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From Handbills to Proposed Bills: Suggestions for Regulating the Las Vegas “Strip” Tease

I. INTRODUCTION

The world-class resorts that shape Las Vegas’ neon skyline draw millions of visitors each year. These tourists are the lifeblood of the local economy, and they come to enjoy the attractions and accommodations densely concentrated along Las Vegas Boulevard. This resort district, known as the Strip, offers visiting pedestrians stunning architectural views, inexpensive meals, live sidewalk shows, and access to numerous hotel-casinos. However, while these attractions have been proven to effectively generate profits for resort owners, another force now aggressively competes for the time and attention of would-be resort patrons.

Visitors walking along the Strip are constantly bombarded with adult-themed handbills distributed by off-premises canvassers.¹ The majority of this material depicts graphic advertisements for referral services that provide erotic dancers directly to visitors’ hotel rooms.²

Because of its dense concentration of relatively new resorts, the Strip is often inundated with pedestrians using inadequately sized sidewalks to travel between attractions.³ This congestion has created

1. See Joint Answering Brief of Appellees, *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136 (9th Cir. 1998) (No. 97-15912); see also Order (Case Nos. CV-S-97-0123-LDG(RJJ), CV-S-97-0146-LDG(RJJ)) at 3, 6 (D. Nev. March 4, 1997); CLARK COUNTY, NEV., CODE OF ORDINANCES 16.12.020(5) (1997) (defining “off-premises canvassing” as distributing handbills on public sidewalks).

2. Joint Answering Brief of Appellees, *supra* note 1, at 7–8; Joe Schoenmann, *County Takes Aim, Again, at Strip Handbillers*, LAS VEGAS SUN (May 6, 2010, 2:00 AM), <http://www.lasvegassun.com/news/2010/may/06/plan-g-no-news-racks-allowed>; Dave Toplikar, *Mayor Opposed Escort Service Handbillers on Fremont Street*, LAS VEGAS SUN (Jan. 20, 2011, 2:30 PM), <http://www.lasvegassun.com/news/2011/jan/20/mayor-opposed-escort-service-solicitors-fremont-st>.

3. CLARK COUNTY, NEV., CODE OF ORDINANCES 16.12.010 (1997) (“Since, traditionally, the major emphasis along the Strip has been on automobile transportation and not on pedestrians, the existing pedestrian environment is inadequate as a transportation system and lacking in many safety features. Moreover, a great number of persons are engaged in use of the public sidewalks to conduct off-premises canvassing which creates undue obstruction, hindrance, blockage, hampering, and interference with pedestrian travel and littering of the public sidewalks The activities of these congregating canvassers coupled with competition frequently result in the harassment of pedestrians. Large numbers of

what county commissioners have termed a “captive audience” for opportunistic adult outcall businesses, which use canvassers to obstruct high-traffic areas, effectively forcing their handbills on visitors.⁴ To make matters worse, the frequency of pedestrian delay has increased significantly during recent years as a result of fierce competition between outcall services. Because each service aims to outsell its competitors, each has the incentive to have the largest canvassing presence in the most congested locations.⁵ This “competitive cycle” has resulted in a glut of handbillers lining both sides of the Strip’s bottlenecked sidewalks, creating gauntlets of graphic advertising “through which pedestrians must pass and in which the pedestrians are forced to take the proffered advertising.”⁶ Occasionally, pedestrians wishing to avoid the graphic material are forced into the dangerous street as they attempt to bypass the cordons of canvassers.⁷

This competitive and congested atmosphere has resulted in tourist harassment, physical disputes among canvassers, and extreme amounts of sexually charged litter.⁸ These conditions directly affect resort patronage, particularly at the resorts abutting premium canvassing locations.⁹ As a result, between 1994 and 1996, numerous resorts and other businesses brought civil actions to enjoin canvassers from engaging in such obstructive and abusive practices.

pedestrians are walking in the streets to avoid harassment and the congested public sidewalks and many pedestrians are crossing against the traffic signal indications.”).

4. Joint Answering Brief of Appellees, *supra* note 1, at 7–9.

5. *Id.*

6. *Id.* at 9. In many locations, these gauntlets include as many as twenty or more canvassers strategically positioned in confined areas of narrow sidewalks. *Id.*

7. *Id.* at 18–19, n.17 (One canvassing representative “admitted during cross examination that he and his competitors would specifically target sidewalk areas with heavy pedestrian volume . . . for distribution of their commercial advertisements, that commercial canvassers would stand ‘shoulder to shoulder,’ all ‘to slam a tourist with a book,’ that he himself observed a lot of fights among the canvassers on the sidewalks, that the canvassers would threaten and harass [sic] tourists and call them names, that they would engage in violent confrontations over the prime ‘hot spots’ on the resort district’s sidewalks, and that pedestrians would be forced off the sidewalks and into the streets as a result of these activities.”); see CLARK COUNTY, NEV., CODE OF ORDINANCES 16.12.010 (1997); Schoenmann, *supra* note 2.

8. Joint Answering Brief of Appellees, *supra* note 1, at 10–11.

9. See Liz Benston, *Peddlers, Performers Clogging the Strip are Troubling to Casinos*, LAS VEGAS SUN (July 27, 2011, 2:00 AM), <http://www.lasvegassun.com/news/2011/jul/27/human-clutter-strip-troubling-resorts/>.

This led to the issuance of over twenty court orders concerning pedestrian abuse.¹⁰

Recognizing the need to regulate aggressive canvassing tactics, Clark County has repeatedly attempted to enact a legislative solution. In 1994, county commissioners enacted the Obstructive Use Ordinance in an effort to alleviate sidewalk congestion by criminalizing pedestrian obstruction.¹¹ Unlike later restrictions, this ordinance did not implicate canvassers’ expressive rights, but instead prohibited them from “stacking and storing their distribution materials on sidewalks.”¹² However, as is evident from the litany of injunctions issued after its passage,¹³ the Obstructive Use Ordinance failed to prevent pedestrian obstruction.

In 1996, the county made a second legislative attempt to resolve its persistent concerns for pedestrian safety. It patterned the new ordinance after a law previously enacted in Key West, Florida, a tourist community with similar canvassing problems. On its face, the Key West ordinance completely banned all off-premises canvassing in the city’s tourist district,¹⁴ and, like the Clark County ordinance, it was enacted only after less restrictive efforts had failed. The Key West model was attractive to Clark County’s commissioners because it was both demonstrably effective and had survived a First Amendment challenge at the Eleventh Circuit.¹⁵

Clark County’s version of the ordinance, known as Section 16.12, took effect on January 1, 1997, and made it a misdemeanor to engage in “off-premises canvassing” within the Las Vegas Resort District.¹⁶ Like the Key West ordinance, Section 16.12 specifically defined “off-premises canvassing” as “distributing, handing out, or offering, on public sidewalks, handbills, leaflets . . . or other printed or written literature . . . which . . . propose one or more commercial transactions.”¹⁷

10. Joint Answering Brief of Appellees, *supra* note 1, at 11.

11. CLARK COUNTY, NEV., CODE OF ORDINANCES 16.11.010 (1997).

12. Joint Answering Brief of Appellees, *supra* note 1, at 12 (citing CLARK COUNTY, NEV., CODE OF ORDINANCES 16.11.070 (1997)).

13. *Id.* at 11.

14. *Id.* at 13.

15. *Id.* at 13–14 (citing *Sciarrino v. City of Key West*, 83 F.3d 364 (11th Cir. 1996)).

16. CLARK COUNTY, NEV CODE OF ORDINANCES 16.12.040(a), (d) (1997).

17. CLARK COUNTY, NEV CODE OF ORDINANCES 16.12.020 (5) (1997).

On January 31, 1997, the operators of two Nevada-based outcall services filed suit in a U.S. district court challenging the constitutionality of the ordinance as it applied to their businesses. Shortly thereafter, the ACLU intervened as a plaintiff, contending that the ordinance facially violated the First Amendment, because it regulated both commercial speech and “fully protected noncommercial speech that is inextricably intertwined with commercial speech.”¹⁸ The district court disagreed and subsequently denied the plaintiffs’ request for a preliminary injunction.¹⁹

The following year the Ninth Circuit reversed, holding that the ACLU had demonstrated the probable success of its claim.²⁰ Consequently, the matter was remanded, and the county was enjoined from enforcing the ordinance.²¹ Nine years later, the district court ruled that the ordinance was unconstitutionally overbroad.²²

To date, the county has failed to enact a comprehensive solution to the canvassing problem, which some believe is threatening Nevada’s “economic engine” by “tarnishing the Strip’s image as a safe and fun place for tourists.”²³ While resort executives “have long expressed concerns to county commissioners about various nuisances—handbillers of sexual entertainment in particular”²⁴—the county has neither enacted nor enforced an ordinance directly regulating obstructive canvassing since the Ninth Circuit’s injunction in 1997.²⁵ This lack of legislative progress, however, should be

18. *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1142 (9th Cir. 1998), *amended by* 160 F.3d 541 (9th Cir. 1998).

19. *Id.* at 1141.

20. *County of Clark*, 160 F.3d at 542.

21. *Id.*

22. *See S.O.C., Inc. v. County of Clark*, 481 F. Supp. 2d 1122, 1134 (D. Nev. 2007).

23. *See Benston, supra* note 9; *see also* Scott Wyland, *Some Seek Crackdown Against Street Peddlers Strip*, LAS VEGAS REVIEW-JOURNAL (Aug. 1, 2011, 1:59 AM), <http://www.lvrj.com/news/some-seek-crackdown-against-street-peddlers-on-strip-126503523.html>.

24. Benston, *supra* note 9.

25. It is worth noting, however, that on Tuesday, August 7th, 2012—months after this Comment was accepted for publication—Clark County Commissioners approved an anti-littering ordinance that will require handbillers to pick up and dispose of handbills discarded by passersby every fifteen minutes, in the area within twenty-five feet of where the material was distributed. *See* Kristi Jourdan, *Commissioners Pass Law Targeting Litterers on the Strip*, LAS VEGAS REVIEW-JOURNAL (Aug. 7, 2012, 5:52 PM), <http://www.lvrj.com/news/commissioners-pass-law-targeting-litterers-on-the-strip-165363006.html>. While this new law is likely to improve the overall image of the Strip by removing much of the sexually charged litter from sidewalks and storm drains, it is not a

understood not as tacit approval of aggressive canvassing, but instead, as the result of the county’s hesitancy to expose itself to another round of First Amendment litigation.²⁶

Surely there is truth to the argument that obstructive canvassing is harmful to the state’s economy. Although the documented rationale for enacting Section 16.12 was largely pedestrian safety, it would be naive to contend that county officials were not concerned about resort profitability. Indeed, the Strip constitutes a major source of the state’s revenue and employs a substantial number of Las Vegans. Thus, during this time of economic instability and the resulting decline in tourism, it is no surprise that county officials have been clear about their desire to restore the Strip’s once appealing image.²⁷

However, despite the county’s interest in attracting tourists, it must also consider the high costs associated with attempts to regulate speech. For example, when Clark County enacted and defended Section 16.12, it not only failed to resolve its concerns, but also became embroiled in a costly ten-year legal battle, which resulted in an award of attorney’s fees and almost a quarter-million

compressive solution to the county’s obstructive canvassing concerns. On its face, it does nothing to limit where, when, or how canvassers may approach or obstruct pedestrians. Instead, it simply imposes a new burden on canvassers. To be sure, this added inconvenience is likely to adversely affect canvassing profits, but there is little reason to believe that it will result in a noticeable reduction in obstructive practices. This, presumably, is why county commissioners are once again reviewing proposals for an ordinance that would regulate obstructive canvassing as a safety concern. See Jane Ann Morrison, *County Targets Strip Pests One Animal, Panhandler at a Time*, LAS VEGAS REVIEW-JOURNAL (Jul. 2, 2012, 2:00 AM), <http://www.lvrj.com/news/county-targets-strip-pests-one-animal-panhandler-at-a-time-161047405.html> (noting that one interest group alone has developed thirty-two such proposals, and that the county recently commissioned a \$581,000 study of congestion on the Strip, which it intends to use when drafting a final ordinance); see also Kristi Jourdan, *County Orders Study of Strip Pedestrian Congestion*, LAS VEGAS REVIEW-JOURNAL (Apr. 4, 2012, 7:20 AM), <http://www.lvrj.com/news/county-orders-581-000-study-of-strip-pedestrian-congestion-146006445.html> (explaining that in April 2012, “commissioners approved [the] \$581,000, three-month study to identify areas where pedestrian movement is congested on [the Strip],” and that it will be used to inform proposed code amendments aimed at “regulating commercial activity on sidewalks”). Thus, despite the county’s new anti-littering law, a discussion about a defensible ordinance directly regulating obstructive canvassing is as relevant now as it has ever been.

26. See Morrison, *supra* note 25 (suggesting that county commissioners have been slow to enact proposed solutions to the obstructive canvassing problem because of the strength of canvassers’ First Amendment concerns); see also Benston, *supra* note 9.

27. Schoenmann, *supra* note 2.

dollars in damages.²⁸ Certainly, the prospect of facing another similar defeat has, to some degree, chilled efforts to enact a regulation reflective of the commission's actual position on canvassing.²⁹ Thus, county commissioners are stuck in the proverbial "damned if you do, damned if you don't" position: on one hand, they cannot afford to allow aggressive canvassers to perpetuate a further decline in tourism, and on the other, they must consider the high costs that will likely follow another judicially rejected attempt at effective regulation.

This Comment addresses these competing concerns by evaluating three possible regulatory models in terms of both utility and defensibility. It proceeds by (1) demonstrating that the privatization of canvassing regulation is likely to be found indefensible if challenged in either state or federal court; (2) exploring the inescapable problem with regulating canvassing through the commercial-speech doctrine; and (3) proposing the adoption of a narrowed version of the content-neutral, time, place, and manner restriction upheld by the Supreme Court in *Hill v. Colorado*.³⁰

II. PUBLIC V. PRIVATE PROPERTY: A DISTINCTION WITHOUT A DIFFERENCE

In the wake of the Ninth Circuit's ruling on Section 16.12, Clark County has essentially attempted to privatize canvassing regulation by supporting the exclusionary efforts of private-property owners.³¹ On the surface, this appears to be an attractive solution for two reasons: first, it allows the owners of "mega-resorts," who often own the sidewalks immediately abutting their properties, to independently restrict a substantial amount of undesired canvassing. Second, it leaves the county itself unexposed to the risks of First Amendment litigation. Of course, the immediate drawback to this approach is that canvassers excluded from private property will presumably relocate to already congested publicly owned sidewalks.

28. Joe Schoenmann, *The Likely Price of Lost Battle over Handbillers*, LAS VEGAS SUN (Nov. 16, 2008, 2:00 AM), <http://www.lasvegassun.com/news/2008/nov/16/likely-price-lost-battle-over-handbillers>; *S.O.C., Inc. v. County of Clark*, No. 2:97-CV-0123 LDG(RJJ), 2008 WL 700293 (D. Nev. Mar. 13, 2008).

29. See Morrison, *supra* note 25; see also Schoenmann, *supra* note 2.

30. *Hill v. Colorado*, 530 U.S. 703 (2000).

31. Joint Opening Brief of Appellants at 5–6, *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243 (Nev. 2001) (No. 34563).

The county, though, seems willing to bear this cost because doing so allows at least some resort owners to preserve a visitor friendly atmosphere.³² Moreover, under existing Nevada case law, it is tempting to conclude that this partial solution is legally sustainable. Indeed, in 2001, when canvassers challenged Mirage Resorts's right to exclude, the Nevada Supreme Court announced in a plurality opinion that privately owned sidewalks immediately abutting resort-owned properties were not subject to full First Amendment protections.³³ However, a thorough examination of the *Mirage* decision reveals that its precedential value is questionable at best. This is further evidenced by a Ninth Circuit decision handed down less than two months later, in which the court held that a nearly identical portion of privately held sidewalk, located just across the street, was a public forum subject to full First Amendment protection.³⁴ Ultimately, these cases suggest that canvassers are likely to prevail in future challenges to resort owners' exclusionary efforts, and consequently, that it is only a matter of time until the county will need to consider a new regulatory model.

A. The Mirage Decision: An Illusory Support for the Resort Owner's Right to Exclude

The portion of sidewalk at issue in *Mirage* was privately owned by Mirage Resorts (the Mirage) and immediately abutted the rest of the resort property.³⁵ Consistent with the theme of its Treasure Island hotel, a section of the sidewalk is built from wooden planks slightly elevated several feet above the ground. Signs indicating that the property is privately held by the Mirage are located at various points along the passageway.³⁶ In 1993, in order to comply with local zoning and licensing requirements, the Mirage conveyed to Clark County "a perpetual pedestrian easement over, under, and across the parcel of land" on which the sidewalk at issue was located.³⁷ The legal description of the easement states that it is a

32. *See generally id.*

33. *Mirage*, 23 P.3d at 248.

34. *Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd. of Las Vegas*, 257 F.3d 937, 948 (9th Cir. 2001).

35. *Mirage*, 23 P.3d at 245.

36. *Id.*

37. *Id.*

“pedestrian easement for the west right-of-way of Las Vegas Boulevard.”³⁸ The county required the easement, because constructing the Treasure Island required the elimination of publicly owned sidewalks.³⁹

In 1999, the Mirage filed suit seeking preliminary and permanent injunctions against two outcall services (known as S.O.C./Hillsboro), claiming that the corporations were trespassing by directing canvassers to distribute handbills on the Treasure Island walkway.⁴⁰ A Nevada trial court granted the preliminary injunction and S.O.C./Hillsboro appealed.⁴¹ The Nevada Supreme Court eventually upheld the Mirage’s right to exclude the canvassers, but it left the public forum question largely unsettled. Writing for the plurality, Justice Young focused on two principal issues: (1) whether the easement contemplated the type of canvassing at issue; and (2) if it did not, whether the walkway actually constituted a public forum, warranting full First Amendment protection.⁴² He began with an analysis of the easement itself, concluding that a narrow reading of its express language limited its scope to pedestrian travel.⁴³ As a consequence, he noted, the easement “does not contemplate use by commercial businesses seeking to advance their own economic gains,”⁴⁴ and therefore, any such commercial activity constitutes an actionable trespass.⁴⁵

He next addressed S.O.C./Hillsboro’s alternative claim that, as a public forum, the Treasure Island sidewalk is subject to full First Amendment protection. He began with a brief history of public forum jurisprudence, noting that “[t]he United States Supreme Court has formulated an approach to the protection of free speech based largely on the type of forum involved.”⁴⁶ In the *Perry* decision, the Supreme Court identified three types of forums: (1) the “quintessential public forum,” which “encompasses ‘places which by long tradition or government fiat have been devoted to assembly and

38. *Id.*

39. *Id.*

40. *Id.* at 245–46.

41. *Id.* at 246.

42. *Id.* at 246, 248.

43. *Id.* at 247.

44. *Id.*

45. *Id.*

46. *Id.* at 248.

debate,’ such as streets and parks”; (2) the semipublic forum, which includes “public property which the state has opened for use by the public as a place for expressive activity”; and (3) the “nonpublic forum,’ which consists of property that is neither by tradition nor designation a forum for public discourse.”⁴⁷

Using this framework, Justice Young opined that S.O.C./Hillsboro had blithely attempted to characterize the Treasure Island sidewalk as a public forum. He explained that the mere opening of walkway for pedestrian travel is not in itself indicative of a public forum, and that any rule to the contrary would “paint[] too broad a stroke” over the property owner’s fundamental right to exclude.⁴⁸ While he did not expressly call for further proof that the walkway either traditionally attracted public discourse or was intended to invite expressive activity, he went on to cite numerous cases rejecting similar claims for lack of such evidence.⁴⁹

However, Justice Young’s public forum analysis was rejected by three of the five members of the court. While concurring in the result, Chief Justice Maupin wrote separately, contending that the walkway was a public forum. He began by noting that the public forum issue was conclusively settled by the federal district court in *Venetian Casino Resort v. Local Joint Executive Board*.⁵⁰ In *Venetian*, a resort owner excluded union members from picketing on a private pedestrian walkway in front of the Venetian Casino Resort. In that case, however, a federal district court judge concluded that the sidewalk was a public forum, reasoning that it “was previously public, serves as a thoroughfare along a main public road, and serves the needs of the general public.”⁵¹

Although Justice Maupin concluded that the federal district court’s public forum rule must also apply to the practically identical Treasure Island walkway, he contended that the Mirage’s exclusion of the commercial canvassers was nevertheless permissible.⁵² He

47. *Id.* at 248–49 (quoting *Perry Educ. Ass’n v. Perry Local Educ. Ass’n*, 460 U.S. 37, 45 (1983)).

48. *Id.* at 249.

49. *Id.* at 249–50 n.40.

50. *Id.* at 252. At the time of the *Mirage* decision, the *Venetian* case was pending before the Ninth Circuit. The effects of the Ninth Circuit’s decision are discussed below.

51. *Venetian Casino Resort v. Local Joint Exec. Bd.*, 45 F. Supp. 2d 1027, 1036 (D. Nev. 1999).

52. *Mirage*, 23 P.3d at 252 (Maupin, J., concurring).

explained that unlike the political speech at issue in *Venetian*, the speech at issue in *Mirage* was commercial in nature and, therefore, not subject to full First Amendment protection.⁵³ Quoting from the Supreme Court's decision in *Metromedia*, he asserted that even in the traditional public forum, "the difference between commercial price and product advertising and ideological communication permits regulation of the former that the First Amendment would not tolerate with respect to the latter."⁵⁴ He then concluded that the suppression of S.O.C./Hillsboro's expression was permissible under the test announced by the Supreme Court in *Central Hudson*,⁵⁵ because it appeared to either "solicit offers of illegal prostitution" or create a misleading impression of the same.⁵⁶

Justice Rose, the lone dissenter, agreed that the walkway constituted a public forum, but he did not reach the commercial speech issue. Instead, he contended that uncontroverted evidence demonstrated that the offers for erotic dance services were merely a pretext for offers of illegal prostitution.⁵⁷ Accordingly, he noted that had the lower court determined that the advertisements in fact promoted illegal activity, he would have joined the Chief Justice in upholding the *Mirage*'s right to exclude despite the existence of a public forum.⁵⁸

Therefore, although Justice Young's plurality opinion suggests that resort-owned walkways are not necessarily public forums, it is unclear what, if any, precedential weight *Mirage* carries. In fact, a majority of the *Mirage* justices actually argued that the Treasure Island sidewalk was a public forum. This alone indicates the possibility that *Mirage* could prove unfavorable for resort owners in future public forum litigation at the Nevada Supreme Court.

53. *Id.* (citing *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980)).

54. *Id.* (quoting *Metromedia Inc. v. San Diego*, 453 U.S. 490, 507 (1981) (internal quotation marks omitted)).

55. *Id.* (citing *Central Hudson*, 447 U.S. at 566).

56. *Id.*

57. *Id.* at 255 (Rose, J., dissenting). At the district court the *Mirage* presented a substantial amount of evidence tending to show that the offers for erotic dance are a mere pretext for prostitution. For example, a detective with the Las Vegas Metropolitan Police Department's vice squad testified that acts of prostitution are offered during ninety-five percent of sting operations. Respondents' Answering Brief at 15, *Mirage*, 23 P.3d 243 (No. 34563).

58. *Mirage*, 23 P.3d at 255.

Furthermore, in light of the Ninth Circuit’s decision in *Venetian*, it is almost certain that the Strip’s sidewalk canvassers will eventually win on a public forum claim brought in either state or federal court.

B. *The Venetian Appeal*

On appeal from the district court’s *Venetian* decision, the Ninth Circuit held that a section of sidewalk privately held by the Venetian Casino Resort was a public forum for the purposes of First Amendment protection. The Venetian sidewalk, like its Treasure Island counterpart, was created when Las Vegas Boulevard (the Strip) was widened to accommodate the construction of newer resorts. The construction required adding a travel lane where the then-existing public sidewalk was located. Like the Mirage, Venetian Resorts agreed to convey a right-of-way easement to Clark County and construct a sidewalk on the portion of the property immediately abutting the Strip.⁵⁹ Incidentally, the new Venetian sidewalk was to be located directly across the street from the Treasure Island.⁶⁰

Shortly after it was completed, a group of labor unions used the sidewalk to hold a demonstration protesting the resort’s employment practices.⁶¹ The Venetian responded by warning demonstrators that they were trespassing and requesting police assistance to remove those who would not leave. Acting on the advice of the Clark County District Attorney, the officers refused to issue citations or make any arrests.⁶² Three days later, the Venetian filed suit in the District of Nevada seeking, among other things, a declaratory judgment that the sidewalk was not a public forum subject to full First Amendment protection.⁶³ The district court reached the opposite conclusion and the Venetian subsequently appealed.

In a 2–1 decision, the Ninth Circuit held that the Venetian sidewalk was in fact a public forum. The majority focused its analysis on the fact that the original public sidewalk, which was replaced by the Venetian’s new walkway, was historically treated as a public

59. *Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd. of Las Vegas*, 257 F.3d 937 (9th Cir. 2001).

60. *Mirage*, 23 P.3d at 252 (Maupin, J., concurring).

61. *Venetian*, 257 F.3d at 940.

62. *Id.* at 940–41.

63. *Id.* at 941.

forum.⁶⁴ It then determined that the new sidewalk, like its predecessor, was (1) primarily intended to serve as a thoroughfare for pedestrian traffic and (2) was “connected to and virtually indistinguishable from the public sidewalks to its north and south.”⁶⁵ Therefore, the court concluded, although the new sidewalk was physically removed from the previous thoroughfare, it had retained all the characteristics of a public forum subject to full First Amendment protection.⁶⁶

C. The Venetian and the Disappearing Mirage Doctrine

While the Ninth Circuit’s *Venetian* ruling is unquestionably binding on Nevada’s U.S. District Court, it is also likely to be treated as highly persuasive in Nevada’s state courts.⁶⁷ Consequently, because presumably all privately held sections of sidewalk abutting the Strip have replaced and are connected to preexisting public walkways, any future litigation on the issue will likely result in the finding of a fully protected public forum. Nonetheless, one is tempted to wonder whether Nevada Courts could still enforce the right to exclude by concluding, like Justices Maupin, Shearing, and Rose, that the adult-themed handbills constitute only partially protected or wholly unprotected commercial speech.⁶⁸ The answer, however, is probably no. In *S.O.C., Inc. v. County of Clark*, which is discussed in detail below, the Ninth Circuit took the opposite view, ruling that S.O.C./Hillsboro’s handbills constituted fully protected expression. Thus, as it relates to handbilling on the Strip, whether a sidewalk is privately or publicly owned is probably a distinction without a difference. Accordingly, it appears that county commissioners will need to formulate a new regulatory scheme if they intend to permanently restrict obstructive canvassing.

64. *Id.* at 943.

65. *Id.* at 943–47.

66. *Id.* at 941–49.

67. *See* *Hostetler v. Harris*, 197 P. 697, 698 (Nev. 1921); *Nash v. McNamara*, 93 P. 405 (Nev. 1908). Of course, in the *Mirage* decision, Justice Young at least implicitly asserted that Nevada was not bound by a federal court’s finding of a public forum. However, relying on *Mirage* seems inadvisable, particularly in light of the majority’s actual position on the public-forum question. *See supra* Part II.A.

68. *See* *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243, 252–53 (Nev. 2001) (Maupin, J., concurring).

III. REGULATION BASED ON THE COMMERCIAL-SPEECH DOCTRINE

The core problem with using the commercial speech doctrine as the sole justification for an effective canvassing regulation is that it is difficult, if not impossible, to narrowly tailor a *purely commercial* prohibition that actually reaches outcall canvassing.

Under the overbreadth doctrine, a regulation of expressive conduct will be held facially unconstitutional if it "seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad."⁶⁹ Of course, the Supreme Court has held that the overbreadth doctrine does not apply when an ordinance is directed at *purely commercial expression*.⁷⁰ However, purely commercial expression is defined as "speech which does *no more* than propose a commercial transaction."⁷¹ Accordingly, the commercial-speech doctrine will save a statute from an overbreadth challenge only when the restriction is limited to purely transactional language, providing exceptions for distributed material containing both transactional and fully protected speech.⁷² Therefore, if a purportedly "commercial" ordinance is not so limited, it will be deemed to reach beyond commercial speech and thus be subject to an overbreadth challenge.⁷³

A. *The Inextricable Problem*

In Las Vegas, it seems that both the canvassers and commissioners are well aware that the Strip's graphic handbills represent something more than commercial speech. As S.O.C. and Hillsboro have argued, they are not in the business of "selling

69. S.O.C., Inc. v. County of Clark, 152 F.3d 1136, 1142 (9th Cir.), *amended by* 160 F.3d 541 (9th Cir. 1998) (quoting *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984) (internal quotation marks omitted)).

70. *See* *Bates v. State Bar*, 433 U.S. 350, 381 (1977) (refusing to address an overbreadth challenge to an ordinance regulating professional advertising for pecuniary gain); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496-97 (1982) (holding that where an ordinance is directed at purely commercial activity the overbreadth doctrine is not applicable).

71. *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66 (1983) (emphasis added) (quoting *Va. Pharm. Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (internal quotation marks omitted)).

72. *County of Clark*, 152 F.3d at 1144 (citing *Perry v. L.A. Police Dep't*, 121 F.3d 1365, 1368 (9th Cir. 1997)).

73. *See id.*

hotdogs . . . providing haircuts . . . or providing any other service that does not constitute speech.”⁷⁴ Instead, they are “in the business of providing referrals for erotic dance.”⁷⁵ Accordingly, they contend, their speech constitutes only the voluntary distribution of contact information for adult entertainers, which is something other than a strict commercial proposal. Thus, they conclude, their handbills cannot be properly characterized as pure commercial speech.⁷⁶ While this conclusion is certainly subject to plausible counterargument, it seems that Clark County Commissioners were persuaded by similar reasoning while drafting Section 16.12.

Rather than limiting the ordinance to regulate only the distribution of proposals for commercial transactions, commissioners worded it to reach the distribution of materials that (1) “advertise or promote commercial transactions,” (2) “specifically or generically refer to products or services for sale, lease, or rent,” and (3) are “distributed with an economic motivation of commercial gain.”⁷⁷ These additional restrictions on expressive conduct seem to indicate that commissioners recognized that a purely commercial regulation would be insufficient to tackle the canvassing problem. To the county’s credit, it seems plausible, even likely, that a court would find that referrals containing contact information for erotic dancers do not fit within the narrow scope of “proposed commercial transactions.” In fact, a similarly strict interpretation of the commercial speech doctrine has been applied by both the Ninth Circuit and the Supreme Court.

Emphasizing the need to carefully determine whether a purportedly commercial restriction actually reaches protected expression, the court in *Gaudiya Vaishnava Society v. City of San Francisco* stated:

The Supreme Court has recognized that drawing the line between “purely commercial ventures and protected distribution of written materials [is] a difficult task.” In attempting to distinguish between commercial speech and fully-protected speech, the Court in *Schaumburg* held that when a transaction “does more than inform

74. Opening Brief of Appellants at 29, *County of Clark*, 152 F.3d 1136 (No. 97-15912).

75. *Id.*

76. *Id.* at 29-30.

77. CLARK COUNTY, NEV., CODE OF ORDINANCES 16.12.050 (5)(a) (1997).

private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it [is not treated as] a variety of . . . commercial speech.”⁷⁸

Thus, because the Strip’s erotic handbills can be characterized as providing contact information, or referrals, for dancers, they are arguably concerned with something more than simply describing the nature and costs of services. Therefore, they are unlikely to be treated as purely commercial expression in the First Amendment context. This, presumably, is why county officials drafted Section 16.12 to facially regulate more than purely commercial expression, which is precisely why the ordinance is properly subject to an overbreadth attack.

It is difficult, if not impossible, to articulate a commercial-based restriction that would both resolve Clark County’s canvassing concerns and survive an overbreadth challenge. Section 16.12 exemplifies why such regulations are unworkable. As recognized by the Ninth Circuit, Section 16.12 expressly restricts the distribution of material that incidentally refers to products or services for sale or material that is freely distributed in a profit-generating scheme.⁷⁹ This allows county officials to “prohibit the distribution of newspapers, pamphlets, magazines, and other publications that contain some form of commercial advertising, even if the noncommercial content is unrelated to the advertising copy.”⁸⁰ Moreover, under Section 16.12, the county may “prohibit the distribution of a newspaper that stresses social, political, and environmental issues if the paper’s production costs were covered by revenue generated from advertisements,”⁸¹ or “a religious organization’s newsletter that contain[s] advertisements for its members’ businesses.”⁸² In other words, these extra-commercial restrictions allow the county to impermissibly regulate commercial

78. 952 F.2d 1059, 1063 (9th Cir. 1991) (citing *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 630, 632 (1980) (internal citation omitted)).

79. *See County of Clark*, 152 F.3d at 1144.

80. *Id.*

81. *Id.* (citing *Hays Cnty. Guardian v. Supple*, 969 F.2d 111, 114–15 (5th Cir. 1992) (holding that distributing a free newspaper that discussed “environmental, peace, and social justice issues” was fully protected expression even though its publication expenses were covered, in part, by revenue derived from advertisers)).

82. *Id.*

expression that is “inextricably intertwined” with a significant amount of protected speech.⁸³ As the Ninth Circuit noted, excessive regulatory capabilities of this kind are highly indicative that an ordinance is unconstitutionally overbroad.⁸⁴ However, as explained above, if 16.12 were not so intertwined with protected extra-commercial expression, a court would likely find the handbillers’ “referrals for erotic dance” beyond the ordinance’s reach. Because restricting the obstructive canvassing appears to require restricting quasi-commercial expression inextricably connected to forms of protected speech, it is unlikely that county commissioners will be able to draft an effective, commercially-centered regulation that is not overbroad in its reach of constitutionally-protected speech.

B. Commercial Restrictions in Content-Neutral Costumes

Restrictions on commercial speech, and particularly those that regulate extra-commercial speech, cannot be characterized as content-neutral time, place, and manner restrictions. Nonetheless, in response to S.O.C./Hillsboro’s overbreadth challenge, Clark County attempted to do just that.⁸⁵ Addressing this argument, the Ninth Circuit concluded that Section 16.12 necessarily fails a content-neutral standard because, by its own terms, it is neither content-neutral nor narrowly tailored.⁸⁶ Interestingly, this is presumably true of any commercial-based regulation capable of reaching outcall canvassers.

Government-imposed time, place, and manner restrictions on protected speech are “valid if they (1) are content-neutral; (2) are narrowly tailored to serve a significant governmental interest; and (3) leave open ample alternative channels of communication.”⁸⁷ Speech restrictions will be deemed content-neutral only when they are “justified without reference to the content of the regulated speech.”⁸⁸ This means that a true content-neutral ordinance must

83. *Id.* (citing *Perry v. L.A. Police Dep’t*, 121 F.3d 1365, 1368 (9th Cir. 1997) (“[W]here the commercial and expressive parts of speech are ‘inextricably intertwined,’ a court [may] not parcel out the protected and unprotected parts of the speech”).

84. *Id.* at 1144.

85. Joint Answering Brief of Appellees, *supra* note 1, at 56.

86. *County of Clark*, 152 F.3d at 1146–48.

87. *One World One Family Now v. City & County of Honolulu*, 76 F.3d 1009, 1012 (9th Cir. 1996) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

88. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

address only the form, and not the content, of the targeted expression. Ordinances restricting commercial speech, however, necessarily address content because, by definition, they expressly regulate commercial content. Section 16.12 does not avoid this fatal defect because, like traditional commercial restrictions, it too targets at least some commercial content.

The advantage to defending a content-neutral restriction is that, unlike content-based restrictions, the government need not demonstrate that it had a “compelling interest” in restricting the speech.⁸⁹ Instead, a lower standard is imposed, requiring only that it show a “substantial interest” in enacting the regulation.⁹⁰ While attempting to defend Section 16.12, Clark County erroneously assumed that the court would apply the lower, content-neutral “substantial interest” standard.⁹¹ Accordingly, it neglected to provide “any reason why its interest in aesthetics and traffic safety [were] compelling.”⁹² Nonetheless, even if the county had attempted to frame its interests as compelling, the court almost certainly would have disagreed. While municipalities may “have a substantial interest in protecting the aesthetic appearance of their communities by avoiding visual clutter[,] . . . in assuring safe and convenient circulation on their streets,”⁹³ and “in preventing solicitors from harassing pedestrians on public streets and sidewalks,”⁹⁴ the Supreme Court has repeatedly refused to find such interests compelling.⁹⁵ Furthermore, as explained below, even if Clark County could have demonstrated a compelling interest, the ordinance would still have probably failed for being insufficiently tailored.

89. *County of Clark*, 152 F.3d at 1145.

90. *Id.*

91. *Id.* at 1146.

92. *Id.* (citing CLARK COUNTY, NEV., ORDINANCE 16.12.010 (1997) (enacting the ordinance “[i]n recognition of the need to improve the pedestrian environment, the need to maintain accessible sidewalks, the need to prevent harassment of pedestrians, and the need to reduce litter”)).

93. *One World One Family Now v. City & County of Honolulu*, 76 F.3d 1009, 1013 (9th Cir. 1996) (internal quotation omitted).

94. *County of Clark*, 152 F.3d at 1146 (citing *Edenfield v. Fane*, 507 U.S. 761, 774 (1993)).

95. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 521 (1981) (plurality opinion); *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939) (stating that the “purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it”).

While a content-based regulation on expression will be unconstitutional if less restrictive alternatives are available,⁹⁶ the lower content-neutral standard requires only that the regulation not be “substantially broader than necessary to achieve the government’s interest.”⁹⁷ Section 16.12, however, fails to satisfy either tailoring standard.⁹⁸ First, the ordinance is substantially over-inclusive because it reaches well beyond regulating those who allegedly obstruct foot traffic and harass pedestrians. By virtue of the fact that it reaches noncommercial speech inextricably intertwined with commercial speech, the ordinance is over-inclusive for the same reason it was found overbroad. Indeed, while the county asserted that its interests were preventing harassment and alleviating sidewalk congestion, Section 16.12 expressly regulates distributors of quasi-commercial material, whether or not such canvassers or their materials contribute in any way to the county’s stated concerns.⁹⁹

Additionally, and as explained by the Ninth Circuit, Section 16.12 is also over-inclusive in terms of its geographic scope, because it fails to identify specific problematic locations.¹⁰⁰ Instead, “it categorically bans ‘off-premises canvassing’ along the entire Las Vegas Resort District regardless of whether the traffic, safety, and litter problems identified by Clark County exist at a given location.”¹⁰¹

Thus, it seems that in order for Clark County to enact a regulation based on commercial content that would pass constitutional muster, it would have to restrict only purely commercial expression in specifically identified locations. Such an ordinance, however, is unlikely to resolve the county’s concerns for at least two reasons. First, it is possible, if not likely, that the canvassing would be found beyond the reach of such a strict ordinance. Second, as a practical matter, even if the expression were deemed purely commercial in nature, the canvassers could still avoid its geographic reach by migrating to the areas of the Strip left unidentified by the ordinance. This illustrates the fatal tailoring

96. *See* Vill. of Schaumburg v. Citizens for a Better Env’t, 444 U.S. 620, 637 (1980).

97. *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

98. *County of Clark*, 152 F.3d at 1147–48.

99. *Id.* at 1146.

100. *Id.* at 1147.

101. *Id.*

defect that would inevitably plague such a geographically restrictive ordinance: On the one hand, if the regulation is limited only to problematic areas, it is necessarily under-inclusive because of the mobile nature of the county’s concern. On the other, as the Ninth Circuit indicated,¹⁰² if legislatures seek to avoid under-inclusion by restricting speech at locations that are not currently problematic, the regulation will likely be held to be over-inclusive.

Of course, the county could attempt to overcome the content hurdle by identifying a compelling state interest in regulating extra-commercial speech. However, given the nature of the county’s actual concerns and the infrequency with which such interests are recognized, a content-based regulation would likely result in another expensive Ninth Circuit loss. Moreover, even if such a compelling interest were identified, the county would still face the seemingly insurmountable geographic tailoring problem, and it would have to resolve it under the even stricter “least-restrictive means” standard. Accordingly, it seems that while a purely commercial approach cannot adequately address the county’s concern, a further-reaching, quasi-commercial restriction is almost certain to fail under another First Amendment challenge. Therefore, if the county is sincerely interested in a permanent solution, it appears it would be wise to look outside of the commercial framework.

IV. THE RIGHT TIME, PLACE, AND MANNER FOR A WORKABLE CANVASSING REGULATION

At the conclusion of its opinion in *S.O.C., Inc. v. County of Clark*, the Ninth Circuit noted that the county might solve its canvassing problem by enacting a truly content-neutral time, place, and manner (TPM) restriction on speech.¹⁰³ In fact, the court went so far as to tacitly endorse possible examples of workable regulations.¹⁰⁴ Of course, while TPM regulations have obvious advantages in terms of defensibility, they cannot, by definition, be used to completely eliminate the adult-themed canvassing presence on the Strip. Therefore, in order for the county to maintain any control over the problem, it will likely have to concede to a canvassing presence on at least on some parts of the Strip.

102. *Id.*

103. *See id.* at 1147–49.

104. *Id.* at 1147.

Accordingly, the county's presumable goal in enacting a TPM regulation is to eliminate any and all of the harmful canvassing that can be restricted under the First Amendment. Ultimately, and somewhat ironically, Las Vegas must take a gamble: if it fails to restrict enough canvassing, handbillers will continue to frustrate tourists and resort owners, but if it restricts too much, it is sure to face defeat in another round of First Amendment litigation. However, and as should be expected in Las Vegas, the Strip's regulators can stack the odds in favor of the house.

While Clark County's concerns about obstructive canvassing in its resort district are relatively unique, several cities have faced similar problems in the abortion clinic context. In *Hill v. Colorado*, the Supreme Court upheld a TPM statute that successfully regulated obstructive, aggressive leafleting practices occurring near healthcare facilities.¹⁰⁵ Although the *Hill* court addressed a regulation on expression intended to prevent abortions, its analysis paid little attention to the content of the speech and focused instead on the harm resulting from the chosen method of expression.¹⁰⁶ Interestingly, the aggressive canvassing methods employed on the Strip are strikingly similar in both form and consequence. Thus, by looking to the Colorado ordinance as a model for regulating the Strip, Clark County may well be able to enact an ordinance analogous to the one supported by the *Hill* Court's ruling, while substantially mitigating the effects of aggressive canvassing on the Strip.

A. *Hill v. Colorado*

The Colorado regulation was enacted in response to concerns about the accessibility of medical treatment at Colorado healthcare facilities. These concerns resulted from the obstructive conduct of anti-abortion activists known to gather at abortion clinics and aggressively surround incoming patients while thrusting signs and leaflets in their faces. Affected patients routinely reported that they were offended, intimidated, and physically delayed by demonstrators. Likewise, clinic operators testified that the aggressive protesting significantly inconvenienced the administration of healthcare

105. *Hill v. Colorado*, 530 U.S. 703 (2000).

106. *Id.*

services.¹⁰⁷ Faced with threats that directly implicated public health and safety, Colorado enacted legislation intended to balance citizens’ First Amendment rights with the state’s “imperative” interest in providing unobstructed access to medical facilities.¹⁰⁸ The relevant portion of the statute provides:

No person shall *knowingly* approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility.¹⁰⁹

Shortly after enactment, protestors challenged the constitutionality of the restriction and eventually argued their case before the Supreme Court. Writing for a six-member majority, Justice Stevens began by discussing the statute’s actual effects on protected expression and the propriety of using the “content-neutral” standard to determine its validity. He explained:

Although the statute prohibits speakers from approaching unwilling listeners, it does not require a standing speaker to move away from anyone passing by. Nor does it place any restriction on the content of any message that anyone may wish to communicate to anyone else, either inside or outside the regulated areas. It does, however, make it more difficult to give unwanted advice, particularly in the form of a handbill or leaflet, to persons entering or leaving medical facilities.¹¹⁰

Applying the first prong of the content-neutral test articulated in *Ward v. Rock Against Racism*, he explained that the statute could not be characterized as content based, because it was “justified without reference to the content of regulated speech.”¹¹¹ He supported this conclusion by further acknowledging that, on its face, the regulation restricted only where certain expressive activities could occur, and not the content of the expression itself.¹¹²

107. *Hill v. Thomas*, 973 P.2d 1246, 1249–51 (Colo. 1999).

108. *Id.* at 1249 n.4 (citing COLO. REV. STAT. § 18-9-122 (1993)).

109. § 18-9-122(3) (emphasis added).

110. *Hill*, 530 U.S. at 707–08.

111. *Id.* at 719–20.

112. *Id.*

Discussing the significance of the state's interest, he explained that the statutory restriction was intended to "protect those who enter a healthcare facility from the harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can accompany an unwelcome approach . . . by a person wishing to . . . thrust an undesired handbill upon her."¹¹³ Thus, he noted, Colorado intended to protect the "right of 'passage without obstruction,'" which had been implicated by violations of the "right . . . to be let alone."¹¹⁴ Of course, however, the "right to be let alone" is in obvious tension with the expressive rights guaranteed by the First Amendment.

While the right to persuade others is not curtailed simply because a listener finds a particular message offensive, the First Amendment's protections do not always reach offensive speech that is so intrusive that it cannot be avoided by the unwilling listener.¹¹⁵ Instead, the Supreme Court has consistently held that "no one has a right to press even 'good' ideas on an unwilling recipient."¹¹⁶ Even in the public forum, Cohen's freedom to wear his vulgar jacket extends only insofar as his audience can "avoid further bombardment of their sensibilities."¹¹⁷ Accordingly, and specific to Colorado's concern, "[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests."¹¹⁸

The unwilling listener's interest in avoiding offensive speech stems from the broader "right to be let alone," which Justice Brandeis described as the "the most comprehensive of rights and the right most valued by civilized men."¹¹⁹ Of course, "[t]his common-law 'right' is more accurately characterized as an 'interest' that States can choose to protect in certain situations."¹²⁰ And while this

113. *Id.* at 724.

114. *Id.* at 718 (quoting *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 736 (1970)).

115. *Id.* at 716 (citing *Frisby v. Schultz*, 487 U.S. 474, 487 (1988)).

116. *Id.* at 718 (quoting *Rowan*, 397 U.S. at 738).

117. *Cohen v. California*, 403 U.S. 15, 21 (1971) (holding that the First Amendment protects the right to engage in offensive expression as long as those offended by it can avoid it).

118. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 772–73 (1994).

119. *Hill*, 530 U.S. at 716–17 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

120. *Id.* at 717 n.24 (citing *Katz v. United States*, 389 U.S. 347, 350–51 (1967)).

interest has special force in the privacy of the home, it may also be protected where citizens are in transit.¹²¹ This is because of its contextual relationship with the right of passage without obstruction, which guarantees "as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege."¹²² Thus, the critical question is, at what point does a demonstrator's persistence violate the rights of the passerby he intends to persuade? According to the *Hill* majority, it is when the speaker continues to importune, follow, intimidate, or otherwise obstruct, after his offered communication has been declined.¹²³ Thus, because the Colorado statute regulated only speech that interfered with the protection of these rights, the Court found that the restriction was the product of a *significant* state interest.¹²⁴

Discussing the statute's tailoring, Justice Stevens began by reiterating that "when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal."¹²⁵ He then demonstrated that the statute neither entirely foreclosed on a particular means of expression nor burdened an excessive amount of speech. Starting with the regulation on the display of signs or placards, he noted that the required eight-foot separation between the speaker and audience was unlikely to have an adverse effect on the demonstrator's ability to communicate.¹²⁶ Moreover, he noted, the restriction "might actually aid the pedestrians' ability to see the signs by preventing others from surrounding them and impeding their view."¹²⁷

With regard to oral statements, he continued, the distance requirement does impose a burden on the speaker's ability to be heard, especially where there is background noise or the speaker is competing for attention.¹²⁸ Nonetheless, it is evident that the statute

121. *Id.* at 717.

122. *Id.* (quoting *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 204 (1921)).

123. *Id.* at 718.

124. *See id.*

125. *Id.* at 726 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)).

126. *Id.*

127. *Id.*

128. *Id.*

is tailored to keep speakers at a distance rather than to quiet their message, because it does not limit the speaker's ability to communicate by restricting noise level or the use of amplification equipment, even though similar restrictions have been previously upheld.¹²⁹ More importantly, the eight-foot restriction allows the speaker to communicate at a "normal conversational distance" unlike the defective fifteen-foot zone rejected in *Schenck*.¹³⁰ Furthermore, the statute does not require the speaker to relocate when an unwilling listener passes within eight-feet of the expression, and it imposes a "knowing" requirement to protect speakers who mistakenly believe they are maintaining the mandated distance.¹³¹

Consistent with Colorado's concern, handbilling is the form of expression most burdened by the statute. Indeed, it is arguable that the eight-foot restriction significantly limits the ability to force literature on *unwilling* pedestrians. However, it does not prevent the handbiller from "simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians can easily accept."¹³² Accordingly, the statute primarily burdens the speaker's ability to reach the *unwilling* listener, and any burden on the opportunity to reach the willing recipients is *de minimis* at best. Thus, even the handbilling restriction is consistent with the First Amendment, which guarantees the citizen's right to "reach the minds of *willing* listeners," by providing an "opportunity to win their attention."¹³³

Addressing the statute's geographic tailoring, Justice Stevens reasoned that because the restriction applies only within one hundred feet of healthcare facilities—where citizens are often in particularly vulnerable physical and emotional conditions—the state had narrowly limited the restriction to the physical areas where obstruction and unwelcomed speech posed the greatest concern. From this perspective, the Colorado restriction interferes with less speech than other health and safety related speech regulations that have previously been upheld, including the restriction of all fairground handbilling to a limited number of booths upheld in

129. *Id.* (citing *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 772–73 (1994)).

130. *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 377–78 (1997).

131. *Hill*, 530 U.S. at 727.

132. *Id.*

133. *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (emphasis added).

Heffron, and other commonplace ordinances requiring silence near hospitals.¹³⁴ Thus, in light of Colorado’s strong interest in regulation and the minimal burdens imposed on expression, it should come as little surprise that the court upheld the statute.

B. The Colorado Cure for Clark County Canvassing

A Clark County ordinance closely resembling Colorado’s eight-foot rule would likely reach enough obstructive canvassing to significantly curb its concerning effects and survive a First Amendment challenge. Of course, to achieve success on the Strip, commissioners would have to alter certain provisions to some degree. Such modifications, however, need not make the statute more restrictive than the Colorado version. For example, in order to adequately address the Strip’s narrow sidewalks, the first portion of the ordinance could be reworked to provide:

No person shall knowingly approach another person within eight feet of such person, or *where space restrictions do not permit safely maintaining such a separation, then a distance not less than safety will permit*, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to. . . .

Strictly speaking, a statute providing this exception to the default eight-foot requirement would actually impose less of a burden on handbillers than the Colorado statute, because where applicable, it would allow them to get closer to their intended audience. However, at first glance, it also seems that such an exception would dilute the effectiveness of the ordinance. After all, assuming that the “safest possible distance” is on the edges of the sidewalk, then wherever the exception applies, canvassers are free to remain within an arm’s length of passersby.

Nonetheless, such a statute would dramatically improve the status quo on the Strip in at least two ways. First, it would give commissioners and property owners an incentive to limit the applicability of the exception. This could be done by creating special canvassing “safe” zones carved out of public and private property abutting the problematic sections of sidewalk within the statute’s reach. In these areas, canvassers would be forced to maintain a

134. *Hill*, 530 U.S. at 727–28. (citing *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981)).

greater distance—if not the full eight feet—from pedestrians, unless a pedestrian publicly consented to an approach. This physical separation alone would alleviate much of the congestion in popular canvassing areas, and it could be created at any location within the statute’s reach. Thus, after determining the statute’s geographic scope, the county could, with the cooperation of property owners, force a physical gap between canvassers and pedestrians on an as needed basis. This sort of adaptability would allow the county to keep pace with peripatetic canvassers.

Second, even in areas where the exception applies, the proposed consent requirement would likely result in a significant decrease in the number of canvassers. The canvassing model used by outcall services requires distributing “the maximum number of advertisements at the least cost.”¹³⁵ When canvassers are free to approach and distribute material to all pedestrians, there is an incentive to employ enough canvassers to reach each passerby. However, when the pool of possible recipients is reduced to those who affirmatively consent to a canvasser’s approach, the need for canvassers presumably decreases proportionately. Indeed, even under the charitable assumption that one-third of the Strip’s visitors would publicly consent to distribution and that it would take one-third of the current canvassing force to elicit that consent, the restriction would still effectively reduce the need for canvassers by a two-thirds. Certainly, this would eventually result in a corresponding reduction in the number of canvassers.

Furthermore, the consent requirement may cause the canvassing model to fail altogether. If canvassers are limited to those who publicly consent to an approach, then they are likely to forfeit two substantial groups of potential clients: (1) those who would prefer to pursue adult entertainment without drawing attention to themselves; and (2) those who are not interested in the service until they receive the provocative handbill. Without the ability to reach these groups, aggressive canvassing could very well become an obsolete method of marketing adult services, and this, it seems, is exactly the sort of result Clark County intends to achieve.

135. Joint Answering Brief of Appellees, *supra* note 1, at 9.

C. The Defensibility of a Clark County Version

Of course, with the likelihood of imposing such a burden on canvassing comes the likelihood of another First Amendment challenge. Moreover, while the county has an apparent advantage by virtue of the *Hill* ruling, a successful defense will still require a showing that the circumstances prompting the restriction are analogous to those at issue in Colorado. To create this analogy, the county will have to demonstrate a comparable interest in restricting aggressive canvassing and similarly tailor the geographic reach of the regulation. Additionally, the county will also want to consider and preempt possible First Amendment challenges by including additional temporal limitations in its version.

Clark County's biggest risk in relying on *Hill* is that a court could be persuaded that the troubling situation on the Strip is not as significant as the situation faced by the Colorado legislature. However, a plausible argument could be made that, at bottom, Clark County and Colorado are seeking to protect almost identical interests. In order to frame such an argument, the County will want to clearly identify the restriction as a legislative balancing of its interest in protecting pedestrians' right to proceed without obstruction and the speaker's right to reach a willing audience.

1. The State's interest in a reasonable restriction

Of course, canvassers will likely contend that the right to proceed without obstruction is not implicated to the same degree that it was in *Hill*. Presumably, they will attempt to distinguish themselves from abortion protestors by arguing that their expressive tactics do not infringe on the "right to be let alone." To do so, they will likely assert that, unlike abortion protestors, *individual canvassers* rarely, if ever, importune, follow, intimidate, or physically obstruct, after an offered handbill has been declined.¹³⁶ While there may be some truth to this distinction, it does not allow canvassers to escape the fact that the net effect of their operation is the obstruction of pedestrians on Las Vegas Boulevard. Indeed, while the conduct of *individual canvassers* may not rise to the level of importuning or physically obstructing unwilling listeners, the same cannot be said of the tactics intentionally employed by a canvassing company taken as a whole. As

136. *See id.*

pedestrians attempt to proceed along the Strip, they are frequently delayed by groups of canvassers offering handbills. When an offer from a canvasser is refused, a co-canvasser approaches and makes an identical offer; when that offer is rejected, the process repeats.¹³⁷ Surely, this orchestrated effort to generate a profit by importuning and obstructing pedestrians is no less repugnant to Brandeis' beloved "right to be let alone" than the similar conduct of individual right-to-life demonstrators. In fact, it may well be that this sophisticated attempt to force provocative quasi-commercial speech on an unwilling listener is even more offensive than the aggressive delivery of sociopolitical expression. From this perspective, Clark County's interest in protecting pedestrians from obstruction caused by unwanted speech appears to be similar in *significance* to the interest that persuaded the Court in *Hill*.

Responding to this argument, canvassers might contend that a pedestrian's refusal of a handbill is distinguishable from the "unwillingness" of the protected audience in Colorado because the canvasser's handbill is less likely to elicit a confrontational, emotional response. Essentially, this argument would presuppose that the handbilling on the Strip is not as inherently offensive as the emotive language and gruesome images that often accompany anti-abortion demonstrations. Thus, it implicitly suggests that because pedestrians are less likely to be offended by nearly pornographic handbills, their refusal is somehow less indicative of their unwillingness. Whatever merit this claim might have, it applies only when a pedestrian refuses a handbill without recognizing its content, because once content is purposely refused, the recipient's unwillingness is unquestionable. Of course, as a practical matter, it seems that it would be rare for a pedestrian to be entirely ignorant of the content of the refused handbill—particularly when surrounded by groups of canvassers clad in shirts reading "Girls Direct To You In 20 Minutes."¹³⁸ However, even assuming that this ignorance is common, the degree to which the content is offensive is unlikely to affect the court's analysis, because, as the *Hill* court explained, "[i]t may not be the content of

137. Schoenmann, *supra* note 2.

138. See Steve Marcus, *Men Hand Out Cards Advertising Out-Call "Entertainers" on the Strip on Sunday, July 24, 2011* (photograph), in Joe Schoenmann, *Casino Execs, County Staff Recommend 7 Steps to Clean Up Strip*, LAS VEGAS SUN (Mar. 29, 2012, 2:00 AM), <http://www.lasvegassun.com/news/2012/mar/29/group-suggests-ways-strip-can-clean-its-act/>; see also Wyland, *supra* note 23.

the speech, as much as the deliberate ‘verbal or visual assault,’ that justifies proscription.”¹³⁹

Furthermore, even if challengers convince the court that the difference in content is somehow relevant, it remains problematic to use likelihood of offense to establish pedestrian unwillingness. Although it may be true that people are generally uncomfortable when forced to view images of aborted fetuses, the same may be true of people forced to view images of objectified young women juxtaposed with language suggestive of prostitution.¹⁴⁰ In fact, it stands to reason that those likely to be seriously offended by gruesome abortion imagery—including those who stringently oppose abortion on moral grounds and those who strongly support women’s freedoms—are also those most likely to be offended by material depicting young ladies as purchasable goods. That this reaction is likely to occur on both ends of the political spectrum is indicative of at least one reason that a court would reject using the probability of offense to determine whether a pedestrian was truly unwilling to receive a rejected handbill. Such a subjective standard would require the court to assume that pedestrians generally prefer certain images to others. While courts typically refuse to make such value judgments, in this case, where the probability of offense is so unpredictable, judges are likely to be particularly repulsed.

2. Reasonable tailoring

Because challengers are unlikely to find a relevant way to meaningfully distinguish obstructive canvassing from obstructive protesting, county officials should anticipate an attack on the restriction’s tailoring. Fortunately, an effective version of the statute upheld in *Hill* need not burden any additional types of speech. In fact, because commissioners can achieve the desired goal while omitting certain provisions of the Colorado ordinance, they will want to do so in order to be sure that no unnecessary speech is burdened. For example, to avoid an over-inclusive challenge, the county will need to consider excising the restriction on “oral

139. *Hill*, 530 U.S. at 716 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–11 n.6 (1975)).

140. Peter O’Connell, *Handbills Battle Hits Strip*, LAS VEGAS REVIEW-JOURNAL (June 11, 1999), http://www.reviewjournal.com/lvrj_home/1999/Jun-11-Fri-1999/news/11353806.html.

protest,”¹⁴¹ because although the *Hill* court found the provision to be reasonably tailored to Colorado’s interest, the county’s interest probably does not require such a limitation.

a. Geographic tailoring. In addition to tailoring the types of speech it will regulate, Commissioners will also need to carefully and explicitly define the exact locations where the new ordinance will apply. Fortunately, the Colorado statute also provides an adaptable example of reasonable geographic tailoring. As a starting point, it is important to note that the restriction at issue in *Hill* did not apply only to clinics performing abortion services; instead, it extended to all healthcare facilities.¹⁴² This distinction is noteworthy because it suggests that the court is unlikely to require similar statutes to be applicable only where obstruction has previously occurred. Indeed, *Hill* seems to indicate that such restrictions are reasonably tailored when imposed within one hundred feet of any location where the legitimate interest is implicated.¹⁴³ Concurring with the *Hill* Judgment, Justice Souter, joined by Justices O’Connor, Ginsburg, and Breyer, explained that while the Colorado statute “was not enacted to protect dental patients, [he] [could not] say it [was] beyond the State’s interest to do so; someone facing an hour with a drill in his tooth may reasonably be protected from the intrusive behavior of strangers who are otherwise free to speak.”¹⁴⁴ This suggests that as long as the ordinance’s geographic reach is clearly defined and limited only to areas where the concern for obstruction is reasonably implicated, courts will be somewhat deferential to the county’s tailoring.

While challengers may attempt to distinguish resort visitors as less vulnerable than those seeking medical attention, it stands to reason that the Strip’s pedestrians are at least as susceptible to harm as those protected by the Colorado statute. Whereas medical patients risk missing an opportunity for treatment, agitating an existing condition, or psychological harm, canvassers have caused members of their unwilling audience, who are often unfamiliar with their

141. See COLO. REV. STAT. § 18-9-122 (1993).

142. *Hill*, 530 U.S. at 703.

143. *Id.*

144. *Id.* at 739 (Souter, J., concurring).

surroundings, to risk life and limb in a dangerous street to avoid the unwanted expression.¹⁴⁵

Accordingly, it seems that the county has at least two workable options for restricting the geographic reach of a *Hill*-based ordinance. First, acting cautiously, it could limit the restriction to reach only carefully defined areas where canvassing has historically been obstructive and locations where pedestrians are *likely* to be endangered by obstructive conduct. This sort of tailoring would be analogous to further narrowing the reach of the Colorado statute, which currently applies within one hundred feet of all healthcare facilities, to apply only at facilities where abortions or other controversial medical procedures are *likely* to occur. Moreover, such a limited restriction is consistent with the county’s interest because it allows for the identification and subsequent regulation of any specified area where unrestricted canvassing is *likely* to unduly obstruct pedestrians. This, in theory, would allow for the regulation of all heavily traveled sections of the Strip’s narrow sidewalks. Thus, taking a cautious approach, the county could adopt an ordinance that by analogy is less restrictive than the statute upheld in *Hill* while still restricting enough canvassing to vindicate its interests. Accordingly, under *Hill*, it appears unlikely that such a geographic reach could be found unreasonably over- or under-inclusive.

Second, relying on Justice Souter’s description of Colorado’s tailoring, the county could possibly take a more aggressive approach by applying its restriction to any location where unregulated handbilling *could* endanger pedestrians. After all, while it seems that even the most ardent opponents of dental hygiene are unlikely to obstruct dental patients, the *Hill* majority found it reasonable for Colorado to regulate such conduct because dental patients *could* be particularly vulnerable to its effect.¹⁴⁶ Of course, Clark County would be unwise to interpret this language to support an ordinance reaching all sidewalks abutting busy county streets, because although obstructive canvassing on any such sidewalk could present dangers similar to those on the strip, most courts would be loath to uphold a restriction so geographically expansive. However, commissioners might be able to impose the ordinance where avoiding unwanted

145. Joint Answering Brief of Appellees, *supra* note 1, at 18 n.17; Schoenmann, *supra* note 2; Morrison, *supra* note 25.

146. *Hill*, 530 U.S. at 739 (Souter, J., concurring).

speech *could reasonably* endanger pedestrians, or, in other words, in areas where both canvassing and dangerous traffic would be reasonably expected. While any increase in restrictive reach increases litigation risks, *Hill* appears to support a geographic scope at least this broad. Moreover, looser tailoring would allow the county to regulate off-Strip areas posing similar dangers to tourists, including the sections of sidewalk surrounding historic downtown Las Vegas, where former Mayor Oscar Goodman has repeatedly attempted to regulate outcall canvassing.¹⁴⁷

b. Temporal tailoring. In addition to geographic tailoring, county officials might also consider adding a final layer of litigation protection by limiting the ordinance to apply only at certain times of the day. Although *Hill* suggests that the county would likely satisfy the First Amendment's tailoring requirements by carefully limiting both the types of expression restricted and the locations where such restrictions apply, a time restriction would only further indicate Clark County's commitment to protecting speech rights. Furthermore, a timing restriction need not diminish the ordinance's ability to reach problematic canvassing, because while Las Vegas is the prototypical twenty-four hour town, there are certainly times when canvassing ebbs. For example, while visitors are known to walk to the Strip until the early morning hours, comparatively few continue into the early daylight hours. During these few hours, the incentive to canvass decreases along with the pedestrian population. Thus, by analyzing traffic patterns and canvassing habits, the county may well be able to identify specific periods when regulation is wholly unnecessary and draft its ordinance accordingly. Therefore, because a temporal limitation appears to be a low-cost means of garnering a court's favor, county commissioners would be wise to consider including one in future attempts to regulate obstructive canvassing.

V. CONCLUSION

With troubling economic conditions already handicapping the resort industry, protecting visitors from unwanted, obstructive, and otherwise dangerous canvassing has once again become a priority for Clark County's legislature. Moreover, without new regulation, the

147. Toplikar, *supra* note 2.

county actually risks a significant increase in the canvassing presence, because the odds favor canvassers in a challenge to their current exclusion from privately-owned sidewalks. However, while attempts to entirely eradicate canvassing through the commercial speech doctrine will likely result in costly defeat, the county does have powerful and defensible legislative options. A properly modified version of the statute upheld in *Hill* is not only capable of significantly mitigating canvassing concerns, it is also likely to survive a First Amendment challenge. And although this author lacks the resources necessary to define the precise scope of such legislation, county commissioners, using this Comment as a rough guide, will likely be able to draft an effective and defensible ordinance restricting off-premise canvassing on the Las Vegas Strip.

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