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CITY BAR

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Emily Weidenhof
Director of NYC Plaza Program
New York City Department of Transportation
55 Water Street, 6th Floor
New York, NY 10041

Re: DOT Proposed Pedestrian Plaza Rules

Dear Ms. Weidenhof:

We write to express our concern regarding the proposed Pedestrian Plaza Rules issued by the Department of Transportation (DOT). The proposed rules would confine constitutionally-protected “expressive matter vending” and any tip-producing “solicitation, entertainment or performance” to distinct “Designated Activity Zones” in Times Square. Further, the rules would prohibit individuals from “[e]ngaging in conduct or committing acts that disturb the peace, comfort or repose of a reasonable person of normal sensitivities.” The Committee is concerned that these rules – although couched in gender-neutral language – will be applied in a discriminatory manner.

The proposed rules, along with their predecessor legislation, Int. 1109-2016, all appear to have been intended as a response to the appearance of female performers in Times Square.¹ These performers, often referred to as “desnudas,” are women who perform topless except for body paint in the public areas of Times Square. 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 legislation or regulations introduced to address his presence. Given this background, we are concerned that the implementation of the DOT’s rules will suffer from the same gender-biased approach. We therefore write to urge that, in acknowledgment of this motivation and background, the rules include protections against discriminatory enforcement.

¹ See generally, TIMES SQUARE TASK FORCE, *Roadmap for a 21st Century Times Square* (2015) available at <http://www.abettertimesquare.org/the-plan>.

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.² The DOT must ensure that the right to Equal Protection is not violated through discriminatory enforcement of the rules, 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.”³

The DOT rules prohibit individuals in pedestrian plazas from “[e]ngaging in conduct or committing acts that disturb the peace, comfort or repose of a reasonable person of normal sensitivities.” This extremely broad and impossibly vague regulation could be interpreted to ban female and gender non-conforming New Yorkers from exercising their legal right to be topless in public. Many of those who visit Times Square, including the police officers who patrol it, may personally find the sight of exposed breasts offensive, obscene or uncomfortable. However, the protection of such personal sensibilities is not a legal justification for unequal enforcement of the law.⁴ Government policies must comply absolutely with the requirements of the Equal Protection Clause, even if doing so offends some members of the public.⁵

The Rules Have Implications for 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.⁶ In such a traditional public forum, the government may not “shield the public from some kinds of speech on the ground that

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

³ 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/>.

⁴ 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”).

⁵ *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”).

⁶ *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (striking down buffer zones outside abortion clinics).

they are more offensive than others.”⁷ 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.”⁸

It is beyond dispute that the proposed rules seek to limit free speech rights on the streets and sidewalks of New York City, and particularly Times Square – one of the most highly-trafficked public forums in the world. 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. Certainly a potential challenge cannot be ruled out. The focus of this letter is to voice our concern that women and gender nonconforming people who choose to go topless in Times Square will be disproportionately targeted and restricted to certain areas.

Accordingly, the Sex and Law Committee of the New York City Bar recommends that the proposed rules be amended to (1) take notice that the law in New York allows both men and women to be topless in public; (2) require that the regulations on speech be enforced in a non-discriminatory manner; and (3) recommend that police officers patrolling pedestrian plazas be trained in public exposure laws and free speech rights.

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

Respectfully,



Katharine Bodde
Chair, Sex & Law Committee

⁷ *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).

⁸ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).