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 9 *HH-Fresno, LLC*

10 **UNITED STATES DISTRICT COURT**
 11 **EASTERN DISTRICT OF CALIFORNIA – FRESNO BRANCH**

12 HH-FRESNO, LLC,

Plaintiffs,

13 vs.

CIVIL CASE NO.

14
 15 CITY OF FRESNO, and DEVELOPMENT
 AND RESOURCE MANAGEMENT
 16 DEPARTMENT, an agency of the
 CITY OF FRESNO

COMPLAINT

17 Defendants.
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20 **PLAINTIFF'S COMPLAINT FOR DECLARATORY RELIEF,**
 21 **INJUNCTIVE RELIEF, DAMAGES, ATTORNEYS' FEES, AND COSTS**
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3 **INTRODUCTION**

4 1. This is a civil action wherein Plaintiff prays for a declaratory judgment
5 and both a preliminary and permanent injunction to restrain and enjoin the named
6 Defendants, as well as their agents, employees, and representatives, from acting
7 under color of state law to deprive Plaintiff of its rights, privileges, and immunities
8 secured to it by the United States Constitution. Specifically, Plaintiff seeks to have
9 this Court declare unconstitutional facially and as applied, and to enjoin enforcement
10 of certain provisions of the Municipal Code of the City of Fresno, California
11 (“Code”) against Plaintiff as described more particularly below. In short, the
12 Defendants collectively targeted Plaintiff’s proposed First Amendment protected
13 business by taking actions specifically designed to preclude Plaintiff from opening
14 and operating its desired establishment. In their rush to censor Plaintiff and to mute
15 Plaintiff’s speech, Defendants have unconstitutionally prevented Plaintiff’s ability to
16 operate its business in the City of Fresno. Plaintiff herein seeks damages, as well as
17 declaratory and injunctive relief, and costs and attorneys’ fees pursuant to 42 U.S.C.
18 § 1988.
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24 **PARTIES**

25 2. Plaintiff incorporates by reference each and every paragraph above as
26 though fully set forth herein.
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BOOKSTORE, ADULT shall mean any building, or portion thereof, in which 25 per cent or more of any one or more of the following: Wall space or any display area other than wall space (e.g. tables, racks and/or any other display areas or structures) or stock in trade (inventories not on display but on site) or gross revenues or advertising and other promotion of books, magazines, periodicals or other printed matter depict, describe or otherwise expressly relate to “specified sexual activities” or “specified anatomical areas,” as defined in this article.2015 Code Sec. 12-105.B.20.

July 2015 Code Sec.12-105.B.20.

12. Under the July 2015 Code, an “Adult Novelty Store” is defined as:

NOVELTY STORE, ADULT shall mean any building, or portion thereof, in which 25% of more of the display area for devices, instruments or paraphernalia is used for the distribution, sale, offer for sale and/or rental or offer for rental of any device, instrument or paraphernalia evidently designed or marketed for sexual stimulation of human genital organs or for sadomasochistic use or abuse of themselves or others. Such devices, instruments or paraphernalia include but are not limited to phallic-shaped vibrators, dildos, muzzles, whips, chains, bather restraints, racks, non-medical enema kits, body piercing implements (excluding earrings or other decorative jewelry) or other evident tools of sadomasochistic abuse.

July 2015 Code Sec. 12-105.N.3.

1 13. Under the December 2015 Code, the term “Adult Bookstore” was
2 redefined as:

3
4 **Adult Bookstore.** Any building, or portion
5 thereof, where space devoted to adult
6 materials composes 25 percent or more or 500
7 square feet, whichever is less, of any one or
8 more of the following:

- 9 a. Wall space;
10 b. Any display area other than wall space
11 (e.g. tables, racks, and/or any other display
12 areas or structures) or stock in trade
13 (inventories not on display, but on site).

14 December 2015 Code Sec. 15-2705.G.2.

15 14. Under the December 2015 Code, the term “Adult Novelty Store”
16 remained the same as under the July 2015 Code as:

17 **Adult Novelty Store.** A building, or portion
18 thereof, in which 25 percent or more of the
19 display area for devices, instruments, or
20 paraphernalia is used for the distribution, sale,
21 offer for sale and/or rental or offer for rental
22 of any device, instrument, or paraphernalia
23 evidently designed or marketed for sexual
24 stimulation of human genital organs or for
25 sadomasochistic use or abuse of themselves or
26 others. Such devices, instruments, or
27 paraphernalia include, but are not limited to,
28 phallic-shaped vibrators, dildos, muzzles,
whips, chains, bather restraints, racks, non-
medical enema kits, body-piercing
implements (excluding earrings or other
decorative jewelry) or other evident tools of
sadomasochistic abuse.

1 December 2015 Code Sec. 15-2705.G.6.

2 15. Notably, as a preamble to the portion of the December 2015 Code
3 dedicated to regulation of “Adult-Oriented Businesses” (“Adult Regulations”), the
4 Code specifies the following purpose for enactment of this section:
5

6
7 Certain types of Adult-Oriented Businesses
8 possess characteristics that may be
9 determined to be objectionable, and, when
10 concentrated, many be found to have a
11 deleterious effect upon adjacent areas.
12 Therefore, special regulation of these uses is
13 necessary to ensure that these adverse effects
14 will not contribute to the blighting or
15 downgrading of the surrounding
16 neighborhood nor create an adverse effect on
17 minors.

15 December 2015 Code Sec. 15-2705.A.

16
17 **GENERAL FACTUAL ALLEGATIONS**

18 16. Plaintiff incorporates by reference each and every paragraph above as
19 though fully set forth herein.
20

21 ***I. Plaintiff locates retail space for its proposed business.***

22 17. In September 2015, Plaintiff’s agents began to explore the possibility of
23 opening a retail establishment in the City in compliance with all existing provisions
24 of the then-existing July 2015 Code.
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1 18. Plaintiff's agents found what they believed to be a suitable retail space
2 for its proposed business, a store front located at 333 East Shaw Avenue, Fresno,
3 California 93710 (the "Premises").
4

5 19. The Premises is located in a C-3 District (*i.e.*, a Regional Shopping
6 Center District).
7

8 20. The Premises is a retail venue with approximately 5,576 square feet of
9 usable space.
10

11 21. Due to the desirability of the Premises, and the fast-paced and
12 competitive market for retail space, Plaintiff intended to submit a letter of intent to
13 execute a lease for rental of the Premises in early December 2015. Otherwise,
14 Plaintiff would be at risk for losing the opportunity to execute a lease for the
15 Premises.
16

17
18 ***II. Plaintiff seeks guidance from Defendants on the application of the "adult"***
19 ***regulations to its proposed business at the Premises as set forth in the then-***
20 ***existing July 2015 Code.***

21 22. In an abundance of caution to insure compliance with the then-existing
22 provisions of the July 2015 Code, on November 6, 2015, Plaintiff's counsel filed a
23 Zoning Inquiry Application with the Department regarding its proposed business to
24 be located at the Premises. The Zoning Inquiry Application indicated:
25

26
27 I am interested in operating a general retail
28 business in the City of Fresno and want to
assess the viability of operating at 333 E.

1 Shaw Ave, Fresno, California 93710. Of
2 particular importance, is whether or not my
3 business will be considered an “adult novelty
4 store,” and thus not allowed to operate from
5 the above-mentioned address due to the
6 restrictions on use in the C3 zoning district.

7 The store mainly sells lingerie, gag-gifts,
8 marital aids, and brand name souvenirs.
9 However, there is a minimal amount of
10 “adult” instruments offered. To compare, the
11 store offers products on par with a Spencer’s
12 Gifts. Therefore, of special concern is the
13 definition of “adult novelty store” as it
14 appears in the Fresno zoning ordinance.
15 Specifically, how the city measures 25% of
16 the display area for adult instruments, devices,
17 or paraphernalia.

18 Does this mean percentage of the entire
19 display area in the store, or just the display
20 area for instrument, devices, or
21 paraphernalia? And if it’s the latter, then what
22 is specifically considered non-adult
23 instruments, devices, or paraphernalia such
24 that it would count towards the percentage of
25 display area mentioned in the “adult novelty
26 store” definition[?]

27 23. In accordance with Department’s procedures, Plaintiff submitted a
28 \$182.00 check with its Zoning Inquiry Application as a processing fee.

29 24. Because Plaintiff needed to submit its letter of intent to the owner of the
30 Premises for rental of the Premises with all due speed, or risk losing that particular
31 retail venue to another retailer, Plaintiff’s counsel inquired as to how long it would
32 take the Department to respond to the Zoning Inquiry Application.

1 25. A Department official assured Plaintiff that the Department would
2 respond to Plaintiff's Zoning Inquiry Application within seven to ten business days.

3
4 26. Ten days later, the Department still had not responded, despite repeated
5 requests for the response from Plaintiff's counsel. Plaintiff's counsel reiterated the
6 urgency of Plaintiff's need to make a determination about whether to pursue a lease
7 for the Premises, and that Plaintiff did not intend to pursue such a lease if the
8 Department determined that Plaintiff's proposed business would be subject to the
9 "adult" regulations in the Code.
10

11
12 27. Thus, the Department was aware that its opinion was critical to
13 Plaintiff's analysis of whether to enter into a lease with the owners of the Premises
14 to rent the Premises.
15

16 28. After much foot dragging, on December 2, 2015, the Department issued
17 its response. The Department indicated that the Premises was located in a C-3
18 (Regional Shopping Center District). The Department further added that:
19

20
21 An "adult novelty store", per section 12-
22 105.N.3 of the Fresno Municipal Code, is
23 defined as: "any building, or portion thereof,
24 in which 25% or more of the display area for
25 devices, instruments or paraphernalia is used
26 for the distribution, sale, offer for sale and/or
27 rental or offer for rental of any device,
28 instrument or paraphernalia evidently
designed or marketed for sexual stimulation
of human genital organs or for
sodomasochistic use or abuse of themselves or

1 others. Such devices, instruments or
2 paraphernalia include but are not limited to
3 phallic-shaped vibrators, dildos, muzzles,
4 whips, chains, bather restraints, racks, non-
5 medical enema kits, body piercing
6 implements (excluding earrings or other
decorative jewelry) or other evident tools of
sodomasochistic abuse”.

7 Of particular importance, as you note in your
8 letter, is how the City measures the 25% of the
9 display area for adult devices, instruments, or
10 paraphernalia. The 25% is a percentage of the
11 entire display area in the store and not just the
12 display area for instrument devices and
paraphernalia.

13 Should the display area of the entire store
14 contain 25% or more of adult devices,
15 instruments, or paraphernalia, it will be
16 considered an adult novelty store and
prohibited on the subject property.

17 ***III. Based on the Department’s interpretation of the then-existing term “Adult***
18 ***Novelty Store,” Plaintiff moved forward with its plans to open a retail***
19 ***establishment in the City.***

20 29. Armed with the Department’s interpretation of the term “Adult Novelty
21 Store” as set forth in the then-existing July 2015 Code, Plaintiff analyzed the amount
22 of allowable floor space for various types of products and determined it could easily
23 operate its proposed business at the Premises below the threshold for triggering
24 designation as an Adult Novelty Store.
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1 30. Indeed, Plaintiff operates retail establishments in over twenty cities
2 across the United States restricting its inventory to avoid classification as “adult”
3 establishments, in compliance with each municipality’s zoning laws.
4

5 31. Based on the Department’s representations, on December 2, 2015,
6 Plaintiff submitted a letter of intent to the owner of the Premises to rent the Premises.
7
8 The parties executed the letter of intent shortly thereafter, and then commenced
9 negotiations on the terms of the lease for Plaintiff’s rental of the Premises.
10

11 ***IV. The City amends the term “Adult Bookstore” in an effort to prevent Plaintiff***
12 ***from commencing operation of its proposed business at the Premises.***

13 32. Notably, on December 3, 2015, *one day* after the Department provided
14 its response to Plaintiff’s Zone Inquiry Application with an interpretation of the
15 definition of “Adult Novelty Store” that would have enabled Plaintiff to operate the
16 proposed business at the Premises without designation as an “adult” entity, and
17 *unbeknownst to Plaintiff*, the City revised the then-existing July 2015 Code, thereby
18 altering the definition of the term “Adult Bookstore” to Plaintiff’s detriment.
19
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21 33. In the newly enacted December 2015 Code, the term “Adult Bookstore”
22 was re-defined in a manner that differs from that of then-operational July 2015 Code
23 in two significant ways. First, the December 2015 Code broadened the kinds of
24 merchandise that would trigger the 25% threshold for regulation from the easily
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1 identifiable merchandise of “books, magazines, periodicals or other printed matter,”
2 to any merchandise deemed to be “adult material.”

3
4 34. Notably, the nebulous term “adult material” is not defined elsewhere.

5 35. Second, the December 2015 Code implemented a new, stringent display
6 space requirement that had not existed prior to its enactment. A retailer will be
7 designated an “Adult Bookstore,” subject to the extensive Adult Regulations, when
8 “space devoted to adult materials composes 25 percent of more or 500 square feet,
9 whichever is less” of wall space, display space, or inventory. *See* December 2015
10 Code Sec. 15-2705.G.2.

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12
13 36. Consequently, a retailer with a 50,000-square-foot establishment would
14 be subject to regulation as an “Adult Bookstore” if 500 square feet (or 1%) of its wall
15 space, display space, or inventory were allocated to merchandise the Defendants
16 determine to be “adult material.”
17

18
19 37. As a preamble to the “Adult Regulations,” the Code indicates that its
20 “Adult Regulations” are necessary to prevent potential negative secondary effects
21 associated with “Adult-Oriented Businesses.” *See* December 2015 Code Sec. 15-
22 2705.A.
23

24
25 38. However, the December 2015 Code does not identify any specific
26 studies, judicial opinions, regulations or ordinances that support enactment of the
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1 stringent wall/floor/display space requirements found in the definition of “Adult
2 Bookstore.”

3
4 39. Upon information and belief, the City, its officials, employees, and
5 agents did not review any studies, judicial opinions, regulations or ordinances
6 supporting the necessity of revising the definition of “Adult Bookstore” to include
7 the stringent wall/floor/display space requirement prior to enactment of that term.
8

9 40. Upon information and belief, the City did not conduct any studies on
10 possible negative secondary effects of Adult Bookstores with 500 square feet or less
11 of wall/floor/display space allocated to “adult material” when such allocation is less
12 than 25% of the overall wall/floor display space prior to enacting the December 2015
13 Code.
14
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16
17 ***V. Plaintiff proceeds with plans to open a retail establishment at the Premises.***

18 41. In early 2016, without any knowledge that the City had altered its Code
19 to Plaintiff’s determinant, and in reliance on the Department’s December 2, 2015
20 response to Plaintiff’s Zone Inquiry Application, Plaintiff and the owner of the
21 Premises negotiated the terms of a lease for Plaintiff’s rental of the Premises. On
22 April 25, 2016, Plaintiff executed a ten-year lease for rental of the Premises with its
23 owner.
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27 42. On May 17, 2016, Plaintiff filed its initial Zone Clearance application,
28 seeking to operate its proposed business at the Premises in compliance with what it

1 understood at that time to be the only “adult” regulation potentially applicable to the
2 proposed business, the “Adult Novelty Store” regulation found in the July 2015
3 Code. In particular, Plaintiff explained that it intended to:
4

5 . . . operate[] as a retail use according to
6 zoning code. More than 75% of the sales floor
7 will be lingerie, apparel, accessories and
8 souvenirs. The specialty area is
9 approximately 1,000 sq. ft[.] or less than 25%
of the total display area.

10 43. Plaintiff submitted the initial Zone Clearance application in good faith
11 and without knowledge that the City had amended its Code to alter the definition of
12 the term “Adult Bookstore.”
13

14
15 ***VI. Plaintiff’s ability to open its proposed business at the Premises remains in a***
16 ***state of limbo.***

17 44. Plaintiff repeatedly contacted the Department to request a decision on
18 its initial Zone Clearance application.
19

20 45. On June 1, 2016, Plaintiff’s counsel traveled to the City to meet with
21 City officials with the goal of providing the Department with any information it may
22 need to issue a favorable decision on Plaintiff’s initial Zone Clearance application
23 and to discuss any issues that the Department may have identified as detrimental to
24 Plaintiff’s initial Zone Clearance application.
25
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27 46. At that meeting, the Department indicated that Plaintiff’s proposed
28 allocation of 1000 square feet of floor/wall/display space to specialty items, when the

1 Premises consisted of approximately 5,576 square feet, would subject Plaintiff's
2 proposed business to regulation as an "Adult Bookstore."

3
4 47. Plaintiff's counsel explained that, at the time Plaintiff had sought the
5 Department's opinion on the suitability of its proposed business at the Premises, the
6 only potential regulation that could trigger application of the then-existing "adult"
7 regulations was the "Adult Novelty Store" and that Plaintiff's initial Zone Clearance
8 application made it clear that Plaintiff would not trigger the 25% threshold for "adult"
9 regulation as an "Adult Novelty Store."
10
11

12 48. Furthermore, Plaintiff's counsel provided Department officials with
13 judicial opinions indicating that the December 2015 Code's revised definition of
14 "Adult Bookstore," which triggered the Adult Regulations for hypothetical retailers
15 who devote just 1% of floor/wall/display space to "adult material" would not pass
16 constitutional muster.
17
18

19 49. Plaintiff's counsel requested that the Department evaluate Plaintiff's
20 initial Zone Clearance application under the version of the Code in place at the time
21 Plaintiff filed the Zone Inquiry Application, meaning, the July 2015 Code, on the
22 grounds of fairness to Plaintiff and the constitutionally infirm definition of the term
23 "Adult Bookstore" found in the December 2015 Code.
24
25

26 50. After that meeting, several weeks passed, with no decision from the
27 Department.
28

1 51. In an effort to assist the Department in reaching its decision, Plaintiff's
2 counsel repeatedly contacted Department officials to indicate Plaintiff's willingness
3 to provide any additional information necessary to reaching a decision, as well as to
4 urge the Department to issue its decision as Plaintiff would be unable to operate its
5 proposed business at the Premises until a favorable decision was reached.
6

7
8 52. As more time passed, Plaintiff's counsel offered to travel, again, to the
9 City to answer any questions and/or to provide any information to assist the
10 Department in reaching its decision.
11

12 53. On June 20, 2016, the Department denied Plaintiff's initial Zone
13 Clearance application on the ground that:
14

15 Pursuant to Section 15-5004 of the Fresno
16 Municipal Code, the application has been
17 deemed incomplete. The application lacked
18 sufficient information to determine use.
19 Please resubmit application with a more
20 detailed operational statement that includes
21 all aspects of the proposed operation,
22 including specific items to be sold and a
23 detailed floor plan. This is necessary given
24 that the proposed use may not be allowed if it
25 exceeds certain thresholds as defined by the
26 Fresno Municipal Code.

27 54. Plaintiff promptly endeavored to provide the Department the requested
28 information to no avail.

 55. On July 21, 2016, Plaintiff submitted a revised Zone Clearance
application to obtain clearance to commence operation of its proposed business at the

1 Premises in compliance with the City’s revised definition of “Adult Bookstore” as
2 set forth in the December 2015 Code even though that term was not in effect in that
3 form when Plaintiff began its dialogue with the Defendants about its proposed
4 business.
5

6 56. On August 17, 2016, Plaintiff’s counsel submitted an appeal of the
7 denial of the initial Zoning Clearance Application, contending that the Department
8 should reverse the denial because that denial was the result of the City’s patent
9 discrimination against Plaintiff on the basis of Plaintiff’s intent to engage in protected
10 expression in violation of Plaintiff’s constitutional rights by way of *post-hac* revision
11 of the term “Adult Bookstore” to prohibit Plaintiff from operating its proposed
12 business at the Premises.
13
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16 57. Furthermore, given the City’s repeated delays in responding to Plaintiff,
17 Plaintiff’s counsel requested that the Department issue its final determination on its
18 appeal of the denial of the Zoning Clearance Application no later than August 24,
19 2016.
20
21

22 58. On August 19, 2016, the Department denied Plaintiff’s initial Zone
23 Clearance Application. In particular, the Department ruled that:
24

25 The proposed Hollywood Hustler use is
26 considered an Adult-Oriented Business
27 pursuant to Section 15-2705-G of the Fresno
28 Municipal Code. Furthermore, Adult-
Oriented Businesses are strictly prohibited in

1 the CG, Commercial General, zone district.
2 Adult-Oriented Businesses are only permitted
3 in the Industrial Light and Industrial Heavy
4 zone districts subject to the approval of a
conditional use permit.

5 59. On September 12, 2016, the Department, with no apparent authority to
6 do so, demanded that Plaintiff withdraw one of its two Zone Clearance applications.
7

8 60. On September 19, 2016, in an effort to cooperate with the Department,
9 yet under protest, Plaintiff withdrew its appeal of the denial of the initial Zone
10 Clearance application. Plaintiff indicated its continued interest in proceeding with
11 the revised Zone Clearance application, which was filed in compliance with the term
12 “Adult Bookstore” as amended on December 3, 2015. Due to the significant delay
13 the Department had already caused to commencing operation of the proposed
14 business at the Premises, Plaintiff requested expedited review of the revised Zone
15 Clearance application.
16
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18

19 61. On September 22, 2016, the Department indicated that it had received
20 Plaintiff’s revised Zone Clearance Application and that the application was “deemed
21 complete” but that the Department was “still reviewing” it.
22

23 62. Despite numerous efforts to contact Department officials to offer any
24 assistance or any additional information about Plaintiff’s proposed business to spur
25 a decision on Plaintiff’s revised Zone Clearance application, Plaintiff has received
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1 no such decision and has not been given any timeframe for when the Department
2 intends to rule on that application.

3
4 63. Thus, Plaintiff's proposed business was arbitrarily, capriciously, and
5 erroneously classified as an "Adult Bookstore" as defined in the December 2015
6 Code, in the denial of the initial Zone Clearance application, which, at the
7 Department's demand (and with no apparent authority to make such a demand),
8 Plaintiff withdrew under protest.
9

10
11 64. Plaintiff's revised Zone Clearance application remains in a state of
12 limbo, with no indication as to when the Department will (if ever) issue its decision.
13

14 ***VII. Plaintiff has been harmed by Defendants' unconstitutional actions.***

15
16 65. Plaintiff has been unable to commence operation of its proposed
17 business at the Premises.

18
19 66. As a result of Defendants' actions, including but not limited to the
20 Department's December 2, 2015 interpretation of the term "Adult Novelty Store"
21 under the then-existing 2015 Code, the City's stealth amendment to the term "Adult
22 Bookstore" in the December 2015 Code *just one day later*, the Defendants' arbitrary,
23 capricious, and erroneous classification of Plaintiff's proposed business as an "Adult
24 Bookstore" subject to the Adult Regulations of the December 2015 Code in denying
25 the initial Zone Clearance application, and Defendants' refusal to rule on Plaintiff's
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1 revised Zone Clearance application, Plaintiff has suffered and continues to suffer
2 extensive financial harm.

3
4 67. Plaintiff has signed a ten-year commercial lease obligating Plaintiff to
5 pay monthly rent, has engaged contractors to perform renovations at the Premises,
6 has engaged an architect and consultant, has purchased store fixtures, and has
7 completed allocation quantities for store inventory.
8

9 68. However, Plaintiff has been (and without this Court's consideration,
10 will remain) unable to commence operations at the Premises.
11

12 69. As a result of Defendants' conduct, Plaintiff has suffered economic
13 harm.
14

15 70. Additionally, Plaintiff's exercise of its First Amendment rights has been
16 systematically squelched at the hands of the Defendants. Thus, in addition to
17 economic and reputational harm, Plaintiff has suffered a deprivation of the ability to
18 exercise fundamental rights.
19

20
21 **CLAIMS**

22 **Count 1: Declaratory relief, injunctive relief, damages, and attorneys'**
23 **fees and costs because the Code operates as an unlawful prior**
24 **restraint facially and as applied in violation of Plaintiff's First**
25 **Amendment rights.**

26 71. Plaintiff incorporates by reference each and every paragraph above as
27 though fully set forth herein.
28

1 72. The rights enforceable by 42 U.S.C. § 1983 include, among other rights
2 guaranteed by the United States Constitution, the right to be free from discriminatory
3 state (and, in this case municipal) action that violates the First Amendment of the
4 United States Constitution.
5

6 73. Plaintiff will be engaging in protected expression in the form of the sale
7 of certain amount of instructional DVDs and literature, as well as clothing, greeting
8 cards, Halloween costumes, games, sashes, tiaras, key chains, buttons, gag gifts, joke
9 books, and bumper stickers. Furthermore, Plaintiff's sale of material related to the
10 emerging bondage-domination-sadomasochism ("BDSM") political and cultural
11 movement, whether considered symbolic speech or expressive conduct, constitutes
12 protected expression. Finally, Plaintiff's displays and the packaging on Plaintiff's
13 merchandise constitute protected commercial expression.
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18 74. It is well-settled that "an ordinance which . . . makes the peaceful
19 enjoyment of freedoms which the Constitution guarantees contingent upon the
20 uncontrolled will of an official—as by requiring a permit or license which may be
21 granted or withheld in the discretion of such official—is an unconstitutional
22 censorship or prior restraint upon the enjoyment of those freedoms." *Shuttlesworth*
23 *v. City of Birmingham*, 394 U.S. 147, 151 (1969) (plurality opinion) (quoting *Staub*
24 *v. City of Baxley*, 355 U.S. 313, 322 (1958)); accord *FW/PBS v. City of Dallas*, 493
25 U.S. 215 (1990).
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1 75. Upon information and belief, the Defendants have accorded their
2 officials the unbridled discretion to suppress Plaintiff's protected expression in
3 violation of the First Amendment of the United States Constitution and
4 corresponding provision of the State Constitution under the December 2015 Code.
5

6 76. Upon information and belief, the Defendants have sought to suppress
7 Plaintiff's protected expression in violation of the First Amendment of the United
8 States and the corresponding provision of the State Constitution by arbitrarily
9 applying the Code to bar Plaintiff indefinitely from the ability to operate its proposed
10 business at the Premises.
11

12 77. Upon information and belief, under the Code, Plaintiff was required to
13 submit a Zone Clearance application to commence operation of its proposed business
14 at the Premises.
15

16 78. The Premises is located in a C-3 zone, and Plaintiff has repeatedly
17 indicated to the Defendants and the Defendant's agents and employees that it has no
18 intent to operate its proposed business as one that would fall subject to the "adult"
19 regulations.
20

21 79. Upon information and belief, the Code does not specify any timeframe
22 or deadlines for the Department to render a decision on Zone Clearance applications.
23

24 80. Furthermore, upon information and belief, because the term "adult
25 material" is not defined in the December 2015 Code, City and Department officials
26
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1 are free to use that nebulous term to arbitrarily, capriciously, and erroneously
2 designate Plaintiff's proposed business as an "Adult Bookstore" thereby barring
3 Plaintiff from commencing its operations at the Premises.
4

5 81. Furthermore, upon information and belief, because the Code lacks any
6 provision regarding *ex post facto* application of newly amended provisions to pre-
7 existing applications, City officials are free to amend the Code as many times as
8 necessary to justify denial of a Zone Clearance application to businesses like
9 Plaintiff's, engaged in protected expression.
10
11

12 82. In fact, upon information and belief, the Code does not provide *any*
13 criteria to guide the Defendants' assessment of whether businesses carry merchandise
14 that constitutes "adult material."
15

16 83. Further, upon information and belief, the Code's Zone Clearance
17 permitting scheme fails to place *any* limits upon the timeframe within which
18 Defendants, or their agents, must make a decision on Plaintiff's or any other
19 establishment's applications.
20
21

22 84. Consequently, Defendants have taken advantage of this lack of
23 specificity in the Code to indefinitely table Plaintiff's revised Zone Clearance
24 application, thereby depriving Plaintiff of administrative review of their decision on
25 the revised Zone Clearance application, with the end result of barring Plaintiff from
26 operation of its proposed business at the Premises.
27
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1 85. By reason of the foregoing, Plaintiff is entitled to a judgment declaring
2 that the December 2015 Code operates as an unlawful prior restraint on protected
3 expression, facially and as applied to Plaintiff, in violation of the First Amendment
4 and the corresponding provision of the State Constitution.
5

6 86. Plaintiff has presented this Court with a justiciable controversy.
7

8 **Count 2: Declaratory relief, injunctive relief, damages, and attorneys’**
9 **fees and costs because the enactment of the term “Adult**
10 **Bookstore” in the December 2015 Code violates the First**
11 **Amendment.**

12 87. Plaintiff incorporates by reference each and every paragraph above as
13 though fully set forth herein.

14 88. The rights enforceable by 42 U.S.C. § 1983 include, among other rights
15 guaranteed by the United States Constitution, the right to be free from discriminatory
16 state (and, in this case municipal) action that violates the First Amendment of the
17 United States Constitution.
18

19 89. As set forth in greater detail above, Plaintiff intends to operate a
20 business at the Premises that will engage in protected expression.
21

22 90. To pass constitutional muster, the enactment of the revised definition of
23 “Adult Bookstore” found in the December 2015 Code must (1) have the purpose and
24 effect of reducing “negative secondary effects” that are claimed to emanate from, or
25 be associated with adult bookstores; (2) not have been enacted with the intent to
26
27
28

1 suppress expression; and (3) have only a trivial impact upon the engagement of
2 speech and expression-related activities.

3
4 91. First, upon information and belief, there is no-known evidence that the
5 stringent wall/floor/display space requirements found in the December 2015 Code's
6 definition of the term "Adult Bookstore" are necessary to reduce negative secondary
7 effects of adult bookstores.
8

9
10 92. Upon information and belief, the Adult Regulations do not identify any
11 studies, judicial opinions, regulations or ordinances that support the enactment of the
12 stringent wall/floor/display space requirements found in the December 2015 Code's
13 definition of "Adult Bookstore."
14

15
16 93. Upon information and belief, the City did not review any studies,
17 judicial opinions, regulations or ordinances that support the enactment of the
18 stringent wall/floor/display space requirements found in the December 2015 Code's
19 definition of "Adult Bookstore" prior to enactment.
20

21
22 94. Upon information and belief, the City did not conduct any studies that
23 support the enactment of the stringent wall/floor/display space requirements found in
24 the December 2015 Code's definition of "Adult Bookstore" prior to enactment.

25
26 95. Second, the revised definition of "Adult Bookstore" found in the
27 December 2015 Code was enacted, upon information and belief, to suppress
28 Plaintiff's unwanted, but protected expression.

1 96. As part of Plaintiff's decision-making process as to whether to pursue a
2 lease to rent space at the Premises to commence operations of a retail establishment,
3 Plaintiff sought and obtained an opinion from a City official indicating that, if
4 Plaintiff allocated less than 25% of its display area to specialty merchandise, it could
5 not be designated an "Adult Novelty Store" and thus, would not be subject to the
6 restrictive then-existing "adult" regulations, which, among other things, would
7 prohibit Plaintiff from operating its proposed business at the Premises because the
8 Premises is located in a C-3 zone where "Adult Novelty Stores" are unable to operate.
9
10

11
12 97. Thus, on December 2, 2015, at the time the Department issued its
13 answer to Plaintiff's Zoning Inquiry Application, Plaintiff's proposed business
14 would, as the Department indicated, be able to operate at the Premises without being
15 designated an "Adult Novelty Store" under then-existing July 2015 Code.
16
17

18 98. Upon information and belief, in an effort to suppress Plaintiff's
19 unwanted, but protected expression, the City amended the definition of the term
20 "Adult Bookstore" to prohibit Plaintiff from operating its proposed business at the
21 Premises because the newly defined term under the freshly enacted December 2015
22 Code broadened the categories of merchandise that triggered the 25% threshold from
23 "books, magazines, periodicals or other printed matter" to anything deemed to be
24 "adult material." This expansion of the triggering merchandise under the December
25 2015 Code enabled City officials to deem Plaintiff an "Adult-Oriented Business,"
26
27
28

1 prohibited from operating in C-3 zones when the City would have been unable to so
2 prohibit Plaintiff under any of the “adult” regulations in place at the time Plaintiff
3 sought the City’s opinion by way of the Zone Inquiry application.
4

5 99. Even under the new definition of “Adult Bookstore,” there is no
6 evidence that Plaintiff would meet this standard.
7

8 100. Third, upon information and belief, the revised definition of “Adult
9 Bookstore” as found in the December 2015 Code substantially impacts protected
10 expression, and in this case, completely suppresses such expression.
11

12 101. By reason of the foregoing, Plaintiff is entitled to a judgment declaring
13 that the term “Adult Bookstore” as defined in the December 2015 Code violates the
14 First Amendment, facially and as applied, and the corresponding provision of the
15 State Constitution.
16

17
18 102. Plaintiff has presented this Court with a justiciable controversy.

19 **Count 3: Declaratory relief, injunctive relief, damages, and attorneys’**
20 **fees and costs because the Code is impermissibly vague**
21 **facially and as applied to Plaintiff.**

22 103. Plaintiff incorporates by reference each and every paragraph above as
23 though fully set forth herein.
24

25 104. The rights enforceable by 42 U.S.C. § 1983 include, among other rights
26 guaranteed by the United States Constitution, the right to be free from discriminatory
27
28

1 state (and in this case municipal) action that violates the First and Fourteenth
2 Amendments of the United States Constitution.

3
4 105. Statutes which are vague, and which are not subject to reasonable
5 interpretation by common men, inherently deny due process and are therefore
6 unconstitutional. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

7
8 106. Under the Code, City officials have the discretion to deem a business an
9 “Adult Bookstore” when “space devoted to *adult materials* composes 25 percent or
10 more or 500 square feet, whichever is less” of wall space or display areas, including
11 inventory not on display. *See Code Sec. 15-2705.G.2* (emphasis added). The term
12 “adult materials” is not defined elsewhere and is unconstitutionally vague.

13
14
15 107. The term “adult material” is impermissibly vague because it fails to
16 provide people of ordinary intelligence a reasonable opportunity to understand what
17 conduct it prohibits, particularly when compared to the specificity of other terms in
18 the Adult Regulations, such as the in depth description of what constitutes “devices,
19 instruments, or paraphernalia” that would subject a business to regulation as an
20 “Adult Novelty Store.” More troubling, the City ditched a precise definition of
21 merchandise that would subject a business to regulation as an “Adult Bookstore” (*i.e.*,
22 “books, magazines, periodicals or other printed material” as specified in the 2015
23 Code’s definition of the term “Adult Bookstore”), for the nebulous term “adult
24 materials.”
25
26
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28

1 108. Additionally, the term “adult material” authorizes and encourages
2 arbitrary and discriminatory enforcement. What is “adult material” to one official
3 may not be “adult material” to another.
4

5 109. In this case, City and Department officials capitalized on the
6 impermissible vagueness of the term “adult material” to suppress Plaintiff’s
7 unwanted, but protected expression.
8

9 110. Therefore, Plaintiff is entitled to a judgment declaring the Code’s
10 definition of “Adult Bookstore,” which includes the nebulous term “adult material,”
11 impermissibly vague, both facially and as applied to Plaintiff, in violation of the First
12 and Fourteenth Amendments to the Constitution of the United States, as well as the
13 corresponding provisions of the State Constitution.
14

15 111. Plaintiff has presented this Court with a justiciable controversy.
16

17 **Count 4: Declaratory relief, injunctive relief, damages, and attorneys’**
18 **fees and costs because the Code is impermissibly overbroad**
19 **facially and as applied to Plaintiff.**
20

21 112. Plaintiff incorporates herein by reference each and every paragraph
22 above as though fully set forth herein.
23

24 113. The rights enforceable by 42 U.S.C. § 1983 include, among other rights
25 guaranteed by the United States Constitution, the right to be free from discriminatory
26 state action that violates the First and Fourteenth Amendments of the United States
27 Constitution.
28

1 114. The overbreadth doctrine prohibits a statute from making innocent or
2 constitutionally protected conduct criminal in nature. *See Broderick v. Oklahoma*,
3 413 U.S. 601, 613 (1971); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).
4

5 115. The term “adult material,” as found in the definition of what constitutes
6 an “Adult Bookstore” is unconstitutionally overbroad.
7

8 116. The phrase “adult material,” as found in the definition of the term “Adult
9 Bookstore” in the Code easily expands the boundaries of the restrictive Adult
10 Regulations to ensnare retail establishments that dedicate inventory and display areas
11 to lawful, protected expressive material as a subjective “catch all” provision.
12

13 117. Drug stores, retailers, magazine stands, and bookstores that currently
14 operate in C-3 zones could fall subject to the 25% threshold of an “Adult Bookstore”
15 for carrying material that City officials deem to be “adult material.”
16

17 118. This overbroad term has enabled Defendants and their employees and
18 agents to suppress Plaintiff’s protected expression.
19

20 119. Thus, Plaintiff is entitled to a judgment declaring the Code’s definition
21 of “Adult Bookstore,” which includes the term “adult material,” impermissibly
22 overbroad, both facially and as applied to Plaintiff, in violation of the First and
23 Fourteenth Amendments to the Constitution of the United States, as well as the
24 corresponding provisions of the State Constitution.
25

26 120. Plaintiff has presented this Court with a justiciable controversy.
27
28

1 **Count 5: Declaratory relief, injunctive relief, damages, and attorneys’**
2 **fees and costs because the Defendants denied Plaintiff its**
3 **rights under the Equal Protection Clause.**

4 121. Plaintiff incorporates by reference each and every paragraph above as
5 though fully set forth herein.

6 122. The rights enforceable by 42 U.S.C. § 1983 include, among other rights
7 guaranteed by the United States Constitution, the right to be free from discriminatory
8 state (municipal) action that violates the Equal Protection Clause of the Fourteenth
9 Amendment of the United States Constitution.
10

11 123. The Fourteenth Amendment’s Equal Protection Clause instructs that no
12 State shall “deny to any person within its jurisdiction the equal protection of the
13 laws.” U.S. Const. amend. XIV, § 1.
14

15 124. Under the Fourteenth Amendment, a law that impermissibly interferes
16 with the exercise of a fundamental right, such as freedom of expression, is subject to
17 strict scrutiny.
18

19 125. Defendants’ failure to issue the necessary licenses and permits to
20 Plaintiff to operate its proposed business at the Premises violates Plaintiff’s rights
21 under the Equal Protection Clause, which prohibits state actors from discriminating
22 on the basis of the content of expression.
23
24
25
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1 126. Defendants have refused to allow Plaintiff to operate its proposed
2 business in a C-3 zone, despite Plaintiff's intent to comply with all relevant
3 regulations for businesses operating in C-3 zones.
4

5 127. Plaintiff is similarly situated to all other non-"adult" retailers in Fresno,
6 which are presently permitted to operate, including but not limited to drug stores,
7 convenient marts, magazine stores, bookstores, general retailers like Spencer's Gifts,
8 and specialty retailers like Victoria's Secret.
9

10 128. No rational person could regard the circumstances of Plaintiff to differ
11 from those of its comparators to a degree that would justify the differential treatment
12 on the basis of a legitimate government policy.
13
14

15 129. Moreover, the similarity in the circumstances and difference in
16 treatment are sufficient to exclude the possibility that the Defendants acted on the
17 basis of mistake.
18

19 130. Upon information and belief, Defendants have circumvented the
20 application process afforded all other non-"adult" businesses seeking to locate in the
21 City to render Plaintiff's establishment non-operational on the basis of Plaintiff's
22 unwanted, but protected expression.
23
24

25 131. Notably, at the time Plaintiff was making the critical decision of whether
26 to pursue a lease for rental of the Premises, a Department official indicated that, so
27 long as Plaintiff's display of specified novelty merchandise did not exceed 25%,
28

1 Plaintiff's proposed business at the Premises would not be subject to regulation as an
2 "Adult Novelty Store."
3

4 132. Defendants were on notice that Plaintiff had no intent to exceed that
5 25% threshold, and, thus, could not be barred from operation of its proposed business
6 at the Premises as an "adult" business of any kind under the then-existing July 2015
7 Code.
8

9 133. Upon information and belief, Defendants amended the Code to broaden
10 the definition of the term "Adult Bookstore" to be triggered by merchandise deemed
11 to be "adult material" to subject Plaintiff's proposed business to regulation as an
12 "Adult Bookstore," including the regulations that prohibit the operation of such
13 establishments in retail space located in C-3 zones, such as the Premises.
14

15 134. Upon information and belief, the City did not review any studies,
16 judicial opinions, regulations or ordinances that support the enactment of the
17 stringent wall/floor/display space requirements found in the December 2015 Code's
18 definition of "Adult Bookstore" prior to enactment.
19

20 135. Upon information and belief, Defendants have treated Plaintiff
21 differently from its comparators on the impermissible consideration of the intent to
22 inhibit or punish Plaintiff for its engagement in unwanted, but protected expression.
23

24 136. By reason of the foregoing, Plaintiff is entitled to a judgment declaring
25 the Defendants' unconstitutional administration of the Code to Plaintiff's detriment
26
27
28

1 as being a violation of the Equal Protection Clause of the Fourteenth Amendment to
2 the United States Constitution, as well as corresponding provision of the State
3 Constitution.
4

5 137. This unequal enforcement of the Code and classification of Plaintiff's
6 proposed business at the Premises as an "Adult Bookstore" has barred Plaintiff from
7 commencing its operations of the proposed business at the Premises on the basis of
8 Plaintiff's unwanted, but nonetheless, protected expression.
9

10 138. Plaintiff has presented this Court with a justiciable controversy.
11

12 **Count 6: Declaratory relief, injunctive relief, damages, and attorneys'**
13 **fees and costs because the Defendants' application of the Code**
14 **to Plaintiff's proposed business violates due process rights.**

15 139. Plaintiff incorporates by reference each and every paragraph above as
16 though fully set forth herein.
17

18 140. The rights enforceable by 42 U.S.C. § 1983 include, among other rights
19 guaranteed by the United States Constitution, the right to be free from state action
20 (including municipal action) that violates the Due Process Clause of the Fourteenth
21 Amendment of the United States Constitution.
22

23 141. Defendants have deprived Plaintiff of a protected liberty interest,
24 namely, the right to engage in protected expression.
25

26 142. Further, Defendants have infringed on Plaintiff's exercise of this
27 fundamental right without according Plaintiff due process.
28

1 143. As discussed in greater detail above, Defendants circumvented the
2 standard procedures afforded all other businesses attempting to obtain licenses in the
3 City.
4

5 144. Indeed, Defendants amended the Code to bar Plaintiff from
6 commencing operation of its proposed business at the Premises the *day after* the
7 Department issued Plaintiff an interpretation of the term “Adult Novelty Store”
8 because, the then-existing term nor any other term would have enabled the City to
9 prohibit Plaintiff from commencing its operations at retail space located in a C-3
10 zone.
11
12

13 145. Furthermore, Defendants have rebuffed Plaintiff’s attempts to obtain a
14 final decision from them on Plaintiff’s revised Zone Clearance application, having
15 made no such decision or any particular timeframe in which the Department would
16 rule.
17
18

19 146. Defendants’ repeated delays, in issuing a final decision, have been, upon
20 information and belief, outside the normal response time and procedures for routine
21 matters such as Zone Clearance applications. Indeed, the Department took nearly a
22 month to respond to Plaintiff’s Zone Inquiry application when the Department stated
23 that it ordinarily responded to such matters in “7-10 business days.” Moreover,
24 Plaintiff has been waiting for a final decision on its revised Zone Clearance
25 application for more than seven months.
26
27
28

1 B. Finding and declaring that the Code allows impermissible
2 discrimination on the basis of protected expression in violation of the First and
3 Fourteenth Amendments and the corresponding State Constitution provisions;
4

5 C. Finding and declaring that the definition of the term “Adult Bookstore,”
6 which incorporates the term “adult material” is unconstitutional on its face and as
7 applied to Plaintiff under the First and Fourteenth Amendments to the United States
8 Constitution and the corollary protections of the State Constitution;
9

10 D. Finding and declaring that Defendants targeted Plaintiff for special
11 treatment on the basis of Plaintiff’s protected expression in violation of the First and
12 Fourteenth Amendments and the corresponding State Constitution provisions;
13
14

15 E. Finding and declaring that Defendants’ actions violated Plaintiff’s due
16 process rights under the Fourteenth Amendment and the corresponding State
17 Constitution provisions;
18

19 F. Enjoining Defendants and their employees, agents, and representatives,
20 as well as all persons acting for or on their behalf, from enforcing the “Adult
21 Bookstore” provisions of the Code against Plaintiff or its interests;
22

23 G. Awarding Plaintiff monetary damages against Defendants for, *inter*
24 *alia*, lost profits, loss of good will, insurance costs for the Premises, costs associated
25 with retaining an architect and consultant, and deprivation of constitutional rights;
26
27
28

1 H. Awarding Plaintiff its attorney fees and costs under 42 U.S.C. § 1988;
2 and

3 I. Awarding such further and additional relief that the Court deems just
4 and proper.
5

6 Dated: February 6, 2017

Respectfully Submitted,

7
8
9 s/Paul J. Cambria, Jr.

10 PAUL J. CAMBRIA, JR., ESQ.

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