UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

WILLIAM J. DORSETT,

Plaintiff,

v.

CITY OF SAN DIEGO,

Defendant.

Case No.: 24-cv-01172-BTM-SBC

ORDER (1) GRANTING PLAINTIFF WILLIAM DORSETT'S MOTION FOR A PRELIMINARY INJUNCTION; AND (2) DENYING THE CITY OF SAN DIEGO'S MOTION TO DISMISS

[ECF NOS. 4 & 5]

Pending before the Court are (1) Plaintiff William J. Dorsett's motion for a preliminary injunction and (2) Defendant City of San Diego's (the City) motion to dismiss Dorsett's complaint. (ECF Nos. 4 & 5). For the reasons stated below, Dorsett's motion for a preliminary injunction is granted, and the City's motion to dismiss is denied.

BACKGROUND

Dorsett's complaint was filed on July 8, 2024, and alleges the following facts. (ECF No. 1). In June 2023, Dorsett was in Balboa Park and saw a Park Ranger issuing a citation to someone for making bubbles without protective equipment. (ECF No. 1 at ¶¶ 24-29). Dorsett voiced his objection to the park ranger, who cited Dorsett for violating San Diego Municipal Code Section 56.27. (Id. at ¶¶ 35-38). In full, Section

56.27 provides:

> That is [sic] shall be and is hereby declared to be unlawful for any person to be guilty of any offensive or disorderly conduct in or upon any of the streets, alleys, sidewalks, squares, parks, or in any store, or other public place in said City, and it shall be unlawful for any person to make any loud noise, or disturbance, or use any loud, noisy, boisterous, vulgar, or indecent language on any of the streets, alleys, sidewalks, square, park, or in any store or other public place in said City.

Dorsett was found guilty of violating Section 56.27 and ordered to pay a fine. (ECF No. 1 at ¶¶ 50-51). On appeal, Dorsett claimed that his conviction violated his First Amendment right to free speech. (Id. at ¶ 52). The City Attorney's Office agreed that Dorsett's conviction was inconsistent with his First Amendment right to free speech. (Id. at ¶ 54). The Appellate Division also agreed and ruled that Dorsett's "conduct was protected by the First Amendment of the Constitution," and thus reversed his conviction. (Id. at ¶¶ 57-59); *People v. Dorsett*,103 Cal. App. 5th Supp. 7 (Cal. Ct. App. 2024).

Because of the citation and trial, Dorsett has since refrained from criticizing law enforcement officers and is anxious and stressed about being cited under Section 56.27 were he to criticize law enforcement officers. (ECF No. 1 at ¶¶ 68-70).[1] He has thus brought this case and motion for a preliminary injunction to enjoin the enforcement of Section 56.27. Specifically, Dorsett is seeking an order "[e]njoining the City of San Diego and its officers, agents, servants, employees, and attorneys from taking any actions to enforce San Diego Municipal Code § 56.27 in any manner against any individual." The City has moved to dismiss Dorsett's complaint.

LEGAL STANDARDS

[1] Based on these allegations, Dorsett has suffered an injury and has Article III standing to challenge San Diego Municipal Code § 56.27.

Under Federal Rule of Civil Procedure 8, each pleading must include "a short and plain statement of the claim showing that the pleader is entitled to relief" and must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Federal Rule of Civil Procedure 12(b)(6) permits dismissal for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

A complaint may survive a motion to dismiss only if it contains enough facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). The court must be able to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 663. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* In reviewing a Rule 12(b)(6) motion, the Court accepts as true all facts alleged in the complaint and draws all reasonable inferences in favor of the plaintiff. *al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir. 2009).

When a motion to dismiss is granted, "[l]eave to amend should be granted unless the pleading 'could not possibly be cured by the allegation of other facts.'" *Velez v. Cloghan Concepts LLC*, 387 F. Supp. 3d 1072, 1078 (S.D. Cal. 2019) (quoting *Ramirez v. Galaza*, 334 F.3d 850, 861 (9th Cir. 2003)). When assessing whether leave to amend should be granted, district courts should consider "four factors: bad faith, undue delay, prejudice to the opposing party, and/or futility." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). "The first factor under *Winter* is the most important—likely success on the merits." *Garcia v.*

Google, Inc., 786 F.3d 733, 740 (9th Cir. 2015) (en banc). "When the balance of equities 'tips sharply in the plaintiff's favor,' the plaintiff must raise only 'serious questions' on the merits—a lesser showing than likelihood of success." *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 684 (9th Cir. 2023).

When a plaintiff shows that a law is likely unconstitutional, the second, third, and fourth *Winter* factors "typically favor" the issuance of a preliminary injunction. *Junior Sports Magazines Inc. v. Bonta*, 80 F.4th 1109, 1115, 1120 (9th Cir. 2023); *see also Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 838 (9th Cir. 2020) ("It is always in the public interest to prevent the violation of a party's constitutional rights. When weighing public interests, courts have consistently recognized the significant public interest in upholding First Amendment principles. (citations and quotation marks omitted)); *de Jesus Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'"); *Sanders County Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 748-49 (9th Cir. 2012) (ruling that the balance of equities favors the issuance of a preliminary injunction where a law infringes the First Amendment).

DISCUSSION

A. Likely Success on the Merits

The Court finds that Dorsett is likely to succeed in showing that Section 56.27 is unconstitutionally vague and overbroad.

The Fourth Circuit's decision in *Carolina Youth Action Project v. Wilson*, 60 F.4th 770 (4th Cir. 2023), is instructive. There, the court found a law outlawing in schools "disorderly" or "boisterous" conduct or "obscene" or "profane" language unconstitutionally vague because the court was unable to adequately discern the law's scope. *Id.* at 782-86. Because the law lacked "any meaningful standards," there was a substantial "risk of arbitrary enforcement." *Id.* at 784. As the Supreme Court has

explained, laws simply prohibiting "annoying" or "indecent" conduct require "wholly subjective judgments." *United States v. Williams*, 553 U.S. 285, 306 (2008).

Section 56.27 raises the same problems. Section 56.27 fails to give "a person of ordinary intelligence fair notice of what is prohibited." *Id.* at 304. Whether conduct is "offensive or disorderly" and whether speech is "loud, noisy, boisterous, vulgar, or indecent" depends on the beholder, will change over time, and will vary across locations and age groups. *See generally Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) ("Conduct that annoys some people does not annoy others."); *see also Cohen v. California*, 403 U.S. 15, 25 (1971) ("[O]ne man's vulgarity is another's lyric."). Those terms are subjective and can only be defined by comparison to a norm of "acceptable" or "normal" conduct and speech. But Section 56.27 does not give people fair notice of how far they may or may not deviate from those norms to fall within the ordinance, and thus the violation of Section 56.27 "may entirely depend upon whether or not a policeman is annoyed." *See Coates*, 402 U.S. at 614; *accord Houston v. Hill*, 482 U.S. 451, 465 (1987) ("Although we appreciate the difficulties of drafting precise laws, we have repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them.").

The ordinance "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *See Sewell v. Georgia*, 435 U.S. 982, 986 (1978) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)). Section 56.27 also "abuts upon sensitive areas of basic First Amendment freedoms" and thus "operates to inhibit the exercise of those freedoms." *Grayned*, 408 U.S. at 109 (brackets, quotation marks, and citations omitted)); *accord Butcher v. Knudsen*, 38 F.4th 1163, 1169 (9th Cir. 2022) ("When a law implicating free speech is impermissibly vague, it risks repressing the very discourse that the First Amendment protects and encourages."). For those reasons, Dorsett is likely to succeed in showing that Section 56.27 is unconstitutionally vague.

Section 56.27 is also likely unconstitutionally overbroad. Under the "First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech." *Williams*, 553 U.S. at 292.

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Id.* at 293. Here, as explained, Section 56.27 does not give fair notice of what speech is lawful or unlawful, and thus its overbreadth depends on how it is defined. Its vagueness essentially precludes a clear overbreadth analysis. But under its plain terms, Section 56.27 prohibits a substantial amount of constitutionally protected speech.

The Constitution precludes a state from criminalizing the public display of the "F word," *Cohen*, 403 U.S. at 25; precludes a state from criminalizing a person's use of "obscene or opprobrious language toward or with reference to any member of the city police," *Lewis v. New Orleans*, 415 U.S. 130 (1974); and precludes a city from criminalizing a person's right "to oppose or challenge police action," *Hill*, 482 U.S. at 463 (1987). Those decisions preclude the City from outlawing "offensive or disorderly" conduct and "loud, noisy, boisterous, vulgar, or indecent" speech. Section 56.27 prohibits a substantial amount of constitutionally protected speech and amounts to little more than a prohibition on "annoying" or "inappropriate" speech and conduct. The First Amendment precludes such a prohibition.

The City relies heavily on *Colten v. Kentucky*, 407 U.S. 104 (1972), but that case is distinguishable. The Court upheld the conviction in *Colten* because the defendant's conduct increased the risk of a traffic accident, and the Court found the Kentucky statute at issue constitutional because it clearly "authorized [a] conviction for refusing to disperse with the intent of causing inconvenience, annoyance, or alarm." *Id.* at 109-10. This case is completely different because (a) Dorsett was merely speaking to the park ranger and not increasing any risk of danger or an accident; (b) Section 56.27 does not provide clear notice of what speech or conduct is

lawful or unlawful; and (c) Section 56.27 covers a substantial amount of constitutionally protected speech and does not contain an intent element.

In sum, Dorsett is likely to succeed in showing that Section 56.27 is unconstitutionally overbroad.[2]

B. The Remaining *Winter* Factors

Because Dorsett is likely to succeed in showing that Section 56.27 is unconstitutional, the remaining *Winter* factors strongly support the issuance of a preliminary injunction. *See generally Junior Sports Magazines*, 80 F.4th at 1115, 1120. Section 56.27 is likely infringing Dorsett's constitutional rights and risks arbitrary enforcement, and thus he is likely to suffer irreparable harm in the absence of preliminary relief, *Arpaio*, 695 F.3d at 1002; the balance of equities weighs in his favor, *Bullock*, 698 F.3d at 748-49; and it is in the public interest to issue a preliminary injunction, *U.S. Marshals Serv.*, 977 F.3d at 838.

Because Dorsett has satisfied the *Winter* factors, the Court will grant his motion for a preliminary injunction.

C. The City's Motion to Dismiss

According to the City, Dorsett was cited for violating Section 56.27 because he was interfering with the park ranger's issuance of a citation. Therefore, according to the City, Dorsett was not cited in retaliation for the exercise of his First Amendment right nor did the park ranger selectively enforce Section 56.27. It thus follows, according to the City, that Dorsett's claims for retaliation and selective enforcement

[2] While the parties dispute whether Section 56.27 imposes criminal or civil sanctions, that dispute is not dispositive here because the ordinance "unquestionably attaches sanctions to protected conduct" and is unconstitutionally overbroad even if it imposes civil as opposed to criminal penalties. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 n.19 (1984) ("[W]here the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack."). The Court notes, nonetheless, that the California Appellate Division reversed Dorsett's "conviction," thus indicating that the penalty was criminal.

fail. But the City's arguments are based on factual contentions—the basis for the park ranger's issuance of the citation—that the Court may not adopt at this stage. Moreover, the state appellate court already determined that the citation was unlawful under the First Amendment. Dorsett's claims under Counts Three and Four are adequately pled.

The City's remaining arguments regarding Dorsett's First Amendment claims lack merit because, as explained above, Dorsett has shown that Section 56.27 is likely unconstitutional. Indeed, the California Appellate Division has already ruled that Dorsett's citation was contrary to his First Amendment right. Dorsett's claims under Counts One and Two are adequately pled.

Dorsett's claims under Counts Five and Six are adequately pled because a *Monell* claim may be based on a municipality's allegedly unconstitutional ordinance and may be based on a municipality's deliberate indifference. *See generally Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978); *accord City of Canton v. Harris*, 489 U.S. 378, 385 (1989). The sufficiency of these claims can be revisited at the summary judgment stage.

The City's request to strike paragraphs 30-33, 44, 46-50, and 54-66 of the complaint is denied because those paragraphs do not fall within Federal Rule of Civil Procedure 12(f) and because there is no prejudice from them. *See generally San Diego Unified Port Dist. v. Monsanto Co.*, 309 F. Supp. 3d 854, 861 (S.D. Cal. 2018) (explaining that motions to strike are disfavored and rarely granted without a showing of prejudice).

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CONCLUSION

For the reasons stated, Dorsett's motion for a preliminary injunction is **granted**. The City of San Diego and its officers, agents, employees, and attorneys are hereby **enjoined**, pending further proceedings in this case, from taking any actions to enforce San Diego Municipal Code § 56.27 in any manner against any individual.

The City's motions to dismiss and strike are **denied**.

IT IS SO ORDERED.

Dated: September 23, 2024

Honorable Barry Ted Moskowitz
United States District Judge