 (2007) (noting that if  
 4 local legislation conflicts with state law, then that local legislation is preempted and is void; adding  
 5 that there is a conflict if the local legislation duplicates, contradicts, or enters into an area fully  
 6 occupied by general law, either expressly or by legislative implication). The state law on which  
 7 Plaintiffs rely is California Penal Code § 314, as interpreted by the California Supreme Court in *In*  
 8 *re Smith*, 7 Cal. 3d 362 (1972). In *Smith*, the California Supreme Court held that a man who had  
 9 been sunbathing nude on a public beach had not violated § 314. The Court noted that § 314  
 10 prohibits a person from *lewdly* exposing his person or private parts in a public place, and “[a] person  
 11 does not expose his private parts ‘lewdly’ within the meaning of section 314 unless his conduct is  
 12 sexually motivated.” *Id.* at 366. The Court continued: “The necessary proof of sexual motivation  
 13 was not and could not have been made in the case at bar [because] [i]t is settled that mere nudity  
 14 does not constitute a form of sexual ‘activity.’” *Id.*

15 Plaintiffs’ assertion that Penal Code § 314 disables local governments such as the City and  
 16 County of San Francisco from enacting a law banning nudity (even if not lewd) is without merit. As  
 17 Defendants note, a state appellate court has already rejected the argument that an ordinance that bans  
 18 public nudity is preempted because it conflicts with § 314, as interpreted by the California Supreme  
 19 Court in *Smith*. See *Eckl v. Davis*, 51 Cal. App. 3d 831 (1975). The court in *Eckl* explained as  
 20 follows:

21 *Smith* is a determination that nudity, in and of itself, is not within the  
 22 proscription of Penal Code section 314. However, the fact that the  
 23 Legislature has undertaken to proscribe *sexually motivated* public  
 24 nudity – conduct as to which stringent control by legislation is  
 25 obviously necessary – does not mean that the Legislature has thereby  
 26 impliedly determined that public nudity *not* so motivated, including  
 27 sunbathing in the nude on public beaches, is lawful and, therefore, not  
 28 subject to local regulation. Rather, the reasonable conclusion is that  
 the Legislature intended to reach the serious problem of sexually  
 motivated public nudity and to leave the matter of the control of public  
 nudity not so motivated to the commonly accepted concept of social  
 propriety and to local legislative bodies if particular circumstances call  
 for appropriate action.

1 *Id.* at 842 (emphasis added). The Court finds *Eckl*'s reasoning persuasive. Absent any contrary  
2 state appellate authority, this Court concludes that there is no conflict between the Ordinance and  
3 state law. Because there is no conflict, the Court must address Plaintiffs' constitutional claims, *i.e.*,  
4 that the Ordinance at issue violates their First Amendment and equal protection rights.

5 3. First Amendment

6 a. Facial Challenge

7 As a preliminary matter, the Court finds that, at this juncture in the proceedings, Plaintiffs  
8 have asserted only a facial challenge to § 154, and not an as-applied challenge. Although Plaintiffs  
9 maintain that they are making both kinds of challenges, they essentially argue that the Ordinance is  
10 per se unconstitutional – that the Ordinance is unconstitutionality in all contexts where public nudity  
11 is banned thereby. Their complaint does not allege any specific circumstance in which the ban has  
12 been applied which raises specific and particular constitutional issues.

13 In fact, it is clear that the Ordinance has not actually been applied against any individual  
14 because it is not due to go into effect until February 1, 2013. Nor are there any allegations in the  
15 complaint, nor is there otherwise any evidence, that the City has threatened to apply the Ordinance  
16 to any person in a particular circumstance.

17 At the hearing, Plaintiffs argued that, since passage of the Ordinance, nudists have been  
18 treated more harshly – *e.g.*, at the December 4, 2012, hearing of the Board of Supervisors and during  
19 the SantaCon festivities in the downtown area. But Plaintiffs have not demonstrated that in either  
20 instance was the Ordinance being enforced, particularly since it does not go into effect under  
21 February 1, 2013. Plaintiffs conceded as much at the hearing.

22 Finally, although Plaintiffs have identified in their complaint nudist activities that they have  
23 previously engaged in, they have failed to identify with any specificity (including in their complaint)  
24 what nudist activities they wish to engage in now or in the imminent future that fall within the scope  
25 of § 154, once it is effective. As the Ninth Circuit has indicated, a court should “decline[] to  
26 entertain [an] as-applied challenge[] that would require [it] to speculate as to prospective facts.”  
27 *Hoye v. City of Oakland*, 653 F.3d 835, 859 (9th Cir. 2011). This is particularly true where an as-  
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1 applied challenge is likely to be subject to a context sensitive inquiry under *United States v.*  
2 *O'Brien*, 391 U.S. 367 (1968), discussed below.

3 b. Expression

4 Defendants argue that, under Ninth Circuit precedent, the Court should dismiss Plaintiffs'  
5 facial challenge to § 154 because “[a] facial challenge must fail unless, at a minimum, the  
6 challenged ordinance is directed narrowly and specifically at expression or conduct commonly  
7 associated with expression,” *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 950 (9th Cir. 1997)  
8 (internal quotation marks omitted), and nudity is neither. As an example of an inadequate facial  
9 challenge, Defendants point to *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996). There, the  
10 Ninth Circuit “upheld a Seattle ordinance prohibiting sitting or lying on the sidewalk in downtown  
11 and in certain neighborhood commercial zones. [The court] reasoned that the ordinance targeted  
12 general conduct, not expression. Thus, an overbreadth challenge was inappropriate.” *Nunez*, 114  
13 F.3d at 950. Notably, the Ninth Circuit acknowledged that “sitting can possibly be expressive” but  
14 emphasized that that fact was not

15 enough to sustain plaintiffs’ facial challenge to the Seattle ordinance. .  
16 . . [T]he Supreme Court has entertained facial freedom-of-expression  
17 challenges only against statutes that, “by their terms,” sought to  
18 regulate “spoken words,” or patently “expressive or communicative  
19 conduct” such as picketing or handbilling. Seattle’s ordinance does  
20 neither. By its terms, it prohibits only sitting or lying on the sidewalk,  
21 neither of which is integral to, or commonly associated with,  
22 expression.

20 *Roulette*, 97 F.3d at 303-04.

21 Here, in spite of what Plaintiffs argue, nudity in and of itself is not inherently expressive. In  
22 *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000), a case in which a nude dancing establishment  
23 challenged an ordinance banning public nudity, a four-justice plurality of the Supreme Court  
24 expressly noted that “[b]eing ‘in a state of nudity’ is not an inherently expressive condition.” *Id.* at  
25 289 (plurality opinion). Justice Souter did not take issue with this proposition. *See id.* at 310  
26 (Souter, J., concurring in part and dissenting in part) (“agree[ing] with the analytical approach that  
27 the plurality employs in deciding this case”). His views on the question were expressed in his earlier  
28 concurrence in *Barnes v. Glen Theatre*, 501 U.S. 560 (1991), where he expressly stated that,



1 “[a]lthough [nude] dancing is inherently is inherently expressive, nudity *per se* is not.” *Id.* at 581  
2 (Souter, J., concurring). While the dissenting opinion of Justices Stevens and Ginsburg would have  
3 found the *Erie* ordinance unconstitutional, their opinion was predicated on the proposition that  
4 “nude dancing is a species of expressive conduct that is protected by the *First Amendment*.” *City of*  
5 *Erie*, 529 U.S. at 326 (Stevens, J. and Ginsburg, J., dissenting) (emphasis in original). It was not  
6 predicated on a finding that nudity divorced from expressive conduct such as dancing is protected  
7 under the First Amendment. Thus, not a single justice in *City of Erie* suggested that public nudity  
8 *per se* is expressive conduct protected by the First Amendment.

9 More on point, prior to *City of Erie*, the Supreme Court in *Barnes* rejected a First  
10 Amendment challenge to an Indianan public indecency statute which banned complete nudity in  
11 public despite its impact upon some expressive activity such as nude dancing which the Court  
12 acknowledged had some degree of First Amendment protection. The plurality opinion noted that  
13 Indiana “has not banned nude dancing as such, but has proscribed public nudity across the board.”  
14 *Barnes*, 501 U.S. at 566 (plurality opinion). Applying the *O’Brien* test, the plurality reviewed the  
15 lengthy history of legislation banning public indecency and found that the statute “furthers a  
16 substantial government interest in protecting order and morality.” *Id.* at 569. In concurring, Justice  
17 Scalia found the statute was “a general law regulating conduct and not specifically directed at  
18 expression,” and thus not subject to First Amendment protection at all. *Id.* at 572 (Scalia, J.,  
19 concurring). As noted above, Justice Souter, in concurring, stated that while nude dancing is  
20 inherently expressive, nudity *per se* is not.” *Id.* at 581 (Souter, J., concurring). Even the dissenting  
21 justices in *Barnes* made a distinction between nude dancing in theaters and nudity “in parks,  
22 beaches, hot dog stands, and like public places,” which was proscribed “to protect others from  
23 offense.” *Barnes*, 501 U.S. at 591 (White, J., Marshall, J., Blackmun, J., and Stevens, J., dissenting).  
24 Thus, again not a single justice in *Barnes* suggested that public nudity itself constitutes expressive  
25 conduct protected by the First Amendment.

26 Thus, it is not surprising that lower courts have also held that public nudity alone is not  
27 expression protected by the First Amendment. *See, e.g., South Fla. Free Beaches, Inc. v. Miami*,  
28 734 F.2d 608, 610 (11th Cir. 1984) (stating that “nudity is protected as speech only when combined

1 with some mode of expression which itself is entitled to first amendment protection”); *Bush v. City*  
2 *of San Diego*, No. 10CV1188-LAB (RBB), 2010 U.S. Dist. LEXIS 57922, at \*8 (S.D. Cal. June 11,  
3 2010) (noting that “[t]he ordinance merely prohibits public nudity, and by its terms regulates  
4 conduct alone”).

5 This conclusion is consistent with the test to determine when conduct is sufficiently  
6 expressive as to deserve First Amendment protection. Expressive conduct exists where “an intent to  
7 convey a particularized message was present, and [ ] the likelihood was great that the message  
8 would be understood by those who viewed it.” *Texas v. Johnson*, 491 U.S. 397, 404 (1989), *quoting*  
9 *Spence v. Washington*, 418 U.S. 405, 410-11 (1974); *cf. Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)  
10 (noting that “[i]t is possible to find some kernel of expression in almost every activity a person  
11 undertakes – for example, walking down the street or meeting one’s friends at a shopping mall – but  
12 such a kernel is not sufficient to bring the activity within the protection of the First Amendment”).  
13 Even if a person intended to convey a particular message simply by walking in public nude, the  
14 likelihood is far from “great that the message would be understood by those who viewed it,” at least  
15 absent any other context to suggest that the nudity is intended to convey a particular message.  
16 Unlike the burning of a flag (*see Johnson* 491 U.S. at 397), burning of a draft card (*see O’Brien*, 391  
17 U.S. at 367), or wearing a black armband in protest against the war (*see Tinker v. Des Moines Indep.*  
18 *Comm. School Dist.*, 393 U.S. 503 (1969)), public nudity in and of itself is not commonly associated  
19 with expression of a particular message. *See Bush v. City of San Diego*, No. 10CV1188-LAB  
20 (RBB), 2010 U.S. Dist. LEXIS 57922, at \*5-6 (S.D. Cal. June 11, 2010) (noting that “nudity, by  
21 itself, [does not] communicate an intelligible message such that there [is no] First Amendment right  
22 to be naked”; adding that “the link between the [bike] riders’ nudity and their message is . . .  
23 attenuated”).

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1 Because nudity in and of itself is not inherently expressive, the Court agrees with Defendants  
 2 that, under *Nunez*, Plaintiffs' facial challenge to the Ordinance which is not narrowly and  
 3 specifically directed at expression must fail.<sup>4</sup> *See Nunez*, 114 F.3d at 950.

4 c. Overbreadth

5 Although *Nunez* suggests the Court may end its inquiry on the merits of a facial challenge at  
 6 this point, given the substantial body of jurisprudence finding nudity in some contexts does have  
 7 expressive value and the fact that the Ordinance does not contain an exemption for, *e.g.*, nudity  
 8 employed in explicitly expressive activity, the Court finds it appropriate to address Plaintiffs'  
 9 overbreadth argument. "For a statute to be facially invalid on overbreadth grounds, it must be  
 10 substantially overbroad." *Acosta v. City of Costa Mesa*, 694 F.3d 960, 970 (9th Cir. 2012). A  
 11 statute is substantially overbroad "if a substantial number of its applications are unconstitutional,  
 12 judged in relation to the statute's plainly legitimate sweep." *United States v. Perelman*, 695 F.3d  
 13 866, 870 (9th Cir. 2012).

14 In the case at bar, Plaintiffs have failed to make an adequate showing that there is a  
 15 substantial number of unconstitutional applications, particularly when judged in relation to the  
 16 Ordinance's plainly legitimate sweep. Given the Supreme Court's decisions in *City of Erie* and  
 17 *Barnes*, the Ordinance's general ban on public nudity for the most part regulates conduct only. In  
 18 the main therefore, there is no First Amendment problem – *i.e.*, the Ordinance is plainly legitimate.  
 19 And even though nudity can be expressive in some contexts, Plaintiffs have not established that  
 20 there are a substantial number of contexts where the conduct constitutes expression<sup>5</sup> and in which  
 21 the application of the Ordinance would be unconstitutional under the *O'Brien* test.

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 24 <sup>4</sup> To the extent that Plaintiffs' bring an additional First Amendment claim on the basis that  
 25 the permitting exemption is a prior restraint on speech, that claim also fails because nudity is not  
 26 inherently expressive. *See Ward v. Rock Against Racism*, 491 U.S. 781, 795 n.5 (1989) (stating that  
 27 "[t]he relevant question [in determining whether something is a prior restraint] is whether the  
 challenged regulation authorizes suppression of *speech* in advance of its expression") (emphasis  
 added).

28 <sup>5</sup> *See Bush*, 2010 U.S. Dist. LEXIS 57922, at \*6 (noting that "the link between the [bike]  
 riders' nudity and their message is . . . attenuated").

1 The Court notes that, in evaluating Plaintiffs' claim of substantial overbreadth, it considers  
2 the fact that § 154 is not as far reaching as Plaintiffs have suggested. In many respects, the  
3 Ordinance is quite limited. For example, the Ordinance basically bans nudity on public streets,  
4 plazas, and transit system areas. It does not, like the laws in *City of Erie* and *Barnes*, ban nudity in  
5 all public places, such as indoor establishments (where there is a consenting audience); nor does it  
6 ban nudity on public beaches or parks.<sup>6</sup> Also, the Ordinance prohibits exposure of a person's  
7 genitals, perineum, or anal region only. It does not ban exposure of breasts as did the laws in *City of*  
8 *Erie* and *Barnes*. Cf. *Barnes*, 501 U.S. at 587 (Souter, J., concurring) (stating that ordinance's  
9 limitation is minor, as it only prohibited dancers from "[d]ropping the final stitch."). While the  
10 Ordinance does not contain an explicit exemption for those engaged in expressive matters of serious  
11 literary, artistic, scientific or political value as did the Jackson ordinance in *J&B Entertainment, Inc.*  
12 *v. City of Jackson*, 152 F.3d 362, 365 (5th Cir. 1998), given the narrowness of the San Francisco  
13 Ordinance compared to laws upheld in *City of Erie* and *Barnes*, the Court concludes Plaintiffs have  
14 failed to establish there is a "substantial number of applications [which] are unconstitutional,  
15 judged in relation to the statute's plainly legitimate sweep." *Perelman*, 695 F.3d at 870.

16 The Court thus concludes that Plaintiffs' facial challenge also fails under a traditional  
17 overbreadth analysis.

18 d. As-Applied Challenge

19 Because, as noted above, the Court finds that Plaintiffs have made, at this juncture in the  
20 proceedings, a facial challenge only, the Court need not opine any further. However, because  
21 dismissal of the complaint is without prejudice to Plaintiffs raising a ripe as-applied challenge, the  
22 Court notes that, unless Plaintiffs can demonstrate that the Ordinance has been enforced selectively  
23 in a manner which discriminates on the bases of *e.g.*, of viewpoint, *see Hoye*, 653 F.3d at 854  
24 (noting that an as-applied challenge may be made, even where a law is neutral and constitutional in  
25 all fact situations, if it has been enforced selectively in a viewpoint discriminatory way), the *O'Brien*  
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28 <sup>6</sup> At the hearing, Defendants explained that there is a separate provision that governs in the  
City's Park Code. That provision is not at issue in this case.

1 test – which governs expressive conduct – will apply. *See O’Brien*, 391 U.S. at 367. Under the  
2 *O’Brien* test,

3 [a] government regulation [of expressive conduct] is sufficiently  
4 justified if it is within the constitutional power of the Government; if it  
5 furthers an important or substantial governmental interest; if the  
6 governmental interest is unrelated to the suppression of free  
7 expression; and if the incidental restriction on alleged First  
8 Amendment freedoms is no greater than is essential to the furtherance  
9 of that interest.

10 *O’Brien*, 391 U.S. at 377.

11 This is consistent with *City of Erie*, where a plurality of the Supreme Court applied the  
12 *O’Brien* test. *See City of Erie*, 529 U.S. at 289, 295 (“clarify[ing] that government restrictions on  
13 public nudity such as the ordinance at issue here should be evaluated under the framework set forth  
14 in *O’Brien* for content-neutral restrictions on symbolic speech”; adding that “there is nothing  
15 objectionable about a city passing a general ordinance to ban public nudity (even though such a ban  
16 may place incidental burdens on some protected speech)”). Other courts have followed suit. *See*,  
17 e.g., *Bush*, 2010 U.S. Dist. LEXIS 57922, at \*7-8 (applying *O’Brien* test to an ordinance that banned  
18 public nudity); *Moore v. City of Berkeley*, No. C-98-3579 CW (N.D. Cal.) (applying *O’Brien* test to  
19 an ordinance that targeted public nudity; noting that “[t]he Ordinance at issue . . . is a general  
20 prohibition on public nudity that regulates conduct alone, whether or not that conduct is  
21 accompanied by expressive activity”).

22 In their opposition, Plaintiffs argue that the *O’Brien* test should not apply and that, instead,  
23 the Court should automatically apply the stricter test set forth in *Johnson*, 491 U.S. at 397, because §  
24 154 is on its face content-based or “sensitive.” However, the Ordinance on its face is content  
25 neutral, because it does not describe the activity it regulates by the content of its message. *See*  
26 *Minority TV Project, Inc. v. FCC*, 676 F.3d 869, 872-74 (9th Cir. 2012) (stating that ““whether a  
27 statute is content neutral or content based is something that can be determined on the face of it; if the  
28 statute describes speech by content, then it is content based”). The Ordinance applies across the  
board to all public nudity regardless of the content of the intended message or in fact whether there  
is any message at all.

1 Plaintiffs also assert that the Ordinance is content-based because of the Ordinance's permit  
2 exemption, *see, e.g.*, Docket No. 20 (Reply at 11) (arguing that the ordinance is not content neutral  
3 because it allows nude expressive speech at permitted events but not at other times), but that  
4 exemption – as a facial matter – is best characterized as a time, manner, and/or place restriction, one  
5 that has nothing to do with content. *See, e.g., OSU Student Alliance v. Ray*, 699 F.3d 1053, 1065  
6 (9th Cir. 2012) (in case involving permit, noting that a time, place, and manner regulation must  
7 contain adequate standards to guide the official's decision and render it subject to effective judicial  
8 review); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1023 (9th Cir.  
9 2009) (noting that reasonable time, place, and manner restrictions on speech are permissible and that  
10 such restrictions can include permitting requirements); *cf. Barnes*, 501 U.S. at 566 (noting similarity  
11 between time, place and matter test and *O'Brien*). Nothing suggests that permits are issued on the  
12 basis of the content of the applicant's message.

13 4. Equal Protection

14 The Court now turns to Plaintiffs' equal protection claim. Section 154 generally bans public  
15 nudity in certain areas but creates two exceptions: (1) for children under the age of five years and (2)  
16 for persons at any permitted parade, fair, or festival held under a City or other government-issued  
17 permit. Based on these exemptions, Plaintiffs bring an equal protection challenge to the Ordinance.  
18 More specifically, Plaintiffs contend that the Ordinance violates their right to equal protection  
19 because (a) it improperly discriminates between two categories of children – those between 0-4  
20 years and those between 5-14 years, *see* Compl. ¶ 48, and (b) it improperly discriminates between  
21 persons who are nude at a permitted event and those who are nude in a public place other than at a  
22 permitted event. *See* Compl. ¶ 44.

23 a. Age Exemption

24 Plaintiffs lack standing to challenge the age exemption. None is a child between the age of 5  
25 and 14. In their opposition brief, Plaintiffs do little to address this deficiency except to assert that  
26 Defendants should be estopped from making the argument because the parties stipulated to deferring  
27 a hearing on Plaintiffs' motion for class certification. *See* Opp'n at 21. But this is an insufficient  
28 basis to make an estoppel argument. Plaintiffs need to have standing in their own right before they

1 can make any argument that they are adequate representatives for members of the class or  
 2 subclasses. *See Nelsen v. King County*, 895 F.2d 1248, 1249-50 (9th Cir. 1990) (stating that  
 3 “[s]tanding ‘is a jurisdictional element that must be satisfied prior to class certification’” and that,  
 4 “[i]f the litigant fails to establish standing, he may not ‘seek relief on behalf of himself or any other  
 5 member of the class’”).

6 Even if there were not a standing problem, Plaintiffs’ equal protection claim is problematic  
 7 for an independent reason. Because Plaintiffs’ equal protection claim is not based on a fundamental  
 8 right (as nudity is not inherently expressive), the age exemption is subjected to only rational review.  
 9 *See Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1141 (9th Cir. 2011) (stating  
 10 that, “[i]f the ordinance does not concern a suspect or semi-suspect class or a fundamental right, we  
 11 apply rational basis review and simply ask whether the ordinance ‘is rationally-related to a  
 12 legitimate governmental interest’”); *see also Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83  
 13 (2000) (noting that “[s]tates may discriminate on the basis of age without offending the Fourteenth  
 14 Amendment if the age classification in question is rationally related to a legitimate state interest”;  
 15 also stating that “[t]he rationality commanded by the Equal Protection Clause does not require States  
 16 to match age distinctions and the legitimate interests they serve with razorlike precision”). As  
 17 Defendants argue, “treating infants and preschool children differently from others is entirely  
 18 reasonable for purposes of a public nudity ban. The necessity of diaper-changing alone provides a  
 19 rational basis for excluding infants and toddlers from a public nudity ban.”<sup>7</sup> Mot. at 17. Moreover,  
 20 the Board of Supervisors could have assumed there is a lesser connotation of sexuality in the nudity  
 21 of younger children. In any event, nothing in Plaintiffs’ complaint suggests that there is an absence  
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23 <sup>7</sup> Plaintiffs have not demonstrated the age exemption here warrants anything other than the  
 24 most deferential level of rational basis review (as opposed to what commentators have characterized  
 25 as rational basis “with bite”) wherein so long as “any reasonably *conceivable* state of facts . . . could  
 26 provide a rational basis for the classification,” then Defendants’ actions will be deemed to comport  
 27 with equal protection. *See SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir.  
 28 2002); *see also Heller v. Doe*, 509 U.S. 312, 320 (1993) (stating that “[a] State . . . has no obligation  
 to produce *evidence* to sustain the rationality of a statutory classification”; that “[a] legislative  
 choice is not subject to courtroom factfinding and may be based on rational speculation unsupported  
 by evidence or empirical data”; and that “[a] statute is presumed constitutional, and ‘the burden is  
 on the one attacking the legislative arrangement to negative every conceivable basis which might  
 support it’”) (emphasis added).

1 of a rational basis for the differential treatment of children under five. *See, e.g., Solis v. Fresno*  
 2 *Police Dep't*, 1:11-CV-00053 AWI GSA, 2011 U.S. Dist. LEXIS 90443, at \*22 (E.D. Cal. Aug. 15,  
 3 2011) (stating that “Plaintiff’s Complaint fails to address an absence of rational basis for Plaintiff’s  
 4 treatment”); *Davis v. NCAA*, No. C 11-01207 WHA, 2011 U.S. Dist. LEXIS 68034, at \*10-11 (N.D.  
 5 Cal. June 24, 2011) (stating that, “[i]n order for plaintiffs’ federal equal protection claim to survive  
 6 defendants’ motion, the amended complaint must plead sufficient facts and inferences to make it  
 7 plausible that Bylaw 14.5.4.2 is not rationally related to any conceivable legitimate purpose” and  
 8 “[i]t does not”). In fact, Plaintiffs have not even addressed the absence of a rational basis in their  
 9 opposition brief.

10 To the extent Plaintiffs argue that the age exemption in the Ordinance should still be held  
 11 invalid because it conflicts with state law, they are no better off. The state law on which Plaintiffs  
 12 rely is California Penal Code § 26, which provides in relevant part that “[a]ll persons are capable of  
 13 committing crimes except [*inter alia*] [c]hildren under the age of 14, in the absence of clear proof  
 14 that at the time of committing the act charged against them, they knew its wrongfulness.” Cal. Pen.  
 15 Code § 26. Section 26 is, in essence, a statutory defense to a crime. *See People v. Anderson*, 51  
 16 Cal. 4th 989, 996 (2011) (indicating that § 26 is a “statutory defense”); *see also In re Jennings*, 34  
 17 Cal. 4th 254, 276 (2004) (indicating that a defense to a crime may be made based on § 26). But, as  
 18 Defendants point out, whether a person can assert a particular defense to criminal charges is a  
 19 different issue from whether they can be charged with a crime in the first instance. Nothing about  
 20 the Ordinance interferes with a defense under § 26. There is no conflict between the Ordinance and  
 21 state law. *See Mot. at 24-25; see also O’Connell*, 41 Cal. 4th at 1068 (explaining that “[a] local  
 22 ordinance *contradicts* state law when it is inimical to or cannot be reconciled with state law”)  
 23 (emphasis in original).

24 b. Exemption for Permitted Event

25 As for the permit exemption, Plaintiffs’ equal protection challenge also fails. Once again,  
 26 because no fundamental right is implicated (as nudity is not inherently expressive), rational review  
 27 applies. And once again, Defendants have offered a rational basis for the distinction – *i.e.*, because  
 28 nudity at permitted events such as the Pride Parade and Bay-to-Breakers is “generally widely



1 publicized, and the public has come to expect public nudity at those events, and thus is not  
2 ‘unwillingly or unexpectedly exposed’ to nudity at them. Further, permitted events typically involve  
3 street closures and other public safety precautions that reduce the risk that nudity will create public  
4 safety hazards.” Mot. at 18; *see also Barnes*, 501 U.S. at 590-91 (White, J., Marshall, J., Blackmun,  
5 J., and Stevens, J., dissenting) (stating that “[t]he purpose of forbidding people to appear nude in  
6 parks, beaches, hot dog stands, and like public places is to protect others from offense”). The  
7 legislative history of the Ordinance contains evidence of the impact of nudity and pedestrian  
8 safety/traffic. *See generally* Defs.’ RJN, Ex. D (transcript of the November 5, 2012, special meeting  
9 of the City Operations & Neighborhood Services Committee transcript).

10 Similar to above, nowhere in their complaint or opposition brief do Plaintiffs make any  
11 assertion there is a lack of a rational basis for the permit exception. Rather, in their opposition brief,  
12 Plaintiffs make clear that their equal protection claim is predicated on the First Amendment. *See*  
13 Opp’n at 22. The problem for Plaintiffs is that, as discussed above, nudity in and of itself is not  
14 inherently expressive.

15 5. Summary

16 For the foregoing reasons, the Court concludes that both Plaintiffs’ First Amendment claim  
17 and their equal protection claim should be dismissed. As to the First Amendment claim, the facial  
18 challenge is dismissed with prejudice. Plaintiffs have leave to amend, however, to plead an as-  
19 applied challenge. *Cf. Carrico v. City & County of San Francisco*, 656 F.3d 1002, 1006 (9th Cir.  
20 2011) (noting that a pre-enforcement challenge may be made in a First Amendment case, although  
21 there are certain standing requirements in the pre-enforcement context). As to the equal protection  
22 claim, the dismissal is without prejudice, and Plaintiffs have leave to amend consistent with this  
23 order.

24 B. Plaintiffs’ Motion for Preliminary Injunction

25 Because the Court is dismissing Plaintiffs’ complaint in its entirety, their motion for a  
26 preliminary injunction is denied as moot. The denial is without prejudice – *i.e.*, this ruling does not  
27 bar Plaintiffs from seeking a preliminary injunction in conjunction with a proper as-applied  
28 challenge.

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**III. CONCLUSION**

For the foregoing reasons, Defendants’ motion to dismiss is granted in its entirety, and Plaintiffs’ motion for a preliminary injunction is thereby denied as moot.


The Court also notes that, as an administrative matter, it shall terminate Plaintiffs’ motion for class certification because of its decision on the motion to dismiss. This ruling does not bar Plaintiffs from bringing a class claim in an as-applied challenge, if they can, in good faith and consistent with Federal Rule of Civil Procedure 11, do so.

Plaintiffs have forty-five (45) days from the date of this order to file an amended complaint.

This order disposes of Docket Nos. 5 and 15.

IT IS SO ORDERED.

Dated: January 29, 2013

  
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EDWARD M. CHEN  
United States District Judge

**United States District Court**  
For the Northern District of California