No. 05-35752

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL JAMES BERGER, a single man also known as Magic Mike,
Plaintiff-Appellee

v.

CITY OF SEATTLE, VIRGINIA ANDERSON, Director of Seattle Center; MICHAEL ANDERSON, Emergency Service Manager for Seattle Center; TEN UNKNOWN EMPLOYEES/OFFICERS, of the Seattle Center and the City of Seattle, all in both their individual and official capacities,
Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

PETITION FOR REHEARING *EN BANC*

Date of decision: January 9, 2008
Judges: O'Scannlain, Haddon, and Berzon

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RULE 35(b)(1) STATEMENT

I believe, based on a reasoned and studied professional judgment, that this proceeding involves a question of exceptional importance and warrants *en banc* review. The First Amendment to the United States Constitution protects the free exchange of communication in traditional public fora such as public parks. Restrictions on free speech rights are only permitted in order to serve significant government interests, and limiting laws are subject to strict scrutiny. The panel decision skirts the thrust of decades of constitutional jurisprudence to dramatically amplify local authorities' power to regulate free speech activities in public parks, and by natural extension, other quintessentially public fora as well. This decision is in conflict with the following decisions of this Court:

Grossman v. City of Portland, 33 F.3d 1200 (9th Cir. 1994);

Santa Monica Food Not Bombs v. Santa Monica, 450 F.3d 1022 (9th Cir. 2006);

Rosen v. Port of Portland, 641 F.2d 1243 (9th Cir. 1981);

Gerritsen v. City of Los Angeles, 994 F.2d 570 (9th Cir. 1993);

A.C.L.U. of Nevada v. City of Las Vegas (ACLU II), 466 F.3d 784 (9th Cir. 2006); and

Kuba v. A-1 Agricultural Association, 387 F.3d 850 (9th Cir. 2004).

Its decision is also in conflict with decisions from sister Courts of Appeals, including, but not limited to:

Cox v. City of Charleston, 416 F.3d 281 (4th Cir. 2005);

Community for Creative Non-Violence v. Turner, 893 F.2d 1387 (D.C. Cir. 1990);

Douglas v. Brownell, 88 F.3d 1511 (8th Cir.1996);

Knowles v. City of Waco, 462 F.3d 430 (5th Cir. 2006);

American-Arab Anti Discrimination Committee v. City of Dearborn, 418 F.3d 600 (6th Cir. 2005);

Burk v. Augusta-Richmond County, 365 F.3d 1247 (11th Cir. 2004); and

A Quaker Action Group v. Morton, 516 F.2d 717 (D.C. Cir. 1975).

Consideration by the full Court is therefore necessary to secure and maintain the uniformity of the Ninth Circuit Court of Appeals' decisions and the uniformity of the law across the country.

This appeal involves issues of exceptional importance to the law of this Circuit and the nation, including:

1. Whether or not laws or ordinances may be imposed that require single individuals to apply and obtain a permit in advance, and wear a photographic identification badge, in order to exercise free speech in the traditional public forum of a public park;

2. Whether or not the government may impose a ban on the oral solicitation of donations where other oral communications are freely permitted;

3. Whether or not patrons of a public park, who happen to be standing in line or eating at a table, are considered a "captive audience" who may be isolated from persons wishing to engage them with protected speech, particularly where the "captive audience" may still be solicited by licensed vendors?

Dated: January 30, 2008

Sam N. Dawood, for

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And

Sam N. Dawood, for

Robert Corn-Revere
(admission to Ninth Circuit Bar pending)

David M. Shapiro

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STATEMENT

This case raises issues of profound importance within this Circuit and throughout the United States regarding freedom of expression in a traditional public forum. The panel erred by doing what neither this Court nor any other high federal court has ever done: sanctioning a permit system that requires a single person to apply for a permit in advance of engaging in free speech activities in a public park. The panel also approved of a content-based regulation prohibiting the solicitation of donations. Finally, the panel extended "captive audience" analysis to allow broad restrictions on speech in the quintessential public forum of a city park. These holdings contravene settled precedent.

The plaintiff and appellee, Michael "Magic Mike" Berger ("Berger") is a street performer who has, for decades, entertained people in the Seattle area in public venues. Berger's presentation is a mixture of entertainment (performing magic tricks and creating "balloon sculptures") and verbal communication, such as promoting the value of reading to his audience.

Berger performs in the large public urban park known as the "Seattle Center." The 84 acres constituting the park were gifted to the City of Seattle in the

19th century for "the use of the public forever." The park is visited by over 10 million people a year, and boasts that it is "a social and cultural gathering place for people around the world." Supp. Excerpts of Record, 3-4.

In 2002, the Seattle Center promulgated a set of "Campus Rules" requiring even solo performers (as is Berger) to register in advance as "street performers," wear a photo identification badge, and stand in one of sixteen pre-designated spots in the park.[1] The Rules also prohibit the "active solicitation" of donations and prohibit all park entrants from engaging in free speech activities (including political speech) within 30 feet of any "captive audience," which is broadly defined to include people waiting in line or eating lunch. The Rules impose restraints even on traditionally protected activities such as singing a protest song in a public park. In addition, the Rules themselves indicate the lack of necessity of such restrictions, as they permit gatherings of up to one hundred people (so long as no "performance" is involved) without prior notice, permit or license, and allow commercial speech in the same locations where non-commercial speech is prohibited. See, e.g., Rules G.2.a; C.14.

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[1] The Rules are set forth at ER 45-64.

In this lawsuit, Berger moved for summary judgment on a facial challenge to 1) the Rules that require all performers to apply in advance for a permit prior to singing, juggling and so forth in the park and to wear an identification badge (F.1, C.15, C.16); 2) the requirement that a performer may not vocally or through gestures request donations (F.3.a, F.8); 3) the designation of only about 16 spots on the 84 acre park for performances, thereby limiting access to the potential audience (F.4, F.5); and 4) the "captive audience" rule which prohibits any entrant to the park (not just street performers) from engaging in political and other speech activities within 30 feet of people who are, for example, standing in line to buy movie tickets (G.4, C.12, and C.14).

The district court, Judge Robart, granted plaintiff's motion for summary judgment, holding that the Seattle Center rules are facially unconstitutional. The district court found that the Rules sweep far too broadly, particularly in the context of a public park, and are not narrowly tailored to advance the City's stated goals. The opinion notes that "[n]o matter how persuasive the lyrical urgings of Martha Reeves and the Vandellas might be, there is no dancing in the street in the Seattle Center, at least not without permission."

The panel reversed the district court in its majority decision. Judge O'Scannlain wrote the opinion, which was joined by Judge Haddon. Judge Berzon wrote a strong dissent that questions most of the holdings reached by the majority.

The panel's majority opinion leads to an unprecedented result: It allows a government authority to compel a single individual to apply for permits and wear a badge before engaging in free speech activities in a public park. Op. at 214-27.[2] It also ventures into startling new territory by extending the "captive audience" rule to "protect" park patrons who are standing in line in a public park from "political and commercial speech" by approving a rule compelling speakers to stand at least 30 feet away. Rules G.4, C.5, C.14, Op. at 239-43.

These rulings depart from the principle that the most protected venues for the dissemination and reception of free speech are public parks, streets and sidewalks. As stated by the Supreme Court:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.

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[2] The opinion is set forth as Exhibit A to this Petition.

Hague v. CIO, 307 U.S. 496, 515 (1939) (Roberts, J., concurring). For speakers to be able to compete in the marketplace of ideas, publicly owned gathering places of the people must be available. The government may regulate them in order to ensure the orderly exercise of First Amendment rights, Cox v. Louisiana, 379 U.S. 536 (1965), but such regulations are subject to careful scrutiny. See, e.g., Carey v. Brown, 447 U.S. 455, 461 (1980).

But rather than subjecting the Seattle Center's rules to an exacting and skeptical analysis, the panel majority applies law developed in order to enhance communication by providing for its orderly presentation to justify rules that virtually abolish free speech in the public park. For example, Seattle Center's rules require a performer to apply in advance for a permit and a badge good for one year but this required pre-registration does not result in the park's knowing when or where the performer actually will be present in the park. Rule F, Op. at 251. It is, therefore, what dissenting Judge Berzon terms a speech "registration scheme" rather than a "speech coordination" system. Op. at 250.

A "speech coordination" regulation serves a significant government interest such as ensuring that dissenting voices are heard or that the sidewalks remain passable. In some cases speech coordination will require the advance application by the speaker so that the authority can allocate limited space among competing

interests. While disfavored as a prior restraint on speech, such a system can survive "searching and careful" review. Op. at 250-251, citing Grossman v. City of Portland, 33 F.3d 1200 (9th Cir.1994).

The Seattle Center rules, however, do not have a coordination purpose. "The permit requirement has nothing to do with the space allocation effort, but is simply a gratuitous restriction on speech." Op. at 251. The rules constitute a mere "speech registration" scheme that requires certain persons to undergo the hurdle of applying for the right to communicate in a public park in advance. This scheme unacceptably "imposes a prior restraint on speech with no purpose other than to make government surveillance and control of the speakers easier. It is hard to think of a more obviously unconstitutional measure in the First Amendment context." Id., at 254-55.

A further aspect of this case, and one of emerging national importance, is the question of to what extent the government may allow public parks to be exclusively or closely controlled by commercial interests. The trend towards privatization has been previously noted, with concern, by this Court. See A.C.L.U. of Nevada v. City of Las Vegas (ACLU II), 466 F.3d 784, 790, n. 9 (9th Cir. 2006) (pointing out the "growing 'nationwide trend toward the privatization of public property.' . . . If this trend of privatization continues—and we have no reason to

doubt that it will—citizens will find it increasingly difficult to exercise their First Amendment rights to free speech, as the fora where expressive activities are protected dwindle."). It would be unfortunate to allow this decision, with its substantial expansion of government's authority to limit speech in a traditional public forum, to stand as precedent without a studied review of its potential effect on the body politic.[3]

The majority opinion also inaccurately characterizes Berger as a troublemaker whose activities justify the Rules, e.g., Op. at 224, n. 22. These statements are based on claims by the City that are contested issues of fact. Such assertions have no place in the discussion of a facial challenge to a regulation. "Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court." ACLU II, 466

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[3] The shrinking of available public space and its effect on social discourse, public spirit, and civic identity has also been discussed widely in academic and popular literature. See, e.g., Shirley Kressel, Privatizing the Public Realm, New Democracy Newsletter, (July-August 1998); Jerold S. Kayden, Privately Owner Public Space: The New York City Experience, p. 348 (2000); Tridib Banerjee, The Future of Public Space, Journal of the American Planning Association (Winter 2001, Vol. 67 Issue 1, p.9); Don Mitchell, The Right to the City: Social Justice and the Fight for Public Space, Ch. 2 (2003), Lizabeth Cohen, A Consumer's Republic: The Politics of Mass Consumption in Postwar America, Ch. 6 (2003); Peter

F.3d at 791 (citing Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 958 (1984)).

GROUNDS FOR REHEARING

A. The Panel Majority's Opinion is in Direct Conflict With Holdings of this Court and Its Sister Courts of Appeals.

En banc consideration is appropriate where necessary to secure or maintain the uniformity of the court's decisions. FRAP 35(a)(1). Rehearing is also warranted where a panel opinion of the Ninth Circuit "directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity." Ninth Cir.R. 35-1. The panel's decision meets both criteria, because, as Judge Berzon notes in the dissent, "There is no case anywhere, as far as I can tell, approving a speech permitting scheme of this kind—that is, one applicable to single individuals and having nothing to do with allocating scarce public space among competing users." Op. at 247.

Marcuse, The Threats to Publicly Usable Space in a Time of Contraction, Public Space in the Time of Shrinkage (V.8, N.1, September 2003).

1. Conflict Within the Ninth Circuit—Permit Schemes Imposed on Small Groups

The panel majority's holding is in sharp conflict with Grossman v. City of Portland, 33 F.3d 1200 (9th Cir. 1994), which struck down an ordinance making it unlawful for any person "to conduct or participate in any organized entertainment, demonstration, or public gathering, or to make any address, in a park" without a permit. Id. at 1201. The panel ignores Grossman's admonition against any rule that could be read to preclude free speech activities by single individuals or small groups. While Grossman allows that "[s]ome type of permit requirement may be justified in the case of large groups," the opinion carefully analyzes the Portland statute and finds that it failed to limit its application to groups larger than the plaintiff's—a group of six to eight people. Id. at 1206. Compared to other cities' ordinances, which generally require permits for groups of 50 people or more, the Portland ordinance was far too broad. 33 F.3d at 1207, n.13. As Judge Berzon points out, this Court has "never countenanced the imposition of permits for individual speakers in public fora. Indeed, the possibility that the ordinance in Grossman could reach 'the actions of single protestors,' was one of the reasons we struck that ordinance down as unconstitutional." Op. at 254.

The majority of the panel attempts to distinguish Grossman by first noting that the Portland ordinance "imposed a 7-day waiting period for such permits"

while Seattle Center issues permits "routinely." Op. at 226. Even were that true,[4] Grossman holds that "[b]oth the procedural hurdle of filling out and submitting a written application, and the temporal hurdle of waiting for the permit to be granted may discourage potential speakers." 33 F.3d at 1206 (emphasis added). The panel opinion ignores the chilling effect of the application process itself: "Spontaneous expression, which is often the most effective kind of expression, is prohibited by the ordinance." Id. This is equally true of Seattle Center's speech registration scheme.

Second, the majority distinguishes Portland's invalidated ordinance from the instant case because "the Seattle Center's permit rule simply applies to street performances, designed to engage members of the public, which may lead to congestion problems or altercations with members of the public." Op. at 226. However, the statute in Grossman also applied to "entertainment." Grossman, 33 F.3d at 1201. In any event, the panel's underlying assumption that a performance can be neatly distinguished from speech activities is difficult to justify. Free

[4] In point of fact, the Portland law permitted the Parks Commissioner "up to seven days" to grant or deny a permit—there was no mandatory waiting period. Grossman, 33 F.3d at 1204. And examination of the record and the Seattle Center Rules themselves reveals no guarantee of an immediate issuance of a permit. Rather, the permit is issued "upon [the] Director's satisfaction that the information set forth in the application is true" and no time limit is imposed on the City. ER 51.

speech protections apply to art and entertainment every bit as much as they do political speech. United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 818 (2000). A great deal of protected speech may be embodied within a performance and separating the two is well-nigh impossible. The majority apparently concludes that street performance is somehow a lesser form of expression; the basis for this assumption cannot be found in precedent.

The majority also does not adhere to Grossman's proviso that a permitting system affecting speech must in fact promote the government's stated interests. 33 F.3d at 1207. Grossman noted that a group of 100 family members could meet at a park under the Portland ordinance, while a group of six people wearing anti-war t-shirts needed a permit. The disjunction between the burdens on speech and the City's stated interests of "safety and convenience of park users" precluded the conclusion that the ordinance was narrowly tailored. "In short, the ordinance did not simply burden speech; it discriminated against speech." 33 F.3d at 1207. And so it is with the Seattle Center's Rules, which on their face permit gatherings of 100 people without a permit while obliging a single individual, who happens to be singing, to obtain a permit. See Rule G.2.a.

Ultimately, however, the panel's majority opinion is inconsistent with Grossman's fundamental orientation, which correctly emphasizes the heavy

presumption against the constitutional validity of prior restraints on speech, particularly in public parks. 33 F.3d at 1204-05. Rather, the panel mines the case law and the record for phrases and claims that can be cobbled together to justify the restrictions. This difference in approach is encapsulated by the majority's approval of the City's claim that the park will not construe the ordinance to preclude "spontaneous singing or dancing" but only "performances aimed at attracting an audience." Op. at 226. In other words, the opinion approves of the City's newly-claimed intention to restrict speakers from addressing an audience, precisely the activity that this Court should be protecting.[5]

The opinion is also in conflict with Santa Monica Food Not Bombs v. Santa Monica, 450 F.3d 1022, 1039 (9th Cir. 2006) ("the significant governmental interest justifying the unusual step of requiring citizens to inform the government in advance of expressive activity has always been understood to arise only when large groups of people travel together on streets and sidewalks"), Rosen v. Port of Portland, 641 F.2d 1243, 1248-49, n. 8 (9th Cir. 1981) (rejecting a rule requiring

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[5] The majority's acceptance of the City Attorney's interpretation of the Rule is in itself error. While it "is common to consider a city's authoritative interpretation of its guidelines and ordinances . . . [to] affect the constitutional analysis, such a limiting construction must be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice," none of which

persons engaging in free speech activities at the airport to obtain a copy of Port regulations and fill out the requisite forms with the Port in advance and stating that even if the 24-hour notice requirement were justified for large groups, it sweeps too broadly in regulating small groups), and Gerritsen v. City of Los Angeles, 994 F.2d 570 (9th Cir. 1993) (invalidating permit scheme in public park because the entire park is a traditional public forum and the permit requirements did not serve a significant public interest).

2. Conflict within the Ninth Circuit—Requesting Donations

A second conflict arises with respect to the panel's approval of Campus Rule F.3.a. stating that "[n]o performer shall actively solicit donations, for example by live or recorded word of mouth, gesture, mechanical devices, or second parties." Op. at 230-231. The majority's reliance on Acorn v. City of Phoenix, 798 F.2d 1260 (9th Cir. 1986) is inapposite. Acorn upheld a city ordinance which prohibited solicitation from occupants of vehicles based upon the City's significant interest in preventing the hazards imposed by fundraisers approaching cars in traffic and having the occupants dig out change. Id. at 1268. Those considerations are not

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exist here. Santa Monica Food Not Bombs v. Santa Monica, 450 F.3d at 1035. See also Op. at 251-52 n. 4 (Berzon, J., dissenting).

present here. In addition, Acorn questions whether a street while in use by vehicular traffic is a "traditional public forum." Id. at 1267-68.

A more analogous case—and one in conflict with the panel's opinion—is ACLU II, 466 F.3d 784. In that case, as a response to "aggressive panhandling," Las Vegas prohibited asking for donations, begging, soliciting, or pleading, whether orally or written, in a five block area of the downtown core. ACLU II found the ordinance to be a content-based regulation because it discriminated based on content, triggering strict scrutiny. Id. at 794. The ordinance could not survive strict scrutiny because it was not narrowly drawn. Just like Rule F.3.a., the Las Vegas rule prohibited even peaceful solicitations and was therefore not "the least restrictive means of achieving the City's stated goal[] of protecting potential visitors from aggressive or intrusive solicitation." ACLU II, 466 F.3d at 797; see also Boos v. Barry, 485 U.S. 312, 321 (1988) ("content-based restriction on political speech in a public forum ... must be subjected to the most exacting scrutiny.").

3. Conflicts with Other Courts of Appeals

Judge Berzon's dissent highlighted the conflicting decision in Cox v. City of Charleston, 416 F.3d 281 (4th Cir. 2005), which she noted the majority "badly misreads." Slip Op. 254 & n. 6 (Berzon, J., dissenting). Among other things, Cox

held that the "unflinching application of [a permit requirement] to groups as small as two or three renders it constitutionally infirm." Cox, 416 F.3d at 285. In addition to Cox, the panel opinion conflicts with numerous decisions from other Courts of Appeals. See, e.g., Community for Creative Non-Violence v. Turner, 893 F.2d 1387, 1392 (D.C. Cir. 1990) (similar regulation failed the narrow tailoring test because it affected many incidents of free expression that posed little or no threat to the safety and convenience of persons in a public forum); Douglas v. Brownell, 88 F.3d 1511, 1524 (8th Cir.1996) (finding a parade permit ordinance not narrowly tailored because it applied to groups as small as ten persons); Knowles v. City of Waco, 462 F.3d 430, 435 (5th Cir. 2006) (permit requirement for groups of two or more is too small); American-Arab Anti Discrimination Committee v. City of Dearborn, 418 F.3d 600 (6th Cir. 2005) (same); Burk v. Augusta-Richmond County, 365 F.3d 1247, 1255 n. 13 (11th Cir. 2004) (permit requirement for groups of five or more too small); A Quaker Action Group v. Morton, 516 F.2d 717, 728 (D.C. Cir. 1975) (permit requirement for one or more is too small).

B. En Banc Review is Warranted Because the Panel Majority's "Captive Audience" Analysis Drastically Revises First Amendment Analysis.

This proceeding also involves a question of exceptional importance warranting review pursuant to FRAP 35(a)(2). For the first time, a circuit court has applied the "captive audience" rule to persons present in a public park. This decision conflicts with the decisions of other United States Courts of Appeals that have addressed the issue, and will lead to lack of uniform application of First Amendment protections across the nation. The opinion also introduces a troubling new concept into the law, one that is likely to lead to powerful restrictions on free speech in quintessentially public fora.

Rules G.4, C.12, and C.14 collectively effect a total ban on engaging in speech activities (including political speech) within thirty feet of any so-called "captive audience," any building entrance, or any person engaged in any scheduled event sponsored by the Seattle Center. Rule C.5 defines "Captive Audience" as any person who is waiting in line to obtain tickets, food, or other goods and services, or to attend any Seattle Center event, in audience at such an event or sitting where foods and beverages are consumed.

Relying upon Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), the panel justifies its approval of the "captive audience" rule by equating visitors to a

public park with riders in a streetcar. Lehman, however, did not involve a traditional public forum—indeed, the Court stressed that "[h]ere, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare." Id. at 303.

This Circuit has previously rejected the assertion that the government has a valid interest in "protecting" an audience outside a place of public entertainment "from unpopular speech." Kuba v. A-1 Agricultural Association, 387 F.3d 850, 861, n. 10 (9th Cir. 2004). Kuba notes that the Supreme Court has applied "captive audience" analysis only where the audience is particularly vulnerable or constricted. Id. Notwithstanding this Circuit and Supreme Court authority, the panel majority expands the "captive audience" exception to the point that it threatens large segments of established First Amendment jurisprudence. As noted by Judge Berzon:

> If a captive audience is to be found at the Seattle Center, such an audience could be found in just about any public park anywhere. For that matter, people walking down the street usually want to get where they are going; on the majority's rationale, they would be "captive" also, because they have no choice but to walk from here to there. Any such result would be deeply at odds with our law, as it would swallow entirely the broad protection of speech in public fora.

Op. at 262. Because the panel's "captive audience" analysis is a "radical rewrite of free speech law in public parks" (Op. at 259), the decision is in conflict with the

entire underlying premise of the First Amendment and public forum analysis: that people have the right to communicate and hear ideas, even objectionable ones, even in public parks, public sidewalks and the streets. This is where Justice Holmes' celebrated marketplace of ideas is held—a marketplace that until now was protected by these Courts from undue interference by the government.

Significantly, one group is excluded from Rule G.4—concessionaires who are licensed by the Center. Therefore, a person standing in line to purchase a movie ticket may be cajoled by a popcorn vendor, but may not hear the message of a citizen seeking petition signatures. The panel decision undermines the marketplace in favor of a sterile environment where the public has a new "right" to avoid being bothered by anyone other than commercial vendors. Standing Constitutional jurisprudence on its head, the panel majority sacrifices the First Amendment in service of a barren public square where only licensed merchants enjoy the right of free speech.

CONCLUSION

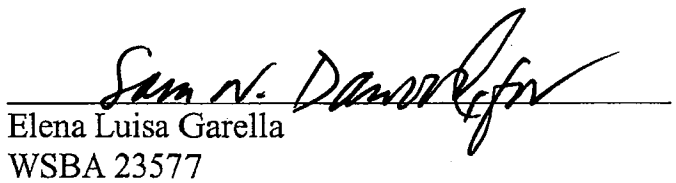
The freedom to put forth one's opinions and concerns in the marketplace of ideas is one of the most significant rights this country's citizens possess. The panel's opinion significantly limits those rights, particularly in the rapidly shrinking traditional public forum of the urban park. The decision is likely to

cause confusion (and potentially harm) because of its departure from prior Ninth Circuit and other federal decisions.

Berger respectfully requests that the Court grant the petition and rehear this case *en banc*.

Dated this 30th day of January, 2008.

LAW OFFICE OF ELENA LUISA GARELLA



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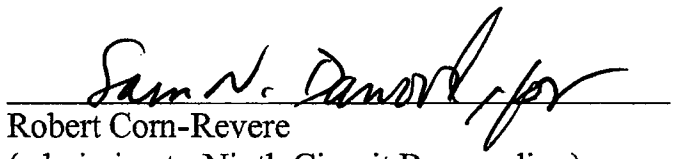


Robert Corn-Revere
(admission to Ninth Circuit Bar pending)

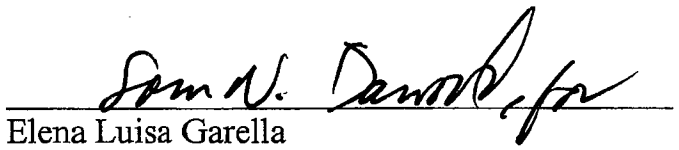
David M. Shapiro

DAVIS WRIGHT TREMAINE LLP
Attorneys for Appellee Berger

CERTIFICATION OF COMPLIANCE PURSUANT TO FED.R.APP. 32(c) AND CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rule 35-4 and 40-1, the attached Petition for Rehearing En Banc is proportionately spaced, has a typeface of 14 points or more and contains 4100 words.

DATED this 30th day of January, 2008.



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No. 05-35752

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL JAMES BERGER, A SINGLE MAN ALSO KNOWN AS MAGIC MIKE,
Plaintiff-Appellee,

v.

CITY OF SEATTLE; VIRGINIA ANDERSON, DIRECTOR OF SEATTLE CENTER; MICHAEL ANDERSON, EMERGENCY SERVICE MANAGER FOR SEATTLE CENTER; TEN UNKNOWN EMPLOYEES/OFFICERS, OF THE SEATTLE CENTER AND THE CITY OF SEATTLE, ALL IN BOTH THEIR INDIVIDUAL AND OFFICIAL CAPACITIES,
Defendants-Appellants,

On Petition for Panel Rehearing and Petition for Rehearing En Banc
Case No. 05-35752
Honorable Circuit Judges Diarmuid F. O'Scannlain & Marsha S. Berzon,
Honorable District Judge Sam E. Haddon

BRIEF OF AMICUS CURIAE THE ALLIANCE DEFENSE FUND IN SUPPORT OF PLAINTIFF-APPELLEE'S PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC, AND IN SUPPORT OF REVERSAL OF THE NINTH CIRCUIT'S PANEL RULING

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IDENTITY AND INTEREST OF AMICUS

The Alliance Defense Fund – The Alliance Defense Fund ("ADF") is a not-for-profit public interest legal organization providing strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom. Since its founding in 1994, ADF has played a role in many cases before this Court. Included in these cases are a significant number of free speech cases, such as *Gathright v. City of Portland*, 439 F.3d 573 (9th Cir. 2006), and *Lee v. Katz*, 276 F.3d 550 (9th Cir. 2002). Like the speech at issue in this case, religious speech can be controversial. As such, it is often the target of censorship in our Nation's public fora. Recognizing that this case will potentially have a profound impact on the landscape of speech rights in public fora, ADF is seeking to ensure that the freedom of expression and the opportunity for rigorous debate of controversial ideas—which are essential to our democratic system—are jealously guarded within our public ways and parks.

CONSENT OF ALL PARTIES TO AMICUS

Pursuant to Circuit Rule 29-2(a), all parties to this matter have consented to the filing of this amicus brief, confirmed by telephone call from Elena L. Garella, attorney for Plaintiff-Appellee, on February 7, 2008, and with Gary E. Keese, attorney for Defendants-Appellants, on February 5, 2008.

INTRODUCTION

In *Berger v. City of Seattle*, 2008 WL 80707 at *4 (9th Cir. Jan. 9, 2008), a panel of this Court held that an individual street performer must apply for and obtain a permit before speaking in the Seattle Center's traditional public forum. It also held that no person (except city employees and concessionaires) may engage in any speech activities in this forum within 30 feet of any building entrance, within 30 feet of persons engaged in any scheduled events, or even within 30 feet of persons in line for goods or services or persons seated at food and beverage locations. *Id.* at *14-15. These holdings are clearly contrary to previous rulings of the U.S. Supreme Court and this Court, as well as rulings of, at minimum, the Fourth, Fifth, Sixth, Eighth, and D.C. Circuits. These holdings must be reversed by this Court.

First, prior restraints to a traditional public forum violate the First Amendment when they apply to the speech of an individual or even a small group. "It is offensive—not only to the values protected by the First Amendment but to the very notion of a free society—that in the context of everyday public discourse a citizen must inform the government of her desire to speak to her neighbors and then obtain a permit to do so." *Watchtower Bible and Tract Society of New York, Inc., v. Village of Stratton*, 536 U.S. 150, 165-66 (2002).

Second, the captive audience doctrine does not apply in public parks or generally upon streets and sidewalks. "The ability of the government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California*, 403 U.S. 15, 21 (1971). Political and artistic speech are not "intolerable" in public parks. In fact, public parks are the very place for such speech, and the government may not restrict such speech therein.

ARGUMENT

I. Permit requirements for individuals or small groups of speakers in traditional public fora are unconstitutional prior restraints.

A three-part framework is used to evaluate the constitutionality of a restriction on free speech; first, it must be determined whether or not the speech is protected; second, the nature of the forum where the speech would take place must be identified; third, the government's restriction on the speech must be justified by the requisite standard. *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 797 (1985). The City of Seattle's permit requirement for street performers in a traditional public forum cannot stand because it is an unconstitutional prior restraint on speech.

a. Mr. Berger's speech is constitutionally protected.

Mr. Berger's desired expression, peacefully speaking, doing magic tricks, and creating balloon animals in a public park, is protected by the Constitution. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (finding "performances . . . consist[ing] of remarks by speakers, as well as rock music" to be protected speech); *United States v. Allen*, 341 F.3d 870, 877 (9th Cir. 2003) (public park "was a place for 'performances,' 'exhibitions,' and 'other sources of entertainment'"); *Dworkin v. Hustler Magazine, Inc.* 668 F. Supp. 1408, 1413 (C.D. Cal. 1987) (noting the "free speech rights of all comedy performers and humorists" (citing *Fisher v. Dees*, 794 F.2d 432, 440 (9th Cir. 1986))).

b. The Seattle Center is a traditional public forum.

Public parks, such as the Seattle Center, are quintessential traditional public fora. They have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (internal citation omitted) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). Public places historically associated with the free exercise of expressive activities, such as parks, are "considered without more, to be public forums." *United States v. Grace*, 461 U.S.

171, 177 (1983). As such, the government's capacity to limit expressive activities in these areas is severely limited. *Boos v. Barry*, 485 U.S. 312, 318 (1988).

c. Permit requirements on individuals or small groups of speakers in traditional public fora are invalid prior restraints.

Regulations requiring authorization from a public official before expressive activity may occur in an archetypical public forum are prior restraints on speech. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Since prior restraints censor speech before it occurs, there is a heavy presumption against their constitutionality. *Bantam Books v. Sullivan,* 372 U.S. 58, 70 (1963). This heavy presumption is "justified by the fact that 'prior restraints on speech . . . are the most serious and least tolerable infringement on First Amendment rights.'" *Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir. 1994) (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1975)). Seattle's permit requirement on street performers is an invalid prior restraint on speech because it is not a valid time, place, or manner restriction.

i. The permit requirement is not a valid time, place, or manner restriction.

To be a valid time, place, or manner restriction, a permit requirement must (i) be content-neutral, (ii) be narrowly tailored to serve a significant governmental interest, and (iii) leave open alterative channels of communication. *Ward*, 491 U.S. at 791; *ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1106 (9th Cir.

2003). Seattle's permit requirement on street performers fails this test in numerous ways. Even if the prior restraint is content-neutral, it serves no significant governmental interest, is not narrowly tailored to any interest asserted, and does not leave open alternative channels of communication.

1. The permit requirement fails even if it is content neutral.

Both the district court and this Court's panel considered the permit requirement to be content neutral. *See* Brief of Appellee, 2005 WL 4155589, at *9; *Berger*, 2008 WL 80707 at *4. Mr. Berger disputes this characterization, see Brief of Appellee, 2005 WL 4155589, at *9, but the permit requirement fails even under the scrutiny standard for content neutral restrictions.

2. The permit requirement is not narrowly tailored to serve a significant government interest.

In order to satisfy a requirement of narrow tailoring, a regulation must promote a "substantial government interest that would be achieved less effectively absent the regulation," but must not "burden more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799. Defendants cannot meet either of these standards. They have no legitimate interest in registering speakers, and the permit requirement is not narrowly tailored.

First, the government must proffer a substantial interest for its regulation. *Id.* In this case, however, there is no substantial government interest furthered by

the permit requirement. Defendants try to argue that they have an interest in maintaining the peace and order of the park. *See Berger*, 2008 WL 80707 at *4-5. The problem with this argument is that the permit requirement has nothing to do with maintaining peace and order in the park. It has "nothing to do with where or when the performance will occur," *id.* at *19 (Berzon, J., dissenting in part and concurring in part), and it "serves no discernible purpose whatever, other than to identify speakers to the government in advance of their speech." *Id.* at *17.

The permit requirement only allows the government to know the identity of potential street performers before they speak in the park. As cogently argued in Judge Berzon's dissent, there is simply no "coordination of use" purpose served by the requirement. A coordination of use purpose is one which seeks to coordinate speakers to improve or maintain peace and order in a public forum. *Id.* at *18. Defendants' permit requirement, however, serves no such purpose. It only forces speakers to register before speaking, to inform the government of the identity of potential street performers. "The 'purpose,' such as it is, is not a permissive governmental interest at all, much less a significant one." *Id.* at *19; *see Watchtower Bible and Tract Society*, 536 U.S. at 159-60 (upholding the right to speak anonymously).

Besides promoting a "substantial government interest that would be achieved less effectively absent the regulation," the restriction on speech also must

not "burden more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799. The *Berger* panel, however, held that only the first part of *Ward*'s mandate should be considered. *See Berger*, 2008 WL 80707 at *6, *13. But a court must move on to further analyze the burden of the restriction. A restriction is only narrowly tailored if it "targets and eliminates no more than the exact source of the evil it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (internal quotation and citation omitted). Otherwise, the regulation is under- or overbroad.

Defendants' permit requirement for street performers is not narrowly tailored. This and other circuit courts have repeatedly recognized that permit requirements on individual speakers or small groups violate the First Amendment. *See, e.g.*, *Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir. 1994); *Rosen v. Port of Portland,* 641 F.2d 1243, 1248 n.8 (9th Cir. 1981); *Cox v. City Charleston*, 416 F.3d 281, 285-86 (4th Cir. 2005); *Douglas v. Brownell*, 88 F.3d 1511, 1524 (8th Cir. 1996); *Cmty. For Creative Non-Violence v. Turner*, 893 F.2d 1387, 1392 (D.C. Cir. 1990); *see also American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005) ("Permit schemes and advance notice requirements that potentially apply to small groups are nearly always overly broad and lack narrow tailoring."); *Knowles v. City of Waco*, 462 F.3d 430, 436 (5th Cir. 2006) ("Other circuits have held, and we concur, that

ordinances requiring a permit for demonstrations by a handful of people are not narrowly tailored to serve a significant government interest.").

This Court in *Grossman* struck down a permit requirement for small groups carrying signs in a public park. 33 F.3d at 1206. This Court found that the permit requirement could be applied against even an individual speaker. *Id.* In advising the defendant city, however, this Court assured them that "[s]ome type of permit requirement *may* be justified in the case of *large groups*, where the burden placed on park facilities and the possibility of interference with other park users is more substantial." *Id.* (citation omitted) (second emphasis added). Thus, permit requirements can only be imposed on large groups of speakers in traditional public fora. *See, e.g., Thomas v. Chicago Park District*, 534 U.S. 316 (2002) (upholding permit requirement for events of more than 50 persons).

This Court recently echoed this important principle in *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1039 (9th Cir. 2006). "As the cautionary language in our earlier opinions indicates, the significant governmental interest justifying the unusual step of requiring citizens to inform the government in advance of expressive activity has always been understood to arise only when large groups of people travel together on streets and sidewalks." *Id.* (citing *Rosen* 641 F.2d at 1247; *Grossman,* 33 F.3d at 1206; *NAACP, Western Region v. City of Richmond,* 743 F.2d 1346, 1355 (9th Cir. 1984)).

Similarly, in *Cox*, the Fourth Circuit found that "ordinances are facially unconstitutional to the extent that they require small gatherings, including sole protestors, to obtain a permit before protesting in a public forum." 250 F.Supp. 2d at 591. Such an ordinance "sweeps too broadly and is not narrowly tailored to achieve the cities' safety interest." *Id.* at 590.

The District of Columbia Circuit, in *Turner*, struck down a permit scheme that applied to the "organized exercise" of free speech rights on Transit authority property. *Turner*, 893 F.2d at 1392. The court noted that the permit scheme could even affect "an individual's" speech or "two or more individuals speaking." *Id.* The court pointed out that while the defendant transit authority's state interests were achieved more effectively with the regulation than without it, the permit requirement also "restricts many incidents of free expression that pose little or no threat to [the government's] ability to provide safe and efficient transportation and an equitably available forum for public expression." *Id.*; *compare Berger*, 2008 WL 80707 at *6, *13 (holding that the only relevant question is whether the government interests were achieved more effectively with the regulation than without it). The *Turner* court found the permit requirement overbroad because a "substantial quantity of speech that does not impede [the government's] permissible goals." *Id.* Even where the defendants' interests were admirable, the permit requirement came at "too high a cost." *Id.*

The Eighth Circuit concurred in *Douglas* and struck down a permit requirement for parades of ten or more people. 88 F.3d at 1524. The *Douglas* court noted, "We entertain doubt whether applying the permit requirement to such a small group is sufficiently tied to the City's interest in protecting the safety and convenience of citizens who use the public sidewalks and streets." *Id.* While the court recognized that "some type of permit requirement *may* be justified in the case of large groups, where the burden placed on park facilities and the possibility of interference with other park users is more substantial," this same concern is not present when there is a small group or individual speaker. *Id.* at 1206.

The permit regulation at issue expressly applies to individual performers, who are constitutionally protected speakers in a public park. Even where governmental interests have been legitimate and laudable, these prior restraints have been stricken as not narrowly tailored. The government's illegitimate interest only weakens its argument.

The lack of narrow tailoring in this case is fueled by the regulation's overbreadth. The permit requirement applies to all street performers, even those who speech is, and has always been, peaceful. It therefore bans a large amount of protected speech. In addition, Defendants have other methods of dealing with the supposed threat of street performers, such as disorderly conduct, pedestrian interference, aggressive begging, and nuisance laws. Banning speech by one or

even a small group of individuals is not justified by the Defendants' claimed interests.

3. The permit requirement does not leave open alternative channels of communication.

In considering whether a regulation leaves open ample alternative channels of communication, the Supreme Court has generally upheld regulations which merely limit expressive activity to a specific part of the regulated area or to a limited time frame. *Turner*, 893 F.2d at 1393. But in contrast, Defendants' permit requirements at issue here completely exclude street performers wishing to speak in the Seattle Center. They must obtain a permit in order to speak at all. There are no Seattle Center areas *not* covered by the permit requirement. Thus, "there is no intra-forum alternative." *Id.* Defendants' permit requirement fails this final prong of prior restraint analysis, and is unconstitutional under the First Amendment as an unlawful prior restraint.

II. The captive audience doctrine is inapplicable in public parks.

The right to be free from unwanted speech "is far less important when strolling through Central Park than when in the confines of one's own home, or when persons are powerless to avoid it." *Hill v. Colorado*, 530 U.S. 703, 716 (2000) (internal quotation marks omitted) (quoting *Cohen v. California*, 403 U.S. 15, 21-22 (1971)). The captive audience doctrine, therefore, does not apply in public parks, and the panel of this Court erred in holding so.

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The captive audience doctrine is applicable only in limited circumstances, i.e., where people have no real choice but to be. This includes (i) schools, (ii) medical facilities, (iii) public transportation or vehicle registration venues, and (iv) private residences. In such places, people may legitimately be considered captive, if not literally, in some meaningful sense. The same is not true of persons voluntarily enjoying the traditional public forum of their local public park.

Judge Berzon states that "[p]ublic park-goers are not a protectable captive audience for constitutional purposes." In fact, public park-goers are the very opposite of captive audiences. They voluntarily show up and freely choose whether or not to engage in any recreational activities, to engage in any entertainment activities, or to patronize any businesses. They are not required to appear by law. *See Bethel School Dist. No. 403 v. Frazier*, 478 U.S. 675 (1986) (schools). They are not required to appear in order to get to work. *See Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (public transportation); *Avedisian v. Holcomb*, 853 F.Supp. 185 (E.D. Va. 1994) (lines to Dept. of Motor Vehicles). They are not required to appear or else resign medical health. See *Madsen v. Women's Health Center*, 512 U.S. 753 (1994). They are not required to appear or else give up the privacy of one's residence. *See Frisby v. Schultz*, 487 U.S. 474 (1988) (private residence); *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970) (mailing to private residence).

Likewise, the public has limited privacy interests in public parks, *see Hill*, 530 U.S. at 716, and the City of Seattle cannot meet its burden to restrict speech in this way. "The ability of the government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen*, 403 U.S. at 21. Having speakers nearby while one waits in line for tickets or enjoys one's lemonade at the park should not be considered intolerable. It is a far cry from hearing protestors continually outside one's own home. *See Frisby*, 487 U.S. 474. Especially in traditional public fora, the public must simply averts their eyes when confronted with speech that they disagree with. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 (1975). "The plain, if at times disquieting truth, is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, we are inescapably captive audiences for many purposes." *Id.* at 211.

Moreover, the fact that the city exempts concessionaires and licensees shows a preference for commercial speech, which is less protected than political and artistic speech. *See Berger*, 2008 WL 80707, at *23 (Berzon, J., dissenting in part and concurring in part).

CONCLUSION

"In short, the law is clear: Permits for speech in traditional public fora are

disfavored and may be upheld only when they are tailored to serve a coordination of use purpose . . . created by large groups of individuals engaging in First Amendment-protected activity." *Berger*, 2008 WL 80707 at *21 (Berzon, J., dissenting in part and concurring in part); *see Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1039 (9th Cir. 2006). A street performer is one individual, and a permit requirement on an individual speaker or a small group of speakers in a traditional public forum is an unconstitutional prior restraint.

In addition, the captive audience doctrine does not apply in public parks. The right to be free from unwanted speech "is far less important when strolling through Central Park than when in the confines of one's own home, or when persons are powerless to avoid it." *Hill v. Colorado*, 530 U.S. 703, 716 (2000).

Plaintiff-Appellee's Petition for Rehearing En Banc should be granted because public parks must be kept open for public debate, as the First Amendment requires.

Respectfully submitted this 8 th day of February, 2008.

Kevin Theriot

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To: **Panel and all active judges and any interested senior judges**

Re: **Brief of Amicus Curiae in support of Appellee's Petition for panel rehearing and petition for rehearing en banc**

05-35752 *Berger v. City of Seattle*

Opinion dated 2/11/08

Panel Judges: Honorable Diarmuid F. O'SCANNLAIN, Circuit Judge

Honorable Marsha S. BERZON, Circuit Judge

Honorable Sam E. Haddon, District Judge

Date circulated to the court: February 11, 2008

IMPORTANT:
All requests for 5.4 notice must be made within 21 days of the circulation date.

No. 05-35752

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL JAMES BERGER, a single man also known as "Magic Mike,"

Plaintiff-Appellee,

vs.

CITY OF SEATTLE; VIRGINIA ANDERSON, Director of Seattle Center; MICHAEL ANDERSON, Emergency Service Manager for Seattle Center; TEN UNKNOWN EMPLOYEES/OFFICERS, of the Seattle Center and the City of Seattle, all in both their individual and official capacities,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

District: No. C03-3238 JLR

The Honorable James L. Robart, District Judge

BRIEF *AMICUS CURIAE* OF AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington is a statewide non-partisan and non-profit organization with over 25,000 members, dedicated to preserving our nation's founding principles of civil liberties, including those embodied in the U.S. Constitution. From its inception, the ACLU has been a strong supporter of the freedom of expression and frequently appears before this Court as counsel for parties and as *amicus curiae*.

The ACLU submits this brief to encourage the Court to rehear this case *en banc* and reverse the majority's truly alarming opinion, which values silence over speech in our traditional public forums. Amicus ACLU concurs with the arguments in Mr. Berger's Petition for Rehearing *En Banc* and respectfully submits these additional observations about the need for *en banc* review. Both parties to this appeal have consented to the ACLU's submission of this brief.

I. INTRODUCTION

As Amicus ACLU finalizes this brief on February 8, 2008, presidential candidate Barack Obama will deliver a campaign speech at the 17,000-seat Key Arena in Seattle Center. Thousands of people will stand in line before the doors open. Radio and television crews are certain to be present. One would expect that this event, particularly in this public location, would be a prime setting for the exercise of one's First Amendment rights.

Those expectations would fall drastically short. Seattle Center regulations stifle substantial amounts of the discourse that may take place around that event. Senator Clinton's supporters may not hand leaflets to anyone waiting in line. They may not wave a sign or wear a campaign t-shirt within 30 feet of anyone waiting to enter. Senator McCain's supporters may not sing "Our Country" outside the event without a pre-arranged and pre-paid permit from Seattle Center. Anyone who engages in these forms of speech risks a five-day exclusion from the park, enforceable by criminal trespass laws. And yet, while no one may approach those waiting in line to persuade them to vote for someone else, licensed vendors may approach those same people and persuade them to buy a Seattle Center snow globe before heading inside.

These rules are hardly consistent with our First Amendment traditions regarding public parks, which the law treats as the quintessential public forum.

Our courts recognize that parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939). The majority's opinion upholding Seattle Center's drastic speech restrictions departs from this precedent and lends credence to wholesale bans on some of the most treasured forms of speech in our parks. The Court should rehear this appeal *en banc* and vacate this inconsistent decision.

II. ARGUMENT

This Court has long-recognized that our public parks have special status in the First Amendment context. *See Grossman v. City of Portland*, 33 F.3d 1200, 1204-05 (9th Cir. 1994) (internal citations omitted); *see also Gerritsen v. City of Los Angeles*, 994 F.2d 570, 576 (9th Cir. 1993) (recognizing parks as "quintessential public forums"). Accordingly, this Court has required the government to "bear an extraordinarily heavy burden to regulate speech in such locales." *N.A.A.C.P. v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984).

The City of Seattle has not come close to meeting this burden. The majority erred when it endorsed a set of constitutionally impermissible prior restraints and restrictions on protected speech in our public parks.

A. The Majority Opinion Only Applied Half of the Established "Narrow Tailoring" Standard.

From the outset, the majority opinion misinterprets the Supreme Court's narrow-tailoring standard, which applies in this case. The majority correctly observes that "[a] rule is narrowly tailored if it 'promotes a substantial government interest that would be achieved less effectively absent the regulation.'" Op. at 218 (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)). But *Albertini* provides only half of the standard. Time, place, or manner restrictions are not narrowly tailored if they "burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). In *Ward*, the Supreme Court explained that this limitation actually constitutes "the essence of narrow tailoring." *Id.* at 799 n.7. Thus, while a "regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative," the regulation must not be "substantially broader than necessary to achieve the government's interest." *Id.* at 800.

This Court has consistently weighed a regulation's burden on speech as part of its narrow-tailoring analysis. *See, e.g.*, *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1038 (9th Cir. 2006); *Menotti v. City of Seattle*, 409 F.3d 1113, 1130-31 (9th Cir. 2005); *United States v. Baugh*, 187 F.3d 1037, 1043 (9th Cir. 1999); *Grossman*, 33 F.3d at 1205. In contrast, the majority only considered Seattle Center's interests, with little or no consideration of the regulations' burdens on speech. *See* Op. at 218, 223-24, 238 (quoting *Albertini*, 472 U.S. at 689). As a result, the majority's analysis amounts to little more than rational basis review of the challenged regulations. *See Casey v. City of Newport*, 308 F.3d 106, 112 n.4 (1st Cir. 2002) (noting that the narrow-tailoring standard, without *Ward*'s qualifying language, "would be little more than a requirement that the regulation at issue be rationally related to the identified interest"). Our First Amendment traditions require scrutiny more exacting than a "rational basis" analysis, particularly in the context of a public park. The majority's departure from this tradition merits rehearing *en banc*.

Moreover, the majority's analytical error infects its entire opinion. For example, in its review of the City's ban on all speech activities within 30 feet of a "captive audience," the majority never considered the breadth of protected

speech that the ban proscribed. *See* Op. at 239-43. Similarly, in its review of the City's total ban on active solicitation, the majority does not consider the amount of protected speech that the solicitation ban burdens. Op. at 231-33. This method of analysis and the resulting decision are inconsistent with the standard applied by the Supreme Court, this Court, and every other Court of Appeals in the country.[1]

B. The Majority Opinion Dramatically Expands the Government's Ability to Silence Speech in the Name of a Captive Audience's Privacy Interests.

Seattle Center's Rule G.4 prohibits all "speech activities," defined to include both political and commercial speech, within 30 feet of any "captive audience," any building entrance, or any person "engaged in any scheduled event that is sponsored or co-sponsored by Seattle Center." Seattle Center

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[1] *See, e.g., Sullivan v. City of Augusta*, 511 F.3d 16, 33 n.8 (1st Cir. 2007); *Housing Works, Inc. v. Kerik*, 283 F.3d 471, 481 (2d Cir. 2002); *Ben Rich Trading, Inc. v. City of Vineland*, 126 F.3d 155, 163 (3d Cir. 1997); *Cox v. City of Charleston*, 416 F.3d 281, 284 (4th Cir. 2005); *Justice For All v. Faulkner*, 410 F.3d 760, 770 (5th Cir. 2005); *American-Arab Anti-Discrimination Comm'n v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005); *Weinberg v. City of Chicago*, 310 F.3d 1029, 1040 (7th Cir. 2002); *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1219 (8th Cir. 1998); *Wells v. City & County of Denver*, 257 F.3d 1132, 1148 (10th Cir. 2001); *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1318-19 (11th Cir. 2000); *Initiative & Referendum Inst. v. United States Postal Serv.*, 417 F.3d 1299, 1307 (D.C. Cir. 2005).

defines "captive audience" as any person or group "(1) waiting in line to obtain tickets or food or other goods or services, or to attend any Seattle Center event; (2) attending or being in an audience at any Seattle Center event; or (3) seated in any seating location where foods or beverages are consumed." Rule C.5.

In their remarkable breadth, these rules most closely resemble the rule in *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), which the Supreme Court unanimously struck down. The rule in that case declared that the entire Los Angeles airport terminal "is not open for First Amendment activities by any individual and/or entity." *Id.* at 570-71. Like that case, no saving construction is possible here. *Id.* at 575-76.

The majority opinion never considers whether this sweeping ban on close-range communication burdens substantially more speech than necessary. As the district court and Judge Berzon point out, the burdens these rules place on park users are substantial to the point of absurdity. For example, the "captive audience" rules require activists to cover their campaign buttons and t-shirts when approaching a food stall in the park. Protest songs must fall silent when anyone wishing to picnic comes within 30 feet. Local musicians may not distribute concert fliers to people waiting for a show at Seattle's annual

Bumbershoot music festival. Initiative proponents may not use picnic tables to gather signatures. The suppression of all this speech is unnecessary to prevent the "unwanted harangues and solicitations" that these rules purport to curtail.

The majority also greatly expanded the scope of the seldom-used, but much criticized, "captive audience" doctrine. No court has defined people waiting in line or picnicking as a "captive audience" whose interest in simply being left alone merits broad restrictions on speech.[2] Park users are not "captive" in either a physical or circumstantial sense. They can avert their eyes from a unwelcome performance, *see Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975), discard an unwanted leaflet, *see Con. Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. 530, 542 (1980), or simply choose not to go near a disagreeable speaker, *see Church of the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996) (citing *Lee v. Weisman*, 505 U.S. 577 (1992)).

The majority relies on *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), and *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), as

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[2] In an analogous situation, this Court previously rejected the notion that patrons in a place of entertainment merit "captive audience" protection. *See Kuba v. 1-A Agric. Assoc.*, 387 F.3d 850, 861 n.10 (9th Cir. 2004).

authority for this novel expansion of the captive audience doctrine. *See* Op. at 240. Neither supports the majority's analysis.

In *Lehman v. City of Shaker Heights*, the Supreme Court upheld a policy barring political advertising inside buses. 418 U.S. at 304. But the *Lehman* Court specifically distinguished advertising inside a bus from speech in traditional public forums, like public parks: "These situations are different from the traditional settings where First Amendment values inalterably prevail. . . . Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare." *Id.* at 302-03. The majority ignored this express distinction.

Madsen v. Women's Health Center is also inapposite. In that case, the Supreme Court reviewed a narrowly targeted injunction directed at activists with a history of physically impeding access to a medical facility. 512 U.S. at 759-61. "There are obvious differences . . . between an injunction and a generally applicable ordinance." *Id.* at 764. Unlike a case-specific injunction, this appeal involves a facial challenge to a Seattle Center rule that applies to far more people than Mr. Berger. The fact-specific reasoning in *Madsen* is unavailing in this context.

Unlike the majority's decision here, courts have consistently restrained efforts to expand the definition of a captive audience. "[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." *Erznoznik*, 422 U.S. at 209. The majority's effort to expand government power merits rehearing *en banc*.

C. The Majority Opinion Misapplies Settled Ninth Circuit Precedent to Uphold the Seattle Center's Sweeping Solicitation Ban.

The majority's incomplete narrow-tailoring analysis also results in the approval of a solicitation ban that fails constitutional standards. The Supreme Court has consistently recognized that requests for donations are constitutionally protected speech. *See, e.g., Schaumburg v. Citizens for Better Env't*, 444 U.S. 620, 633 (1980); *United States v. Kokinda*, 497 U.S. 720, 725 (1990). Seattle Center's rule prohibits all forms of active solicitation by performers: "No performer shall actively solicit donations, for example by live or recorded word of mouth, gesture, mechanical devices, or second parties." Rule F.3.a. The Court should rehear the active solicitation ban *en banc* because the majority opinion conflicts with Ninth Circuit precedent and justifies broad restrictions on expression in our public parks. On this point, amicus respectfully disagrees with Judge Berzon's reluctant acceptance that the

active solicitation ban passes muster because it applies to "only certain aggressive manners of donation requests, rather than requests for donations generally." Op. at 249 n.2.

1. The Ban on "Active Solicitation" Is Overbroad.

The City contends that Rule F.3.a. aims to address past complaints about "pushy or overbearing performers." Op. at 231. The plain language of the rule restricts far more than that. Rule F.3.a. encompasses *all* forms of active solicitation by *anyone* deemed a "street performer."[3] Moreover, the mere fact that some park visitors may have complained in the past should not justify broad prohibitions on an entire category of protected speech. Disorderly conduct and harassment laws are the traditional means to punish those who unlawfully accost others. *See, e.g.,* RCW 9A.84.030 (disorderly conduct); RCW 9A.46.020 (harassment). The City does not need to impose sweeping bans on all vocalized performer-requests for contributions to address its public safety concerns.

The majority incorrectly relies on *ACORN v. City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986), to sustain the overbreadth of Seattle Center's ban. In

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[3] Under Rule C.15, "street performer" includes anyone who sings, dances or otherwise engages in artistic expression at Seattle Center.

ACORN, the City of Phoenix enacted an ordinance to combat the specific practice of "tagging," in which individual solicitors step into the street and approach automobiles stopped at a red light. *Id.* at 1262. Phoenix enacted an ordinance prohibiting solicitation on a street or highway out of concern for traffic safety and flow. *Id.* The Court held that Phoenix's speech restriction was narrowly tailored because it prohibited only the specific form of solicitation (i.e., tagging) that was, by its very nature, disruptive to traffic flow and safety. *Id.* at 1268. Seattle Center's large-scale ban on active solicitation stands in stark contrast to Phoenix's targeted ban on particular conduct that directly implicated traffic safety.

Seattle Center's ban is more like the ban at issue in *American Civil Liberties Union of Nevada v. City of Las Vegas* ("*ACLU II*"), 466 F.3d 784 (9th Cir. 2006). That case involved a Las Vegas ordinance prohibiting solicitation at various locations throughout the city. *Id.* at 788. In striking down the ordinance, this Court commented that even a content-neutral solicitation ordinance is unconstitutional if it burdens substantially more speech than necessary:

> The record indicates that aggressive panhandling, solicitation, and handbilling were the problems confronted by the City. Yet the solicitation ordinance targets a substantial amount of constitutionally protected speech that is not the source of the

> "evils" it purports to combat. The ordinance would therefore fail the time, place, and manner test even if it were content-neutral.

Id. at 796 n.13 (citing and properly applying the *Ward* standard).

2. The Majority Opinion Does Not Properly Analyze Content-Neutrality.

In *ACLU II*, the Court concluded that Las Vegas' ordinance was content-based even though it was not enacted for the purpose of suppressing certain content. *Id.* at 796. The Court reached this conclusion because the ordinance required law enforcement officers to "evaluate the substantive content of a message to know whether the solicitation ordinance applies." *Id.* at 795-96 (noting that the ordinance did not ban the act of solicitation, but rather "prohibited messages that contain soliciting content").

Similarly, in *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136 (1998), this Court found an "off-premises canvassing" ban content-based. The ordinance at issue distinguished not only between commercial and non-commercial speech but also among different types of commercial speech:

> The Ordinance targets and restricts the distribution of material containing *some* commercial information. The Ordinance's ban against "off-premises canvassing" in the Las Vegas Resort District does not prohibit the distribution of handbills that contain no commercial advertising. As a result, an officer who seeks to enforce the Clark County Ordinance would need to examine the contents of the handbill to determine whether its distribution was prohibited.

Id. at 1145 (emphasis in original). In other words, this Court has consistently held that solicitation bans are content-based if they require law enforcement officers to make a content-based determination as to whether the ban applies.

The same applies at Seattle Center. Seattle police officers must analyze the substance of a street performer's message to determine whether it is permissible ("For my next trick, I will pull a rabbit out of my hat.") or if it is forbidden ("If you liked our show, please put a dollar in our case."). *See ACLU II*, 466 F.3d at 794 ("Even if [the] distinction is innocuous or eminently reasonable, it is still a content-based distinction because it 'singles out certain speech for differential treatment based on the idea expressed.'" (quoting *Foti v. City of Menlo Park*, 146 F.3d 629, 636 n.7 (9th Cir. 1998)). The City, by its own admission, is already making such content-based enforcement decisions. *See* Opening Br. at 31. This Court's precedent in *ACLU II* and *S.O.C.* holds that solicitation bans are not content-neutral if they require police officers to make enforcement decisions based on the performer's message. Yet the majority upheld a speech restriction that does exactly that. This decision should be reheard *en banc*.

III. CONCLUSION

The majority departed from this Court's precedent and upheld sweeping restrictions on expression in our public parks. For the reasons set forth in

Mr. Berger's Petition and above, the Court should rehear this appeal *en banc*, vacate the majority opinion, and issue a new opinion that affirms the trial court.

RESPECTFULLY SUBMITTED this 8th day of February, 2008.

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CERTIFICATE OF SERVICE

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No. 05-35752

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL JAMES BERGER, a single man also known as Magic Mike,

Plaintiff-Appellee,

vs.

CITY OF SEATTLE, et al.,

Defendants-Appellants,

CITY OF SEATTLE'S RESPONSE TO PETITION FOR REHEARING *EN BANC*

Date of Decision: January 9, 2008
Judges: O'Scannlain, Haddon, and Berzon

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I. INTRODUCTION

In attempting to meet the rigorous requirements for *en banc* review, Berger and his amici paint an alarming picture—a panel decision that will "virtually abolish free speech in the public park,"[1] and will result in a "barren public square."[2] Despite the alarmist rhetoric, the free speech sky is not falling.

The forty-four page majority decision: 1) carefully considers Seattle Center's substantial—and uncontested in the record—interests that underlie each of the challenged rules; and, 2) thoroughly and systematically applies the three-part time, place, and manner test, including the narrow-tailoring prong, to each challenged rule.

Berger and the amici ask this Court to instead trivialize or ignore the very real and uncontested interests at stake, to exaggerate the scope of the rules, and then to require a perfect fit between the two caricatures. That is not, nor should it be, the test for narrow tailoring.

A. Seattle Center's Overall Permit System.

Seattle Center (the Center), the site of the 1962 Seattle World's Fair, is an 84-acre campus that receives approximately 10 million visitors per year, about 85 % of which are there to attend particular attractions or

[1] Petition, p. 8.
[2] Petition, p. 21.

events.[3] After a two-year process, the Center adopted street performer rules as part of a larger regulatory system, the "Campus Rules", that governs a wide variety of activities on Center grounds.[4] The Campus Rules require permits for commercial sales,[5] for the use of amplification,[6] for the placement of equipment or the erection of structures,[7] and for gatherings of 100 or more people (including those that do not involve amplification or equipment).[8]

1. The Designated Locations Rule.

Before adopting the rules, Center security received three to four complaints per week by visitors, vendors, and other performers about territorial disputes among performers and about one per month about "pushy or overbearing" performers.[9] In order to reduce such complaints, the Center reserved sixteen locations for street performances on a first-come, first-served basis.[10]

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[3]ER 33-34.
[4]ER 35-6.
[5]Rule E.1, ER 48.
[6]Rule E.9, ER 49; and Rule G.2.b, ER 56.
[7]Rule E.4, E.10, ER 49; and Rule G.2.c, ER 56.
[8]Rule G.2.a, ER 56.
[9]ER 14.
[10]Rule F.5, ER 54-55. The Center originally proposed fourteen sites, but expanded that to sixteen at the request of performers. ER 36.

2. The Permit.

The five dollar annual street performer permit is not a typical government permit. The Center has no discretion to deny it, but rather issues it automatically upon receipt of a completed application.[11] A permitted street performer has preferential and automatic first-come, first served access to any available performance location.[12] The sixteen locations are more than adequate to handle the number of performers, even at peak times.[13] The permit and designated locations operate together as a form of "prior approval."[14] The Center neither knows nor cares about the content of the performance.

3. The Passive Solicitation Rule.

In order to reduce complaints that some performers (including Mr. Berger) were aggressively demanding "donations," the Center enacted the "passive solicitation" rule.[15] The rule expressly allows solicitation in

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[11]Rule F.1, ER 51.
[12]Rule F.5, ER 54.
[13] ER 15.
[14]Given that most, if not all, street performances involve the use of equipment (such as carts), they would require a permit even if the separate annual street performer permit did not exist.
[15]Rule F.3.a, ER 53.

conjunction with any performance, but simply requires it be done in a passive manner—for example, with the busker's traditional "hat and a sign."

4. The Captive Audience Rule.

Finally, in order to reduce complaints from Center visitors that others were approaching them with unwanted communications while they were standing in line for events, tickets, or food, the Center included in the Campus Rules a rule that prohibits speech activities within 30 feet of a captive audience.[16] The Campus Rules also prohibit speech activities within 30 feet of a doorway or a scheduled Center event. The rest of the 84-acre campus is open to speech activities without any permit required (unless of course the proposed activity includes commercial sales, amplified sound, or the placement of equipment on the campus grounds).[17]

B. The Panel Decision.

The Panel Decision carefully considered each time, place, and manner rule in light of the interests the Center identified, and concluded each was content neutral, narrowly tailored to serve substantial interests, and left open ample alternative channels of communication.[18] This is the system, and the decision, Berger claims will "abolish free speech in the public park."

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[16]Rule 4, ER 57.
[17]Rule G.1, ER 56.
[18] *Berger v. City of Seattle*, 512 F.3d 582 (9th Cir. 2008).

II. ARGUMENT

Berger and the amici claim the Decision misapplies narrow tailoring analysis to the rules. However, it is Berger and the amici who misapply the test. For example, they repeatedly insist that no permit requirement can, as a matter of law, ever be constitutionally applied to a single speaker in a public forum. They claim that the Decision conflicts with that rule. They are wrong on both counts.

A. Narrow Tailoring Analysis Requires a Case by Case Comparison of Means and Ends.

Their argument misses the central point of narrow tailoring—to conduct a case-by-case comparison of the particular means chosen to the specific interests the requirement is designed to serve. All of the narrow tailoring cases, including *Ward v. Rock Against Racism, Cox v. City of Charleston,* and *Grossman v. City of Portland,*[19] and the other Courts of Appeals cases cited by Berger and amici, stand for the same proposition. Narrow tailoring is necessarily an individualized inquiry—comparing the particular means chosen (exactly what conduct is being regulated?) to the particular interests those means are designed to achieve (why is that conduct being regulated?).

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[19] *Ward v. Rock Against Racism*, 491 U.S. 781(1989), *Cox v. City of Charleston*, 416 F.3d 281 (4th Cir. 2005), *Grossman v. City of Portland*, 33 F.3d 1200 (9th Cir. 1994).

None of those cases announce a *per se* rule requiring a minimum number of participants to require a permit. It all depends on exactly what conduct is being permitted and why. In *Ward*, for example, the regulation required event organizers to use city-approved sound equipment and a city-approved sound technician.[20] The City's interest was to prevent amplified sound from unnecessarily interfering with other park users. The requirement was sufficiently narrowly tailored because it furthered that interest and did not regulate substantially more conduct than necessary in order to do so.

Berger and amici claim the Decision does not apply half of the *Ward* test.[21] However, the Decision devotes considerable analysis to exactly that consideration – whether each rule is substantially overinclusive compared to the interests it serves.[22]

B. The Permit Rule.

1. The Permit Rule Applies Only To Conduct Aimed At Attracting An Audience, And Not To Spontaneous Expression.

The permit rule was never intended to apply to an individual engaging in spontaneous expression. The City said so at oral argument. The Decision correctly applied a limiting construction. "We read the rule to apply only to

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[20] *Ward* at 781.

[21] For example, ACLU amicus at 3-4.

[22] *Berger* at 593-597 (the permit rule); at 598-599 (the permit display rule); at 599-600 (the solicitation rule); and at 601-604 (the captive audience rule).

conduct aimed at attracting an audience – the sort of conduct that the city cites as the source of its concern."[23] The limiting construction makes it clear that the permit rule does not apply to spontaneous protest songs or to "dancing in the streets."[24]

2. Berger Ignores a Primary Interest Underlying the Permit Rule.

The Dissent, Berger, and the amici completely ignore some of the Center's primary interests that underlie the permit rule, including reducing complaints about territorial disputes among performers. The interest in reducing territorial disputes is unrelated to the size of prospective gatherings and is implicated even before any performance begins. By creating a system of permits and first-come, first-served designated sites, the system is narrowly tailored to prevent disputes among performers vying for premium high-traffic locations before the conflict among users arises.

Requiring performers to obtain and display the annual permit facilitates the ability of Center users, including street performers, to self-manage otherwise potentially problematic disputes. Visitors, vendors, and other performers are readily aware whether a performer has a valid

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[23] *Berger at 587.*

[24] The Center has not enforced the challenged rules, including the permit rule, since the District Court decision. As of the date of this brief, The Center is in the process of amending the Rules to formally include the limiting language in Rule F.1, the permit rule.

performance permit, and therefore has priority at a particular location. The Dissent, Berger, and amici simply ignore that important interest.

3. The Cases Do Not Say That A Permit Requirement May Never be Applied to a Single Speaker or a Small Group in a Traditional Public Forum.

None of the cases set a *per se* minimum number for a permit requirement—again because it depends on exactly what the individual or small group is doing and why the government is seeking to regulate that conduct. For example, a parade implicates different interests than a performance. In a parade, the likely number and location of the marchers is what affects the interest—protecting public safety. In a performance, on the other hand, the potential audience is a factor that affects the government's legitimate interest, not the number of performers.

Berger and the amici do not even mention *Thomas v. Chicago Park District,* the Supreme Court's most recent teaching on permit systems. Significantly, the Chicago permit system upheld in *Thomas* included, for example, a permit requirement to use amplified sound. Chicago Park Dist.Code, ch. VII, §§ C.3.a(1), C.3.a(6) required a permit to "...conduct a public assembly, parade, picnic, or other event involving more than fifty individuals,' or engage in an activity such as 'creat[ing] or emit[ting] any

Amplified Sound."[25] The interests involved in regulating amplified sound, like the interests in regulating street performances aimed at attracting an audience, are unrelated to the number of speakers.

A permit system that required all users, even individual speakers, to obtain a permit to use amplified sound would be analyzed under the *Thomas* and *Ward* time, place, and manner test. The narrow tailoring prong would compare the means to the interests (coordinating uses so that amplified sound does not unnecessarily disturb other users, for example).[26]

It is hardly a preordained outcome that the Supreme Court would find such a requirement failed the narrow tailoring test. Indeed, the amplification requirements in *Ward* and the permit system in *Thomas* both appear on their face to apply to all amplification, regardless of the number of speakers. As the Decision explains, the number of performers is not crucial in analyzing the Center's interests regarding conduct aimed at gathering an audience—"the size of the affected group of speakers is not dispositive."[27]

In *Grossman*, the Portland ordinance required a permit in order to

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[25] *Thomas v. Chicago Park District*, 534 U.S. 318, 319 (2002).
[26] Nothing in *Thomas* or *Ward* suggests that such a content neutral permit requirement for amplified sound could not as a matter of law be constitutionally applied to small groups or even to individual speakers, so long as it was narrowly tailored to substantial interests and left open adequate alternative channels of communication.
[27] *Berger* at 591 n.11.

participate in any organized entertainment, demonstration, or public gathering in a park.[28] Portland's stated interest was "protect 'the safety and convenience' of park users."[29] That interest is related to the number of people who gather—not the number who directly participate. Since a very small group of demonstrators or individuals holding signs would not significantly impact the interest, requiring them to obtain a permit was unconstitutionally overinclusive.

In *Cox*, the Fourth Circuit carefully compared the means Charleston chose (requiring a permit for any "parade, exhibition, assembly, or procession") with Charleston's asserted interest (protecting public safety).[30] The Fourth Circuit correctly found the ordinance was not sufficiently narrowly tailored to serve the public safety interest. It was substantially overinclusive because it purported to regulate even a two-person parade on the public sidewalk—conduct that would not implicate public safety.[31]

4. The Decision Correctly Applies Narrow Tailoring.

The Decision carefully distinguished both the Charleston ordinance in *Cox* and the Portland ordinance in *Grossman* from the Center's permit Rule F.1 on precisely that basis—its tailoring to the particular interests it serves.

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[28] *Grossman* at 1201.
[29] *Id.* at 1204.
[30] *Cox* at 284-6.
[31] *Id.* at 284-5.

The Decision's limiting construction makes it clear that the scope of the permit rule is limited to "conduct aimed at attracting an audience" and therefore to conduct that implicates the Center's legitimate interests in regulating crowds. "In light of those interests, and the limited scope of the restriction, we are satisfied that Rule F.1is narrowly tailored to significant government interests and avoids the constitutional infirmities discerned in Portland's overbroad licensing scheme in *Grossman*."[32]

The *Cox* court also expressly recognized that there is not, nor could there be, a magic constitutional numerical floor given the multitude of possible interests a government may legitimately take into account.

> Although we affirm the decision of the district court that the Ordinance is facially unconstitutional to the extent that it applies to small groups, we decline Cox's invitation to announce a numerical floor below which a permit requirement cannot apply. The relevant legislative body (the city council here) is the proper forum for balancing the multitude of factors to be considered in determining how to keep the streets and sidewalks of a city safe, orderly, and accessible in a manner consistent with the First Amendment.[33]

The record in this case demonstrates that the Center, in balancing the multitude of factors to be considered, developed a permit requirement and a designated site system that do not regulate street performing substantially more than necessary to address the Center's significant and uncontested

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[32] *Berger* at 597.
[33] *Cox,* at 286.

interest in reducing territorial disputes and in clarifying and coordinating potentially competing uses.

5. The Decision Does Not Conflict With Any Of The Other Court Of Appeals Cases Cited By Berger Or Amici.

None of the other cases cited by Berger or amici conflict with the Decision either. All are readily distinguishable. The rule at issue in *Burk v. Augusta-Richmond County*, for example, was content-based and failed the strict scrutiny test that therefore applied. It did not even involve a content neutral time, place, or manner regulation.[34] The National Park Service permit requirement in *A Quaker Action Group v. Morton* purported to apply to "all public gatherings." Interestingly enough in light of Berger's complaints about this Court's limiting construction of the permit rule, the *Morton* Court sustained the permit system on the condition that the Park Service adopt narrowing implementing regulations.[35]

The city ordinance in *American-Arab Anti Discrimination Committee v. City of Dearborn* was a 30-day advance parade application requirement that purported to apply to "any group with a common purpose or goal." Not surprisingly, the Court found the 30-day advance requirement was overbroad

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[34] *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1255 (11th Cir. 2004).
[35] *A Quaker Action Group v. Morton*, 516 F.2d 717, 728 (D.C. Cir. 1975).

to the extent it applied to very small parades, which did not raise the same necessity for advance planning by the City.[36]

The criminal ordinance in *Knowles v. City of Waco* prohibited "street activity" and "parades" within school zones during designated times. The Court found the ordinance would apply to a two-person parade and was therefore overbroad when compared with the City of Waco's legitimate interests in protecting school children, etc.[37]

The transit agency permit requirement in *Community For Creative Non-Violence v. Turner* applied to "any organized exercise of rights and privileges which deal with political, religious or social matters."[38] The Court found that requirement was overbroad because small groups of participants in an "organized exercise of rights…" did not implicate the agency's legitimate interests.

And the five-day advance application notice requirement in the parade ordinance in *Douglas v. Brownell* was overbroad since it applied to small

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[36] *American-Arab Anti Discrimination Committee v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005).
[37] *Knowles v. City of Waco*, 462 F.3d 430,(5th Cir. 2006).
[38] *Community For Creative Non-Violence v. Turner*, 893 F.2d 1387 (D.C. Cir. 1990)

groups that would not implicate the city's legitimate interests in requiring advance notice in order to plan for parades.[39]

Nothing in any of these cases creates any *per se* rule about minimum numbers for any permit requirement regardless of the issue involved in the particular permit system. All are distinguishable from the Center's street performance permit rule. The Center's interests in preventing territorial disputes and in encouraging users to coordinate their uses are unrelated to the number of performers.

6. Narrow Tailoring Does Not Require the Means Chosen be the Least Restrictive Alternative.

Berger's real complaint is that the Decision does not require the Center to adopt the least restrictive means imaginable. However, the government is not required to pursue the "least restrictive alternative" available. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest...the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."[40]

While a rule could hypothetically require a permit only if and when a performer successfully gathers an audience of a certain size, such a system

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[39] *Douglas v. Brownell*, 88 F.3d 1511 (8th Cir. 1996)
[40] *Ward* at 800.

would be wholly impractical and, more importantly for narrow tailoring purposes, be exactly the type of "least restrictive alternative" that is not constitutionally required.

C. Berger Also Misapplies the Narrow Tailoring Test to the Solicitation Rule.

Berger and his amici also mischaracterize the solicitation rule and the associated cases. The plain language of the provision regulates only the "manner," not the content, of solicitations. They ignore that crucial element of the provision, claiming the Decision therefore conflicts with *ACLU of Nevada v. City of Las Vegas (ACLU II)*[41]

But *ACLU II* involved an area-wide ban on all solicitation—not just a "manner" regulation like the Center rule. Calling the Center's manner rule a "ban," as Berger repeatedly does, simply does not make it so. Again, the Decision got it right. The Majority Decision and the Dissent agreed—a manner regulation such as this one is content neutral, is narrowly tailored to support the Center's substantial and undisputed interest in reducing aggressive solicitation, and leaves open the alternative channel of solicitation by passive means.

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[41] *ACLU of Nevada v. City of Las Vegas (ACLU II) 466 F.3d 784 (9th Cir. 2006).*

Berger and amici would again require a perfect fit—i.e. a rule that regulates only overly aggressive solicitation. Requiring such a perfect fit would in effect preclude effective regulation, since how could a rule (and these are administrative rules, not criminal statutes) be drafted to apply only to overly "aggressive" solicitations.[42]

That is precisely why the manner test requires "narrow tailoring" and not perfection or adoption of the least restrictive alternatives. The passive solicitation rule is narrowly tailored because it targets the problematic conduct—aggressive solicitation—in a practical way while allowing expression of the exact same message (i.e. "please donate") when communicated in a manner that does not raise the same problems.

D. In Evaluating the Captive Audience Rule, Berger and the Amici Again Misapply the Test for Unconstitutional Overinclusiveness.

Berger also mischaracterizes both the plain language of the "active audience" time, place, and manner limitation and the Decision's construction of that language. The rule is a "place" regulation similar to the ones that limit speech activities within 30 feet of an entranceway.

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[42] The record shows that Center officials received a complaint that a young child was reduced to tears when Mr. Berger complained that his "donation" was insufficient. ER 32. It is unclear how a manner regulation could both reach that conduct and meet Berger's idea of narrow tailoring.

Berger quotes the Dissent to the effect that the captive audience rule could apply even to people walking through a park.[43] The Dissent's claims ignore the plain wording of the rule. People walking through the Center to attend events are simply not within the captive audience rule. Nor is there any "floating bubble" zone around pedestrians, since by definition the rule does not apply to anyone that is moving through the Center grounds.

The captive audience rule applies only to the narrow circumstances where visitors cannot move without losing access to the services they are there to receive. The primary factor in determining whether a person is "captive" is whether the person has a free choice to avoid the message, or whether he or she must choose between listening at close range to an unwanted message or foregoing services the person is standing in line to receive.

Berger also mischaracterizes the "captive audience" cases. Berger claims that the Supreme Court's reasoning in *Lehman v. City of Shaker Heights* applies only to a limited public forum such as the busses at issue in the case. *Lehman* simply does not say that people can never be a captive audience in a traditional public forum.[44]

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[43] Petition, at 20, quoting *Berger*, at 617

[44] *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

Berger also claims that *Kuba v. A-1 Agricultural Association* precludes any captive audience rule in a traditional public forum as a matter of law. *Kuba* says no such thing. The case does say that the facts in that case did not support the Cow Palace's claim that people walking through a parking lot to attend an event qualified as a captive audience.[45]

A captive audience rule, like any other time, place, or manner regulation in a traditional public forum, must meet the applicable test. The Decision carefully analyzed the Center's rule and underlying interests, distinguished *Kuba* on the facts, and correctly concluded the rule was narrowly tailored and left open alternative channels of communication.[46]

Berger also misapplies the analysis for underinclusiveness. Berger argues that the captive audience rule is unconstitutional because it does not apply to Seattle Center employees and licensed concessionaires. First, Berger and amici exaggerate the scope of the limited exception for licensed concessionaires. Amici ACLU, for example, claims the exception allows commercial vendors to engage in commercial speech within 30 feet of captive audiences.[47] However, as we have seen, commercial activity

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[45] *Kuba v.A-1 Agricultural Association*, 387 F.3d 850 (9th Cir. 2004).
[46] *Berger* at 604-606.
[47] ACLU Amicus Brief, p 4.

requires a separate permit. There is no evidence that the Center has ever issued a permit for commercial speech within 30 feet of captive audiences.

Berger also misapplies the underinclusiveness test. The test for unconstitutional underinclusiveness is very different from the one for overinclusiveness. Government need not regulate all sources of a particular evil in order to regulate any. Thus, a limitation is unconstitutionally under-inclusive only if it is so underinclusive that it either: a) suggests the government is actually targeting the covered expression because of its viewpoint; or, b) undermines the government's claim that it is genuinely concerned about that interest.

There is absolutely no evidence that either situation applies here. Berger and the amici simply assume that the Center employees' and concessionaires' communications with visitors have raised the same problems as private parties trapping captive audiences. There is absolutely no evidence in the record to support that assumption. There is also no evidence whatsoever that it was adopted in order to target any speech on the basis of viewpoint or that the exception for government speech undermines the rationale for the rule. The complaints the Center received were exclusively about private speakers—neither government speakers nor

licensed concessionaires.[48] The record on both points is uncontested—there is no evidence of any invidious viewpoint based motivation and, therefore, the rule is not unconstitutionally underinclusive.

III. CONCLUSION

En Banc review is the exception, not the rule. Berger has failed to meet the exacting standard. The Decision follows established Supreme Court and Ninth Circuit precedent, does not conflict with decisions of any other circuit, and properly applies the narrow tailoring test to all the challenged Center rules. The Petition for Rehearing En Banc should be denied.

DATED this 26th day of February, 2008.

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[48] ER 14.