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Attorneys for Defendants Las Vegas Metropolitan Police Department,

Officer Javon Charles, Officer Timothy Nye, Officer Austin Lea,

Officer Cody Gray, Officer Supreet Kaur, Officer Haley Andersen,

Sergeant John Johnson, Captain Dori Koren, Officer Richard Palacios,

Officer Patrick Whearty, and Officer Wood

UNITED STATES DISTRICT COURT**DISTRICT OF NEVADA**

WILLIAM FLEMING, an individual,

Plaintiff,

vs.

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT, a Municipal Corporation;
OFFICER JAVON CHARLES, an individual;
OFFICER TIMOTHY NYE, an individual;
OFFICER GABRIEL LEA, an individual;
OFFICER CODY GRAY, an individual;
OFFICER SUPREET KAUR, as an
individual; OFFICER HALEY ANDERSEN,
as an individual; SERGEANT JOHN
JOHNSON, as an individual; CAPTAIN
DORI KOREN, as an individual; OFFICER
RICHARD PALACIOS, as an individual;
OFFICER PATRICK WHEARTY, as an
individual; OFFICER WOOD, as an
individual; and DOE OFFICERS I - X,
individuals,

Defendants.

Case Number:

**LVMPD DEFENDANTS' NOTICE OF
REMOVAL**

TO: THE UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA

Defendants Las Vegas Metropolitan Police Department (the "Department" or
"LVMPD"), Officer Javon Charles ("Charles"), Officer Timothy Nye ("Nye"), Officer
Austin Lea ("Lea"), and Officer Cody Gray ("Gray"), Officer Supreet Kaur ("Kaur"),
Officer Haley Andersen ("Andersen"), Sergeant John Johnson ("Johnson"), Captain Dori

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1 Koren ("Koren"), Officer Richard Palacios ("Palacios"), Officer Patrick Whearty
2 ("Whearty"), and Officer Wood ("Wood"), collectively ("LVMPD Defendants"), by and
3 through their attorneys of record, Craig R. Anderson, Esq. and Jackie V. Nichols, Esq. of
4 Marquis Aurbach, hereby gives notice of removal of the above-captioned action from the
5 Eighth Judicial District Court of Clark County, Nevada, to the United States District Court
6 for the District of Nevada. Removal of this action is authorized under 28 U.S.C. §§ 1331,
7 1441, and 1446. The specific grounds for removal are as follows:

8 1. Plaintiff William Fleming commenced this action against LVMPD, Officer
9 Javon Charles, Officer Timothy Nye, Officer Austin Lea, Officer Cody Gray on January 2,
10 2023. A true and correct copy of the Complaint is attached hereto as **Exhibit A**. Plaintiff
11 amended his complaint to reflect against Officer Supreet Kaur, Officer Haley Andersen,
12 Sergeant John Johnson, Captain Dori Koren, Officer Richard Palacios, Officer Patrick
13 Whearty, and Officer Wood on January 24, 2023 (First Amended Complaint). The First
14 Complaint was in the Eighth Judicial District Court of the County of Clark, State of Nevada.
15 A true and correct copy of the First Amended Complaint is attached hereto as **Exhibit B**.

16 2. LVMPD Defendants are the defendants in the above-referenced action
17 commenced the Eighth Judicial District Court of the County of Clark, State of Nevada, Case
18 No. A-23-863339-C, and is now pending in that court.

19 3. Service of the Summons and Complaint was made on LVMPD on January 3,
20 2023. A copy of the Summons for the defendant is attached hereto as **Exhibit C**.

21 4. Service of the Summons and the Complaint was made on Officer Javon
22 Charles on January 4, 2023. A copy of the Affidavit of Service for the defendant is attached
23 hereto as **Exhibit D**.

24 5. Service of the Summons and the Complaint was made on Officer Timothy
25 Nye on January 3, 2023. A copy of the Affidavit of Service for the defendant is attached
26 hereto as **Exhibit E**.

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1 6. Service of the Summons and the Complaint was made on Officer Austin Lea
2 on January 4, 2023. A copy of the Affidavit of Service for the defendant is attached hereto
3 as **Exhibit F.**

4 7. Service of the Summons and the Complaint was made on Officer Cody Gray
5 on January 4, 2023. A copy of the Affidavit of Service for the defendant is attached hereto
6 as **Exhibit G.**

7 8. Service of the Summons and the Complaint was made on Officer Supreet
8 Kaur on January 26, 2023. A copy of the Affidavit of Service for the defendant is attached
9 hereto as **Exhibit H.**

10 9. Service of the Summons and the Complaint was made on Officer Haley
11 Andersen on January 26, 2023. A copy of the Affidavit of Service for the defendant is
12 attached hereto as **Exhibit I.**

13 10. Service of the Summons and the Complaint was made on Sergeant John
14 Johnson on January 26, 2023. A copy of the Affidavit of Service for the defendant is
15 attached hereto as **Exhibit J.**

16 11. Service of the Summons and the Complaint was made on Captain Dori Koren
17 on January 26, 2023. A copy of the Affidavit of Service for the defendant is attached hereto
18 as **Exhibit K.**

19 12. Service of the Summons and the Complaint was made on Officer Richard
20 Palacios on January 26, 2023. A copy of the Affidavit of Service for the defendant is
21 attached hereto as **Exhibit L.**

22 13. Service of the Summons and the Complaint was made on Officer Patrick
23 Whearty on January 26, 2023. A copy of the Affidavit of Service for the defendant is
24 attached hereto as **Exhibit M.**

25 14. Service of the Summons and the Complaint was made on Officer Wood on
26 January 26, 2023. A copy of the Affidavit of Service for the defendant is attached hereto as
27 **Exhibit N.**

28

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1 15. No further proceedings, other than as described-above, have been had in this
2 matter in the Eighth Judicial District Court.

3 16. The Complaint alleges that LVMPD Defendants violated Plaintiff's First and
4 Fourth Amendment rights.

5 17. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1331, in
6 that it is an action arising under 42 U.S.C. §1983. Pursuant to 28 U.S.C. §1441, LVMPD is
7 therefore entitled to remove this action to this Court.

8 18. Thirty days have not elapsed since LVMPD Defendants was served with the
9 Complaint in this action. Copies of the Summons and Complaint are attached hereto as
10 **Exhibits A-N** constituting all the papers and pleadings on LVMPD.

11 19. A true and correct copy of this Notice of Removal is being filed this date with
12 the Clerk of the Eighth Judicial District Court of Nevada.

13 20. Based on the foregoing, LVMPD removes the above action now pending
14 Eighth Judicial District Court of the County of Clark, State of Nevada, as Case No. A-23-
15 863339-C, to this court.

16 Dated this 2nd day of February, 2023.

17 MARQUIS AURBACH

18
19 By: s/Jackie V. Nichols

20 Craig R. Anderson, Esq.
21 Nevada Bar No. 6882
22 Jackie V. Nichols, Esq.
23 Nevada Bar No. 14246
24 10001 Park Run Drive
25 Las Vegas, Nevada 89145
26 Attorneys for Defendants Las Vegas
27 Metropolitan Police Department, Officer
28 Javon Charles, Officer Timothy Nye,
Officer Austin Lea, Officer Cody Gray,
Officer Supreet Kaur, Officer Haley
Andersen, Sergeant John Johnson, Captain
Dori Koren, Officer Richard Palacios,
Officer Patrick Whearty, and Officer Wood

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **LVMPD DEFENDANTS' NOTICE OF REMOVAL** with the Clerk of the Court for the United States District Court by using the court's CM/ECF system on the 2nd day of February, 2023.

☒ I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

☒ I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Margaret A. McLetchie, Esq.
Leo S. Wolpert, Esq.
McLetchie Law
602 South 10th Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff William Fleming

s/Sherri Mong
An employee of Marquis Aurbach

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EXHIBIT A

Electronically Filed
1/2/2023 9:44 PM
Steven D. Grierson
CLERK OF THE COURT



MARGARET A. MCLEATCHIE, Nevada Bar No. 10931
LEO S. WOLPERT, Nevada Bar No. 12658

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Counsel for Plaintiff William Fleming

CASE NO: A-23-863339-C
Department 6

**DISTRICT COURT
CLARK COUNTY, NEVADA**

WILLIAM FLEMING, an individual,

Plaintiff,

vs.

Case. No.:

Department No.:

COMPLAINT

[JURY TRIAL DEMANDED]

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT, a Municipal Corporation;
OFFICER JAVON CHARLES, an
individual; OFFICER TIMOTHY NYE, an
individual; OFFICER AUSTIN LEA, an
individual; OFFICER GRAY, an individual;
DOE OFFICERS I – X, individuals.

Defendants.

Plaintiff William Fleming, by and through his counsel of record, hereby files this
Complaint for damages pursuant to 42 U.S.C. § 1983 (civil action for deprivation of rights),
the Nevada Constitution, and Nevada statute.

NATURE OF THE ACTION

Plaintiff William Fleming is a musician and street performer. He has performed
numerous times on the raised pedestrian walkways above the Las Vegas Strip (in the Las
Vegas Resort District), playing guitar and singing to the delight of passers-by. Mr. Fleming
carefully set up and engaged in his performances to avoid blocking or impeding the flow of
pedestrian traffic on the pedestrian bridges. The Clark County, Nevada, Code of Ordinances
(the “Clark County Code” or “CCC”) permits his conduct, the First Amendment of the United
States Constitution, and Article 1, Section 9 of the Nevada Constitution protect Mr.

1 Fleming's right to engage in free expression on the Strip—as the Las Vegas Metropolitan
 2 Police Department (“Metro”) well knows. Despite these facts, starting in January 2021,
 3 Metro officers began harassing Mr. Fleming and violating his First Amendment rights, citing
 4 him for obstructive use of a public sidewalk and even arresting him pursuant to CCC §
 5 16.11.070.

6 This is an action under 42 U.S.C. § 1983 and the Nevada Constitution seeking to
 7 address the unconstitutionality of the Code as applied to Mr. Fleming, the violations of Mr.
 8 Fleming's First and Fourth Amendment rights (and their Nevada constitutional analogues)
 9 by Metro and its individual officers, and Metro's negligent training and supervision which
 10 led to these constitutional harms. Mr. Fleming also seeks a permanent injunction and
 11 declaratory relief to redress Defendants' willful, deliberate, and clear constitutional
 12 violations, and the harm—which is ongoing and irreparable—that he has suffered as a result.

13 Over the past decades, courts have repeatedly vindicated musicians' and other
 14 artists' rights to perform on the public sidewalks of the Las Vegas Resort District. The
 15 Federal District Court has repeatedly made clear that Metro cannot use the Code as a pretext
 16 to shut down musical and artistic performances that do not actually obstruct pedestrian
 17 traffic. Yet, despite consistent rebukes from this Court, Metro continues to engage in the
 18 same constitutionally violative conduct. Enough is enough.

19 JURISDICTION AND VENUE

20 1. This Court has jurisdiction to award Plaintiff damages pursuant to 42 U.S.C.
 21 § 1983, the Nevada Constitution, and Nev. Rev. Stat. § 41.130.

22 2. The Defendants acted, purported to act, and/or pretended to act in the
 23 performance of their official duties, and thus Defendants acted under color of law and are
 24 subject to liability as state actors pursuant to 42 U.S.C. § 1983.

25 3. The acts or omissions giving rise to Plaintiff's claims all occurred in Clark
 26 County, Nevada. Thus, venue is proper in the Eighth Judicial District Court of the State of
 27 Nevada.
 28

PARTIES

4. During all relevant times herein, Plaintiff William Fleming (“Mr. Fleming”) is a musician and street performer who resides in Clark County, Nevada.

5. Defendant Metro is the law enforcement agency for Clark County and the City of Las Vegas. Defendant Metro is sued in its official capacity.

6. Upon information and belief, Defendant Metro is aware of and has either explicitly or implicitly condoned or created a policy and practice of allowing Metro officers to enforce Clark County Code (“Clark County Code” or “CCC”) § 16.11.070 arbitrarily and/or intentionally to chill constitutionally protected street performances in and around the Las Vegas Resort District.

7. The Code does not criminalize street performances in and around the Las Vegas Resort District.

8. Upon information and belief, Defendant Metro has a policy and practice of allowing its officers to violate the law with impunity and has created or failed to address a culture at Metro that its officers are above the law.

9. Upon information and belief, Defendant Metro has failed to adequately train its officers to refrain from engaging in police misconduct, abusing their position of power, and improperly citing individuals engaged in constitutionally protected street performances.

10. Upon information and belief, Defendant Officer Javon Charles, was at all relevant times herein employed by Metro.

11. Upon information and belief, Defendant Officer Timothy Nye, was at all relevant times herein employed by Metro.

12. Upon information and belief, Officer Austin Lea was at all relevant times herein employed by Metro.

13. Upon information and belief, Officer Gray (first name unknown) was at all relevant times herein employed by Metro.

14. Upon information and belief, Doe Officers I through X were at all relevant times herein employed by Metro.

STANDING

17. An actual case and controversy exists between Mr. Fleming and Defendants concerning their respective rights, privileges, and obligations.

Plaintiff William Fleming

19. Mr. Fleming has performed on the pedestrian bridges above the streets of the Las Vegas Resort Corridor, colloquially known as the "Las Vegas Strip," which allow pedestrians to cross the streets without entering the traffic below and provide enhanced acoustics for Mr. Fleming's performances.

21. Mr. Fleming accepts tips and donations, but never charges a fee for the songs he plays.

History of Litigation Concerning the Las Vegas Resort District

4

1 487 U.S. 474, 480 (1988) (quotation omitted). They are the “archetype” of a traditional public
 2 forum. *Id.* As the United States Court of Appeals for the Ninth Circuit has explained, “[t]he
 3 protections afforded by the First Amendment are nowhere stronger than in streets and parks,
 4 both categorized for First Amendment purposes as traditional public fora.” *Berger v. City of*
 5 *Seattle*, 569 F.3d 1029, 1035–36 (9th Cir. 2009) (citations omitted). Public sidewalks are
 6 also a traditional public forum and are open to the public for expressive activities. *United*
 7 *States v. Grace*, 461 U.S. 171, 179 (1983).

8 24. The United States Court of Appeals for the Ninth Circuit has repeatedly
 9 specifically found that the sidewalks located within the Las Vegas Resort District are public
 10 fora.

11 25. The Ninth Circuit issued its first decision pertaining to the public nature of
 12 the sidewalks in the Las Vegas in 1998 in *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136 (9th
 13 Cir. 1998). In that case, the Circuit held that a Clark County Ordinance which prohibited
 14 canvassers from distributing leaflets on the sidewalks in the Las Vegas Resort District was
 15 facially overbroad and thus unconstitutional on its face. *Id.* at 1140. In so holding, the Circuit
 16 noted that there was “no dispute that the Ordinance regulates activities occurring in a public
 17 forum.” *Id.* at 1144.

18 26. Three years later, the Ninth Circuit issued another opinion finding that the
 19 streets and sidewalks in the Las Vegas Resort District are public fora. *Venetian Casino*
 20 *Resort, LLC v. Local Joint Exec. Board of Las Vegas*, 257 F.3d 937 (9th Cir. 2001).

21 27. According to clearly established case law, when a sidewalk performs an
 22 essential public function, it is a traditional public forum and its private owner does not have
 23 the right to exclude individuals from the sidewalk based upon permissible First Amendment
 24 activity. *Perez-Morciglio v. Las Vegas Metro. Police Dept.*, 820 F. Supp. 2d 1100, 1110 (D.
 25 Nev. 2011) (citing *Venetian Casino Resort, LLC v. Local Joint Exec. Board of Las Vegas*,
 26 45 F. Supp. 2d 1027, 1036 (D. Nev. 1999)).

27 28. According to clearly established case law, “a thoroughfare sidewalk,
 28 seamlessly connected to public sidewalks at either end and intended for general public use”

1 is “a public sidewalk, and consequently, a traditional public forum from which [the
2 sidewalk’s private owners] have no right to exclude members of the public.” *Perez-Morciglio*
3 *v. Las Vegas Metropolitan Police Dept.*, 820 F. Supp. 2d 1100, 1111 (D. Nev. 2011) (citing
4 *Venetian Casino Resort, L.L.C. v. Local Joint Executive Board of Las Vegas*, 45 F. Supp. 2d
5 1027, 1036 (D. Nev. 1999)).

6 29. Pedestrian bridges/raised walkways that allow pedestrians to cross over
7 streets also meet the definition of public sidewalks and are traditional public fora. They are
8 connected to public sidewalks at either end by stairs, escalators, and/or elevators, and they
9 are intended for general public use to ease pedestrian congestion on streets themselves. Just
10 as the Ninth Circuit considered Fremont Street—an area primary consisting of pedestrian
11 traffic—a traditional public forum, so too should this court construe the pedestrian
12 bridges/raised walkways in this matter as traditional public fora. *See ACLU of Nev. v. City of*
13 *Las Vegas*, 333 F.3d 1092, 1102 (9th Cir. 2003) (“The use and purpose of the Fremont Street
14 Experience support the conclusion that it is a traditional public forum. Despite its expensive
15 make-over, the Fremont Street Experience remains a public thoroughfare. Although cars are
16 no longer permitted to drive down the length of the Fremont Street Experience, the agreement
17 between [Fremont Street Experience, LLC] and the City requires that a route for pedestrians
18 remain open at all times, limiting [Fremont Street LLC]’s discretion to manipulate the
19 landscape.”).

20 30. Further, in *S.O.C., Inc. v. Mirage Casino-Hotel* (23 P.3d 243, 249 (Nev.
21 2001)), the Nevada Supreme Court examined the Michigan Court of Appeals’ decision in
22 *Commodities Export Co. v. City of Detroit* (321 N.W.2d 842 (Mich. Ct. App. 1982)). “In that
23 case, a private business enterprise attempted to distribute commercial handbills on a
24 privately-owned bridge and surrounding property of its closest competitor. The owner of the
25 bridge attempted to exclude the handbillers who, in turn, sued alleging that they had a First
26 Amendment right to distribute their advertisements on the property because it was held open
27 to the general public. The court of appeals, after analyzing the United States Supreme Court’s
28 cases in this area, concluded that the rights surrounding private property ownership cannot

1 be extinguished because the property is held open to the public.” *S.O.C., Inc.*, 23 P.3d 243,
 2 249. Thus, even if the raised walkways are considered privately-owned, because they are
 3 held open to the public, they constitute traditional public fora.

4 ***Metro’s Involvement in Litigation Concerning the Strip***

5 31. Metro and its officers have been parties to a number of lawsuits regarding
 6 infringement of free speech rights in the Las Vegas Resort District. For example, on July 9,
 7 2009, two street performers filed suit in federal court alleging constitutional violations after
 8 Metro officers cited them for storing materials or obstructing the sidewalks on the Las Vegas
 9 Strip. *See Banasik et al. v. Clark Cty., et al.*, U.S. Dist. Ct. Case No. 2:09-cv-01242-LDG-
 10 GWF (“*Banasik*”). *Banasik* was resolved pursuant to a settlement agreement between the
 11 parties.

12 32. Just a few years ago, in *Santopietro v. Howell*, 857 F.3d 980 (9th Cir. 2017),
 13 the Ninth Circuit addressed free speech in the Las Vegas Resort District. In that case, the
 14 plaintiff was a street performer who performed as a “sexy cop” on the sidewalks in the Las
 15 Vegas Resort District and was cited by Metro officers for allegedly conducting a business
 16 without a license, a violation of Clark County Code § 6.56.030. The officers’ citation for a
 17 violation of Clark County Code § 6.56.030 was predicated on the fact that the plaintiff
 18 solicited tips in exchange for posing for pictures. *Id.* at 984. In its opinion reversing summary
 19 judgment, the Ninth Circuit reiterated that the sidewalks in the Las Vegas Resort District are
 20 public fora, *id.* at 988, and that performances on public sidewalks are protected under the
 21 First Amendment as expressive activity. *Id.* at 987 (citing *Berger*, 569 F.3d at 1035–36). The
 22 Ninth Circuit also reiterated that the solicitation of tips is “entitled to the same constitutional
 23 protections as traditional speech.” *Id.* at 988 (quoting *ACLU of Nev. v. City of Las Vegas*,
 24 466 F.3d 784, 792 (9th Cir. 2006)).

25 33. A more recent civil rights matter involving Metro’s infringement of street
 26 performers’ free speech rights is *Taylor v. LVMPD, et al.*, Case No. 2:19-cv-00995-JCM-
 27 NJK, in the U.S. District Court of Nevada. Mr. Taylor is a street performer with a congenital
 28 disease that affects the development and mobility of the joints in his arms and legs, requiring

him to use a wheelchair. Mr. Taylor “live draws” by using his mouth to draw artwork for passersby on the Las Vegas Strip. He uses a small portable table while drawing. Beginning in April 2017, Mr. Taylor was repeatedly harassed and cited by Metro officers for obstructing the use of a public walkway, in purported violation of CCC § 16.11.070. Judge Mahan granted Mr. Taylor a temporary restraining order against Metro, explaining that “[t]he plain language of chapter 16 of the CCC is entirely consistent with [Mr. Taylor’s] First Amendment rights” because “[Mr. Taylor] engages in live drawing—which is expressive activity protected by the First Amendment—in a public forum.” *Id.*, ECF No. 84 at 14, 17. Judge Mahan held that CCC § 16.11.070 is facially constitutional because it provides a carve-out for First Amendment activities (by permitting First Amendment speech as long as it is not actually obstructive of a walkway), but noted that “there is a serious question that goes to the merits of the claim” regarding the code as-applied to Mr. Taylor. *Id.* at 15. This matter eventually settled.

Clark County Code § 16.11.070

34. The Clark County Code limits individuals’ ability to store property on the sidewalks in and around the Las Vegas Resort District. It provides as follows:

No equipment, materials, parcels, containers, packages, bundles or other property may be stored, placed or abandoned in or on the public sidewalk. This provision shall not apply to materials or 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 or a backpack which is temporarily placed next to a street performer for that street performer’s use unless said musical instrument actually obstructs the sidewalk in violation of this chapter.

CCC § 16.11.070.

35. Thus, the Clark County Code prohibits storage of materials on a public sidewalk unless the materials are temporarily placed there by a street performer or the street performers’ materials are actually obstructing the sidewalk.

36. “Street performer” is defined as a member of the general public who engages in any performing act or the playing of any musical instrument, singing or vocalizing, with or without musical accompaniment, and whose performance is not an

1 official part of a sponsored event.” CCC § 16.11.020(i).

2 37. Maintaining a table, chair, booth or other structure on the sidewalk that does
3 not actually obstruct the sidewalk and is connected to First Amendment activity is expressly
4 excluded from the definition of “obstructive use.” CCC § 16.11.020(e)(1) (defining
5 “obstructive use” as “[p]lacing, erecting or maintaining an unpermitted table, chair, booth or
6 other structure upon the public sidewalk, if the placing, erecting, or maintaining of the table,
7 chair, or booth is not protected by the First Amendment or if the placing, erecting, or
8 maintaining of the table, chair, or booth is protected by the First Amendment but is actually
9 obstructive”).

10 38. CCC § 16.11.020(e) defines eight meanings of “obstructive use,” including
11 the following catch-all in § 16.11.020(e)(8): “[o]bstructive use’ means . . . any use of the
12 public sidewalk that causes the [level of service] for the public sidewalk to decline below
13 [level of service] C.” CCC § 16.11.020(f) defines level of service (LOS) C as “a pedestrian
14 flow on a sidewalk of less than or equal to ten pedestrians per minute per foot as specified
15 and defined in the Highway Capacity Manual, Special Report 209, a copy of which is filed
16 with the office of the county clerk.” Thus, as long as at least eleven pedestrians per minute
17 per foot can walk on a sidewalk, the LOS of the sidewalk would exceed level C and would
18 not meet the definition of obstructive use.

19 39. While the placing of items on the sidewalk are *per se* obstructions pursuant
20 to CCC § 16.11.070 (“No equipment, materials, parcels, containers, packages, bundles or
21 other property may be stored, placed or abandoned in or on the public sidewalk”), in addition
22 to the definition regarding obstructive use, the following language in CCC § 16.11.070
23 should exempt Mr. Fleming from citation: “This provision shall not apply to . . . items *such*
24 *as a musical instrument case or a backpack which is temporarily placed next to a street*
25 *performer for that street performer’s use* unless said musical instrument actually obstructs
26 the sidewalk in violation of this chapter.” CCC § 16.11.070 (emphasis added). Thus, when
27 materials placed on a sidewalk by a street performer do not cause obstruction, there is no
28 violation.

Clark County Code § 6.04.130

40. Section 6.04.130 of the Clark County Code provides:

It is unlawful for any person to sell, peddle, offer to sell or solicit for sale by offering or displaying any merchandise, goods, items, wares, or services on any improved or unimproved portion of a public right-of-way, including private property upon which a limited easement of public access has been granted, in the unincorporated area of Clark County except that which is otherwise expressly permitted by this code or state statute. This prohibition restricts only sales actually occurring or proposed to occur on the aforementioned public right-of-way, and does not prohibit any person from distributing advertisements or other promotional materials designed to encourage commercial transactions at licensed business locations.

CCC § 6.04.130.

41. In *Santopietro*, the Ninth Circuit discussed solicitation of tips, stating that “[m]unicipalities accordingly may not ban either ‘passive’ solicitation of tips for street performance (e.g., putting a hat out or saying ‘thank you’), or ‘active’ solicitation (e.g., encouraging a tip orally or by tipping a hat).” *Santopietro*, 857 F.3d at 988 (citing *Berger v. City of Seattle*, 569 F.3d 1029, 1052 (9th Cir. 2009)). Under *Santopietro*, the solicitation of tips (whether passive or active) is permitted in public fora, as long as no fee is charged for the good or service being provided.

42. Metro even acknowledged that such solicitation is permitted in its 2010 Memorandum of Understanding (“MOU”), further discussed below: “As a content-based regulation of speech in a public forum, such a ban [on active solicitation of tips] is subject to strict scrutiny, a standard not met by a distinction between active and passive solicitation of voluntary tips. Metro’s 2010 MOU appears to incorporate that holding, by recognizing that ‘non-coercive solicitation of tips[] is not a per se violation’ of the County Code’s business licensing provisions.” *Id.*

History of the Clark County Code

43. The current version of the Clark County Code is the result of civil rights litigation addressing issues very similar to the ones presented in the instant Complaint.

44. As noted above, on July 9, 2009, two street performers filed suit in federal

1 court alleging constitutional violations after Metro officers cited them for storing materials
2 or obstructing the sidewalks on the Las Vegas Strip. *See Banasik et al. v. Clark County et*
3 *al.*, U.S. Dist. Ct. Case No. 2:09-cv-01242-LDG-GWF.

4 45. In the course of the litigation, the parties—which included Metro and
5 individual Metro officers as defendants—entered into a Memorandum of Understanding
6 (“MOU”) in which the parties agreed that street performing is expressive speech or conduct
7 protected by the First Amendment and that street performing was not a violation of, inter
8 alia, the provisions of Chapter 16.11 of the Clark County Code of Ordinances. As part of the
9 MOU, the parties agreed to pursue various provisions of the Clark County Code, including
10 CCC § 16.11.070.

11 46. On November 16, 2010, the Clark County Board of County Commissioners
12 voted to amend Chapter 16.11 of the Clark County Code to include the definition of “street
13 performer” and to clarify that materials can be placed on public sidewalks.

14 47. Metro’s ongoing practices reflect that it has not honored its agreements in
15 the 2010 MOU and that its violations of Mr. Fleming’s rights are bad faith acts intended to
16 violate the Constitution..

17 ***Metro Officers Repeatedly and Improperly Cite Mr. Fleming for Violating the Code***

18 **a. January 2, 2021, Incident**

19 48. On the night of January 2, 2021, Mr. Fleming was performing on the bridge
20 connecting the Cosmopolitan and Aria hotels. As part of his performance, Mr. Fleming had
21 his guitar strapped to himself, his microphone stand in front of him, and his guitar case,
22 speaker, and cords on either side of him.

23 49. On information and belief, Mr. Fleming was approached by Metro Officers
24 Nye and Charles, who told him he was taking up too much “real estate” with his belongings
25 and needed to leave.

26 50. On information and belief, while Mr. Fleming offered to make his setup as
27 compact as possible, Defendant Officers Nye and Charles still demanded Mr. Fleming leave
28 or they would issue him a citation. As such, Mr. Fleming packed up his belongings and left.

1 51. In order to better conform to the laws governing his street performances and
2 avoid future interactions with Metro Officers, Mr. Fleming researched CCC § 16.11.070,
3 which, as stated above, allows for a street performer to perform with items such as an
4 instrument case or backpack next to them.

5 **b. January 7, 2021, Citation**

6 52. On the evening of January 7, 2021, into the early morning of January 8,
7 2021, Mr. Fleming was engaged in street performance on the bridge connecting the Planet
8 Hollywood and Cosmopolitan Hotels. Mr. Fleming was positioned against the glass at the
9 edge of the bridge, with his microphone stand and guitar case at his feet, and his speaker
10 placed inside his guitar case.

11 53. Just past midnight on the morning of January 8, 2021, Defendant Officers
12 Lea, Gray, and Charles approached Mr. Fleming in the area where he was performing.

13 54. The Officers issued Mr. Fleming a citation for storing materials on a public
14 sidewalk in violation of CCC § 16.11.070.

15 55. During the January 7, 2021 encounter, Mr. Fleming tried to explain that he
16 was storing his materials on the bridge in accordance with the requirements of the County
17 Ordinance, even reading the Ordinance aloud to them at one point.

18 56. The officers behaved in a hostile manner towards Mr. Fleming, and after
19 issuing the citation demanded he leave or they would arrest him.

20 57. The citation became Case No. 21-CR-005341, and was subsequently
21 dismissed on or about February 22, 2021.

22 **c. January 15, 2021, Incident**

23 58. On the evening of January 15, 2021, Mr. Fleming was performing on the
24 bridge connecting the Cromwell and Bally's hotels.

25 59. Mr. Fleming was again positioned against the edge of the bridge, with the
26 same compact setup he had on his January 8 interaction with Metro Officers.

27 60. Defendant Officers Gray and Charles approached Mr. Fleming's
28 performance, and again told him he has violating CCC § 16.11.070.

61. Mr. Fleming attempted to explain to the Defendant Officers that his setup was in compliance with the required LOS C: a minimum of ten people per foot of width per minute able to get by.

62. Despite this, Mr. Fleming ceased his performance and left under threat of arrest or citation.

d. January 17, 2021, Incident

63. On January 17, 2021, Mr. Fleming was performing on the bridge between Bally's and Flamingo.

64. Again, Mr. Fleming positioned against the edge of the bridge, with the same compact setup he normally employed.

65. Defendant Officer Lea approached Mr. Fleming with approximately 5-7 Doe Officers.

66. Mr. Fleming attempted to record the interaction with his phone, but Defendant Officer Lea grabbed Mr. Fleming's hand to prevent him from doing so.

67. Mr. Fleming was then forcibly detained and handcuffed by Defendant Officer Lea and the Doe Officers.

68. Mr. Fleming was detained in Clark County Detention Center for over seven hours.

69. Additionally, the application of handcuffs caused Mr. Fleming discomfort and bruising.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS

TO THE CONSTITUTION OF THE UNITED STATES

PURSUANT TO 42 U.S.C. § 1983

(CCC § 16.11.070 IS UNCONSTITUTIONAL AS APPLIED TO MR. FLEMING)

(AGAINST ALL DEFENDANTS)

70. Mr. Fleming repeats and realleges Paragraphs 1 through 70 as though fully set forth herein.

71. The First Amendment to the United States Constitution, as applied to state

1 governments through the Fourteenth Amendment, prohibits a state from “abridging the
2 freedom of speech.” U.S. Const. Amend. I.

3 72. The First Amendment prohibits “restrict[ing] expression because of
4 [expression’s] message, its ideas, its subject matter, or its content.” *Ashcroft v. American*
5 *Civil Liberties Union*, 535 U.S. 564, 573 (2002).

6 73. Although a municipality may place reasonable time, place, and manner
7 restrictions on speech in public fora, those restrictions must be content neutral and narrowly
8 tailored to serve a significant government interest. *A.C.L.U. of Nevada v. City of Las Vegas*,
9 466 F.3d 784, 792 (9th Cir. 2006).

10 74. Defendants, acting under color of law, have caused and will cause Mr.
11 Fleming to be deprived of his constitutional rights in violation of 42 U.S.C. § 1983.

12 75. “An as-applied challenge contends that [a] law is unconstitutional as applied
13 to [a] litigant’s particular speech activity, even though the law may be capable of valid
14 application to others.” *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir.1998). Thus, a
15 successful “as-applied” challenge does not invalidate the law itself, but only the particular
16 application of that law. *Id.*

17 76. On every occasion that Mr. Fleming has been harassed or cited by
18 Defendants for violating the Code, he was engaging in a protected street performance.

19 77. Because his street performance is protected speech, any ordinance which
20 has the effect of preventing him from engaging in street performance is an improper
21 restriction on his First Amendment rights.

22 78. Without a declaratory judgment from this Court stating that CCC §
23 16.11.070 is unconstitutional as applied to Mr. Fleming under the First and Fourteenth
24 Amendments to the United States Constitution, Mr. Fleming faces a real and serious threat
25 of prosecution if he continues to engage in his protected street performances.

26 79. Without injunctive relief from this court prohibiting Defendants from
27 enforcing CCC § 16.11.070 against Mr. Fleming in this unconstitutional manner, Mr.
28 Fleming faces a real and serious threat of prosecution if he continues to engage in his

1 protected street performances.

2 SECOND CAUSE OF ACTION
 3 VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS
 4 TO THE CONSTITUTION OF THE UNITED STATES
 5 PURSUANT TO 42 U.S.C. § 1983
 6 (RIGHT TO FREE SPEECH AND EXPRESSION)
 7 (AGAINST ALL DEFENDANTS)

8 80. Mr. Fleming repeats and realleges Paragraphs 1 through 79 as though fully
 9 set forth herein.

10 81. Defendants acted under color of law, and their actions violated Mr.
 11 Fleming's rights to freedom of speech and free expression as guaranteed by the First and
 12 Fourteenth Amendments of the United States Constitution.

13 82. CCC § 16.11.070 only prohibits street performers from temporarily storing
 14 items on the sidewalk if those items "actually obstruct[]" the sidewalk.

15 83. CCC § 16.11.070 contains a specific exemption for "materials or property
 16 held or stored in a carry bag or pack which is actually carried by a pedestrian or items such
 17 as a musical instrument case or a backpack which is temporarily placed next to a street
 18 performer for that street performer's use unless said musical instrument actually obstructs
 19 the sidewalk."

20 84. Mr. Fleming's temporary placement of his equipment falls within this
 21 exemption because the equipment Mr. Fleming uses for his street performance is necessary
 22 to perform and does not obstruct pedestrian traffic.

23 85. Defendant Officers' actions of threatening, citing, and arresting Mr.
 24 Fleming for obstructive use of a public sidewalk while he was engaged in his street
 25 performance and their seizure of his person and property violated his rights to freedom of
 26 speech and expression as guaranteed by the First and Fourteenth Amendments to the United
 27 States Constitution.

28 86. Defendant Metro is liable for its employees' actions because at all relevant
 times it was responsible for making and enforcing policies with respect to Metro officer
 interactions with citizens and ensuring that officers uniformly enforce laws and do not cite

1 or harass persons exercising their constitutional rights.

2 87. Further, Defendant Metro failed to make and enforce constitutional policies
3 with respect to Metro officers' interactions with citizens. Defendant Metro failed to do so by
4 harassing and citing Mr. Fleming on multiple occasions for engaging in constitutionally
5 protected street performance. As evidenced by these repeated interactions with Mr. Fleming
6 and the history of litigation concerning speakers' First Amendment rights on the Las Vegas
7 Strip, Defendant Metro's policies were not narrowly tailored to fulfill a compelling
8 government interest, and constituted deliberate indifference to the constitutional rights of
9 street performers Metro officers are likely to encounter.

10 88. Therefore, because Defendant Metro's policies and actions constituted
11 deliberate indifference to Mr. Fleming's First and Fourteenth Amendment rights and were
12 the moving force behind its officers' violations of those rights, Defendant Metro is liable for
13 Mr. Fleming's injuries.

14 89. As a direct and proximate result of Defendants' violations of the First and
15 Fourteenth Amendments, Mr. Fleming has suffered, is suffering, and will continue to suffer
16 damages in an amount subject to proof.

17 90. Mr. Fleming is entitled to monetary, compensatory, and punitive damages
18 from Defendants.

19 91. It has been necessary for Mr. Fleming to retain the services of attorneys to
20 pursue this matter, and Mr. Fleming is entitled to attorney's fees, costs, and prejudgment
21 interest.

22 **THIRD CAUSE OF ACTION**
23 **VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS**
24 **TO THE CONSTITUTION OF THE UNITED STATES**
25 **PURSUANT TO 42 U.S.C. § 1983**
26 **(RIGHT TO FREE SPEECH AND EXPRESSION – CHILLING EFFECT)**
27 **(AGAINST ALL DEFENDANTS)**

28 92. Mr. Fleming repeats and realleges Paragraphs 1 through 91 as though fully
set forth herein.

93. Defendants acted under color of law, and their actions violated Mr.

1 Fleming's rights to freedom of speech and expression as guaranteed by the First and
2 Fourteenth Amendments to the United States Constitution.

3 94. Defendant Metro's actions of harassing and citing citizens engaged in
4 protected street performance in and around the Las Vegas Resort District improperly
5 restrained and chilled Mr. Fleming's rights to free speech and expression as guaranteed by
6 the First and Fourteenth Amendments to the United States Constitution.

7 95. Defendant Metro is liable because at all relevant times Defendant Metro
8 was responsible for making and enforcing policies with respect to officer interactions with
9 citizens and ensuring, via adequate training and supervision that officers were aware of
10 relevant law with respect to free speech and expression, and Defendant Metro failed to do so
11 by permitting its officers to regulate, harass, and cite citizens for engaging in protected street
12 performances.

13 96. As evidenced by the repeated unconstitutional citation and arrest of Mr.
14 Fleming for engaging in constitutionally protected expressive activities on the Las Vegas
15 Strip, as well as the numerous cases brought against it regarding its repeated, unlawful
16 citation and detention of plaintiffs engaged in expressive activities on the Las Vegas Strip,
17 Defendant Metro's failure to enforce these policies and train and supervise its officers with
18 respect to those engaging in expressive activities in public for a constitutes deliberate
19 indifference to the First Amendment rights of those whom Defendant Metro's officers are
20 likely to come into contact.

21 97. Had Defendant Metro adequately trained its officers, Mr. Fleming's
22 constitutional injury—violation of his right to free speech—would have been avoided.

23 98. Mr. Fleming continues and intends to continue engaging in his street
24 performance in the future. Mr. Fleming relies on his street performances to provide an outlet
25 for his artistic expression, and relies on the tips he receives in exchange for his original works
26 of art to supplement his income.

27 99. Based on previous harassment, citations, and prosecution for engaging in
28 his street performance, Mr. Fleming fears that if he engages in his street performance in the

1 only way he is capable of doing—*i.e.*, bringing his guitar, a case for his guitar, a microphone,
2 and a speaker—he will be prosecuted. Mr. Fleming continues to engage in his street
3 performance, but fears that Metro officers will cite him and seize his property.

4 100. Defendants' actions of harassing, citing, and arresting Mr. Fleming have
5 restricted, chilled, and inhibited the speech and expression of Mr. Fleming and other non-
6 party individuals. While Mr. Fleming continues to and will continue to engage in his chosen
7 street performance, he is constantly fearful that he will be unlawfully harassed and cited by
8 Metro officers.

9 101. As a direct and proximate result of Defendants' violations of the First and
10 Fourteenth Amendments, Mr. Fleming has suffered, is suffering, and will continue to suffer
11 damages in an amount subject to proof.

12 102. Mr. Fleming is entitled to monetary, compensatory, and punitive damages
13 from Defendants.

14 103. It has been necessary for Mr. Fleming to retain the services of attorneys to
15 pursue this matter, and Mr. Fleming is entitled to attorney's fees, costs, and prejudgment
16 interest.

17 **FOURTH CAUSE OF ACTION**
18 **VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS**
19 **TO THE CONSTITUTION OF THE UNITED STATES**
20 **PURSUANT TO 42 U.S.C. § 1983**
21 **(RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES)**
22 **(AGAINST DEFENDANT METRO, DEFENDANT LEA, DOE OFFICERS)**

23 104. Mr. Fleming repeats and realleges Paragraphs 1 through 103 as though fully
24 set forth herein.

25 105. The Fourth Amendment to the United States Constitution provides that the
26 "right of the people to be secure in their persons, houses, papers and effects, against
27 unreasonable searches and seizures, shall not be violated...." U.S. Const. Amend. IV.

28 106. Defendants acted under color of law, and violated Mr. Fleming's right to be
free from unlawful searches and seizures as guaranteed by the Fourth and Fourteenth
Amendments to the United States Constitution. Defendant Doe Officers I–V and Officer Lea

1 unlawfully seized Mr. Fleming's guitar, guitar case, microphone, microphone stand, and
2 speaker—which Mr. Fleming needs to engage in his street performance—without probable
3 cause that he committed a crime.

4 107. Defendant Doe Officers I–V and Officer Lea unlawfully seized Mr.
5 Fleming when they arrested him without probable cause that a crime was being committed
6 on January 17, 2021 in violation of his rights under Fourth and Fourteenth Amendment to
7 the United States Constitution.

8 108. Defendant Metro is liable because at all relevant times it was responsible
9 for making and enforcing policies with respect the Officer Defendants' seizures of property
10 and ensuring that such seizures are conducted within the parameters of the law, and
11 Defendant Metro failed to do so.

12 109. As evidenced by the repeated unconstitutional citations of Mr. Fleming for
13 engaging in constitutionally protected expressive activities on the Las Vegas Strip, as well
14 as the numerous cases brought against it regarding its repeated, unlawful citation and
15 detention of plaintiffs engaged in expressive activities on the Las Vegas Strip, Defendant
16 Metro's failure to enforce these policies and train and supervise its officers with respect to
17 unconstitutional seizures of property constituted deliberate indifference to the Fourth
18 Amendment rights of those whom Defendant Metro's officers are likely to come into contact.

19 110. Had Defendant Metro adequately trained its officers, Mr. Fleming's
20 constitutional injury—the unreasonable seizure of his property—would have been avoided.

21 111. Mr. Fleming is entitled to monetary, compensatory, and punitive damages
22 from Defendants.

23 112. It has been necessary for Mr. Fleming to retain the services of attorneys to
24 pursue this matter, and Mr. Fleming is entitled to attorney's fees, costs, and prejudgment
25 interest.

26 113. As a direct and proximate result of Defendants' violations of the First and
27 Fourteenth Amendments, Mr. Fleming has suffered, is suffering, and will continue to suffer
28 damages in an amount subject to proof.

FIFTH CAUSE OF ACTION**VIOLATION OF THE CONSTITUTION OF THE STATE OF NEVADA – FREE SPEECH****PROTECTIONS****(AGAINST ALL DEFENDANTS)**

114. Mr. Fleming repeats and realleges Paragraphs 1 through 113 as though fully set forth herein.

115. Mr. Fleming's rights to speech and expressive conduct are impermissibly restricted, chilled, deterred and inhibited by the actions of Defendants.

116. Article 1, Section 9 of the Constitution of the State of Nevada provides "[e]very citizen may freely speak, write, and publish his sentiments on all subjects . . . and no law shall be passed to restrain or abridge the liberty of speech"

117. Defendants' actions, as alleged herein, constitute violations of Mr. Fleming's rights under Article 1, Section 9 of the Constitution of the State of Nevada.

118. Mr. Fleming is entitled to monetary, compensatory, and punitive damages from Defendants.

119. It has been necessary for Mr. Fleming to retain the services of attorneys to pursue this matter, and Mr. Fleming is entitled to attorney's fees, costs, and prejudgment interest.

120. As a direct and proximate result of Defendants' violations of the Nevada Constitution, Mr. Fleming has suffered, is suffering, and will continue to suffer damages in an amount subject to proof.

SIXTH CAUSE OF ACTION**NEGLIGENT TRAINING, SUPERVISION, AND RETENTION****UNDER NEV. REV. STAT. § 41.130****(AGAINST DEFENDANT METRO)**

121. Mr. Fleming repeats and re-alleges Paragraphs 1 through 120 as though fully set forth herein.

122. Defendant Metro owed a duty to persons such as the Mr. Fleming to use reasonable care in the training, supervision, and retention of their employees to make sure that their employees are fit for their positions by implementing policies and procedures designed to prevent wrongful acts by their employees, such as those committed by individual

1 defendant officers.

2 123. Defendant Metro breached this duty by failing to train its officers regarding
3 the First Amendment free speech rights of individuals to engage in expressive conduct such
4 as street performances in and around the Las Vegas Resort District, thereby creating a
5 situation where its officers improperly enforce CCC § 16.11.070.

6 124. Moreover, Defendant Metro has breached this duty by failing to train its
7 officers regarding the MOU Defendant Metro entered into in *Banasik et al. v. Clark County*
8 *et al.*, U.S. Dist. Ct. Case No. 2:09-cv-01242-LDG-GWF, in which the parties agreed that
9 street performing is expressive speech or conduct protected by the First Amendment and that
10 street performing was not a violation of, *inter alia*, the provisions of Chapter 16.11 of the
11 Clark County Code, thereby creating a situation where its officers are enforcing CCC §
12 16.11.070 in violation of the terms of the MOU.

13 125. Defendant Metro is not entitled to discretionary immunity because its lack
14 of adequate training and supervision regarding the rights of individuals to engage in free
15 speech and expressive conduct such as street performances violated—and continues to
16 violate—Mr. Fleming’s constitutional rights.

17 126. Defendant Metro is liable because at all relevant times, the officers were in
18 the employ of Metro and Metro is responsible for Metro’s officers’ conduct. Defendant
19 Metro’s officers were not acting independently, committed the wrongful acts during the
20 course of their official duties as police officers, and such actions were reasonably foreseeable
21 considering the nature and scope of their employment as police officers.

22 127. As a direct and proximate result of Defendant Metro’s failure to adequately
23 train its officers, Mr. Fleming has suffered, is suffering, and will continue to suffer damages
24 in an amount subject to proof.

25 128. Mr. Fleming is entitled to monetary, compensatory, and punitive damages
26 from Defendants.

27 129. It has been necessary for Mr. Fleming to retain the services of attorneys to
28 pursue this matter, and Mr. Fleming is entitled to attorney’s fees, costs, and prejudgment

1 interest.

2 SEVENTH CAUSE OF ACTION
 3 VIOLATION OF THE CONSTITUTION OF NEVADA—UNREASONABLE
 4 SEARCH AND SEIZURE
 5 (AGAINST ALL DEFENDANTS)

6 130. Mr. Fleming repeats and realleges Paragraphs 1 through 129 as though fully
 7 set forth herein.

8 131. Article 1, Section 18 of the Nevada Constitution provides that the “right of
 9 the people to be secure in their persons, houses, papers and effects, against unreasonable
 10 searches and seizures, shall not be violated....” Nev. Const. art. I, § 18.

11 132. Defendants violated Mr. Fleming’s right to be free from unlawful searches
 12 and seizures as guaranteed by Article I, Section 18 to the Nevada Constitution. Defendants
 13 Doe Officers I–VIII and Officer Lea unlawfully seized Mr. Fleming’s guitar, guitar case,
 14 microphone, microphone stand, and speaker—which Mr. Fleming needs to engage in his
 15 street performance—without probable cause that he committed a crime.

16 133. Defendants Doe Officers and Officer Lea unlawfully seized Mr. Fleming
 17 when they arrested him without probable cause that he committed a crime on January 17,
 18 2021.

19 134. As a direct and proximate result of Defendants’ violations of the Nevada
 20 Constitution, Mr. Fleming has suffered, is suffering, and will continue to suffer damages in
 21 an amount subject to proof.

22 135. Mr. Fleming is entitled to monetary, compensatory, and punitive damages
 23 from Defendants.

24 136. It has been necessary for Mr. Fleming to retain the services of attorneys to
 25 pursue this matter, and Mr. Fleming is entitled to attorney’s fees, costs, and prejudgment
 26 interest.

27 137. As a direct and proximate result of Defendants’ violations of the First and
 28 Fourteenth Amendments, Mr. Fleming has suffered, is suffering, and will continue to suffer
 damages in an amount subject to proof

EIGHTH CAUSE OF ACTION
VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE
CONSTITUTION OF THE UNITED STATES—MALICIOUS PROSECUTION
PURSUANT TO 42 U.S.C. § 1983
(AGAINST ALL DEFENDANTS)

138. Mr. Fleming repeats and realleges Paragraphs 1 through 137 as though fully set forth herein.

139. The Fourth Amendment of the Constitution of the United States provides that that the “right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated....” U.S. Const. Amend. IV.

140. The Fourth Amendment prohibits prosecution where the suit was “instituted without probable cause, . . . the “motive in instituting the suit was malicious,” and the “prosecution ended without a conviction.” *Thompson v. Clark*, 142 S. Ct. 1332, 1336 (2022) (citations and internal quotations omitted).

141. All criminal actions pertaining to Mr. Fleming’s citations and arrests have been terminated in Mr. Fleming’s favor.

142. As a direct and proximate result of Defendants’ constitutional violations, Mr. Fleming has suffered, is suffering, and will continue to suffer damages in an amount subject to proof.

143. Mr. Fleming is entitled to monetary, compensatory, and punitive damages from Defendants.

144. It has been necessary for Mr. Fleming to retain the services of attorneys to pursue this matter, and Mr. Fleming is entitled to attorney’s fees, costs, and prejudgment interest.

145. As a direct and proximate result of Defendants’ violations of the First and Fourteenth Amendments, Mr. Fleming has suffered, is suffering, and will continue to suffer damages in an amount subject to proof.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays as follows:

1 a. A declaration that CCC § 16.11.070 is unconstitutional as applied to Mr.
2 Fleming;

3 b. A permanent injunction preventing Defendant Metro and its officers from
4 violating the constitutional rights of individuals by improperly citing street performers for
5 obstructive use of public sidewalk;

6 c. An award in excess of \$15,000 requiring all Defendants to pay monetary
7 and compensatory damages in an amount to be determined at trial;

8 d. An award in excess of \$15,000 against the individual Defendants for
9 punitive damages in an amount to be determined at trial;

10 e. An award of attorney's fees and costs; and,

11 f. Any further relief the Court deems appropriate.

12 DATED this 2nd day of January, 2023.

13 /s/ Leo S. Wolpert

14 MARGARET A. MCLETCHIE, Nevada Bar No. 10931

15 LEO S. WOLPERT, Nevada Bar No. 12658

16 **MCLETCHIE LAW**

17 602 South Tenth Street

18 Las Vegas, NV 89101

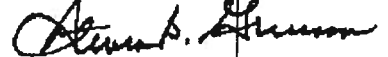
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20 Email: maggie@nvlitigation.com

21 *Counsel for Plaintiff, William Fleming*

EXHIBIT B

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10 *Counsel for Plaintiff William Fleming*

11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 WILLIAM FLEMING, an individual,

Case No.: A-23-863339-C

14 Plaintiff,

Dept. No.: VI

15 vs.

FIRST AMENDED COMPLAINT

[JURY TRIAL DEMANDED]

16 LAS VEGAS METROPOLITAN POLICE
17 DEPARTMENT, a Municipal Corporation;
18 OFFICER JAVON CHARLES, an
19 individual; OFFICER TIMOTHY NYE, an
20 individual; OFFICER GABRIEL LEA, an
21 individual; OFFICER CODY GRAY, an
22 individual; OFFICER SUPREET KAUR, as
23 an individual; OFFICER HALEY
24 ANDERSEN, as an individual; SERGEANT
25 JOHN JOHNSON, as an individual;
26 CAPTAIN DORI KOREN, as an individual;
27 OFFICER RICHARD PALACIOS, as an
28 individual; OFFICER PATRICK
WHEARTY, as an individual; OFFICER
WOOD, as an individual; DOE OFFICERS I
- X, individuals.

Defendants.

Plaintiff William Fleming, by and through his counsel of record, hereby files this
Complaint for damages pursuant to 42 U.S.C. § 1983 (civil action for deprivation of rights),
the Nevada Constitution, and Nevada statute.

NATURE OF THE ACTION

Plaintiff William Fleming is a musician and street performer. He has performed



1 numerous times on the raised pedestrian walkways above the Las Vegas Strip (in the Las
2 Vegas Resort District), playing guitar and singing to the delight of passers-by. Mr. Fleming
3 carefully set up and engaged in his performances to avoid blocking or impeding the flow of
4 pedestrian traffic on the pedestrian bridges. The Clark County, Nevada, Code of Ordinances
5 (the “Clark County Code” or “CCC”) permits his conduct, the First Amendment of the United
6 States Constitution, and Article 1, Section 9 of the Nevada Constitution protect Mr.
7 Fleming’s right to engage in free expression on the Strip—as the Las Vegas Metropolitan
8 Police Department (“Metro”) well knows. Despite these facts, starting in January 2021,
9 Metro officers began harassing Mr. Fleming and violating his First Amendment rights, citing
10 him for obstructive use of a public sidewalk and even arresting him pursuant to CCC §
11 16.11.070.

12 This is an action under 42 U.S.C. § 1983 and the Nevada Constitution seeking to
13 address the unconstitutionality of the Code as applied to Mr. Fleming, the violations of Mr.
14 Fleming’s First and Fourth Amendment rights (and their Nevada constitutional analogues)
15 by Metro and its individual officers, and Metro’s negligent training and supervision which
16 led to these constitutional harms. Mr. Fleming also seeks a permanent injunction and
17 declaratory relief to redress Defendants’ willful, deliberate, and clear constitutional
18 violations, and the harm—which is ongoing and irreparable—that he has suffered as a result.

19 Over the past decades, courts have repeatedly vindicated musicians’ and other
20 artists’ rights to perform on the public sidewalks of the Las Vegas Resort District. The
21 Federal District Court has repeatedly made clear that Metro cannot use the Code as a pretext
22 to shut down musical and artistic performances that do not actually obstruct pedestrian
23 traffic. Yet, despite consistent rebukes from this Court, Metro continues to engage in the
24 same constitutionally violative conduct. Enough is enough.

25 JURISDICTION AND VENUE

26 1. This Court has jurisdiction to award Plaintiff damages pursuant to 42 U.S.C.
27 § 1983, the Nevada Constitution, and Nev. Rev. Stat. § 41.130.

28 2. The Defendants acted, purported to act, and/or pretended to act in the

1 performance of their official duties, and thus Defendants acted under color of law and are
2 subject to liability as state actors pursuant to 42 U.S.C. § 1983.

3 3. The acts or omissions giving rise to Plaintiff's claims all occurred in Clark
4 County, Nevada. Thus, venue is proper in the Eighth Judicial District Court of the State of
5 Nevada.

6 PARTIES

7 4. During all relevant times herein, Plaintiff William Fleming ("Mr. Fleming")
8 is a musician and street performer who resides in Clark County, Nevada.

9 5. Defendant Metro is the law enforcement agency for Clark County and the
10 City of Las Vegas. Defendant Metro is sued in its official capacity.

11 6. Upon information and belief, Defendant Metro is aware of and has either
12 explicitly or implicitly condoned or created a policy and practice of allowing Metro officers
13 to enforce Clark County Code ("Clark County Code" or "CCC") § 16.11.070 arbitrarily
14 and/or intentionally to chill constitutionally protected street performances in and around the
15 Las Vegas Resort District.

16 7. The Code does not criminalize street performances in and around the Las
17 Vegas Resort District.

18 8. Upon information and belief, Defendant Metro has a policy and practice of
19 allowing its officers to violate the law with impunity and has created or failed to address a
20 culture at Metro that its officers are above the law.

21 9. Upon information and belief, Defendant Metro has failed to adequately train
22 its officers to refrain from engaging in police misconduct, abusing their position of power,
23 and improperly citing individuals engaged in constitutionally protected street performances.

24 10. Upon information and belief, Defendant Officer Javon Charles, was at all
25 relevant times herein employed by Metro.

26 11. Upon information and belief, Defendant Officer Timothy Nye, was at all
27 relevant times herein employed by Metro.

28 12. Upon information and belief, Officer Gabriel Lea was at all relevant times



- 1 herein employed by Metro.
- 2 13. Upon information and belief, Officer Cody Gray was at all relevant times
- 3 herein employed by Metro.
- 4 14. Upon information and belief, Officer Supreet Kaur was at all relevant times
- 5 herein employed by Metro.
- 6 15. Upon information and belief, Officer Haley Andersen was at all relevant
- 7 times herein employed by Metro.
- 8 16. Upon information and belief, Officer Richard Palacios was at all relevant
- 9 times herein employed by Metro.
- 10 17. Upon information and belief, Officer Patrick Whearty was at all relevant
- 11 times herein employed by Metro.
- 12 18. Upon information and belief, Officer Wood (first name unknown) was at
- 13 all relevant times herein employed by Metro
- 14 19. Upon information and belief, Sergeant John Johnson was at all relevant
- 15 times herein employed by Metro.
- 16 20. Upon information and belief, Captain Dori Koren was at all relevant times
- 17 herein employed by Metro.
- 18 21. Upon information and belief, Doe Officers I through X were at all relevant
- 19 times herein employed by Metro.
- 20 22. The naming of defendants herein is based upon information and belief. Mr.
- 21 Fleming reserves his right to name additional defendants and modify his allegations
- 22 concerning defendants named herein.

23 **STANDING**

- 24 23. Mr. Fleming is and continues to be directly affected by Defendants'
- 25 practices and policies of violating the constitutional rights of individuals based upon their
- 26 exercise of constitutional rights, as set forth more fully herein, and/or other abuses by
- 27 Defendants acting under color of law.
- 28 24. An actual case and controversy exists between Mr. Fleming and Defendants

concerning their respective rights, privileges, and obligations.

FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

Plaintiff William Fleming

25. Mr. Fleming is a musician and artist who specializes in guitar and vocals.

26. Mr. Fleming has performed on the pedestrian bridges above the streets of the Las Vegas Resort Corridor, colloquially known as the “Las Vegas Strip,” which allow pedestrians to cross the streets without entering the traffic below and provide enhanced acoustics for Mr. Fleming’s performances.

27. Mr. Fleming sets up his guitar, amplifier, and microphone immediately alongside the walls of the pedestrian bridges, to ensure that his performance does not impede the flow of pedestrian traffic.

28. Mr. Fleming accepts tips and donations, but never charges a fee for the songs he plays.

29. Mr. Fleming performs with his back to the wall of the pedestrian bridge, as far out of the way of the flow of pedestrian traffic as possible, and condenses his belongings to be as compact as possible to avoid blocking the flow of pedestrian traffic.

History of Litigation Concerning the Las Vegas Resort District

30. For “[t]ime out of mind public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum.” *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (quotation omitted). They are the “archetype” of a traditional public forum. *Id.* As the United States Court of Appeals for the Ninth Circuit has explained, “[t]he protections afforded by the First Amendment are nowhere stronger than in streets and parks, both categorized for First Amendment purposes as traditional public fora.” *Berger v. City of Seattle*, 569 F.3d 1029, 1035–36 (9th Cir. 2009) (citations omitted). Public sidewalks are also a traditional public forum and are open to the public for expressive activities. *United States v. Grace*, 461 U.S. 171, 179 (1983).

31. The United States Court of Appeals for the Ninth Circuit has repeatedly specifically found that the sidewalks located within the Las Vegas Resort District are public



1 fora.

2 32. The Ninth Circuit issued its first decision pertaining to the public nature of
3 the sidewalks in the Las Vegas in 1998 in *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136 (9th
4 Cir. 1998). In that case, the Circuit held that a Clark County Ordinance which prohibited
5 canvassers from distributing leaflets on the sidewalks in the Las Vegas Resort District was
6 facially overbroad and thus unconstitutional on its face. *Id.* at 1140. In so holding, the Circuit
7 noted that there was “no dispute that the Ordinance regulates activities occurring in a public
8 forum.” *Id.* at 1144.

9 33. Three years later, the Ninth Circuit issued another opinion finding that the
10 streets and sidewalks in the Las Vegas Resort District are public fora. *Venetian Casino*
11 *Resort, LLC v. Local Joint Exec. Board of Las Vegas*, 257 F.3d 937 (9th Cir. 2001).

12 34. According to clearly established case law, when a sidewalk performs an
13 essential public function, it is a traditional public forum and its private owner does not have
14 the right to exclude individuals from the sidewalk based upon permissible First Amendment
15 activity. *Perez-Morciglio v. Las Vegas Metro. Police Dept.*, 820 F. Supp. 2d 1100, 1110 (D.
16 Nev. 2011) (citing *Venetian Casino Resort, LLC v. Local Joint Exec. Board of Las Vegas*,
17 45 F. Supp. 2d 1027, 1036 (D. Nev. 1999)).

18 35. According to clearly established case law, “a thoroughfare sidewalk,
19 seamlessly connected to public sidewalks at either end and intended for general public use”
20 is “a public sidewalk, and consequently, a traditional public forum from which [the
21 sidewalk’s private owners] have no right to exclude members of the public.” *Perez-Morciglio*
22 *v. Las Vegas Metropolitan Police Dept.*, 820 F. Supp. 2d 1100, 1111 (D. Nev. 2011) (citing
23 *Venetian Casino Resort, L.L.C. v. Local Joint Executive Board of Las Vegas*, 45 F. Supp. 2d
24 1027, 1036 (D. Nev. 1999)).

25 36. Pedestrian bridges/raised walkways that allow pedestrians to cross over
26 streets also meet the definition of public sidewalks and are traditional public fora. They are
27 connected to public sidewalks at either end by stairs, escalators, and/or elevators, and they
28 are intended for general public use to ease pedestrian congestion on streets themselves. Just

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as the Ninth Circuit considered Fremont Street—an area primarily consisting of pedestrian traffic—a traditional public forum, so too should this court construe the pedestrian bridges/raised walkways in this matter as traditional public fora. *See ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1102 (9th Cir. 2003) (“The use and purpose of the Fremont Street Experience support the conclusion that it is a traditional public forum. Despite its expensive make-over, the Fremont Street Experience remains a public thoroughfare. Although cars are no longer permitted to drive down the length of the Fremont Street Experience, the agreement between [Fremont Street Experience, LLC] and the City requires that a route for pedestrians remain open at all times, limiting [Fremont Street LLC]’s discretion to manipulate the landscape.”).

37. Further, in *S.O.C., Inc. v. Mirage Casino-Hotel* (23 P.3d 243, 249 (Nev. 2001)), the Nevada Supreme Court examined the Michigan Court of Appeals’ decision in *Commodities Export Co. v. City of Detroit* (321 N.W.2d 842 (Mich. Ct. App. 1982)). “In that case, a private business enterprise attempted to distribute commercial handbills on a privately-owned bridge and surrounding property of its closest competitor. The owner of the bridge attempted to exclude the handbillers who, in turn, sued alleging that they had a First Amendment right to distribute their advertisements on the property because it was held open to the general public. The court of appeals, after analyzing the United States Supreme Court’s cases in this area, concluded that the rights surrounding private property ownership cannot be extinguished because the property is held open to the public.” *S.O.C., Inc.*, 23 P.3d 243, 249. Thus, even if the raised walkways are considered privately-owned, because they are held open to the public, they constitute traditional public fora.

Metro’s Involvement in Litigation Concerning the Strip

38. Metro and its officers have been parties to a number of lawsuits regarding infringement of free speech rights in the Las Vegas Resort District. For example, on July 9, 2009, two street performers filed suit in federal court alleging constitutional violations after Metro officers cited them for storing materials or obstructing the sidewalks on the Las Vegas Strip. *See Banasik et al. v. Clark Cty., et al.*, U.S. Dist. Ct. Case No. 2:09-cv-01242-LDG-



1 GWF (“*Banasik*”). *Banasik* was resolved pursuant to a settlement agreement between the
2 parties.

3 39. Just a few years ago, in *Santopietro v. Howell*, 857 F.3d 980 (9th Cir. 2017),
4 the Ninth Circuit addressed free speech in the Las Vegas Resort District. In that case, the
5 plaintiff was a street performer who performed as a “sexy cop” on the sidewalks in the Las
6 Vegas Resort District and was cited by Metro officers for allegedly conducting a business
7 without a license, a violation of Clark County Code § 6.56.030. The officers’ citation for a
8 violation of Clark County Code § 6.56.030 was predicated on the fact that the plaintiff
9 solicited tips in exchange for posing for pictures. *Id.* at 984. In its opinion reversing summary
10 judgment, the Ninth Circuit reiterated that the sidewalks in the Las Vegas Resort District are
11 public fora, *id.* at 988, and that performances on public sidewalks are protected under the
12 First Amendment as expressive activity. *Id.* at 987 (citing *Berger*, 569 F.3d at 1035–36). The
13 Ninth Circuit also reiterated that the solicitation of tips is “entitled to the same constitutional
14 protections as traditional speech.” *Id.* at 988 (quoting *ACLU of Nev. v. City of Las Vegas*,
15 466 F.3d 784, 792 (9th Cir. 2006)).

16 40. A more recent civil rights matter involving Metro’s infringement of street
17 performers’ free speech rights is *Taylor v. LVMPD, et al.*, Case No. 2:19-cv-00995-JCM-
18 NJK, in the U.S. District Court of Nevada. Mr. Taylor is a street performer with a congenital
19 disease that affects the development and mobility of the joints in his arms and legs, requiring
20 him to use a wheelchair. Mr. Taylor “live draws” by using his mouth to draw artwork for
21 passersby on the Las Vegas Strip. He uses a small portable table while drawing. Beginning
22 in April 2017, Mr. Taylor was repeatedly harassed and cited by Metro officers for obstructing
23 the use of a public walkway, in purported violation of CCC § 16.11.070. Judge Mahan
24 granted Mr. Taylor a temporary restraining order against Metro, explaining that “[t]he plain
25 language of chapter 16 of the CCC is entirely consistent with [Mr. Taylor’s] First
26 Amendment rights” because “[Mr. Taylor] engages in live drawing—which is expressive
27 activity protected by the First Amendment—in a public forum.” *Id.*, ECF No. 84 at 14, 17.
28 Judge Mahan held that CCC § 16.11.070 is facially constitutional because it provides a carve-

1 out for First Amendment activities (by permitting First Amendment speech as long as it is
 2 not actually obstructive of a walkway), but noted that “there is a serious question that goes
 3 to the merits of the claim” regarding the code as-applied to Mr. Taylor. *Id.* at 15. This matter
 4 eventually settled.

5 ***Clark County Code § 16.11.070***

6 41. The Clark County Code limits individuals’ ability to store property on the
 7 sidewalks in and around the Las Vegas Resort District. It provides as follows:

8 No equipment, materials, parcels, containers, packages, bundles or other
 9 property may be stored, placed or abandoned in or on the public sidewalk.¹
 10 This provision shall not apply to materials or property held or stored in a
 11 carry bag or pack which is actually carried by a pedestrian or items such as
 12 a musical instrument case or a backpack which is temporarily placed next
 to a street performer for that street performer’s use unless said musical
 instrument actually obstructs the sidewalk in violation of this chapter.

13 CCC § 16.11.070.

14 42. Thus, the Clark County Code prohibits storage of materials on a public
 15 sidewalk unless the materials are temporarily placed there by a street performer or the street
 16 performers’ materials are actually obstructing the sidewalk.

17 43. “Street performer” is defined as a member of the general public who
 18 engages in any performing act or the playing of any musical instrument, singing or
 19 vocalizing, with or without musical accompaniment, and whose performance is not an
 20 official part of a sponsored event.” CCC § 16.11.020(i).

21 44. Maintaining a table, chair, booth or other structure on the sidewalk that does
 22 not actually obstruct the sidewalk and is connected to First Amendment activity is expressly
 23 excluded from the definition of “obstructive use.” CCC § 16.11.020(e)(1) (defining
 24

25 ¹ “Public Sidewalk” is defined as any “portion of a highway between the curb lines, or the
 26 lateral lines of a roadway, and the adjacent property lines, intended for use of pedestrians,
 27 and shall also include crosswalks, medians and traffic islands. For the purposes of this
 28 chapter, ‘public sidewalk’ shall include private property upon which a limited easement of
 public access has been granted.” CCC § 16.11.020(d). This includes pedestrian bridges over
 the Strip. *See Taylor*, Case No. 2:19-cv-00995-JCM-NJK, ECF No. 84 at 13–14 (considering
 pedestrian bridges as part of CCC § 16.11.070’s use of “sidewalk.”).



1 “obstructive use” as “[p]lacing, erecting or maintaining an unpermitted table, chair, booth or
2 other structure upon the public sidewalk, if the placing, erecting, or maintaining of the table,
3 chair, or booth is not protected by the First Amendment or if the placing, erecting, or
4 maintaining of the table, chair, or booth is protected by the First Amendment but is actually
5 obstructive”).

6 45. CCC § 16.11.020(e) defines eight meanings of “obstructive use,” including
7 the following catch-all in § 16.11.020(e)(8): “[o]bstructive use’ means . . . any use of the
8 public sidewalk that causes the [level of service] for the public sidewalk to decline below
9 [level of service] C.” CCC § 16.11.020(f) defines level of service (LOS) C as “a pedestrian
10 flow on a sidewalk of less than or equal to ten pedestrians per minute per foot as specified
11 and defined in the Highway Capacity Manual, Special Report 209, a copy of which is filed
12 with the office of the county clerk.” Thus, as long as at least eleven pedestrians per minute
13 per foot can walk on a sidewalk, the LOS of the sidewalk would exceed level C and would
14 not meet the definition of obstructive use.

15 46. While the placing of items on the sidewalk are *per se* obstructions pursuant
16 to CCC § 16.11.070 (“No equipment, materials, parcels, containers, packages, bundles or
17 other property may be stored, placed or abandoned in or on the public sidewalk”), in addition
18 to the definition regarding obstructive use, the following language in CCC § 16.11.070
19 should exempt Mr. Fleming from citation: “This provision shall not apply to . . . items *such*
20 *as a musical instrument case or a backpack which is temporarily placed next to a street*
21 *performer for that street performer’s use* unless said musical instrument actually obstructs
22 the sidewalk in violation of this chapter.” CCC § 16.11.070 (emphasis added). Thus, when
23 materials placed on a sidewalk by a street performer do not cause obstruction, there is no
24 violation.

25 ***Clark County Code § 6.04.130***

26 47. Section 6.04.130 of the Clark County Code provides:

27 It is unlawful for any person to sell, peddle, offer to sell or solicit for sale
28 by offering or displaying any merchandise, goods, items, wares, or services
on any improved or unimproved portion of a public right-of-way, including

private property upon which a limited easement of public access has been granted, in the unincorporated area of Clark County except that which is otherwise expressly permitted by this code or state statute. This prohibition restricts only sales actually occurring or proposed to occur on the aforementioned public right-of-way, and does not prohibit any person from distributing advertisements or other promotional materials designed to encourage commercial transactions at licensed business locations.

CCC § 6.04.130.

48. In *Santopietro*, the Ninth Circuit discussed solicitation of tips, stating that “[m]unicipalities accordingly may not ban either ‘passive’ solicitation of tips for street performance (e.g., putting a hat out or saying ‘thank you’), or ‘active’ solicitation (e.g., encouraging a tip orally or by tipping a hat).” *Santopietro*, 857 F.3d at 988 (citing *Berger v. City of Seattle*, 569 F.3d 1029, 1052 (9th Cir. 2009)). Under *Santopietro*, the solicitation of tips (whether passive or active) is permitted in public fora, as long as no fee is charged for the good or service being provided.

49. Metro even acknowledged that such solicitation is permitted in its 2010 Memorandum of Understanding (“MOU”), further discussed below: “As a content-based regulation of speech in a public forum, such a ban [on active solicitation of tips] is subject to strict scrutiny, a standard not met by a distinction between active and passive solicitation of voluntary tips. Metro’s 2010 MOU appears to incorporate that holding, by recognizing that ‘non-coercive solicitation of tips[] is not a per se violation’ of the County Code’s business licensing provisions.” *Id.*

History of the Clark County Code

50. The current version of the Clark County Code is the result of civil rights litigation addressing issues very similar to the ones presented in the instant Complaint.

51. As noted above, on July 9, 2009, two street performers filed suit in federal court alleging constitutional violations after Metro officers cited them for storing materials or obstructing the sidewalks on the Las Vegas Strip. *See Banasik et al. v. Clark County et al.*, U.S. Dist. Ct. Case No. 2:09-cv-01242-LDG-GWF.

52. In the course of the litigation, the parties—which included Metro and



1 individual Metro officers as defendants—entered into a Memorandum of Understanding
2 (“MOU”) in which the parties agreed that street performing is expressive speech or conduct
3 protected by the First Amendment and that street performing was not a violation of, inter
4 alia, the provisions of Chapter 16.11 of the Clark County Code of Ordinances. As part of the
5 MOU, the parties agreed to pursue various provisions of the Clark County Code, including
6 CCC § 16.11.070.

7 53. On November 16, 2010, the Clark County Board of County Commissioners
8 voted to amend Chapter 16.11 of the Clark County Code to include the definition of “street
9 performer” and to clarify that materials can be placed on public sidewalks.

10 54. Metro’s ongoing practices reflect that it has not honored its agreements in
11 the 2010 MOU and that its violations of Mr. Fleming’s rights are bad faith acts intended to
12 violate the United States Constitution and Nevada Constitution.

13 ***Metro Officers Repeatedly and Improperly Cite Mr. Fleming for Violating the Code***

14 **a. January 2, 2021, Incident**

15 55. On the night of January 2, 2021, Mr. Fleming was performing on the bridge
16 connecting the Cosmopolitan and Aria hotels. As part of his performance, Mr. Fleming had
17 his guitar strapped to himself, his microphone stand in front of him, and his guitar case,
18 speaker, and cords on either side of him.

19 56. On information and belief, Mr. Fleming was approached by Metro Officers
20 Nye and Charles, who told him he was taking up too much “real estate” with his belongings
21 and needed to leave.

22 57. On information and belief, while Mr. Fleming offered to make his setup as
23 compact as possible, Defendant Officers Nye and Charles still demanded Mr. Fleming leave
24 or they would issue him a citation. As such, Mr. Fleming packed up his belongings and left
25 the area.

26 58. In order to ensure he conformed to the laws governing his street
27 performances and avoid future interactions with Metro Officers, Mr. Fleming subsequently
28 researched CCC § 16.11.070, which, as stated above, allows for a street performer to perform

1 with items such as an instrument case or backpack next to them.

2 **b. January 7, 2021, Citation**

3 59. On the evening of January 7, 2021, into the early morning of January 8,
4 2021, Mr. Fleming was engaged in street performance on the bridge connecting the Planet
5 Hollywood and Cosmopolitan Hotels. Mr. Fleming was positioned against the glass at the
6 edge of the bridge, with his microphone stand and guitar case at his feet, and his speaker
7 placed inside his guitar case.

8 60. Just past midnight on the morning of January 8, 2021, Defendant Officers
9 Lea, Gray, and Charles approached Mr. Fleming in the area where he was performing.

10 61. The Officers issued Mr. Fleming a citation for storing materials on a public
11 sidewalk in violation of CCC § 16.11.070.

12 62. During the January 7-8, 2021 encounter, Mr. Fleming tried to explain that
13 he was storing his materials on the bridge in accordance with the requirements of the County
14 Ordinance, even reading the Ordinance aloud to them at one point.

15 63. The officers behaved in a hostile manner towards Mr. Fleming, and after
16 issuing the citation demanded he leave or they would arrest him. As a result, Mr. Fleming
17 left the area.

18 64. The citation became Case No. 21-CR-005341, and was subsequently
19 dismissed on or about February 22, 2021.

20 **c. January 15, 2021, Incident**

21 65. On the evening of January 15, 2021, Mr. Fleming was performing on the
22 bridge connecting the Cromwell and Bally's Hotels.

23 66. Mr. Fleming was again positioned against the edge of the bridge, with the
24 same compact setup he had on his January 7-8 interaction with Metro Officers.

25 67. Defendant Officers Gray and Charles approached Mr. Fleming's
26 performance, and again told him he has violating CCC § 16.11.070.

27 68. Mr. Fleming attempted to explain to the Defendant Officers that his setup
28 was in compliance with the required LOS C: a minimum of ten people per foot of width per

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1 minute able to get by.

2 69. Despite this, Mr. Fleming ceased his performance and left the area under
3 threat of arrest or citation.

4 **d. January 17, 2021, Arrest**

5 70. On January 17, 2021, Mr. Fleming was performing on the bridge between
6 Bally's and Flamingo.

7 71. Again, Mr. Fleming positioned against the edge of the bridge, with the same
8 compact setup he normally employed.

9 72. Defendant Officer Lea approached Mr. Fleming with approximately 5-8
10 Doe Officers.

11 73. Mr. Fleming attempted to record the interaction with his phone, but
12 Defendant Officer Lea grabbed Mr. Fleming's hand to prevent him from doing so.

13 74. Mr. Fleming was then forcibly detained and handcuffed by Defendant
14 Officer Lea and the Doe Officers.

15 75. Mr. Fleming was detained in Clark County Detention Center for over seven
16 hours.

17 76. Additionally, the application of handcuffs caused Mr. Fleming discomfort
18 and bruising.

19 77. During Mr. Fleming's arrest, Metro seized the materials he used in his
20 performance, including but not limited to his guitar, guitar case, microphone and microphone
21 stand, speaker, cables to connect his guitar and microphone to the speaker, and bag to keep
22 his materials in, for eighteen days.

23 78. Following Mr. Fleming's arrest, he approached Officer Nye in person while
24 he patrolled the Strip to inquire how he could possibly perform again in the future without
25 being cited or arrested by Metro.

26 79. Contrary to the requirements of the County Ordinance, Officer Nye
27 instructed him to have his speaker and microphone attached to him, and while he could place
28 his guitar case on the ground, it must be empty.

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e. February 4, 2021, Incident

80. On February 4, 2021, Mr. Fleming was performing on the bridge connecting the Cromwell and Caesar's Palace Hotels.

81. Again, Mr. Fleming was positioned against the edge of the bridge, but this time in accordance with Officer Nye's over-restrictive directions: his guitar, microphone, and speaker were all attached to him, leaving only his guitar case on the ground.

82. Defendant Officers Palacios, Whearty, and Doe Officer IX approached, stopped, and required Mr. Fleming to produce his ID.

83. While checking Mr. Fleming's record, the officers acted in a hostile manner towards Mr. Fleming, instructing him that he was not permitted to remain stationary and threatening to arrest him and/or issue him a citation unless he moved.

84. As such, Mr. Fleming packed up his belongings and left the area.

f. April 30, 2021, Incident

85. On the evening of April 30, 2021, into the early morning of May 1, 2021, Mr. Fleming was performing on the bridge connecting the Bellagio and Bally's Hotels.

86. Again, Mr. Fleming was positioned at the edge of the bridge, this time with everything attached to him and none of his belongings on the ground.

87. On information and belief, Defendant Officer Wood and Doe Officer X approached Mr. Fleming. Officer Wood acted aggressively toward him and demanded he get off the bridge or be arrested.

88. On information and belief, Defendant Officer Wood explained that he could not be there because he did not have a permit to perform. Mr. Fleming tried to explain that he did not need one, but the Officers persisted, stating that he leave or be arrested.

89. As a result, Mr. Fleming left the area.

g. June 13, 2021, Incident

90. On the evening of June 13, 2021, Mr. Fleming was performing on the bridge connecting the Cromwell and Bally's Hotels.

91. Again, Mr. Fleming was positioned against the edge of the bridge with

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1 everything attached to him, except for a water bottle in a small grocery bag placed at his feet.

2 92. Defendant Officers Kaur and Andersen, and Defendant Sergeant Johnson
3 approached Mr. Fleming and aggressively threatened to arrest him if he did not leave.

4 93. As a result, Mr. Fleming left the area.

5 **h. June 19, 2021, Incident**

6 94. On the evening of June 19, 2020, and into the early morning of June 20,
7 2020, Mr. Fleming was performing on the bridge connecting the Cromwell and Bally's
8 Hotels.

9 95. Mr. Fleming was again positioned against the edge of the bridge with
10 everything attached to him and none of his belongings on the ground.

11 96. On information and belief, Defendant Officer Andersen and Defendant
12 Captain Koren approached Mr. Fleming and demanded Mr. Fleming leave or be arrested.

13 97. As a result, Mr. Fleming left the Strip.

14 98. Mr. Fleming has felt humiliated and degraded as a result of the actions of
15 the Defendant Officers.

16 99. The actions of the Defendant Officers have inhibited Mr. Fleming from
17 engaging in his protected street performance, and discouraged him from continuing his
18 performances in the future out of fear of arrest, citation, and harassment from the Officers.

19 **CAUSES OF ACTION**

20 **FEDERAL CLAIMS**

21 **FIRST CAUSE OF ACTION**

22 **VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS**
23 **TO THE CONSTITUTION OF THE UNITED STATES**
24 **PURSUANT TO 42 U.S.C. § 1983**

25 **(CCC § 16.11.070 IS UNCONSTITUTIONAL AS APPLIED TO MR. FLEMING)**
26 **(AGAINST ALL DEFENDANTS)**

27 100. Mr. Fleming repeats and realleges Paragraphs 1 through 99 as though fully
28 set forth herein.

101. The First Amendment to the United States Constitution, as applied to state
governments through the Fourteenth Amendment, prohibits a state from "abridging the

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1 freedom of speech.” U.S. Const. Amend. I.

2 102. The First Amendment prohibits “restrict[ing] expression because of
3 [expression’s] message, its ideas, its subject matter, or its content.” *Ashcroft v. American*
4 *Civil Liberties Union*, 535 U.S. 564, 573 (2002).

5 103. Although a municipality may place reasonable time, place, and manner
6 restrictions on speech in public fora, those restrictions must be content neutral and narrowly
7 tailored to serve a significant government interest. *A.C.L.U. of Nevada v. City of Las Vegas*,
8 466 F.3d 784, 792 (9th Cir. 2006).

9 104. Defendants, acting under color of law, have caused and will cause Mr.
10 Fleming to be deprived of his constitutional rights in violation of 42 U.S.C. § 1983.

11 105. “An as-applied challenge contends that [a] law is unconstitutional as applied
12 to [a] litigant’s particular speech activity, even though the law may be capable of valid
13 application to others.” *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir.1998). Thus, a
14 successful “as-applied” challenge does not invalidate the law itself, but only the particular
15 application of that law. *Id.*

16 106. On every occasion that Mr. Fleming has been harassed or cited by
17 Defendants for violating the Code, he was engaging in a protected street performance.

18 107. Because his street performance is protected speech, any ordinance which
19 has the effect of preventing him from engaging in street performance is an improper
20 restriction on his First Amendment rights.

21 108. Without a declaratory judgment from this Court stating that CCC §
22 16.11.070 is unconstitutional as applied to Mr. Fleming under the First and Fourteenth
23 Amendments to the United States Constitution, Mr. Fleming faces a real and serious threat
24 of prosecution if he continues to engage in his protected street performances.

25 109. Without injunctive relief from this court prohibiting Defendants from
26 enforcing CCC § 16.11.070 against Mr. Fleming in this unconstitutional manner, Mr.
27 Fleming faces a real and serious threat of prosecution if he continues to engage in his
28 protected street performances.

SECOND CAUSE OF ACTION
VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS
TO THE CONSTITUTION OF THE UNITED STATES
PURSUANT TO 42 U.S.C. § 1983
(RIGHT TO FREE SPEECH AND EXPRESSION)
(AGAINST ALL DEFENDANTS)

110. Mr. Fleming repeats and realleges Paragraphs 1 through 109 as though fully set forth herein.

111. Defendants acted under color of law, and their actions violated Mr. Fleming's rights to freedom of speech and free expression as guaranteed by the First and Fourteenth Amendments of the United States Constitution.

112. CCC § 16.11.070 only prohibits street performers from temporarily storing items on the sidewalk if those items "actually obstruct[]" the sidewalk.

113. CCC § 16.11.070 contains a specific exemption for "materials or 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 or a backpack which is temporarily placed next to a street performer for that street performer's use unless said musical instrument actually obstructs the sidewalk."

114. Mr. Fleming's temporary placement of his equipment falls within this exemption because the equipment Mr. Fleming uses for his street performance is necessary to perform and does not obstruct pedestrian traffic.

115. Defendant Officers' actions of threatening, citing, and arresting Mr. Fleming for obstructive use of a public sidewalk while he was engaged in his street performance and their seizure of his person and property violated his rights to freedom of speech and expression as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

116. Defendant Metro is liable for its employees' actions because at all relevant times it was responsible for making and enforcing policies with respect to Metro officer interactions with citizens and ensuring that officers uniformly enforce laws and do not cite

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1 or harass persons exercising their constitutional rights.

2 117. Further, Defendant Metro failed to make and enforce constitutional policies
 3 with respect to Metro officers' interactions with citizens. Defendant Metro failed to do so by
 4 harassing and citing Mr. Fleming on multiple occasions for engaging in constitutionally
 5 protected street performance. As evidenced by these repeated interactions with Mr. Fleming
 6 and the history of litigation concerning speakers' First Amendment rights on the Las Vegas
 7 Strip, Defendant Metro's policies were not narrowly tailored to fulfill a compelling
 8 government interest, and constituted deliberate indifference to the constitutional rights of
 9 street performers Metro officers are likely to encounter.

10 118. Therefore, because Defendant Metro's policies and actions constituted
 11 deliberate indifference to Mr. Fleming's First and Fourteenth Amendment rights and were
 12 the moving force behind its officers' violations of those rights, Defendant Metro is liable for
 13 Mr. Fleming's injuries.

14 119. As a direct and proximate result of Defendants' violations of the First and
 15 Fourteenth Amendments, Mr. Fleming has suffered, is suffering, and will continue to suffer
 16 damages in an amount subject to proof.

17 120. Mr. Fleming is entitled to monetary, compensatory, and punitive damages
 18 from Defendants.

19 121. It has been necessary for Mr. Fleming to retain the services of attorneys to
 20 pursue this matter, and Mr. Fleming is entitled to attorney's fees, costs, and prejudgment
 21 interest.

22 **THIRD CAUSE OF ACTION**
 23 **VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS**
 24 **TO THE CONSTITUTION OF THE UNITED STATES**
PURSUANT TO 42 U.S.C. § 1983

25 **(RIGHT TO FREE SPEECH AND EXPRESSION – CHILLING EFFECT)**
 26 **(AGAINST ALL DEFENDANTS)**

27 122. Mr. Fleming repeats and realleges Paragraphs 1 through 121 as though fully
 28 set forth herein.

123. Defendants acted under color of law, and their actions violated Mr.

1 Fleming's rights to freedom of speech and expression as guaranteed by the First and
2 Fourteenth Amendments to the United States Constitution.

3 124. Defendant Metro's actions of harassing and citing citizens engaged in
4 protected street performance in and around the Las Vegas Resort District improperly
5 restrained and chilled Mr. Fleming's rights to free speech and expression as guaranteed by
6 the First and Fourteenth Amendments to the United States Constitution.

7 125. Defendant Metro is liable because at all relevant times Defendant Metro
8 was responsible for making and enforcing policies with respect to officer interactions with
9 citizens and ensuring, via adequate training and supervision that officers were aware of
10 relevant law with respect to free speech and expression, and Defendant Metro failed to do so
11 by permitting its officers to regulate, harass, and cite citizens for engaging in protected street
12 performances.

13 126. As evidenced by the repeated unconstitutional citation and arrest of Mr.
14 Fleming for engaging in constitutionally protected expressive activities on the Las Vegas
15 Strip, as well as the numerous cases brought against it regarding its repeated, unlawful
16 citation and detention of plaintiffs engaged in expressive activities on the Las Vegas Strip,
17 Defendant Metro's failure to enforce these policies and train and supervise its officers with
18 respect to those engaging in expressive activities in public for a constitutes deliberate
19 indifference to the First Amendment rights of those whom Defendant Metro's officers are
20 likely to come into contact.

21 127. Had Defendant Metro adequately trained its officers, Mr. Fleming's
22 constitutional injury—violation of his right to free speech—would have been avoided.

23 128. Mr. Fleming continues and intends to continue engaging in his street
24 performance in the future. Mr. Fleming relies on his street performances to provide an outlet
25 for his artistic expression, and relies on the tips he receives in exchange for his original works
26 of art to supplement his income.

27 129. Based on previous harassment, citations, and prosecution for engaging in
28 his street performance, Mr. Fleming fears that if he engages in his street performance in the

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only way he is capable of doing—*i.e.*, bringing his guitar, a case for his guitar, a microphone, and a speaker—he will be prosecuted. Mr. Fleming continues to engage in his street performance, but fears that Metro officers will cite him and seize his property.

130. Defendants' actions of harassing, citing, and arresting Mr. Fleming have restricted, chilled, and inhibited the speech and expression of Mr. Fleming and other non-party individuals. While Mr. Fleming continues to and will continue to engage in his chosen street performance, he is constantly fearful that he will be unlawfully harassed and cited by Metro officers.

131. As a direct and proximate result of Defendants' violations of the First and Fourteenth Amendments, Mr. Fleming has suffered, is suffering, and will continue to suffer damages in an amount subject to proof.

132. Mr. Fleming is entitled to monetary, compensatory, and punitive damages from Defendants.

133. It has been necessary for Mr. Fleming to retain the services of attorneys to pursue this matter, and Mr. Fleming is entitled to attorney's fees, costs, and prejudgment interest.

FOURTH CAUSE OF ACTION
VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS
TO THE CONSTITUTION OF THE UNITED STATES
PURSUANT TO 42 U.S.C. § 1983

(UNREASONABLE SEARCH AND SEIZURE)
(AGAINST DEFENDANT METRO, DEFENDANT LEA, DOE OFFICERS)

134. Mr. Fleming repeats and realleges Paragraphs 1 through 133 as though fully set forth herein.

135. The Fourth Amendment to the United States Constitution provides that the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated...." U.S. Const. Amend. IV.

136. Defendants acted under color of law, and violated Mr. Fleming's right to be free from unlawful searches and seizures as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution. Defendant Doe Officers I–V and Officer Lea

1 unlawfully seized Mr. Fleming's guitar, guitar case, microphone, microphone stand, and
2 speaker—which Mr. Fleming needs to engage in his street performance—without probable
3 cause that he committed a crime.

4 137. Defendant Doe Officers I–VIII and Officer Lea unlawfully seized Mr.
5 Fleming when they arrested him without probable cause that a crime was being committed
6 on January 17, 2021 in violation of his rights under Fourth and Fourteenth Amendment to
7 the United States Constitution.

8 138. Defendant Metro is liable because at all relevant times it was responsible
9 for making and enforcing policies with respect the Officer Defendants' seizures of property
10 and ensuring that such seizures are conducted within the parameters of the law, and
11 Defendant Metro failed to do so.

12 139. As evidenced by the repeated unconstitutional citations of Mr. Fleming for
13 engaging in constitutionally protected expressive activities on the Las Vegas Strip, as well
14 as the numerous cases brought against it regarding its repeated, unlawful citation and
15 detention of plaintiffs engaged in expressive activities on the Las Vegas Strip, Defendant
16 Metro's failure to enforce these policies and train and supervise its officers with respect to
17 unconstitutional seizures of property constituted deliberate indifference to the Fourth
18 Amendment rights of those whom Defendant Metro's officers are likely to come into contact.

19 140. Had Defendant Metro adequately trained its officers, Mr. Fleming's
20 constitutional injury—the unreasonable seizure of his property—would have been avoided.

21 141. Mr. Fleming is entitled to monetary, compensatory, and punitive damages
22 from Defendants.

23 142. It has been necessary for Mr. Fleming to retain the services of attorneys to
24 pursue this matter, and Mr. Fleming is entitled to attorney's fees, costs, and prejudgment
25 interest.

26 143. As a direct and proximate result of Defendants' violations of the First and
27 Fourteenth Amendments, Mr. Fleming has suffered, is suffering, and will continue to suffer
28 damages in an amount subject to proof.

FIFTH CAUSE OF ACTION
VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE
CONSTITUTION OF THE UNITED STATES
PURSUANT TO 42 U.S.C. § 1983
(MALICIOUS PROSECUTION)
(AGAINST DEFENDANT METRO, DEFENDANT LEA,
DEFENDANT GRAY, DEFENDANT CHARLES)

144. Mr. Fleming repeats and realleges Paragraphs 1 through 143 as though fully set forth herein.

145. The Fourth Amendment of the Constitution of the United States provides that that the “right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated....” U.S. Const. Amend. IV.

146. The Fourth Amendment prohibits prosecution where the suit was “instituted without probable cause,” and the “prosecution ended without a conviction.” *Thompson v. Clark*, 142 S. Ct. 1332, 1336 (2022) (citations and internal quotations omitted).

147. All criminal actions pertaining to Mr. Fleming’s citations and arrests have been terminated in Mr. Fleming’s favor.

148. As a direct and proximate result of Defendants’ constitutional violations, Mr. Fleming has suffered, is suffering, and will continue to suffer damages in an amount subject to proof.

149. Mr. Fleming is entitled to monetary, compensatory, and punitive damages from Defendants.

150. It has been necessary for Mr. Fleming to retain the services of attorneys to pursue this matter, and Mr. Fleming is entitled to attorney’s fees, costs, and prejudgment interest.

151. As a direct and proximate result of Defendants’ violations of the First and Fourteenth Amendments, Mr. Fleming has suffered, is suffering, and will continue to suffer damages in an amount subject to proof.

SIXTH CAUSE OF ACTION
VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE
CONSTITUTION OF THE UNITED STATES
PURSUANT TO 42 U.S.C. § 1983
(UNLAWFUL ARREST)
(AGAINST DEFENDANT METRO, DEFENDANT LEA, DOE OFFICERS)

152. Mr. Fleming repeats and realleges Paragraphs 1 through 151 as though fully set forth herein.

153. The Fourth Amendment's of the Constitution of the United States provides that that the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated...." U.S. Const. Amend. IV

154. The Fourth Amendment prohibits arrests made "without probable cause or other justification." *Perez-Morciglio v. Las Vegas Metro. Police Dep't*, 820 F. Supp. 2d 1111 (D. Nev. 2011) (quoting *Dubner v. City & Cnty. of S.F.*, 266 F.3d 959, 964–65 (9th Cir. 2001)).

155. Mr. Fleming was arrested by Officer Lea and Doe Officers I-VIII without probable cause on January 17, 2021.

156. All criminal actions pertaining to Mr. Fleming's arrest on January 17, 2021, have been terminated in Mr. Fleming's favor.

157. As a direct and proximate result of Defendants' constitutional violations, Mr. Fleming has suffered, is suffering, and will continue to suffer damages in an amount subject to proof.

158. Mr. Fleming is entitled to monetary, compensatory, and punitive damages from Defendants.

159. It has been necessary for Mr. Fleming to retain the services of attorneys to pursue this matter, and Mr. Fleming is entitled to attorney's fees, costs, and prejudgment interest.

160. As a direct and proximate result of Defendants' violations of the First and Fourteenth Amendments, Mr. Fleming has suffered, is suffering, and will continue to suffer damages in an amount subject to proof.

Nevada Constitutional Claims

SEVENTH CAUSE OF ACTION
VIOLATION OF THE CONSTITUTION OF THE STATE OF NEVADA
(FREE SPEECH PROTECTIONS)
(AGAINST ALL DEFENDANTS)

161. Mr. Fleming repeats and realleges Paragraphs 1 through 160 as though fully set forth herein.

162. Mr. Fleming's rights to speech and expressive conduct are impermissibly restricted, chilled, deterred and inhibited by the actions of Defendants.

163. Article 1, Section 9 of the Constitution of the State of Nevada provides "[e]very citizen may freely speak, write, and publish his sentiments on all subjects . . . and no law shall be passed to restrain or abridge the liberty of speech"

164. Defendants' actions, as alleged herein, constitute violations of Mr. Fleming's rights under Article 1, Section 9 of the Constitution of the State of Nevada.

165. Mr. Fleming is entitled to monetary, compensatory, and punitive damages from Defendants.

166. It has been necessary for Mr. Fleming to retain the services of attorneys to pursue this matter, and Mr. Fleming is entitled to attorney's fees, costs, and prejudgment interest.

167. As a direct and proximate result of Defendants' violations of the Nevada Constitution, Mr. Fleming has suffered, is suffering, and will continue to suffer damages in an amount subject to proof.

EIGHTH CAUSE OF ACTION
VIOLATION OF THE CONSTITUTION OF THE STATE OF NEVADA
(FREE SPEECH PROTECTIONS – CHILLING EFFECT)
(AGAINST ALL DEFENDANTS)

168. Mr. Fleming repeats and realleges Paragraphs 1 through 167 as though fully set forth herein.

169. The free speech protections of Article 1, Section 9 of the Constitution of the State of Nevada are "coextensive to, but no greater than, that of the First Amendment to the

1 United States Constitution.” *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 415, 23 P.3d
2 243, 251 (2001) (citations omitted).

3 170. Defendant Metro’s actions of harassing and citing citizens engaged in
4 protected street performance in and around the Las Vegas Resort District improperly
5 restrained and chilled Mr. Fleming’s rights to free speech and expression as guaranteed by
6 the First and Fourteenth Amendments to the United States Constitution.

7 171. Defendant Metro is liable because at all relevant times Defendant Metro
8 was responsible for making and enforcing policies with respect to officer interactions with
9 citizens and ensuring, via adequate training and supervision that officers were aware of
10 relevant law with respect to free speech and expression, and Defendant Metro failed to do so
11 by permitting its officers to regulate, harass, and cite citizens for engaging in protected street
12 performances.

13 172. As evidenced by the repeated unconstitutional citation and arrest of Mr.
14 Fleming for engaging in constitutionally protected expressive activities on the Las Vegas
15 Strip, as well as the numerous cases brought against it regarding its repeated, unlawful
16 citation and detention of plaintiffs engaged in expressive activities on the Las Vegas Strip,
17 Defendant Metro’s failure to enforce these policies and train and supervise its officers with
18 respect to those engaging in expressive activities in public for a constitutes deliberate
19 indifference to the First Amendment rights of those whom Defendant Metro’s officers are
20 likely to come into contact.

21 173. Had Defendant Metro adequately trained its officers, Mr. Fleming’s
22 constitutional injury—violation of his right to free speech—would have been avoided.

23 174. Mr. Fleming continues and intends to continue engaging in his street
24 performance in the future. Mr. Fleming relies on his street performances to provide an outlet
25 for his artistic expression, and relies on the tips he receives in exchange for his original works
26 of art to supplement his income.

27 175. Based on previous harassment, citations, and prosecution for engaging in
28 his street performance, Mr. Fleming fears that if he engages in his street performance in the

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only way he is capable of doing—*i.e.*, bringing his guitar, a case for his guitar, a microphone, and a speaker—he will be prosecuted. Mr. Fleming continues to engage in his street performance, but fears that Metro officers will cite him and seize his property.

176. Defendants' actions of harassing, citing, and arresting Mr. Fleming have restricted, chilled, and inhibited the speech and expression of Mr. Fleming and other non-party individuals. While Mr. Fleming continues to and will continue to engage in his chosen street performance, he is constantly fearful that he will be unlawfully harassed and cited by Metro officers.

177. As a direct and proximate result of Defendants' violations of the First and Fourteenth Amendments, Mr. Fleming has suffered, is suffering, and will continue to suffer damages in an amount subject to proof.

178. Mr. Fleming is entitled to monetary, compensatory, and punitive damages from Defendants.

179. It has been necessary for Mr. Fleming to retain the services of attorneys to pursue this matter, and Mr. Fleming is entitled to attorney's fees, costs, and prejudgment interest.

NINTH CAUSE OF ACTION
VIOLATION OF THE CONSTITUTION OF THE STATE OF NEVADA
(FREE SPEECH PROTECTIONS—CCC § 16.11.070
IS UNCONSTITUTIONAL AS APPLIED TO MR. FLEMING)
(AGAINST ALL DEFENDANTS)

180. Mr. Fleming repeats and realleges Paragraphs 1 through 179 as though fully set forth herein.

181. Article 1, Section 9 of the Constitution of the State of Nevada provides "[e]very citizen may freely speak, write, and publish his sentiments on all subjects . . . and no law shall be passed to restrain or abridge the liberty of speech"

182. The free speech protections of Article 1, Section 9 of the Constitution of the State of Nevada are "coextensive to, but no greater than, that of the First Amendment to the United States Constitution." *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 415, 23 P.3d

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1 243, 251 (2001) (citations omitted).

2 183. The First Amendment prohibits “restrict[ing] expression because of
3 [expression’s] message, its ideas, its subject matter, or its content.” *Ashcroft v. American*
4 *Civil Liberties Union*, 535 U.S. 564, 573 (2002).

5 184. Although a municipality may place reasonable time, place, and manner
6 restrictions on speech in public fora, those restrictions must be content neutral and narrowly
7 tailored to serve a significant government interest. *A.C.L.U. of Nevada v. City of Las Vegas*,
8 466 F.3d 784, 792 (9th Cir. 2006).

9 185. “An as-applied challenge contends that [a] law is unconstitutional as applied
10 to [a] litigant’s particular speech activity, even though the law may be capable of valid
11 application to others.” *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir.1998). Thus, a
12 successful “as-applied” challenge does not invalidate the law itself, but only the particular
13 application of that law. *Id.*

14 186. On every occasion that Mr. Fleming has been harassed or cited by
15 Defendants for violating the Code, he was engaging in a protected street performance.

16 187. Because his street performance is protected speech, any ordinance which
17 has the effect of preventing him from engaging in street performance is an improper
18 restriction on his First Amendment rights.

19 188. Without a declaratory judgment from this Court stating that CCC §
20 16.11.070 is unconstitutional as applied to Mr. Fleming under Article 1, Section 9 of the
21 Nevada Constitution, Mr. Fleming faces a real and serious threat of prosecution if he
22 continues to engage in his protected street performances.

23 189. Without injunctive relief from this court prohibiting Defendants from
24 enforcing CCC § 16.11.070 against Mr. Fleming in this unconstitutional manner, Mr.
25 Fleming faces a real and serious threat of prosecution if he continues to engage in his
26 protected street performances.

27

28

TENTH CAUSE OF ACTION
VIOLATION OF THE CONSTITUTION OF NEVADA
(UNREASONABLE SEARCH AND SEIZURE)
(AGAINST ALL DEFENDANTS)

190. Mr. Fleming repeats and realleges Paragraphs 1 through 189 as though fully set forth herein.

191. Article 1, Section 18 of the Nevada Constitution provides that the “right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated....” Nev. Const. art. I, § 18.

192. Defendants violated Mr. Fleming’s right to be free from unlawful searches and seizures as guaranteed by Article I, Section 18 to the Nevada Constitution. Defendants Doe Officers I–VIII and Officer Lea unlawfully seized Mr. Fleming’s guitar, guitar case, microphone, microphone stand, and speaker—which Mr. Fleming needs to engage in his street performance—without probable cause that he committed a crime.

193. Defendants Doe Officers and Officer Lea unlawfully seized Mr. Fleming when they arrested him without probable cause that he committed a crime on January 17, 2021.

194. As a direct and proximate result of Defendants’ violations of the Nevada Constitution, Mr. Fleming has suffered, is suffering, and will continue to suffer damages in an amount subject to proof.

195. Mr. Fleming is entitled to monetary, compensatory, and punitive damages from Defendants.

196. It has been necessary for Mr. Fleming to retain the services of attorneys to pursue this matter, and Mr. Fleming is entitled to attorney’s fees, costs, and prejudgment interest.

197. As a direct and proximate result of Defendants’ violations of the First and Fourteenth Amendments, Mr. Fleming has suffered, is suffering, and will continue to suffer damages in an amount subject to proof.

1 **Nevada Tort Claims**

2 **ELEVENTH CAUSE OF ACTION**
 3 **NEGLIGENT TRAINING, SUPERVISION, AND RETENTION**
 4 **UNDER NEV. REV. STAT. § 41.130**
(AGAINST DEFENDANT METRO)

5 198. Mr. Fleming repeats and re-alleges Paragraphs 1 through 197 as though
 6 fully set forth herein.

7 199. Defendant Metro owed a duty to persons such as the Mr. Fleming to use
 8 reasonable care in the training, supervision, and retention of their employees to make sure
 9 that their employees are fit for their positions by implementing policies and procedures
 10 designed to prevent wrongful acts by their employees, such as those committed by individual
 11 defendant officers.

12 200. Defendant Metro breached this duty by failing to train its officers regarding
 13 the First Amendment free speech rights of individuals to engage in expressive conduct such
 14 as street performances in and around the Las Vegas Resort District, thereby creating a
 15 situation where its officers improperly enforce CCC § 16.11.070.

16 201. Moreover, Defendant Metro has breached this duty by failing to train its
 17 officers regarding the MOU Defendant Metro entered into in *Banasik et al. v. Clark County*
 18 *et al.*, U.S. Dist. Ct. Case No. 2:09-cv-01242-LDG-GWF, in which the parties agreed that
 19 street performing is expressive speech or conduct protected by the First Amendment and that
 20 street performing was not a violation of, *inter alia*, the provisions of Chapter 16.11 of the
 21 Clark County Code, thereby creating a situation where its officers are enforcing CCC §
 22 16.11.070 in violation of the terms of the MOU.

23 202. Defendant Metro is not entitled to discretionary immunity because its lack
 24 of adequate training and supervision regarding the rights of individuals to engage in free
 25 speech and expressive conduct such as street performances violated—and continues to
 26 violate—Mr. Fleming's constitutional rights.

27 203. Defendant Metro is liable because at all relevant times, the officers were in
 28 the employ of Metro and Metro is responsible for Metro's officers' conduct. Defendant

1 Metro's officers were not acting independently, committed the wrongful acts during the
2 course of their official duties as police officers, and such actions were reasonably foreseeable
3 considering the nature and scope of their employment as police officers.

4 204. As a direct and proximate result of Defendant Metro's failure to adequately
5 train its officers, Mr. Fleming has suffered, is suffering, and will continue to suffer damages
6 in an amount subject to proof.

7 205. Mr. Fleming is entitled to monetary, compensatory, and punitive damages
8 from Defendants.

9 206. It has been necessary for Mr. Fleming to retain the services of attorneys to
10 pursue this matter, and Mr. Fleming is entitled to attorney's fees, costs, and prejudgment
11 interest.

12 **TWELFTH CAUSE OF ACTION**
13 **FALSE ARREST**
14 **(AGAINST DEFENDANT METRO, DEFENDANT LEA, DOE OFFICERS)**

15 207. Mr. Fleming repeats and re-alleges Paragraphs 1 through 206 as though
16 fully set forth herein.

17 208. A false arrest occurs when an arrest is "instigated or effected without legal
18 cause or justification." *Jordan v. State ex rel. Dep't of Motor Vehicles & Pub. Safety*, 121
19 Nev. 44, 70, 110 P.3d 30, 48 (2005), abrogated on other grounds by *Buzz Stew, LLC v. City*
20 *of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008) (citations and internal quotations
21 omitted).

22 209. Mr. Fleming was arrested without probable cause, and therefore without
23 legal cause or justification, on January 17, 2021 by Officer Lea and Doe Officers I-XIII.

24 210. As a direct and proximate result of Defendants' unlawful arrest, Mr.
25 Fleming has suffered, is suffering, and will continue to suffer damages in an amount subject
26 to proof.

27 211. Mr. Fleming is entitled to monetary, compensatory, and punitive damages
28 from Defendants.

212. It has been necessary for Mr. Fleming to retain the services of attorneys to pursue this matter, and Mr. Fleming is entitled to attorney's fees, costs, and prejudgment interest.

THIRTEENTH CAUSE OF ACTION
MALICIOUS PROSECUTION
(AGAINST DEFENDANT METRO, DEFENDANT METRO, DEFENDANT LEA,
DEFENDANT GRAY, DEFENDANT CHARLES)

213. Mr. Fleming repeats and re-alleges Paragraphs 1 through 212 as though fully set forth herein.

214. Malicious Prosecution exists when there is ““(1) want of probable cause to initiate the prior criminal proceeding; (2) malice; (3) termination of the prior criminal proceedings; and (4) damage.”” *LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877, 879 (2002) (quoting *Jordan v. Bailey*, 113 Nev. 1038, 1047, 944 P.2d 828, 834 (1997)).

215. Defendant Officers Lea, Gray, and Charles initiated the criminal proceeding against Mr. Fleming when they issued him a citation on January 8, 2021 without probable cause that a crime was being committed.

216. All criminal proceedings pertaining to Mr. Fleming stemming from the events alleged herein have been terminated in his favor.

217. As a direct and proximate result of Defendants' unlawful arrest, Mr. Fleming has suffered, is suffering, and will continue to suffer damages in an amount subject to proof.

218. Mr. Fleming is entitled to monetary, compensatory, and punitive damages from Defendants.

219. It has been necessary for Mr. Fleming to retain the services of attorneys to pursue this matter, and Mr. Fleming is entitled to attorney's fees, costs, and prejudgment interest.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays as follows:

- a. A declaration that CCC § 16.11.070 is unconstitutional as applied to Mr. Fleming;
- b. A permanent injunction preventing Defendant Metro and its officers from violating the constitutional rights of individuals by improperly citing street performers for obstructive use of public sidewalk;
- c. An award in excess of \$15,000 requiring all Defendants to pay monetary and compensatory damages in an amount to be determined at trial;
- d. An award in excess of \$15,000 against the individual Defendants for punitive damages in an amount to be determined at trial;
- e. An award of attorney's fees and costs; and,
- f. Any further relief the Court deems appropriate.

DATED this 24th day of January, 2023.

/s/ Leo S. Wolpert

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EXHIBIT C