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**TESTIMONY OF ELIZABETH REINER PLATT
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**NEW YORK CITY COUNCIL COMMITTEE ON TRANSPORTATION
HEARING ON INT. 1109-2016, PROVIDING THE DEPARTMENT OF
TRANSPORTATION AUTHORITY OVER PEDESTRIAN PLAZAS**

March 30, 2016

My name is Elizabeth Reiner Platt, and I am a member of the Sex and Law Committee of the New York City Bar Association. I am testifying today on behalf of the Sex and Law Committee. We thank the Committee on Transportation for this opportunity. Our Committee collectively represents a broad cross-section of the legal community, including civil rights and liberties attorneys, public defenders, prosecutors, and attorneys with expertise in discrimination and gender equity. My testimony today is based on the expertise of our members. We wish to urge that special attention be paid in passing a bill which ensures that any resulting regulations of speech within New York's pedestrian plazas be both written and implemented in a non-discriminatory manner.

This bill seeks to give the Department of Transportation the ability to designate space as pedestrian plazas, and regulate speech and other activities in these plazas. The legislative intent does not recognize the discriminatory background from which this issue grows or the potential for abuse in the resulting regulations.

To begin, while neutral on its face, the motivation for and history of this bill has focused overwhelmingly on the regulation of women, specifically topless performers or "desnudas." The alarm over nudity as expressed by members of city government, certain media outlets, and the Times Square Task Force Report, including the condemnation of desnudas as "wrong" and requiring an "aggressive" response were not previously voiced about male performers. Indeed, Times Square's "Naked Cowboy," who, like the desnudas, performs near-nude for tips, has been a local fixture for well over a decade and there has never been a bill introduced to address his presence.

Further, government officials including Police Commissioner William J. Bratton have specifically criticized the desnudas, and the written complaints that were included in the Task Force Report issued this fall called the desnudas an offense to religious faith, a display of "low class behavior," and even as "disgusting tramp[s]." Given this background, we question whether

the implementation of the bill, and any subsequent regulations issued by the DOT, will suffer from the same gender-based disparities. In particular, we are concerned that the bill's requirement that nearly all activities within pedestrian plazas require an activity permit granted by the DOT leaves ample room for discretion that will result in unequal treatment.

Further, the 1992 New York Court of Appeals decision *People v. Santorelli* clarified that women have the same right as men to be bare-chested in public. The City Council must therefore ensure that the right to equal protection is not violated through discriminatory enforcement of any regulations that result from this bill, including unequal enforcement of penal laws criminalizing public exposure. We also urge that all police officers patrolling Times Square be trained to understand and comply with equal protection principles, including the right of women to be topless in public.

Accordingly, the Sex and Law Committee recommends that the City Council amend the bill to (1) take legislative notice that, by law, both men and women in New York are permitted to be topless in public; (2) require that activity permits be issued on a non-discriminatory basis; (3) require that any time, place, and manner restrictions on speech adopted by the DOT be written and enforced in a non-discriminatory manner; and (4) recommend that police officers patrolling pedestrian plazas be trained in public exposure laws and free speech rights.

Finally, it is beyond the scope of this testimony to opine as to the likely outcome of any claim that may be brought against the City on First Amendment grounds as a result of promulgated rules and regulations should this legislation be enacted. Certainly, a potential challenge cannot be ruled out. Given the "traditionally open character of public streets and sidewalks," the government's ability to restrict expressive conduct in such areas is very limited.¹ Reasonable restrictions on the time, place, or manner of protected speech may be imposed in a public forum only if those restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."² In addition to our above recommendations, we urge that any DOT-implemented restrictions take into account these important First Amendment guideposts.

In conclusion, we thank the Committee for providing us the opportunity to voice our concern about the potential discriminatory effect this bill may impose on women and gender nonconforming people, and to urge that any restrictions imposed on Times Square be carefully crafted so as not to create de facto categories based on gender, or disproportionately target and restrict the movement of female performers.

¹ *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (striking down buffer zones outside abortion clinics).

² *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).