ACLU
AMERICAN CIVIL LIBERTIES UNION of NEVADA

July 20, 2010

City of Las Vegas Recommending Committee
Attn: Councilman Ricki Barlow, Councilman Stavros Anthony
400 Stewart Avenue
Las Vegas, NV 89101

Re: Bill No. 2010-31, Regulation of Expression within the Pedestrian Mall

Dear Recommending Committee:

The ACLU of Nevada strongly opposes the passage of Bill No. 2010-31, which amends Titles 10 and 11 of the Municipal Code of the City of Las Vegas to restrict expressive activity on the Fremont Street Pedestrian Mall. We are extremely disturbed by this bill's provisions, which plainly violate mall-goers' First Amendment rights to free speech and assembly. Passage of Bill No. 2010-31 would not merely infringe upon the constitutional rights of the thousands of individuals who visit the Pedestrian Mall daily; indeed, it would all but guarantee another round of costly, time-consuming litigation for the City of Las Vegas. In these tight times, Las Vegas taxpayers deserve better than to have their elected officials drag their city into a protracted, quixotic legal battle.

The ACLU of Nevada has been litigating against similar laws for over a decade, and the courts have repeatedly held both that Fremont Street is a public forum and that similar attempts to curb speech do not pass constitutional muster. *See A.C.L.U. of Nevada v. City of Las Vegas*, 33 F.3d 1092, 1106 (9th Cir. 2003) ("The Fremont Street Experience is a traditional public forum: its public forum status was not destroyed by its transformation, and its current characteristics are those of a public forum."). Because the Fremont Street Experience is a public forum, "the government must bear an extraordinarily heavy burden to regulate speech" in it. *Id.* at 1098. This is a burden that Bill 2010-31 cannot hope to meet.

Just like the prior iterations of free speech restrictions, Bill 2010-31 violates the First Amendment. The proponents of Bill 2010-31 claim that it imposes "reasonable time, place and manner" restrictions on protected expression. *See* Business Impact Statement Bill No. 2010-31. It is true that, "[t]he government may place reasonable time, place and manner restricts on speech" in public fora. *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784, 792 (9th Cir. 2006). However, merely calling an ordinance a "reasonable time, place and manner" restriction does not make it so. To satisfy the First Amendment, such a restriction must "meet three criteria: (1) it must be content-neutral; (2) it must be narrowly tailored to serve a significant governmental interest; and (3) it must leave open ample alternative channels for communication of the information." *Berger v. City of Seattle*, 569 F.3d 1029, 1036 (9th Cir. 2009) (en banc).

Bill 2010-31 may be content-neutral on its face, as it indiscriminately bans all solicitation, leafleting and performance in the vast majority of the Fremont Street Experience. However, this only illustrates its fatal overbreadth, and why it cannot be sufficiently narrowly tailored to pass constitutional muster.

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"To be narrowly tailored ... the restriction may not burden substantially more speech than necessary." *A.C.L.U. of Nevada*, 466 F.3d at 796, n.13. Just as previous iterations of free speech restrictions targeted "a substantial amount of constitutionally protected speech that is not the source of the 'evils' it purports to combat," Bill 2010-31 targets so much speech on so much of the Fremont Street Experience that it cannot be considered "narrowly tailored." *Id.* Given Bill 2010-31's broad proscription of expressive activities, it could be said that the only "evil" it purports to combat is speech itself.

Additionally, Bill 2010-31 does not leave ample alternative channels for communication. It merely adds two side-by-side 12 by 100 foot "free expression zones" to the Pedestrian Mall, while prohibiting solicitation, leafleting and mall entertainment everywhere else. Given that the Fremont Street Experience space frame encompasses "an area of nearly 200,000 square feet,"[1] Bill 2010-31 bans protected expression in over 98% of the Pedestrian Mall. In fact, speakers who utilize the "free expression zone" will only reach an audience who happens to congregate near one side of 3rd Street. This falls well short of leaving "ample alternative channels for communication," as "the speaker is not permitted to reach the intended audience." *Berger*, 569 F.3d at 1049.

Proponents of Bill 2010-31 might compare it favorably to a provision in the Santa Monica Municipal Code that places various "time, place, and manner" restrictions on street performers throughout the city. *Compare* Santa Monica Municipal Code Chapter 6.112.[2] However, Chapter 6.112 is far less restrictive of speech than Bill 2010-31. First, the Santa Monica ordinance is silent on restricting solicitation and leafleting, while Bill 2010-31 would almost completely ban those two protected forms of speech. Additionally, the Santa Monica ordinance sets ten foot perimeters around bus stops, street corners, and business entrances around which street performers may not perform. *See* Santa Monica Municipal Code Chapter 6.112.030(a). These restrictions are specifically related to the significant government interests in maintaining public safety and access to businesses. As mentioned above, the restrictions found in Bill 2010-31 are not narrowly tailored toward any such end; they simply force those who wish to engage in speech into a tiny, out-of-the-way space.

We are currently in mediation over free speech issues on Fremont Street, supervised by U.S. Magistrate Judge Leavitt. While we cannot discuss the confidential settlement, passing new and unconstitutional codes to govern Fremont Street would unquestionably lead to renewed litigation.

Make no mistake; the ACLU of Nevada will fight tooth and nail to protect the constitutional rights of everyone who visits the Fremont Street Experience. When the courts inevitably hold Bill 2010-31 unconstitutional, the City will be obligated to pay not only its own attorney's fees, but the potential plaintiffs' attorney's fees as well.

For all these reasons, we urge that you do not recommend the passage of Bill 2010-31.

Sincerely,

Allen Lichtenstein
General Counsel

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1 *See* A2Z Las Vegas, *Fremont Street Experience Brings Downtown Las Vegas Into Next Century*, http://www.a2zlasvegas.com/fse/fse01.html (last visited July 17, 2010).

2 Santa Monica Municipal Code Chapter 6.112 may also fail to pass constitutional muster. It, unlike the numerous attempts to restrict speech on Fremont Street, has never been tested in court.

6.112.020 Definitions.

For purposes of this Chapter, the following words or phrases shall have the following meanings:

(a) **Charge.** To require someone to pay a fee or to set, negotiate or establish a fee for a performance. Seeking voluntary contributions through passing around a hat, leaving open an instrument case or other receptacle, or soliciting donations after a performance is not a charge.

(b) **Handcrafts.** Objects made either by hand or with the help of devices used to shape or produce the objects through such methods as weaving, carving, stitching, sewing, lacing, and beading including, but not limited to, objects such as jewelry, pottery, silver work, leather goods, and trinkets. Handcrafts are not likely to communicate a message, idea, or concept to others, are often mass produced or produced with limited variation, and often have functional utility apart from any communicative value they might have. Handcrafts do not include visual art.

(c) **Performer.** An individual who performs in a public area, for the purpose of providing public entertainment.

(d) **Perform.** To engage in a performance including, but not limited to, the following activities: playing musical instruments, singing, dancing, acting, pantomiming, puppeteering, juggling, reciting, or creating visual art in its entirety. "Perform" shall not include: (1) the provision of personal services such as hair weaving or massage; (2) the application of substances to others' skin, including, but not limited to, paints, dyes, and inks; (3) the completion or other partial creation of visual art; (4) the creation of visual art which is mass produced or produced with limited variation or (5) the creation of handcrafts. This list of exclusions is not intended to be exhaustive.

(e) **Public Areas.** Sidewalks, parkways, playgrounds and all other public spaces located in the City.

(f) **The Pier.** The Santa Monica Pier, consisting of both the Newcomb Pier and the Municipal Pier, protruding from the Santa Monica State Beach at the southwesterly terminus of Colorado Avenue, and extending for approximately two thousand one hundred thirty-five feet into the Santa Monica Bay. The Pier is divided into three performance areas: the

Center Performance area, the Breezeway Performance area, and the General Performance area. The boundaries of each of these performance areas are delineated in Exhibit A to Resolution Number 9704 (CCS).

(g) **Sculpture.** A three dimensional work of art which is created through shaping solid material such as wood, stone, clay or metal by carving, modeling, or similar methods.

(h) **Third Street Promenade.** Third Street between the southeasterly line of Wilshire Boulevard and the northwesterly line of Arizona Avenue, and between the southeasterly line of Arizona Avenue and the northwesterly line of Santa Monica Boulevard and between the southeasterly line of Santa Monica Boulevard and the northwesterly line of Broadway.

(i) **Transit Mall.** The sidewalks on Santa Monica Boulevard and Broadway from the east side of Ocean Avenue to the west side of Fifth Street.

(j) **Visual Art.** Drawings and paintings, applied to paper, cardboard, canvas, or other similar medium

through the use of brush, pastel, crayon, pencil, or other similar object, and sculptures. (Added by Ord. No. 1888CCS § 1 (part), adopted 10/28/97; amended by Ord. No. 1949CCS § 4, adopted 7/20/99; Ord. No. 1959 CCS § 1, adopted 10/12/99; Ord. No. 1982CCS § 1, adopted 8/8/00; Ord. No. 2009CCS § 1, adopted 5/22/01; amended by Ord. No. 2028CCS § 1, adopted 11/13/01; Ord. No. 2047CCS § 1, adopted 7/9/02)

6.112.010 Purpose.

The City Council finds that the existence in the City of street performers provides a public amenity that enhances the character of the City and seeks to encourage such performances in a manner consistent with the overall public interest. The City Council also recognizes that street performers seek to and do draw crowds to their performance. This can create serious safety problems by impacting the ability of pedestrians to move safely on sidewalks and through cross walks and impeding the response time of safety personnel. It can also impact access to and egress from businesses. Cognizant that street performers are engaged in First Amendment activities, this chapter imposes reasonable time, place, and manner restrictions on street performers to the extent necessary to ensure the safety of performers, their audience, and the general public and to prevent unreasonable interference with residents' enjoyment of peace and quiet in their homes or the ability of businesses to operate and conduct their business. (Added by Ord. No. 1888CCS, § 1 (part), adopted 10/28/97)

6.112.050 Special regulations for Third Street Promenade and Transit Mall.

In addition to the requirements of Sections 6.112.030 and 6.112.040, no performer shall perform in the Third Street Promenade or the Transit Mall outside of an enclosed building in violation of the following requirements:

(a) Except as provided in subsection (q) of Section 6.112.030, no performer shall perform except during the following time periods:

(1) Nine a.m. to eleven p.m. daily.

(2) Eleven p.m. on Friday and Saturday to one-thirty a.m. of the following day.

(b) No performer shall perform within sixty feet of any special event authorized by the City unless the special event encompasses one or more City blocks in which case the performance shall be conducted according to any administrative guidelines which shall be adopted by the City.

(c) No performer shall:

(1) Perform on the Third Street Promenade in any specific location or within one hundred twenty feet of that location as measured in a north/south direction, for more than two hours in any six hour period. The time required to set up and to remove any instruments, props, equipment, or other items shall be considered part of the performance for purposes of this subdivision and subdivision (2) of this subsection (c).

(2) Perform on the Third Street Promenade on an even hour at the same location that he/she was performing on the preceding hour, or within one hundred twenty feet of that location as measured in a north/south direction.

(3) Perform on the Transit Mall in any specific location or within one hundred twenty feet of that location as measured in an east/west direction, for more than two hours in any six hour period. The time required to set up and to remove any instruments, props, equipment, or other items shall be considered part of the performance for purposes of this subdivision and subdivision (4) of this subsection (c).

(4) Perform on the Transit Mall on an even hour at the same location that he/she was performing on the preceding hour, or within one hundred twenty feet of that location as measured in an east/west direction.

(5) Perform within ten feet of a vendor operating pursuant to or under the authority of an approved license agreement or within forty feet of any other vendor or performance.

(6) Perform on the Transit Mall at a distance greater than five feet from the outer wall of any building or any permanent extension of the building such as a planter box.

(7) Perform on the Santa Monica Boulevard segment of the Transit Mall within twenty feet of the Third Street Promenade. (Added by Ord. No. 1888CCS § 1 (part), adopted 10/28/97; amended by Ord. No. 1949CCS § 7, adopted 7/20/99; Ord. No. 1959CCS § 3, adopted 10/12/99; Ord. No. 2009CCS § 2, adopted 5/22/01; amended by Ord. No. 2028CCS § 2, adopted 11/13/01; Ord. No. 2047CCS § 4, adopted 7/9/02; Ord. No. 2075CCS § 2, adopted 5-13-03)

6.112.040 Performance permit.

(a) To receive a performance permit, a person must complete and file with the City a performance permit application on a form approved by the City. The applicant must provide the following information:

(1) The applicant's name;

(2) The applicant's address;

(3) Proof of the identity of the applicant. This identification must contain a photograph of the applicant. Acceptable forms of identifications shall include, but not be limited to, a driver's license, student identification card, or passport;

(4) A detailed description of the nature of the act to be performed;

(5) A detailed description of any instrument(s) or prop(s) which will be used by the performer(s);

(6) A minor under the age of sixteen shall provide a copy of an entertainment work permit issued to the minor by the Department of Industrial Relations of the State of California and shall identify the responsible adult(s) who will be with the minor at all times that the minor is performing;

(b) The performance permit will be issued annually commencing on January 1st of each calendar year;

(c) Upon receipt of a written application for a performance permit, a performance permit shall be approved within three business days of the filing of a fully completed application, unless one of the following findings is made:

(1) The applicant has knowingly made a false, misleading, or fraudulent statement of fact to the City in the application process;

(2) The application does not contain the information required by this Chapter;

(3) The applicant has not satisfied the requirements of this Chapter.

(d) In addition to requiring compliance with all provisions of this Chapter, the City may condition the approval of a performance permit on the applicant's compliance with other provisions of the City's Municipal Code which are applicable to the performance.

(e) The City may revoke or suspend a performance permit upon the commission of the second violation either of this Chapter or of permit conditions within a six-month period. In any such case, the permit holder shall have the right to appeal from a decision of the City to revoke or suspend any permit in accordance with Chapter 6.16 of this Code. A performer's permit may be suspended for up to four months. If the performance permit of any performer is suspended, no new permit shall be issued during the period of suspension. Any revocation of a performer's permit shall be for six months unless the performer previously had a performance permit revoked and the new violations of this Chapter or permit conditions relate to public safety, in which case, the permit shall be revoked for twelve months. No new permit shall be issued during a revocation period. The City shall establish administrative guidelines to assist in the implementation of this Section.

(f) No application for a performance permit or the renewal thereof shall be accepted unless the application is accompanied by a payment of a nonrefundable annual fee in an amount to be set by resolution adopted by the City Council.

(g) The performance permit shall include a photograph of the performer, shall not be assignable or

transferable, and shall contain the permit number of the applicant and the year in which the permit expires. Each performer in a group shall obtain his/her own separate performance permit.

(h) A replacement performance permit may be obtained upon payment of a nonrefundable fee in an amount to be set by resolution adopted by the City Council.

(i) A performer shall clearly display his or her permit while performing, and shall allow inspection of the permit by any City police or fire official on request.

(j) The City Council may by resolution adjust the noise limitations established in this Chapter during public holidays.

(k) When an applicant requests a performance permit application, the City shall also give the applicant a document which summarizes the rules and regulations concerning street performances in the City. This document may be, but is not required to be, a copy of this Chapter. (Added by Ord. No. 1888CCS § 1 (part), adopted 10/28/97; amended by Ord. No. 1949CCS § 6, adopted 7/20/99; Ord. No. 2047CCS § 3, adopted 7/9/02; Ord. No. 2145CCS § 1, adopted 11/23/04)

6.112.030 Rules and regulations.

CodeAlert: This item has been affected by 2304. Please refer to the CodeAlert Ordinance List for the most current provisions.

(a) Subject also to Sections 6.112.050 and 6.112.060, no performer may perform:

(1) Within ten feet of any bus stop;

(2) Within ten feet of any street corner or a marked pedestrian crosswalk;

(3) Within ten feet of the outer edge of any entrance of any business, including, but not limited to, doors; vestibules; driveways; outdoor dining area entries; and emergency exits, during the hours that any business on the premises is open to the public or to persons having or conducting lawful business within those premises.

(b) No person may perform on the Third Street Promenade, the Pier, the Transit Mall, or any public sidewalk without first obtaining a performance permit issued by the City pursuant to Section 6.112.040.

(c) A performer and the performer's equipment may not block or obstruct the free and safe movement of pedestrians. If a sufficient crowd gathers to observe a performer such that the passage of the public through a public area is blocked or obstructed, a police officer or fire official may disperse that portion of the crowd that is blocking or obstructing the passage of the public. If a performer cannot conduct a performance in a location without blocking or obstructing the passage of the public, a police officer or fire official may cause the performer to leave the location or require that the performer relocate his/her equipment, but shall not prevent the performer from occupying another location in compliance with this Chapter.

(d) A performer who performs for a charge shall obtain a business license and be subject to all applicable provisions of Chapter 6.36. A performer who performs without charge shall not be required to obtain a vendor permit pursuant to Chapter 6.36 or a business license pursuant to Chapter 6.04.

(e) No performer shall construct, erect, or maintain any stage, platform, or similar structure for use during any performance unless the stage or platform:

(1) Is integral to the performance and the performance only takes place on the stage;

(2) Does not exceed four feet by four feet and one-quarter inch in height;

(3) Is removed from the public way when the performer is not performing;

(4) Has beveled edges.

(f) No performer shall use any knife, sword, torch, flame, axe, saw, or other object that can cause serious bodily injury to any person, or engage in any activity, including but not limited to, acrobatics, tumbling, or cycling, that can cause serious bodily injury to any person.

(g) No performer shall use any generator, wet cell battery with removable fill caps, or any other power source that poses a fire or public safety hazard. No performer shall connect or maintain an electrical cord to an adjacent building or to a City power source.

(h) No performer may litter his or her performance site.

(i) No performer shall utilize or prevent the public from utilizing any public benches, waste receptacles, or other street furniture during the performance.

(j) No minor under the age of sixteen can perform unless the minor is at all times accompanied by a responsible adult eighteen years of age or older, has obtained an entertainment work permit issued by the Department of Industrial Relations of the State of California and maintains the permit in his/her possession at the time of the performance.

(k) No performer shall place any object on a public sidewalk which causes less than a four-foot contiguous sidewalk width being kept clear for pedestrian passage.

(l) No performer shall perform with more instruments, props, equipment, merchandise, or other items than the performer can reasonably transport or remove at one time.

(m) No performer shall place his/her instruments, props, equipment, merchandise, or other items on a public sidewalk, public street, or public right-of-way for more than two hours without performing in accordance with the provisions of this Chapter.

(n) No performer shall leave his/her instruments, props, equipment, merchandise, or other items unattended.

(o) No performer shall perform in contravention of the allowable noise levels established by Chapter 4.12 and Chapter 6.116 of this Code.

(p) No performer shall block or obstruct a curb cut.

(q) The following formula establishes the special performance hours that apply during specified holidays on the Third Street Promenade, the Transit Mall, and the Pier:

(1) If the holiday follows a weekend and the next day is a workday, then the holiday shall be treated as if it were Sunday and the day preceding the holiday shall be treated as if it were Saturday.

(2) If the holiday precedes a weekend, then the holiday shall be treated as if it were Saturday and the preceding day shall be treated as if it were Friday.

(3) If the holiday occurs during midweek, and is surrounded by workdays, then the holiday shall be treated as if it were Sunday and the day preceding the holiday shall be treated as if it were Friday.

The following is a list of holidays which trigger the application of this subsection: New Year's Day, President's Day, Memorial Day, Independence Day, Columbus Day, Labor Day, Veterans Day, Thanksgiving Day, and Christmas Day. The City Council may by resolution add to this list of holidays.

(r) No performer shall perform outside designated performance zones on the Third Street Promenade and the Pier, as established by resolution of the City Council. (Added by Ord. No. 1888CCS § 1 (part), adopted 10/28/97; amended by Ord. No. 1949CCS § 5, adopted 7/20/99; Ord. No. 1959CCS § 2, adopted 10/12/99; Ord. No. 2047CCS § 2, adopted 7/9/02; Ord. No. 2075CCS § 1, adopted 5-13-03)

6.116.060 Special regulations for vendors on the Third Street Promenade and Transit Mall.

No person authorized to vend pursuant to Sections 6.36.030(f) and 6.36.030(g), or any successor legislation, may on the Third Street Promenade or the Transit Mall:

(a) Vend on the Third Street Promenade in any specific location, or within one hundred twenty feet of that location as measured in a north/south direction, for more than a two-hour period in any six-hour period. The time required to set up and to remove equipment and material for vending shall be considered part of the time limit established by this subsection and subsection (b) of this Section;

(b) Vend on the Third Street Promenade on an even hour at the same location that he/she was vending on the preceding hour, or within one hundred twenty feet of that location as measured in a north/south direction;

(c) Vend on the Transit Mall in any specific location, or within one hundred twenty feet of that location as measured in an east/west direction, for more than a two-hour period in any six-hour period. The time required to set up and to remove equipment and material for vending shall be considered part of the time limit established by this subsection and subsection (d) of this Section;

(d) Vend on the Transit Mall on an even hour at the same location that he/she was vending on the preceding hour, or within one hundred twenty feet of that location as measured in an east/west direction;

(e) Vend within ten feet of a vendor operating pursuant to or under the authority of an approved license agreement or within forty feet of any other vendor or performer;

(f) Vend those items authorized by Section 6.36.030(g), or any successor legislation, unless that person is also performing pursuant to Chapter 6.112, the item vended is representative of the work being created during the performance, and no more than five such items are displayed at any one time. A performer/vendor may display these items from a table or cart, the performer/vendor's instrument case, or attached to an easel which is used as part of the performance. If a performer/vendor displays items from a table or cart, all other requirements specified in Section 6.116.010 shall apply except that the performer/vendor shall be limited to utilizing one table or cart of a size not larger than four feet in width by four feet in length by three feet in height.

(g) Vend on the Transit Mall at a distance greater than five feet from the outer wall of any building or any permanent extension of the building such as a planter box. (Added by Ord. No. 1949CCS § 12, adopted 7/20/99; amended by Ord. No. 1959CCS § 6, adopted 10/12/99; amended by Ord. No. 2028CCS § 7, adopted 11/13/02; Ord. No. 2047CCS § 9, adopted 7/9/02; Ord. No. 2075CCS § 7, adopted 5-13-03; Ord. No. 2145CCS § 6, adopted 11/23/04)