



1 recently in Hunt v. City of Los Angeles, 601 F. Supp. 2d 1158 (C.D.  
2 Cal. 2009), aff'd in part, remanded in part 638 F.3d 703 (9th Cir.  
3 2011), and in Dowd v. City of Los Angeles, No. CV 09-06731 (C.D.  
4 Cal. Oct. 21, 2010) (order granting in part preliminary injunction)  
5 ("Dowd Order").

6 The City adopted the version of LAMC § 42.15 at issue here in  
7 April 2008 ("2008 Ordinance"). As this court has previously  
8 explained:

9 The latest version of the ordinance divides much of the  
10 available space in the heart of the Boardwalk into  
11 individual spaces designated as P-Zone spaces and I-Zone  
12 spaces. Id. § 42.15(2). In the P-Zone spaces, "persons  
13 can perform, engage in traditional expressive speech, and  
14 petitioning activities, and vend the following expressive  
15 items: newspapers, leaflets, pamphlets, bumper stickers,  
16 patches, buttons, or books created by the vendor or  
17 recordings of the vendor's own performances . . . ." Id.  
18 § 42.15(2)(a). In the I-Zone spaces, "persons may engage  
19 in activities permissible in the P-Zone, and also engage in  
20 vending of expressive items created by the vendor, or the  
21 vending of expressive items that are inextricably  
22 intertwined with the vendor's message . . . ." Id. §  
23 42.15(2)(b).

24 With certain limited exceptions, anyone wishing to use  
25 a P-Zone or I-Zone space during Peak Season must apply for  
26 an annual permit and enter into a lottery system by which  
27 spaces are assigned each day. Program Rules at pp. 2-3.  
28 The person to whom the space is assigned has priority to  
use the space. But, after 12:00 p.m., anyone (with or  
without a permit) may use any unoccupied space, so long as  
she engages only in activities approved for the P-Zones and  
relinquishes the space to the permit-holder if she returns.

Outside of the P and I-Zones, anyone may engage in any  
activity permitted in the P-Zones and vend expressive items  
"inextricably intertwined with the vendor's message," so  
long as she does not "set up a display table, easel, stand,  
equipment, or other furniture, use a pushcart or other  
vehicle . . . ." Id. § 42.15(D)(1)(a). On the West side  
of the Boardwalk, outside of the P and I-Zones, anyone can  
engage in any permitted P-Zone activity as long as it is  
"not vending and does not substantially impede or obstruct  
pedestrian or vehicular traffic, subject to reasonable size  
and height restrictions on any table, easel, or other  
furniture . . . ." Id. § 42.15(D)(1)(b).

1           The ordinance and Program Rules also include noise  
2 regulations. LAMC § 42.15(F)(1) provides that noise levels  
3 must not exceed seventy-five decibels when measured at a  
4 distance of twenty-five feet away or ninety-six decibels  
5 when measured from one foot away between nine o'clock in  
6 the morning and sunset. Furthermore, LAMC § 42.15(F)(4)  
7 bans the use of amplified sound anywhere on the Boardwalk  
8 except in specially designated P-Zone spaces between 17th  
9 Avenue and Horizon Avenue and between Breeze Avenue and  
10 Park Avenue. The Program Rules clarify that amplified  
11 sound "is permitted only in the designated spaces in the  
12 P-Zones in the locations specified in Section 42.15 between  
13 9:00 a.m. and sunset, and is prohibited after sunset and  
14 before 9:00 a.m." Program Rules at p. 4.

15 Dowd Order at 4-6.

16           The City argues that it had various compelling reasons for  
17 these regulations, but suspended the 2008 Ordinance after this  
18 court issued its preliminary injunction in October 2010. The City  
19 then repealed and replaced the Ordinance in December 2011.

20           Plaintiffs filed this action against the City on August 19,  
21 2011, claiming that the 2008 Ordinance violates the First, Fifth,  
22 and Fourteenth Amendments of the U.S. Constitution. Plaintiffs  
23 challenge the Ordinance "on both facial and as-applied grounds,"  
24 alleging that it is "impermissibly vague," an "impermissible prior  
25 restraint on protected expression in a public forum," and "not a  
26 reasonable time, place and manner regulation[]." (Compl. ¶¶ 4-5.)  
27 Plaintiffs further allege that they engaged in expressive and  
28 vending activities on the Boardwalk while the 2008 Ordinance was in  
effect, and were cited for violating various provisions of the  
Ordinance or otherwise harmed by its restrictions.

          The City filed this Motion for Summary Judgment on April 12,  
2012, arguing - among other things - that: 1) Plaintiffs' facial  
challenges are barred by the statute of limitations; and 2)

1 Plaintiffs have not asserted any valid as-applied claims as to the  
2 2008 Ordinance.

3 **II. DISCUSSION**

4 In light of controlling Ninth Circuit precedent, this court  
5 agrees that the City is entitled to summary judgment on both  
6 Plaintiffs' facial and as-applied claims.

7 **A. Facial Claims**

8 As the City explains, Plaintiffs' facial challenges to the  
9 2008 Ordinance are barred by the two-year statute of limitations  
10 for § 1983 claims in California. "An ordinance may be facially  
11 unconstitutional in one of two ways: either it is unconstitutional  
12 in every conceivable application, or it seeks to prohibit such a  
13 broad range of protected conduct that it is unconstitutionally  
14 overbroad." Foti v. City of Menlo Park, 146 F.3d 629, 635 (9th  
15 Cir. 1998) (internal quotation marks and alterations omitted). In  
16 either case, the argument is that the ordinance is unconstitutional  
17 on its face - i.e. as it is written - regardless of how it is  
18 applied in any particular instance. Accordingly, "[a] successful  
19 challenge to the facial constitutionality of a law invalidates the  
20 law itself." Id.

21 "It is well-established that claims brought under § 1983  
22 borrow the forum state's statute of limitations for personal injury  
23 claims, and in California, that limitations period is two years."  
24 Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd., 509  
25 F.3d 1020, 1026 (9th Cir. 2007) (citation omitted). The Ninth  
26 Circuit has held that this "limitations period applies to all §  
27 1983 claims, regardless of the civil right asserted." Id. at 1027.  
28 As the Circuit further explained: "Given the general rule that the

1 statute of limitations begins to run when a potential plaintiff  
2 knows or has reason to know of the asserted injury, it stands to  
3 reason that any facial injury to any right should be apparent upon  
4 passage and enactment of a statute." Id. (internal quotation marks  
5 omitted).

6 Here, the City adopted the challenged version of the Ordinance  
7 in April 2008, and Plaintiffs do not dispute that they each "knew  
8 of the 2008 Boardwalk Ordinance when it was adopted." (Pls.'  
9 Statement of Genuine Disputes of Material Fact in Opp'n to Mot. ¶  
10 3.) Accordingly, under existing Ninth Circuit precedent, the court  
11 finds that the statute of limitations for Plaintiffs' facial  
12 challenges to the Ordinance started to run when the City adopted  
13 the Ordinance in April 2008. Because Plaintiffs did not file this  
14 action until August 2011 - more than three years after the City  
15 adopted the Ordinance - and have alleged no basis for tolling the  
16 two-year statute of limitations, their facial challenges are time-  
17 barred.

#### 18 **B. As-Applied Claims**

19 The City argues that Plaintiffs have no valid as-applied  
20 claims because the challenged aspects of the Ordinance were not  
21 enforced against Plaintiffs in a discriminatory manner. The court  
22 agrees. As the Ninth Circuit has explained in some detail, also in  
23 the First Amendment context:

24 An as-applied challenge contends that a law is  
25 unconstitutional as applied to a litigant's particular  
26 speech activity, even though the law may be capable of  
27 valid application to others. [Plaintiff] purports to raise  
28 an as-applied challenge to [the ordinance], but [Plaintiff]  
misunderstands the nature of such challenges. As-applied  
challenges are not based solely on the application of an  
allegedly unconstitutional law to a particular litigant.  
Rather, they separately argue that discriminatory

1 enforcement of a speech restriction amounts to viewpoint  
2 discrimination in violation of the First Amendment. It is  
3 for this reason that a successful as-applied challenge does  
4 not render the law itself invalid but only the particular  
application of the law. An as-applied challenge goes to  
the nature of the application rather than the nature of the  
law itself.

5 Desert Outdoor Adver., Inc. v. City of Oakland, 506 F.3d 798, 805  
6 (9th Cir. 2007) (alterations, citations, and internal quotation  
7 marks omitted).

8 Here, Plaintiffs' only evidence as to relevant aspects of the  
9 Ordinance implicate the constitutionality of non-discretionary  
10 provisions on their face.<sup>1</sup> For instance, one of the Plaintiffs  
11 appears to have been cited for occupying a P-Zone space before  
12 noon, in clear violation of the Ordinance. Likewise, another  
13 Plaintiff claims that he was cited for playing amplified music in  
14 the I-Zone and for vending photographs in the P-Zone - again,  
15 conduct clearly proscribed by the Ordinance. In other words,  
16 Plaintiffs contend that these non-discretionary provisions of the  
17 Ordinance were applied to them exactly as written, in the same  
18 manner that they were applied to everyone else on the Boardwalk.  
19 Plaintiffs argue that this enforcement violated their  
20 constitutional rights only because the relevant provisions are  
21 unconstitutional on their face, not because of their particular  
22 application to Plaintiffs. Such claims therefore constitute facial  
23 challenges, not valid as-applied claims, as to the 2008 Ordinance.

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28 <sup>1</sup> Plaintiffs do not claim that the City ever enforced the  
allegedly vague "inextricably intertwined" standard against them.

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**CONCLUSION**

For all of these reasons, the court hereby GRANTS the City's Motion for Summary Judgment as to all of Plaintiffs' claims.

IT IS SO ORDERED.

Dated: September 14, 2012

  
DEAN D. PREGERSON  
United States District Judge