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Mr. Victor Bolden
Corporation Counsel
City of New Haven
165 Church Street
New Haven, CT 06510

Dear Mr. Bolden,

I very much appreciate your timely and detailed response to the concerns I raised in my previous letter. The City's good intentions in maintaining the Green as a vibrant public forum have never been in doubt; your careful consideration of my letter only underscores that fact.

Still, I remain convinced that the ordinances you have proposed raise serious constitutional concerns—concerns that your letter defending the ordinances largely fails to address.

First, and importantly: Judge Kravitz's opinion in *Mitchell v. City of New Haven* **did <u>not</u> find that the City's rules governing the Green were constitutional**. As the passage you quoted from *Mitchell* makes clear, what passed constitutional muster was the "City's rules … *as established and clarified through longstanding practice.*" *Mitchell* emphasized that "[t]he language of the City's Ordinances and the Proprietors' Regulations, standing alone, would not provide anything close to enough guidance to survive a First Amendment challenge." What saved the City in *Mitchell* was not the language of its ordinances, but the fact that, in Judge Kravitz's words, the City's "actual practice—at least according to the evidence [then] before the Court—[was] remarkably constrained." *Cf. MacDonald v. Safir*, 206 F.3d 183, 191 (2d Cir. 2000) (Calabresi, J.) (citing *Forsyth County* for the proposition that courts are "required … to consider the well-established practice of the authority enforcing the ordinance"). Despite the vague language of the ordinances—and the murky question of whether they even applied to the Green—the record before Judge Kravitz indicated that the City's Parks Director had never made use of the broad discretion given him. Instead, he had denied permit applications only when some other group had requested use of the same space at the same time.

Thus, while you are quite right to say that "Judge Kravitz did not find that the City violated the First Amendment" and that he "ruled in the City's favor," it is wrong to characterize (as you twice do) the City's *rules themselves* as "constitutionally acceptable." They were and are not. The question, then, is whether the proposed amendments remedy the current rules' constitutional infirmities. In regard to the provisions regarding fees and indemnity bonds, the answer, unfortunately but clearly, is that they do not.

Turning to the fee provision: your letter notes, quite rightly, that *Forsyth County* expressed a concern with one particular form of discretion—an administrator's ability to decide whether to charge fees at all. Your proposed ordinances would remove such discretion. But *Forsyth County*

also addressed another, equally important form of discretion; in fact, your own quotation from that case begins with it. This is discretion over "how much to charge for police protection." Your proposed ordinances do little to constrain the Park Director's discretion over that determination. Worse, they allow—or perhaps require!—the Park Director to **decide how much to charge applicants based on content-discriminatory judgments about the communicative impact of their intended speech**. Section II.B of *Forsyth County* describes why this is unconstitutional.

Sidestepping that part of the opinion, your letter argues that the proposed ordinances satisfy *Forsyth County* (and *Transportation Alternatives*) because they require the Director to explain permit denials in writing and provide an appeals procedure. Yet this misses the point. The constitutional worry, both mine and that of the Supreme Court in *Forsyth County*, is not that permits will be denied without stated reasons. It is that they will be approved subject to fees, set at the discretion of the Director, that are based on impermissible criteria. As currently proposed, the ordinances allow (or require) the Director to charge certain speakers more for police protection and cleanup simply because they may wish "to express views unpopular with bottle throwers." *Forsyth County*, 505 U.S. at 134. These are costs "associated with the public's reaction to the speech," *id.*—what I referred to in my previous letter as the "communicative impact" of expression. Yet the Supreme Court could not have been clearer on this point: **"Listeners' reaction to speech is not a content-neutral basis for regulation."** *Id.*

The ordinances requiring an indemnity bond suffer the same constitutional defect. (In addition, by removing any discretion to offer a waiver based on the application's ability to pay—a form of discretion that likely *would be* content-neutral—the City may well cripple the ability of controversial but poorly-resourced speakers to use the Green.) Here again, the important point is not whether the Director may or must impose a cost on speech. The point is that the cost to be imposed remains both discretionary and content-discriminatory. Practically speaking, you have proposed changing the law from "The Director *may* employ unconstitutional discretion" to "The Director *must* employ unconstitutional discretion." That is not an improvement.

I note in passing that *Thomas v. Chicago Park District* does nothing to alter the point just made, for in *Thomas*, applicants were not charged fees based on the communicative impact of their speech. To repeat: my constitutional worry is not that permits are required to use the Green, or that the Director has too much leeway in denying such permits. The problem is that, to get a permit, applicants will be required pay fees that vary based on how controversial their speech is expected to be. This was not at issue in *Thomas*, where, as you say, the picnicker and political activist were both treated alike.

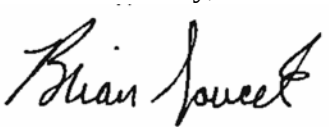
As for the concern I raised about commercial activity on the Green, let me be clear: mine was a prudential worry, not primarily a constitutional one. The concern I expressed was that a content-neutral, flat ban on "the sale or marketing of any goods or services," would presumably disallow the ads that have traditionally flanked the Arts and Ideas Festival stage. On the other hand, if the proposed limitation on marketing is *not* a flat ban, then I cannot see how decisions about what marketing to allow could possibly remain content-neutral.

I share your expectation that the City of New Haven will continue its "'longstanding practice' of respecting First Amendment rights" on the Green. The worries I have raised are not about the City's practice, however, but about the text of its ordinances. And while I welcome your attempt

to improve the ordinances—as Judge Kravitz encouraged you to do in *Mitchell*—I remain convinced that the changes currently proposed raise serious constitutional problems of their own.

I hope this letter clarifies the worries I raised previously. If not, I look forward to speaking with you by phone in order to continue this discussion. Your assistant is welcome to contact me at bsoucek@ucdavis.edu to find a convenient time.

Most sincerely,



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cc: Hon. Jorge Perez, President, Board of Aldermen
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[*] Title and affiliation given for identification purposes only. The views here are mine, not those of the University of California or the UC Davis School of Law.