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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10  
11 WILLIAM J. DORSETT, and  
12 ROGELIO FLORES,

13 Plaintiffs,

14 v.

15 THE CITY OF SAN DIEGO, and  
16 DOES 1-25, inclusive,

17 Defendants.

Case Number: 3:24-cv-00813-H-AHG

FIRST AMENDED COMPLAINT FOR  
DAMAGES AND EQUITABLE RELIEF

[Jury Trial Demanded]



## INTRODUCTION

1  
2 1. It is a matter of well-settled law at the core of the First Amendment to the  
3 United States Constitution that artists have a right to publicly express themselves, even  
4 if the public may pay them for their artwork. The Plaintiffs in this case are “buskers,”  
5 artists in San Diego who exercise their First Amendment rights – one by painting and  
6 the other by performing magic – to the delight of the public, while asking the public for  
7 money to support their art. As detailed below, the Defendants violated the Plaintiff’s  
8 First Amendment rights through unfounded or pretextual citations for alleged violations  
9 of the city code and other arbitrary and unlawful limitations to chill their expressive  
10 activity. San Diego has also enacted an unconstitutional new ordinance that compounds  
11 its First Amendment violations.

12 2. The City of San Diego and its employees deprived Plaintiff William J.  
13 Dorsett of his rights when they cited him for a violation of the City code, on February  
14 1, 2023, telling him that his creation and display of his original artwork was not speech  
15 protected by the United States Constitution because it was offered for sale.

16 3. The City of San Diego and its employees deprived both Plaintiffs William  
17 J. Dorsett and Rogelio Flores of their rights when they created arbitrary and unjustified  
18 location-based restrictions that limited the reach of their speech.

19 4. The City of San Diego and its employees deprived Plaintiff William J.  
20 Dorsett of his rights when they selectively enforced—against him and not against  
21 others—arbitrary location-based restrictions that limited the reach of his speech.

22 5. The City of San Diego deprived both Plaintiffs William J. Dorsett and  
23 Rogelio Flores, as well as all members of the public, of their First Amendment rights  
24 when it enacted San Diego Municipal Code Article 3, Division 5, Section 63.0501 *et*  
25 *seq.* (“Expressive Activity on Public Property”). This is a facial challenge to parts of  
26 that ordinance, which became effective on March 29, 2024. In sum, the ordinance is  
27 unconstitutionally vague, which will unlawfully empower city officials and law  
28

1 enforcement to continue to arbitrarily enforce the law, including against buskers such as  
2 Plaintiffs, and deprives the public, including buskers like the plaintiffs, of  
3 constitutionally required notice of what is prohibited and what is permissible.

#### 4 **PARTIES**

5 6. Plaintiff William J. Dorsett (“Dorsett”) is an individual living in San Diego  
6 who regularly creates and displays artwork in public. His expressive activity includes  
7 live painting, the live creation of palm frond roses, and the display of this artwork.

8 7. Plaintiff Rogelio Flores (“Flores”) is an individual living in San Diego who  
9 regularly performs in public. His expressive activity includes juggling, magic, and side  
10 gags.

11 8. Defendant City of San Diego (“San Diego”) is a political subdivision of the  
12 State of California and a body corporate and politic exercising local government powers  
13 as specified by the Constitution and the laws of the State of California. At all relevant  
14 times, the San Diego Police Department and the San Diego Park and Recreation  
15 Department were departments and agencies of San Diego. At all relevant times, San  
16 Diego was the employer of DOES 1 through 25.

17 9. Plaintiffs do not know the true names and capacities of Defendants sued  
18 herein as DOES 1 through 25, and for that reason have sued them by their fictitious  
19 names. On information and belief, Plaintiffs allege that each of these fictitiously named  
20 Defendants are responsible in some manner for some or all the acts alleged herein.  
21 Plaintiffs will amend this Complaint to set forth the true names and capacities of  
22 fictitiously named Defendants once ascertained.

23 10. Plaintiffs are informed and believe, and thereon allege, that each of the  
24 Defendants sued here, including those named herein as Does, are the agents, servants,  
25 employees, licensees, guarantees, indemnitors, invitees, or assignees of each other, and  
26 in doing the things herein alleged acted within the course and scope of such agency,  
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1 employment, license, guaranty, indemnity, invitation, assignment, and/or relationship  
2 and with the full knowledge, consent and approval of the remaining Defendants.

### 3 JURISDICTION AND VENUE

4 11. The United States District Court for the Southern District of California has  
5 jurisdiction over this matter and authority to grant the requested relief pursuant to 28  
6 U.S.C. §§ 1331 and 1343 because Plaintiffs allege ongoing violations by Defendants of  
7 the rights secured to Plaintiffs by the First and Fourteenth Amendments of the United  
8 States Constitution. Plaintiffs seeks damages and injunctive and declaratory relief  
9 pursuant to 42 U.S.C. § 1983.

10 12. Venue is proper in the Southern District under 28 U.S.C. § 1391(b) because  
11 all Defendants reside in the district, and the events or omissions giving rise to Plaintiff's  
12 claims occurred in this District.

### 13 GENERAL ALLEGATIONS

14 13. "To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two  
15 essential elements: (1) that a right secured by the Constitution or laws of the United  
16 States was violated, and (2) that the alleged deprivation was committed by a person  
17 acting under the color of state law." *Adams v. Deloria*, 443 F. Supp. 3d 1093, 1100 (N.D.  
18 Cal. 2020). Section 1983 actions may be brought against a city, such as San Diego, for  
19 the actions of its agents. *See Monell v. Department of Social Services of City of New*  
20 *York*, 436 U.S. 658, 690 (1978); *Lockett v. County of Los Angeles*, 977 F.3d 737, 741  
21 (9th Cir. 2020).

#### 22 **Unconstitutional Harassment of Dorsett for Making & Selling Artwork**

23 14. "The Supreme Court has been clear that the arts and entertainment constitute  
24 forms of expression under the First Amendment." *White v. City of Sparks*, 500 F.3d 953,  
25 955 (9th Cir. 2007) (a case about an artist's right to paint in public). Further, "an artist's  
26 *sale* of his original artwork constitutes speech protected under the First Amendment."  
27 *Id.* at 954. "It is beyond dispute that solicitation is a form of expression entitled to the  
28

1 same constitutional protections as traditional speech.” *ACLU of Nev. V. City of Las*  
2 *Vegas*, 466 F.3d 784, 792 (9th Cir. 2006). “It is well settled that a speaker’s rights are  
3 not lost merely because compensation is received; a speaker is no less a speaker because  
4 he or she is paid to speak.” *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781,  
5 801 (1988).

6 15. On or about February 1, 2023, Dorsett was busking—painting and  
7 displaying his original artwork for members of the public—on a public sidewalk in  
8 Ocean Beach, San Diego, when he was approached by *six* armed officers—employees  
9 of the Defendant City of San Diego (three police officers and three park rangers). Dorsett  
10 captured this incident on video.<sup>1</sup>

11 16. These officers were acting under the color of state law, identifying  
12 themselves as on-duty officers, displaying their badges, wearing uniforms, and  
13 performing official duties. *See Naffe v. Frey*, 789 F.3d 1030 (9th Cir. 2015) (“An  
14 individual acts under color of state law when he or she exercises power ‘possessed by  
15 virtue of state law and made possible only because the wrongdoer is clothed with the  
16 authority of state law.’”) (citing *United States v. Classic*, 313 U.S. 299, 326 (1941)); *see*  
17 *also Davis v. John*, 485 F.Supp.3d 1207, 1216 (C.D. Cal. 2020). For an officer to be  
18 acting under color of state law, that officer’s actions must be “in some way related to  
19 the performance of his official duties.” *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 838  
20 (9th Cir. 1996).

21 17. The officers gave Dorsett a written citation for violating San Diego  
22 Municipal Code §§ 36.0103 & 36.0106(a)(ii)(J). A true and correct copy of that citation  
23 is attached to this complaint as Exhibit A.

24 18. San Diego Municipal Code § 36.0103 requires all “*sidewalk vendors*” to  
25 “obtain a *vending permit* prior to *vending* on any *sidewalk*” (italics in the original). San  
26 Diego Municipal Code § 36.0106(a)(11)(J) states, in relevant part: (a) No *stationary*

27 <sup>1</sup> This video can be seen at <https://www.youtube.com/watch?v=Oeb17HJ71-k> (retrieved on June 28,  
28 2024).

1 *sidewalk vendor shall vend and no roaming sidewalk vendor shall stop to make sales in*  
2 *the following locations: ... (11) within 15 feet of any: ... (J) high-traffic bike and shared*  
3 *use path” (italics in the original).*

4 19. However, the vending code that the City cited Dorsett for violating (San  
5 Diego Municipal Code Art. 6. Div. 1 § 36.0101 *et seq.*) specifically exempts expressive  
6 activities as well as those selling items constituting expressive activities. A true and  
7 correct copy of the vending code is attached to this complaint as Exhibit B. Section  
8 36.0113 exempts “[a]ny vendor or individual engaged solely in artistic performances,  
9 free speech, political or petitioning activities, or engaged solely in *vending* of items  
10 constituting expressive activity protected by the First Amendment[.]”

11 20. Thus, by issuing this citation, the City and its employees deprived Dorsett  
12 of, and chilled, his First Amendment right to create, display, and sell his paintings, in  
13 addition to ignoring the plain text of the City’s own ordinance that exempted artistic  
14 performances and the vending of items constituting expressive activity protected by the  
15 First Amendment—which plainly includes painting and the sale of those paintings.

16 21. Three of the six officers made other statements that Dorsett’s art was not  
17 protected by the First Amendment.

18 22. A ranger stated, “We’re doing an admin cite for fixed priced on your stuff,  
19 vending in this area...”<sup>2</sup>

20 23. A police officer told Dorsett that because Dorsett displayed suggested  
21 donations for his art, he was not protected by the First Amendment.<sup>3</sup>

22 24. Another ranger told Dorsett, “He didn’t get you for obstructing the sidewalk,  
23 what he got you for was vending... anything that has a labeled price tag on it.”<sup>4</sup>

24  
25  
26 <sup>2</sup> See video recording, *supra*, note 4 at timestamp 23:50.

27 <sup>3</sup> See video recording, *supra*, note 4 at timestamp 14:35.

28 <sup>4</sup> See video recording, *supra*, note 4 at timestamp 26:55.



1 performer). Restrictions on the time, place and manner of protected speech must (1) be  
2 “justified without reference to the content of the regulated speech”; (2) be “narrowly  
3 tailored to serve a significant governmental interest”; and (3) “leave open ample  
4 alternative channels for communication of the information.” *Ward v Rock Against*  
5 *Racism*, 491 U.S. 781, 791 (1989). This applies to restrictions on street performers.  
6 *Berger*, 569 F.3d at 1036.

7 32. In or around September 2022, while Flores was performing where he usually  
8 performed in Balboa Park, on El Prado, park rangers told him he could not perform  
9 there. This happened three or four times. The ranger told him there was a designated  
10 area with signs which was the only area where Flores could perform. Flores moved at  
11 their request, but his reach to the public was severely limited as a result.

12 33. The El Prado is an historic public forum in Balboa Park, with an  
13 approximately 40-foot-wide pedestrian thoroughfare that opens into large areas, with  
14 large intersections. Defendants have sought to exclude Plaintiffs from El Prado and  
15 restrict them to other areas of Balboa Park where their reach is limited.

16 34. On May 21, 2023, a ranger employed by the City of San Diego, and acting  
17 under color of state law, forced Dorsett, under threat of citation, to also move from the  
18 historic public busking location on El Prado in Balboa Park to a secluded busking  
19 location while Dorsett was creating and displaying art.

20 35. On May 29, 2023, Flores was kicked out of the El Prado area of Balboa Park  
21 again and moved to a designated “First Amendment” area where there were fewer  
22 members of the public.

23 36. On November 16, 2023, Flores was busking in Balboa Park on El Prado and  
24 a small crowd of about twenty people gathered to watch him. After his show had ended,  
25 a Park Ranger approached him and issued three citations.

1           37. These types of location-based restrictions are not only being enforced in the  
2 El Prado area of Balboa Park, but in public areas across the City, including in La Jolla,  
3 Mission Beach Park, Ocean Beach and Pacific Beach

4           38. On February 1, 2023, a ranger employed by the City of San Diego, and  
5 acting under color of state law, told Dorsett that he had to move from a wide public  
6 sidewalk in Ocean Beach, to a grassy area that was crowded with vendors selling goods.

7           39. On July 18, 2023, the Chief Park Ranger for the City of San Diego, Michael  
8 F. Ruiz, informed Dorsett that he was only allowed to engage in expressive activities in  
9 a small area during San Diego Comic Con (“Comic Con”) (from July 19 – July 23,  
10 2023). Comic Con, billed as the biggest comic convention in the United States, is held  
11 in the San Diego Convention Center in downtown San Diego. When Dorsett arrived at  
12 this area, he discovered it was too small to accommodate buskers, and it was overly  
13 watered, to the point water was pooling, and the ground was muddy, thus making it  
14 impracticable for buskers to communicate with the public. Dorsett observed and  
15 recorded that only the grassy area set up for free speech activities was oversaturated  
16 with water.<sup>6</sup> Other areas were not over-watered. This area was watered during the night,  
17 every night, during Comic Con, to the point that it made it impractical to create or  
18 display artwork. The result was that Dorsett earned approximately one third of the  
19 amount he had earned at past Comic Cons. After Comic Con ended, Dorsett visited that  
20 area and discovered that it was no longer overly watered. On information and belief, the  
21 City of San Diego designated a zone for buskers, and then overly watered it to  
22 discourage buskers from engaging in expressive activities during Comic Con.

23           40. The City of San Diego continues to impose location-based restrictions at the  
24 time Plaintiffs are filing this complaint, including confining expressive activity in many  
25 public parks to 4-foot by 8-foot marked spaces in undesirable locations.

26  
27 \_\_\_\_\_  
28 <sup>6</sup> A recording that includes Dorsett’s observations over multiple days can be seen at:  
<https://www.youtube.com/watch?v=0xv8VTDfBTw> (retrieved on June 28, 2024).

1 41. The City of San Diego’s location-based restrictions unconstitutionally turn  
2 on the content of a Plaintiffs’ speech, burden more speech than necessary, and failed to  
3 leave open ample alternative channels for communication by not providing “speakers  
4 with exposure.” *Camenzind v. California Exposition & State Fair*, 84 F.4th 1102, 1114  
5 (9th Cir. 2023) (location-based restriction justified when placed in “a prime location that  
6 provides speakers with exposure to virtually everyone who enters the fairgrounds” with  
7 nowhere preferable).

8 42. The City’s burdens and restrictions on Plaintiffs’ protected speech resulted  
9 in a dramatic loss of revenue for the plaintiffs due to the reduced exposure to the public.

### 10 **Viewpoint Discrimination Through Selective Enforcement**

11 43. “Once a forum is opened up to assembly or speaking by some groups,  
12 government may not prohibit others from assembling or speaking.” *Police Dep’t of Chi.*  
13 *v. Mosley* 408 U.S. 92, 96 (1972). “[D]iscriminatory enforcement of speech restriction  
14 amount[s] to viewpoint discrimination in violation of the First Amendment.” *Menotti v.*  
15 *City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005). Although the Ninth Circuit has  
16 often addressed “discriminatory enforcement” claims under the Equal Protection clause  
17 rather than the First Amendment, both claims may be available. *Hightower v. City and*  
18 *County of San Francisco*, 77 F.Supp.3d 867, 883 (N.D. Cal. 2014).

19 44. On or about May 21, 2023, the City of San Diego pretextually stated that  
20 Dorsett was obstructing a public sidewalk in El Prado with a small painting setup even  
21 though it left ample room on the sidewalk for members of the public to walk around  
22 him. On or around March 1, 2023, the City of San Diego had allowed PETA to take up  
23 more than 400-square-feet of a public walkway, also in the El Prado area of Balboa  
24 Park, in a way that in fact did obstruct the public walkway.<sup>7</sup> The City of San Diego had  
25 told Dorsett that setting up his small display in El Prado was blocking a “fire lane,” but  
26 they allowed PETA to take up large amounts of space in the same area.

27 \_\_\_\_\_  
28 <sup>7</sup> PETA’s display in the Prado can be seen in this video.  
<https://www.youtube.com/watch?v=wDYzS7bq5zo> (retrieved on June 28, 2024).

1 **Challenge to New Ordinance**

2 45. On March 29, 2024, San Diego Municipal Code Article 3, Division 5,  
3 Section 63.0501 *et seq.* (“Expressive Activity on Public Property”) became effective. A  
4 true and correct copy of that ordinance is attached to this complaint as Exhibit C. The  
5 provisions of this new law deprive Plaintiffs, and other members of the public, of their  
6 First Amendment rights. Plaintiffs challenge that ordinance.

7 *Provision Regarding Handcrafts and Mass-Produced Art*

8 46. Section 63.0505 provides: Vendors of handcrafts or mass-produced visual  
9 art and vendors of services shall comply with the Sidewalk Vending Regulations in  
10 Chapter 3, Article 6, Division 1, for all vending activities in parks, plazas, beach areas,  
11 and on sidewalks that are not otherwise authorized by a special event permit, lease, or  
12 other advance written approval by the City Manager...”

13 47. The term “mass-produced” is undefined.

14 48. Dorsett paints several paintings and displays them while he is busking. The  
15 statute is facially unconstitutional, or vague, because it does not put the public on notice  
16 as to what conduct is prohibited, for example, how many paintings an artist can create  
17 before he has broken the law.

18 49. Further, the common understanding of the word mass-produced is  
19 something that is manufactured in large quantities by an automated mechanical process,  
20 and yet the ordinance applies “mass-produced” to things that are expressly not machine  
21 made, because it applies it to art that is created by “the use of brush, pastel, crayon,  
22 pencil, stylus or other object.” §630.0502 (definition of visual art). This ambiguity  
23 precludes notice of what the ordinance prohibits.

24 50. The term “handcrafts” is defined as “objects made either by hand or with the  
25 help of devices used to shape or produce the objects through such methods as weaving,  
26 carving, stitching, sewing, lacing, welding, or beading, including necklaces, earrings,  
27 bracelets, rings, and other jewelry used or intended for personal adornment, pottery,  
28

1 silver or metal work, leather goods, and trinkets. Handcrafts are objects not likely to  
2 communicate a message, idea, or concept to others, are often mass-produced or  
3 produced with limited variation, and often have functional utility apart from any  
4 communicative value they might have.” §63.0502.

5 51. One of Dorsett’s pieces of art is a rose made by hand from palm fronds,  
6 which may fit this definition of a handcraft.

7 52. The term “services’ is defined as “activities involving the performance of  
8 work for others or the provision of intangible items that cannot be returned once they  
9 are provided. Examples include hair braiding, face painting, massage, yoga, fortune  
10 telling, tattooing, and dog training.”

11 53. Flores performs a magic show. His magic show is a “performance of work  
12 for others” and the “provision of intangible items that cannot be returned once they are  
13 provided.” (Notably, the terms “intangible items” and “performance of work” are not  
14 defined in the statute).

15 54. The problem with all three facets of this statute is that, as applied to  
16 Plaintiffs, it subjects them to the “Sidewalk Vending Regulations in Chapter 3, Article  
17 6, Division 1.” Those Sidewalk Vending Regulations provide an exemption for  
18 expressive activities which, as discussed in paragraph 19, *supra*, the City has not  
19 recognized during its enforcement actions with respect to Plaintiff’s expressive  
20 activities. *See* San Diego Municipal Code Ch. 3, Art. 6, Div. 1 § 36.0113.

21 55. So, in effect, the City is either stating that Dorsett’s visual art and handcrafts,  
22 and Flores’ services are not expressive activities or §63.0505 is so vague that it “clearly  
23 fails to give a person of ordinary intelligence a reasonable opportunity to know what is  
24 prohibited,” the “enforcement of the ordinance poses a danger of arbitrary and  
25 discriminatory application,” and “this lack of clarity may operate to inhibit the exercise  
26 of freedom of expression because individuals will not know whether the ordinance  
27  
28

1 allows their conduct, and may choose not to exercise their rights for fear of being  
2 criminally punished.” *Hunt v. City of Los Angeles*, 638 F.3d 703, 712 (9th Cir. 2011).

3 56. Thus, this provision either states that Plaintiffs’ art, as services, handcrafts,  
4 and mass-produced visual art, are not expressive activity and subject to regulation like  
5 the sale of commercial goods, or it is impermissibly vague and will chill Plaintiffs’ First  
6 Amendment-protected activity.

7 *Provisions Forbidding Sale*

8 57. Section 63.0503(b) provides: “Any person engaged in *expressive activity*  
9 shall not... (2) display any merchandise for sale on the ground or on any *above-ground*  
10 *structure...*”

11 58. The word “merchandise” is undefined.

12 59. The First Amendment protects the sale of artwork. *See White v. City of*  
13 *Sparks*, 500 F.3d 953, 954 (9th Cir. 2007). Criminalizing the sale of artwork deprives  
14 the Plaintiffs, and all members of the public, of their First Amendment rights.

15 60. On its public website<sup>8</sup> it interprets the new regulations to forbid “sales,”  
16 stating, “Expressive activity locations are not designated for sidewalk vending **or sales**  
17 and are strictly for expressive activities.” (emphasis added) And then it doubles down,  
18 stating “Expressive activity does not include... the sale or creation of handcrafts... or  
19 the creation or sale of mass-produced merchandise **or visual art.**” (emphasis added).

20 61. Dorsett paints and displays his artwork for sale. Dorsett cannot set up a table  
21 or easel “on the ground” in San Diego and sell his artwork without exposing himself to  
22 a citation and fine.

23 62. Thus, §63.0503(b) “clearly fails to give a person of ordinary intelligence a  
24 reasonable opportunity to know what is prohibited,” the “enforcement of the ordinance  
25 poses a danger of arbitrary and discriminatory application,” and “this lack of clarity may  
26

27 <sup>8</sup> Publicly available at <https://www.sandiego.gov/park-and-recreation/parks/expressive-activity-parks>  
28 (retrieved on April 26, 2024). A true and correct printout of the version posted on April 26, 2024 has  
been attached to this complaint as Exhibit D.

1 operate to inhibit the exercise of freedom of expression because individuals will not  
2 know whether the ordinance allows their conduct, and may choose not to exercise their  
3 rights for fear of being criminally punished.” *Hunt v. City of Los Angeles*, 638 F.3d 703,  
4 712 (9th Cir. 2011).

5 63. This provision should be enjoined because it either forbids the sale of  
6 artwork, or it is impermissibly vague and will chill the sale of artwork.

### 7 **Damages**

8 64. Before Defendants’ recent enforcement efforts, Dorsett was regularly  
9 earning approximately \$1,000 per day while busking. Since Defendants started  
10 enforcing their vending codes against him, his earnings have dropped to approximately  
11 \$100 per day. And that is when he *can* busk, because Defendants have caused Dorsett  
12 anxiety that hinders his ability to leave his house.

13 65. For example, during December Nights in 2023, from December 1-2, Dorsett  
14 earned \$200 per night. During December Nights in 2022, from December 2-3, Dorsett  
15 had earned \$1200. The only difference was that in 2022, Dorsett was allowed to set up  
16 in the El Prado area. In 2023, Defendants forced him to set up outside of the area of the  
17 event. There had been no intervening change in the law, as the vending ordinance that  
18 applied during both events became effective on June 22, 2022.

19 66. Flores has also lost substantial earnings since Defendants started infringing  
20 his rights, reducing his earnings from busking from approximately \$250 per day to  
21 approximately \$120 per day.

## 22 **FIRST CLAIM FOR RELIEF**

### 23 **Free Speech Clause of the First Amendment to the U.S. Constitution**

24 **(42 U.S.C. § 1983)**

25 **(Against all Defendants)**

26 67. Plaintiffs allege and incorporate by reference every allegation set forth in the  
27 preceding paragraphs of this Complaint as if fully set forth herein.

28

1           68. “[T]he Supreme Court has been clear that the arts and entertainment  
2 constitute protected forms of expression under the First Amendment.” *White v. City of*  
3 *Sparks*, 500 F.3d 943, 955 (9th Cir. 2007). And “the degree of First Amendment  
4 protection is not diminished merely because the [protected expression] is sold rather  
5 than given away.” *Id.* at 956 (citing *City of Lakewood v. Plain Dealer Pub. Co.*, 486  
6 U.S. 750, 756 n. 5 (1988); and *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781,  
7 801 (1988) (“It is well settled that a speaker’s rights are not lost merely because  
8 compensation is received; a speaker is no less a speaker because he or she is paid to  
9 speak.”)); *see also Berger v. City of Seattle*, 569 F.3d 1029, 1050 (9th Cir. 2009)  
10 (“Speech that solicits funds is protected by the First Amendment.”).

11           69. A content-based speech regulation in a traditional public forum is subject to  
12 strict scrutiny and will be upheld only if it is narrowly drawn to serve a compelling  
13 governmental interest.” *Santa Monica Nativity Scenes Committee v. City of Santa*  
14 *Monica*, 784 F.3d 1286, 1292 (9<sup>th</sup> Cir. 2015).

15           70. Dorsett’s busking activities, consisting of creating and displaying artwork  
16 for sale are protected by the First Amendment.

17           71. Flores’ busking activities, consisting of a magic show performed in public  
18 for monetary donations, are protected by the First Amendment.

19           72. As described herein, the City of San Diego:

- 20           a. Told Dorsett that the sale of his artwork was not protected by the First  
21           Amendment (¶¶ 14-27, *supra*),
- 22           b. Created a regime of location-based restrictions to prevent both Plaintiffs  
23           from speaking (¶¶ 28-42, *supra*),
- 24           c. Engaged in selective enforcement (¶¶ 43-44), and
- 25           d. Created laws and policies that chill the exercise of Plaintiffs’ First  
26           Amendment Rights (¶¶ 45-63).

1 73. Defendants' enforcement activities and communications, as set forth herein,  
2 have thus deprived Dorsett and Flores of their free speech rights in public spaces,  
3 including the sidewalks and streets of Balboa Park, Ocean Beach, La Jolla, Mission  
4 Beach, Pacific Beach, and other areas of the City of San Diego, which constitute public  
5 forums.

6 74. Plaintiffs are entitled to damages under 42 U.S.C. § 1983.

7 75. Pursuant to 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. § 2201, Plaintiff is  
8 entitled to declaratory relief and temporary, preliminary, and permanent injunctive  
9 relief.

10 76. Plaintiff found it necessary to engage the services of private counsel to  
11 vindicate their rights under the law. Plaintiff is therefore entitled to an award of  
12 attorneys' fees pursuant to 42 U.S.C. § 1988.

## 13 **SECOND CLAIM FOR RELIEF**

### 14 **Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution** 15 **(42 U.S.C. § 1983)**

16 (Against all Defendants)

17 77. Plaintiffs allege and incorporate by reference every allegation set forth in the  
18 preceding paragraphs of this Complaint as if fully set forth herein.

19 78. "The Equal Protection Clause of the Fourteenth Amendment commands that  
20 no State shall deny to any person within its jurisdiction the equal protection of the laws,  
21 which is essentially a direction that all persons similarly situated should be treated  
22 alike." *ArchitectureArt, LLC v. City of San Diego*, 231 F. Supp. 3d 828, 844 (S.D. Cal.  
23 2017), *aff'd*, 745 F. App'x 37 (9th Cir. 2018) (citing *City of Cleburne, Texas v. Cleburne*  
24 *Living Center*, 473 U.S. 432 (1985)).

25 79. Defendants' enforcement had a discriminatory effect, and the Defendants  
26 were motivated by a discriminatory purpose. *See Lacey v. Maricopa Cnty.*, 693 F.3d  
27 896, 920 (9th Cir. 2012).

1 80. While enforcing against Plaintiffs, Defendants did not enforce against  
2 PETA, and others. PETA, and others, were “similarly situated” entities that “could have  
3 been prosecuted but were not.” *United States v. Armstrong*, 517 U.S. 456, 469 (1996).

4 81. “[P]laintiffs are generally required to show the existence of an  
5 unconstitutional policy by extrapolating from a series of enforcement actions. They must  
6 argue, in effect, that these actions demonstrate that the municipality is enforcing against  
7 them a rule that is distinct from the constitutionally valid enactment... Often, the only  
8 way to establish whether [an unconstitutional] policy exists is to extrapolate from  
9 enforcement data.” *Hoye v. City of Oakland*, 653 F.3d 835, 855 (9th Cir. 2011).

10 82. Defendants purpose was unlawful because they decided to enforce the law  
11 against Plaintiffs because their speech was disfavored, while PETA’s speech was  
12 favored speech. This was the result of an intentional policy or practice to limit  
13 Defendants’ speech, while promoting more favored speech.

14 83. An unconstitutional policy must exist, otherwise Defendants would not have  
15 allowed PETA, and others, to do what Defendants have cited Plaintiffs for doing.

16 84. Plaintiffs are entitled to damages under 42 U.S.C. § 1983.

17 85. Pursuant to 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. § 2201, Plaintiff is  
18 entitled to declaratory relief and temporary, preliminary, and permanent injunctive  
19 relief.

20 86. Plaintiff found it necessary to engage the services of private counsel to  
21 vindicate their rights under the law. Plaintiff is therefore entitled to an award of  
22 attorneys’ fees pursuant to 42 U.S.C. § 1988.

### 23 **THIRD CLAIM FOR RELIEF**

#### 24 **Due Process Clause of the Fourteenth Amendment to the U.S. Constitution** 25 **(42 U.S.C. § 1983)**

26 87. Plaintiffs allege and incorporate by reference every allegation set forth in the  
27 preceding paragraphs of this Complaint as if fully set forth herein.  
28

1           88. The City of San Diego’s Municipal Code—specifically San Diego  
2 Municipal Code Article 3, Division 5, Section 63.0501 *et seq.* (“Expressive Activity on  
3 Public Property”)—and Defendants’ enforcement thereof violate the Due Process  
4 Clause of the Fourteenth Amendment, both facially and as-applied to Plaintiffs.

5           89. A regulation is constitutionally void on its face when, as matter of due  
6 process, it is so vague that persons “of common intelligence must necessarily guess at  
7 its meaning and differ as to its application” *Connally v. General Const. Co.*, 269 U.S.  
8 385, 391 (1926); *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1115 (1997). The void  
9 for vagueness doctrine is designed to prevent arbitrary and discriminatory enforcement.  
10 The problem with a vague regulation is that it “impermissibly delegates basic policy  
11 matters to policemen, judges, and juries for resolution on an ad hoc and subjective  
12 basis....” *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972).

13           90. The City’s new ordinance is void for vagueness because it “clearly fails to  
14 give a person of ordinary intelligence a reasonable opportunity to know what is  
15 prohibited,” the “enforcement of the ordinance poses a danger of arbitrary and  
16 discriminatory application,” and “this lack of clarity may operate to inhibit the exercise  
17 of freedom of expression because individuals will not know whether the ordinance  
18 allows their conduct, and may choose not to exercise their rights for fear of being  
19 criminally punished.” *Hunt v. City of Los Angeles*, 638 F.3d 703, 712 (9th Cir. 2011).

20           91. The City’s new ordinance, as applied to Plaintiffs, is unconstitutionally  
21 vague because (1) it does not define the term “merchandise,” which is subject to  
22 regulation; (2) it does not define the term “mass produced,” the kind of merchandise  
23 subject to regulation; and (3) it is internally contradictory in that it refers to regulation  
24 of “mass produced” items that are made through “the use of brush, pastel, crayon, pencil,  
25 stylus or other object.”

26           92. And even the City’s vending ordinance is impermissibly vague. *See*  
27 Paragraph 19, *supra*. It regulates and forbids everything except art, politics, and  
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1 activities protected by the First Amendment. This is impossibly vague and ambiguous  
2 – and is content based.

3 93. Plaintiffs are entitled to damages under 42 U.S.C. § 1983.

4 94. Pursuant to 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. § 2201, Plaintiff is  
5 entitled to declaratory relief and temporary, preliminary, and permanent injunctive relief  
6 invalidating and restraining enforcement of these provisions of the Municipal Code.

7 95. Plaintiff found it necessary to engage the services of private counsel to  
8 vindicate their rights under the law. Plaintiff is therefore entitled to an award of  
9 attorneys' fees pursuant to 42 U.S.C. § 1988.

### 10 **RELIEF REQUESTED**

11 WHEREFORE, Plaintiffs request that judgment be entered against Defendants as follows:

- 12 a. An entry of judgment declaring that the Defendants' actions are  
13 unconstitutional under the First Amendment to the U.S. Constitution, as applied  
14 to Plaintiffs, under 42 U.S.C. §§ 1983 & 1988, and 28 U.S.C. § 2201;
  - 15 b. An entry of a judgment declaring Plaintiffs' right to busk in San Diego free  
16 from official harassment, intimidation, fines, and arrest, under 42 U.S.C. §§  
17 1983 & 1988, and 28 U.S.C. § 2201;
  - 18 c. An entry of a judgment declaring that Dorsett's sale of his artwork is protected  
19 by the First Amendment, under 42 U.S.C. §§ 1983 & 1988, and 28 U.S.C. §  
20 2201;
  - 21 d. An entry of a judgment declaring Flores' magic show is protected by the First  
22 Amendment, under 42 U.S.C. §§ 1983 & 1988, and 28 U.S.C. § 2201;
  - 23 e. An entry of a judgment declaring that San Diego Municipal Code Article 3,  
24 Division 5, Sections 63.0503(b) & 63.0505 are impermissibly vague, under 42  
25 U.S.C. §§ 1983 & 1988, and 28 U.S.C. § 2201;
  - 26 f. An injunction forbidding the enforcement of San Diego Municipal Code Article  
27 3, Division 5, Sections 63.0503(b) & 63.0505;
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- g. An injunction forbidding Defendants from classifying and treating Plaintiffs’ busking as unprotected commercial speech or vending;
- h. An injunction forbidding Defendants from restricting the location of Plaintiffs’ busking to areas without exposure to the public;
- i. An injunction forbidding Defendants from discriminating against Plaintiffs through selective enforcement of San Diego Municipal Code Article 3, Division 5, Section 63.0501 *et seq.*, and other statutes;
- j. An award of damages according to proof at trial;
- k. An award of attorney’s fees and costs pursuant to 42 U.S.C. § 1988;
- l. For such other further relief as the Court may deem just and proper.

Date: June 28, 2024

**|JD| GRAHAM LEGAL**

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**DEMAND FOR JURY TRIAL**

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiffs demand trial by jury on all claims in this action of all issues so triable.

Date: June 28, 2024

**|JD| GRAHAM LEGAL**

By: /s/ Jeremiah D. Graham

