Dancing in the Street: Busking and the First Amendment

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TABLE OF CONTENTS

I. INTRODUCTION

When hearing the word "busker" one may imagine a scene of perfectly synchronized chimney sweepers dancing in the streets of early twentieth-century London in the classic Disney film, Mary Poppins. Merriam Webster defines "busker" as "a person who entertains in a public place for donations."[1] With its

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[1] *Busker*, MERRIAM-WEBSTER, https://www.merriamwebster.com/dictionary/busker [https://perma.cc/XVM9-XPLA] (last visited Feb. 9, 2021).

origins dating back to 1851,[2] the term is not commonly used today as it once was but is still relevant. Buskers, also known as street performers, contribute to the vibrancy and cultural fabric of our nation's cities. As a form of expression, street performances are afforded First Amendment protection and rights. However, the question arises of how buskers' speech is categorized when their performance renders a profit; are these acts then considered commercial speech, subject to lesser First Amendment protection? Nonetheless, regulating busking at the local government level often proves to be a difficult balance between the freedom of expression and public concerns such as health, safety, and use of shared spaces. This article examines the legal framework for regulating buskers and explores how jurisdictions around the country do so while adhering to constitutional parameters and taking practical considerations into account.

II. LEGAL FRAMEWORK FOR BUSKING

A. Noise Restrictions Under the First Amendment

The First Amendment guarantees individuals freedom of expression by prohibiting governmental restraints on free speech.[3] Generally, restraints on fundamental rights such as freedom of speech are subject to strict scrutiny, meaning the restriction must be narrowly tailored and serve a compelling state interest. However, the government may place reasonable time, place, and manner ("TPM") restrictions on speech in a public forum.[4] Ideally, doing so "minimizes disruption of a public place while still protecting freedom of speech."[5] Public forums include places such as parks, sidewalks, and streets.

In order to pass constitutional muster, TPM restrictions must be content-neutral, narrowly drawn to serve a significant government interest, and leave open alternative channels of communication.[6] Municipal noise regulations are among some of the most contested and challenged TPM restrictions under the

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[2] *Id*.

[3] *See* U.S. CONST. amend. I.

[4] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1539–55 (6th ed. 2020).

[5] *Id*. at 1539.

[6] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981) (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 (1976)).

First Amendment.

First, in order for a government regulation of speech to be content neutral, the regulation must not limit any particular type of speech; rather, it must only regulate the circumstances under which the speech may take place.[7] Content-neutral regulations must be both viewpoint neutral and subject neutral; the government cannot regulate speech based on the ideology of the message or the topic of the speech.[8]

In the alternative, content-based regulations regulate speech based on content and are presumptively invalid.[9] However, content-based regulations may be upheld if they pass strict scrutiny. *Boos v. Berry* demonstrates the distinction between content-based and content-neutral regulations.[10] In this case, the Supreme Court invalidated a District of Columbia ordinance that prohibited the display of signs critical of a foreign government within five hundred feet of that government's embassy.[11] The Court reasoned that because picketing in front of the embassy was determined purely by the content of the speech, and not the time, place, or manner, it qualified as an invalid content-based regulation that did not survive strict scrutiny.[12]

Generally, noise ordinances are considered content-neutral because their purpose is not to regulate a certain message, but to limit the volume of sound produced.[13] For example, in *Ward*, in an effort to ensure that musical performances in a city park's band shell were loud enough to be heard by the audience without disturbing those on nearby streets, the city enacted an ordinance requiring all musical performers to use sound amplification equipment and a sound technician provided by the city.[14] The Court deemed the ordinance content neutral because its purpose was to "control noise levels at band shell events" and was thus unrelated to the music's content.[15]

Secondly, TPM restrictions are subject to intermediate

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[7] *See Clark*, 468 U.S. at 293–94; *Heffron*, *452 U.S. at 648–49*.

[8] *See* CHEMERINSKY, *supra* note 4.

[9] R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992).

[10] Boos v. Berry, 485 U.S. 312, 320 (1988).

[11] *Id.* at 315.

[12] *Id.* at 334.

[13] *See Ward*, 491 U.S. at 791. *See also* Paula P. Bentley, Case Comment, *A Line in the Sand: Florida Municipalities Struggle to Determine the Line Between Valid Noise Ordinances and Unconstitutional Restrictions*, 35 STETSON L. REV. 461, 473–74 (2006).

[14] *Ward*, 491 U.S. at 784.

[15] *Id.* at 792.

scrutiny, meaning such regulations must be narrowly tailored to serve a significant government interest.[16] This requires the regulation to "promote[] a substantial government[al] interest that would be achieved less effectively absent the regulation."[17] Unlike strict scrutiny, this does not mean that the regulation must be the least restrictive means. Referencing back to *Ward*, the Court found the ordinance was narrowly tailored to serve a significant governmental interest because the City had "a substantial interest in protecting its citizens from unwelcomed noise."[18]

Third, TPM regulations must leave open alternative channels of communication. Alternative channels of communication are available if the noise ordinance limits the volume, time, or location of noises produced because individuals "may still express themselves at a lower volume, during specified times, or in a different location."[19] A noise regulation will fail to meet this third prong if it leaves the speaker with no other adequate means of expression. In *Ward*, the Court found the city ordinance allowed alternative channels of communication because it did "not attempt to ban any particular manner or type of expression at a given place or time" nor did it have an "effect on the quantity or content of that expression beyond regulating . . . [its] amplification."[20]

Noise ordinances may also be challenged for overbreadth. A regulation may be considered overbroad when it intrudes on free-speech rights more than is necessary to serve the governmental interest.[21] For example, the D.C. Circuit Court of Appeals invalidated an ordinance with a sixty-decibel limitation, finding it to be an unreasonably low restriction for a national park.[22] Using the same overbreadth standard, the *Ward* Court held that because the ordinance at issue requiring all performers to use city designated equipment and sound technicians had no material impact on any performer's artistic control, it was "not

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

17 United States v. Albertini, 472 U.S. 675, 689 (1985).

18 *Ward*, 491 U.S. at 796–97.

19 Bentley, *supra* note 13, at 474.

20 *Ward*, 491 U.S. at 802.

21 *See Reeves* v. McConn, *631 F.2d* 377, *383* (5th Cir. 1980) ("If, at the expense of First Amendment freedoms, a statute reaches more broadly than is reasonably necessary to protect legitimate state interests, a court may forbid its enforcement.").

22 *See* United States v. Doe, 968 F.2d 86, 91 (D.C. Cir. 1992).

substantially broader than necessary to achieve the government's interest."[23]

B. Challenges to Busking Ordinances

1. Friedrich v. Chicago

In *Friedrich*, plaintiffs challenged a Chicago Street Performance Ordinance under First Amendment claims.[24] The 1983 ordinance regulated the manner in which street performers may perform in public areas by setting restrictions on the time, date, and specific locations that street performers could perform in the city. Notably, the ordinance included a permitting system that plaintiffs did not challenge.

The *Friedrich* Court recognized that performances conducted by performers with the proper licensures are a form of expression protected by the First Amendment and that generally, this type of activity on a public forum would be subject to intermediate scrutiny as a TPM restriction.[25] However, the Court reasoned that while the restrictions were "content neutral within the class of performers as defined by the ordinance" the restriction was not neutral with respect to the type of speaker since it "does not embrace many other classes of speakers and 'performers' such as leafletters, picketers, or preachers."[26] Thus, because of the content-based nature of the ordinance, the Court directed that it be subject to strict scrutiny under the First Amendment (requiring the ordinance to be narrowly drawn to serve a compelling interest, rather than a significant interest).[27]

The Court found that the City satisfied its burden of showing that its interests are compelling; the large crowds drawn by street performers were continuously large enough to divert pedestrians into the streets, endangering both pedestrians and drivers.[28] But the Court found that certain aspects of the ordinance did not narrowly further this compelling interest as it pertains to broad time, date, and place restrictions.[29] For

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[23] *Ward*, 491 U.S. at 800, 802.
[24] Friedrich v. Chicago, 619 F. Supp. 1129, 1131 (N.D. Ill. 1985).
[25] *See id.* at 1141–42.
[26] *Id.* at 1142.
[27] *Id.*
[28] *Id.*
[29] *Id.*

example, the ordinance took effect sooner than necessary on days it applies; the time restriction on the Rush Street area beginning at 3 PM. was unnecessary because the crowds were not dense in that area until 5 PM.[30] Likewise, the prohibition of street performances on Wednesday nights in the Rush Street area was unconstitutional because testimony and evidence failed to show that crowds came anywhere near the levels of Friday and Saturday nights.[31] Additionally, the Court commented that the ordinance concerned a broader geographical area than necessary to achieve the City's compelling interest in safety, as serious crowd conditions existed only in specific areas.[32]

Notably, the Court upheld some parts of the ordinance, including provisions that banned street performances when crowds were most dense (7 PM to 11 PM on Fridays and Saturdays), because the restriction at times of dense crowding protects public safety and alleviates crowd conditions.[33] The Court also upheld parts of the ordinance that applied only for eight hours during the week because it allowed other times for performers to perform and draw more manageable crowd sizes.[34] Further, regarding the ordinance provisions that the Court upheld, the Court also found that the City did not have reasonable less restrictive alternatives to achieve its compelling state interest in safety.[35] The Court rejected plaintiffs' arguments that an increase in police enforcement could solve crowd control issues and rejected the argument that the city should shut down the heavily crowded street areas to subdue traffic at certain hours.[36] Notably, the *Friedrich* ruling demonstrates that a court is likely to use trends and evidence to consider whether a content-based public space restriction on speech is valid under the First Amendment. This includes not only the trends of performers, but also evidence of safety problems.[37]

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[30] *Id.*

[31] *Id.*

[32] *Id.* at 1143. For example, the Court invalidated the part of the ordinance banning performances in certain shopping areas because the City failed to prove that crowds are heavy enough to warrant a ban on street performances after 7:30 PM on weekdays and 5:30 PM on Sundays.

[33] *Id.* at 1143.

[34] *Id.* at 1145.

[35] *Id.*

[36] *Id.* at 1144–45.

[37] *Id.* at 1147.

2. Additional First Amendment Caselaw

First Amendment and busking issues have been presented before a variety of federal courts. In *Schad v. Borough of Mount Ephraim*, the Supreme Court held that a zoning ordinance that prohibited all forms of live entertainment within a town violated the First Amendment, as a total ban leaves no open alternative channels of communication within the City.[38] A few of the circuit courts have weighed in on the issue. In *Davenport v. City of Alexandria*, the Fourth Circuit upheld permit requirements for street performers because the standards were precisely defined, and city officials had no discretion on how to issue a permit.[39] But, the Fourth Circuit invalidated the street busking ordinance, finding it overbroad and unrelated to a substantial safety interest that would outweigh the street performer's First Amendment rights.[40]

Later, in *Deegan v. City of Ithaca*, the Second Circuit recognized that "[a city] has a legitimate interest in keeping sound from reaching a level that is unreasonably 'injurious or annoying or disturbing' in furtherance of . . . [a] concern for 'the comfort, repose, health, and safety of anyone within its geographical limits.'"[41] However, the Court held that a local ordinance that prohibited sounds audible at a distance of twenty-five feet (a "plainly audible" standard) unreasonably burdened protected speech, as the low volume set by the ordinance was not narrowly tailored to serve the City's interest in maintaining reasonable sound levels in public spaces.[42]

Similarly, in *Lionhart v. City of New Orleans*, the United States District Court for the Eastern District of Louisiana granted New Orleans street entertainers a preliminary injunction against the enforcement of a city ordinance that prohibited amplified music audible at a distance of twenty-five feet and unamplified music audible at a distance of fifty feet.[43] Plaintiffs

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

39 Davenport v. Alexandria, 710 F.2d 148, 149–51 (4th Cir. 1983) (en banc).

40 Davenport v. Alexandria, 748 F.2d 208, 210 (4th Cir. 1984). This case is discussed further in Part II (c)(i), *infra*.

41 Deegan v. Ithaca, 444 F.3d 135, 143 (2d Cir. 2006) (citing Carew-Reid v. Metro. Transp. Auth., 903 F.2d 914, 917 (2d Cir. 1990)).

42 *Id.*

43 Lionhart v. New Orleans, No. 96-1869, 1996 U.S. Dist. LEXIS 18903, at *6 (E.D. La. Dec. 11, 1996).

argued these levels were "unreasonably low."[44] The Court ordered the City to review and consider appropriate legislative action.[45]

C. The Classification of Busking

1. Busking, Noncommercial or Commercial Speech?

Generally, noncommercial speech is entitled to full protection under the First Amendment. Like other First Amendment activities, the government may impose reasonable TPM restrictions on noncommercial activities. However, the Supreme Court has not given a clear definition of commercial speech. Much of the commercial speech case law involves advertising. The Court has asserted that economic motivation alone is not sufficient to constitute commercial speech.[46] Instead, courts will engage in a three-part test to determine if speech is commercial or not.[47] All three factors must be present.[48] First, the speech must be an advertisement of some form. Second, the speech must refer to a specific product.[49] Third, the speaker must have an economic motivation for the speech.[50] Importantly, commercial speech is afforded less protection than other constitutionally guaranteed forms of expression. Commercial speech is subject to intermediate scrutiny,[51] and an overbreadth analysis does not apply to government regulation of commercial speech.[52]

The limited case law on street busking suggests that busking activity qualifies as noncommercial speech subject to First

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44 *Id.* at *5.
45 *Id.* at *6.
46 Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 (1983).
47 *See id.*
48 *See id.*
49 *See id.*
50 *See id.*
51 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 570 (1980) (holding that although a New York State regulation completely banning electric utilities from advertising to promote the use of electricity served a governmental interest in energy conservation, it violated the First Amendment because it restricted all promotional advertising regardless of its effect on electricity). *See also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 566–67 (2001); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 195 (1999).
52 Bd. of Trs. of State Univ. of New York v. Fox, 492 U.S. 469, 481–82 (1989). A regulation may be considered overbroad when it intrudes on free-speech rights more than is necessary to serve the governmental interest. *Id.* at 481.

Amendment protection. For example, in *Davenport v. City of Alexandria*, a street performer, who performed, exhibited, and lectured on the bagpipes, challenged the validity of a city ordinance which prohibited performances and exhibitions on the sidewalks, walkways, or other public property of the central business district and required a permit.[53] In addressing the street performer's claims, the Fourth Circuit assessed whether his performances qualified as commercial or noncommercial speech. The Court reasoned that "'commercial speech' is a legal term of art referring to advertising" and street performing, like the plaintiff's, is unrelated to advertising.[54] Additionally, the Court explained that there is "no distinction between expression which generates a profit and expression which does not."[55] After a series of remands, the Fourth Circuit ultimately held the ordinance unconstitutional, overbroad, and unrelated to a substantial safety interest that would outweigh the street performer's First Amendment rights.[56]

Similarly, the United States District Court for the District of Massachusetts opined that First Amendment protection applies to street performers, even if they accept "contributions of passersby during . . . public performances."[57] In *Goldstein*, a street performer who performed and positioned his instrument case "so that passersby may contribute donations" challenged a local bylaw that required permits for street entertainers based on "broad evaluative criteria" including the "financial responsibility of the applicant" and the "opinion of neighboring merchants."[58] Although the Town claimed its criteria were in the "interest of public safety," the Court deemed them "irreconcilable with freedom of expression" and found the bylaw unconstitutional as

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53 Davenport v. Alexandria, 710 F.2d 148, 150 (4th Cir. 1983).

54 *Id.* at 150 n.6.

55 *Id.* *See also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 292 (1964) (upholding the right of a newspaper to publish a paid political ad); Joseph Burstyn v. Wilson, 343 U.S. 495, 506 (1952) (holding that an operation for profit does not strip film makers of their First Amendment rights).

56 *Davenport*, 748 F.2d at 210.

57 Goldstein v. Nantucket, 477 F. Supp. 606, 609 (D. Mass. 1979). The District Court relied on *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) to reason that speech, including that of street performers, "is protected even though it is carried in a form that is 'sold' for profit, and even though it may involve a solicitation or purchase or otherwise pay or contribute money." *Goldstein*, 477 F. Supp. at 609 (alteration in original) (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. at 761).

58 *Goldstein*, 477 F. Supp. at 607–09.

applied to the plaintiff.[59]

Notably, while other courts have not explicitly stated whether busking is noncommercial speech, they have applied First Amendment protection to such activities. For example, in *Service Employees International Union v. City of Houston*, the Fifth Circuit invalidated a local anti-busking provision that prohibited people from playing instruments in the park other than for their own enjoyment, finding the provision did not meet reasonable TPM restrictions.[60] Likewise, the Second Circuit applied the same standard when upholding an executive order banning a busker previously convicted of child molestation from child-oriented performances on public property.[61] This application of reasonable TPM restrictions indicates that courts are likely to treat street busking as protected and noncommercial First Amendment activity throughout various jurisdictions.

2. Busking Classified as Panhandling

Some jurists may classify busking as "panhandling."[62] This creates an issue of whether busking qualifies as panhandling and, moreover, what type of constitutional protection busking is afforded. Notably, the First Amendment protects charitable solicitation as a form of speech.[63] In *Citizens for a Better Environment*, the Supreme Court invalidated a municipal ordinance that prohibited charitable organizations from soliciting contributions unless they used at least seventy-five percent of their receipts for charitable purposes, holding "that charitable appeals for funds, on the street or door to door, involve a variety

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[59] *Id*. at 609.

[60] Serv. Emps. Int'l Union v. Houston, 542 F. Supp. 2d 617, 641 (S.D. Tex. 2008), *rev'd*, 595 F.3d 588, 605 (5th Cir. 2010). The district court, later overruled by the Fifth Circuit, found that the provision was "content neutral because it regulate[d] all music played too loudly or for financial gain . . . regardless of message." 542 F. Supp. 2d at 641. The court then found the ordinance met a significant government interest in protecting citizens from unwanted noise and it was narrowly tailored, as it did not affect any protected conduct other than the City's substantive interest. *Id.* at 642. Further, the city allowed "ample alternative avenues for expression;" the musicians could play for their own enjoyment or obtain a permit if they wanted to play for money. *Id.*

[61] Hobbs v. Westchester, 397 F.3d 133, 153–54, 157–58 (2d Cir. 2005) (finding that such a ban served a compelling governmental interest in protecting the welfare of children, and it was narrowly tailored to serve that interest).

[62] *See* Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 644 (1980) (Rehnquist, J., dissenting).

[63] *Schaumberg*, 444 U.S. at 633 (majority opinion).

of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment."[64]

However, the Supreme Court has yet to resolve constitutional limitations on panhandling, mainly whether panhandling qualifies as charitable solicitation protected by the First Amendment. The circuit courts are divided on the issue. The Seventh Circuit was one of the first to extend charitable solicitation to include individual panhandlers, reasoning that "[l]ike the organized charities, [the panhandlers'] messages cannot always be easily separated from their need for money."[65] Additionally, the Court asserted the First Amendment guarantees panhandlers' right to "deliver their pitch and ask for support" in public.[66] Other jurisdictions have adopted the Seventh Circuit standard granting panhandlers First Amendment protection. In 2015, the Fourth Circuit invalidated a Virginia county ordinance prohibiting all roadside solicitations within county roadways on First Amendment grounds, finding the ordinance burdened substantially more speech than necessary to further public safety interests.[67] The court articulated "there is no question that panhandling and solicitation of charitable contributions are protected speech."[68]

Although not as persuasive as a circuit court ruling, the District of Columbia Court of Appeals opined that panhandling "implicates expressive conduct or communicative activity" as a

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[64] *Id*. at 632. In applying First Amendment protection, the Court held that the city ordinance did not survive strict scrutiny because while the Village's interest "in protecting the public from fraud, crime and undue annoyance" was substantial, it was not the least restrictive means of achieving such an interest. *Id*. at 636.

[65] Gresham v. Peterson, 225 F.3d 899, 901, 904 (7th Cir. 2000) (invalidating an Indianapolis ordinance that "limit[ed] street begging in public places and prohibit[ed] entirely activities defined as 'aggressive panhandling'").

[66] *Id*.

[67] Reynolds v. Middleton, 779 F.3d 222, 224–25, 230–31 (4th Cir. 2015).

[68] *Id*. at 225 (citing Clatterbuck v. Charlottesville, 708 F.3d 549, 553 (4th Cir. 2013)). *See also* Speet v. Schuette, 726 F.3d 867, 877–78 (6th Cir. 2013) (stating, "begging is indistinguishable from charitable solicitation for First Amendment purposes" and invalidating an overbroad Michigan statute criminalizing all begging in public places); Smith v. Fort Lauderdale, 177 F.3d 954 (11th Cir. 1999) (upholding a city ordinance banning soliciting, begging, or panhandling on specified beach areas because the regulations were narrowly tailored to provide a safe, pleasant environment and to prevent adverse impacts on tourism).

"form of speech."[69] In this case, the court declared the District's Panhandling Act[70] permissible under the First Amendment because it met reasonable TPM restrictions, as it "sought to prohibit [aggressive] panhandling in certain places where public safety could be compromised by disrupting the smooth flow of pedestrian or vehicular traffic."[71] Taking it a step further, the DC Court of Appeals equated the activity of street musicians who receive donations with that of panhandlers'; reasoning that a donation may "connote a charitable gift or contribution" and the act of placing a bucket on the ground signals the acceptance of such a donation.[72]

However, not all courts afford panhandlers First Amendment protection. For example, the Second Circuit upheld a New York Metropolitan Transportation Authority regulation prohibiting the solicitation of alms within subways.[73] The Court distinguished panhandling from charitable solicitations by reasoning that unlike charitable solicitations, the conduct of "begging was not inseparably intertwined with a particularized message," so as to bring it within the scope of First Amendment protection.[74]

As a growing trend, the majority of circuit courts treat panhandling synonymously with charitable solicitation, a firmly established form of First Amendment free speech. Thus, if a court were to classify buskers as panhandlers, then such individuals are likely to be afforded First Amendment protection. However, such a classification will not fully insulate buskers from First Amendment restrictions in all circuits, as there is an argument to be made that busking does not qualify as charitable solicitation because it lacks a "particularized message."

3. Predictions on the Treatment of Busking in a Court of Law

First, the act of busking does not meet the legal definition of "commercial" activity commonly associated with advertising. Although buskers often receive donations for their street performances, economic motivation alone is not sufficient to

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69 McFarlin v. D.C., 681 A.2d 440, 447 (D.C. 1996) (quoting Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993)).

70 D.C. CODE § 22-2302 (2021) (allows individuals to beg, solicit, or panhandle as long as they do not do so in an aggressive manner).

71 *McFarlin*, 681 A.2d at 448.

72 *Id*. at 450.

73 Young v. N.Y.C. Transit Auth., 903 F.2d 146, 148 (2d Cir. 1990).

74 *Id*. at 153–54.

constitute commercial speech. Second, it is the consensus of courts across the country to treat busking as noncommercial activity. A few courts have gone even further, explicitly classifying busking as noncommercial activity by emphasizing the fact that buskers may make a profit has no bearing on whether busking qualifies as commercial activity. Moreover, courts continue to treat busking as First Amendment activity subject to reasonable TPM restrictions, thus indicating that such activities are noncommercial and subject to full constitutional protection.

Last, even if a court were to qualify busking as panhandling, it seems likely that such activity would qualify as a protected First Amendment activity. All but one of the four Circuit Courts presented with the issue have equated panhandling with charitable solicitation and afford such activity the same level of First Amendment protection. However, buskers may be vulnerable to a panhandling challenge, as their actions arguably lack a particularized message in many instances.

D. Conclusions Drawn from Caselaw

The caselaw discussed is indicative of how a local jurisdiction may regulate street performers. First of all, based on the treatment of busking by courts, across federal courts, it is likely that busking will be classified as non-commercial activity and thus afforded First Amendment protection.

Busking laws that are content-neutral will be subject to reasonable time, place, and manner restrictions, and intermediate scrutiny (the restriction must be content-neutral, narrowly drawn to serve a significant governmental interest, and leave open alternative channels of communication). For example, when setting objective maximum decibel levels for noise, this is not a difficult threshold to meet. However, using a more subjective standard such as a "plainly audible" standard (meaning the "sound can be detected by a person using his or her unaided hearing faculties"[75] usually measured from a set distance from the sound source) may require a more difficult intermediate scrutiny analysis. Notably, plainly audible standards were challenged in *Lionhart* and *Deegan* as being set too low.

Cities may also entertain the idea of promulgating laws or

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[75] *Noise Pollution – Amplified Noise Ordinances*, INST. FOR LOC. SELF-RELIANCE, https://ilsr.org/rule/noise-pollution/2446-2/ [https://perma.cc/XHF2-2E69] (last visited Mar. 27, 2021).

regulations that apply only to street performers. Like the *Friedrich* case, this type of regulation is likely to qualify as content-based, as it is applicable only to a specific group of speakers: performers (not preachers, protestors, etc.). Content-based regulations must survive strict scrutiny under the First Amendment (requiring the regulation to be narrowly drawn to serve a compelling state interest). This means a city would have the burden of demonstrating that it has a compelling state interest in regulating street performer sounds, a much higher threshold than the significant governmental interest required under intermediate scrutiny.

The *Deegan* Court and others have recognized that comfort, health, and safety are important state interests when it comes to regulating noise. However, evidence of trends and data demonstrating the adverse impact that busking noise has on individuals would be needed to show that a city has a compelling state interest.[76] Additionally, a city would need to demonstrate that its law is narrowly tailored to serve a compelling state interest and is the least restrictive means of doing so; this is a tough hurdle to clear.

In summation, a city should proceed cautiously when considering busking laws or regulations that may be considered content-based, as it could leave a municipality open to a constitutional challenge in court. Often, it is critical that the city have evidence to demonstrate that it has a compelling state interest. In the alternative, a jurisdiction could consider imposing content-neutral time, place, and manner noise regulations, which are not as vulnerable to constitutional challenges but would apply broadly to all forms of speech, not just street performances. Lastly, a permitting system for street performers would be valid as long as the standards are clearly defined, and city officials have no discretion on who to issue permits to.[77]

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[76] *See* Friedrich v. Chicago, 619 F. Supp. 1129, 1143 (N.D. Ill. 1985).

[77] *See* Davenport v. Alexandria, 748 F.2d 208, 210 (4th Cir. 1984).

III. PRACTICE MODELS

A. Discussion of Cities

Keeping the constitutional framework in mind, we look to other cities for practice models. Cities have addressed street performer sounds in a variety of ways. Some cities have laws and regulations specifically for street performances; these efforts include implementing specific street musician laws, setting up permitting systems, or a combination of both. These practice models are discussed in more detail below. In the alternative, many cities rely on noise provisions already in place to regulate street performers; in other words, there is not a separate set of noise standards specifically for street performers. Usually, these provisions regulate noise by setting a maximum decibel threshold or a plainly audible standard. Cities that rely on general noise provisions include San Francisco,[78] Boston,[79] and Portland.[80]

1. New York, New York

New York City regulates street performer sounds by requiring permits for sound producing devices and limiting areas where performances may take place. Permits are required to "use a sound device such as a loudspeaker, megaphone, or stereo" in a street performance and are issued by local police precincts for a fee.[81] Street performances without a sound device do not require a permit. Violations may result in a civil penalty fine. Further, no person shall operate or use any sound reproduction device for advertising purposes or to "[attract] attention to any performance, show sale or display of merchandise, in connection with any commercial or business enterprise" on various public forums including streets, sidewalks, and parks without a permit.[82] Effectively, this provision provides street performers with an idea of what type of activity is prohibited.

While different from local jurisdictions, transit authorities that regulate busking activities within public transit spaces can serve

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78 S.F., CAL., POLICE CODE art. 29, § 2909 (2020).

79 BOS., MASS., MUN. CODE ch. XVI, § 16-26 (2020).

80 PORTLAND, OR., CITY CODE tit. 18, ch. 18.12, § 18.12.020 (2020).

81 *Musician or Performer Permit*, NYC311, https://portal.311.nyc.gov/article/?kanumber=KA-02069 [https://perma.cc/U4BH-PA3G] (last visited Mar. 8, 2021).

82 N.Y.C. ADMIN. CODE § 24-244(b) (2007).

as a source of practice model ideas. While New York's Metro Transportation Authority (MTA) Rules of Conduct only apply to performers within the subway system, their detailed regulations for transit performers can serve as sources of ideas for cities considering their own street performer provisions. Specifically, MTA § 1050.6 prohibits commercial activity on any transit facility or conveyance and provides a clear-cut definition of commercial:

> Commercial activities include (1) the advertising, display, sale, lease, offer for sale or lease, or distribution of food, goods, services or entertainment (including the free distribution of promotional goods or materials); and (2) the solicitation of money or payment for food, goods, services or entertainment. No person shall panhandle or beg upon any facility or conveyance.[83]

Notably, while the rules of conduct prohibit the solicitation of money or payment for entertainment, panhandling and begging, they do explicitly permit "artistic performances, including the acceptance of donations."[84] This suggests that the MTA recognizes a distinction between performing and commercial, panhandling-type activities.

2. Chicago, Illinois

As demonstrated in *Friedrich*,[85] Chicago is one of the few larger cities with its very own street performer ordinance.[86] All performers in a public area must obtain a city permit.[87] A performance may take place in any public area, but only between set hours dependent on the day of the week. By law, performers may not block the passage of the public through a public area. If a sufficient crowd gathers and blocks a public area, a police officer may disperse the crowds or order the performer to cease performing.[88] Further, a performer must comply with all relevant portions of the Chicago Noise Ordinance, which prohibits a street performer from generating any sound louder than an average conversational level at a distance of 100 feet or more measured

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83 N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(b) (2020).

84 N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(b) (2020).

85 *See* Matthias Young, *Busking Laws for the Street Performer*, GUITAR TREATS (Feb. 25, 2015), http://guitartreats.com/2015/02/busking-laws-street-performers.html [https://perma.cc/X8SE-X248].

86 CHI., ILL., MUN. CODE ch. 4-244 (2020).

87 CHI., ILL., MUN. CODE ch. 4-244, art. III, § 4-244-161 (2020).

88 CHI., ILL., MUN. CODE ch. 4-244, art. III, § 4-244-164(b) (2020).

vertically or horizontally from the sound source.[89] The code also prohibits street performers from performing in specific areas, including high traffic roadway areas and specific park areas.[90] Street Performers Ordinance violations may result in the revocation of a street performance permit for one calendar year and possible community service requirements.[91] Notably, the city code allows performers to accept contributions without committing disorderly conduct.[92] The city code also has its own ordinance governing charitable solicitation in Chicago, suggesting that street performers, even when they collect contributions are not engaging in solicitation.[93]

3. Asheville, North Carolina

Worth mentioning are the rules the City of Asheville places on its "performers of sidewalk entertainment." First, the obstruction of pedestrian and vehicular traffic by street performers is prohibited.[94] Specifically, the entertainer "must provide a minimum of six feet of pedestrian passageway."[95] Street performers are also prohibited from performing "any closer than 40 feet from another performer."[96] This not only regulates the flow of traffic but reduces the volume of sound produced by street entertainers performing simultaneously. Lastly, the City only allows performances between designated daytime hours and no later than 10 PM.[97] Although smaller than other cities discussed in this article, Asheville's standards can serve as a source of ideas, as it is one of the few jurisdictions with specific street musician ordinances.

4. Cambridge, Massachusetts

Cambridge regulates street performers through both a permitting system and maximum decibel levels, enforced by the City Arts Council with assistance from the City's Police

89 CHI., ILL., MUN. CODE ch. 4-244, art. III, § 4-244-164(d)(1) (2020).
90 CHI., ILL., MUN. CODE ch. 4-244, art. III, §§ 4-244-164(f)–(h) (2020).
91 CHI., ILL., MUN. CODE ch. 4-244, art. III, § 4-244-164(e) (2020).
92 CHI., ILL., MUN. CODE ch. 4-244, art. III, § 4-244-165 (2020).
93 *See* CHI., ILL., MUN. CODE ch. 10-8, art. II, § 10-8-080 et seq. (2020).
94 ASHEVILLE, N.C., CODE ch. 16, art. V, § 16-145(e)(3) (2020).
95 ASHEVILLE, N.C., CODE ch. 16, art. V, § 16-145(e)(3) (2020).
96 ASHEVILLE, N.C., CODE ch. 16, art. V, § 16-145(e)(7)(a) (2020).
97 ASHEVILLE, N.C., CODE ch. 16, art. V, § 16-145(e)(5) (2020).

Department.[98] Its street performer ordinance "seeks to balance the interests of the performers with those of the residents and businesses of the City."[99] In order to perform in a public area, street performers must obtain and display an individual street performer permit.[100] All permits must be displayed while performing and are subject to inspection by any Cambridge police officer or staff person of the Cambridge Arts Council upon request.[101]

Street performances are subject to maximum decibel levels, which are not to exceed a median level of "eighty decibels (80 db(A)) measured at a distance of twenty-five (25) feet from the Performer or Performing group."[102] Sound amplification is permitted as long as it does not exceed maximum decibel levels.[103] Upon a complaint by a resident, a staff person from the Cambridge Arts Council shall measure the sound level inside the residential dwelling.[104] If the sound levels exceed a median sound level of fifty decibels, and exceed the background noise by at least ten decibels, the performers causing such sound shall either "turn down the music or move to a distance from the structure so as to reduce the sound level. . . ."[105] Notably, Cambridge's ordinance is limited to complaints by residents only, effectively providing little statutory relief for businesses and other entities disturbed by street performer noise.

Additionally, Cambridge's Street Performer Ordinance contains various other provisions regulating such performances. For example, performances are limited to certain times and areas.[106] Most notably, performances may not take place within one hundred feet of schools, libraries, churches, and hospitals.[107] Further, performers may not block passage ways of public areas.[108] If such blockage exists, a police officer may "disperse the portion of the crowd that is creating the obstruction."[109] Similar to Asheville's distance requirements, performers are prohibited

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98 *See* CAMBRIDGE, MASS., CODE ch. 12.16, § 12.16.170 (2018).
99 CAMBRIDGE, MASS., CODE ch. 12.16, § 12.16.170(A) (2018).
100 CAMBRIDGE, MASS., CODE ch. 12.16, § 12.16.170(E)(3) (2018).
101 CAMBRIDGE, MASS., CODE ch. 12.16, § 12.16.170(F) (2018).
102 CAMBRIDGE, MASS., CODE ch. 12.16, § 12.16.170(G)(3) (2018).
103 CAMBRIDGE, MASS., CODE ch. 12.16, § 12.16.170(G)(3) (2018).
104 CAMBRIDGE, MASS., CODE ch. 12.16, § 12.16.170(G)(3) (2018).
105 CAMBRIDGE, MASS., CODE ch. 12.16, § 12.16.170(G)(3) (2018),
106 CAMBRIDGE, MASS., CODE ch. 12.16, § 12.16.170(G)(2) (2018).
107 CAMBRIDGE, MASS., CODE ch. 12.16, § 12.16.170(G)(1)(a) (2018).
108 CAMBRIDGE, MASS., CODE ch. 12.16, § 12.16.170(G)(4) (2018).
109 CAMBRIDGE, MASS., CODE ch. 12.16, § 12.16.170(G)(4) (2018).

from performing less than fifty feet from another performer.[110] By law, "performer[s] may request contributions or money or property at a performance," subject to city signage requirements.[111]

Violations of the Cambridge Street Performer Ordinance may result in a non-criminal disposition enforceable by police officers and/or the Cambridge Arts Council staff.[112] Penalty fees also may apply.[113] Permits may be revoked "if a performer has received five non-criminal dispositions during the calendar year."[114] Notably, the ordinance explicitly states that "sound levels generated by street performances shall be governed by this [ordinance] and not by the Cambridge City noise ordinance."[115]

5. Alexandria, Virginia

The City of Alexandria regulates street performers through right-of-way permits and noise restrictions. First, while the City "does not issue special permits for street performers . . . [a]t no time may the streets or sidewalks be blocked without the proper right-of-way permits,"[116] meaning that street performers who block streets or right-of-ways must obtain a right-of-way permit.[117] Second, street performer noise levels are governed by Central Business District restrictions that set limits and measure sounds based on where the sound is generated or produced.[118] In addition to maximum noise levels set by decibel and time of day, the City provides a "plainly audible" standard.[119] Notably, these

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110 CAMBRIDGE, MASS., CODE ch. 12.16, § 12.16.170(G)(5) (2018).
111 CAMBRIDGE, MASS., CODE ch. 12.16, § 12.16.170(G)(6) (2018).
112 CAMBRIDGE, MASS., CODE ch. 12.16, § 12.16.170(I)(1) (2018).
113 CAMBRIDGE, MASS., CODE ch. 12.16, § 12.16.170(I)(1) (2018).
114 CAMBRIDGE, MASS., CODE ch. 12.16, § 12.16.170(I)(3)(a) (2018).
115 CAMBRIDGE, MASS., CODE ch. 12.16, § 12.16.170(K) (2018).
116 *Noise Control*, CITY OF ALEXANDRIA, VA., (Aug. 21, 2020, 1:06 PM), https://www.alexandriava.gov/Noise#OtherNoises [https://perma.cc/55AB-HWME].
117 *Id.*
118 *Id.*
119 ALEXANDRIA, VA., CODE tit. 11, ch. 5, § 11-5-4.1 (c)(d)(i)(1) (2020). For example, between the daytime hours of 7:00 AM and 11:00 PM, no sounds may be louder than seventy-five decibels at a distance of ten feet "from the place at which the sound is being generated or produced, for an aggregate duration" of 60 seconds between such hours. Further, "any sound that is plainly audible above the background noise level to a person of normal hearing at a distance greater than 50 feet" from the sound source "shall be presumed to exceed 75 db(A) at 10 feet . . . and the burden shall be on the person responsible for such

ordinances are a likely byproduct of a 1984 Fourth Circuit decision in *Davenport*.[120]

6. Austin, Texas

Known for its live music scene and abundance of street performers, Austin does not require permits specifically for street performers.[121] The City does however promulgate maximum decibel levels for sound equipment based on time of day and property type (e.g. business, residential, and public areas).[122] Additionally, there are two situations in which a permit will be required for street musicians. First, street performers must obtain a "right of way " or "ROW" city permit for performances taking place on public right of ways, including sidewalk spaces, driveways, and street lanes.[123] Second, live music permits are required for the use of sound equipment for outdoor music that involves the amplification of sound.[124] Third, street performers performing only in Austin's public recreation areas must obtain a permit from the City's Parks and Recreation Department and are subject to time of day and decibel level restrictions.[125]

However, various members of the music community have expressed a need for a permitting system specifically for street performers. Some street performers are in favor of such a system in order to gain clarity on where they can perform[126] and what

sound generation to prove otherwise." ALEXANDRIA, VA., CODE tit. 11, ch. 5, § 11-5-4.1(c) (2020).

120 *See generally* Davenport v. Alexandria, 748 F.2d 208 (4th Cir. 1984). *See supra* Part II.B.ii.

121 City of Austin, *Street Performance Program*, MUSIC & ENT., http://www.austintexas.gov/page/street-performance-program [https://perma.cc/K3D9-Q3HS] (last visited Mar. 11, 2021).

122 AUSTIN, TEX., CODE tit. 9, ch. 9-2, § 9-2-4(1)–(2) (2020).

123 *Right of Way (ROW) Management*, AUSTINTEXAS.GOV, https://austintexas.gov/department/right-way-row-management [https://perma.cc/2FKV-KK4H] (last visited Feb. 26, 2021) ("The ROW is the public-owned portion of land. . . . The ROW boundaries vary depending on the physical conditions at any given location."). *See Right of Way (ROW) Permits*, AUSTINTEXAS.GOV, http://www.austintexas.gov/department/right-way-row-permits [https://perma.cc/VAQ4-VFSY] (last visited Feb. 1, 2021).

124 AUSTIN, TEX., CODE ch. 9-2, art. 1, § 9-2-30 (2021).

125 AUSTIN, TEX., CODE ch. 8-1, art. 4, § 8-1-42, 8-1-51(1)–(2) (2021).

126 Philip Issa, *Without a Permit System, Austin's Street Performers Busk with Uncertainty*, KUT 90.5, (Apr. 27, 2015, 10:24AM), https://www.kut.org/austin/2015-04-27/without-a-permit-system-austins-street-performers-busk-with-uncertainty [https://perma.cc/N9LH-AN6E].

activities are permissible.[127] Some business owners are also in support of a permitting system, as complaints of loud street performances in front of businesses have increased.[128] The Austin Music Commission even developed its own set of recommendations for a street performance ordinance in 2014, which suggested including definitions of "street performers," "buskers," and "public right-of-way;" prohibiting the obstruction of public right of ways and private properties; and setting a requirement that street performances end by 1:00 AM.[129]

B. Lessons Learned & Considerations

The city practice models can be used to generate legislative and policy recommendations for cities to consider when addressing street performer sounds. However, whatever a city chooses to implement, it must adhere to the First Amendment legal framework. Lessons learned from the six cities are categorized and discussed below.

Consideration 1: Provide a Clear Definition of Commercial Activity

In order to provide clarity as to whether street performing qualifies as noncommercial or commercial activity, a local jurisdiction may consider providing a clear definition of "commercial" within its related ordinances. A clear-cut, codified definition would include specific language identifying what types of activities qualify as "commercial," like the New York City and the New York MTA codes.[130] It appears to be a trend among jurisdictions (including Chicago and the New York MTA) to state in their regulations that performances which collect money do not qualify as commercial speech.[131] This practice is in line with

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127 Jackie Wang, *Austin City Council shelves amendment clarifying street performer regulations*, THE DAILY TEXAN, (Mar. 27, 2015, 1:49am), https://thedailytexan.com/2015/03/27/austin-city-council-shelves-amendment-clarifying-street-performer-regulations [**https://perma.cc/Y7ZT-DTBL]**.

128 Issa, *supra* note 126.

129 AUSTIN MUSIC COMM'N, RECOMMENDATION NO. 20140804-004 – STREET PERFORMERS & THE ART OF BUSKING, (Aug. 4, 2014).

130 N.Y.C., ADMIN. CODE, § 24-244(b) (2021); N.Y.C. *METRO. TRANSP. AUTH., RULES OF CONDUCT* §1050.6 (2021).

131 N.Y.C. *METRO. TRANSP. AUTH., RULES OF CONDUCT* § 1050.6(c) (2021); CHI., ILL., MUN. CODE ch. 4-244, § 4-244-165; Boston, Mass., Memorandum from City of Boston Law Dep't on Street Performers & Musicians to Albert E. Goslin,

caselaw treating street busking as noncommercial activity.[132]

Consideration 2: Implement Specific Street Performer Laws and/or Regulations

As demonstrated by the cities discussed in this article, there are a variety of ways in which a city may regulate street performers. First, a city may consider setting time limits prohibiting street performers from performing during certain hours of the day (e.g., late nights and early mornings). For example, Chicago allows street performances between 10:00 AM and 8:00 PM on weekdays and 10:00 AM to 10:00 PM on weekends.[133] Likewise, Asheville and Cambridge promulgate designated street performer hours.[134] Second, like Cambridge, a city may consider promulgating maximum sound levels defined by a measurable standard specifically for street performers. Additionally, a city may consider prohibiting performers from blocking public ways and sidewalks as Chicago, Cambridge, Asheville, and Alexandria do. Jurisdictions that implement laws and/or regulations specific to street performers should recognize that doing so would likely be content-based and thus, subject to strict scrutiny. As shown in *Friedrich*, it would be wise for a city to collect evidence of trends and data that would justify a compelling state interest for such a restriction. However, at the very least, if considered content-neutral, such TPM restrictions would be subject to intermediate scrutiny.

Consideration 3: Rely on or Implement General Noise Laws and Regulations

An alternative option to enacting specific street performer ordinances is for a city to rely on general noise laws and regulations already in place. Likewise, a city could develop general noise laws. Usually, general noise laws and regulations apply to all forms of speech, not just street performers. General

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Acting Police Commissioner, (Jul. 12, 2006), http://www.buskersadvocates.org/images/SAABostonPics/BostonLegalDoc.pdf [https://perma.cc/HU2S-58VT] (Boston Law Department has opined similarly, although such a conclusion is not codified).

132 *See supra* Part II.C.i.

133 CHI., ILL., MUN. CODE ch. 4-244, art. III, § 4-244-164(a) (2020).

134 ASHEVILLE, N.C., CODE ch. 16, art. V, § 16-145 (e)(5) (2020); CAMBRIDGE, MASS., CODE ch. 12.16, § 12.16.170(e)(2) (2018).

noise laws may include setting maximum decibel levels or plainly audible standards and can vary by the time of day and location. General noise laws of this kind are likely to be content-neutral and subject to intermediate scrutiny. As mentioned earlier, several U.S. cities rely on general noise provisions to regulate street performers. Interestingly, some of the practice model cities do so as well, but in combination with other methods to regulate street performers. For example, while the City of Alexandria requires street performers to obtain a right of way permit, performers must also adhere to all relevant city noise ordinance provisions in place.[135] However, it is important to recognize that general noise laws may not address the unique noise challenges a city may be faced with, which is why some jurisdictions may consider developing specific street performer ordinances.

Consideration 4: Implement a Permitting System

A jurisdiction may consider adopting a true permitting system for all street performers like the cities of Chicago and Cambridge. Notably, it is not as common for cities to have true permitting systems applicable to all street performers. Chicago's permitting system sets time and place restrictions; explicitly requires all street musicians to obtain a permit and adhere to city noise regulations; and prohibits street performers from generating any sound louder than an average conversational level at a distance of 100 feet or more measured vertically or horizontally from the sound source.[136]

In the alternative, a city could consider following New York City and Austin's lead by requiring permits for sound device speakers instead of for street musicians. Such a set up could address noise concerns with amplified devices and instruments. However, this would not address the unamplified human voice. Lastly, a jurisdiction could consider requiring street performers to obtain right of way permits, as Alexandria and Austin require. As with any permitting system, the permitting system's standards must be precisely defined, and city officials must have no discretion on how to issue a permit. Of course, when implementing any permitting system, there are administrative and enforcement considerations the jurisdiction will have to

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135 *See supra* Part III. A. 5.

136 CHI., ILL., MUN. CODE ch. 4-244, art. III, § 4-244-164(d)(1) (2021).

evaluate.

Consideration 5: A Combined Approach

Implementing street performer laws and regulations, relying on general noise ordinances, and implementing a permitting system are not exclusive to one another. In fact, using some or all of the methods discussed in combination can work to address street performer sounds. Many cities rely on a combination approach including New York, Chicago, and Alexandria.

C. Additional Considerations

It is important to recognize that not one size fits all when it comes to regulating street performers. Beyond constitutional considerations and public concerns, there are community considerations at play. Street performers not only express themselves, but they express the culture of the cities in which they perform. Developing laws and policies for street performers goes beyond simply regulating "noise;" it is much more than that. With cities rapidly changing and developing, there is a need to preserve the character of the urban environment, including its artistic performances. Local jurisdictions have a difficult, yet meaningful task of balancing all interests at play.

Recognizing the importance of preserving local performance cultures, some communities have formed their own groups and alliances dedicated to doing just that. For example, while the only legally enforceable law regarding street performers in Portland is the city noise ordinance, the Portland's Street Musician Agreement Coalition developed its own community guidelines.[137] The guidelines recommend that street musicians should space themselves a minimum of one block apart, rotate their locations, and adhere to Portland's Noise Control ordinance.[138] While the Street Musician Agreement Coalition is not legally binding, it encourages a set of agreed upon standards among street musicians. These groups can be successful when working closely with cities' governing bodies to foster

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[137] Amanda Fritz & Street Roots, *Sidewalk Use and Musicians Part of the Larger Code of Courtesy*, STREET ROOTS (May 3, 2011), https://www.streetroots.org/news/2011/05/03/sidewalk-use-and-musicians-part-larger-code-courtesy [https://perma.cc/YQS8-BEVU].

[138] *Id.*

relationships and generate ideas.

Also, important to mention are the enforcement mechanisms for the standards and rules governing street performers. Each city will need to develop an enforcement system that fits its needs, practices, and resource availability. As discussed in the city practice models, there are varying city departments responsible for enforcing its noise provisions from police departments to arts councils. Overall, a city should consider how its enforcement mechanism will be perceived by the busking community and whether the enforcing entity will be conducive to creating a safe environment for performers to demonstrate their craft and exercise their First Amendment rights.

IV. CONCLUSION

Regulating busking, or street performance activities, begins with having an understanding of the constitutional framework for doing so. As a form of speech, busking is subject to First Amendment protections. However, the government may place reasonable time, place, and manner restrictions on speech in public. These types of restrictions on noise must be content-neutral, narrowly drawn to serve a significant government interest, and leave open alternative channels of communication. Typically, general noise ordinances are content-neutral because their purpose is not to regulate a certain message, but to simply limit the volume of sound produced. Significant government interests may include public health concerns, such as protecting citizens from loud sound levels and promoting safety in congested public spaces. However, regulations explicitly geared towards street performances may be considered content-based and subject to strict scrutiny: a much higher hurdle to clear than intermediate scrutiny. Not only will a city need to demonstrate its compelling state interest, but it will likely need evidence of trends and data to support its justification.

An additional constitutional consideration is the question of whether profit rendered from busking qualifies it as commercial speech and thus, subject to lesser First Amendment protection. Caselaw on the issue indicates that busking will not be considered commercial speech because it lacks the quintessential advertising characteristic that would qualify it as such. Generally, most courts have held that the First Amendment applies to street performers even if they accept monetary

contributions from passersby. Further, even if the profit gained is considered panhandling, it would still be afforded First Amendment protection because the First Amendment protects charitable solicitation as a form of speech.

It is vital that cities keep the legal framework at the forefront when developing laws and regulations for busking activities. As the city practice models show, there are a variety of ways a city can regulate street performances including general noise provisions, specific street performance regulations, permitting systems, or a combination thereof. However, there are practical considerations that cannot be overlooked, including enforcement and administrative mechanisms and importantly, the need to preserve and respect the artistic expression of local culture. After all, this type of speech is precisely what the First Amendment aims to protect. Balancing the freedom of expression and public concerns is a difficult balance to strike. An imbalance can often lead to challenges, including litigation. However, while it is a difficult balance to strike, it is not impossible, and can be achieved by truly adhering to the constitutional framework, following lessons learned by other cities, and forming alliances between policymakers, the community, and artists. Doing so can work to promote vibrant urban spaces that are inclusive for all, meaning performers, residents, and visitors alike.