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October 30, 2015

Hon. Bill de Blasio
Mayor of the City of New York
City Hall
New York, New York 10007

Re: Times Square Task Force Report

Dear Mayor de Blasio:

We write to express concern regarding the recently released Times Square Task Force report, “Roadmap for a 21st Century Times Square” (“the Report”).¹ The Report proposes creating three “distinct regulatory zones” in Times Square: (i) “Civic Zones” for passive use, events and programming; (ii) “Flow Zones” for unimpeded pedestrian throughput; and (iii) “Designated Activity Zones” for constitutionally-protected solicitation for the immediate exchange of money for goods, services or entertainment. As envisioned, the zoning plan would confine performers seeking tips to Designated Activity Zones, while speakers and performers not seeking tips would be permitted in the Civic Zones.

As leader of one of the most diverse and progressive cities in the nation, you have shown dedication to gender equity and support for the economic and social inclusion of all New Yorkers which we applaud. We are therefore understandably concerned about the significant possibility of the Report’s zoning plan - although couched in gender-neutral language - being applied in a discriminatory manner, particularly since the Report appears to have been drafted as a response to the appearance of female performers in Times Square. These performers, often referred to as “desnudas,” are women who perform topless except for body paint in the public areas of Times Square. We are writing to urge that special attention be paid to the implementation of the Report in a non-discriminatory manner.

The History and Language of the Report Appears to Target Female Performers

Despite the Report’s use of gender-neutral language referring to panhandlers, costumed performers and individuals seeking tips, we are concerned that the Task Force appears to have been created in order to address the controversy over nudity in Times Square. To be sure, this

¹ Available at <http://www.abettertimesquare.org/the-plan>.

alarm over nudity has focused solely on the presence and propriety of topless women, not men. Comments about the presence of desnudas being “wrong” and requiring an “aggressive” response² were not previously voiced about male performers. Times Square’s “Naked Cowboy,” who, like the desnudas, performs near-nude for tips, has been a local fixture for well over a decade. No task force has been convened to address his presence.

Further, Police Commissioner William J. Bratton stated, prior to the creation of the Task Force: “It drives me crazy when at Times Square you see the naked people there covered in body paint as an expression of art.”³ And written complaints included in the Report overwhelmingly focus on the desnudas, including references to topless women as an offense to religious faith, a display of “low class behavior,” and even as “disgusting tramp[s].”

Given this background to the Report, we question whether the implementation of the Report’s recommendations will suffer from the same gender-based language and approach.

Laws Regulating Toplessness Should Be Enforced Equally On All Genders

Women must be – and since a 1992 Court of Appeals decision in New York State, indisputably are – allowed the same right to be bare-chested in public as men.⁴ The Task Force must ensure that the right to equal protection is not violated through discriminatory enforcement of the Report’s recommendations, including unequal enforcement of penal laws criminalizing public exposure. We 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. As U.S. Congresswoman Carolyn Maloney has advocated, “the Naked Cowboy and the flag-painted women should be treated the same. There should be equal treatment.”⁵

Some of those who visit Times Square, including the police who patrol it, may personally find the sight of exposed breasts offensive, obscene or just uncomfortable. However, the protection of such public sensibilities is not a legal justification for unequal enforcement of the law.⁶ Government policies must comply with the requirements of the Equal Protection Clause,

² Transcript: Mayor de Blasio Holds Press Conference to Discuss Intro. 866, In Relation to Regulation of Cooling Towers, Aug. 18, 2015, available at <http://www1.nyc.gov/office-of-the-mayor/news/568-15/transcript-mayor-de-blasio-holds-press-conference-discuss-intro-866-relation-regulation>.

³ Colleen Wright, “The Desnudas of Times Square, Topless but for the Paint”, N.Y. Times, Aug. 14, 2015, available at http://www.nytimes.com/2015/08/16/nyregion/the-desnudas-of-times-square-topless-but-for-the-paint.html?_r=0.

⁴ See *People v. Santorelli*, 80 N.Y.2d 875 (1992).

⁵ Will Bredderman, “Topless Task Force Congresswoman Wants Equal Treatment for Desnudas and Naked Cowboy”, Observer, Aug. 26, 2015, available at <http://observer.com/2015/08/topless-task-force-congresswoman-wants-equal-treatment-for-desnudas-and-naked-cowboy/>.

⁶ See *Santorelli*, 80 N.Y.2d at 881 (Titone, J., concurring) (prohibiting the exposure of female breasts in public “betrays an underlying legislative assumption that the sight of a female’s uncovered breast in a public place is offensive to the average person in a way that the sight of a male’s uncovered breast is not. It is this assumption that lies at the root of the statute’s constitutional problem.”). See also *People v. David*, 585 N.Y.S.2d 149, 151 (Co. Ct. 1991) (holding a New York exposure statute’s “gender based classification does not serve the legitimate governmental interest better than would a gender neutral law”).

even if doing so offends some members of the public.⁷

The regulations proposed by the Task Force must not be used to justify discriminatory treatment of topless women – either performers or non-performers – in Times Square. Any regulations imposed must be enforced equally on all genders. That means that anyone performing for tips – “naked” cowboys, costumed Sesame Street characters, musicians, frozen Statue of Liberty performers, desnudas – should all be treated equally under the new zoning plan. Equal treatment should be a main component of training those who will be charged with enforcement of the three distinct zoning areas.

The Implication of First Amendment Rights

Given the “traditionally open character of public streets and sidewalks,” the government’s ability to restrict expressive conduct in such areas is very limited.⁸ In such a traditional public forum, the government may not “shield the public from some kinds of speech on the ground that they are more offensive than others.”⁹ 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.”¹⁰

It is beyond dispute that the Task Force seeks to limit free speech rights on the streets and sidewalks of Times Square – one of the most highly-trafficked public forums in the world – on the grounds that the recommendations constitute, in their view, reasonable time, place and manner restrictions. It is beyond the scope of this letter to opine as to the likely outcome of a claim brought against the City on First Amendment grounds. That will be for a court to decide. The focus of this letter is to voice our concern that women and gender nonconforming people who choose to go topless will be disproportionately targeted and restricted to certain areas. Any time, place and manner restriction imposed on Times Square must be carefully crafted so as not to create de facto categories based on gender, or disproportionately target and restrict the movement of topless female performers to certain areas.

⁷ *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. ‘Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.’”), quoting *Palmer v. Thompson*, 403 U.S. 217, 260–261 (1971) (White, J., dissenting); See also *People v. Whidden*, 51 N.Y.2d 457, 461 (1980) (rejecting, as justification for penal law, the “unfounded assumption that underage women are more vulnerable to emotional harm than are their male counterparts” as an “archaic and overbroad generalization [] which is evidently grounded in long-standing stereo-typical notions of the differences between the sexes”).

⁸ *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (striking down buffer zones outside abortion clinics).

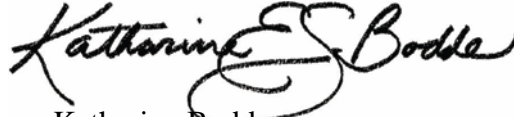
⁹ *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (striking down ordinance prohibiting drive-in movie theater from showing films containing nudity when its screen is visible from a public street).

¹⁰ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

* * *

Thank you for your time and consideration given to these comments. We stand ready to provide further information if that would be helpful, and we welcome the opportunity to discuss this issue further with the appropriate members of your staff.

Respectfully,

A handwritten signature in black ink that reads "Katharine S. Bodde". The signature is written in a cursive style with a large, stylized "S" in the middle.

Katharine Bodde
Chair, Sex & Law Committee

Cc: Ms. Vikki Barbero, Chairperson, Community Board 5
Commissioner William Bratton, NYPD
Hon. Gale Brewer, Manhattan Borough President
Hon. Dan Garodnick, New York City Council
Hon. Corey Johnson, New York City Council
Mr. Tim Tompkins, President, Times Square Alliance
Mr. Carl Weisbrod, Chair, Department of City Planning