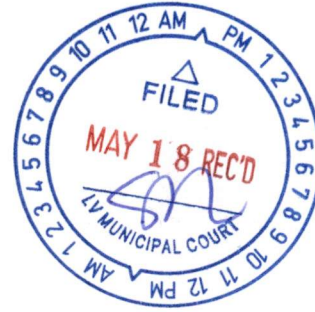




25-071255 Motion SHAJUAN HUFF

ORIGINAL



1 **RIS**
2 JACOB T. S. VALENTINE (16324)
3 CHRISTOPHER PETERSON (13932)
4 **AMERICAN CIVIL LIBERTIES**
5 **UNION OF NEVADA**
6 4362 W. Cheyenne Ave.
7 North Las Vegas, NV 89032
8 Telephone: (702) 366-1226
9 Facsimile: (702) 830-9205
10 Email: jvalentine@aclunv.org
11 *Attorneys for Defendant*

8 **MUNICIPAL COURT**
9 **LAS VEGAS, NEVADA**

10 STATE OF NEVADA,

11 Plaintiff,

12 v.

13 TONEY FOOTE,

14 Defendant

Case Number: 25-071255

Department: 2

**Reply in Support of Defendant's
Motion to Dismiss Pursuant to the
First Amendment**

15 Defendant Toney Foote files this Reply in Support of his Motion to Dismiss the charge
16 against him for violating Las Vegas Municipal Code § 11.68.107. Mr. Foote moved to dismiss the
17 charges against him as LVMC 11.68.107 violates the First Amendment to the U.S. Constitution
18 both as applied to Mr. Foote and on the face of the ordinance. This Reply is in support of Mr.
19 Foote's motion to dismiss.

20 Dated: May 14, 2026.

**American Civil Liberties
Union of Nevada**

21 JACOB T. S. VALENTINE (16324)
22 4362 W. Cheyenne Ave.
23 North Las Vegas, NV 89032
24 Tel.: (725) 235-3119

1 **Memorandum of Points and Authorities**

2 “In the realm of private speech or expression, government regulation may not favor one
3 speaker over another.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828
4 (1995).

5 Mr. Foote is a street performer on Fremont Street who was charged with a misdemeanor
6 for allegedly performing outside of the six-foot diameter circle LVMC 11.68.107 requires street
7 performers to perform in. This restriction on expressive conduct explicitly does not apply to
8 Fremont Street Experience LLC (FSE), which is a private company, or anyone FSE hires. LVMC
9 11.68.115 (exempting FSE and FSE contractors from most of the regulations on Fremont Street).
10 FSE and anyone the company hires are permitted to perform anywhere at any time.

11 Mr. Foote brings both a facial and as-applied First Amendment challenge to the ordinance
12 he was cited under. LVMC 11.68.107 violates the First Amendment on its face as it engages in
13 speaker-based viewpoint discrimination by favoring the speech of some speakers (Fremont Street
14 Experience LLC and its employees) over other speakers (those designated as street performers
15 such as Mr. Foote).

16 First, as made clear in *Rosenberger*, speaker-based discrimination in a traditional public
17 forum like Fremont Street is a violation of the First Amendment. Furthermore, even if the Court
18 applied strict scrutiny instead of a *per se* ban on speaker-based discrimination, the government has
19 not offered any “compelling interest” in allowing FSE and its employees dance around outside of
20 the circles while requiring street performers to stay in one spot. Finally, as applied to Mr. Foote,
21 LVMC 11.68.107 burdens Mr. Foote’s ability to engage in protected street performing as Mr.
22 Foote’s speech requires adequate space and crowd participation which LVMC 11.68.107 does not
23 permit, and Fremont Street Experience LLC’s speech is favored over Mr. Foote’s which violates
24 the First Amendment as applied to Mr. Foote.

1 **I. Argument**

2 “In the realm of private speech or expression, government regulation may not favor one
3 speaker over another.” *Rosenberger*, 515 U.S. 819 at 828 (1995). When a regulation on speech is
4 speaker-based (an egregious form of content-based regulations), the normal presumption that the
5 regulation is constitutional is inverted as content-based regulations on speech are presumptively
6 unconstitutional. *ACLU v. City of Las Vegas*, 466 F.3d 784, 792 (9th Cir. 2006)

7 LVMC 11.68 both states “within the specified time frame, street performers may perform
8 only in a designated location”, LVMC 11.68.107(C)(3), and Fremont Street Experience LLC
9 (“FSE”) and anyone who receives compensation from the private company are exempt from those
10 location restrictions, LVMC 11.68.115.

11 Here, the government’s opposition to Mr. Foote’s Motion to Dismiss does not
12 meaningfully dispute the Motion to Dismiss. The government, in its opposition, does not dispute
13 the facts that Mr. Foote’s street performances are protected by the First Amendment, Fremont
14 Street is a traditional public forum, and FSE is exempt from the restrictions placed on Mr. Foote’s
15 speech. This alone is a constitutional violation under *Rosenberger*. But even assuming it was not
16 an outright violation of the Mr. Foote’s rights, the government has not shown evidence justifying
17 the ordinance.

18 **A. The government does not dispute that Mr. Foote was cited for engaging in a
19 protected form of speech within a traditional public forum.**

20 Mr. Foote, in his Motion to Dismiss, established that he was engaged in protected speech
21 street performing by dancing as Michael Jackson. The government, in its opposition, does not
22 argue that Mr. Foote’s speech is unprotected. Opposition at 2:25-3:12; 6:4-10 (*citing Berger v.*
23 *City of Seattle* which plainly states that street performing is protected speech). The government
24 also makes no argument that Mr. Foote was cited for allegedly stepping outside of a performance
circle under LVMC 11.68.107. Neither party therefore disputes that Mr. Foote’s performances are

1 protected by the First Amendment and that he was cited for allegedly being a street performer who
2 stepped outside of a performance circle.

3 **B. The government admits that had someone paid by Fremont Street LLC been**
4 **engaged in the same speech that someone would be exempt from LMVC 11.68.107.**

5 The government admits that LMVC 11.68 exempts anyone hired by FSE from the location
6 restrictions imposed by LMVC 11.68.107(C)(3). Opposition at 4:3-4 (admitting that Defendant
7 challenges the ordinance for “exempting FSE and its contractors”). The government also does not
8 dispute that FSE engages in speech that is similar to the speech Mr. Foote was cited for conducting
9 outside of the performance circle. Opposition at 4:1-2 (“The content sponsored by FSE is typically
10 similar to that provided by Defendant.”)

11 This favoritism is not allowed under the First Amendment and the analysis could end here
12 because, “in the realm of private speech or expression, government regulation may not favor one
13 speaker over another.” *Rosenberger*, 515 U.S. 819 at 828 (1995)

14 **C. The government cannot change an ordinance which by its plain text contains a**
15 **speaker-based regulation into a content neutral regulation by attempting to justify**
16 **the purpose of the ordinance.**

17 Speaker-based distinctions are a particularly egregious form of content-based distinctions.
18 *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 55, 103 S. Ct. 948, 960 (1983)
19 (“when speakers and subjects are similarly situated, the State may not pick and choose”). “A
20 regulation is content-based if [1] either the underlying purpose of the regulation is to suppress
21 particular ideas, [] or [2] if the regulation, by its very terms, singles out particular content for
22 differential treatment.” *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (emphasis
23 added).

24 Despite LMVC 11.68 falling under the second option (by its terms singling out a particular
speaker), the government conducts an analysis of the underlying purpose of the ordinance. This is

1 not relevant as despite the government’s sole focus on the time, place, and manner portions of the
2 ordinance, LVMC 11.68 still contains a section exempting a specific speaker from these
3 restrictions on protected speech.

4 No amount of justification as to any “special purpose” a forum or the favored speaker
5 may have is relevant when that forum is a traditional public forum and the ordinance singles out a
6 favored speaker on its face. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 52-
7 53, 103 S. Ct. 948, 959 (1983) (explaining how the analysis in *Perry* would not have included an
8 analysis of any special properties had the ordinance restricted a public forum); *Turner Broad. Sys.*
9 *v. FCC*, 512 U.S. 622, 642-43, 114 S. Ct. 2445, 2459 (1994) (“nor will the mere assertion of a
10 content-neutral purpose be enough to save a law which, on its face, discriminates based on
11 content”); *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1071 (9th Cir. 2020)
12 (stating that ordinances favoring content and favoring speakers, although often related, are
13 different).

14 LVMC 11.68, on its face, chooses Fremont Street Experience LLC and elevates the speech
15 of this corporation above all others. *See* LVMC 11.68.115 (not requiring street performers paid by
16 Fremont Street Experience LLC to follow the requirement that street performers only perform in
17 the designated circles outlined in LVMC 11.68.107(C)(3)).¹

18 Analysis of the underlying purpose of a regulation is not necessary when the regulation
19 singles out particular content (or in this case a particular speaker) for differential treatment. Since
20 the government does not dispute that the ordinance singles out FSE LLC for preferential treatment
21

22 ¹ See also LVMC 11.68.107(1) (street performer “may not interfere in any way with
23 performances provided by or on behalf of The Fremont Street Limited Liability Company”;
24 LVMC 11.68.107(5)(c) (street performers may not emit any sound during the “celestial vault
lightshow” put on by Fremont Street Experience LLC); and LVMC 11.68.107(5)(d) (street
performers may not emit any sound within 100 feet of any concert stage used by Fremont Street
Experience LLC).

1 and any attempts by the government to justify this preferential treatment is not meaningful, the
2 regulation is speaker-based.

3
4 **D. In every forum speaker-based regulations trigger strict scrutiny at a minimum
and in a traditional public forum it is unconstitutional.**

5 Within a traditional public forum, speaker-based regulations on protected speech are
6 unconstitutional. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469, 129 S. Ct. 1125, 1132
7 (2009); *Perry Educ. Ass'n*, 460 U.S. 37, 55, 103 (1983) (“when speakers and subjects are similarly
8 situated, the State may not pick and choose”); *Rosenberger*, 515 U.S. 819 at 828 (1995) (“In the
9 realm of private speech or expression, government regulation may not favor one speaker over
10 another”).

11 But, regardless of forum, all speaker-based regulations are at least subject to strict scrutiny.
12 *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1162 (9th Cir. 2022); *ACLU v. City of Las Vegas*, 466
13 F.3d 784, 792 (9th Cir. 2006). To satisfy strict scrutiny the government must identify compelling
14 interests and show that the challenged ordinance is least restrictive means to advance these
15 interests. *Reed v. Town of Gilbert*, 576 U.S. 155, 172, 135 S. Ct. 2218, 2232 (2015).

16 The government cannot do so here as similar restrictions have been found to not meet strict
17 scrutiny. *See Berger v. City of Seattle*, 569 F.3d 1029, 1043 (9th Cir. 2009) (When discussing a
18 similar ordinance: “[T]here are easily available alternative modes of regulation ... that would have
19 considerably less impact on speech than the single-speaker prospective registration system.”); *see*
20 *also ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 798 (9th Cir. 2006) (finding that a labor
21 exemption in the City’s tabling ordinance violated the First Amendment because the ordinance
22 discriminated among speakers).

23 The harms claimed by the government are “public safety, pedestrian flow, and orderly use
24 of uniquely congested public forum.” Opposition at 6:18-20. LVMC 11.68.107 does not alleviate

1 these harms when it also exempts FSE from these regulations, and the government has no
2 compelling interest in allowing FSE to dance while prohibiting Mr. Foote. In fact, the government
3 has failed to provide any justifications for exempting FSE from the ordinance. The government
4 cannot pretend that the ordinance is narrowly tailored to address public safety, pedestrian flow,
5 and the orderly use of a congested public forum when FSE is both exempt from the ordinance and
6 draws massive crowds of 20,000 people to the area.² The ordinance exempts from regulation the
7 greatest cause of issues regarding “public safety, pedestrian flow, and orderly use of uniquely
8 congested public forum” and is therefore not even narrowly tailored to serve a compelling
9 government interest (the improper standard the government asks this Court to employ). The
10 government also mentions that LVMC 11.68 was adopted and modified to respond to issue
11 regarding the “monopolization of certain areas of Fremont Street.” Opposition at 6:13-17. Yet the
12 same ordinance provides Fremont Street Experience LLC, a private company, a monopoly on all
13 performing arts outside of the performance circles.

14 Not to mention LVMC 11.68 is also not the least restrictive means as it criminalizes all
15 independent performing art outside of 25-38 six-foot circles for the only twelve hours per day
16 when tourists are likely to be on Fremont Street, regardless of whether the performer causes any
17 actual obstruction, safety hazard, or territorial dispute.

18
19 **E. *Ashley and Peck* are irrelevant and the government misinterprets the decisions
made in these cases.**

20 The issue before this Court, whether LVMC 11.68 violates the prohibition on favoring the
21 First Amendment activity of FSE LLC over others by placing burdens on unaffiliated street
22

23
24 ²John Katsilometes, Superstar DJ draws 20K to free show in downtown Las Vegas, available at:
<https://neon.reviewjournal.com/kats/superstar-dj-draws-20k-to-free-show-in-downtown-las-vegas-3332553/>

1 performers which are not placed on FSE LLC approved street performers, and has not been
2 litigated previously, let alone in *Ashley*, or *Peck*.

3 The comparisons to *Ashley* and *Peck* the government makes to the present case are not
4 persuasive as both cases are unpublished cases brought by pro se litigants who did not make the
5 arguments Defendant makes here. *Ashley v. City of Las Vegas*, No. 2:16-cv-02053-GMN-VCF,
6 2016 U.S. Dist. LEXIS 163575 (D. Nev. Nov. 27, 2016) (does not contain the word “speaker” at
7 all); *Peck v. City of Las Vegas*, No. 2:15-cv-02070-JAD-PAL, 2016 U.S. Dist. LEXIS 120603 (D.
8 Nev. Sep. 6, 2016) (does not address speaker-based regulations). Not to mention the courts in
9 *Ashley* and *Peck* cases did not find the ordinances “constitutionally permissible” as the government
10 claims or even come to a final decision. Opposition at 2:16-18 Instead, the federal courts found in
11 motions for a preliminary injunction and temporary restraining order that the Plaintiffs had failed
12 to show that the ordinance was unconstitutional at a very early stage of the civil case. Instead of
13 reaching a final decision *Ashley* was settled and *Peck* voluntarily dismissed his case without
14 prejudice.

15 **F. The government also fails to establish that the ordinance satisfied the**
16 **government’s preferred test.**

17 In reference to LVMC 11.68, the government claims that “an officer does not need to hear
18 or read the message to determine whether a violation has occurred.” Opposition 4:5-6. Although
19 this analysis is unnecessary when a regulation engages in speaker discrimination explicitly, as
20 applied to Mr. Foote this test still confirms that the ordinance is unconstitutional. When it is unclear
21 whether a regulation is content-based the court may look at whether an officer issuing a citation
22 would need to look at the content of the speech in order to determine whether it violates the
23 regulation. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134, 112 S. Ct. 2395, 120
24 L. Ed. 2d 101 (1992); Opposition at 4:5-6.

1 Those designated by the government under LVMC 11.68 to be street performers are the
2 only people who must adhere to the limitations to a protected form of speech (street performing)
3 contained within LVMC 11.68.107. This means that when citing someone under LVMC 11.68 an
4 officer must not only determine that the person violated what the government considers to be time,
5 place, and manner restrictions but the officer must also determine that the person not only fits the
6 definition of a street performer but also that this “street performer” is not affiliated with Fremont
7 Street Experience LLC.

8 LVMC 11.68 defines a street performer as a person who “engages in any form of
9 performing art, including but not limited to posing, acting, dancing or miming, whether in costume
10 or not; the playing of any musical instrument, singing or vocalizing, with or without
11 accompaniment” who is not affiliated with Fremont Street Experience LLC. It then equates
12 busking to street performing. So, only street performers who are busking are subject to LVMC
13 11.68.107 and an officer looking to cite someone under 11.68.107 must first look at who is
14 performing and determine whether they are busker/street performer. The government does not
15 dispute that street performing is a protected form of speech. Opposition at 2:25-3:12; 6:4-10 (*citing*
16 *Berger v. City of Seattle* which plainly stated that street performing is protected speech). An officer
17 looking to cite someone under LVMC 11.68.107 must therefore look at someone dancing and rule
18 whether or not that person is a street performer before citing them. This necessarily mean those
19 engaged in a protected activity (street performing) are the only people subject to the ordinance.

20
21 **G. As-applied to Mr. Foote the government’s assertions are even weaker and the ordinance limits Mr. Foote’s ability to engage in protected activity.**

22 Applying the governments preferred test to Mr. Foot, officers here could not determine
23 whether or not to cite Mr. Foote without first deciding that Mr. Foote was a street performer. This
24 is reflected in the citation Mr. Foote received. See MTD Exhibit A (citing Mr. Foote under a charge

1 of “Unlawful Acts-Street Performers” and Guzman’s case report describing Mr. Foote as a street
2 performer). Additionally, Mr. Foote dances on Fremont Street and there are plenty of tourists who
3 also dance on Fremont Street, often with Mr. Foote. The officer who cited Mr. Foote had to look
4 at Mr. Foote and his performance to determine whether he was a street performer subject to LVMC
5 11.68. Otherwise, officers on Fremont Street would be citing every single person dancing on
6 Fremont Street outside of the designated circles regardless of whether that person fit the
7 description of a street performer or not. This required speaker-based investigation into the content
8 of Mr. Foote’s dancing necessarily means that the ordinance is speaker-based. And as mentioned
9 above, the government has not argued facts which would survive strict scrutiny.

10 Also, LVMC Chapter 11.68 violates the First Amendment as applied to Mr. Foote because
11 it prohibits Mr. Foote’s ability to engage in his First Amendment rights to dance like Michael
12 Jackson and perform as a street performer. Even if a regulation is otherwise facially neutral if it
13 “regulates conduct that has an expressive element,” that regulation is subject to First Amendment
14 scrutiny. *McAllister v. Clark Cty.*, 746 F. Supp. 3d 918, 936 (D. Nev. 2024) (citing *Arcara v. Cloud*
15 *Books, Inc.*, 478 U.S. 697, 703–04 (1986)). In other words, if a regulation targets conduct “integral,
16 or commonly associated” with First Amendment activity, it receives First Amendment scrutiny.
17 *See Roulette v. City of Seattle*, 97 F.3d 300, 303 (9th Cir. 1996) (determining whether an ordinance
18 is subject to scrutiny by looking at whether the regulated conduct is “integral, or commonly
19 associated” with First Amendment activity). An indirect restriction may also be subject to strict
20 scrutiny if “it restricts access to the traditional public fora.” *McCullen v. Coakley*, 573 U.S. 464
21 (2014).

22 Integral to Mr. Foote’s performances is the ability for Mr. Foote to dance. Under LVMC
23 11.68.108(A)(2) Mr. Foote must attempt to constrain his dancing to a 6-foot diameter circle. If Mr.
24 Foote fails to do this, Mr. Foote may receive a citation as he did here. Also integral to Mr. Foote’s

1 performances is the ability for Mr. Foote to interact with the crowd. This includes taking pictures
2 and dancing with people. Mr. Foote, his equipment, and groups of individuals seeking to take
3 photos with Mr. Foote cannot all fit within three feet of Mr. Foote. Also, should Mr. Foote's fans
4 attempt to dance with Mr. Foote, he cannot fully dance with them as he only has three feet of space
5 to move in any direction. The very real risk Mr. Foote faces of stepping more than three feet in
6 any direction limits Mr. Foote's ability to engage in protected First Amendment rights.

7 **II. Conclusion**

8 The charges against Mr. Foote should be dismissed as his First Amendment rights were
9 violated. Additionally, LVMC 11.68 should be found to violate the constitution on its face as it
10 unconstitutionally exempts Fremont Street Experience LLC from its regulations on First
11 Amendment activities.

12
13 Dated: May 14, 2026

**American Civil Liberties
Union of Nevada**



JACOB T. S. VALENTINE (16324)
4362 W. Cheyenne Ave.
North Las Vegas, NV 89032
Tel.: (725) 235-3119

Certificate of Electronic Service

I hereby certify that service of this Reply in Support of Defendant’s Motion to Dismiss Pursuant to the First Amendment was hereby filed and served May 14, 2026, via email to:

- This Court by sending a copy to municourtmotions@lasvegasnevada.gov
- The City Attorney’s Office by sending a copy to lvcadonotreply@lasvegasnevada.gov



Jacob T. S. Valentine
An employee of
**American Civil Liberties
Union of Nevada**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24