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SANTOPIETRO V. HOWELL’S MISSTEP AND THE NEED TO CORRECT THE PREVENTABLE ADVERSE IMPACT OF VENDOR LICENSING LAWS ON STREET PERFORMERS’ EXPRESSIVE CONDUCT

*Stephen A. Touchton**

Street performers and artists who engage in expressive activity in traditional public fora are often adversely impacted by the enforcement of vendor licensing laws. Cited, arrested, or negatively impacted in other ways for selling their goods or services, street performers and artists have brought First Amendment challenges to the enforcement of these laws against them. The Ninth Circuit’s recent opinion in *Santopietro v. Howell* and the Second Circuit’s opinion in *Bery v. City of New York* demonstrate how courts’ varied approaches to these challenges have led to inconsistent results.

This Comment first discusses why and how local governments should directly address the problems vendor licensing laws are aimed at curing, but in a manner that does not negatively impact the valuable expressive activity of street performers. This Comment then critiques the Ninth Circuit’s approach to the First Amendment issue in *Santopietro*, primarily by comparison with the Second Circuit’s approach in *Bery*, and concludes that the Ninth Circuit improperly denied the street performer’s motion for summary judgment on that issue.

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I. INTRODUCTION

Across the United States, street performers and artists engage in expressive activity on public sidewalks, in public parks, and in other public spaces.¹ Their activities, which are indisputably protected under the First Amendment's free speech guarantee,² run the gamut from balloon artists to human statues,³ jugglers, musicians, painters, sculptors, and more.⁴

At the same time, local governments across the country are implementing vendor permitting and licensing schemes.⁵ Such laws may fine or jail peddlers, solicitors, temporary stores, and the like if they offer their goods or services in public without first procuring a license from the government.⁶ Although these vendor laws are not solely or explicitly aimed at street performers, street performers have been cited and arrested for violations of these

1. See, e.g., *Santopietro v. Howell*, 857 F.3d 980, 983 (9th Cir. 2017) (Las Vegas Strip); *Berger v. City of Seattle*, 569 F.3d 1029, 1034 (9th Cir. 2009) (Seattle park and entertainment complex); *Bery v. City of New York*, 97 F.3d 689, 691 (2d Cir. 1996) (New York sidewalk); *Peck v. City of Boston*, 750 F. Supp. 2d 308, 310 (D. Mass. 2010) (area outside of a Boston hall which is located on publicly owned property).

2. *Peck*, 750 F. Supp. 2d at 313 (“There is no dispute that artistic expression, including acts by street performers, falls within the protection of the First Amendment’s free speech guarantee.”).

3. A human statute, or “living statue,” is a “street entertainer who poses as a statue, in realistic make-up and costume, typically remaining immobile for very long periods of time.” *Living Statue*, OXFORD DICTIONARIES, https://en.oxforddictionaries.com/definition/living_statue [<http://perma.cc/4X4Y-TYMJ>].

4. See, e.g., *Berger*, 569 F.3d at 1035 (“About a year after the Rules were promulgated, Michael Berger, a balloon artist and Seattle street performer, filed the complaint that gives rise to this appeal.”); *Bery*, 97 F.3d at 691 (artists such as painters, photographers, and sculptors); *Harman v. Santa Cruz*, 261 F. Supp. 3d 1031, 1037 (N.D. Cal. 2017) (“The Pacific Avenue sidewalks are characteristically busy with a variety of street performers, including musicians, dancers, activists, poets, clowns, magicians, jugglers, and acrobats, among others.”); *Peck*, 750 F. Supp. 2d at 310 (“Plaintiff Peck is a resident of Florida who makes his living as a street performer Peck has performed in over twenty different countries and has worked as an acrobat, magician, escape artist, balloon twister and human statue.”).

5. See generally *Santopietro*, 857 F.3d 980 (discussing CLARK COUNTY, NEV., CODE OF ORDINANCES tit. 6, § 56.030 (1989)); *Bery*, 97 F.3d 689 (discussing N.Y.C., N.Y., CODE § 20-452 et seq. (2018)).

6. See, e.g., *Santopietro*, 857 F.3d at 986 n.3 (discussing CLARK COUNTY, NEV., CODE OF ORDINANCES tit. 6, § 56.030 (1989)); *Bery*, 97 F.3d at 692 (discussing N.Y.C., N.Y., CODE § 20-452 (2018)).

laws.⁷ Thus, there is some tension between vendor permitting and licensing schemes that constrain street performance activities at the municipal level and the First Amendment protections afforded to street performance activities at the constitutional level. Unfortunately, federal courts' analyses of alleged First Amendment violations stemming from the enforcement of local vendor laws—challenges brought by, among others, artists and street performers—have not been uniform.⁸

For example, in *Santopietro v. Howell*, the United States Court of Appeals for the Ninth Circuit addressed the constitutionality of a street performer's arrest for allegedly violating a vendor permitting law in Las Vegas.⁹ Pursuant to *Santopietro*, it may not be a First Amendment violation to arrest a street performer who is charging customers for a photograph on a sidewalk.¹⁰ According to the Ninth Circuit's analysis, the street performer's "demand" for payment could mean that the street performer is engaged in activity unprotected by the First Amendment: conducting business without a permit.¹¹

7. See *infra* Parts II.B, III.

8. See *infra* notes 9–14 and accompanying text.

9. See generally *Santopietro*, 857 F.3d 980.

10. *Santopietro*, 857 F.3d at 993 (“[A] reasonable jury could conclude that Santopietro made a ‘demand’ rather than a polite request. If determined to be sufficiently assertive or forceful, and also to link directly to monetary payment, such a quid-pro-quo demand *could* fall outside protected noncommercial First Amendment activity and support the validity of the arrest based on Santopietro’s actions alone.”). Put differently, a “demand” for payment from a street performer means that the street performance is contingent upon receiving money. To distinguish the two terms, “request” means to “ask for” and “demand” means to “require.” The Ninth Circuit fails to explain the legal significance of the politeness of a “request” for payment, if there is any.

11. *Id.* at 994 (“The license requirement imposed on Santopietro’s alleged communication of an offer for the sale of goods or services, see Clark Cty. Mun. Code § 6.56.010–030, may be a valid regulation of commercial speech.”); see also *id.* at 992 (“The heart of the parties’ disagreement is whether Santopietro engaged only in street performance or *also* in regulable commercial activity.”). Under *Santopietro*, then, a line between fully-protected noncommercial expressive activity and less-protected commercial speech is drawn between requests for payment and demands for payment. Put differently, if there is (1) a demand, (2) linked to monetary payment, (3) that is sufficiently assertive or forceful, arrest of street performers based on violation of an otherwise valid vendor licensing scheme is acceptable. Notably, however, the Ninth Circuit does not suggest a test for determining whether a demand is “sufficiently assertive or forceful” to satisfy the third prong of this test. Nor does the Ninth Circuit explain its employment of the open-ended word “could” when it states that activity satisfying the three prongs of this test “*could* fall outside protected non-commercial First Amendment activity.” *Id.* at 993. Thus, activity satisfying this three-part test

In *Bery v. City of New York*, the United States Court of Appeals for the Second Circuit similarly addressed the constitutionality of a vendor permitting scheme in New York.¹² Pursuant to *Bery*, it is a First Amendment violation to arrest an artist for selling or offering for sale a piece of visual art—such as a photograph—on a sidewalk.¹³ According to the Second Circuit’s analysis, the artist is still engaged in constitutionally-protected expressive activity when payment is required rather than merely requested.¹⁴

This Comment explores why the *Santopietro* and *Bery* courts answered the same question, based on similar facts, so differently.¹⁵ Further, it explains why it was incorrect for the Ninth Circuit to conclude that Santopietro’s street performance activity was fully protected under the First Amendment only if she requested—rather than demanded—payment for her goods or services as a street performer. Understanding where the line between lawful expressive activity and unlawful business activity is or should be, and correcting any unnecessary adverse impact of vendor licensing laws on street performers’ expressive conduct, should be done not just for the benefit of street performers. These issues also impact the public that benefits from street performance activities, law enforcement officers setting policing priorities and enforcing ordinances against street performers, lawmakers drafting ordinances that may or will reach expressive activities in public spaces, and the judiciary, whose resources are demanded when there is a clash between vendor laws and those engaged in expressive activity in public fora.

could or could not be considered fully-protected First Amendment activity within the Ninth Circuit, but it is unclear when exactly it will or will not be.

12. See *Bery*, 97 F.3d at 691.

13. See *id.* at 691 (“The individual artists have been arrested, threatened with arrest or harassed by law enforcement officials for attempting to display and sell their creations in public spaces in the City without a general vendors license.”); *id.* at 698 (“[T]he City’s requirement that appellants be licensed in order to sell their artwork in public spaces constitutes an unconstitutional infringement of their First Amendment rights.”); see generally *People v. Bissinger*, 163 Misc. 2d 667 (N.Y. Crim. Ct. 1994).

14. See *Bery*, 97 F.3d at 698.

15. See *Santopietro*, 857 F.3d at 987 (“Our principal question, then, is whether it is constitutionally permissible under the First Amendment to require that a person hold a business license to conduct the activities in which Santopietro was engaged at the time of her arrest.”); *Bery*, 97 F.3d at 695 (“The City argues that appellants’ ‘expression’ allegedly impinged by the Regulation is not in fact their art, but their peddling of the art. . . . The City further argues that appellants are free to display their artwork publicly without a license, they simply cannot sell it.”).

Part II of this Comment is an overview of relevant laws, specifically the First Amendment to the United States Constitution and the local ordinances at issue in *Santopietro* and *Bery*. Part III outlines the factual and procedural background of *Santopietro*, which is the focal point of this Comment. It also provides the factual and procedural background of *Bery*, which is the primary case from which this Comment draws its critique of certain aspects of the *Santopietro* opinion.

Part IV explains why the legal community should care about the adverse impact of vendor laws on street performers, and where the Ninth Circuit went wrong in *Santopietro*. It critiques *Santopietro* through the lens of *Bery*, particularly “whether Santopietro’s actions went beyond protected expression and moved into the realm of [regulable] business activity.”¹⁶ It argues that, despite the Ninth Circuit and Second Circuit being faced with similar facts and similar challenges to similar laws, their different analyses in *Santopietro* and *Bery* led to irreconcilable conclusions—and that the Second Circuit came to the better conclusion.

Part V concludes that full First Amendment protection should be extended to street performers such as Santopietro even if the street performers demand payment rather than “polite[ly] request” voluntary tips for their expressive goods or services.¹⁷ Thus, after subjecting the vendor law to a reasonable time, place, or manner analysis, the Ninth Circuit should have reversed the District of Nevada’s denial of Santopietro’s cross-motion for summary judgment on First Amendment grounds. That would have been the correct outcome because (1) the nature of Santopietro’s statements regarding payment should have no bearing on whether her conduct fell within the scope of protected noncommercial First Amendment activity, and (2) the vendor law at issue was neither sufficiently narrowly tailored, nor did it leave open ample alternative methods for communication.¹⁸

16. *Santopietro*, 857 F.3d at 988.

17. *Id.* at 993.

18. *Id.* at 992 (“The evidence presents conflicting accounts regarding . . . the nature and tone of the statements [Santopietro] made.”); *id.* at 993 (“[G]enuine disputes of fact remain as to . . . the nature of the statements made.”).

II. RELEVANT LAW

A. *First Amendment*

1. First Amendment Protection, Generally

The First Amendment to the United States Constitution, applicable to the individual states through the Fourteenth Amendment, states that “Congress shall make no law . . . abridging the freedom of speech.”¹⁹ “[E]xpressions other than words can convey meaning or express a view,”²⁰ so the First Amendment protects the right to freedom of expression—including but not limited to words—from being curtailed by governmental action.²¹

2. First Amendment Analysis and Levels of Scrutiny

Courts apply varying levels of scrutiny when analyzing the constitutionality of restrictions on protected expression on public property.²² As discussed below, two important factors are (a) the type of public forum the expression occurs in, and (b) whether the restriction is content-based or content-neutral.

19. U.S. CONST., amend. I; *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015) (stating that the First Amendment is “applicable to the States through the Fourteenth Amendment”).

20. George Vetter & Christopher C. Roche, *The First Amendment and the Artist-Part I*, 44 R.I. B.J. 7, 8 (1996). *See also* *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) (“[T]he Constitution looks beyond written or spoken words as mediums of [protected] expression.”).

21. There are, nonetheless, certain types of speech that are categorically excluded from First Amendment protection because the speech is not essential to the exposition of ideas and it harms the public interest in order and morality. *See, e.g.*, *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571–72 (1942); *see also* *Virginia v. Black*, 538 U.S. 343, 359 (2003) (“True threats,” defined as “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,” are not protected by the First Amendment.).

22. *See, e.g.*, *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (discussing the “‘forum based’ approach for assessing restrictions that the government seeks to place on the use of its property”).

a. Type of Forum

To determine the level of scrutiny to which a regulation will be subjected, courts must determine the type of forum the expression occurs in.²³ This approach divides public fora into three categories: (1) traditional public fora; (2) designated public fora; and (3) “all remaining public property.”²⁴

The first category—the traditional public forum—is government property “that has traditionally been available for public expression.”²⁵ Traditional public fora, such as streets, parks, and sidewalks, have long been considered important to the public’s freedom of expression.²⁶ In such places, “the rights of the state to limit expressive activity are sharply circumscribed”²⁷ and regulation of expressive activity is “subject to the highest scrutiny.”²⁸

The second category—the designated public forum—is government property that “the State has opened for expressive activity by part or all of the public.”²⁹ An example of a designated public forum is a community meeting room. The government is not required to “indefinitely retain the open character” of designated public fora but “as long as it does so it is bound by the same standards as apply in a traditional public forum.”³⁰

23. *Id.* (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)).

24. *Id.* at 678–79.

25. *Id.*

26. *See, e.g.*, *Hague v. CIO*, 307 U.S. 496, 515 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”); *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009) (footnotes omitted) (“The protections afforded by the First Amendment are nowhere stronger than in streets and parks.”); *see also Lee*, 505 U.S. at 676 (describing “public streets” as “the quintessential public fora” where regulation can only be sustained if “narrowly tailored to support a compelling state interest”).

27. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

28. *Lee*, 505 U.S. at 678.

29. *Id.* at 678–79.

30. *Perry Educ. Ass’n*, 460 U.S. at 46.

Unlike the first two categories of state-owned property, the third category of property is that which has never been considered a public forum for protected expression, whether by “tradition” or by “designation.”³¹ An example is an interschool mail system intended to facilitate internal communications to teachers regarding school-related matters that, neither by policy nor practice, has been opened “for indiscriminate use by the general public.”³² Limitations on expressive activity conducted on this category of property need to survive a much more limited review than the first two categories of public fora.³³ Essentially, the challenged regulation need only be “reasonable.”³⁴ More specifically, “as long as the regulation is not an effort to suppress the speaker’s activity due to disagreement with the speaker’s view[.]” it will survive.³⁵ Additionally, “the First Amendment does not guarantee access to property simply because it is owned or controlled by the government.”³⁶

b. Content-Based or Content-Neutral Restriction

To determine the level of scrutiny that applies to a regulation, courts also look to whether the restriction on expression is content-based or content-neutral.³⁷ Content-based laws, which “target speech based on its communicative content[,] . . . are presumptively unconstitutional.”³⁸ For instance, the

31. *Id.*

32. *Id.* at 46–47.

33. *Id.* at 46.

34. *Lee*, 505 U.S. at 679.

35. *Id.*

36. *U. S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129 (1981).

37. *Reed*, 135 S. Ct. at 2226–27.

38. *Id.* at 2226; *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818 (2000) (“It is rare that a regulation restricting speech because of its content will ever be permissible.”). *See also* *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (content-based laws are those that “restrict expression because of its message, its ideas, its subject matter, or its content”); *Reed*, 135 S. Ct. at 2229 (“Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech.”). *Reed* elaborates on the meaning of “content-based”: “Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase ‘content based’ requires a

Ninth Circuit concluded in *Berger v. City of Seattle* that an ordinance was “content-based by its very terms” because it “specifically restrict[ed] street performers from communicating a particular set of messages—requests for donations, such as ‘I’d like you to give me some money if you enjoyed my performance.’”³⁹ In order for the state to enforce a content-based exclusion in either a traditional public forum or designated public forum, “it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”⁴⁰ “Narrowly drawn” means that the state must choose “the least restrictive means to further the articulated interest.”⁴¹

There is also “a separate and additional category of laws that, though facially content[-]neutral, will be considered content-based regulations of speech.”⁴² These are “laws that cannot be ‘justified without reference to the content of the regulated speech,’ or that were adopted by the government ‘because of disagreement with the message [the speech] conveys.’ Those laws, like those that are content[-]based on their face, must also satisfy strict scrutiny.”⁴³ They must “serve a compelling state interest and [be] narrowly drawn to achieve that end.”⁴⁴ Since “strict scrutiny applies either when a law is content[-]based on its face or when the purpose and justification for the law are content[-]based, a court must evaluate each question before it concludes that the law is content[-]neutral and thus subject to a lower level of scrutiny.”⁴⁵

court to consider whether a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.” *Id.* at 2227.

39. *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009).

40. *Perry Educ. Ass’n*, 460 U.S. at 45 (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)).

41. *See Sable Commc’ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989).

42. *Reed*, 135 S. Ct. at 2227.

43. *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

44. *Perry Educ. Ass’n*, 460 U.S. at 45 (citing *Carey*, 447 U.S. at 461).

45. *Reed*, 135 S. Ct. at 2228.

Content-neutral laws are subject to lesser scrutiny.⁴⁶ In order for the state to enforce a content-neutral regulation of the time, place, or manner⁴⁷ of expression in either a traditional public forum or a designated public forum, the regulation must be (1) “narrowly tailored to serve a significant government interest,” and (2) “leave open ample alternative channels of communication.”⁴⁸ Courts ask “whether a law is content[-]neutral on its face before turning to the law’s justification or purpose” because “an innocuous justification cannot transform a facially content-based law into one that is content neutral.”⁴⁹

3. First Amendment Protection for Entertainment and Street Performance Activities

The Supreme Court has long recognized that entertainment, including live performances of musical and dramatic works, is protected by the First Amendment.⁵⁰ One commentator suggests that “the values underlying free speech would appear to apply with special force to art and artists” because “[t]he paramount value is the significance of individual self-expression as an aspect of liberty.”⁵¹ Indeed, “[t]here is no dispute that artistic expression, *including acts by street performers*, falls within the protection of the First

46. *Reed*, 135 S. Ct. at 2232 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984)).

47. *Berger*, 569 F.3d at 1035–36. The “time, place or manner” doctrine allows the government to “regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication.” *Burson v. Freeman*, 504 U.S. 191, 197 (1992). “[A] time, place or manner restriction on First Amendment activity may not ‘burden substantially more speech than is necessary to further the government’s legitimate interests.’” *Grossman v. City of Portland*, 33 F.3d 1200, 1205 (9th Cir. 1994) (quoting *Ward*, 491 U.S. at 799). *See also* *Peck v. City of Boston*, 750 F. Supp. 2d 308, 313 (D. Mass. 2010).

48. *Perry Educ. Ass’n*, 460 U.S. at 45 (citing *U.S. Postal Serv.*, 453 U.S. at 132; *Consol. Edison Co.*, 447 U.S. at 535–36; *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939)).

49. *Reed*, 135 S. Ct. at 2228.

50. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

51. JOHN HENRY MERRYMAN ET AL., *LAW, ETHICS AND THE VISUAL ARTS* 679 (Aspen Pub., 5th ed. 2007).

Amendment's free speech guarantee."⁵² Although street performance activities in traditional public fora such as parks and sidewalks are protected expressive activity under the First Amendment, such activities may be subject to reasonable time, place, and manner restrictions.⁵³

For First Amendment purposes, any distinction between so-called highbrow or lowbrow art and entertainment is not determinative of the level of protection given.⁵⁴ The Supreme Court illustrated this point in *Brown v. Entertainment Merchants Association*:

Reading Dante is unquestionably more cultured and intellectually edifying than playing *Mortal Kombat*. But these cultural and intellectual differences are not *constitutional* ones. Crudely violent video games, tawdry TV shows, and cheap novels and magazines are no less forms of speech than *The Divine Comedy*, and restrictions upon them must survive strict scrutiny⁵⁵

4. Solicitation of Tips, Sales, and the First Amendment

The Supreme Court recognizes solicitation as a First Amendment-protected form of speech.⁵⁶ The Ninth Circuit has made clear that "the solicitation of tips is 'entitled to the same constitutional protections as traditional

52. *Peck*, 750 F. Supp. 2d at 313 (emphasis added); see also *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 231 (1977) (stating that the Court's "cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection").

53. See *Berger v. City of Seattle*, 512 F.3d 582, 592 (9th Cir. 2009). The governmental interest in regulating street performance activities may be, for example, prevention of excessive foot-traffic congestion or noise. See, e.g., *id.* (discussing concerns about "safety and convenience" of the public stemming from complaints about, among other things, performers blocking access or making noise).

54. See *infra* note 55 and accompanying text.

55. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 796 n.4 (2011).

56. *United States v. Kokinda*, 497 U.S. 720, 725 (1990).

speech.”⁵⁷ Neither “passive” solicitation, such as putting out a hat, nor “active” solicitation, such as verbally encouraging—but not demanding—tips, may be banned by municipalities within the Ninth Circuit.⁵⁸

Regarding sales, the Supreme Court has stated that “[s]peech . . . is protected even though it is carried in a form that is ‘sold’ for profit . . . and even though it may involve a solicitation to purchase or otherwise pay or contribute money.”⁵⁹ Moreover, courts have found that in the context of fully-protected First Amendment expression such as paintings, tattoos, and the like, “because the sale of [the art] is so intertwined with the process of producing the [art], the sale is entitled to full constitutional protection.”⁶⁰ Finally, at least one city has entered into a court-approved consent decree requiring, among other things, that it “permit the sale of expressive materials on [the city’s boardwalk], without a license or registration[,]” following a First Amendment challenge to the “Peddlers and Solicitors” provision of the city’s code.⁶¹

57. *Santopietro v. Howell*, 857 F.3d 980, 988 (9th Cir. 2017) (quoting *ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784, 792 (9th Cir. 2006)). In *A.C.L.U. of Nevada v. City of Las Vegas*, the Ninth Circuit held that “city ordinances prohibiting solicitation and the erection of tables in a five-block tract of downtown Las Vegas unconstitutionally restrict free speech.” *ACLU of Nev.*, 466 F.3d at 786. In doing so, it noted “the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech” and “that without solicitation the flow of such information and advocacy would likely cease.” *Id.* at 792 (quoting *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988)). Solicitations by charitable organizations receive First Amendment protection extending beyond that given to “purely commercial speech.” See *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980). *Schaumburg*’s holding “compels the conclusion that the First Amendment also protects an individual’s right to ask for charity.” *Blicht v. City of Slidell*, 260 F. Supp. 3d 656, 664 (E.D. La. 2017). Therefore, courts have held that “panhandling is [also] a protected activity under the First Amendment.” *Id.*

58. *Berger*, 569 F.3d at 1053.

59. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

60. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1063 (9th Cir. 2010) (citing *White v. City of Sparks*, 500 F.3d 953 (9th Cir. 2007); *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996)).

61. *Chase v. Town of Ocean City*, No. ELH-11-1771, 2015 U.S. Dist. LEXIS 109959, at *5–7 (D. Md. Aug. 19, 2015). The consent decree followed the court’s preliminary enjoinder of a provision “bann[ing] all sales of artistic work on the Boardwalk by street performers and vendors.” *Id.* at *5–6. Both the preliminary injunction and consent decree apply to the sale of “expressive materials,” defined as “items that have been created, written, or composed by the vendor; are inherently communicative; and have only nominal utility apart from their communicative value.” *Id.* at *6.

B. *The Local Ordinances Challenged in Santopietro and Bery*

Under Supreme Court precedent, “[i]t is . . . well settled that municipal ordinances adopted under state authority constitute state action and are within the prohibition of the [First] [A]mendment.”⁶² Municipal ordinances regulating vendors were challenged on First Amendment grounds in both *Santopietro* and *Bery*.⁶³

1. Clark County Code § 6.56.030⁶⁴

The vendor law challenged in *Santopietro* was Chapter 6 of the Clark County Code.⁶⁵ The code made it “unlawful for any person, in the unincorporated areas of the county to operate or conduct business as a temporary store, professional promoter or peddler, solicitor or canvasser without first having procured a license for the same.”⁶⁶

Prior to the incident that sparked the *Santopietro* litigation—and as a result of repeated arrests and citations made for street performance activities—two street performers sued the Las Vegas Metropolitan Police Department and other public entities and officials under the theory that such enforcement of the code and related ordinances violated the First Amendment.⁶⁷ The parties settled the pre-*Santopietro* lawsuit.⁶⁸ The settlement included an Interim Stipulated Memorandum of Understanding (“MOU”) that (1) specified that Las Vegas Strip sidewalks and pedestrian

62. *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938).

63. *See Santopietro*, 857 F.3d at 985–86; *Bery*, 97 F.3d at 691.

64. CLARK COUNTY, NEV., CODE OF ORDINANCES tit. 6, § 56.030 (1989).

65. *Santopietro*, 857 F.3d at 985–86.

66. *Id.* at 986 n.3 (citing tit. 6, § 56.030).

67. *Id.* at 985.

68. *Id.*

bridges were traditional public fora, (2) defined “street performer,”⁶⁹ (3) recognized that *Berger*⁷⁰ found street performing to be expressive conduct protected under the First Amendment, and (4) cautioned that while street performing is not a per se violation of the code, street performers in violation of some other code, statute, or law are not immune from prosecution due to their street performer statuses.⁷¹

2. § 20-452 et seq. of the Administrative Code of the City of New York

The vendor law challenged in *Bery* was section 20-452 et seq. of the Administrative Code of the City of New York, also known as the General Vendors Law.⁷² The code “contain[ed] regulatory provisions concerning sale or offering for sale of non-food goods and services in public spaces in the City of New York.”⁷³ The code defined “general vendor” as a “person who ‘hawks, peddles, sells, leases or offers to sell or lease, at retail, [] goods or services . . . in a public space.’”⁷⁴ It effectively “bar[red] visual artists from exhibiting, selling or offering their work for sale in public places in New York City without first obtaining a general vendors license.”⁷⁵

Preceding the *Bery* decisions, a criminal case from the City and County of New York addressed the General Vendors Law in an action brought under

69. “Street performer” was defined as “a member of the general public who engages in any performing art or the playing of any musical instrument, singing or vocalizing, with or without musical accompaniment, and whose performance is not an official part of a sponsored event.” *Id.*

70. *See generally Berger*, 512 F.3d 1029.

71. *Santopietro*, 857 F.3d at 985.

72. *Bery*, 97 F.3d at 691.

73. *Id.* at 692; Petition for a Writ of Certiorari at 8, *City of New York v. Bery*, No. 96-1359, 1997 WL 33557454 at *8 (cert. denied) (“Pursuant to the General Vendors Law, Admin. Code §§ 20-452 et seq., it is unlawful for any person to sell or offer for sale in a public space in the City any goods or services, other than exclusively written matter, without first obtaining a general vendor’s license.”).

74. *Bery*, 97 F.3d at 692 (citing N.Y.C., N.Y., CODE § 20-452 (2018)).

75. *Bery*, 97 F.3d at 691; *see also* Brief of Plaintiffs-Appellants at 3, *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996) (No. 95-9089), 1996 WL 33664649 (stating that “vendors of written works were exempt from the licensing requirements, but expressive artists are not”).

facts similar to those in *Santopietro*.⁷⁶ In *People v. Bissinger*,⁷⁷ “[D]efendant was arrested while taking photographs of people who paid him to do so in front of the painted backdrop which [D]efendant provided. When a police officer asked [D]efendant how much he charged, [D]efendant reportedly said ‘Five dollars.’ He was then arrested for[,] [among other things,] unlicensed general vending.”⁷⁸

Defendant averred that both his photographic compositions, as well as the “street performances” he engaged in to obtain “festive” combinations of his cut-outs and backdrops with paying customers, such as tourists, were protected expression.⁷⁹ Assuming arguendo that his activities fell within the framework of the General Vendors Law, the court concluded that “neither [D]efendant’s photographic endeavors, nor the sale of them, are outside the protection of either State or Federal First Amendment protection of expression.”⁸⁰ Although the *Bery* plaintiffs cited to *Bissinger* in their briefing, the Second Circuit’s opinion did not mention *Bissinger*.⁸¹ Nevertheless, *Bissinger* lends additional support to this Comment’s position that it was incorrect to deny Santopietro’s cross-motion for summary judgment on the basis that payment may have been demanded for a street performance photograph.

C. First Amendment Considerations Regarding Permitting Schemes

Because traditional public fora such as streets, parks, and sidewalks have long been considered important to the public’s freedom of expression, drafters and implementers of permitting schemes must be particularly careful

76. As for similarities to *Bery*, the *Bery* plaintiffs framed it this way: “In [*People v. Bissinger*], the Criminal Court dealt with the precise issue raised in this appeal and found that an artist (photographer’s) First Amendment rights were violated by enforcement of New York City Administrative Code § 20-452. In the case at bar, Appellant Harris is a photographer engaged in precisely the same protected activity as that discussed in *Bissinger*.” Brief of Plaintiffs-Appellants, *supra* note 75, at 5. The *Bery* plaintiffs thus averred that a street performer staging photographs for the general public on the street and artists selling their art objects to the general public on the street should be treated in exactly the same way by the courts when a vendor law is challenged on First Amendment grounds. This Comment agrees.

77. *People v. Bissinger*, 163 Misc. 2d 667, 668 (N.Y. Crim. Ct. 1994).

78. *Id.*

79. *Id.* at 670.

80. *Id.* at 672–73.

81. Brief of Plaintiffs-Appellants, *supra* note 75 at 16; see generally *Bery*, 97 F.3d 689.

when it comes to restricting individuals' or small groups' spontaneous expressive activity in such places.⁸² For example, if a permit is a prerequisite for expression, and permits take time to get filed and approved, spontaneous expression is restricted.⁸³

Prior restraints on speech are, in general, presumptively unconstitutional,⁸⁴ and “the term ‘prior restraint’ has been defined rather broadly, encompassing any attempt by a public official (including both administrative and judicial orders) to prevent speech in advance of its actual expression.”⁸⁵ Requiring a person to inform the government before speaking is a clear example of a prior restraint on speech.⁸⁶ Thus, “[i]n order to overcome the presumption of unconstitutionality, any permit scheme has a significant hurdle to clear.”⁸⁷

82. See *supra* note 26 and accompanying text.

83. *Grossman*, 33 F.3d at 1206 (“Both the procedural hurdle of filling out and submitting a written application, and the temporal hurdle of waiting for the permit to be granted may discourage potential speakers.”). See *Christ v. Town of Ocean City*, 312 F. Supp. 3d 465, 486 (D. Md. 2018) (discussing how Ocean City’s advance registration requirement prevents performers from “spontaneously walk[ing] up to the boardwalk and claim[ing] an unoccupied spot”). Cf. *Blicht*, 260 F. Supp. 3d at 671 (stating that requiring panhandlers to apply for panhandling permits during weekday office hours “constitutes a de facto ban on spontaneous weekend panhandling on the streets and sidewalks”).

84. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”); *In re Dan Farr Prods.*, 874 F.3d 590, 593 (9th Cir. 2017).

85. Marla Brooke Tusk, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202, 1226 (2003).

86. In *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 167 (2002), the Supreme Court expressed its concern about restraints on “spontaneous speech.” There is a “strong interest in protecting the opportunity for spontaneous expression in public fora with respect to individuals or small groups” but “[l]ess conclusively decided is the question whether this First Amendment interest in spontaneous expression is similarly strong with respect to large groups or mass conduct.” *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1046 (9th Cir. 2006) (citing *Vill. of Stratton*, 536 U.S. at 165–66); *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1007–14 (9th Cir. 2003); *Rosen v. Port of Portland*, 641 F.2d 1243, 1247 (9th Cir. 1981) (although the Supreme Court has not specifically addressed the constitutionality of single-speaker and small group permitting schemes, the Ninth Circuit “and almost every other circuit to have considered the issue have refused to uphold registration requirements that apply to individual speakers or small groups in a public forum”); *Berger*, 569 F.3d at 1039.

87. Nathan W. Kellum, *Permit Schemes: Under Current Jurisprudence, What Permits Are Permitted?*, 56 DRAKE L. REV. 381, 392 (2008) (internal citation omitted). See also *Berger*, 569 F.3d at 1037 (quoting *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (internal

III. SANTOPIETRO AND BERY

A. *Santopietro*

As discussed in Part II.B.1, Chapter 6 of the Clark County Code made it “unlawful for any person . . . to operate or conduct business as a temporary store, professional promoter or peddler, solicitor or canvasser without first having procured a license for the same.”⁸⁸ A lawsuit brought as a result of repeated arrests and citations for street performance activities was settled.⁸⁹ The settlement included an MOU specifying that street performance activity taking place in traditional public fora such as the Las Vegas Strip is expressive conduct protected under the First Amendment.⁹⁰

Las Vegas Metropolitan Police officers were subsequently trained that unlicensed street performance activities on the Las Vegas Strip is lawful unless there are “demands” for compensation.⁹¹ Moreover, “under the MOU, Metro officers were instructed to leave street performers alone unless there was a disturbance or safety issue for tourists. Metro’s policy was to leave street performers alone unless they were ‘obviously breaking enforceable laws,’ such as battery and robbery.”⁹²

Michelle Santopietro is an actress who occasionally engages in street performances with her friend Lea Patrick as “sexy cops.”⁹³ The nature and extent of their performance is not described in detail by the district or circuit courts, but it entails wearing “sexy” police officer costumes and posing for

quotation marks omitted)) (“A permitting requirement is a prior restraint on speech and therefore bears a ‘heavy presumption’ against its constitutionality.”).

88. CLARK COUNTY, NEV., CODE OF ORDINANCES tit. 6, § 56.030 (1989).

89. *Id.*

90. *Id.*

91. *Santopietro v. Howell*, 857 F.3d 980, 985 (9th Cir. 2017).

92. Appellant’s Reply Brief at 10, *Santopietro v. Howell*, 857 F.3d 980 (9th Cir. 2017) (No. 14-16324), 2015 WL 1407075 at *10.

93. *Santopietro*, 857 F.3d at 984.

pictures with the public.⁹⁴ There is no dispute that the street performers apply their creative talents by interacting with the public in their “sexy cops” performance personae and creating snapshots of their interactions.⁹⁵

On May 28, 2011, while performing their routine, Santopietro and Patrick were approached by three plainclothes Las Vegas Metropolitan Police officers who were patrolling the Las Vegas Strip.⁹⁶ One of the officers asked how much a picture would cost, and Santopietro responded that she and Patrick would pose for tips.⁹⁷ When asked if this was acceptable, the plainclothes officer responded affirmatively.⁹⁸ The performers then posed for a picture with one of the undercover police officers.⁹⁹

When the officer began moving away from the street performers after posing for the picture, Patrick reminded the officer that he said he would tip.¹⁰⁰ The officer indicated there would be no tip.¹⁰¹ Next, Santopietro and Patrick either politely requested or non-coercively demanded that the officers delete the photo if they were not going to tip; whether it was a request or

94. *Santopietro v. Howell*, 27 F. Supp. 3d 1108, 1109 (D. Nev. 2014); Cy Ryan, *Trial Ordered to Determine if Strip Performer's Rights Violated*, LAS VEGAS SUN (May 24, 2017, 3:27 PM), <https://lasvegassun.com/news/2017/may/24/trial-ordered-to-determine-if-strip-performers-rig/> [<http://perma.cc/WH9T-WU5E>]. Since Santopietro is an actress and the Ninth Circuit states that she and Patrick were “presenting their ‘sexy cop’ routine,” *Santopietro*, 857 F.3d at 984, their activities potentially consist of more than posing for pictures in costume. Because no legal distinction is made between posing for pictures in costume and doing something more, further details regarding the exact nature of their routine are unnecessary to understand the case.

95. *See Santopietro*, 857 F.3d at 993. As for any judgments regarding artistic appreciation of the performance, this quote from a New York criminal court is informative: “Many might share the prosecutor’s lack of ‘artistic’ appreciation for this particular expression and/or message; many might disdain defendant’s ‘performance’ and ‘art’ as ‘hokey’ or ‘touristy’ or worse. Nevertheless, neither defendant’s photographic endeavors, nor the sale of them, are outside the protection of either State or Federal First Amendment protection of expression.” *People v. Bissinger*, 163 Misc. 2d 667, 672–73 (N.Y. Crim. Ct. 1994).

96. *Santopietro*, 857 F.3d at 984.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

demand is disputed.¹⁰² One of the officers asked Santopietro what she was going to do with the camera if they did not tip, and Santopietro responded that she was not going to do anything with the camera.¹⁰³ The officer who had posed for the photo then told Patrick that she could not demand a tip.¹⁰⁴ Patrick agreed that she could not demand a tip but reminded him that he had entered into a verbal agreement to tip.¹⁰⁵

Shortly before or after the statement about the verbal agreement to tip, the officer revealed his badge and Patrick was handcuffed.¹⁰⁶ Santopietro was handcuffed after declaring that the officers could not arrest Patrick because Patrick had done nothing wrong.¹⁰⁷ An officer stated that because Santopietro and Patrick were dressed alike and “doing business together,” Santopietro did not have to “say” anything to justify her arrest.¹⁰⁸ Both were arrested for “doing business without a license in violation of Clark County Code § 6.56.030.”¹⁰⁹ Santopietro’s charges were eventually dropped.¹¹⁰

Santopietro brought eleven causes of action against the arresting officers.¹¹¹ The causes of action included First Amendment free speech violations; Fourth Amendment unreasonable search and seizure violations; and Fourteenth Amendment substantive and procedural due process and equal

102. *Id.* at 984. (“[E]ither Patrick or Santopietro asked Crawford to delete the photo from her camera if Howell was unhappy with it or, according to the Officers, if he was not going to tip. The parties dispute the characterization of the statement, as well as of others allegedly made by Patrick. Specifically, they disagree as to whether the statements were made as polite requests or as ‘demands’—albeit, the Officers concede, ‘non-coercive’ ones.”). The officers did not elaborate regarding what exactly a “non-coercive demand” is. In the MOU discussed *supra* Part II.B.1, “coercive” was the term used for impermissibly aggressive conduct. Appellant’s Reply Brief, *supra* note 92, at 5.

103. *Santopietro*, 857 F.3d at 984.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 985.

109. *Id.*

110. *Id.*

111. *Id.*

protection violations.¹¹² The arresting officers were granted summary judgment because the court concluded they had probable cause to arrest Santopietro by way of her association with Patrick.¹¹³ The court denied Santopietro's cross-motion for partial summary judgment on her claim that her arrest violated her First Amendment rights.¹¹⁴ It concluded that "it is reasonable for an officer to believe that tipping has become involuntary (and thus coerced) when a street performer reminds someone to tip, demands a tip, and asserts that a verbal contract exists that necessitates payment of a tip."¹¹⁵

Santopietro appealed the district court's grant of summary judgment for the officers, asserting, among other things, that she was engaged in fully-protected First Amendment activity at the time of her arrest.¹¹⁶ The officers argued that Santopietro and Patrick were unlawfully engaging in business without a license.¹¹⁷ The Ninth Circuit framed the issue as follows: "Our principal question, then, is whether it is constitutionally permissible under the First Amendment to require that a person hold a business license to conduct the activities in which Santopietro was engaged at the time of her arrest."¹¹⁸

Construing the facts in the light most favorable to Santopietro, the Ninth Circuit found that the District of Nevada erred in granting the officers summary judgment because "it misconceived the scope of the applicable First Amendment protections."¹¹⁹ Because of their training, the officers should have known that the Clark County ordinance did not apply to Santopietro's conduct.¹²⁰ Moreover, no reasonable officer could have inferred

112. *Id.* at 985–86. This Comment focuses on the First Amendment issue.

113. *Santopietro*, 27 F. Supp. 3d at 1111, *rev'd in part*, *Santopietro*, 857 F.3d at 986.

114. *Santopietro*, 857 F.3d at 986.

115. *Id.*

116. *Id.*

117. *Id.* at 987.

118. *Id.*

119. *Id.*

120. *Id.* at 988.

anything other than that the conduct was protected.¹²¹ Construing the facts in the light most favorable to Santopietro, no actions she took justified summary judgment for the officers.¹²² Her statements to the officers were, “at most, active solicitation of tips by a street performer . . . , an impermissible basis under *Berger* for arrest.”¹²³

However, regarding Santopietro’s cross-motion for summary judgment on First Amendment grounds, the Ninth Circuit found that the District of Nevada’s denial was proper because “genuine disputes of fact remain as to (1) which statement Santopietro made, and (2) the nature of the statements made.”¹²⁴ The court concluded that a reasonable jury could find that Santopietro made a “demand” for a tip that was sufficient to fall outside protected noncommercial First Amendment activity and support the arrest.¹²⁵

B. *Bery*

In *Bery*, “individual artists engaged in painting, photography and sculpture” were “arrested, threatened with arrest or harassed by law enforcement officials for attempting to display and sell their creations in public spaces in the City [of New York] without a general vendors license.”¹²⁶ For example, Plaintiff and painter Robert Bery received approximately thirty summonses for violating the ordinance before finally being arrested.¹²⁷ Another plaintiff was “a photographer who [made] his living taking pictures on the streets of New York” who not only “had his camera confiscated by the New York City

121. *Id.* at 993.

122. *Id.* at 992.

123. *Id.*

124. *Id.* at 993.

125. *Id.*

126. *Bery v. City of New York*, 97 F.3d 689, 691 (2d Cir. 1996); see also Christina A. Mathes, *Bery v. New York: Do Artists Have a First Amendment Right to Sell and Display Art in Public Places*, 5 JEFFREY S. MOORAD SPORTS L.J. 103, 105–06, 106 n.21–23 (1998).

127. JOHN HENRY MERRYMAN ET AL., *LAW, ETHICS AND THE VISUAL ARTS* 753 (Aspen Pub., 5th ed. 2007); Bruce Lambert, *Neighborhood Report: Midtown; Speak Freely: Carry a Paintbrush*, N.Y. TIMES (Dec. 24, 1995), <http://www.nytimes.com/1995/12/24/nyregion/neighborhood-report-midtown-speak-freely-carry-a-paintbrush.html> [<https://perma.cc/8X3L-Q577>].

Police” but was “arrested several times and . . . issued summonses for both exhibiting and taking photographs” on the street.¹²⁸

The artists and an artists’ advocacy organization filed motions for a preliminary injunction to enjoin enforcement of the General Vendors Law on the basis that it violated the artists’ First Amendment rights.¹²⁹ “The [United States District Court for the Southern District of New York] ruled that the General Vendors Law was a content-neutral municipal ordinance of general application which violated neither the First nor the Fourteenth Amendment, although its incidental effect was to restrict the sale of art on the sidewalks of New York,”¹³⁰ and the plaintiffs appealed.¹³¹

On appeal, the Second Circuit noted that “[t]he First Amendment shields more than political speech and verbal expression; its protections extend to entertainment[,] [including theater and music].”¹³² The City of New York argued that the artists’ “‘expression’ allegedly impinged by the Regulation is not in fact their art, but their peddling of the art[,]” and further argued that while the artists are “free to display their artwork in public without a license, they simply cannot sell it.”¹³³ The Second Circuit rejected the City’s argument on the basis that the sale of protected materials is also protected.¹³⁴

Furthermore, the street marketing is in fact a part of [the] art. . . . [The artists] believe that art should be available to the public. Anyone, not just the wealthy, should be able to view it and buy it. Artists are part of the ‘real’ world; they struggle to make a living

128. Brief of Plaintiffs-Appellants at 4–5, *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996) (No. 95-9089), 1996 WL 33664649.

129. *Bery*, 97 F.3d at 691.

130. *Id.* at 692–93.

131. *Id.* at 691.

132. *Id.* at 694.

133. *Id.* at 695.

134. *Id.*

and interact with their environments. The sale of art in public places conveys these messages.¹³⁵

The appellate court went on to criticize the trial court's lowering of the proffered art objects' expressive value to that of mere "crafts":

The district court seems to have equated the visual expression involved in these cases with the crafts of the jeweler, the potter and the silversmith who seek to sell their work. While these objects may at times have expressive content, paintings, photographs, prints and sculptures, such as those appellants seek to display and sell in public area of the City, always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection.¹³⁶

Ultimately, the Second Circuit held that "the City's requirement that appellants be licensed in order to sell their artwork in public spaces" was "an unconstitutional infringement of their First Amendment rights."¹³⁷

Notably, the Ninth Circuit has treated the Second Circuit's *Bery* opinion favorably. In a pre-*Santopietro* case from 2010, *Anderson v. City of Hermosa Beach*,¹³⁸ a tattooist brought a First Amendment challenge to a municipal ordinance in the United States District Court for the Central District of California because the ordinance effectively banned all tattoo parlors.¹³⁹ Concluding that tattooing is not protected under the First Amendment, the

135. *Id.* at 696.

136. *Id.* (citations omitted). It is worth emphasizing that they "are entitled to *full* First Amendment protection[.]" *id.* (emphasis added), not the lesser protection given to commercial speech.

137. *Bery*, 97 F.3d at 698. *Bery* has been cited for the proposition that "people may, by creating or selling artistic objects, engage in protected speech." *Mastrovincenzo v. City of New York*, 435 F.3d 78, 91 (2d Cir. 2006) (citing *Bery*, 97 F.3d at 695). However, the sellers must be "genuinely and primarily engaged in artistic self-expression" as opposed to "a chiefly commercial exercise." *Mastrovincenzo*, 435 F.3d at 91.

138. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010).

139. *Id.* at 1055.

Central District of California granted the City's motion for summary judgment and denied the tattooist's motion for summary judgment.¹⁴⁰ On appeal, the Ninth Circuit held as a matter of first impression that "tattooing is purely expressive activity fully protected by the First Amendment."¹⁴¹ Moreover, the *Anderson* opinion also cites *Bery* for the proposition that artists' sale of their artwork constitutes protected speech under the First Amendment.¹⁴² Thus, the court reasoned that "the business of tattooing qualifies as purely expressive activity . . . and is therefore entitled to full constitutional protection . . . subject to reasonable time, place, or manner restrictions."¹⁴³

IV. PROBLEMS AND SUGGESTED ALTERNATIVE APPROACHES

A. *Why Governments Enacting Vendor Laws Should Consider the Adverse Impact on Street Performers*

Cities and counties may have understandable concerns that cause them to enact the type of vendor laws at issue in *Santopietro* and *Bery*. Each has an interest in keeping public fora safe and free from congestion, especially destinations that attract vendors due to the presence of tourists.¹⁴⁴ Tourists are a source of revenue for municipalities, vendors, street performers, and artists alike.¹⁴⁵ Cities and counties also have an interest in preventing "turf wars" or fights between vendors, excessive noise, or harassment of tourists

140. *Id.* at 1055–58.

141. *Id.* at 1055. The court noted *Anderson*'s declaration that "[t]he tattoo designs that are applied by me are individual and unique creative works of visual art, designed by me in collaboration with the person who is to receive the tattoo." *Id.* at 1057. *See also id.* at 1060 ("The tattoo itself, the process of tattooing, and even the business of tattooing are . . . purely expressive activity fully protected by the First Amendment.").

142. *Id.* at 1063.

143. *Id.*

144. *See, e.g.,* *Berger v. City of Seattle*, 512 F.3d 582, 592 (9th Cir. 2009) (discussing concerns about "safety and convenience" of the public stemming from complaints about, among other things, performers blocking access or making noise).

145. *See, e.g.,* NEV. REV. STAT. § 268.810 (1993) (attributing a "progressive decline in the economic growth and vitality of businesses" in certain business districts to "the decrease in tourists and other visitors to these districts"); *Peck v. City of Boston*, 750 F. Supp. 2d 308, 310 (D. Mass. 2010). ("Plaintiff Peck . . . makes his living as a street performer.").

by overzealous vendors.¹⁴⁶ As discussed in Part III.A, the Las Vegas Metropolitan Police Department intended to prevent “disturbance[s] or safety issue[s] for tourists” such as battery and robbery.¹⁴⁷

These concerns, however, can be addressed without implementing and enforcing vendor laws that are overbroad and adversely impact otherwise law-abiding street performers or chill their expressive activity. Bad actors can be deterred and punished through enforcement of traffic ordinances, noise ordinances, criminal codes, health codes, and the like. Otherwise, municipalities permit some bad actors to spoil opportunities for all street performers when the municipalities’ goals can be achieved by means that (1) directly address specific conduct that actually harms the public, but (2) do not negatively impact street performance activities that are not harmful.

Not only are local governments able to protect their interests without implementing and enforcing vendor laws against otherwise law-abiding street performers, but both *Santopietro* and *Bery* make clear the negative impact that vendor laws may have when they reach the expressive activities of street performers and artists.¹⁴⁸ The most obvious is a chilling effect on expression in public fora.¹⁴⁹ Street performers’ ability to make a living as street performers may be adversely impacted, as well as their creative drive.¹⁵⁰ Street performers may be prevented from selling their goods or services,

146. See, e.g., *Berger*, 512 F.3d at 592; *Peck v. City of Las Vegas*, No. 2:15-CV-02070-JAD-PAL, 2016 WL 4697339, at *5 (D. Nev. Sept. 6, 2016).

147. Appellant’s Reply Brief at 10, *Santopietro v. Howell*, 857 F.3d 980 (9th Cir. 2017) (No. 14-16324), 2015 WL 1407075 at *10.

148. See *supra* Parts II.B, III.

149. See, e.g., Brief of Plaintiffs-Appellants at 4, *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996) (No. 95-9089), 1996 WL 33664649 (“Some of the Appellants have been arrested and prosecuted for displaying their art work in violation of GVL licensing regulations. Some of the Appellants would like to display their artwork, but are terrified of the threat of arrest and prosecution, and they are thereby chilled from exercising their rights.”); *id.* at 5 (“Appellant Pascual believes that the constant threats and intimidations [by police officers enforcing the vendor law] have had a chilling effect on the exercise of his expression in public forums and have had adverse effects on his creativity and his ability to survive as an artist.”).

150. See, e.g., *id.* at 5 (“Appellant Pascual believes that the constant threats and intimidations [by police officers enforcing the vendor law] have had a chilling effect on the exercise of his expression in public forums and have had adverse effects on his creativity and his ability to survive as an artist.”).

fined or jailed, have cameras or other supplies confiscated or destroyed, or face legal battles if they choose to protect their rights in court.¹⁵¹

The chilling effect of enforcing vendor laws against non-harmful street performers also has a negative impact on the public as well as the business or tourist districts where street performers tend to congregate. The public's ability to personally engage with these artists on an average day is at worst stripped away entirely, or at least limited. Additionally, the aesthetic environment of public spaces, including tourist destinations known for their street performers, is dulled when municipalities target or otherwise chill street performance activities.¹⁵² For all these reasons, towns, cities, and counties enacting or enforcing vendor laws should be mindful of the potential impact on street performers.

B. *Where the Ninth Circuit Went Wrong in Santopietro*

The Second Circuit's reasoning in *Bery* suggests that a different analytical path and outcome would have been prudent in *Santopietro*. First, this section discusses how *Santopietro* and *Bery* had similar facts, and similar challenges to similar laws. Second, it discusses how the Ninth Circuit and the Second Circuit arrived at different conclusions to similar questions in those cases because the analyses undertaken by the courts substantially differed. Third, this section proposes that the question of "whether Santopietro's action went beyond protected expression and moved into the realm of [regulable] business activity" was not adequately analyzed by the Ninth Circuit.¹⁵³

Santopietro and *Bery* had similar facts.¹⁵⁴ In *Santopietro*, street performers were subjected to adverse treatment by law enforcement officers for

151. See, e.g., *People v. Bissinger*, 163 Misc. 2d 667, 668 (N.Y. Crim. Ct. 1994) (street performer arrested); *id.* at 669 (backdrop and camera seized from street performer).

152. See, e.g., *Harman v. City of Santa Cruz*, 261 F. Supp. 3d 1031, 1037 (N.D. Cal. 2017) ("The Pacific Avenue sidewalks are characteristically busy with a variety of street performers . . . which often results in a lively, loud, and even chaotic environment that has come to be considered part of 'the Santa Cruz culture' and something of 'a staple of the downtown experience.'"); *Chase v. Town of Ocean City*, 825 F. Supp. 2d 599, 604 (D. Md. 2011) ("Street performers are among the boardwalk's many attractions. Indeed, Mayor Meehan acknowledged that street performers are part of the 'experience' that draws visitors to the boardwalk."); *Peck v. City of Boston*, 750 F. Supp. 2d 308, 310 (D. Mass. 2010) ("Boston . . . is well-known for street performers.").

153. *Santopietro v. Howell*, 857 F.3d 980, 988 (9th Cir. 2017).

154. See *supra* Part III (discussing the background of *Santopietro* and *Bery*).

allegedly selling their goods or services in a traditional public forum.¹⁵⁵ In *Bery*, artists were subjected to adverse treatment by law enforcement officers for selling their goods or services in a traditional public forum.¹⁵⁶

Santopietro and *Bery* had similar challenges to similar laws.¹⁵⁷ In *Santopietro*, the Ninth Circuit addressed an alleged First Amendment violation stemming from enforcement of a county's vendor permitting scheme.¹⁵⁸ There, the ordinance made it unlawful for a person to conduct business as a peddler, solicitor, temporary store, or the like in public spaces without first procuring a license to do so.¹⁵⁹ In *Bery*, the Second Circuit addressed a First Amendment challenge to a city's vendor permitting scheme.¹⁶⁰ There, the ordinance made it unlawful for a person to sell goods or services as a peddler, solicitor, hawker, or the like in public spaces without first procuring a license to do so.¹⁶¹

Different analyses led to different conclusions in *Santopietro* and *Bery*.¹⁶² When a permitting ordinance is challenged on First Amendment grounds, the court must first determine whether the activity is protected expression under the First Amendment.¹⁶³ If it is protected expressive activity, the court then determines the level of scrutiny that applies.¹⁶⁴ Next, the court determines whether the permitting ordinance survives such scrutiny.¹⁶⁵ In

155. *See supra* Part III.A.

156. *See supra* Part III.B.

157. *See supra* Part II.B (discussing the ordinances challenged in *Santopietro* and *Bery*), Part III (discussing the procedural background of *Santopietro* and *Bery*).

158. *Santopietro*, 857 F.3d at 986–87.

159. *Id.* at 986 n.3. (citing CLARK COUNTY, NEV., CODE OF ORDINANCES tit. 6, § 56.030 (1989)).

160. *Bery*, 97 F.3d at 691–92.

161. *Id.* at 692 (citing N.Y.C., N.Y., CODE § 20-452 (2018)).

162. *See supra* Part III.

163. *See, e.g., supra* Part II.A.2; *Blitch v. City of Slidell*, 260 F. Supp. 3d 656, 664 (E.D. La. 2017).

164. *See, e.g., supra* Part II.A.2; *Blitch*, 260 F. Supp. 3d at 664.

165. *See, e.g., supra* Part II.A.2; *Blitch*, 260 F. Supp. 3d at 664.

Santopietro, the Ninth Circuit affirmed the denial of the plaintiff's motion for summary judgment on the basis that (1) a reasonable jury could conclude that the plaintiff demanded, rather than requested, payment for her goods or services in a public space, and (2) such a demand, if sufficiently assertive or forceful, could support the validity of her arrest because it would not be fully protected under the First Amendment.¹⁶⁶ Therefore, the Ninth Circuit's analysis in *Santopietro* ended at the threshold matter of whether the activity is protected expression under the First Amendment. As a result, the Ninth Circuit did not continue to the next two steps of the analysis: determining the level of scrutiny and whether the ordinance overcomes that scrutiny.

In *Bery*, the Second Circuit reversed the denial of the plaintiffs' motion for summary judgment on the basis that the plaintiffs' sale of their goods or services in public spaces was fully protected under the First Amendment.¹⁶⁷ Therefore, demands for payment could not support the validity of the artists' arrests unless the vendor law satisfied either strict scrutiny or the reasonable time, place, and manner test. The court was not compelled to determine which of these two levels of scrutiny the ordinance should be subjected to because failing under the "less restrictive yardstick" that is the reasonable time, place, or manner test means that the ordinance would necessarily fail under the more restrictive yardstick that is strict scrutiny.¹⁶⁸ The ordinance did not satisfy the reasonable time, place, and manner test.¹⁶⁹

The Ninth Circuit erred during the first step of its analysis in *Santopietro*. The court should have held, like the Second Circuit did in *Bery*, that the street performer's alleged attempt to sell her goods or services in a traditional public forum was fully protected under the First Amendment.¹⁷⁰ In its pre-*Santopietro Anderson* opinion from 2010, the Ninth Circuit cited *Bery* for the proposition that artists' sale of their artwork constitutes protected speech under the First Amendment.¹⁷¹ Since it has long been settled that entertainment and "artistic expression, including acts by street perform-

166. *Santopietro*, 857 F.3d at 993.

167. *See supra* Part III.B.

168. *Bery*, 97 F.3d at 697.

169. *Id.*

170. *Id.* at 698.

171. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1063 (9th Cir. 2010).

ers, fall[] within the protection of the First Amendment's free speech guarantee[,]”¹⁷² and because the Ninth Circuit, in *Anderson*, agreed with *Bery* that artists' sales are protected,¹⁷³ the Ninth Circuit should have concluded that street performers' sales are likewise protected.

Instead, the *Santopietro* opinion makes the non-committal observation that it is “likely” that “the sale of a snapshot of a performer's protected street performance is . . . protected in itself[,]” like “the sale of an artist's painting.”¹⁷⁴ The Ninth Circuit fails to explain why, in spite of its *Anderson* opinion approvingly citing *Bery*, it is only “likely” that the sale of such a snapshot is fully First Amendment-protected.¹⁷⁵ Yet, the court goes on to opine that a restriction on a non-expressive physical transaction of money is distinct from a restriction on protected expression, and that it is permissible for such a transaction to have an incidental effect on expression.¹⁷⁶ Notably, the Southern District of New York made an “incidental effect” ruling in *Bery* which was reversed by the Second Circuit.¹⁷⁷ This Comment will now discuss several reasons why the Ninth Circuit's observation about transactions does not justify affirming the denial of Santopietro's partial motion for summary judgment.

First and most importantly, the Ninth Circuit's point about physical transactions of money should have no effect on the outcome of Santopietro's case, since no physical transaction of money ever occurred between the “sexy cops” and the police officers.¹⁷⁸ The court stated that the determinative factual dispute in the case is about statements, not the physical transaction of money: “genuine disputes of fact remain as to (1) which statements Santopietro made, and (2) the nature of the statements made.”¹⁷⁹ Second, even

172. *Peck v. City of Boston*, 750 F. Supp. 2d 308, 313 (D. Mass. 2010).

173. *See Anderson*, 621 F.3d at 1063.

174. *Santopietro*, 857 F.3d at 993.

175. *Id.*

176. *Id.*

177. *Bery*, 97 F.3d at 693 (“incidental effect”); *id.* at 699 (reversing the Southern District of New York's judgment); *see also id.* at 695–96 (rejecting the City's argument that the sale of art is non-expressive conduct which is not constitutionally protected).

178. *See infra* note 173 and accompanying text.

179. *Santopietro*, 857 F.3d at 993.

if such a transaction—the exchange of money for a snapshot—did occur, it would be protected since the “sale” of a street performer’s snapshot is fully protected under the First Amendment and “the exchange of a commodity for money” is the definition of “sale.”¹⁸⁰ Third, any exchange of a snapshot for money could not be categorized fairly as a non-expressive transaction having an “incidental” effect on expression because, in and of itself, “[t]he sale of art in public places conveys . . . messages.”¹⁸¹ The exchange is expression.

Santopietro’s alleged demand for payment could not fall outside fully-protected First Amendment activity; therefore, the Ninth Circuit should have subjected the vendor permitting scheme in *Santopietro* to a reasonable time, place, and manner analysis just like the vendor permitting scheme in *Bery*. Subjected to a reasonable time, place, and manner analysis, Chapter 6 of the Clark County Code does not pass constitutional muster under the First Amendment because it is not sufficiently narrowly tailored, nor does it leave open ample alternative methods for communication of street performances such as Santopietro’s “sexy cop” routine. If the Ninth Circuit in *Santopietro* had recognized that, regarding First Amendment protection, the distinction between street performers’ solicitation of tips and demands for payment is a distinction without a difference, the court would have then found that the ordinance in *Santopietro* is not sufficiently narrowly tailored for much the same reason as the ordinance under scrutiny in *Berger*. In *Berger*, the Ninth Circuit held that the ordinance at issue was “not sufficiently narrowly tailored to meet the standard for a valid time, place, and manner regulation.”¹⁸² The Ninth Circuit reasoned that (1) “the Center’s permitting requirement applies to individual speakers who wish to express themselves in a public forum[,]” (2) “[t]he requirement is not limited to only those performers who seek to attract (or who do, in fact, attract) a crowd of a sufficiently large size[,]” and (3) the Ninth Circuit, and “almost every other circuit to have considered the issue[,] [has] refused to uphold registration requirements that apply to individual speakers or small groups in a public forum.”¹⁸³ Because Chapter 6 of the Clark County Code likewise applies to individual and small

180. *Sale*, OXFORD DICTIONARIES, <https://oxforddictionaries.com/definition/sale> [https://perma.cc/QA4Y-VV8W].

181. *Bery*, 97 F.3d at 698.

182. *Berger v. City of Seattle*, 569 F.3d 1029, 1039–40 (9th Cir. 2009).

183. *Id.*

group street performers who do not draw sufficiently large crowds,¹⁸⁴ it is not sufficiently narrowly tailored.¹⁸⁵ Although individual vendors not engaged in sales that are fully-protected by the First Amendment might be covered lawfully by Chapter 6 of the Clark County code, this Comment proposes that street performers' sales are part of their fully-protected expression.

In addition to not being sufficiently narrowly tailored, Chapter 6 of the Clark County Code does not leave open ample alternative methods for communication of street performances such as Santopietro's. Like the artists in *Bery*, street performers "are interested in attracting and communicating with the [person] on the street" and "[t]he sidewalks of the [c]ity must be available for [them] to reach their public audience."¹⁸⁶ Similar to the plaintiff in *Bissinger*, whose street performance involved taking photos of tourists in front of a customized backdrop on a busy New York street, the "sights, sounds and atmosphere" of the "sexy cop" routine taking place on the Las Vegas Strip are "elements of [Santopietro's] expression . . . a deprivation [of] which might be compared to depriving certain types of artists of a paint and brush."¹⁸⁷ Santopietro, no less than the artists in *Bery* or the plaintiff in *Bissinger*, engaged in art that is "locationally dependent or site specific."¹⁸⁸ As such, there are no ample alternative methods for communication of Santopietro and Patrick's "sexy cop" routine which includes the Las Vegas Strip

184. Nothing suggests that anyone other than the few undercover Las Vegas Metropolitan Police Officers were interacting with Santopietro and Patrick at the time of the incident resulting in their arrest.

185. Like the struck-down ordinance in *Bery*, the ordinance here requires individuals and small groups "to inform the government of their intent to engage in expressive activity in a public forum, a requirement that neither [the Ninth Circuit] nor the Supreme Court has *ever* countenanced." *Berger*, 569 F.3d at 1048.

186. *Bery*, 97 F.3d at 698.

187. *Bissinger*, 163 Misc. 2d at 675.

188. Randall Bezanson & Andrew Finkelman, *Trespassory Art*, 43 U. MICH. J. L. REFORM 245, 247 (2010) (discussing how artists expressing themselves through a range of methods such as "painting, sculpture and mosaic, music, theatre, or merely the human body" can share in common site-specificity that "challeng[es] our conventional ideas of location, time, ownership, and artistic expression" and "gives new meaning to a park bench, to a billboard, to a wall, to space itself"). *See also Bery*, 97 F.3d at 698 ("The public display and sale of artwork is a form of communication between the artist and the public not possible in the enclosed, separated spaces of galleries and museums.").

atmosphere as one of its elements and is intended for Las Vegas Strip pedestrians. Indeed, the Ninth Circuit has long held that “[a]n alternative is not ample if the speaker is not permitted to reach the ‘intended audience.’”¹⁸⁹

If requiring artists in New York to be licensed to sell their art in public spaces is an unconstitutional infringement of their First Amendment rights, requiring street performers in Las Vegas to be licensed to sell their art should likewise be an unconstitutional infringement of their First Amendment rights. Street performances are just as expressive as paintings, photographs, prints, and sculptures being sold on the street, and are likewise distinguishable from the crafts of the potter and the silversmith, which are more utilitarian, functional, or ornamental than communicative.¹⁹⁰ Inherent expressiveness in street performances and artwork is “entitled to full First Amendment protection.”¹⁹¹ Full First Amendment protection should extend to street performers such as Santopietro regardless of whether the performers demand payment for their art, thereby selling it, rather than ask for voluntary tips.

V. CONCLUSION

The title “street performers” makes clear that such artists must perform their expressive activity on the street. Streets are the “quintessential public fora”¹⁹² and therefore expressive activity occurring on the streets is “subject to the highest scrutiny” by courts in order to protect the First Amendment freedom of expression from unacceptable governmental interference.¹⁹³ It has long been settled that entertainment and “artistic expression, including

189. *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990); *see also Bery*, 97 F.3d at 698 (“The sidewalks of the City must be available . . . to reach their public audience.”).

190. Courts often group together various types of street performers and artists as being engaged in expressive conduct equally protected under the First Amendment. *See, e.g., Christ v. Town of Ocean City*, 312 F. Supp.3d 465, 476, 479, 491 (D. Md. 2018). In *Christ*, the plaintiffs’ boardwalk performances ranged from painting among pedestrians to interacting with pedestrians in a gold costume. *Id.* at 476. The court treated all their activities, from drawing to miming, as “fully protected speech under the First Amendment and covered by [the boardwalk performing and vending regulation’s] definition of ‘street performer.’” *Id.* at 479, 491.

191. *Bery*, 97 F.3d at 696.

192. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 676 (1992) (describing “public streets” as “the quintessential public fora” where regulation can only be sustained if “narrowly tailored to support a compelling state interest”).

193. *Id.* at 678.

acts by street performers, fall[] within the protection of the First Amendment's free speech guarantee."¹⁹⁴ Any adverse impact on street performers' ability to perform on the street, therefore, weakens the core of their protected expressive activity.

As discussed, vendor permitting laws have indeed had an adverse impact on street performers and chipped away at the core of their expressive activity. By enforcing other types of ordinances such as traffic, noise, criminal, and health ordinances, local governments' understandable concern for the public's safety and well-being can be addressed without implementing and enforcing vendor laws in a manner that adversely impacts otherwise law-abiding street performers and chills their expressive activity.

Local governments and law enforcement officers are not the only ones creating undue problems for street performers. As discussed in Part III.A and Part IV.B, the Ninth Circuit did so as well by drawing an unfair and unreasonable line between requests for tips and demands for payment.¹⁹⁵ Under the Ninth Circuit's *Santopietro* rationale, on the "requests for tips" side is full constitutional protection;¹⁹⁶ on the "demands for payment" side is something less.¹⁹⁷ This distinction should not be outcome-determinative in First Amendment cases like *Santopietro*. Street performers should be able to solicit sales as well as complete transactions without first obtaining a permit from the government, just as artists are able to do. Courts, lawmakers, and law enforcement officials should work toward correcting the preventable adverse impact of vendor licensing laws on street performers' expressive conduct.

194. *Peck v. City of Boston*, 750 F. Supp. 2d 308, 313 (D. Mass. 2010).

195. *See supra* Part III.A and Part IV.B.

196. *See Santopietro v. Howell*, 857 F.3d 980, 993 (9th Cir. 2017).

197. *Id.*