



FIRE

Foundation for Individual
Rights and Expression

August 14, 2023

Laguna Beach City Council
City of Laguna Beach
505 Forest Avenue
Laguna Beach, California 92651

Sent via U.S. Mail and Electronic Mail (CityCouncil@lagunabeachcity.net)

Dear Members of the Laguna Beach City Council:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by the City of Laguna Beach’s regulations on street performances, which close almost the entire Forest Avenue Promenade—a traditional public forum—to musical and artistic expression and require a permit to perform in the small, city-designated performance area. Laguna Beach’s requirement that individual performers obtain the city’s permission to engage in expressive activity in a public forum—and confine that activity to a small area of the forum—violates the First Amendment.

I. Laguna Beach Restricts Street Performances on Forest Avenue Promenade

The Forest Avenue Promenade is an outdoor pedestrian plaza in downtown Laguna Beach on a portion of Forest Avenue closed to automobile traffic.² Laguna Beach opened the Promenade in the summer of 2020.

In 2021, Laguna Beach enacted a Municipal Code policy specific to the Promenade stating that “[n]o person may perform without first obtaining a performance permit issued by the city.”³ The Code defines “performer” as “an individual who performs on public property to provide public entertainment.”⁴ “Perform,” in turn, “means to engage in any of the following activities

¹ More information about FIRE’s mission and activities is available at thefire.org.

² *The Promenade on Forest*, CITY OF LAGUNA BEACH, <https://www.lagunabeachcity.net/do-business-here/business-economic-development/the-Promenade-on-forest> [<https://perma.cc/CBY9-3ZR8>]. The narrative in this letter reflects our understanding of the pertinent facts, but we appreciate that you may have more information and invite you to share it with us.

³ LAGUNA BEACH, CALIFORNIA MUNICIPAL CODE § 11.60.040(a), https://library.qcode.us/lib/laguna_beach_ca/pub/municipal_code/item/title_11-chapter_11_60-11_60_040 [<https://perma.cc/ZA92-F74H>].

⁴ *Id.* § 11.60.020, https://library.qcode.us/lib/laguna_beach_ca/pub/municipal_code/item/title_11-chapter_11_60-11_60_020 [<https://perma.cc/V4CX-8PND>].

on public property: playing musical instruments, singing, dancing, acting, pantomiming, puppeteering, juggling, reciting, engaging in magic, creating visual art in its entirety, or similar artistic endeavors.”⁵

When applying for a permit, performers must provide a “detailed description” of both “the nature of the act” and “any instrument(s) or prop(s) that will be used.”⁶ Applicants’ description of their performance must include its “genre,” and the application form prompts them to provide a website link to a sample of their work.⁷ Further, the Promenade policy states that no one is allowed to perform “outside the designated performance deck within the Forest Avenue Promenade”—known as The Stage on Forest—and the city grants itself discretion to schedule performances and determine the deck’s availability “based on seasonality, business needs and other city programming.”⁸ The policy requires the city to decide whether to grant a permit within 10 business days, but otherwise imposes no restraint on administrators’ discretion to grant or deny a permit.⁹

The city recently enforced the Promenade policy against Michael Bolger, a native Los Angeleno multi-instrumentalist with recording credits spanning Jewel, Red Hot Chili Peppers, Ry Cooder, and Jimmy Cliff—not to mention SpongeBob SquarePants, for which he won a 2013 BMI TV Music Award. Most notably for present purposes, Bolger has earned renown and acclaim busking as a simultaneous trumpeter/accordionist.¹⁰

In the summer of 2021, Bolger began traveling from Los Angeles to perform scheduled shows at The Drake, a restaurant and live entertainment venue in Laguna beach. Before the shows, he would play his accordion and trumpet on the streets of Laguna Beach. He initially avoided the Promenade after seeing a sign indicating a permit was required to perform in that location. Later, however, Bolger noticed the city had removed the signage. He then began busking on the Promenade, near restaurants with outdoor dining.

On April 14, 2023, a Laguna Beach police officer stopped Bolger while he was busking on the Promenade and told him someone had called in a complaint. The officer informed Bolger he could not perform on the Promenade without a permit.

The next day, Bolger emailed the Laguna Beach Arts Program Coordinator, Michael McGregor, about the permit requirement. McGregor replied that Laguna Beach’s regulation of street performances is intended to “preserve the safety, integrity, and interests of performers, local

⁵ *Id.*

⁶ *Id.* § 11.60.040(a)(1)(D)-(E).

⁷ CITY OF LAGUNA BEACH, PUBLIC ENTERTAINMENT AT THE STAGE ON FOREST PERMIT APPLICATION, <https://www.lagunabeachcity.net/home/showpublisheddocument/3556/637409579626130000> [<https://perma.cc/BE6R-JCPT>].

⁸ LAGUNA BEACH, CALIFORNIA MUNICIPAL CODE § 11.60.040(c)-(d).

⁹ *Id.* § 11.60.040(a)(3).

¹⁰ See, e.g., Flying Journalism, *Busking Bolger- famous accordion [sic] and talented trumpet street performance*, YOUTUBE (Dec. 7, 2021), <https://www.youtube.com/watch?v=O7ajoufPBeU>.

businesses, and the general public that make up our community.”¹¹ As to the Promenade, he explained:

Permits are indeed required to play on the Promenade and all performances are scheduled through the Cultural Arts office. Promenade performances may only take place within the designated stage area. City-booked performances are only scheduled for Friday, Saturday and Sunday evenings, as well as select first Thursdays for our local ArtWalk.

And the Promenade, McGregor added, was booked for the better part of half-a-year into the future, through fall 2023.

II. Laguna Beach’s Restrictions on Forest Avenue Promenade Street Performances Violate the First Amendment

By banning all street performances on the Forest Avenue Promenade other than those approved and scheduled by the city for one small, designated area, Laguna Beach has exceeded its limited authority to regulate speech in a traditional public forum.

The Supreme Court has firmly established that the “public retains strong free speech rights when they venture into public streets and parks, which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”¹² Those free speech rights encompass musical performances, “a form of expression and communication . . . protected under the First Amendment.”¹³ The authority of government actors like the City of Laguna Beach to “limit expressive activity” in traditional public forums like the Forest Avenue Promenade is “sharply circumscribed.”¹⁴ The government bears an “extraordinarily heavy burden” to justify any such restrictions.¹⁵

A. The Forest Avenue Promenade is a traditional public forum.

The Forest Avenue Promenade is a traditional public forum where protection of expressive activity is at its apex. The First Amendment protects our nation’s long tradition of citizens freely expressing themselves in public parks, streets, and sidewalks.¹⁶ The U.S. Court of

¹¹ Email from Michael McGregor, Arts Program Coordinator, City of Laguna Beach, to Mike Bolger (Apr. 19, 2023, 10:50 AM) (on file with author).

¹² *Pleasant Grove City, Utah v. Sumnum*, 555 U.S. 460, 469 (2009) (cleaned up); *see also Berger v. City of Seattle*, 569 F.3d 1029, 1035–36 (9th Cir. 2009) (*en banc*) (“The protections afforded by the First Amendment are nowhere stronger than in streets and parks, both categorized for First Amendment purposes as traditional public fora.”).

¹³ *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

¹⁴ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

¹⁵ *Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir. 1994).

¹⁶ *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1099 (9th Cir. 2003) (The “quintessential traditional public forums are sidewalks, streets, and parks.”).

Appeals for the Ninth Circuit—the decisions of which bind Laguna Beach—has recognized that a pedestrian mall that operates as a commercial district and public thoroughfare constitutes a traditional public forum.¹⁷ In doing so, the court recognized that:

[A]s society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place. We think this is particularly true with respect to downtown public spaces conducive to expressive activities.¹⁸

The Forest Avenue Promenade is a generally accessible pedestrian plaza on a portion of a public street.¹⁹ It therefore constitutes a traditional public forum.

B. Laguna Beach’s Promenade regulations impose an unconstitutional content-based prior restraint.

Laguna Beach’s Promenade policy violates the First Amendment by closing off an entire public forum to street performances save for one small “performance deck,” where performances require a permit and are typically allowed only three nights a week. These restrictions amount to an unconstitutional content-based prior restraint on speech.

Any prior restraint “bears a ‘heavy presumption’ against its constitutionality.”²⁰ Prior restraints are “the most serious and the least tolerable infringement” of expressive rights.²¹ In *Berger v. City of Seattle*, the *en banc* Ninth Circuit emphatically declared that “neither we nor the Supreme Court has ever countenanced” a policy that “requires single individuals to inform the government of their intent to engage in expressive activity in a public forum.”²² Rather, the Ninth Circuit has made clear that “the significant governmental interest justifying the unusual step of requiring citizens to inform the government in advance of expressive activity has always been understood to arise only when large groups of people travel together on streets and sidewalks.”²³

¹⁷ *Id.* at 1099–1106.

¹⁸ *Id.* at 1097 (cleaned up).

¹⁹ *The Promenade on Forest*, *supra* note 2.

²⁰ *Berger*, 569 F.3d at 1037 (quoting *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992)); *see also Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 165–66 (2002) (“It is offensive — not only to the values protected by the First Amendment, but to the very notion of a free society — that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.”).

²¹ *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

²² 569 F.3d at 1048 (holding unconstitutional a permit requirement for street performers on Seattle Center grounds).

²³ *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1039 (9th Cir. 2006).

Further, content-based restrictions on speech are “presumptively unconstitutional.”²⁴ To pass constitutional muster, they must be narrowly tailored in service of a compelling government interest.²⁵ If a less restrictive alternative would suffice, the government must use it.²⁶

The permit requirement and ban on Promenade street performances outside the performance deck impose a prior restraint and target speech based on its content.²⁷ These restrictions apply only to forms of expression that fall within the Municipal Code’s definition of “perform.” Thus, individuals may not play musical instruments, dance, or juggle for public entertainment without a permit or outside the performance deck, but they are free to pass out handbills, picket, or preach the gospel (as long as they do not *sing* gospel) anywhere on the Promenade. Laguna Beach’s permit requirement also targets the content of speech by inquiring into the nature of applicants’ acts and requesting recordings of their past performances. The city cannot show that these regulations are narrowly tailored to advance a compelling government interest.

The Municipal Code sheds light on the city’s asserted purpose in regulating street performances generally:

The city council . . . recognizes that street performers seek and do draw crowds to their performance, which can create serious safety problems by impacting the ability of individuals to move safely on sidewalks in high pedestrian traffic areas. Therefore, it is crucial to the continued interest of the community for the city to safeguard public ways with reasonable restrictions and regulations to ensure the health, safety and welfare of the public.²⁸

Even assuming Laguna Beach has a compelling interest in ensuring pedestrian safety, the regulations do not meaningfully serve that interest, as crowds can form on the Promenade near the performance deck and impede pedestrian traffic just as they can in other areas of the Promenade. And crowds are presumably *more* likely to form on a weekend evening—generally the only time performances are allowed—than on other days.

In any event, by making almost every part of a public forum off-limits to street performances and requiring a permit for the limited remaining space, the Promenade policy is far from *narrowly tailored* to advancing the city’s interest in pedestrian safety. Nor is this drastic

²⁴ *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

²⁵ *Id.* at 171.

²⁶ *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 813 (2000).

²⁷ *See Ward*, 491 U. S. at 791 (content-based regulations are those which cannot be “justified without reference to the content of the regulated speech”).

²⁸ LAGUNA BEACH, CALIFORNIA MUNICIPAL CODE § 11.60.010, https://library.qcode.us/lib/laguna_beach_ca/pub/municipal_code/item/title_11-chapter_11_60-11_60_010 [<https://perma.cc/Z9YU-5J3H>].

restriction justified by the invocation of vague concerns about “safety, integrity, and interests of performers, local businesses, and the general public.”²⁹

Not only is Promenade policy overinclusive with respect to the city’s asserted safety interests by applying even to performers who do not draw large crowds, it is also underinclusive in that speakers who do not need a permit, such as street preachers or protesters, are also capable of attracting crowds. The Supreme Court has warned that “[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.”³⁰

The Ninth Circuit has struck down similar restrictions in the past. In *Berger*, the Ninth Circuit invalidated a requirement that street performers obtain a permit to perform on the Seattle Center grounds. The court observed that “we and almost every other circuit to have considered the issue have refused to uphold registration requirements that apply to individual speakers or small groups in a public forum.”³¹ The court acknowledged Seattle’s interest in regulating large crowds of spectators, but concluded the city’s permit requirement was not narrowly tailored in part because it was “not limited to only those performers who seek to attract (or who do, in fact, attract) a crowd of a sufficiently large size.”³² The court emphasized that the permit requirement unjustifiably applied to “street performers who pose no realistic coordination or traffic flow concerns, as well as to those who might.”³³ While Seattle could have drafted a rule requiring a permit for performances that actually attract audiences of a sufficiently large size, it could not “require permits for all performances at the Center, regardless of the size of the crowd.”³⁴ The court also rejected Seattle’s argument that permits were necessary to reduce territorial and other disputes among performers or to coordinate uses at the Seattle Center.³⁵

Laguna Beach’s policy is even *more* restrictive than the unconstitutional policy in *Berger*—it *categorically bans* street performances almost everywhere on the Promenade and requires a permit for the one small area that performers can access. Even the designated performance area is generally open only three nights per week and is unavailable through the fall of 2023. In other words, for at least the next several months, Bolger and other street performers unable to secure one of the performance deck’s limited time slots are completely shut out of a traditional public forum.

The content-based requirement that applicants describe the nature and genre of their performance or provide samples of their work when applying for a permit also fails to promote the city’s safety interests; rather, it simply provides a way for the city to reject artists based on the content of their performances. Laguna Beach does not have a legitimate interest—let alone

²⁹ Email from McGregor to Bolger, *supra* note 11.

³⁰ *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 802 (2011).

³¹ 569 F.3d at 1039.

³² *Id.* at 1040.

³³ *Id.* at 1046 (“It is hard to fathom how an individual performing for two or three others in a park as large as the Center would pose coordination or traffic flow problems for the City.”).

³⁴ *Id.* at 1047.

³⁵ *Id.* at 1040.

a compelling one—in limiting access to a traditional public forum based on city officials’ subjective taste in art or music.

As was true of Seattle, Laguna Beach can achieve its safety interests through far less restrictive means. For example, police can disperse crowds when they become so large as to block pedestrian traffic. But the city’s broad, content-based prior restraint on street performances is impermissible.

The Promenade policy does not even satisfy the more lenient standard for content-neutral restrictions on the time, place, and manner of speech, which must be narrowly tailored to serving a significant governmental interest and leave open ample alternative channels of communication.³⁶ Importantly, an alternative is not sufficiently ameliorative if the speaker is unable to reach his intended audience.³⁷ Through the fall of 2023 and possibly beyond, Bolger and many other street performers who wish to perform on the Promenade are left with *no* alternative channels of communication to their intended audience—namely, shoppers, diners, and pedestrians on the Promenade. Even if Bolger *were* able to perform in the designated area in the near future, he would not be able to reach his intended audience of outdoor diners at any other time, or in specific areas of the public Promenade not close to the performance deck.

Courts also “consider the opportunity for spontaneity in determining whether alternatives are ample.”³⁸ Bolger and other performers have *no* opportunity for spontaneity. The one area where they can perform requires them to obtain a permit, which allows them to perform only at a specific date and time—potentially days or weeks after their request.

Finally, Laguna Beach’s policy is unconstitutional for the independent reason that the city has not established sufficient standards to guide its evaluation of permit applications. Policies imposing prior restraints must have “narrow, objective, and definite standards to guide the licensing authority.”³⁹ The government may not make “the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official — as by requiring a permit or license which may be granted or withheld in the discretion of such official.”⁴⁰ “While permitting guidelines need not eliminate all official discretion, they must be sufficiently specific and objective so as to effectively place some limits on the authority of . . . officials to deny a permit.”⁴¹

The Forest Avenue Promenade regulations set forth *no* standards to guide the city’s evaluation of permit applications. The regulations merely state that after the city receives an application, “a determination whether to approve a performance permit shall be made within ten business

³⁶ *Perry*, 460 U.S. at 45.

³⁷ *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1024 (9th Cir. 2008).

³⁸ *Id.*

³⁹ *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969).

⁴⁰ *Id.*

⁴¹ *Spirit of Aloha Temple v. Cnty. of Maui*, 49 F.4th 1180, 1191 (9th Cir. 2022) (cleaned up).

days.”⁴² And, as noted, the application process invites the injection of subjective preferences into those decisions. By vesting city officials with unbridled discretion to decide whether to grant permits, the permit policy violates the First Amendment.

III. Conclusion

Laguna Beach has effectively banished musical and artistic expression from the traditional public forum of the Forest Avenue Promenade save for one small performance space open three nights per week to performers who meet the city’s approval. The city has no authority to limit expression so drastically in a traditional public forum. Laguna Beach must amend or rescind its regulations on Forest Avenue Promenade street performances to eliminate their unconstitutional defects. FIRE would be pleased to work with the city to ensure its laws and regulations comply with the First Amendment.

We request a substantive response to this letter no later than the close of business on August 28, 2023.

Sincerely,



Aaron Terr
Director of Public Advocacy

Cc: Laguna Beach Cultural Arts Department

⁴² LAGUNA BEACH, CALIFORNIA MUNICIPAL CODE § 11.60.040(a)(3), https://library.qcode.us/lib/laguna_beach_ca/pub/municipal_code/item/title_11-chapter_11_60-11_60_040 [<https://perma.cc/ZA92-F74H>].