Gideon Orion Oliver

Attorney at Law
299 Broadway, Suite 806
New York, NY 10007-1901

(212) 766-8050 (phone)
(646) 349-2914 (fax)*

Gideon@GideonLaw.com*
Not for service

January 16, 2012

BY EMAIL AND BY HAND

Joanna Rosato, Regional Commissioner
General Services Administrative
Public Buildings Service
26 Federal Plaza, Room 1605
New York, NY 10378

Re: Appeal of January 13, 2012 Denial of Application/Permit for Use of Space in Public Buildings and Grounds Submitted December 29, 2011 by Jarret Wolfman on behalf of Occupy the Courts

Dear Regional Commissioner Rosato:

We represent Jarret Wolfman on behalf of Occupy the Courts in connection with this appeal of the January 13, 2012 Denial of an Application/Permit for Use of Space in Public Buildings and Grounds Submitted December 29, 2011.

Occupy the Courts will be a one day occupation of space and mass exercise of First Amendment rights near over 111 Federal courthouses across the country, including the U.S. Supreme Court in Washington, D.C., on Friday January 20, 2012 "to mark the second anniversary of the U.S. Supreme Court's infamous *Citizens United v. Federal Election Commission* decision that opened the floodgates to unlimited corporate money in elections." Occupy the Courts was inspired by Occupy Wall Street and Dr. Cornel West.[1]

Occupy the Courts in New York City plans to hold First Amendment assembly action outside the Daniel Patrick Moynihan United States Courthouse on the Pearl Street side between 4:00 and 6:00PM involving around 200 non-corporate persons who wish to engage in "a small rally with speakers and maybe some singing."

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[1] *See* http://movetoamend.org/occupythecourts.

BACKGROUND

On December 15, 2011, Mr. Wolfman contacted Wesley French, Acting National Relocation Counselor / Program Manager and Regional Program Manager for Outleasing, Site Acquisition and Urban Development to begin what he understood to be the application process. As a result of many communications with Mr. French between December 15, 2011 and December 29, 2011, Mr. Wolfman submitted an Application/Permit for Use of Space in Public Buildings and Grounds on December 29, 2011.

On January 9, 2012, Mr. French wrote Mr. Wolfman:

> I am getting feedback from the US Courts that they have two events on Friday, January 20th (a morning citizenship swearing in, and a 4:00 p.m. installment of a federal judge). With that, I need to work on finding out what the second event is and it's impact.

By letter dated January 13, 2012, Mr. French communicated GSA's denial of the application, stating:

> As you know, the Court is holding events on January 20th at 500 Pearl Street, both in the morning and late afternoon, which will result in many visitors and will necessitate increased security to both the building and grounds. The activity proposed in your application will interfere with these events. Consequently, we are denying your application pursuant to 41 C.F.R. § 102-74.500(c). However, as we discussed, we will continue to offer your group assistance in coordinating with City agencies and in finding an alternate location.

Of the 111 Occupy the Courts events scheduled to take place outside courthouses across the country on January 20, 2012, this is the only instance where a permit has been denied.

Copies of the December 15, 2011 application and the January 13, 2012 denial letter are attached.

THE APPEAL

This written appeal is timely submitted within five days of the January 13, 2012 denial. *See* 41 C.F.R. § 102–74.510.

The denial warrants reversal because the proposed activities are beyond the scope of the conduct regulated by the Subpart cited as the basis for the denial. 41 C.F.R. § 102-

74.500(c) permits the denial of an application if "(c) The proposed use interferes with access to the public area, disrupts official Government business, interferes with approved uses of the property by tenants or by the public, or damages any property." Under 41 C.F.R. § 102-74.460, the entire Subpart "establishes rules and regulations for the occasional use of public areas of public buildings for cultural, educational and recreational activities as provided by 40 U.S.C. 581(h)(2)." Occupy the Courts intends to assemble in a public area outside of a "public building." Thus, the proposed activity is outside the Subpart's scope. The denial on the basis of 41 C.F.R. § 102-74.500(c) should therefore be reversed, and Occupy the Courts' proposed event should go forward, for that reason.

Alternatively, the denial is unreasonable and exceeds the government's authority to regulate speech and related expressive activity in a traditional public forum.[2] *See, e.g., United States v. Grace*, 461 U.S. 181 (1983) (finding that sidewalks adjoining Supreme Court building were traditional public forum and holding unconstitutional statute prohibiting "displaying in the Supreme Court building or on its grounds any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement"). Even assuming, *arguendo*, that the denial is content neutral, it lacks narrow tailoring and fails to provide ample alternatives.[3]

In this respect, determining whether a particular regulation accords with the Constitution "involves a fact specific and situation specific inquiry" in which "'[t]he nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable'". *Deegan*, 444 F.3d at 142, *quoting*

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[2] "The government's authority to regulate speech or expressive conduct on property that has traditionally been open to the public for such activity, such as public streets and parks, is sharply circumscribed.'" *Deegan v. City of Ithaca*, 444 F.3d 135, 141 (2nd Cir. April 6, 2006), *quoting Hobbs v. County of Westchester,* 397 F.3d 133, 148 (2nd Cir. 2005) (citations omitted). "Of course, the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 US 640, 647 (1981). However, "there is a strong First Amendment interest in protecting the right of citizens to gather in traditional public forum locations that are critical to the content of their message, just as there is a strong interest in protecting speakers seeking to reach a particular audience." *Galvin v. Hay*, 374 F.3d 739, 752 (9th Cir. 2004).

[3] Any and all content-neutral time, place and/or manner restrictions placed on Occupy the Courts' exercise of their First Amendment rights must be narrowly tailored to serve a significant governmental interest and permit ample alternative channels for expression. *Deegan*, 444 F.3d at 142, *citing Ward v. Rock Against Racism*, 491 US 791, 791 (1989). "The 'narrowly tailored' standard does not tolerate a time, place, or manner regulation that may burden substantially more speech than necessary to achieve its goal, nor does it require that the least restrictive alternative available be used." *Deegan*, 444 F.3d at 144, *citing Ward*, 491 US at 788-789. The Supreme Court has held that "[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz,* 487 US 474, 485 (1988). The government "'bears the burden of showing that its restriction of speech is justified under the traditional 'narrowly tailored' test.'" *Deegan*, 444 F.3d at 142 (internal citation omitted). A proposed alternative mode of communication may be constitutionally inadequate if the speaker's "ability to communicate effectively is threatened." *See, e.g., Members of City Council v. Taxpayers for Vincent*, 466 US 789, 812 (1984).

Grayned v. City of Rockford, 408 US 104, 116-117 (1972). "The crucial question (in determining whether such expressive conduct may be prohibited) is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned*, 408 US at 116.

The government's obligation to preserve the public peace and security and its attendant power to regulate public assemblages "must be carried out in light of the first amendment interests of the public." *New Alliance Party v. Dinkins,* 743 F.Supp. 1055 (SDNY 1990), *citing Concerned Jewish Youth v. McGuire*, 621 F.2d 471, 474-475 (2nd Cir. 1980). The task is "'one of balancing the interests involved.'" *Concerned Jewish Youth*, 621 F.2d at 474.

Here, the public's interest in holding a First Amendment assembly while occupying the public spaces around the Daniel Patrick Moynihan United States Courthouse on the Pearl Street side between 4:00 and 6:00PM involving around 200 non-corporate persons who wish to engage in "a small rally with speakers and maybe some singing" on the two-year anniversary of the U.S. Supreme Court's infamous *Citizens United v. Federal Election Commission* decision, in solidarity with similar occupations occurring at the same time in cities across the country, is clear. According to Occupy the Courts:

> This protest is being held in front of the Federal courts to focus attention on the theft of our inalienable, human, Constitutional rights by the U.S. Supreme Court, and the Federal judiciary, and the handing off of those rights, by the Courts, to the Corporate elite. We are taking America "to the scene of the crime." By denying this permit request, the GSA is denying NYC's 99% the right to join American all over the country to be heard on this most important issue.

While the government's obligations to preserve public peace and security also give rise to legitimate governmental interests, "[b]ecause the excuses offered for refusing to permit the fullest scope of free speech are often disguised, [Courts] must independently determine the rationality of the government's interest implicated and whether the restrictions are narrowly drawn *to further that interest*." *Olivieri v. Ward*, 801 F.2d 602, 606 (2nd Cir. 1986) (internal quotations omitted) (emphasis added). A court "may not simply assume that [a decision by local officials] will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (*citing and quoting Members of City Council v. Taxpayers for Vincent*, 466 U.S. at 803 n. 22).

In this case, GSA has known about Occupy the Courts' January 20, 2012 occupation plans since at least December 15, 2011. However, it was not until nearly a month later – on January 9, 2012 – that GSA indicated there were two other events the Court had scheduled on January 20, 2012. Notably, according to GSA, both purportedly conflicting events were scheduled by the Court. It is not clear when, or whether the

decision to prioritize these events over Occupy the Courts' proposed event was made without reference to their content. Between January 9, 2012 and January 13, 2012, GSA provided no information about the ways in which Occupy the Courts' proposed activities might relate to or potentially interfere with either of these events; nor are any such details provided in the denial; nor have they been provided since.

GSA's denial is not narrowly tailored to serve the government's legitimate interests in this matter. Both the GSA-administered property and the public sidewalks adjoining the Daniel Patrick Moynihan United States Courthouse on the Pearl Street side can accommodate 200 or more people, whether or not there are other events going on within the courthouse. Groups, including groups of hundreds of people, frequently appear in those spaces in connection with the Court's regular business, and particularly in connection with high-profile cases. The United States Marshals Service and its partners routinely facilitate events of the type Occupy the Courts will engage in. Additionally, there are less restrictive means to achieve any of the government's legitimate interests, while preserving Occupy the Courts' First Amendment rights.

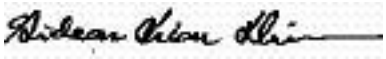
Finally, GSA's denial fails to provide constitutionally significant alternatives. In this respect, the denial states only: "As we discussed, we will continue to offer your group assistance in coordinating with City agencies and in finding an alternate location." This statement does not amount to the provision of any alternative, let alone an ample one. In fact, to date, GSA has directed Occupy the Courts to apply for a Temporary Public Assembly Permit from the New York City Department of Buildings, although no such permit – or indeed any permit - would be required by any New York City agency for a group to gather and hold a stationary demonstration without using amplified sound, as Occupy the Courts plans to do.

CONCLUSION

For the foregoing reasons, the denial warrants reversal, and Occupy the Courts' #J20 event in New York City should go forward with the government's facilitation, just as the 110 other Occupy the Courts events in other cities will.

Thank you for your attention to this matter. We look forward to a prompt determination of this appeal on or before noon on Wednesday, January 18, 2011.

Very truly yours,



Gideon Orion Oliver

/S/
Bina Ahmad
(Of Counsel)