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MEMORANDUM

To: Times Square Alliance
From: Linda Steinman, Eric Feder
Date: July 14, 2015
Subject: Constitutionality of Proposed Regulations of Solicitation for the Immediate Exchange of Money in the Times Square Commons

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This memorandum briefly addresses the constitutionality of proposed regulations to create the Times Square Commons, and other potential options to lawfully regulate the time, place and manner of certain categories of expressive activity in the Times Square District.

To combat the numerous problems related to use of space within Times Square, a series of time, place and manner regulations for the "Times Square Commons" area have been proposed to promote the free flow of pedestrian traffic and allow for passive use enjoyment of the space by visitors. One of the key components of the plan is a pedestrian traffic zone dedicated solely to pedestrian traffic, which we believe should be upheld as constitutional. *See, e.g., Ross v. Early*, 746 F.3d 546, 555 (4th Cir. 2014) (upholding policy restricting protestors to specific area outside venue where circus was being held as valid time, place, and manner regulation, in light of evidence that "the presence of protestors on the relevant sidewalks presents a plausible threat to the orderly flow of pedestrian traffic and, concomitantly, public safety"); *Marcavage v. City of New York*, 689 F.3d 98, 104-06 (2d Cir. 2012) (upholding "no demonstration" zones for pedestrian traffic only outside Republican National Convention at Madison Square Garden in order to maintain security and "accommodate the heavy pedestrian traffic" in that part of the city).[1]

The other key component, addressed in this memo, is to restrict certain solicitation activities involving the demand for immediate payment of money—which the Supreme Court has recognized is particularly disruptive—to specific physical zones within the Times Square Commons.

It has long been held constitutional to restrict the time, place and manner of speech in a public forum so long as the regulation is content neutral; it is narrowly tailored to serve a significant governmental interest; and it leaves open ample alternative channels of

[1] Although the U.S. Supreme Court has struck down "buffer zones" outside abortion clinics, the Court approvingly cited as a reasonable, more narrowly tailored alternative, a local ordinance providing that "[n]o person shall stand, or place any obstruction of any kind, upon any street, sidewalk or crosswalk in such a manner as to obstruct a free passage for travelers thereon." *McCullen v. Coakley*, 134 S.Ct. 2518, 2538 (2014).

communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). This memo will focus on the "content neutrality" and "significant government interest" aspects of the test.

Significant Government Interest

Although Times Square is a quintessential public forum, and streets "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," *Hague v. Committee for Industrial Organizations,* 307 U.S. 496, 515 (1939), courts have long recognized that a city "certainly has a significant interest in keeping its public spaces safe and free of congestion." *Bery v. City of New York*, 97 F.3d 689, 697 (2d Cir. 1996). The Second Circuit highlighted that, for New York in particular, "reducing sidewalk and street congestion in a city with eight million inhabitants, constitute[s a] 'significant governmental interest[].'" *Mastrovincenzo v. City of New York*, 435 F.3d 78, 100 (2d Cir. 2006). *See also Heffron v. Int'l Soc. for Krishna Consciousness, Inc*., 452 U.S. 640, 650 (1981) ("[I]t is clear that a State's interest in protecting the safety and convenience of persons using a public forum is a valid governmental objective."). The Supreme Court has emphasized that regulations "must be assessed in light of the characteristic nature and function of the particular forum involved." *Heffron*, 452 U.S. at 650-51. And the Second Circuit has acknowledged the reality that speech may be restricted by "regulations addressed to particular areas of the City where public congestion might create physical hazards and public chaos." *Bery*, 97 F.3d at 697-98.

Of course, Times Square is more than simply a public thoroughfare—it is a destination unto itself, not unlike an urban park, and recently added public plazas further enhance its urban park-like character. Courts have recognized that in addition to "alleviating congestion and improving circulation" in such spaces, a city has an "indisputably significant" interest in "promoting … aesthetics" and "ensuring that the [spaces] are available to the public for a wide range of activities." *Lederman v. New York City Dep't of Parks & Recreation*, 731 F.3d 199, 202-03 (2d Cir. 2013) (upholding scheme limiting vendors of First Amendment protected matter to specific locations within city parks denoted by medallions).

Content-Neutrality

The City would have a strong argument that a provision regulating solicitation of money for *immediate* payment is a content-neutral regulation that is more akin to a regulation of commercial *activity* (which is conduct) than a regulation of pure expression. In several cases involving non-public forums such as airports and post offices, the U.S. Supreme Court has explained that "the inherent nature of solicitation itself" is a "content-neutral ground" on which to regulate it, and Justice Kennedy has argued for the extension of that reasoning to public forums in his concurring opinions in those cases. *See Int'l Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992) (upholding solicitation ban in airports); *Id.* at 700-05 (Kennedy, J., concurring); *Kokinda*, 497 U.S. at 737-40 (Kennedy, J., concurring) (stating that he would hold that airports and postal facilities are public forums, and that the solicitation bans are content neutral regulations that are narrowly tailored to address substantial government interests). As the

Court explained in *Kokinda*, in upholding a restriction on solicitation on U.S. Postal Service property:

> Solicitation impedes the normal flow of traffic. Solicitation requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card. As residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information. One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide, and act in order to respond to a solicitation. Solicitors can achieve their goal only by stopping passersby momentarily or for longer periods as money is given or exchanged for literature or other items.

Kokinda, 497 U.S. at 733-34. *See also Lee*, 505 U.S. at 683-84 ("We have on many prior occasions noted the disruptive effect that solicitation may have on business.").

Circuit courts have split on whether laws regulating solicitation in the streets (including laws that specifically target panhandling) are content-neutral. The First, Seventh and D.C. Circuits have all upheld laws regulating solicitation for immediate payment of money as content-neutral. *See Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014) (written by retired-Justice Souter); *Norton v. City of Springfield, Ill.*, 768 F.3d 713 (7th Cir. 2014); *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 954-55 (D.C. Cir. 1995). Conversely, the Fourth, Sixth, and Ninth Circuits each struck down ordinances prohibiting panhandling and other forms of solicitation in particular areas in a city. *See Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 556 (4th Cir. 2013); *Speet v. Schuette*, 726 F.3d 867, 876 (6th Cir. 2013); *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 794 (9th Cir. 2006).

In *Clatterbuck*, for example, the Fourth Circuit held—*contra* Justice Kennedy's concurrences—that because the regulation prohibited solicitation for immediation payment but not future payment, it discriminated based on content. 708 F.3d at 556. The Seventh Circuit expressly rejected this logic, pointing out that "the limit to solicitation for immediate receipt," which the plaintiffs argued was "pernicious content discrimination" was viewed by Justice Kennedy as "the soul of reasonableness." *Norton*, 768 F.3d at 716. And even the Ninth Circuit, which struck down a solicitation restriction, acknowledged that, although "a regulation that separates out *words of solicitation* for differential treatment" may be content discriminatory, "courts have held that bans on the *act of solicitation* are content-neutral." *ACLU of Nevada*, 466 F.3d at 794 (citing *Kokinda,* 497 U.S. at 736); *see also id.* at 794 n.10 (collecting cases).

The law in this area was placed in further flux last month when the U.S. Supreme Court vacated and remanded the First Circuit's decision in *Thayer* for reconsideration in light of another recent Supreme Court decision holding that a law that is not content-neutral *on its face* cannot be saved by the fact that the government did not have a content-discriminatory *motive* in enacting the law. *See Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218 (2015). On remand, the First Circuit could well reaffirm its original holding that the law regulating solicitation for immediate payment is content neutral, although this result is not guaranteed. There would certainly be precedent for that approach. As noted above, Justice Kennedy—who is regarded as a leading justice in First Amendment cases—has written separately in the Supreme Court's solicitation cases to emphasize his belief that even in a public forum, laws regulating solicitation for the immediate receipt of funds are constitutional:

> I am in full agreement with the statement of the Court that solicitation is a form of protected speech. If the Port Authority's solicitation regulation prohibited all speech that requested the contribution of funds, I would conclude that it was a direct, content-based restriction of speech in clear violation of the First Amendment. The Authority's regulation does not prohibit all solicitation, however; it prohibits the "solicitation and receipt of funds." … The regulation does not cover, for example, the distribution of preaddressed envelopes along with a plea to contribute money to the distributor or his organization. As I understand the restriction it is directed only at the physical exchange of money, which is an element of conduct interwoven with otherwise expressive solicitation. In other words, the regulation permits expression that solicits funds, but limits the manner of that expression to forms other than the immediate receipt of money.

Lee, 505 U.S. at 704-05 (Kennedy, J., concurring).

Justice Kennedy's reasoning (which was discussed and relied upon in several of the recent Circuit Court solicitation decisions, including *Thayer*) was not directly disrupted by the Court's decision in *Reed.* His reasoning would hopefully provide a clear avenue to uphold as content-neutral regulations of solicitation for immediate payment like the ones proposed for the Times Square Commons. However, *Reed* does seem to suggest a broad definition for content-based regulations, and it will be important to see how the First Circuit rules on the *Thayer* case on remand.

Other cities have employed somewhat similar regulations that have survived challenge. For example, a District Court in Maryland upheld as content neutral a regulation which limited "hawking, peddling, soliciting, and street performing" on the popular boardwalk in Ocean City, Maryland to specific locations on and adjacent to the boardwalk. *See Chase v. Town of Ocean City*, 825 F. Supp. 2d 599 (D. Md. 2011). The court noted that "[t]he location restriction applies to *all* peddling, hawking, soliciting, or street performing, regardless of what is being peddled or

hawked; regardless of whether the solicitation is commercial or non-commercial in nature; and regardless of the ideas communicated." *Id.* at 618. In assessing a scheme to regulate street performers in the Seattle Center recreation area, the Ninth Circuit struck down certain provisions (such as a permitting requirement), but refused to strike down a provision limiting street performers to certain geographic areas in the Center. *See Berger v. City of Seattle*, 569 F.3d 1029, 1048-49 (9th Cir. 2009). The court recognized that "limiting street performers to designated locations does, by definition, improve the coordination of multiple uses of the Center." *Id.* at 1042.

MEMORANDUM

To: Times Square Alliance
From: Sami Naim
Date: September 9, 2015
Subject: Pedestrian Plaza Briefing Document: Times Square as Parkland

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The City is considering converting the pedestrian plaza at Times Square into parkland. There are a few issues that the City must consider before moving forward with this option.

Converting Times Square into parkland will not resolve all vending issues at the plaza
While it is true that commercial activity on parkland is generally prohibited, there are three notable exceptions: (1) if a vendor has a permit from the Department of Parks & Recreation ("Parks"); (2) if a vendor is selling merchandise that is protected by the First Amendment ("Expressive Matter Vendor"); and (3) if a vendor is a disabled veteran and protected by State law ("Disabled Veteran Vendor").

If Times Square were to be converted into parkland, then some questions include:

- How many vendors currently operating in Times Square do not qualify under any exemption?
- Does the number or type of vendors operating in Times change at all if plaza converted into parkland?
- Are existing Parks rules for Expressive Matter Vendors sufficient for plaza management purposes?
- Are existing State laws for Disabled Veteran Vendors sufficient for plaza management purposes?
- What additional local or state laws are required to adequately address issues at plazas?

Converting Times Square into parkland raises potential issues regarding First Amendment activity (protests, marches, etc.)
Parks rules require special event permit for gatherings of more than 20 people generally. For the Central Park Great Lawn, Parks has rules which limit the number of major events to a few per year. Both of these rules are intended to maintain parkland and allow the public to enjoy it when not occupied by a special event.

If Times Square were to be converted into parkland, then some questions include:
- Do existing Parks rules present obstacles to the way Times Square is programmed?
- Do existing Parks rules protect Times Square from protracted litigation over major protests?
- Is the existing Parks fee schedule for special events sufficient?

Converting Times Square into parkland raises potential issues regarding signs and commercial advertising
Parks rules prohibit commercial advertising on parkland. Moreover, there is local law that prohibits billboards within 200 feet of any park that is over one-half acre.

If Times Square were to be converted into parkland, then some questions include:
- Would converting all of Times Square into parkland trigger prohibition on billboard advertising?
- If so, would local legislation be required to exempt Times Square from this prohibition?

Converting Times Square into parkland raises potential issues regarding federal transportation funds.
Currently, Broadway is considered an arterial highway under the Highway Beautification Act. This Act generates federal funds to the city for transportation purposes. However, a change in status may endanger this source of funds. Incidentally, current City officials are negotiating with their federal counterparts regarding the Act's restrictions on outdoor advertising along arterial highways.

If Times Square were to be converted into parkland, then some questions include:
- Would converting all of Times Square into parkland risk federal funds for transportation?
- Would additional amendments to federal legislation be necessary?

MEMORANDUM

To: Times Square Alliance
From: Sami Naim
Date: September 9, 2015
Subject: Pedestrian Plaza Briefing Document: Background for Vending on Parkland

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While it is true that commercial activity on parkland is generally prohibited, there are three notable exceptions: (1) if a vendor has a permit from the Department of Parks & Recreation ("Parks"); (2) if a vendor is selling merchandise that is protected by the First Amendment ("Expressive Matter Vendor"); and (3) if a vendor is a disabled veteran and protected by State law ("Disabled Veteran Vendor").

Some background on the exemptions below.

1) The vendor has a permit from the Department of Parks & Recreation ("Parks").

   Parks issues permits for pushcarts, food trucks, restaurants, skating rink facilities, golf courses, and other commercial activity on parkland. However, Parks cannot issue a permit for commercial activity that is inconsistent with park use and open space norms, e.g, Parks cannot issue a permit for a private chemical factory on parkland.

2) The vendor is selling merchandise that is protected by the First Amendment.

   Parks regulates Expressive Matter Vendors based on reasonable time, place, and manner restrictions. These restrictions were put into place in 2010, in response to concerns over congestion, aesthetics, and the ability of parkland to accommodate a wide range of uses and users.

   Generally, an Expressive Matter Vendor cannot vend in an unsuitable location, such as a zoo, playground, pool, athletic field, or skating rink. An Expressive Matter Vendor also cannot interfere with park property by placing their merchandise directly on a sidewalk, park path, park bench, park furniture or park feature, such as a rock, tree, shrub, or planting.

   If an Expressive Matter Vendor uses a cart, table, or other device to display and sell their merchandise, then he/she must provide a 12-foot-wide park path (14 feet if there is street or park furniture within the path). Other location restrictions include a 50-foot setback from park monuments, and a five-foot setback from park furniture.

   Lastly, if an Expressive Matter Vendor is operating in Battery Park, Union Square Park, The High Line, and parts of Central Park, then he/she must vend from a designated location if either: (a) using a display stand, cart, or device; or (b) "occupying a specific location for longer than necessary to conduct a transaction." This may not be clear enough for purposes of the vendors at Times Square.

3) The vendor is a disabled veteran.

   Disabled veteran vendors are regulated by State law, and do not require a license from the City or Parks. Generally, they are allowed to operate anywhere a City-permitted vendor may operate. That being said, State law prohibits these vendors from certain areas, including: Broadway, Seventh Ave., Eighth Ave., 42nd St. (between Lexington and Eighth Ave.), and 49th St. (between Lexington and Seventh Ave.).

Times Square – Why Not Parkland?

Below are four key reasons why parkland is not an ideal land use designation for the Times Square pedestrian plazas:

1. **Public Trust and Need for Alienation Legislation:** Designation of Times Square area streets and sidewalks as parkland would require State alienation legislation for adjustments to park boundaries and over time would be a highly inflexible method for achieving quality of life objectives. As a practical matter, park designation would likely be irreversible.

2. **Modifications to Zoning and Effects on Adjacent Development:** The City's Zoning Resolution measures and determines height and setback, street wall, pedestrian circulation, yard and a variety of other regulations on the basis of the relationship of a building or site to the street line. If Times Square area streets and sidewalks adjacent to buildings were designated as parkland, a variety of zoning regulations would be impacted. This would necessitate amendments to the Zoning Resolution subject to review under the City's the land use review process, which requires approvals by both the City Planning Commission and the City Council.

3. **Other Effects on Adjacent Property Owners:** If Times Square area streets and sidewalks were designated as parkland, their continued use for loading, deliveries, projecting signage, overhanging canopies and other common uses of the public sidewalk would become problematic, since they are inconsistent with park use.

4. **Limitations on Commercial Activities Within the Park:** Although park designation might assist in addressing some current quality of life issues, it would also be restrictive in terms of permitted commercial uses and would continually raise issues whether activities are consistent with park use. For example, while food vending would be consistent with park use, other activities such as theater promotions may not.