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5 **LAS VEGAS MUNICIPAL COURT**
6 **CLARK COUNTY, NEVADA**

8 CITY OF LAS VEGAS,

9 Plaintiff,

10 vs.

11 TONEY FOOTE,

12 Defendant.

CASE NO.: 25-071255

DEPT NO.: 2

13
14 **CITY'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

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16 Comes now the City of Las Vegas, by and through Carlene M. Helbert,
17 Assistant City Attorney, files the following Opposition to Defendant's Motion To
18 Dismiss. This Opposition is based on the following Points and Authorities and oral
19 argument, if any, heard by this court.

20 **I.**

21 **RELEVANT FACTUAL AND LEGAL HISTORY**

22 In 1995 the City of Las Vegas found that due to progressive decline in the
23 downtown area, special efforts were needed to revitalize the area. LVMC 11.68.010.
24 In accordance with recently enacted NRS 268.810, the City created the Pedestrian
25 Mall ("the Mall") and delegated to the Fremont Street Experience Limited Liability
26 Company ("FSE"), the authority to control and regulate the Mall. LVMC 11.68.010,
27 11.68.040, 11.68.060. Although authority was delegated to FSE, the Ninth Circuit
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1 held that the Mall was still a public forum. ACLU of Nevada v. City of Las Vegas,
2 333 F.3d 1092 (2003).

3 Following the creation of the Mall, the City enacted various ordinances to
4 maintain the Mall’s principal purpose: “to serve as an economic and entertainment
5 venue that will enhance the historical central business district.” LVMC 11.68.010.
6 Provisions governing the activities of street performers on the Mall were added to
7 Chapter 11.68 in 2011 and 2015. Notably, per Court directives, **the ACLU was**
8 **consulted on these ordinances**, to affirm that First Amendment rights were being
9 protected while achieving public safety and economic growth. LVMC 11.68.010.
10 Ultimately, revisions in 11.68, including the ordinance at issue in this case, were
11 passed with ACLU support. Minutes of City Council Meeting, August 5, 2015, and
12 September 2, 2015.

13 Following the enactment of these ordinances, street performers filed federal
14 lawsuits requesting injunctions based upon First Amendment violations. See e.g.,
15 Peck v. City of Las Vegas, 2016 WL 4697339 (D. Nev. 2016), and Ashley v. City
16 of Las Vegas, 2016 WL 6996999 (D. Nev. 2016). Both courts found the ordinances
17 constitutionally permissible and upheld the Mall’s performer-location and time
18 restrictions as narrowly tailored content neutral restrictions. Id. Although these
19 cases are only of persuasive value, the legal basis and rationale remains unchanged.
20 As such, this Court should deny Defendant’s Motion to Dismiss.

21 **II.**
22 **POINTS AND AUTHORITIES**

23 **The Ordinance is Content Neutral, Narrowly Tailored**
24 **and Leaves Open Ample Alternatives For Communication**

25 “Even protected speech is not equally permissible in all places and at all
26 times.” Cornelius v. NAACP Legl Def. & Educ. Fund, Inc., 473 U.S. 788, 799, 105
27 S.Ct. 3439, 3447 (1985). “Statutes are presumptively valid and the burden is on
28 those attacking them to show their unconstitutionality.” State v. Colosimo, 122 Nev.

1 950 (2006). In case of doubt every possible presumption will be made in favor of
2 the constitutionality of a statute, and courts will only interfere when the Constitution
3 is clearly violated. List v. Whisler 99 Nev. 133, 137 (1983).

4 When a government imposes a content neutral restriction on speech protected
5 by the First Amendment, intermediate scrutiny is applied. Ward v. Rock Against
6 Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753 (1989). The government may
7 impose reasonable restrictions on time, place or manner of speech in a public form,
8 so long as the restrictions are justified without reference to the content of the speech,
9 are narrowly tailored to serve a significant government interest, and leave open
10 ample alternative channels for communication. Id. Defendant is unable to
11 demonstrate a constitutional violation as the ordinance is content neutral, narrowly
12 tailored and leaves open ample alternative channels for communication.¹

13 14 **A. The Ordinance Is Content Neutral**

15 Defendant attempts to argue that the ordinance favors one type of speech over
16 another and is therefore engaging in content discrimination. This argument fails
17 because Defendant mischaracterizes what the ordinance regulates. The ordinance
18 does not regulate speech based on its content or viewpoint. It regulates where and
19 how performances may occur within a uniquely high-density public space.

20 “A regulation that serves purposes unrelated to the content of expression is
21 deemed neutral even if it has an incidental effect on some speakers/messages but not
22 others.” Ward, 491 U.S. at 791.

23 The ordinance regulates location and spacing, not message or viewpoint.
24 Defendant’s message or ideology is wholly irrelevant. In fact, viewpoints are largely

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26 ¹ Although Defendant was cited for violating 11.68.107, he appears to be challenging
27 Chapter 11.68 in its entirety as referenced several times throughout the Opening
28 Brief. No authority has been cited regarding his standing to challenge an ordinance
he has not been charged with in a criminal matter. For clarity purposes City will
simply refer to any and all challenged ordinances as “the ordinance.”

1 aligned. The content sponsored by FSE is typically similar to that provided by
2 Defendant – a musician with crowd pleasing performances.

3 Defendant’s claim of favoritism is premised on exempting FSE and its
4 contractors from certain logistics, not because of any ideological perspective or
5 message. An officer does not need to hear or read the message to determine whether
6 a violation has occurred. Rather, the ordinance regulates the source of expression,
7 providing for operational distinctions for the managing entity (FSE) to assist in
8 facilitating stewardship, safety and flow.

9 Courts have consistently upheld regulations that distinguish based on the manner
10 or circumstances of expression, rather than its content. In ACLU of Nevada v. City
11 of Las Vegas 466 F.3d 784, 794 (2006), the Ninth Circuit provided a plethora of
12 cases in which ordinances that regulate either the *manner* of expression and/or
13 expressive *conduct* have been upheld as content neutral. See e.g. Turner
14 Broadcasting System, Inc. v Federal Communication Commission, 512 U.S. at 645,
15 114 S.Ct. 2445 (holding that rules that distinguish “based only upon the manner in
16 which speakers transmit their messages to viewers, and not upon the messages they
17 carry” are content-neutral); G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d at
18 1075 (holding that a regulation on the size and type of signs permitted in a city is
19 not content-based); Honolulu Weekly, Inc. v. Harris, 298 F.3d 1037, 1044 (9th
20 Cir.2002) (holding that an ordinance requiring distribution of publications from
21 specified news racks based on whether or not they charge their readers is content-
22 neutral because “the city targeted the manner in which [they are] distributed, not the
23 content of [their] message[s]”); One World One Family Now v. City and County of
24 Honolulu, 76 F.3d 1009, 1012 (9th Cir.1996) (holding that a ban on the sale of all
25 merchandise, including message-bearing merchandise, on city streets is content-
26 neutral). Hill v. Colorado, 530 U.S. 703, 719, (2000) (holding that a ban on
27 approaching within eight feet of another person outside an abortion clinic for the
28 purpose of giving them information, protesting, or counseling is content-neutral

1 because “it is not a ‘regulation of speech[]’ [but][r]ather, it is a regulation of the
2 places where some speech may occur”); Menotti v. City of Seattle, 409 F.3d at 1129
3 (holding that a ban on accessing portions of downtown Seattle during World Trade
4 Organization conference “was not a regulation of speech content, but rather was a
5 regulation of the places where some speech may occur” (internal quotation marks
6 omitted)); Colacurcio v. City of Kent, 163 F.3d 545, 551–53 (9th Cir.1998) (holding
7 that a ten-foot distance requirement between nude dancers and patrons is content-
8 neutral where it does not distinguish between types of dancing).

9 Similarly, LVMC 11.68.107 regulates the mode of communication, not the
10 content. The ordinance applies uniformly to all performers, regardless of identity or
11 style, whether someone is impersonating Michael Jackson or presenting original
12 work. What matters is not the message, but the manner in which performance
13 impacts the shared public space.

14 Moreover, government regulation of expressive activity is content neutral so long
15 as it is *justified* without reference to the content of the regulated speech.” Ward v.
16 Rock Against Racism, 491 U.S. 781, 791 (1989) An ordinance is “content-based if
17 either the main purpose in enacting it was to suppress or exalt speech of a certain
18 content, or it differentiates based on the content of the speech on its face.” City of
19 Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993).

20 As clearly noted in 11.68.010, the main purpose of the ordinance is to enhance
21 economic vitality and public safety, it is not intended to suppress or exalt speech of
22 a certain content. Operational exemptions for the managing entity, FSE, do not
23 equate to expressive favoritism. Rather, they reflect administrative measures
24 necessary to coordinate large-scale events and ensure public safety. The ordinance
25 is silent on any ideological viewpoints and is content neutral.

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2 **B. The ordinance is narrowly tailored to serve a significant government**
3 **interest**

4 “A narrowly tailored time, place or manner restriction on speech is one that does
5 ‘burden substantially more speech than is necessary’ to achieve a substantial
6 government interest.” Berger v. City of Seattle, 569 F.3d 1029, 1041 (9th Ct. 2009).
7 “[T]he chosen restriction ‘need not be the least restrictive or least intrusive means’
8 available to achieve the government’s legitimate interests, although the existence of
9 an obvious, less burdensome alternative is a relevant consideration. Id.

10 The government has a legitimate interest in “ensuring the public safety and order,
11 promoting the free flow of traffic on streets and sidewalks, and protecting property
12 rights.” McCullen v. Coakely, 573 U.S. 464, 503 (2014).

13 City Council found that the ordinance was enacted in response to ongoing issues
14 concerning violent infighting, threats and other forms of intimidation, as a result of
15 monopolization of certain areas on the Mall. See LVMC 11.68.010. The 2015
16 amendments were passed in response to the findings that the Mall’s public safety
17 and well-being had deteriorated. Id.

18 The ordinance is narrowly tailored to serve the City’s significant interest in public
19 safety, pedestrian flow, and orderly use of uniquely congested public forum. It does
20 not prohibit Defendant’s speech or performance, it only regulates the manner and
21 location in which that speech occurs during peak hours.

22 For the majority of the day, Defendant may perform on the Mall with minimal
23 restrictions. Even during the limited hours of 3 p.m. to 1 a.m., Defendant is not
24 excluded from the forum, he is simply required to perform within the designated
25 circles, where he in fact continues to perform. See 11.68.020, 11.68.107. The modest
26 spatial limitation directly addresses documented issues of congestion, territorial
27 disputes, and safety concerns, without burdening substantially more speech than
28 necessary.

1 Moreover, the ordinance leaves open ample alternative channels for expression.
2 Defendant may perform within the designated circles on the Mall, in the nearby
3 “free zone” at 3rd Street and Fremont, or in countless other public forums through
4 the City. See LVMC 11.68108(a)(1)(providing for the 3rd Street free zone). The
5 ordinance does not restrict Defendant’s message, audience or ability to perform, it
6 regulates only the physical footprint (or perhaps more accurately a “moonwalking”
7 print) of that expression in a high-density environment.

8 Defendant retains full ability to express himself in this location. Defendant’s
9 personal preference for more space does not negate the constitutionally permissible
10 narrowly tailored and valid time, place and manner restrictions.

11 **C. As applied the ordinance is constitutional**
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13 Defendant’s motion leans on broad assertions of facial invalidity and alleged
14 speaker favoritism, but the only question on an as-applied challenge is whether this
15 particular enforcement action violated his First Amendment rights. It did not.

16 In contrast to a facial constitutional challenge which seeks to invalidate a
17 statute itself, an as-applied constitutional challenge “concedes that a statute may be
18 facially constitutional or constitutional in many of its applications but contends that
19 it is not so under the particular circumstances of the case.” Willson v. First Jud. Dist.
20 Ct. in & for Cnty . of Carson City, 140 Nev. Adv. Op. 7 (2024).

21 As applied, the ordinance is clearly content neutral. Defendant was cited for
22 “performing outside of the FSE performance circle” during the specified time frame.
23 The content of Defendant’s performance was irrelevant and unconsidered. The facts
24 demonstrate a straightforward application of a valid time, place and manner rule.
25 They do not reflect any content or viewpoint-based enforcement. Accordingly, the
26 ordinance is not invalid as-applied and the Motion to Dismiss should be denied.

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III.

CONCLUSION

As found by Ashley and Peck, City’s ordinances overseeing modes of communication and logistical operations on the Mall are constitutional. As such, Defendant’s Motion To Dismiss should be denied.

Dated: April 30, 2026

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Attorney for Respondent

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on April 30, 2026, I forwarded a true and correct copy of the foregoing **OPPOSITION TO MOTION TO DISMISS** via email to:

Jacob T. Valentine, Esq.
jvalentine@aclunv.org

and

Las Vegas Municipal Court
municourtmotions@lasvegasnevada.gov

An employee of the Office of the City Attorney