

## **EXHIBIT A**

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

Bruce Peck,  
Plaintiff  
v.  
City of Las Vegas  
Defendant

2:15-cv-02070-JAD-PAL

## **Order Granting in Part Motion for Summary Judgment**

[ECF No. 75]

Street performer Bruce Peck sues the City of Las Vegas for damages and declaratory and injunctive relief under 28 U.S.C. § 1983, alleging that portions of the prior and current ordinances that govern the Fremont Street pedestrian mall violate his First and Fourteenth Amendment rights.<sup>1</sup> Peck’s first four claims are facial challenges to five of the provisions governing street performances on the mall.<sup>2</sup> Peck’s fifth and final claim is a mixed as-applied and facial challenge of several provisions governing the mall.<sup>3</sup>

Peck successfully obtained limited preliminary injunctive relief: enjoining the City of Las Vegas from enforcing (or issuing citations for violating) the portion of LVMC § 11.68.108(E) that requires all performers to register for the performance-zone lottery regardless of whether they want to participate in it.<sup>4</sup> The City now moves to dismiss all of Peck’s claims or, alternatively, for summary judgment.<sup>5</sup> I consider the City’s motion under the summary-judgment standard for three reasons. First, I already determined when deciding Peck’s motion for preliminary injunction that: (a) Peck has met his burden of “making a colorable claim that [his]

<sup>1</sup> ECF No. 20.

<sup>2</sup> *Id.* at 5-9.

<sup>3</sup> *Id.* at 9–18.

4 ECF No. 79

<sup>5</sup> ECF No. 75

1 First Amendment rights have been infringed, or are threatened with infringement,” and (b) the  
2 City had met its burden “to justify the restriction.”<sup>6</sup> Second, both sides provided additional  
3 evidence for me to consider. And, finally, I do not anticipate significantly more evidence as  
4 neither side has filed a supplement in the eight months since this motion was filed, and discovery  
5 is now closed.<sup>7</sup>

6 I find that the City has met its burden to justify the buffer zone, performance zone, lottery  
7 system, portions of the performer registration, and sound restrictions. I therefore grant the City  
8 summary judgment in its favor on Peck’s first, second, and fourth claims for relief. But the City  
9 has not met its burden to justify LVMC § 11.68.108(E)’s requirement that performers register for  
10 the lottery scheme regardless of whether they want to participate, so I grant Peck summary  
11 judgment in his favor of that portion of his third claim for relief; I grant the City summary  
12 judgment on the remaining portions of that claim. And I grant the City judgment in its favor on  
13 the portions of Peck’s fifth claim for relief alleging facial challenges to the street-performer  
14 restrictions, which are duplicative of his other claims. I deny the motion in all other respects  
15 because the City has not fully developed either argument or the record regarding the as-applied  
16 challenges in Peck’s fifth claim for relief. Finally, I refer this case to the magistrate judge for a  
17 mandatory settlement conference.

#### 18 **Background**

19 In 1995 upon finding that there “had been a progressive decline in the economic growth  
20 and vitality of business located in the central business district of the City [that] is attributable to  
21 the decrease in tourists and other visitors to the central business district,”<sup>8</sup> the City of Las Vegas  
22 adopted ordinances under Nevada’s Pedestrian Mall Act<sup>9</sup> to close part of the historic Fremont

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24 <sup>6</sup> ECF No. 79 at 4 (quoting *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir.  
25 2011)).

26 <sup>7</sup> ECF No. 80.

27 <sup>8</sup> LAS VEGAS MUNI. CODE § 11.68.010(A).

28 <sup>9</sup> NEV. REV. STAT. §§ 268.810 et seq.

1 Street and convert it into a pedestrian mall (the Mall).<sup>10</sup> The ordinances are codified in Chapter  
2 11.68 of the Las Vegas Municipal Code, govern activities on the Mall, and delegate certain  
3 responsibilities for and powers over the Mall's operations to The Fremont Street Experience,  
4 LLC (FSE).<sup>11</sup>

5 Since its adoption, Chapter 11.68 has been reshaped by litigation and compromises  
6 between the City, the FSE, and the American Civil Liberties Union of Nevada (ACLU).<sup>12</sup>  
7 Provisions governing the activities of street performers on the Mall were added to Chapter 11.68  
8 by Ordinance No. 6131 in 2011. The most recent amendments to Chapter 11.68 included  
9 changes to the provisions governing street performers and were implemented by Ordinance No.  
10 6462, which took effect on November 1, 2015.<sup>13</sup>

11 Bruce Peck is a street performer who has worked in Las Vegas since October 2010.<sup>14</sup>  
12 Peck challenges several of the provisions of Chapter 11.68 (as enacted in 2011 and amended in  
13 2015) governing the activities of street performers on the Mall as unconstitutional on their face or  
14 as they are applied to him.

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21<sup>10</sup> LAS VEGAS MUNI. CODE §§ 11.68.010 et seq.

22<sup>11</sup> *Id.* at § 11.68.070.

23<sup>12</sup> See e.g. *American Civil Liberties Union of Nev. v. City of Las Vegas*, 333 F.3d 1092 (9th Cir.  
24 2003) cert. denied, 540 U.S. 1110 (2004) ("ACLU I"); *American Civil Liberties Union of Nev. v. City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006) ("ACLU II"); *American Civil Liberties Union of Nev. v. City of Las Vegas*, No. 2:97-cv-01419-DAE-LRL (D. Nev. Oct. 24, 2011) (case closed upon parties' settlement).

27<sup>13</sup> ECF No. 5 at 45.

28<sup>14</sup> ECF No. 20 at 2, 4–5, ¶¶ 2, 17.

## Discussion

## A. Summary-judgment standard

3 Summary judgment is appropriate when, viewing the evidence “in the light most  
4 favorable to the nonmoving party,” there is no genuine dispute as to any material fact.<sup>15</sup> The  
5 moving party “bears the initial responsibility of informing the district court of the basis for its  
6 motion[ ] and identifying those portions of ‘the pleadings, depositions, answers to  
7 interrogatories, and admissions on file, together with the affidavits, if any,’ [that] it believes  
8 demonstrate the absence of a genuine issue of material fact.”<sup>16</sup> An issue is “genuine” if  
9 the evidence would permit a reasonable jury to return a verdict for the nonmoving party.<sup>17</sup> A fact  
10 is “material” if it could affect the outcome of the case.<sup>18</sup>

11        “[W]hat is required to defeat summary judgment is simply evidence ‘such that a  
12 reasonable juror drawing all inferences in favor of the [nonmoving party] could return a verdict  
13 in the [nonmoving party’s] favor.’”<sup>19</sup> “[W]here evidence is genuinely disputed on a particular  
14 issue—such as by conflicting testimony—that ‘issue is inappropriate for resolution on summary  
15 judgment.’”<sup>20</sup> But “[w]here the record taken as a whole could not lead a rational trier of fact to  
16 find for the nonmoving party, there is no genuine issue for trial,’ and summary judgment is  
17 appropriate.”<sup>21</sup>

<sup>15</sup> *Jones v. Williams*, 791 F.3d 1023, 1030 (9th Cir. 2015) (quotation marks omitted); FED. R. CIV. PROC. 56(a).

<sup>16</sup> *Celotex Corp. v. Catarett*, 477 U.S. 317, 323 (1986).

<sup>17</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

<sup>18</sup> *Id.* at 248

<sup>19</sup> *Zetwick v. Cty. of Yolo*, 850 F.3d 436, 2017 WL 710476, at \*3 (9th Cir. Feb. 23, 2017) (quoting *Reza v. Pearce*, 806 F.3d 497, 505 (9th Cir. 2015)).

<sup>20</sup> *Id.* (quoting *Direct Techs., LLC v. Elec. Arts, Inc.*, 836 F.3d 1059, 1067 (9th Cir. 2016)).

<sup>21</sup> *Id.* (quoting *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009)).

1      **B. Applying the summary-judgment standard to Peck's claims**

2      Peck's first four claims are facial challenges to the provisions that: (1) prohibit street  
 3 performances within certain areas of the Mall; (2) limit the volume of sound that street  
 4 performers can emit; (3) designate certain spots as the only locations where street performances  
 5 are permitted on the Mall from 3 p.m. to 1 a.m.; (4) authorize the establishment of a lottery  
 6 system for street performers to reserve the designated performance zones; and (5) require street  
 7 performers to register with the City after first using a designated performance zone.<sup>22</sup> Peck's  
 8 fifth and final claim challenges these same provisions on their face and others as they are applied  
 9 to him.<sup>23</sup>

10     **1. Several of the challenged restrictions do not exist.**

11     Peck alleges that Chapter 11.68 prohibits street performances during the celestial-vault-  
 12 light show,<sup>24</sup> but I could not find that prohibition in either the 2011 or 2015 amendments. Peck  
 13 further alleges that Chapter 11.68 prohibits anyone from taking a seated position anywhere on the  
 14 Mall,<sup>25</sup> but the 2011 amendments are silent on this issue and the 2015 amendments allow street  
 15 performers to sit on the Mall in the case of an emergency, upon approval in connection with  
 16 events conducted by or on behalf of the FSE, or when done as part of a street performance.<sup>26</sup>  
 17 Peck additionally alleges that the 2015 amendments ban "dangerous objects" but do not define  
 18 that term<sup>27</sup>; however, "dangerous objects" is not used anywhere in the 2015 amendments. Peck  
 19 finally alleges that the 2015 amendments prohibit street performances within 100 feet of a stage

22 ECF No. 20 at 5–9.

23 *Id.* at 9–18.

24 *Id.* at 10, ¶ 43.

25 *Id.* at 11, ¶ 48.

26 LAS VEGAS MUNI. CODE § 11.68.100(B)(10) (2015).

27 ECF No. 20 at 11, ¶ 50–51.

1 when a “sponsored concert” is in progress but do not define that term<sup>28</sup>; however, that term is  
2 defined in the 2015 amendments to mean “a concert or performance that is provided by or on  
3 behalf of the [FSE] and takes place on one of the permanent stage structures within the  
4 Pedestrian Mall.”<sup>29</sup> Because these restrictions do not appear to exist in the ordinances that Peck  
5 challenges, I grant summary judgment in favor of the City on the portion of each claim in which  
6 they are challenged as facially unconstitutional.<sup>30</sup>

7 **2. Remaining restrictions subject to a facial challenge**

8 The Supreme Court has established a three-pronged test for evaluating a claim of  
9 unconstitutional restriction on speech: (1) whether the speech is protected; (2) the nature of the  
10 forum; and (3) whether the justifications offered for limiting or excluding speech from the forum  
11 satisfy the requisite standards.<sup>31</sup> The first two prongs are easily disposed with: the parties do not  
12 dispute that street performance is a protected form of speech, and the Ninth Circuit has already  
13 determined that the Mall is a traditional public forum.<sup>32</sup> This leaves me to address whether the  
14 justifications offered by the City for limiting street performances on the Mall satisfy the requisite  
15 standards. I already exhaustively analyzed these issues when I decided Peck’s motion for  
16 preliminary injunctive relief. Because the additional evidence provided by the parties does not  
17 significantly alter my previous analysis and findings, this decision is largely a restatement of my  
18 prior order.

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21<sup>28</sup> ECF No. 20 at 16, ¶¶ 71–72.

22<sup>29</sup> LAS VEGAS MUNI. CODE § 11.68.020 (2015).

23<sup>30</sup> As further discussed below, Peck stated colorable as-applied challenges to a variant of two of  
24 these restrictions (application of the sitting/laying restriction and the 100-foot-buffer zone  
25 around “sponsored concerts”); the City has not fully developed an argument to either dismiss or  
26 summarily adjudicate these claims.

27<sup>31</sup> *Conrelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 797 (1985).

28<sup>32</sup> *ACLU II*, 466 F.3d at 789 (quoting *ACLU I*, 333 F.3d at 1094).

1       “Although regulation of speech in a traditional public forum is disfavored, it is not  
 2 impermissible. The government may place reasonable time, place, and manner restrictions on  
 3 speech.”<sup>33</sup> But the restrictions “must be content-neutral and narrowly tailored to serve a  
 4 significant governmental interest, leaving open ample alternative channels of expression.”<sup>34</sup>  
 5 “The failure to satisfy any single prong of this test invalidates the requirement.”<sup>35</sup>

6           **a.       *The challenged restrictions are content-neutral.***

7       “The principal inquiry in determining content neutrality, in speech cases generally and in  
 8 time, place, or manner cases in particular, is whether the government has adopted a regulation of  
 9 speech because of disagreement with the message it conveys. The government’s purpose is the  
 10 controlling consideration.”<sup>36</sup> “Government regulation of expressive activity is content neutral  
 11 so long as it is *justified* without reference to the content of the regulated speech.”<sup>37</sup> An  
 12 ordinance is “content-based if either the main purpose in enacting it was to suppress or exalt  
 13 speech of a certain content, or it differentiates based on the content of the speech on its face.”<sup>38</sup>

14       Chapter 11.68’s findings explain that the Mall was created “for the movement, safety,  
 15 convenience, enjoyment, entertainment, recreation[,] and relaxation of pedestrians . . .”<sup>39</sup> The  
 16 Mall’s “principal purpose” “is to serve as an economic and entertainment venue that will enhance

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 18       <sup>33</sup> *Id.* at 792.  
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20       <sup>34</sup> *Id.* (citing *Clark v. Cnty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

21       <sup>35</sup> *Id.* (quoting *Grossman v. City of Portland*, 33 F.3d 1200, 1205 (9th Cir. 1994)).

22       <sup>36</sup> *Id.* at 793 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

23       <sup>37</sup> *Id.* (quoting *Ward*, 491 U.S. at 791) (internal quotation marks omitted).

24       <sup>38</sup> *Id.* (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429–30 (1993)).

25       <sup>39</sup> LAS VEGAS MUNI. CODE §§ 11.68.010(A), (D) (“Prior to the Mall’s creation, the former  
 26 Fremont Street area had become known as unseemly and crime ridden, with tourists and  
 27 businesses leaving the area for a more hospitable environment. The Pedestrian Mall was created  
 28 to reverse that declining environment, and provide a safe and enjoyable entertainment experience  
 to attract tourism and thereby support surrounding economic growth.”).

1 the historical central business district.”<sup>40</sup> Chapter 11.68 was amended in 2011 “to facilitate and  
 2 enhance the Mall’s purpose.”<sup>41</sup> And when “the Mall’s environment and function . . .  
 3 deteriorated” after the 2011 amendments, Chapter 11.68 was again amended in 2015 to assuage  
 4 “confusion as to where expressive activity is appropriate, particularly activity engaged in by  
 5 street performers, and to combat infighting and competition for the most desirable locations,  
 6 [and] to enhance assess for all desired users of the Mall, including those seeking to engage in  
 7 expressive activity . . .”<sup>42</sup> Peck submits no evidence to refute these findings, and I accept them  
 8 as evidence of the City’s purpose in enacting—and later amending—the challenged ordinances.  
 9 These findings do not reflect that the City intended to suppress or exalt speech of a certain  
 10 content. Thus, I find that the purpose of the challenged restrictions is content-neutral.

11       Each portion of the ordinances that Peck challenges governs the activities of street  
 12 performers on the Mall. Chapter 11.68 defines a “street performer” to mean any person who, on  
 13 the Mall, “engages in any form of performing art, including but not limited to posing, acting,  
 14 dancing[,] or miming, whether in costume or not; the playing of any musical instrument, singing  
 15 or vocalizing, with or without accompaniment, where the performing art is not provided by or on  
 16 behalf of [FSE].”<sup>43</sup> “The term ‘street performer’ includes persons commonly referred to as  
 17 ‘buskers’ or those who engage in ‘busking’ activities.”<sup>44</sup> On their face, the challenged provisions  
 18 regulate a certain manner of expression or expressive conduct—street performances. But the  
 19 ordinances do not distinguish based on the content of the message conveyed by the performers.  
 20 Nor do any of the challenged provisions prohibit or restrict street performers from  
 21 communicating a particular set of messages. The Supreme Court and the Ninth Circuit have both  
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23       <sup>40</sup> *Id.* at § 11.68.010(D).

24       <sup>41</sup> *Id.* at § 11.68.010(E).

25       <sup>42</sup> *Id.* at § 11.68.010(F), (G).

26       <sup>43</sup> *Id.* at § 11.68.020.

27       <sup>44</sup> *Id.*

1 found that ordinances that similarly regulate “certain *manner* of expression or expressive *conduct*  
 2 [are] content-neutral.”<sup>45</sup> Following their reasoning, I find that these challenged restrictions are  
 3 likewise content neutral on their face. And because the challenged restrictions are content  
 4 neutral, the next question I must address is whether they are narrowly tailored to serve a  
 5 substantial governmental interest.

6                   **b.        *Narrow tailoring***

7        “A narrowly tailored time, place, or manner restriction on speech is one that does not  
 8 ‘burden substantially more speech than is necessary’ to achieve a substantial government  
 9 interest.”<sup>46</sup> “It must target[ ] and eliminate[ ] no more than the exact source of the ‘evil’ [that] it  
 10 seeks to remedy.”<sup>47</sup> And “although the chosen restriction ‘need not be the least restrictive or  
 11 least intrusive means’ available to achieve the government’s legitimate interests, the existence of  
 12 obvious, less burdensome alternatives is a ‘relevant consideration in determining whether the  
 13 “fit” between ends and means is reasonable.’”<sup>48</sup>

14       The City’s findings stated in Chapter 11.68 and the declarations of Mark Brandenburg,  
 15 Interim Chairman of the FSE, and Robert Gallego, director for security and parking for the FSE,  
 16 tell the narrative of the City’s interest and concerns that the street-performer-specific provisions  
 17 were drafted (and then amended) to combat. The City’s findings state that the restrictions  
 18 promote “the movement, safety, convenience, enjoyment, entertainment, recreation[,] and  
 19 relaxation of pedestrians” on the Mall.<sup>49</sup> Following the 2011 amendments, the City found that

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 24       <sup>45</sup> *ACLU II*, 466 F.3d at 794–95 n.11 (collecting cases).

25       <sup>46</sup> *Berger v. City of Seattle*, 569 F.3d 1029, 1041 (9th Cir. 2009) (quoting *Ward*, 491 U.S. at 799).

26       <sup>47</sup> *Id.* (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)) (internal quotation marks omitted).

27       <sup>48</sup> *Id.* (quoting *Ward*, 491 U.S. at 798; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.3 (1993)).

28       <sup>49</sup> LAS VEGAS MUNI. CODE § 11.68.010(A).

“the Mall’s environment and function ha[d] deteriorated.”<sup>50</sup> “The 2011 amendments principally imposed various distance restrictions from specific uses where expressive activity could occur.”<sup>51</sup> But because of the “Mall’s congested nature,” it appeared that the bare distance regulations “created uncertainty among the general public and thus have led to confusion as well as infighting as to where expressive activity may or may not occur.”<sup>52</sup>

Indeed, the environment of the Pedestrian Mall has become such that certain persons or groups have attempted to monopolize certain locations, have been the recipients of threats and other forms of intimidation in an attempt to control certain areas where expressive activity is presently allowed. Unfortunately, the 2011 amendments have facilitated an inhospitable environment that is incompatible with the Mall's entertainment and commercial purposes, and has further resulted in a deterioration of public safety and well-being.<sup>53</sup>

Considering the confusion as to where expressive activity is appropriate, particularly activity engaged in by street performers, and **to combat infighting and competition for the most desirable locations, to enhance access for all desired users of the Mall**, including those seeking to engage in expressive activity, **the City determines that is necessary and appropriate to create designated areas for the activities of street performers during peak hours of the mall's usage and to further ensure that no one is permitted to monopolize or use those locations to the exclusion of others.**<sup>54</sup>

Brandenburg explains that “[t]he absence of designated performance areas . . . created a great deal of pedestrian traffic congestion on the Mall[,] . . . which is narrow at only 80[-]feet wide in most places[ ] [and] is often filled with thousands of visitors who are struggling to move from place to place.”<sup>55</sup> The “[s]treet performers naturally position themselves strategically to

<sup>50</sup> *Id.* at § 11.68.010(F).

51 *Id.*

52 *Id.*

<sup>53</sup> *Id.* (emphasis added).

<sup>54</sup> *Id.* at § 11.68.010(G) (emphasis added).

<sup>55</sup> ECF No. 32-1 at 15, ¶ 19.

1 maximize the traffic that passes by.”<sup>56</sup> But because “[c]ompeting street performers positioned  
 2 themselves in the same area,” they “creat[ed] clusters of street performers vying for the same  
 3 traffic and attention.”<sup>57</sup> **“This created congestion that slowed pedestrian traffic to a crawl,  
 4 similar to a freeway traffic jam. In these instances, visitors had great difficulty navigating  
 5 the Mall. . . .”**<sup>58</sup> Brandenburg recounts that “there were numerous incidents between 2011 and  
 6 2015 in which street performers “got into arguments[,]” “bullied[,]” and “became violent” with  
 7 one another.<sup>59</sup> Street performers claimed certain locations on the Mall as their own to the  
 8 exclusion of others.<sup>60</sup> And “[t]his dynamic created a toxic environment on the Mall.”<sup>61</sup>

9 Brandenburg details how the bare exclusion zones impacted the retail vendors on the  
 10 Mall: a street performer might be in compliance with the restriction that he perform 10 feet away  
 11 from a kiosk, but the performer’s crowd often “pushed up against retail kiosks” and that made  
 12 their operators “particularly vulnerable to shoplifting, which happened often.”<sup>62</sup> He also recounts  
 13 the worst street-performer behavior that Mall visitors encountered: harassment to pay for the  
 14 performances that included holding a child hostage until the father could take money from an  
 15 ATM to pay the amount demanded by the performer and firing a taser on a Mall visitor who  
 16 refused to pay the performer’s money demand.<sup>63</sup> Brandenburg explains that Mall visitors are

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 18 <sup>56</sup> *Id.*

19 <sup>57</sup> *Id.*

20 <sup>58</sup> *Id.* (emphasis added).

21 <sup>59</sup> *Id.* at 15, ¶ 20.

22 <sup>60</sup> *Id.*

23 <sup>61</sup> *Id.*

24 <sup>62</sup> *Id.* at 15–16, ¶ 21.

25 <sup>63</sup> *Id.* at 16, ¶ 22. Peck provides evidence to refute this in the form of a declaration from the  
 26 street performer allegedly involved in the taser incident. ECF No. 77 at 43–44. But it appears  
 27 that the second page of this declaration—supposedly containing the explanation—is missing.  
 28 What is not missing, however, is an admission by the street performer that he owned and had on

1 more vulnerable to harassment and criminal conduct by aggressive street performers because  
 2 “many Mall visitors are under the mistaken belief that street performers are either employed by  
 3 or approved or authorized in some way by [the] FSE.”<sup>64</sup> Gallego mirrors all of Brandenburg’s  
 4 statements.<sup>65</sup>

5 The evidence thus shows that, after the creation of the Mall and substantial investment by  
 6 the FSE<sup>66</sup> revitalized the Fremont Street area and businesses, and visitors returned, it also became  
 7 a desirable location for people who wanted to engage in free-expression activities like street  
 8 performing.<sup>67</sup> But the City and the FSE encountered serious problems with maintaining safety,  
 9 order, and the free flow of pedestrian traffic on the Mall. This appears to be largely due to the  
 10 vast number of street performers who were drawn to the Mall. Successful street performances  
 11 draw crowds, and even unsuccessful ones pose as obstacles to or cause alterations in the natural  
 12 flow of pedestrian traffic.

13 Clusters of performers exacerbate this problem. The increase in this form of expression,  
 14 combined with the fact that the Mall consists of a narrow, five-block street that is largely  
 15 enclosed on top with an enormous video display; contains two permanent stages, a zip-line  
 16 structure, and many retail kiosks; is lined by numerous casinos and other establishments; and is

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 18 him that night a “stun gun” that he “didn’t use it on anyone[] except to fire a warning zap.” ECF  
 19 No. 77 at 44.

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 21<sup>64</sup> ECF No. 31-1 at 16, ¶¶ 23, 25.

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 23<sup>65</sup> *Id.* at 52–55.

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 25<sup>66</sup> The FSE spent \$70 million to build the Mall in 1994–95 and has since expended tens of  
 26 millions of dollars in upgrades, operation, management, marketing, entertainment, and security  
 27 costs. ECF No. 32-1 at 13–14, ¶¶ 11–12.

28<sup>67</sup> This is supported by the street performer declarations that Peck submitted. Heather Baressi  
 29 declares that her “sole profession is street performance and [she] has been performing on  
 30 Fremont Street regularly since November 2012.” ECF No. 77 at 32. Kristoffer Bentz declares  
 31 that he is “a professional magician who spends much of the year traveling and performing in  
 32 public places for members of the general public. [His] travels have often taken [him] to Fremont  
 33 Street . . . . Since the Fall of 2010[,] [he] has been visiting Las Vegas at least 2 times a year, up  
 34 to 4 months per visit, and performing almost exclusively on the Mall.” ECF No. 77 at 35.

1 often congested with the many visitors who come to experience this uniquely Las Vegas  
 2 spectacle<sup>68</sup> proved to be unworkable for all. Visitors and retail operators complained about the  
 3 performers, the performers complained about each other, and security spent an inordinate amount  
 4 of time policing the performers. Thus, the City took action by amending Chapter 11.68 in 2011  
 5 and again in 2015 to specifically address the problems that it and the FSE had in ensuring public  
 6 safety, order, and traffic-flow as a result of the increase in street performances on the Mall.

7 The City first attempted to alleviate those problems by establishing buffer zones where  
 8 street performances were prohibited around the pedestrian ingress, egress, and stopping points  
 9 like building entrances, ATMs, retail kiosks, outdoor dining areas, fire lanes and crosswalks, and  
 10 stages.<sup>69</sup> But the bare “distance separations [ultimately] proved to be effectively impossible to  
 11 enforce[,]” “particularly during peak traffic periods (nights, weekends, and holidays)[,]” and “[i]n  
 12 nearly every instance” where a street performer who was in violation was asked to comply, “the  
 13 street performer complied temporarily by moving a few feet, but then often returned to his/her  
 14 unlawful spot the moment the FSE security guard was no longer observing the street  
 15 performer.”<sup>70</sup>

16 So, the City consulted and worked with the FSE and the ACLU to amend Chapter 11.68  
 17 with additional time, place, and manner restrictions to address the street-performer-specific  
 18 problems. The City Council unanimously approved the 2015 amendments that: (1) designated no  
 19 fewer than 38 individual six-foot diameter zones (and one large, multi-person zone) on the Mall  
 20 as the only places where street performances can be conducted from 3 p.m. to 1 a.m.; (2)  
 21 established a lottery system for street performers to reserve the individual performance zones  
 22 during those hours; and (3) required street performers to register with the City in order to  
 23 participate in the lottery for the individual performance zones. The buffer zones remained in  
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25 <sup>68</sup> The FSE purports on its website that the Mall “welcomes more than 17 million visitors each  
 26 year.” See <http://vegasexperience.com/about-us/> (last accessed Mar. 31, 2017).

27 <sup>69</sup> LAS VEGAS MUNI. CODE § 11.68.107(C).

28 <sup>70</sup> ECF No. 32-1 at 14, ¶¶ 14–15.

1 place following the 2015 amendments, but an additional zone—40 feet from any other street  
 2 performer then performing—was added, and the zone around the stages during concerts was  
 3 reduced from 200 to 100 feet. Armed with this background evidence, I examine whether each  
 4 challenged restriction is narrowly tailored to serve a significant governmental interest.

5 *1. Buffer zones*

6 The Supreme Court reiterated in *McCullen v. Coakley* that ““ensuring public safety and  
 7 order, promoting the free flow of traffic on streets and sidewalks, [and] protecting property  
 8 rights”” are legitimate government interests.<sup>71</sup> It found that the buffer zones at issue in that case  
 9 “clearly serve these interests.”<sup>72</sup> Peck claims that *McCullen* stands for the proposition that  
 10 exclusion zones are *per se* unconstitutional.<sup>73</sup> But the Supreme Court’s holding in *McCullen*  
 11 does not sweep so broadly.

12 *McCullen* concerns “[a] Massachusetts statute [that] ma[de] it a crime to knowingly stand  
 13 on a ‘public way or sidewalk’ within 35 feet of an entrance or driveway to any place, other than a  
 14 hospital, where abortions are performed.”<sup>74</sup> *McCullen* and her co-petitioners, “individuals who  
 15 approach and talk to women outside such facilities, attempting to dissuade them from having  
 16 abortions[.]” challenged the buffer zones on First Amendment grounds, arguing that they prevent  
 17 them from providing counseling near the facilities’ entrances.<sup>75</sup> The Court found that “the buffer  
 18 zones impose serious burdens on the petitioners’ speech” because they “carve out a significant  
 19 portion of the adjacent public sidewalks, pushing petitioners well back from the clinics’  
 20 entrances and driveways. The zones thereby compromise petitioners’ ability to initiate the close,

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 22  
 23 <sup>71</sup> *McCullen v. Coakley*, — U.S. —, 134 S.Ct. 2518, 2535 (2014) (quoting *Schneck v. Pro-Choice  
 Network of Western N.Y.*, 519 U.S. 357, 376 (1997)).

24 <sup>72</sup> *Id.*

25 <sup>73</sup> ECF No. 20 at 7–8, ¶¶ 19–21.

26 <sup>74</sup> *McCullen*, 134 S.Ct. at 2525.

27 <sup>75</sup> *Id.*

1 personal conversations that they view as essential to ‘sidewalk counseling.’”<sup>76</sup> The Court  
 2 recounted more narrow means that Massachusetts could employ to serve its interests,<sup>77</sup> and  
 3 concluded that, instead of pursuing those more narrow means, “the Commonwealth has  
 4 pursued those interests by the extreme step of closing a substantial portion of a traditional public  
 5 forum to all speakers.”<sup>78</sup>

6 *McCullen* does not demand that I find Chapter 11.68’s buffer zones to be invalid time,  
 7 place, and manner restrictions. And it is materially distinguishable because it concerned normal  
 8 conversations, not street performances. The Court explained that, “while the First Amendment  
 9 does not guarantee a speaker the right to any particular form of expression, some forms—such  
 10 as normal conversation and leafletting on a public sidewalk—have historically been more closely  
 11 associated with the transmission of ideas than others.”<sup>79</sup> The statute in *McCullen* also burdened  
 12 much more speech than the problem it sought to address. The Massachusetts statute made it a  
 13 crime to knowingly stand on a public way or sidewalk within 35 feet of an entrance or driveway  
 14 to any place, other than a hospital, where abortions are performed, but the problem that it sought  
 15 to control arose “only once a week in one city at one clinic . . .”<sup>80</sup> Chapter 11.68’s buffer zones,  
 16 however, are limited to areas of the Mall and directed at the only form of expression that the City  
 17 and the FSE had determined was the source of the problems—street performances.

18 Peck recommends that a reasonable alternative to the buffer zones would be to modify  
 19 each of them to only 10 feet.<sup>81</sup> Two of the buffer zones are already 10 feet: around retail kiosks  
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21  
 22 <sup>76</sup> *Id.*

23  
 24 <sup>77</sup> *Id.* at 2537–39.

25  
 26 <sup>78</sup> *Id.* at 2541.

27  
 28 <sup>79</sup> *Id.* at 2536.

<sup>80</sup> *Id.* at 2539.

<sup>81</sup> ECF No. 20 at 18, ¶ 81.

1 or carts<sup>82</sup> and the outer perimeter of outdoor dining areas while in use for dining.<sup>83</sup> Although the  
 2 remainder of the zones are larger, they are still modest: 20 feet from any building entrance, ATM,  
 3 fire lane, or crosswalk<sup>84</sup>; 40 feet from any other then-performing street performer<sup>85</sup>; 100 feet from  
 4 the stage during a sponsored concert<sup>86</sup>; any area of the Mall that is closed to the public<sup>87</sup>; and any  
 5 location that will obstruct or impede pedestrian traffic.<sup>88</sup> I cannot conclude on this record, like  
 6 the Court did in *McCullen*, that the buffer zones that exceed 10 feet “carve out a significant  
 7 portion of the adjacent” Mall, nor that they push street performers “well back” from the very  
 8 areas in which they want to perform.

9 The City’s reasons for establishing the buffer zones—ensuring public safety and order  
 10 and the free flow of pedestrian traffic on a congested pedestrian mall—are substantial  
 11 government interests. The buffer zones target only street performance, a form of expression that  
 12 inherently poses an obstacle to or alters the natural flow of pedestrian traffic, which itself can  
 13 cause public-safety and traffic-flow concerns. I find that the buffer zones eliminate “no more  
 14 than the exact source of the ‘evil’ [that] [they] seek[ ] to remedy.”<sup>89</sup> The buffer zones also target  
 15 only those areas of the Mall that are (or are closely adjacent to) typical pedestrian ingress, egress,  
 16 and stopping areas. Thus, I conclude that the City has shown that the buffer zones are narrowly  
 17 tailored place-and-manner restrictions that do not burden substantially more speech than is  
 18 necessary to achieve a substantial government interest.

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20 <sup>82</sup> LAS VEGAS MUNI. CODE § 11.68.107(C)(2)(b).

21 <sup>83</sup> *Id.* at § 11.68.107(C)(2)(c).

22 <sup>84</sup> *Id.* at § 11.68.107(C)(2)(a), (d).

23 <sup>85</sup> *Id.* at § 11.68.107(C)(2)(g).

24 <sup>86</sup> *Id.* at § 11.68.107(C)(2)(f).

25 <sup>87</sup> *Id.* at § 11.68.107(C)(2)(e).

26 <sup>88</sup> *Id.* at § 11.68.107(C)(2)(h).

27 <sup>89</sup> *Berger*, 569 F.3d at 1041 (quoting *Frisby*, 487 U.S. at 485) (internal quotation marks omitted).

1                   2.     *Performance zones and the lottery system to use them*

2                   The City has now designated certain locations as the only places on the Mall where street  
 3 performances can be conducted from 3 p.m. to 1 a.m., which consist of: (1) the portion of the  
 4 Mall that formerly consisted of Third Street (crossing perpendicular over Fremont Street) and (2)  
 5 “[o]ther areas, each of which is no greater than six feet in diameter and is denoted on the surface  
 6 of the Pedestrian Mall.”<sup>90</sup> The “other areas” are the focus of Peck’s claims. As for those areas,  
 7 “no fewer than thirty-eight” of them must be provided, of which “no fewer than twenty-five”  
 8 must be “available at any given time.”<sup>91</sup> Each zone is available on a first-come-first-served basis  
 9 except when it has been assigned to a particular performer under the lottery system that the 2015  
 10 amendments authorized either the City or the FSE to establish.<sup>92</sup> Under the lottery system, no  
 11 performer can use a particular zone for more than two hours at any time and must switch to a  
 12 new location at the top of each odd-numbered hour during the hours of 3 p.m. and 1 a.m.<sup>93</sup> “No  
 13 street performer may perform within a designated location within the specified time frame  
 14 unless: (1) [h]e or she has been allotted that location for that time; or (2) [n]o one has been  
 15 allotted that location for that time.”<sup>94</sup>

16                   Peck claims that these restrictions give the FSE too much discretion in determining the  
 17 location of the performance zones, deprive street performers of the right to choose where to  
 18 conduct their performances,<sup>95</sup> and do not establish a clear procedure for how performers are  
 19 assigned the spaces or how performers are to determine which spaces to move to after the

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 21  
 22                   <sup>90</sup> LAS VEGAS MUNI. CODE § 11.68.108(A).

23                   <sup>91</sup> *Id.* at § 11.68.108(B).

24                   <sup>92</sup> *Id.* at § 11.68.108(C).

25                   <sup>93</sup> *Id.* at § 11.68.108(D).

26  
 27                   <sup>94</sup> *Id.*

28                   <sup>95</sup> ECF No. 20 at 8–9, ¶¶ 34–39.

1 mandated time period has elapsed.<sup>96</sup> I first address Peck's argument that the restrictions give the  
2 FSE too much discretion in determining the location of the performance zones.

3 A fair reading of the ordinance discloses that it does not provide the FSE too much  
4 leeway in setting the location of the performance zones. The ordinance states that “[a] map  
5 depicting the approximate locations of the designated locations . . . shall be on file with the City  
6 Clerk, **is hereby incorporated by this reference**, and shall be made available for inspection  
7 during normal business hours.”<sup>97</sup> A map of where the performance zones are located is also  
8 available on the City’s website.<sup>98</sup> The City’s online map shows that the performance zones are  
9 staggered along the entire length of the five-block Mall. The ordinance continues, “In the  
10 exercise of its authority under this Chapter, or in order to facilitate the flow of pedestrian traffic,  
11 or to serve the convenience of the Pedestrian Mall’s patrons (or any combination thereof), [t]he  
12 [FSE] may adjust the exact location of any designated location . . . up to twenty-five feet in any  
13 direction from the location appearing on the map . . . .”<sup>99</sup> The plain language of the ordinance  
14 precludes the FSE from doing what Peck fears: adjusting the spots so that they are literally  
15 touching, bunching them all up, or relocating all of them to a “deadzone.” Thus, I do not find  
16 that the ordinance grants the FSE too much discretion regarding the location of the zones.

17 I also do not find that the ordinance is unconstitutionally vague because it fails to  
18 delineate every detail of the lottery procedure: the purpose of the ordinance was to authorize  
19 either the City or the FSE to establish the procedure. Moreover, the City has now done so and  
20 explains on its website exactly how the procedure works:

21           Each Street Performer must register to be included in the lottery. A  
22           Street Performer may register on-line at any time, in person on the  
                 Fremont Street Pedestrian Mall during designated registration

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23  
24 <sup>96</sup> *Id.* at 7–8, ¶¶ 27–33.

25 <sup>97</sup> LAS VEGAS MUNI. CODE § 11.68.108(B) (emphasis added).

26 <sup>98</sup> The City’s “Performance Zones Map” is available at: [www.lasvegasnevada.gov/portal/faces/home/doing-business/db-business-licensing/db-street-performer](http://www.lasvegasnevada.gov/portal/faces/home/doing-business/db-business-licensing/db-street-performer) (last accessed Mar. 31, 2017).

27  
28 <sup>99</sup> LAS VEGAS MUNI. CODE § 11.68.108(B).

hours of 10:00 AM to 8:00 PM, or may register in person during business hours at the City of Las Vegas DSC building located 333 North Rancho Dr.

A lottery will be run each day to assign registrants 38 designated locations for the following day. Not all designated locations may be utilized due to special events. Time slots are designated to start in 2 hour increments starting at 3:00 PM and ending at 1:00 AM. A new lottery with all participants will be run for each time segment. It is possible that a participant may end up with back to back time slots or no time slots at all.

To be included in the lottery a registrant must sign in between the hours of 10:00 AM and 8:00 PM the day before and opt in for time slots.<sup>100</sup>

The City has also made it possible for performers to verify online which spaces have been assigned under the lottery for a given day.<sup>101</sup> The performance spaces are marked with either a number (1–27) or a letter (A–K). And because the performers are assigned a number when they register to be included in the lottery, that number is what is listed under each performance zone on the Performer Schedule maintained by the City.

This leaves Peck’s allegation that these requirements are not valid time, place, or manner restrictions. I disagree. The City’s reasons for establishing the performance zones and corresponding lottery for reserving them—ensuring public safety and order and the free flow of pedestrian traffic on a congested public Mall—are substantial government interests. When bare buffer zones did not alleviate the problems that had been encountered with the increased number of street performances on the Mall like pedestrian harassment, congestion, navigation issues, bullying, in-fighting, monopolizing of areas, and territory disputes among the performers, the City (in conjunction with the ACLU and the FSE) went back to the drafting board and created performance zones to be used only during the most heavily trafficked times on the Mall and a

<sup>100</sup> The City's "Information on Registration Program" is available at: <https://secure3.lasvegasnevada.gov/buskerpermit/Default.aspx> (last accessed Mar. 31, 2017).

<sup>101</sup> The City's "View Schedule" is available at: <https://secure3.lasvegasnevada.gov/buskerpermit/SelectSchedule.aspx> (last accessed Mar. 31, 2017).

1 lottery procedure for allotting each zone to a particular performer. The City likely enacted this  
 2 type of scheme because it recognized following *Berger v. City of Seattle*<sup>102</sup> that designated zones  
 3 available on a first-come-first-served basis address the pedestrian harassment, congestion,  
 4 and navigation problems but not the problems with bullying, in-fighting, monopolizing, and  
 5 territory disputes between the performers.<sup>103</sup>

6 In *Dowd v. City of Los Angeles*,<sup>104</sup> the Central District of California faced a similar First-  
 7 Amendment challenge to the designated-zone-and-permit scheme governing activities on the  
 8 Venice Beach Boardwalk. The *Dowd* court explained that, “[u]nlike the ordinance in *Berger*, the  
 9 2008 Ordinance was a space allocation system [that] assigned performers to particular spots to  
 10 effectively distribute the limited space of the Boardwalk.”<sup>105</sup>

11 Like the scheme in *Dowd*, the designated-zone-and-lottery scheme in Chapter 11.68  
 12 functions as an allocation system for the very limited space that is available on the Mall, and the  
 13 performance zones “combined with the lottery system provide[ ] a mechanism for officers to  
 14 resolve disputes about space allocation in a neutral manner.”<sup>106</sup> And by similarly discouraging  
 15 performers from monopolizing or staking an early claim to a particular place, the Fremont  
 16 scheme “expand[s] the pool of potential performers to include speakers who might not assert  
 17 themselves in a first-come-first-served situation.”<sup>107</sup> “[T]he regulation responds precisely to the

18  
 19  
 20<sup>102</sup> *Berger*, 569 F.3d 1029.

21  
 22<sup>103</sup> *See id.* at 1041 (“There is, for example, no reason two street performers with permits would be  
 23 less likely to engage in a territorial dispute than two street performers without permits. After all,  
 24 under the Rules, a permit does not entitle a performer either to a particular territory or to a  
 25 particular time period within a given territory.”).

26<sup>104</sup> *Dowd v. City of Los Angeles*, 2013 WL 4039043 (C.D. Cal. Aug. 7, 2013) (unreported).

27<sup>105</sup> *Id.* at \*8.

28<sup>106</sup> *See id.*

<sup>107</sup> *See id.*

substantive problems [that] legitimately concern the” City.<sup>108</sup> The Fremont scheme is, in fact, laser focused: it is utilized only during the Mall’s peak attendance times (3 p.m. to 1 a.m.) and its sole target is the street-performance form of expression. Thus, I conclude that the designated performance zones and corresponding lottery system to use them are narrowly tailored time, place, and manner restrictions that do not burden substantially more speech than is necessary to achieve a substantial government interest.

3. *Performer registration to participate in the performance-zone lottery*

Part and parcel of the performance-zone-and-lottery scheme is the requirement that street performers register with the City's Business Licensing Division (or its designee) after first using an individual performance zone. I find that this requirement is, in large part, a narrowly tailored time, place, and manner restriction for the same reasons that I found the performance-zone-and-lottery scheme to be valid. Additionally, the registration process itself is not onerous because registration can be done either online or in person at the Mall or at the City's government building. It is free, and the performers can register anonymously if they so choose—to register the performers are required to provide only a list of what characters or acts they intend to perform.<sup>109</sup> It also does not squash a person's ability to engage in a spontaneous performance because registration can be accomplished up to 72 hours *after* a performer has used one of the designated performance zones.

What continues to vex me is that, as written, the registration requirement is mandatory even on those performers who, like Peck, do not want to participate in the lottery but instead

<sup>108</sup> See *id.* (quoting *Cnty. for Creative Non-Violence*, 468 U.S. at 297).

<sup>109</sup> This requirement is aimed at enforcing the restriction that a performer is entitled to only one registration regardless of whether he has different performances or characters. LAS VEGAS MUNI. CODE § 11.68.108(E). The one-performer-one-registration requirement appears to be an effort to prevent a performer from gaming the system by having multiple registrations and thus increasing his odds of getting assigned multiple zones or a particular zone in the lottery.

1 prefer to utilize a spot that has not been allotted under that system.<sup>110</sup> To the extent that it  
2 requires a lottery registration to use even those performance zones that are not allotted to a  
3 particular performer under the lottery for a given time— zones that LVMC § 11.68.108(D)(2)  
4 states are available to any performer—it operates as a prior restraint on speech.

5 A prior restraint on speech is not unconstitutional per se, but it does come to court  
6 “bearing a heavy presumption against its constitutional validity.”<sup>111</sup> I cannot conclude on this  
7 record that the City has overcome that heavy presumption. Peck has shown that the portion of  
8 LVMC § 11.68.108(E) that requires all performers to register for the lottery scheme regardless of  
9 whether they want to participate in it burdens more speech than is necessary to accomplish the  
10 City’s legitimate ends. Thus, I grant Peck summary judgment in his favor on this element of the  
11 registration portion of LVMC § 11.68.108(E) and extend the preliminary injunctive relief I  
12 granted on this aspect into a permanent injunction.

13 The practical result of this decision is that the City can continue to enforce the  
14 performance-zone and lottery restrictions. The City also may continue requiring those  
15 performers who want to participate in the lottery to register in order to do so. Registered  
16 performers who are assigned performance zones in the lottery will continue to have priority to the  
17 zones that they have been allotted. But to the extent that a zone has not been allotted to any  
18 particular performer under the lottery system, it is available on a first-come-first-served basis to  
19 any performer, regardless of whether he has signed up for the lottery. And no citation may be  
20 issued to a performer for failing to sign up for the lottery.

21           4.     *Sound restrictions*

22 Peck alleges that the 2015 revised ordinance contains unlawful restrictions for using  
23 amplified sound.<sup>112</sup> The ordinances permit street performers to use amplified sound if it is “an  
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25           <sup>110</sup> See LAS VEGAS MUNI. CODE § 11.68.108(E).

26           <sup>111</sup> *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (quotation omitted;  
27 collecting cases).

28           <sup>112</sup> ECF No. 20 at 6, ¶ 22.

1 integral part of the performance” and does “not exceed” 85 dBA when measured from 25 feet  
 2 from the source of the noise and 107 dBA when measured from 1 foot from the source of the  
 3 noise.<sup>113</sup> “[S]ound is not permitted during any actual performance of the celestial vault  
 4 lightshow, or during any special event where the . . . Mall is closed to the general public except  
 5 upon payment of an admission charge.”<sup>114</sup> Nor is “sound . . . permitted during any concert that is  
 6 provided by or on behalf of the [FSE] unless each source of amplified sound is at least one  
 7 hundred feet from the stage on which the concert takes place.”<sup>115</sup> Peck complains that the  
 8 maximum noise levels established by the ordinance “offer[] no legitimate means for  
 9 differentiating a performer’s actual sound levels from that of the ambient” levels for the Mall,  
 10 which he contends are between 87–90 dBA after 6 p.m. when the celestial vault lightshow is not  
 11 playing and “exceeds 105” dBA when it is.<sup>116</sup>

12 I previously found that Peck had provided no evidence or even allegation that he has  
 13 emitted or intends in the future to emit sound as part of his street performances, let alone sound  
 14 in excess of the maximum levels prescribed by the ordinance or through amplification. He  
 15 instead claims that he performs on the Mall as a “living statue”<sup>117</sup>—a type of performance that is  
 16 inherently silent. I found that Peck has “failed to make a clear showing of a specific and concrete  
 17 threat that” the ordinances limitations on the level of sound that street performers can emit would  
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21 <sup>113</sup> LAS VEGAS MUNI. CODE § 11.68.107(C)(5)(a)–(b) (2015).

22 <sup>114</sup> *Id.* at § 11.68.107(C)(5)(c).

23 <sup>115</sup> *Id.* at § 11.68.107(C)(5)(d).

24 <sup>116</sup> ECF No. 20 at 6, ¶ 23.

25 <sup>117</sup> See *id.* at 5, ¶ 17. It appears that Peck has also performed in other cities as a living statue. See  
 26 ECF No. 32-1 at 3, ¶¶ 6–11 (Peck alleged in his complaint against the City of Boston that, “In the  
 27 summer of 2008, [he] performed as a human statue, namely, a golden cowboy. He wore a golden  
 28 outfit and painted his skin gold. As part of his act, he struck various poses for the crowd’s  
 enjoyment.”).

1 be enforced against him,<sup>118</sup> and I thus concluded that he lacks standing to challenge this  
 2 provision.<sup>119</sup> Peck has not provided any evidence for me to alter my initial findings and  
 3 conclusions.

4 I further find that the overbreadth doctrine is not applicable here. The doctrine provides  
 5 an exception “from the general rule that a litigant only has standing to vindicate his own  
 6 constitutional rights.”<sup>120</sup> The exception is applied to “laws that are written so broadly that they  
 7 may inhibit the constitutionally protected speech of third parties.”<sup>121</sup> For the doctrine to apply,  
 8 “there must be a realistic danger that the statute itself will significantly compromise recognized  
 9 First Amendment protections of parties not before the Court for it to be facially challenged on  
 10 overbreadth grounds.”<sup>122</sup> The Supreme Court has “repeatedly emphasized that an overbreadth  
 11 claimant bears the burden of demonstrating, ‘from the text of [the law] *and from actual fact*,’ that  
 12 substantial overbreadth exists.”<sup>123</sup> Peck has not met this burden.

13 Standing issues aside, I find that the sound restrictions are reasonable time, place, and  
 14 manner restrictions. The restrictions apply regardless of the content of the speech. They target  
 15 and eliminate no more than the exact problem that they seek to remedy. As Brandenburg  
 16 explains, the FSE repeatedly encountered street performers who played “amplified sound at an  
 17 excessive level” when they “believed no one was monitoring their sound levels.”<sup>124</sup> The FSE’s  
 18 security personnel “recorded unlawful sound levels in excess of 70 decibels from hundreds of

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19  
 20 <sup>118</sup> See *Lopez v. Candaele*, 630 F.3d 775, 794 (9th Cir. 2010).

21 <sup>119</sup> ECF No. 79 at 5–6.

22 <sup>120</sup> *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796  
 23 (1984).

24 <sup>121</sup> *Id.* at 797.

25 <sup>122</sup> *Id.* at 801.

26 <sup>123</sup> *U.S. v. Stevens*, 559 U.S. 460, 485 (2010) (J. Alito, dissenting) (alteration and emphasis in  
 27 original) (quoting *Virginia v. Hicks*, 539 U.S. 113, 122 (2003)).

28 <sup>124</sup> ECF No. 32-1 at 14, ¶ 16.

1 feet away, not merely at fifty feet away as measured by” the 2011 ordinance.<sup>125</sup> The FSE  
 2 received “complaints not just on the Mall, but from inside the nearby casinos, complaining about  
 3 the noise generated from street performers.”<sup>126</sup> Of particular nuisance were performers “who did  
 4 nothing more than bang incessantly on a bucket as loudly as possible, merely to attract as much  
 5 attention as possible.”<sup>127</sup> “This ‘drumming’ generated numerous complaints from Mall visitors  
 6 and neighboring businesses.”<sup>128</sup>

7                   ***c. Alternative channels of expression***

8                   Performers are free to express themselves along the entire length of the Mall from 1:01  
 9 a.m. until 2:59 p.m. the next day. Space is available during those times on a first-come-first-  
 10 served basis, and performers must simply stay outside of the buffer zones, which are (or are  
 11 directly adjacent to) typical pedestrian ingress, egress, and stopping points. When the Mall  
 12 becomes more crowded with visitors (between 3 p.m. and 1 a.m.) performers are still free to  
 13 express themselves but must do so within one of the 25–38 individual, 6-foot diameter  
 14 performance zones that dot the length of the Mall, or they can perform in the larger former Third  
 15 Street zone. Registered performers who are allotted an individual performance zone under the  
 16 lottery are given priority to the zone that they are assigned, but unallotted zones are available on a  
 17 first-come-first-served basis to any performer. With the caveat to the registration requirement  
 18 discussed above, I find that the challenged restrictions, individually and as a scheme, leave open  
 19 ample channels for expression.

20                   ***3. The restrictions challenged on an as-applied basis***

21                   In a single paragraph, the City asks me to dismiss or summarily adjudicate the portions of  
 22 Peck’s fifth claim for relief challenging several restrictions on an as-applied basis. I decline the  
 23

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24                   <sup>125</sup> *Id.* at 14–15, ¶ 16.  
 25

26                   <sup>126</sup> *Id.* at 15, ¶ 16.  
 27

28                   <sup>127</sup> *Id.* at ¶ 17.  
 29

30                   <sup>128</sup> *Id.*

City's invitation because it has not sufficiently developed these arguments or the record to support them. To summarize, only Peck's fifth claim for relief remains to be resolved, and what is left of that claim are only his allegations that: (1) LVMC 11.68.100(B)(10), which restricts sitting or lying on the ground of the Mall, has been unconstitutionally applied against Peck to restrict his speech<sup>129</sup>; and (2) LVMC 11.68.107(C)(2)(f), which he contends establishes buffer zone during a sponsored concert of 100 feet from stage where concert is taking place, has been unconstitutionally applied against Peck to restrict his speech.<sup>130</sup>

## Conclusion

Accordingly, IT IS HEREBY ORDERED that the City's motion to dismiss or, alternatively, for summary judgment [ECF No. 75] is GRANTED in part:

1. Summary judgment is granted in favor of the City on Peck's first, second, and fourth claims for relief;
2. Summary judgment is granted in favor of Peck on the portion of his third claim for relief concerning LVMC § 11.68.108(E)'s requirement that performers register for the lottery scheme regardless of whether they want to participate; I extend the preliminary injunctive relief in this regard to a permanent injunction. The City of Las Vegas and its employees, servants, and other persons acting in concert or participation with it who receive actual notice of this order are hereby permanently enjoined from (1) enforcing the portion of LVMC § 11.68.108(E) that requires all performers to register for the performance-zone lottery regardless of whether they want to participate in it, and (2) from issuing citations to performers who elect not to register for that lottery.
3. Summary judgment is granted in favor of the City on the remainder of Peck's third claim for relief; and

<sup>129</sup> ECF No. 20 at 11, ¶ 48–49.

<sup>130</sup> *Id.* at 14, ¶¶ 63–65.

4. Summary judgment is granted in favor of the City on the portions of Peck's fifth claim for relief alleging facial challenges to the street-performer restrictions.

The motion is **DENIED** in all other respects.

**IT IS FURTHER ORDERED that this case is referred to the magistrate judge for a mandatory settlement conference.**

DATED: March 31, 2017.

*Dorsey*  
Jennifer A. Dorsey  
United States District Judge