

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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LARIME TAYLOR,

Plaintiff(s),

v.

LAS VEGAS METROPOLITAN POLICE  
DEPARTMENT, et al.,

Defendant(s).

Case No. 2:19-CV-995 JCM (NJK)

TEMPORARY RESTRAINING ORDER

Presently before the court is defendant Clark County's ("the county") motion to dismiss plaintiff's amended complaint. (ECF No. 15). Plaintiff Larime Taylor ("plaintiff") filed a response (ECF No. 61), to which the county replied (ECF No. 74).

Also before the court is defendants Las Vegas Metropolitan Police Department ("LVMPD"), Sheriff Joseph Lombardo, Officer Theron Young, Officer Matthew Kravetz, Officer Thomas Albright, Officer Janette Gutierrez, Officer Clint Owensby, Officer Robert Thorne, Officer Jacob Bittner, Officer Gerardo Reyes, Officer Morgan McClary, Office Jake Freeman, and Officer Christopher Longi's (collectively the "LVMPD defendants") motion to exceed the page limit on its motion to dismiss. (ECF No. 16). Plaintiff filed a response (ECF No. 35), to which the LVMPD defendants replied (ECF No. 39).

Also before the court is the LVMPD defendants' motion to dismiss plaintiff's amended complaint. (ECF No. 21). Plaintiff filed a response (ECF No. 60), to which the LVMPD defendants did not reply.

Also before the court is plaintiff's motion for temporary restraining order. (ECF No. 78).

Also before the court is plaintiff's motion for preliminary injunction. (ECF No. 79).

1     **I.     Background**

2             The instant action arises from the numerous interactions plaintiff has had with LVMPD  
 3 officers while plaintiff was “live drawing” on the Las Vegas Strip. (ECF No. 58). Plaintiff has  
 4 arthrogryposis multiplex congenita (“AMC”), a congenital disease that affects the development  
 5 and mobility of the joints in his arms and legs, requiring him to use a wheelchair. *Id.* at 7. For  
 6 the past seven years, plaintiff has been live drawing on a large sidewalk in front of the Bellagio  
 7 fountains on Las Vegas Boulevard. *Id.* In order to live draw, plaintiff backs his wheelchair  
 8 against the guardrail that abuts Las Vegas Boulevard and uses his mouth to draw on a small  
 9 portable table with a limited number of art supplies. *Id.* Although he does not sell his drawings,  
 10 plaintiff accepts tips from passersby. *Id.* Plaintiff live drew on the Las Vegas Strip without issue  
 11 from 2012, until April 2017. *Id.* at 11. Beginning in April 2017, however, LVMPD officers  
 12 allegedly “began harassing and citing street performers in the Las Vegas Resort District,  
 13 including [plaintiff].” *Id.* at 12.

14             Pursuant to Clark County Code (“CCC”) § 16.11.090, pedestrians who violate the  
 15 provisions of chapter 16 of the CCC are guilty of a misdemeanor. Clark Cnty., Nev. Code of  
 16 Ordinances § 16.11.090. Section 16.11.035 provides as follows:

17                     It is the police of Clark County that no obstructive use, other than a  
 18 permitted obstructive use, shall be permitted upon any public  
 19 sidewalk of the resort district of the Las Vegas Valley if the  
 obstructive use, if allowed to occur, would:

- 20                     (a) Cause the LOS for the sidewalk to decline below LOS C; or  
 21                     (b) Result in a significant threat to or degradation of the safety of  
 pedestrians.

22             Clark Cnty., Nev. Code of Ordinances § 16.11.035. Further, § 16.11.070 states, in pertinent part,  
 23 that:

24                     No equipment, materials, parcels, containers, packages, bundles or  
 25 other property may be stored, placed or abandoned in or on the  
 26 public sidewalk. This provision shall not apply to materials or  
 27 property held or stored in a carry bag or pack which is actually  
 carried by a pedestrian or items such as a musical instrument case  
 28 or a backpack which is temporarily placed next to a street  
 performer for that street performer's use unless said musical  
 instrument case or backpack actually obstructs the sidewalk in  
 violation of this chapter[.]

1 Clark Cnty., Nev. Code of Ordinances § 16.11.070.

2 Because of his small portable table, LVMPD officers have cited plaintiff for obstructive  
3 use of the sidewalk ten times in the last two years. *Id.* at 12–18. LVMPD officers cited plaintiff  
4 on June 11, June 29, July 26, and September 7, 2017; February 16, May 3, and July 28, 2018;  
5 and July 12, 14, and 26, 2019. *Id.* In addition to citing plaintiff, LVMPD officers seized  
6 plaintiff’s table on June 11 and September 7, 2017.<sup>1</sup> *Id.* at 12, 15. Plaintiff further alleges that  
7 LVMPD officers interrupted his performance on June 16 and 19 and October 21, 2019. *Id.* at  
8 19–20<sup>2</sup>; (*see also* ECF No. 78 at 5).

9 With one exception, each of plaintiff’s citations were dismissed. *Id.* at 12–18. The July  
10 26, 2017, citation was the sole exception. *Id.* at 13–14. In that case, the Las Vegas Justice Court  
11 found plaintiff guilty of obstructive use of a public sidewalk after a bench trial. *Id.* at 13. On  
12 appeal to the district court, however, the district court judge vacated plaintiff’s conviction and  
13 remanded the case. *Id.* at 14. The district court issued an order on December 21, 2018, holding  
14 that (1) there was insufficient evidence to prove that plaintiff was actually obstructing the  
15 sidewalk, and (2) CCC § 16.11.070 was unconstitutional as applied to plaintiff because the  
16 regulation, coupled with his AMC, did not provide ample alternative channels for him to engage  
17 in his live drawing. *Id.*

18 Just prior to being issued a citation on July 12, 2019, plaintiff discussed his history of  
19 citations and his successful appeal with Officer Bittner. *Id.* at 17. “Officer Bittner explained that  
20 [LVMPD] was enforcing the [c]ode’s obstruction provisions against artists and performers as a  
21 department-wide policy, and that he was obligated to issue a citation until a court ordered his  
22 superiors to change the policy.” *Id.* On July 14, 2019, Officer Freeman told plaintiff that “until  
23 an injunction was issued[,] he was obligated to follow [LVMPD]’s policy of ticketing street  
24 performers.” *Id.* at 18.

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27 <sup>1</sup> Notably, LVMPD officers seized a different table on each occasion because the table  
was never returned to plaintiff after the June 11, 2017, seizure. (ECF No. 58 at 37).

28 <sup>2</sup> The various LVMPD officers named as defendants are those who interrupted plaintiff’s  
live drawing, whether or not plaintiff received a citation as a result.

1 After his storied history of chapter-16-related citations, plaintiff filed the instant action  
 2 against LVMPD, its officers, Sherriff Lombardo, and the county for violating his First, Fourth,  
 3 Fifth, and Fourteenth Amendment rights; violating the Americans with Disabilities Act  
 4 (“ADA”); violating the Nevada Constitution; negligent training, supervision, and retention; and  
 5 conversion.

## 6 **II. Legal Standard**

### 7 *1. Injunctive relief*

8 Under Federal Rule of Civil Procedure 65, a court may issue a temporary restraining  
 9 order when the moving party provides specific facts showing that immediate and irreparable  
 10 injury, loss, or damage will result before the adverse party’s opposition to a motion for  
 11 preliminary injunction can be heard. Fed. R. Civ. P. 65. “Injunctive relief is an extraordinary  
 12 remedy and it will not be granted absent a showing of probable success on the merits and the  
 13 possibility of irreparable injury should it not be granted.” *Shelton v. Nat’l Collegiate Athletic*  
 14 *Assoc.*, 539 F.2d 1197, 1199 (9th Cir. 1976). “The purpose of a temporary restraining order is to  
 15 preserve the status quo before a preliminary injunction hearing may be held; its provisional  
 16 remedial nature is designed merely to prevent irreparable loss of rights prior to judgment.” *Estes*  
 17 *v. Gaston*, No. 2:12-cv-1853-JCM-VCF, 2012 WL 5839490, at \*2 (D. Nev. Nov. 16, 2012); *see*  
 18 *also Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984).

19 This court considers the following elements in determining whether to issue a temporary  
 20 restraining order and preliminary injunction: (1) a likelihood of success on the merits; (2) a  
 21 likelihood of irreparable injury if preliminary relief is not granted; (3) balance of hardships; and  
 22 (4) advancement of the public interest. *Winter v. N.R.D.C.*, 555 U.S. 7, 20 (2008); *Stanley v.*  
 23 *Univ. of S. California*, 13 F.3d 1313, 1319 (9th Cir. 1994); Fed. R. Civ. P. 65 (governing both  
 24 temporary restraining orders and preliminary injunctions).

25 The party seeking the injunction must satisfy each element; however, “the elements of the  
 26 preliminary injunction test are balanced, so that a stronger showing of one element may offset a  
 27 weaker showing of another.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th  
 28 Cir. 2011). “Serious questions going to the merits and a balance of hardships that tips sharply

1 towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also  
 2 shows that there is a likelihood of irreparable injury and that the injunction is in the public  
 3 interest.” *Id.* at 1135 (internal quotations marks omitted).

4 Finally, to obtain injunctive relief, plaintiff must show it is “under threat of suffering  
 5 ‘injury in fact’ that is concrete and particularized; the threat must be actual and imminent, not  
 6 conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant;  
 7 and it must be likely that a favorable judicial decision will prevent or redress the injury.” *Ctr. for*  
 8 *Food Safety v. Vilsack*, 636 F.3d 1166, 1171 (9th Cir. 2011) (quoting *Summers v. Earth Island*  
 9 *Inst.*, 555 U.S. 488, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009)).

## 10 2. Motion to dismiss

11 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief  
 12 can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short  
 13 and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.  
 14 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not  
 15 require detailed factual allegations, it demands “more than labels and conclusions” or a  
 16 “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
 17 2009) (citation omitted).

18 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550  
 19 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual  
 20 matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citation  
 21 omitted).

22 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply  
 23 when considering motions to dismiss. First, the court must accept as true all well-pled factual  
 24 allegations in the complaint; however, legal conclusions are not entitled to the assumption of  
 25 truth. *Id.* at 678-79. Mere recitals of the elements of a cause of action, supported only by  
 26 conclusory statements, do not suffice. *Id.*

27 Second, the court must consider whether the factual allegations in the complaint allege a  
 28 plausible claim for relief. *Id.* at 679. A claim is facially plausible when plaintiff’s complaint

1 alleges facts that allow the court to draw a reasonable inference that defendant is liable for the  
2 alleged misconduct. *Id.* at 678.

3 Where the complaint does not permit the court to infer more than the mere possibility of  
4 misconduct, the complaint has “alleged—but it has not shown—that the pleader is entitled to  
5 relief.” *Id.* at 679. When the allegations in a complaint have not crossed the line from  
6 conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.

7 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d  
8 1202, 1216 (9th Cir. 2011). The *Starr* court held,

9 First, to be entitled to the presumption of truth, allegations in a  
10 complaint or counterclaim may not simply recite the elements of a  
11 cause of action, but must contain sufficient allegations of  
12 underlying facts to give fair notice and to enable the opposing  
13 party to defend itself effectively. Second, the factual allegations  
that are taken as true must plausibly suggest an entitlement to  
relief, such that it is not unfair to require the opposing party to be  
subjected to the expense of discovery and continued litigation.

14 *Id.*

### 15 **III. Discussion**

16 As an initial matter, the court dismisses the county as a defendant from claims 1, 2, 3, and  
17 6 pursuant to plaintiff’s stipulation. (ECF No. 61 at 1 n.2). Similarly, the court dismisses all  
18 claims against the LVMPD officers in their official capacities and dismisses Sheriff Lombardo as  
19 a defendant in claim 2, consistent with the plaintiff’s stipulation. (ECF No. 60 at 2 n.4, 23 n.20).

20 Amended pleadings supersede the original pleading. *Ferdik v. Bonzelet*, 963 F.2d 1258,  
21 1262 (9th Cir. 1992). Consequently, filing an amended complaint will ordinarily moot a pending  
22 motion to dismiss the original complaint. *See, e.g., MMG Ins. Co. v. Podiatry Ins. Co. of Am.*,  
23 263 F. Supp. 3d 327, 331 (D. Me. 2017) (“Typically, this amendment would render the pending  
24 motion to dismiss moot.”); *Oliver v. Alcoa, Inc.*, No. C16-0741JLR, 2016 WL 4734310, at \*2  
25 (W.D. Wash. Sept. 12, 2016); *Williamson v. Sacramento Mortgage, Inc.*, No. CIV. S-10-2600  
26 KJM, 2011 WL 4591098, at \*1 (E.D. Cal. Sept. 30, 2011), *as amended* (Oct. 11, 2011).

27 However, there is an exception to the general rule. When the amended complaint is  
28 substantially identical to the original complaint, the court can adjudicate the pending motion to

dismiss as it pertains to the amended complaint. *Mata-Cuellar v. Tennessee Dep't of Safety*, No. 3:10-0619, 2010 WL 3122635, at \*2 (M.D. Tenn. Aug. 6, 2010). As Judge Woodcock in the United States District Court for the District of Maine explained:

It would be futile to dismiss [defendants'] motion without prejudice, only to have [defendants] refile another motion to dismiss with effectively the same arguments. As the later amendment of the [c]omplaint does not affect the substance of the pending motion to dismiss, the [c]ourt considers the [a]mended [c]omplaint as the operative complaint for purposes of the motion.

*MMG Ins. Co.*, 263 F. Supp. 3d at 331.

Accordingly, the court will first address the pending motions for a temporary restraining order and preliminary injunction. The court will then address the defendants' respective motions to dismiss the first amended complaint as they pertain to the identical second amended complaint.<sup>3</sup>

### *1. Injunctive relief*

#### *A. Likelihood of success on the merits*

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Plaintiffs may bring two kinds of First Amendment claims challenging the constitutionality of a law: a "facial" and an "as-applied" challenge. *See Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1033 (9th Cir. 2006). The Ninth Circuit has described facial challenges as follows:

Facial constitutional challenges come in two varieties: First, a plaintiff seeking to vindicate his own constitutional rights may argue that an ordinance is unconstitutionally vague or . . . impermissibly restricts a protected activity. Second, an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court.

*Id.* (citations and quotation marks omitted). A facial challenge "may be paired with the more common as-applied challenge, where a plaintiff argues that the law is unconstitutional as applied to his own speech or expressive conduct." *Id.* at 1034.

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<sup>3</sup> The only difference between the first and second amended complaints is the identification of two LVMPD officers.



Here, plaintiff brings both facial and as-applied challenges against CCC §§ 16.11.035, 16.11.070, and 16.11.090. The court will address each in turn.<sup>4</sup>

*i. Facial challenge*

When addressing First Amendment challenges to a statute, “the appropriate level of scrutiny is initially tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content.” *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is “justified without reference to the content of the regulated speech.”

*Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations omitted).

Statutes that address conduct may nonetheless curtail “expressive activity.” The court must determine whether the challenged regulation targets “purely expressive activity” or “conduct that merely contains an expressive component.” *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1059 (9th Cir. 2010) (citing *United States v. O’Brien*, 391 U.S. 367, 376 (1968); *Cohen v. Cal.*, 403 U.S. 15, 18 (1971)).

Conduct with an expressive component includes “processes that do *not* produce pure expression but rather produce symbolic conduct that, ‘on its face, does not necessarily convey a message.’” *Id.* (quoting *Cohen*, 403 U.S. at 18). If the regulation addresses conduct with an expressive component, “then it is entitled to constitutional protection only if it is ‘sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.’” *Id.* (quoting *Spence v. Wash.*, 418 U.S. 405, 409 (1974)).

Conduct possesses sufficient communicative elements “to bring the First Amendment into play” when “an intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by

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<sup>4</sup> Plaintiff’s motion “focuses on [his] central First Amendment claim.” (ECF No. 78 at 2 n.6). Accordingly, the court limits its injunctive relief analysis to plaintiff’s First Amendment claim.



those who viewed it.” *Tex. v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Cohen*, 403 U.S. at 410–11) (alterations omitted). For instance, the Supreme Court has found that flag burning, *Johnson*, 491 U.S. at 404–07; placing a peace sign on the flag, *Spence v. Wash.*, 418 U.S. 405, 409–410 (1974); and wearing a black armband in protest of the Vietnam War, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969), are all instances of expressive conduct.

The Supreme Court “has held that when, as here, ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *Wayte v. United States*, 470 U.S. 598, 611 (1985) (quoting *O’Brien*, 391 U.S. at 376). If the conduct warrants First Amendment protection, the court applies the *O’Brien* four-part test, which is “a less stringent test than those established for regulations of pure speech,” to determine the constitutionality of the statute. *Anderson*, 621 F.3d at 1059.

[A] government regulation is sufficiently justified [1] if it is within the constitutional power of the [g]overnment; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*O’Brien*, 391 U.S. at 377.

The Ninth Circuit’s holding in *A.C.L.U. of Nevada v. City of Las Vegas* is instructive. *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006) (“*A.C.L.U. II*”); *see also A.C.L.U. of Nevada v. City of Las Vegas*, 333 F.3d 1092 (9th Cir. 2003) (“*A.C.L.U. I*”), *cert. denied*, 540 U.S. 1110 (2004). In *A.C.L.U. I* and *A.C.L.U. II*, plaintiffs challenged § 11.68.100(H) of the Las Vegas Municipal Code (“LVMC”), which banned the unauthorized erection of structures in the Fremont Street Experience. *A.C.L.U. I*, 333 F.3d at 1108. After holding that the Fremont Street Experience was a traditional public forum, the Ninth Circuit noted “that tables often are used in association with core expressive activities, such as gathering signatures, distributing informational leaflets, proselytizing, or selling message-bearing merchandise.” *Id.* at 1109.

1 The Ninth Circuit reversed the district court's determination and remanded the case for  
 2 further consideration. *Id.* On remand, "[t]he [district] court granted summary judgment to  
 3 [p]laintiffs on their as-applied claim, but declined to hold that the tabling statute is facially  
 4 invalid." *A.C.L.U. II*, 466 F.3d at 790. The Ninth Circuit affirmed this reasoning, holding as  
 5 follows:

6 We decline to hold, however, that the tabling ordinance is facially  
 7 unconstitutional. On its face, the ordinance does not regulate  
 8 expressive activity. In *ACLU I*, we noted that tables often are used  
 9 in association with core expressive activity, but suggested that  
 10 [p]laintiffs' tabling claim would benefit from further exploration of  
 11 the factual record on remand. Plaintiffs chose not to submit  
 12 additional evidence. Although the record is sufficiently clear for  
 13 us to hold that the tabling ordinance is unconstitutional as applied  
 14 to [p]laintiffs' expressive activities, nothing in the record indicates  
 15 that tables are used in the Fremont Street Experience for expressive  
 16 purposes with enough frequency to support [p]laintiffs' facial  
 17 challenge to the ordinance. Plaintiffs have not argued that the  
 18 tabling ordinance is facially invalid when applied to nonexpressive  
 19 conduct. We therefore affirm the district court's ruling that LVMC  
 20 § 11.68.100(H) is facially constitutional.

21 *Id.* at 800 (internal citations and quotation marks omitted).

22 On one hand, the parties do not dispute that street performing is speech protected by the  
 23 First Amendment or that the Las Vegas Strip is a public forum. (*See, e.g.*, ECF No. 21 at 15).  
 24 On the other hand, the parties do not dispute that it is within the constitutional power of the  
 25 government to regulate the storing and unloading of materials on public sidewalks. Nor do the  
 26 parties dispute that pedestrian and traffic safety on the Las Vegas Strip is an important or  
 27 substantial governmental interest. The court is left to determine whether the governmental  
 28 interest is unrelated to the suppression of free expression and whether chapter 16's incidental  
 restriction on First Amendment freedoms is narrowly tailored to achieve that interest.

The county has provided an unambiguous justification for chapter 16, § 16.11.010, which  
 states in full:

The board finds that due to vehicle congestion, long delays  
 and increasing costs, it has become increasingly more  
 attractive for residents and visitors to use the public sidewalks  
 on Las Vegas Boulevard South (the Strip) rather than to drive  
 or to ride. Since, traditionally, the major emphasis along the  
 Strip has been on automobile transportation and not on  
 pedestrians, the existing pedestrian environment is inadequate

as a transportation system and lacking in many safety features. Moreover, a great number of persons are engaged in uses of the public sidewalks which create undue obstruction, hindrance, blockage, hampering, and interference with pedestrian travel. Large numbers of pedestrians are walking in the streets when the public sidewalks become congested and many pedestrians are crossing against the traffic signal indications. In recognition of the need for improvement of the pedestrian environment and the need for accessible public sidewalks, it is necessary to enact [chapter 16].

Clark Cnty., Nev. Code of Ordinances § 16.11.010. The county implemented chapter 16 to “improve[] . . . the pedestrian environment” and provide “accessible public sidewalks.” *Id.* Section 16.11.010 does not mention free speech or expressive activity. Chapter 16 does not expressly target free speech or expressive activity. Because the county justified its regulation of public sidewalks without reference to any speech, let alone the content thereof, the third prong of the *O’Brien* test is satisfied: the governmental interest at issue is unrelated to the suppression of free expression.

To the extent that chapter 16 impinges on speech, it inhibits only conduct with expressive components. To avoid curtailing expressive conduct, chapter 16 defines “obstructive use,” in relevant part, as follows:

Placing, erecting or maintaining an unpermitted table, chair, booth or other structure upon the public sidewalk, *if the placing, erecting, or maintaining of the table, chair, or booth is not protected by the First Amendment or if the placing, erecting, or maintaining of the table, chair, or booth is protected by the First Amendment but is actually obstructive[.]*

Clark Cnty., Nev. Code of Ordinances § 16.11.020 (emphasis added). Section 16.11.070 contains a similar First Amendment safety valve for “items . . . temporarily placed next to a street performer for that street performer’s use unless said [items]<sup>5</sup> actually obstruct[] the sidewalk in violation of this chapter[.]” Clark Cnty., Nev. Code of Ordinances § 16.11.070.

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<sup>5</sup> For the purposes of this analysis, the court interprets the language “items such as a musical instrument case or a backpack” as creating a nonexhaustive list. The phrase “such as” is “used to introduce an example or series of examples.” *Such as*, Merriam-Webster Online dictionary, available at <https://www.merriam-webster.com/dictionary/such%20as>, last visited October 31, 2019. To interpret the list as exhaustive would render the phrase “such as” superfluous, which the court avoids if possible. See *Williams v. Taylor*, 529 U.S. 362, 404

1 The court finds that the fourth prong of the *O'Brien* test is met. Like the ordinance at  
 2 issue in *A.C.L.U. I* and *II*, chapter 16 of the CCC facially targets conduct, not speech. The  
 3 regulations at issue in chapter 16 of the CCC are narrowly tailored to achieve pedestrian and  
 4 traffic safety by targeting congestion on public sidewalks. To address congestion problems,  
 5 §§ 16.11.020 and 16.11.070 target prevent unpermitted tables, chairs, booths or other structures  
 6 and equipment, materials, parcels, containers, packages, bundles or other property from being  
 7 placed on public sidewalks, where they would exacerbate existing congestion issues. Thus, like  
 8 the Ninth Circuit reasoned in *A.C.L.U. II*, plaintiff has not shown that the ordinance prohibiting  
 9 tables or other objects on public sidewalks is facially invalid when applied to nonexpressive  
 10 conduct.

11 Further, chapter 16 carves out several exceptions for expression protected by the First  
 12 Amendment. These carve-outs alleviate First Amendment concerns despite the fact that the  
 13 ordinance itself targets only conduct, not speech.

14 Accordingly, the county and LVMPD's motions to dismiss are granted as to plaintiff's  
 15 facial challenges to CCC chapter 16. Claims 4 and 5 are dismissed with prejudice.

16 *ii. As-applied challenges*

17 The delineation of facial challenges and as-applied challenges is tenuous at best.<sup>6</sup> "[T]he  
 18 distinction between facial and as-applied challenges is not so well defined that it has some  
 19 automatic effect or that it must always control the pleadings and disposition in every case  
 20 involving a constitutional challenge." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010).

21 However, as a general rule, "[w]hen considering an as-applied challenge, a court  
 22 considers the challenged statute in light of the charged conduct." *Martinez v. City of Rio*  
 23 *Rancho*, 197 F. Supp. 3d 1294, 1309 (9th Cir. 2016) (citations and quotation marks omitted). As  
 24 a result, the differentiation between a facial challenge and an as-applied challenge "is both  
 25 instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not  
 26 (2000) (holding that it is "a cardinal principle of statutory construction that [the court] must give  
 27 effect, if possible, to every clause and word of a statute.").

28 <sup>6</sup> For a discussion of the inconsistency of the Supreme Court's folkwisdom that as-applied challenges are separate and distinct from—and preferable to—facial challenges, see Fallon, *Fact and Fiction About Facial Challenges*, 99 Calif. L. Rev. 915 (2011).

1 what must be pleaded in a complaint.” *Citizens United*, 558 U.S. at 331 (citing *United*  
 2 *States v. Treasury Employees*, 513 U.S. 454, 477–78 (1995)).

3 “The sidewalks along the Las Vegas Strip dedicated to public use are public fora.”  
 4 *Santopietro v. Howell*, 857 F.3d 980, 988 (9th Cir. 2017) (citing *Venetian Casino Resort, L.L.C.*  
 5 *v. Local Joint Exec. Bd. of Las Vegas*, 257 F.3d 937, 943 (9th Cir. 2001)); (see also ECF No. 21  
 6 at 15). “[S]treet performing is expressive speech or expressive conduct protected under the First  
 7 Amendment.” *Santopietro*, 857 F.3d at 985 (quoting *Berger v. City of Seattle*, 569 F.3d 1029  
 8 (9th Cir. 2009) (en banc) (internal quotation marks omitted)); (see also ECF No. 21 at 15). Thus,  
 9 taken together, street performers on the Las Vegas Strip are protected by the First Amendment.

10 LVMPD and its officers understand that First Amendment protections extend to street  
 11 performers on the Las Vegas Strip. Not only did LVMPD acknowledge as much in its response  
 12 to plaintiff’s motion to dismiss (ECF No. 21 at 15), the Ninth Circuit noted—as plaintiff points  
 13 out in this case—that LVMPD previously settled a First-Amendment claim stemming from  
 14 enforcing the CCC against street performers on the Las Vegas Strip:

15 To settle that suit, the parties, including Metro, agreed to an  
 16 Interim Stipulated Memorandum of Understanding (“MOU”) in  
 17 2010. The MOU (1) specified that the sidewalks and pedestrian  
 18 bridges along the Strip constitute a traditional public forum; (2)  
 19 defined “street performer” as “a member of the general public who  
 20 engages in any performing art or the playing of any musical  
 21 instrument, singing or vocalizing, with or without musical  
 22 accompaniment, and whose performance is not an official part of a  
 23 sponsored event”; and (3) recognized that this court held in *Berger*  
 24 *v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009) (en banc),  
 25 “that street performing is expressive speech or expressive conduct  
 26 protected under the First Amendment.” The MOU went on to  
 provide that “[s]treet performing, including the acceptance of  
 unsolicited tips and the non-coercive solicitation of tips, is not  
 a *per se* violation of any of the codes or statutes being challenged  
 in [the] action,” which included Chapter 6 of the Clark County  
 Code. The MOU also recited that “[t]he entirety of Chapter 6 of  
 the Clark County Code, the business licensing codes, as written, is  
 inapplicable to the act of street performing.” At the same time, the  
 MOU cautioned that “[s]treet performers who are legitimately in  
 violation of a county code, state statute, or other law of general  
 applicability are not immune from prosecution simply because they  
 are street performers.”

27 *Santopietro*, 857 F.3d at 985.  
 28

1 Here, the court finds that plaintiff has stated a colorable First Amendment as-applied  
2 challenge. Plaintiff is entitled to exercise his First Amendment right to free speech, which  
3 includes street performances on the Las Vegas Strip. However, due to his AMC, plaintiff  
4 requires the use of a small, portable table in order to do so.

5 The plain language of chapter 16 of the CCC is entirely consistent with plaintiff's First  
6 Amendment rights. Plaintiff engages in live drawing—which is expressive activity protected by  
7 the First Amendment—in a public forum. Further, § 16.11.020(i) defines a “street performer” as  
8 “a member of the general public who engages in any performing act or the playing of any  
9 musical instrument, singing or vocalizing, with or without musical accompaniment, and whose  
10 performance is not an official part of a sponsored event.” Clark Cnty., Nev. Code of Ordinances  
11 § 16.11.020(i). Plaintiff's live drawing is a “performing act,” and plaintiff is not an official part  
12 of a sponsored event. Plaintiff is therefore entitled to the First Amendment protections that  
13 chapter 16 of the CCC affords to street performers.

14 Section 16.11.020 makes the placement of a table on a public sidewalk an “obstructive  
15 use” only “if the placing, erecting, or maintaining of the table, chair, or booth is not protected by  
16 the First Amendment or if the placing, erecting, or maintaining of the table, chair, or booth is  
17 protected by the First Amendment but is actually obstructive.” Clark Cnty., Nev. Code of  
18 Ordinances § 16.11.020(e)(1). Because plaintiff's live drawing is a performing act within the  
19 meaning of § 16.11.020, plaintiff is a street performer using his table in furtherance of his First  
20 Amendment activity. Therefore, plaintiff would have to be “actually obstructive” to violate CCC  
21 chapter 16.

22 As plaintiff notes, his wheelchair and table “take[] up less than four feet . . . of a 21.5-  
23 foot-wide sidewalk.” (ECF No. 61 at 15). Plaintiff positions himself on a large stretch of  
24 sidewalk in front of the Bellagio fountains “with the back of his wheelchair to the guardrail so he  
25 does not impede the flow of traffic on the sidewalk while he is engaged in his performance.”  
26 (ECF No. 79 at 5). In fact, “[plaintiff] often positions himself between gated trees which  
27 protrude into the sidewalk, and his table does not protrude further than said trees. This further  
28 undermines any claim that [plaintiff] has ever ‘actually obstructed’ the sidewalk in front of the



1 Bellagio.” *Id.* at 5 n.10. Plaintiff has taken every measure available to him to avoid obstructing  
 2 the sidewalk at issue. Nonetheless, plaintiff has been repeatedly cited for obstruction *per se*  
 3 under chapter 16 of the CCC for his attempts to engage in live drawing, an expressive activity  
 4 protected by the First Amendment.

5 The LVMPD defendants argue that plaintiff has adequate alternative channels to express  
 6 himself. (ECF No. 21 at 17–18). The LVMPD defendants bolster this argument by positing that  
 7 there are alternative channels for plaintiff to disseminate his message, “such as handing out his  
 8 artwork to tourists and distributing flyers about artwork on the Las Vegas Strip.” *Id.*

9 The LVMPD defendants ignore the fact that chapter 16 of the CCC, as the LVMPD  
 10 defendants have enforced it against plaintiff, entirely precludes him from engaging in his chosen  
 11 First Amendment speech: live drawing. Handing out his artwork is not the same as having the  
 12 opportunity to live draw for passersby on the strip. Neither is handing out flyers about artwork.  
 13 By enforcing CCC chapter 16 against plaintiff for using his small table, the LVMPD defendants  
 14 have completely excluded plaintiff from a public forum, the Las Vegas Strip. In order to engage  
 15 in his chosen First-Amendment-protected street performance, plaintiff must necessarily be  
 16 allowed to use his small table.

17 Accordingly, the court finds there is a serious question that goes to the merits of the  
 18 claim, which weighs in favor of injunctive relief. Further, in light of the serious question that  
 19 goes to the merits of plaintiff’s claim, the LVMPD defendants’ motion to dismiss is denied as to  
 20 claim 1.

21 *B. Irreparable injury, balance of hardships and the public interest*

22 “Both [the Ninth Circuit] and the Supreme Court have repeatedly held that ‘the loss  
 23 of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes  
 24 irreparable injury.’” *Klein v. City of San Clemente*, 584 F.3d 1196, 1207–08 (9th Cir. 2009)  
 25 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (alteration omitted).

26 The Ninth Circuit has “consistently recognized the ‘significant public interest’ in  
 27 upholding free speech principles.” *Id.* at 1208 (citation omitted); *see also Am. Bev. Ass’n v. City*  
 28 *& Cnty. of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (“Because [p]laintiffs have a



1 colorable First Amendment claim, they have demonstrated that they likely will suffer irreparable  
2 harm if the [o]rdinance takes effect.”); *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (“A  
3 colorable First Amendment claim is irreparable injury sufficient to merit the grant of relief.”  
4 (internal quotation marks omitted)).

5 “The fact that plaintiffs have raised serious First Amendment questions compels a finding  
6 that . . . the balance of hardships tips sharply in plaintiffs’ favor.” *Am. Bev. Ass’n*, 916 F.3d at  
7 758 (quoting *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007)) (internal  
8 quotation marks and alterations omitted).

9 However, “[t]he public interest in maintaining a free exchange of ideas, though great, has  
10 in some cases been found to be overcome by a strong showing of other competing public  
11 interests, especially where the First Amendment activities of the public are only limited, rather  
12 than entirely eliminated.” *Sammartano*, 303 F.3d at 974.

13 Here, due to plaintiff’s circumstances, his First Amendment expression is entirely  
14 eliminated—rather than merely limited—by LVMPD’s enforcement of chapter 16 against him.  
15 He has stated a colorable as-applied challenge to chapter 16 of the CCC. Thus, plaintiff has  
16 shown that he faces the loss of First Amendment freedoms, so the possibility of irreparable  
17 injury weighs in favor of a preliminary injunction. The balance of hardships and public interest  
18 cut in favor of injunctive relief in light of the fundamental freedom of speech at issue in this  
19 case.

20 Going beyond the legal landscape, the factual circumstances of the case further support  
21 injunctive relief. Plaintiff accepts tips from passersby, which helps plaintiff “afford life’s  
22 necessities and support his wife.” (ECF No. 78 at 3). Specifically, plaintiff uses his tips “to fund  
23 his wife’s medical expenses for cancer treatment.” *Id.* at 2 n.5. Despite plaintiff’s intended use  
24 for his tips, at least one LVMPD officer “threatened to get the Internal Revenue Service to go  
25 after [plaintiff] and, like a modern-day highwayman, claimed he was entitled to seize the tips  
26 [plaintiff] receives from passersby who enjoy what he does and wish to support him and his  
27 wife.” *Id.* at 2.

1 Finally, enjoining the county and LVMPD from enforcing chapter 16 against only  
 2 defendant minimizes the hardship to the county and LVMPD. Both entities may otherwise  
 3 continue enforcing chapter 16 to ensure the free flow of pedestrians on public sidewalks and  
 4 traffic safety.

5 All the *Winter* factors weigh in favor of injunctive relief. Plaintiff's motion for  
 6 temporary restraining order is granted.

7 *C. Plaintiff's bond*

8 The court must condition a preliminary injunction on the plaintiff posting security "in an  
 9 amount that the court considers proper to pay the costs and damages sustained by any party  
 10 found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). "The district court  
 11 is afforded wide discretion in setting the amount of the bond, and the bond amount may be zero  
 12 if there is no evidence the party will suffer damages from the injunction." *Conn. Gen. Life Ins.*  
 13 *Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003).

14 A temporary restraining order preventing the county and LVMPD from enforcing chapter  
 15 16 against defendant in this case will not cause the defendants to suffer any monetary damages.  
 16 In the absence of such injury, the court may grant a preliminary injunction without bond. No  
 17 security is ordered.

18 *2. Motions to dismiss as to the remaining claims*

19 *A. Claim 2: As-applied challenge under the ADA against the LVMPD defendants*

20 The ADA provides that "no qualified individual with a disability shall, by reason of such  
 21 disability, be excluded from participation in or be denied the benefits of the services, programs,  
 22 or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C.  
 23 § 12132. Thus, to state a claim under ADA, a plaintiff must show three things:

24 (1) he is a "qualified individual with a disability"; (2) he was either  
 25 excluded from participation in or denied the benefits of a public  
 26 entity's services, programs or activities, or was otherwise  
 27 discriminated against by the public entity; and (3) such exclusion,  
 28 denial of benefits, or discrimination was by reason of his disability.

1 *Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997).<sup>7</sup>

2 “[T]he ADA must be construed broadly in order to effectively implement the ADA’s  
3 fundamental purpose of providing a clear and comprehensive national mandate for the  
4 elimination of discrimination against individuals with disabilities.” *Barden v. City of*  
5 *Sacramento*, 292 F.3d 1073, 1077 (9th Cir. 2002). Accordingly, the Ninth Circuit “ha[s]  
6 construed ‘the ADA’s broad language as bringing within its scope anything a public entity  
7 does.’” *Id.* at 1076 (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001)).

8 This includes maintaining public sidewalks, which “is a normal function of a city and  
9 without a doubt something that the city does.” *Barden*, 292 F.3d at 1076 (internal quotation  
10 marks, citation, and alteration omitted). Therefore, public entities must maintain the accessibility  
11 of public sidewalks for individuals with disabilities. *Id.* Law enforcement agencies are public  
12 entities within the purview of the ADA, making them subject to the statutory obligations  
13 discussed above. *Lee*, 250 F.3d at 691.<sup>8</sup> Further, “[a] public entity shall  
14 make reasonable modifications in policies, practices, or procedures when the modifications are  
15 necessary to avoid discrimination on the basis of disability, unless the public entity can  
16 demonstrate that making the modifications would fundamentally alter the nature of the service,  
17 program, or activity.” 28 CFR § 35.130.

18 Plaintiff has AMC, which severely limits his mobility. The parties do not dispute the fact  
19 that plaintiff is a “qualified individual with a disability.” Instead, LVMPD argues that it did not  
20 exclude plaintiff from accessing the sidewalks and, as a result, plaintiff has failed to state a  
21 claim. (ECF No. 21 at 20). LVMPD further argues that the “[u]se of a portable table is not a  
22 public entity service, program, or activity that is subject to Title II.” *Id.* In response, plaintiff  
23 argues that “in addition to the right to be on the sidewalk, [disabled people] also have [the] same  
24 right as other street performers to engage in free expression when they aren’t obstructing the  
25 sidewalk.” (ECF No. 60 at 21).

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26  
27 <sup>7</sup> LVMPD erroneously provides the four-element standard for a claim under the  
Rehabilitation Act in its motion to dismiss. *See* (ECF No. 21 at 19).

28 <sup>8</sup> Because Sherriff Lombardo is not a public entity, he is properly dismissed as a  
defendant to this claim. *See* 42 U.S.C. § 12131. Plaintiff agrees. (ECF No. 60 at 2 n.4, 23 n.20).

1 While LVMPD correctly notes that “there is not a single allegation that LVMPD’s denied  
2 [p]laintiff the use of his table because of his disability.” (ECF No. 21 at 20). However, at the  
3 motion to dismiss stage, the court accepts the facts alleged by the plaintiff as true. Thus, the  
4 court considers the fact that (1) expressive activity on the Las Vegas Strip is protected by CCC  
5 chapter 16 unless it is actually obstructive; (2) plaintiff requires the use of a small table in order  
6 to engage in First Amendment expressive activity—his live drawing—on the Las Vegas Strip;  
7 and (3) LVMPD is obligated to make reasonable modifications to its policies to ensure that it  
8 does not discriminate against plaintiff on the basis of his disability.

9 Taking the facts as alleged in plaintiff’s complaint as true, plaintiff was denied the benefit  
10 of live drawing on the Las Vegas Strip, as allowed by the First Amendment. Due to his AMC,  
11 plaintiff must use a small table in order to live draw. Because LVMPD failed to make a  
12 reasonable accommodation for plaintiff, he was not allowed to use his table. Plaintiff was  
13 arguably discriminated against because he was not allowed to use his table and, as a result, was  
14 excluded from live drawing on the Las Vegas Strip. The court finds that plaintiff has advanced a  
15 tenable argument that he was excluded, denied benefits, or discriminated against by reason of his  
16 disability.

17 Therefore, plaintiff has stated a colorable claim under the ADA. The LVMPD  
18 defendants’ motion to dismiss is denied as to claim 2.

19 *B. Claim 3: As-applied challenge under the equal protection clause of the*  
20 *Fourteenth Amendment against the LVMPD defendants*

21 In order to successfully challenge “selective enforcement” under the Fourteenth  
22 Amendment equal protection clause, plaintiffs must demonstrate “[1] that enforcement had a  
23 discriminatory effect and [2] the police were motivated by a discriminatory purpose.”  
24 *Rosenbaum v. City & County of San Francisco*, 484 F.3d 1142, 1152 (9th Cir. 2007) (citation  
25 omitted). “In addition to the showing of discriminatory purpose and effect, plaintiffs seeking to  
26 enjoin alleged selective enforcement must demonstrate the police misconduct is part of a ‘policy,  
27 plan, or a pervasive pattern.’” *Id.* at 1153 (citing *Thomas v. County of Los Angeles*, 978 F.2d  
28 504, 509 (9th Cir. 1993)).

Discriminatory effect is shown when a plaintiff demonstrates that other similarly-situated individuals not in the plaintiff's protected class were not prosecuted. *United States v. Armstrong*, 517 U.S. 456, 465 (1996). "To show discriminatory purpose, a plaintiff must establish that 'the decision-maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.'" *Rosenbaum*, 484 F.3d at 1153 (quoting *Wayte v. United States*, 470 U.S. 598, 610 (1985)).

Here, plaintiff alleges facts sufficient to show that the LVMPD defendants enforced chapter 16 of the CCC against plaintiff "in spite of" its adverse effects on individuals with disabilities. Plaintiff contends that "[t]his unequal treatment is based on an impermissible classification—[plaintiff]'s physical disabilities which necessitate the use of a non-obstructing wheelchair and table during his artistic performances." (ECF No. 58 at 24). Indeed, plaintiff further alleges as follows:

Because [plaintiff] requires the use of a table due to his physical disabilities, CCC § 16.11.070 as applied to him creates a situation wherein despite his right to engage in his chosen artistic expression, engaging in that expression subjects him to citations and harassment from law enforcement that a similarly-situated street performer with full use of his or her limbs would not experience.

*Id.*

However, plaintiff does not allege that there is a policy, plan, or a pervasive pattern of targeting street performers with disabilities or congenital diseases for their First Amendment activity. Instead, plaintiff alleges that LVMPD has instructed its officers to enforce the CCC against any street performers on the Las Vegas Strip. *See id.* at 6 n.12 (listing the representations the LVMPD defendants made to plaintiff while citing him), 12. These allegations are insufficient to prove that plaintiff was cited "because of" his disability.

To the contrary, the LVMPD defendants enforced CCC chapter 16 against defendant no differently than they would—and, according to plaintiff, did—against any other street performer. *See id.* at 9 (discussing other lawsuits regarding enforcement of CCC against street performers on the Las Vegas Strip), 12 ("In or around April 2017, Metro officers began harassing and citing street performers in the Las Vegas Resort District, including [plaintiff]."). Without allegations of

1 a policy, plan, or pattern of unequal enforcement, plaintiff's equal protection claim fails as a  
2 matter of law.

3 Accordingly, the LVMPD defendants' motion to dismiss is granted as to claim 3.  
4 Plaintiff's equal protection challenge is dismissed.

5 *C. Claims 7, 9, and 12: § 1983 claims for violation of the First and Fourteenth*  
6 *Amendment right of free speech and expression against the LVMPD defendants;*  
7 *§ 1983 claim for unreasonable seizure in violation of the Fourth and Fourteenth*  
8 *Amendments and conversion against Officers Young, Ferguson, Albright, and*  
9 *LVMPD*

10 Plaintiff brings several claims under 42 U.S.C. § 1983, which "provides a remedy to  
11 individuals whose constitutional rights have been violated by persons acting under color of state  
12 law." *Caballero v. Concord*, 956 F.2d 204, 206 (9th Cir. 1992). Thus, to prevail on a claim  
13 under § 1983, a plaintiff must show that (1) a person acting under color of state law committed  
14 the conduct at issue, and (2) the conduct deprived the plaintiff of some right, privilege, or  
15 immunity protected by the Constitution or laws of the United States. 42 U.S.C. § 1983; *Shah v.*  
16 *City of Los Angeles*, 797 F.2d 743, 746 (9th Cir. 1986).

17 As discussed in detail above, the First Amendment provides that "Congress shall make no  
18 law . . . abridging the freedom of speech." U.S. Const. amend. I.

19 "A 'seizure' of property, we have explained, occurs when 'there is some meaningful  
20 interference with an individual's possessory interests in that property.'" *Soldal v. Cook Cty., Ill.*,  
21 506 U.S. 56, 61, 113 S. Ct. 538, 543, 121 L. Ed. 2d 450 (1992) (quoting *United States v.*  
22 *Jacobsen*, 466 U.S. 109, 113 (1984)).<sup>9</sup> "The seizure of property in plain view involves no  
23 invasion of privacy and is presumptively reasonable, assuming that there is probable cause to  
24 associate the property with criminal activity." *Payton v. New York*, 445 U.S. 573, 587 (1980).

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25 <sup>9</sup> The Nevada Supreme Court has "defined conversion as 'a distinct act of dominion  
26 wrongfully exerted over another's personal property in denial of, or inconsistent with his title or  
27 rights therein or in derogation, exclusion, or defiance of such title or rights.'" *M.C. Multi-Family*  
28 *Dev., L.L.C. v. Crestdale Assocs., LTD.*, 193 P.3d 536, 542 (Nev. 2008) (quoting *Evans v. Dean*  
*Witter Reynolds, Inc.*, 5 P.3d 1043, 1048 (Nev. 2000)). The court's analysis supporting the  
Fourth and Fourteenth Amendment § 1983 claim applies to the conversion claim because the  
reasonableness of the seizure necessarily dictates whether the officers' "act of dominion" over  
plaintiff's table was "wrongful."

1 “Where the defense of qualified immunity is at issue, as here, [the court] appl[ies] a two-  
 2 part inquiry to § 1983 claims.” *Burke v. Cnty. of Alameda*, 586 F.3d 725, 731 (9th Cir. 2009).  
 3 “First, [the court] ask[s] whether the defendants’ actions violated the Constitution. If there was a  
 4 violation, [the court] ask[s] whether the right violated was clearly established.” *Id.* (citing  
 5 *Saucier v. Katz*, 533 U.S. 194, 200 (2001)).

6 “[A]n officer who acts in reliance on a duly-enacted statute or ordinance is ordinarily  
 7 entitled to qualified immunity.” *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir.  
 8 1994). “The protection of qualified immunity applies regardless of whether the government  
 9 official’s error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of  
 10 law and fact.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quotation marks and citation  
 11 omitted); *see also Butz v. Economou*, 438 U.S. 478, 507 (1978) (“[O]fficials will not be liable for  
 12 mere mistakes in judgment, whether the mistake is one of fact or one of law.”).

13 In *Grossman*, an individual officer arrested plaintiff pursuant to an unconstitutional  
 14 ordinance. *Grossman*, 33 F.3d 1200. The Ninth Circuit held that the individual officer was  
 15 entitled to qualified immunity, but the city remained liable. *Id.* The Ninth Circuit explained as  
 16 follows:

17 Where a statute authorizes official conduct which is patently  
 18 violative of fundamental constitutional principles, an officer who  
 19 enforces that statute is not entitled to qualified  
 20 immunity. Similarly, an officer who unlawfully enforces an  
 21 ordinance in a particularly egregious manner, or in a manner which  
 22 a reasonable officer would recognize exceeds the bounds of the  
 23 ordinance, will not be entitled to immunity even if there is no clear  
 24 case law declaring the ordinance or the officer's particular conduct  
 25 unconstitutional.

26 *Id.* at 1209–10.

27 Here, as in *Grossman*, determining chapter 16’s constitutionality as applied to plaintiff is  
 28 dispositive of claims 7, 9, and 12. Officers Young, Ferguson, and Albright acted in reliance on  
 chapter 16 of the CCC which, as this court noted, is a facially constitutional regulation aimed at  
 addressing pedestrian congestion on public walkways. Plaintiff displayed his table on the  
 sidewalk, which necessarily means that it was in plain view and in a public place. In furtherance



1 of chapter 16's policy of preventing obstructive uses of sidewalks, Officers Young, Ferguson,  
2 and Albright cited plaintiff for his expressive conduct and seized his table.

3 However, § 16.11.020 of the CCC specifically exempts tables used in furtherance of First  
4 Amendment activity from the definition of an "obstructive use" unless the table is "actually  
5 obstructing" the sidewalk. Plaintiff has alleged that, because of his positioning on the sidewalk,  
6 he did not actually obstruct the walkway. Further, plaintiff has clearly demonstrated that his  
7 table was essential to his live drawing. For that reason, the court, as discussed above, finds that  
8 plaintiff has stated a colorable as-applied constitutional challenge to chapter 16 of the CCC.

9 Consequently, Officers Young, Ferguson, and Albright either relied on an  
10 unconstitutional interpretation of chapter 16 or unconstitutionally applied chapter 16 to  
11 plaintiff's expression. Thus, these erroneous applications of chapter 16 stymied plaintiff's First  
12 Amendment rights. Further, plaintiff's First-Amendment-protected expression cannot support  
13 probable cause. *See, e.g., Grossman*, 33 F.3d 1200.

14 But the individual officers were relying on the policy and interpretation promulgated by  
15 LVMPD. (*See* ECF No. 58 at 9 (discussing other lawsuits regarding enforcement of CCC  
16 against street performers on the Las Vegas Strip)). One way a plaintiff may demonstrate  
17 municipal liability for a constitutional violation is by showing that the violation occurred as a  
18 result of inadequate training on the part of the municipality. *See City of Canton v. Harris*, 489  
19 U.S. 378, 389 (1989).

20 Therefore, plaintiff has sufficiently pleaded a *Monell* claim against LVMPD for  
21 promulgating the policy of citing street performers for obstruction *per se* when they use a table  
22 or other object for First Amendment expression. On the other hand, the individual officers are  
23 entitled to qualified immunity for their good faith reliance on the duly-enacted statute as  
24 interpreted by LVMPD.

25 Accordingly, the LVMPD defendants' motion to dismiss is granted in part and denied in  
26 part as to claims 7, 9, and 12. The individual officers are dismissed as defendants. LVMPD  
27 itself is not.  
28

1                   D. *Claim 8: § 1983 claim for chilling free speech in violation of the First and*  
 2                   *Fourteenth Amendments against the LVMPD defendants*

3                   “In order to demonstrate a First Amendment violation, a plaintiff must provide evidence  
 4 showing that by his actions the defendant deterred or chilled the plaintiff’s political speech and  
 5 such deterrence was a substantial or motivating factor in the defendant’s conduct.” *Mendocino*  
 6 *Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999) (citations, quotation marks,  
 7 and alterations omitted). Thus, “plaintiffs must present ‘nonconclusory allegations of subjective  
 8 motivation, supported either by direct or circumstantial evidence, before discovery may be  
 9 had.’” *Magana v. Northern Mariana Islands*, 107 F.3d 1436, 1447 (9th Cir. 1997) (quoting  
 10 *Lindsey v. Shalmy*, 29 F.3d 1382, 1385 (9th Cir. 1994); *Branch v. Tunnell*, 937 F.2d 1382, 1387  
 11 (9th Cir. 1991)). Even “a liberal interpretation of a civil rights complaint may not supply  
 12 essential elements of the claim that were not initially pled.” *Ivey v. Board of Regents*, 673 F.2d  
 13 266, 268 (9th Cir. 1982).

14                   Plaintiff does not allege that the LVMPD defendants acted with the intent to chill his  
 15 speech. (See ECF No. 58). Instead, plaintiff avers at length how they have continued to enforce  
 16 chapter 16 of the CCC—which the court has noted targets the flow of pedestrians and traffic  
 17 safety—against street performers. *Id.* Malintent cannot be imputed to the LVMPD defendants  
 18 simply because plaintiff alleges that they infringed on his First Amendment rights by enforcing  
 19 an otherwise operative and legitimate county ordinance.

20                   As a result, plaintiff’s eighth claim is dismissed without prejudice.

21                   E. *Claim 10: Violation of the Nevada Constitution’s free speech protections against*  
 22                   *all defendants*

23                   Plaintiff contends that “the rights afforded by the Nevada Constitution are coextensive  
 24 with those afforded by the U.S. Constitution.” (ECF No. 61 at 15 (citing *Univ. and Cmty. Coll.*  
 25 *Sys. of Nev. v. Nevadans for Sound Gov’t*, 100 P.3d 179, 187 (Nev. 2004))). As the Nevada  
 26 Supreme Court explained:

27                   The First Amendment to the United States Constitution, as applied  
 28 to state governments through the Fourteenth Amendment, prohibits  
 a state from “abridging the freedom of speech.” Similarly, Article  
 1, Section 9 of the Nevada Constitution protects the general right  
 of the people to engage in expressive activities in this state. We  
 have held that Article 1, Section 9 affords no greater protection to

speech activity than does the First Amendment to the United States Constitution. Further, while Article 19 of the Nevada Constitution expressly recognizes the right to engage in a specific type of expressive activity, including the right to circulate referendums and petitions, that provision likewise grants no broader protection than the First Amendment and Article 1, Section 9 of the Nevada Constitution grant to any covered expressive activity. Therefore, under the Nevada Constitution, the appropriate analysis of appellants' restrictions is identical to that under the First Amendment.

*Nevadans for Sound Gov't*, 100 P.3d at 187.

The county argues that “[p]laintiff has alleged no conduct by Clark County whatsoever in his [c]omplaint. The conduct underlying [p]laintiff’s [c]omplaint consists of the conduct of LVMPD and its agents, parties for whom Clark County is not subject to liability.” (ECF No. 74 at 18). Indeed, the plaintiff contends that his “rights to speech and expressive conduct are impermissibly restricted, chilled, deterred and inhibited by the actions of [d]efendants” and that “[d]efendants’ actions, as alleged herein, constitute violations of [plaintiff’s] rights under the Constitution of the State of Nevada, Art. 1, § 9.” (ECF No. 58 at 34–35).

Plaintiff’s complaint is predicated on actions by LVMPD and its officers. *Id.* at 12–20. Plaintiff alleges that LVMPD officers cited him, harassed him, and interrupted his live drawing. *Id.* Plaintiff further alleges that several LVMPD officers indicated that they cited him pursuant to a policy or command from LVMPD itself. *Id.* at 6 n.12. However, plaintiff does not allege any particular conduct by the county or its officials. The county cannot be held liable for the conduct of LVMPD and its officers. Nev. Rev. Stat. § 280.280; *see, e.g., Scott v. Las Vegas Metro. Police*, 2:10-CV-01900-ECR-PAL, 2011 WL 2295178, at \*5 (D. Nev. June 8, 2011); *Denson v. Clark County*, 2:10-CV-00525-RCJ-LRL, 2010 WL 3076260 (D. Nev. Aug. 4, 2010). Thus, the county’s motion to dismiss is granted as to claim 10.

However, consistent with the discussion of plaintiff’s as-applied challenge under the federal constitution, plaintiff has stated a colorable claim against the LVMPD defendants. The LVMPD defendants’ motion to dismiss is denied as to claim 10.

...

...

1 *F. Claim 11: Negligent training, supervision, and retention against LVMPD*

2 Here, plaintiff's negligent training, supervision, and retention claim is based in state law.  
 3 "It is well established that a state court's interpretation of its statutes is binding on the federal  
 4 courts unless a state law is inconsistent with the federal Constitution." *Hangarter v. Provident*  
 5 *Life & Acc. Ins. Co.*, 373 F.3d 998, 1012 (9th Cir. 2004) (citing *Adderley v. Florida*, 385 U.S. 39,  
 6 46 (1966)); *see also* 28 U.S.C. § 1652.

7 Nevada has waived its general state immunity under Nevada Revised Statutes ("NRS")  
 8 § 41.031. The state's waiver of immunity is not absolute; the state has retained a "discretionary  
 9 function" form of immunity for officials exercising policy-related or discretionary acts. *See Nev.*  
 10 *Rev. Stat. § 41.032.*<sup>10</sup> Nevada adopted the Supreme Court's *Berkovitz-Gaubert* two-part test  
 11 regarding discretionary immunity, meaning "Nevada's discretionary-function immunity statute  
 12 mirrors the Federal Tort Claims Act." *Martinez v. Maruszczak*, 168 P.3d 720, 727 (Nev. 2007).

13 Thus, public entities are immune from suit for discretionary functions, but can be held  
 14 liable for operational functions. *See id.* at 727 ("[D]ecisions made in the course of operating the  
 15 project or endeavor were deemed non-discretionary and, thus, not immune under the  
 16 discretionary-function exception, as those decisions [are] viewed as merely operational."); *see*  
 17 *also Andolino v. State*, 624 P.2d 7, 9 (Nev. 1981) ("[The state of Nevada] may be sued for  
 18 operational acts, but maintains immunity for policy or discretionary ones").

19 Thus, state actors are entitled to discretionary-function immunity under NRS § 41.032 if  
 20 their decision "(1) involve[s] an element of individual judgment or choice and (2) [is] based on  
 21 considerations of social, economic, or political policy." *Martinez*, 168 P.3d at 729. "To come  
 22 within the discretionary function exception, the challenged decision need not actually be  
 23 grounded in policy considerations so long as it is, by its nature, susceptible to a policy analysis."  
 24 *Vickers v. United States*, 228 F.3d 944, 950–51 (9th Cir. 2000). However, "federal courts  
 25 applying the *Berkovitz-Gaubert* test must assess cases on their facts, keeping in mind Congress'

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26  
 27 <sup>10</sup> Title 12 of NRS states in relevant part that no action may be brought against a state  
 28 officer or official which is "[b]ased upon the exercise or performance or the failure to exercise or  
 perform a discretionary function or duty on the part of the State or any of its agencies or political  
 subdivisions . . . whether or not the discretion involved is abused." Nev. Rev. Stat. § 41.032(2).

1 purpose in enacting the exception: to prevent judicial second-guessing of legislative and  
2 administrative decisions grounded in social, economic, and political policy through the medium  
3 of an action in tort.” See *Martinez*, 168 P.3d at 729 (quoting *United States v. S.A. Empresa de*  
4 *Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984)) (internal quotation  
5 marks omitted).

6 The government agency “has the burden of proving that the discretionary function  
7 exception applies.” *Sigman v. United States*, 217 F.3d 785, 793 (9th Cir. 2000). “In a close  
8 case, [the court] must favor a waiver of immunity and accommodate the legislative scheme.”  
9 *Hagblom v. State Director of Motor Vehicles*, 571 P.2d 1172, 1174–75 (Nev. 1977) (quoting  
10 *State v. Silva*, 478 P.2d 591, 593 (Nev. 1970)); see also *Martinez*, 168 P.3d at 724 (“Because the  
11 primary legislative intent behind the qualified waiver of sovereign immunity from tort liability  
12 under NRS Chapter 41 was to waive immunity, we strictly construe limitations upon that  
13 waiver.” (quotation marks and footnote citation omitted)).

14 The LVMPD defendants assert that the training of LVMPD officers is a discretionary act  
15 such that they are entitled to immunity by statute. (ECF No. 21 at 26–27). In particular,  
16 LVMPD asserts that the hiring, training, supervision, and retention of its officers “invoke policy  
17 judgments of the type Congress intended the discretionary function exception to shield.” (ECF  
18 No. 21 at 27 (quoting *Vickers*, 228 F.3d at 950). Consequently, LVMPD posits that decisions  
19 relating to hiring, training, and supervision of employees are always entitled to immunity. The  
20 court disagrees.

21 Negligent training, supervision, and retention claims are not always barred by  
22 discretionary immunity because “certain acts, although discretionary, do not fall within the  
23 discretionary-function exception’s ambit because they involve ‘negligence unrelated to any  
24 plausible policy objectives.’” *Martinez*, 168 P.3d at 728. Indeed, the court has found that in  
25 some cases “the training and supervision of officers is not a ‘discretionary function,’ but rather  
26 an ‘operational function’ for which Metro does not enjoy immunity under the statute.” *Herrera*  
27 *v. Las Vegas Metro. Police Dep’t*, 298 F. Supp. 2d 1043, 1055 (D. Nev. 2004); see also *Perrin v.*  
28 *Gentner*, 177 F. Supp. 2d 1115, 1126 (D. Nev. 2001) (“Metro’s training and supervision of

1 Officer Gentner constituted an ‘operational function’ for which Metro does not enjoy immunity  
2 under NRS 41.032.”).

3 LVMPD has not born is burden to show that its training decisions in this case are  
4 discretionary functions subject to policy judgments. The decisions not to inform LVMPD  
5 officers of the MOU, to instruct them to enforce chapter 16 of the CCC despite the statutory  
6 carve-outs for First Amendment activity, and to repeatedly cite plaintiff for using his small table  
7 arguably constitute “negligence unrelated to any plausible policy objectives.” LVMPD does not  
8 present an argument to the contrary. Because this is a close case, the court favors a waiver of  
9 immunity.

10 Accordingly, the LVMPD defendants’ motion to dismiss plaintiff’s negligent training,  
11 supervision, and retention claim is denied.

#### 12 **IV. Conclusion**

13 The county’s motion is granted as to claims 1, 2, 3, 6, and 10.

14 The court grants the LVMPD defendants’ motion as to all claims against the LVMPD  
15 officers in their official capacities.

16 The court grants the LVMPD defendants’ motion as to Sheriff Lombardo as a defendant  
17 in claim 2.

18 The court denies the LVMPD defendants’ motion to dismiss as to claims 1, 2, 10, and 11.

19 The court grants the LVMPD defendants’ motion to dismiss as to claims 3 and 8.  
20 Plaintiff’s equal protection and § 1983 chilling claims are dismissed without prejudice.

21 The LVMPD defendants’ motion to dismiss is granted in part and denied in part as to  
22 claims 7, 9, and 12. The individual officers are dismissed as defendants as to those claims.  
23 LVMPD itself is not.

24 The court grants both motions to dismiss as to plaintiff’s facial challenges to chapter 16  
25 of the Clark County Code. Claims 4 and 5 are dismissed with prejudice.

26 ...

27 ...

28 ...

1 Accordingly,

2 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the county's motion to  
3 dismiss (ECF No. 15) be, and the same hereby is, GRANTED in part and DENIED in part,  
4 consistent with the foregoing.

5 IT IS FURTHER ORDERED that the LVMPD defendants' motion to dismiss plaintiff's  
6 amended complaint (ECF No. 21) be, and the same hereby is, GRANTED in part and DENIED  
7 in part, consistent with the foregoing.

8 IT IS FURTHER ORDERED that the LVMPD defendants' motion to exceed the page  
9 limit on its motion to dismiss (ECF No. 16) be, and the same hereby is, GRANTED.

10 IT IS FURTHER ORDERED that plaintiff's motion for temporary restraining order (ECF  
11 No. 78) be, and the same hereby is, GRANTED.

12 IT IS FURTHER ORDERED that all defendants, their agents, officials, and employees  
13 are RESTRAINED from enforcing chapter 16 of the CCC against plaintiff's First Amendment  
14 activity on the Las Vegas Strip.

15 IT IS FURTHER ORDERED that defendants shall appear on November 20, 2019, at  
16 1:30 p.m. in Courtroom No. 6A and SHOW CAUSE why a preliminary injunction should not be  
17 granted that restrains and enjoins defendants from enforcing chapter 16 of the CCC against  
18 plaintiff's First Amendment activity on the Las Vegas Strip.

19 IT IS FURTHER ORDERED that defendants shall file their oppositions, if any, to  
20 plaintiff's motion for preliminary injunction by 5:00 p.m. on November 13, 2019.

21 IT IS FURTHER ORDERED that plaintiff shall file his reply, if any, by 5:00 p.m. on  
22 November 18, 2019.

23 DATED November 7, 2019, at 2:15 p.m.

24   
25 \_\_\_\_\_  
UNITED STATES DISTRICT JUDGE