American Civil Liberties Union
of the National Capital Area

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Mr. Randolph J. Myers
Attorney-Advisor, Division of Parks and Wildlife
Office of the Solicitor
United States Department of the Interior
1849 C Street, N.W, Room 5320
Washington, D.C. 20240

Re: Busking in National Capital Region Parks

Dear Mr. Myers:

As you probably know, a "busker" is a person who entertains the public in parks, streets and other public places and seeks voluntary contributions in return. I am writing on behalf of two buskers who have recently been threatened with arrest by United States Park Police (USPP) while performing on National Park Service (NPS) lands in D.C. Because the USPP officers proposed to charge both with the offense of solicitation, the ACLU has agreed to represent them in a challenge to the apparent blanket prohibition against solicitation in National Capital Region (NCR) parks, as applied to buskers. *See* 36 C.F.R. § 7.96(h) ("Soliciting or demanding gifts, money, goods, or services is prohibited."). Before filing suit, however, we would like to discuss our proposal that NPS modify its policy to permit busking in NCR parks. If the Park Service is willing to work with us to develop a more busker-friendly policy, it would eliminate the need for litigation.[1]

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[1] The Preferred Alternative in the latest Draft National Mall Plan, http://www.nps.gov/nationalmallplan/Documents/DraftEIS/DEIS/4_Alternatives.pdf, pp. 83-85, calls for the construction of more performance spaces on the Mall and the creation of an improved computerized permit-allocation system. We believe it does not address the concerns addressed in this letter because we see no suggestion of changes in the regulations governing permits or the permissible kinds of performances. If, however, our reading is mistaken and the plan does encompass more busker-friendly permitting procedures, then we would be interested in discussing the plan further and potentially providing comments in support of the plan.

In the discussion that follows, we make the following main points:

- Busking is protected by the First Amendment, and courts have so held;
- The current NPS regulation banning solicitation has fatal weaknesses, as applied to busking, under First Amendment doctrine;
- We are open to crafting an alternative regulation that resolves these weaknesses rather than pitting buskers against the Park Service in litigation.

A. Busking is Not Commercial Solicitation — It is a Core Expressive Activity with Full First Amendment Protection

For centuries, the sounds of buskers have enriched urban life in America and around the world. Indeed, many now-famous musicians — including Woody Guthrie, Louis Armstrong, Bob Dylan, and Joan Baez — started their careers by busking. And it is well-established that "[m]usic, as a form of expression and communication, is protected under the First Amendment." *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989). As a general rule, buskers implicitly (by a hat or an open instrument case) or explicitly request donations as they perform; this does not reduce the First Amendment's protection of their expressive activities. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (holding that newspaper advertisement criticizing government handling of civil rights demonstrators and requesting donations to support the work of civil rights organizations was not "commercial speech" for First Amendment purposes); *NAACP v. Button*, 371 U.S. 415, 429 (1963) (holding that civil rights organization's solicitation of legal business is protected as political expression, regardless of whether it is labeled "solicitation"); *Jamison v. Texas*, 318 U.S. 413, 417 (1943) (holding that even though religious handbills may invite the purchase of books or promote the raising of funds, this does not undercut their protected status under the First Amendment); *Cantwell v. Connecticut*, 310 U.S. 296, 306-07 (1940) (holding that discretionary licensing scheme directed at religious, charitable, and philanthropic solicitation violated the First Amendment).

The fact that a challenged regulation targets solicitation, rather than the music itself, does not put it outside the reach of the First Amendment. First, the solicitation of money is, on its own, "a recognized form of speech protected by the First Amendment," *United States v. Kokinda*, 497 U.S. 720, 725 (1990). Second, when such a regulation is applied to busking, the court will take into account that the solicitation aspect of busking is intertwined with the musical performance. The U.S. Supreme Court analyzed similarly intertwined protected expression and solicitation in *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980), concluding that charitable solicitation is protected as non-commercial speech because the solicitation is "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political or social issues, and for the reality that without such solicitation the flow of such information and advocacy would likely cease." *Id.* at 632. Unlike solicitations to purchase a physical object such as a t-shirt or compact disc, in which the communicative elements of the t-shirt or album are

distinct from the commercial transaction, the busker's performance simultaneously expresses his artistic message and encourages listeners to respond with emotion and a donation. For this reason, a court examining the treatment of buskers under the solicitation regulation would look behind the label of "solicitation" and address the performance as a whole. *See id.* at 632. *See also, e.g.*, *United States v. Button*, 371 U.S. 415, 429 (1963) (when examining the constitutionality of a state statute regulating attorney "solicitation" of clients, the U.S. Supreme Court emphasized that "a State cannot foreclose the exercise of constitutional rights by mere labels" and proceeded to examine the full range of impact litigation and political advocacy affected by the statute).

Although there are no reported challenges by buskers to regulations in the D.C. courts, other jurisdictions have given strong First Amendment protection to this form of expression. For example, in *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009), the Ninth Circuit struck down on First Amendment grounds several restrictions that the city had imposed on street performers, including a rule banning all "active solicitation" of donations. As the court noted, "If the City desires to curb aggressive solicitation, it could enforce an appropriately worded prohibition on aggressive behavior." *Id.* at 1053. Similarly, in *Davenport v. City of Alexandria*, 748 F.2d 208, 210 (4th Cir. 1984), the Fourth Circuit struck down a ban on "exhibition or performance" activities on most of the sidewalks, walkways, and public property of Old Town Alexandria because the ban was not sufficiently tailored to the city's interests in public safety and traffic control.

B. The Park Service's Blanket Prohibition Against Busking Violates the First Amendment

It is against this backdrop that a court would consider 36 C.F.R. § 7.96(h), entitled "Solicitation," which prohibits "Soliciting or demanding gifts, money, goods or services" in National Capital Region parks. For our clients, whose musical performances led to threats of arrest by USPP officers for solicitation, this regulation is a prohibition on busking.

The National Capital Region parks are, as a general rule, public fora. *See id.* at 954; *Henderson v. Lujan*, 964 F.2d 1179, 1182-83 (D.C. Cir. 1992). Accordingly, the question is whether the Park Service's solicitation regulation, as applied to busking, is narrowly tailored to a significant governmental interest and leaves open ample alternative channels for communication. *Rock Against Racism*, 491 U.S. at 791.[2] The test for

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[2] Although we do not necessarily agree that this regulation is actually content-neutral, the D.C. Circuit has construed the Park Service's solicitation regulation to be a content-neutral time, place, and manner restriction because, under the court's limiting construction, the regulation permits the solicitation of money but limits the manner of that expression to forms that do not involve the immediate receipt of the money. *ISKCON v. Kennedy*, 61 F.3d 949, 954 (D.C. Cir. 1997) (relying on *Lee*, 505 U.S. at 704-

narrow tailoring is whether the regulation burdens "substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 491 U.S. at 799. Even if the regulation is narrowly tailored, moreover, it must also leave open ample alternative channels for communication. *ISKCON v. Kennedy*, 61 F.3d 949, 958 (D.C. Cir. 1995).

In previous litigation involving the National Mall and other National Capital Region parks managed by the Park Service, the government has defended the solicitation ban by citing the Park Service's interests in limiting the wear and tear on park properties, protecting visitors from being confronted or harassed by vendors and panhandlers, preventing the creation of a commercial or "fleamarket" atmosphere on the Mall, and ensuring that visitors have an opportunity to admire the beauty of the National Memorials. Assuming that these interests are substantial, the current NPS solicitation regulation violates the First Amendment when applied to prohibit busking because it is not narrowly tailored to these four interests and fails to leave open ample alternative channels for communication.

1. The Regulation is Not Narrowly Tailored to the Interest of Limiting Wear and Tear on Park Service Properties

First, the regulation is not narrowly tailored to limiting wear and tear on Park Service properties, because busking contributes little or nothing to such problems. As a general rule, unamplified performances by buskers are intended to attract the attention of people who are already walking through or standing in the area. Unlike, for example, setting up tent cities in Lafayette Park, *see Clark v. Community for Creative Non-Violence*, 458 U.S. 288 (1984), buskers playing their musical instruments for a few hours at a time do not increase the pedestrian traffic on the Mall or other park spaces, and even the heaviest guitar case or music stand will compress the grass no more than a picnic basket or people sitting on a blanket. Just as a ban on newsboxes stocked with commercial papers cannot be justified if there are no particular problems associated with commercial as opposed to non-commercial papers, a ban on busking cannot be justified on the basis of "wear and tear" where there are no particular aspects of busking that cause greater wear and tear on Park Service properties than the other activities that routinely take place on the Mall and other park spaces. *See Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425 (1993) (holding that a ban on commercial newsracks was unrelated to the city's interest in sidewalk esthetics because "respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks."); *Lederman v. United States*, 291 F.3d 36 (D.C. Cir. 2002) (government cannot prohibit First Amendment activity that threatens government interests no more than non-First Amendment activity that is not prohibited).

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05 (Kennedy, J., concurring)). Our letter therefore treats the regulation as content-neutral.

2. The Regulation is Not Narrowly Tailored to the Interests of Protecting Visitors from Harassment and Preventing a Commercial or "Fleamarket" Atmosphere

Second, the regulation is not narrowly tailored to the interests of protecting visitors from harassment and preventing a commercial or "fleamarket" atmosphere from developing on Park Service properties because neither characterization properly applies to buskers. Buskers are nothing like the aggressive panhandlers whose activities are prohibited by many municipal rules; they are too busy performing to chase after passersby. Instead, their typically passive and unspoken solicitation of money is unobtrusively combined with their performance (e.g., playing music with an open guitar case or bucket signaling that the busker welcomes contributions of money). Just as the recipient of an annoying bill insert may "escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket," *see Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 542 (1980), a person walking past a busker may escape exposure to the busker's appeal (and the busker's music) by simply continuing on his or her way without giving any money. Whereas most solicitors "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 734 (internal cites and quotations omitted), buskers do not impede or pursue passersby, and there is no exchange of items involved. Additionally, busking creates no risk of "fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase." *Lee*, 505 U.S. 672 at 684 (1992). People donate or not to a busker because they enjoy what they see and hear in front of them, not because of any promise of future conduct. Thus, unlike some other forms of solicitation, there is nothing "inherently more disruptive" about busking than standing and wearing a message-bearing t-shirt, carrying a sign, or singing the National Anthem — all expressive activities protected by the First Amendment and permitted in National Capital Region parks. *See Kokinda*, 497 U.S. at 736.

3. The Regulation is Not Narrowly Tailored to the Interest of Ensuring that Visitors May Admire the Beauty of the Memorials

Third, the regulation is not narrowly tailored to the interest of ensuring that visitors may admire the beauty of the memorials. We concede that inside the memorials themselves it would be appropriate to prohibit busking, as is already the case with picketing or the distribution of leaflets. *See* 36 C.F.R. § 7.96(j)(2)(i) & (ii). But in the vast majority of the National Capital Region park space, busking would not interfere with the ability of visitors to admire the memorials any more than does the surrounding bustle of urbanity or the rallies and protests that take place in these urban parks. *See United States v. John Doe*, 968 F.2d 86, 89 (D.C. Cir. 1992) (holding that the government has no legitimate interest in maintaining tranquility in Lafayette Park, which is exposed to "every form of urban commotion" and is the site of frequent rallies and demonstrations); *Henderson v. Lujan*, 964 F.2d 1179, 1185 (D.C. Cir. 1992) (holding that a leafleting ban

on sidewalks adjacent to the Vietnam Veterans Memorial is not narrowly tailored to the government's interest in preserving tranquility at the Memorial because it is "only barely more necessary for preserving tranquility at the Vietnam Veterans Memorial than is prohibiting leafleting on other city sidewalks.").

4. The Regulation Does Not Leave Ample Alternative Channels Open for Communication

Finally, the regulation does not leave ample alternative channels open for communication. The regulation operates as a blanket ban on busking in the National Capital Region parks at all times, in all places, and in all manners. And although it is technically possible for buskers to move onto District streets or parks not managed by the Park Service, these are not adequate alternatives. First, busking on most District streets, even those near the NCR parks, is not the equivalent of performing in the park spaces. Unlike t-shirt vendors, whose First Amendment interest in having their message worn by visitors to the Mall can arguably be satisfied by vending their message-bearing shirts near the Mall rather than on the Mall itself, *see Friends of the Vietnam Veterans Memorial v. Kennedy*, 116 F.3d 495, 497 (D.C. Cir. 1997) (describing vending "near the Mall" as a possible alternative to selling t-shirts on the Mall), the First Amendment interests of buskers are more location-sensitive. A live musical performance is not a chattel; a listener can enjoy it only in the presence of the performer, not across the street or a block away. And different locations have different characteristics that affect their suitability as performance spaces. Thus, a court would need to evaluate each possible alternative according to its particular characteristics rather than treating every location as fungible.

City sidewalks are inadequate substitutes for the Mall and other NCR parks because they are crowded, often narrow, and have inferior visual and acoustic characteristics in comparison to an open green space. Watching and hearing a performance on a large, open green space is a very different experience from watching and trying to hear the same performance on a tiny strip of sidewalk as commuters and noisy vehicles rush past. *See Green v. City of Raleigh*, 523 F.3d 293 (4th Cir. 2008) (noting, in the context of demonstrations, that sidewalks are "typically smaller and more narrow than parks" and therefore more prone to congestion). Moreover, the crowded nature of the sidewalks makes it difficult for buskers and their audiences to avoid incommoding others.

The District's non-federal parks are inadequate substitutes because they are smaller, more out of the way, and less trafficked than the NCR parks. The National Mall, in particular, is both more centrally located and far larger than any park managed by the District of Columbia.[3] Extending nearly two miles across the center of D.C. and covering

[3] The District's largest municipally-run park appears to be Kingman and Heritage Islands, a 45-acre park in the Anacostia River. Any busker performing on Kingman and Heritage Islands would be performing to an audience of weeds and wild animals. The islands are

an area of over 300 acres, the Mall plays a unique role in D.C.'s open spaces; the closest analogue from another city might be New York's Central Park (which has no anti-busking rule). Additionally, the Mall has a special role as "America's Front Yard." *See ISKCON*, 61 F.3d at 951-52 ("The Mall . . . is an area of particular significance in the life of the Capital and the Nation . . . . It is here that the constitutional rights of speech and peaceful assembly find their fullest expression."). These qualities — the same qualities that make the Mall a special place in our national heritage — also make it an ideal gathering place for artistic as well as other kinds of expression. The use of the Mall and other NCR parks should not be limited only to those with the money and resources to set up sound stages and organize large concerts under a special events permit, but also for the musical "little people" of the performing world. *See Martin v. City of Struthers*, 319 U.S. 141, 146 (in limiting certain regulations, emphasizing the importance of door-to-door distribution of literature in promoting the "poorly financed causes of little people").

The plazas and mezzanines of Metro stations are not adequate substitutes because, except for certain limited areas, they are not public fora, and busking is prohibited in them based on their role as transportation hubs. *See McFarlin v. District of Columbia*, 681 A.2d 440 (D.C. 1996) (upholding prohibition against busking based on the non-public forum status of the regulated Metro properties).

It is also no answer to say that buskers could play their music without solicitation as the court suggested in *Kennedy*, 61 F.3d at 958 (ban on Hare Krishna sales of audio tapes and beads allowed in view of ample alternative channels of communication to wit, free distribution of those items). Unlike sales of material goods, in which the expressive content of the goods is unaffected by the manner in which they are distributed, the solicitation element of busking is intertwined with the larger expressive act. In this respect, busking is akin to the fundraising speeches that the Supreme Court examined in *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988). In *Riley*, the state required professional fundraisers to disclose to potential donors, before making an appeal for funds, information about how much the fundraiser had profited from prior contributions. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). Although the content of these disclosures was arguably commercial speech, the Court refused to analyze the disclosure component in isolation from the speech as a whole, which was non-commercial. The financial disclosure does not "retain its

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isolated and undeveloped, accessible only by a foot bridge from the northern parking lot for RFK Stadium. *See* Ruth Samuelson, *Changes Afoot for Kingman and Heritage Islands*, WASHINGTON CITY PAPER, Oct. 16, 2009, *available at* http://www.washingtoncitypaper.com/blogs/housingcomplex/2009/10/16/changes-afoot-for-kingman-and-heritage-island/. The other municipally-run parks classified as "large" by the District are located east of the Anacostia River — that is, not in areas likely to attract out-of-town visitors or even out-of-neighborhood visitors — and the others are small, often awkwardly-located or awkwardly-configured triangle parks and special-purpose dog-running parks.

commercial character when it is inextricably intertwined with otherwise fully protected speech." *Id.* at 796. "[W]e cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression." *Id.* Similarly, a busker's entire performance — including any elements that involve the solicitation of donations — should be analyzed as a whole, not parceled out into fully-protected and less-protected component parts. Such parceling would be just as "artificial and impractical" as the approach rejected in *Riley*.[4]

We are confident that a lawsuit challenging, on First Amendment grounds, the NPS solicitation regulation as applied to buskers would succeed. However, we hope that rather than engaging in extended litigation pitting buskers against the Park Service, you would agree with us that it would be preferable to accommodate the interests of both either by narrowing the solicitation ban to focus on *aggressive* acts of solicitation and/or purely commercial acts of solicitation, or by governing busking through a modified version of the current "special events" permit regulations that limits the discretion granted to issuing officials. We would be happy to work with you to craft an appropriate regulation along such lines, and will telephone or e-mail to follow up on this letter if we have not heard from you in the next week or so.

Sincerely,

Carl Takei
Staff Attorney

[4] One might object to the analogy because *Riley* involves compelled speech, whereas the Park Service regulation involves compelled silence. But as the Supreme Court has observed, "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual 'freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). "[I]n the context of protected speech, the difference [between compelled speech and compelled silence] is without constitutional significance." *Riley*, 487 U.S. at 796.