Nos. 91-155, 91-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and BRIAN RUMBAUGH,
Petitioners and Cross-Respondents,

v.

WALTER LEE,
Respondent and Cross-Petitioner.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

BARRY A. FISHER
Counsel of Record
DAVID GROSZ
ROBERT C. MOEST
FLEISHMAN, FISHER & MOEST
2049 Century Park E.
Suite 3160
Los Angeles, CA 90067
(310) 557-1077

DAVID M. LIBERMAN
2049 Century Park E.
Suite 3160
Los Angeles, CA 90067
(310) 277-9288

JAY ALAN SEKULOW
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, DC 20007
(202) 337-2273

JEREMIAH S. GUTMAN
EUGENE N. HARLEY
LEVY, GUTMAN, GOLDBERG & KAPLAN
275 Seventh Ave., Suite 1776
New York, NY 10001
(212) 807-0733

Counsel for Petitioners and Cross-Respondents

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REPLY BRIEF

INTRODUCTION

Airport terminals are public thoroughfares that echo the commercial and social centers of their communities. For the Nation and more than a billion travelers a year, airports are a vital crossroads, meeting place, market place and gateway. They ought to remain available for the promulgation and exchange of ideas.

The Port's resolution bans traditional modes of expression—literature distribution and solicitation of contributions. The opposite of narrow tailoring, it cannot withstand scrutiny.

Unable to deny the essential similarities between air terminals and busy urban thoroughfares, the Port resorts to defining the airports' "purpose" expediently, to include what it wants and to exclude distribution and solicitation. The New York terminals are, even in the Port's view, places bustling with activity. These characteristics, typical of the city's streets, reinforce, not detract from, the terminals' forum status.

This case does not involve security areas or places used for ticketing or baggage. Rather, petitioners seek access only to areas where travelers and non-travelers are encouraged to spend time. Petitioners have been in the New York airports for more than seventeen years, under an arrangement made months before this action was filed in 1975. During that time, no traveler has missed a flight because of a momentary pause to examine a religious book or make a voluntary contribution to Krishna consciousness. The court below erred in upholding any part of the Port's prohibition.

ARGUMENT

I. THE CHARACTERISTICS AND USE OF AIR TERMINALS MAKE CLEAR THAT THEY ARE PUBLIC FORA.

A. The Claim of Restriction to "Travel-Related Purposes" Does Not Defeat Forum Status.

The linchpin of the Port Authority's position is that the public spaces of the three New York airports "are not public fora because their sole purpose is the facilitation of safe, efficient and convenient air travel, *not* public assembly and debate." Resp. Br. 29 (emphasis in the original). For several reasons, the premise cannot stand.

First, a traditional forum is not defined by its "purpose." A few months after *Hague v. CIO*, 307 U.S. 496 (1939), the Court recognized what was in any event plain—that "the primary purpose to which streets are dedicated" is "the movement of people and property," *Schneider v. State*, 308 U.S. 147, 160 (1939). In *Hague* itself, the district court had found "no competent proof that the parks of Jersey City are dedicated to any general purpose other than the recreation of the public." 307 U.S. at 505.

The Port Authority's logic, moreover, confuses traditional with designated fora. It is the latter that can be said to have an expressive "purpose." Traditional fora, on the other hand, are defined by their character and use.

The Port attempts to separate the "purpose" of a forum from its physical characteristics and use, making the former dispositive of its public or nonpublic status. The determination of a forum's purpose cannot be made in a vacuum, but "must be assessed in light of the characteristic nature and function of the particular forum involved," *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 650-51 (1981), and the uses to which it is put. "If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case." *United States v. Kokinda*, 110 S. Ct. 3115, 3125 (1990) (Kennedy, J., concurring in the judgment).

The Port asserts that "it is undisputed that persons use Port Authority airports only for travel-related purposes." Resp. Br. 23 (footnote omitted). Just as " 'Congress . . . may not by its own *ipse dixit* destroy the "public forum" status of streets and parks which have historically been public forums,' " *United States v. Grace*, 461 U.S. 171, 180 (1983), the Port Authority may not remove the airports from the public forum category by labeling whatever goes on in them as "travel-related."

In *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), the Court rejected the Los Angeles airport's analogous argument that the overbreadth of its ban on "First Amendment activities" could be eliminated by construing it to affect only non-"airport-related purposes," *id.* at 576.

> The line between airport-related speech and nonairport-related speech is, at best, murky. The petitioners, for example, suggest that an individual who reads a newspaper or converses with a neighbor at LAX is engaged in permitted "airport-related" activity because reading or conversing permits the traveling public to "pass the time" . . . . We presume, however, that petitioners would not so categorize the activities of a member of a religious or political organization who decides to "pass the time" by distributing leaflets to fellow travelers.

Id. The pliancy of the distinction impermissibly allows the Port to arrogate to itself the power to determine the *constitutional* question of whether the public areas of the airport are fora.

The Port Authority also claims that "open access to all members of the public is not inherent in the nature of, nor integral to the function of, air terminals . . . ." Resp. Br. 24. Petitioners do not purport to plumb the depths

of the question of the "inherent . . . nature" of anything. But it is undeniable that "open access" is a necessary condition to the way airports are operated today—the revenues airports derive from the 500 million nonpassengers who visit and use the facilities, not to mention the widespread public dissatisfaction that would arise from the creation of a permanent cordon sanitaire at so vital a hub, assure that. Even if airports can theoretically be closed off, so can, and are, streets or parks, which are sometimes open, for example, only to neighborhood residents or for special events.

The Port Authority relies on five other factors—"congestion," "location," "captive audiences," "financing," and "security"—to demonstrate that airports are not fora. *See* Resp. Br. 24-29. None proves the point.

Problems of congestion, captive audiences, and security can be and—at the New York airports and many others throughout the country—are easily ameliorated by time, place, and manner rules. Indeed, the points are really non-issues, as the petitioners do not seek to distribute literature or solicit contributions in the places giving rise to these concerns.

The claim that a "pedestrian delay of . . . seconds could very well cause loss of hours in travel time because of a missed plane," Resp. Br. 24, while seemingly dramatic, ignores reality. In the years in which the Port has permitted distribution and solicitation at the airports, it has been unable to document even a single case of a "missed plane" on account of these activities. The Port's generalized assertions of congestion fare no better, since, as the district court observed, under that theory, "the clogged and narrow arteries of downtown Manhattan might, as easily, be denied public forum status." App. 45, 721 F. Supp. at 578.

None of the places that the Port claims attract "captive audiences"—"enplaning and deplaning points, at ticket counters, security checkpoints, baggage conveyor belts, and car rental and other ground transportation counters," Resp. Br. 27—are at issue. The Port relies on *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring), but this is not a case about a city bus, but, in effect one about a city—large-scale open areas and miles of walkway encompassing commercial and non-commercial facilities of every kind.

The security areas, *see* Resp. Br. 28, are also a non-issue. They are apart from general circulation areas, and the petitioners have always treated them accordingly.

The assertion that airports are not fora because they "are separated from the city streets of nearby communities by ribbons of highways," Resp. Br. 25, makes little sense. The highways are there not to "separate" the airports from, but to link them with, the whole urban infrastructure. Perhaps even less supportable is the thesis that the airports "do not serve as 'a necessary conduit in the daily affairs of a locality's citizens,' " Resp. Br. 26 (quoting *Heffron*, 452 U.S. at 651), a notion that would shock the tens of millions for whom the airports are a "conduit" of signal importance in their everyday lives.

The Port posits no logical nexus between user financing, *see* Resp. Br. 27-28, and the concept of the public forum. Regardless of the source of the airports' funding, the Port Authority's charter is to operate them as "an essential governmental function." *See* Pet. Br. 4 (quoting constitutive statutes). *United States v. Kokinda*, 110 S. Ct. 3115 (1990), cited by the Port, is inapposite since, among other things, the Port Authority is, unlike the Postal Service, not a player in a "competitive" "market." *Id.* at 3123. Metropolitan airports in New York are—like those everywhere else in the country—an office of government.

B. The Nonpublic Forum Cases Are Inapposite.

Trying to demonstrate that the petitioners "virtually ignore the public forum analysis principles enunciated by this Court," Resp. Br. 29, the Port sets up a row of straw

men. It asserts, (a) "This Court has made it clear that a place is not a public forum *merely* because it resembles a public street," Resp. Br. 29 (emphasis added); (b) "This Court has explicitly stated that a public forum does not exist *merely* because persons are freely permitted to enter a government owned site," Resp. Br. 30 (emphasis added); and (c) "[T]he usefulness of government property as a site for expressive activity does not make such property a traditional public forum . . .," Resp. Br. 31.

Petitioners do not rely on such one-dimensional, abstract claims.[1] Nor did the uniform—until this case—line of circuit authority involving major transportation centers, also wrongly disparaged as "ignor[ing] the reasoning of the decisions of this Court." Resp. Br. 32. The seminal court of appeals decision observed that "the character and function of the [Port Auhority Bus] Terminal make clear that it is a thoroughfare used by thousands of people each day." *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83, 89 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968). Cases concerning airports used fully analogous reasoning, as did the FAA. *See* Pet. Br. 20.

[1] The particular cases the Port cites serve it no better. *Greer v. Spock*, 424 U.S. 828 (1976), relied on " 'the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command.' " *Id.* at 837 (quoting *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 886, 893 (1961)); *see United States v. Kokinda*, 110 S. Ct. 3115, 3121 (1990) (plurality opinion) (describing *Greer*). Other cases involve places closed to general public use. *See Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (utility poles); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) (household mail boxes); *Adderley v. Florida*, 385 U.S. 39 (1966) (curtilage of jailhouse). In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the placement of political advertisements inside city buses would have imposed upon a "captive audience." *Id.* at 304 (plurality opinion), 307 (Douglas, J., concurring). The narrow strip of pavement serving a post office parking lot in *Kokinda* is wholly unlike the massive complexes of modern air terminals. *See* Pet. Br. 36-38.

C. The Terminals Are Fora By Both Tradition and Recent Convention.

Petitioners have shown that the public spaces of airport terminals must be considered public fora "either by tradition or recent convention." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 n. 32 (1984). *See* Pet. Br. 17-35. The Port Authority's efforts to refute the conclusion do not succeed.

In terms of recent convention, the FAA acknowledged over a decade ago that "[i]n recent years it has become a common practice for various religious and non-profit organizations to use commercial airports as a forum for the distribution of literature, the solicitation of funds, the proselytizing of new members, and other similar activities." 45 Fed. Reg. 35,314 (1980). The Port protests that petitioners "refer only to two decades' experience" out of the "approximately 60 years" that airports are said to have existed. Resp. Br. 36. A third of the total period is significant in itself; moreover, it is only in relatively recent years that airports have taken on the urban characteristics that now prevail and that continue to burgeon.[2]

Petitioners have also shown that airports are but the most recent prominent form of transportation nodes that, over centuries, have traditionally been places where ideas and information have been exchanged. The Port does not controvert this fundamental point, but instead tries unsuccessfully to nitpick some of the examples petitioners have given.

[2] The Port says that "the so-called 'tradition' . . . has existed only because of litigation against airports, most of which was commenced by Plaintiffs." Resp. Br. 36. The claim rings hollow coming from the Port Authority, whose airports were among the many that permitted distribution and solicitation *before* any litigation. In any event, the forum status even of streets and parks has hardly been uncontested. *Compare Hague v. CIO*, 307 U.S. 496 (1939) with *Davis v. Massachusetts*, 167 U.S. 43 (1897). Municipalities continue to disclaim streets as public fora. *See Frisby v. Schultz*, 487 U.S. 474 (1988).

The Port first contends that "reference to the alleged decline of downtown street life . . . is clearly irrelevant . . . ." Resp. Br. 34. Petitioners do not argue, however, that airports are fora *because* downtowns have declined, but point out only that this decline has been *reflected* in the increased presence and importance of analogous fora in other places, notably including airports. *See* Pet. Br. 16. Justice Kennedy has noted that, "[a]s society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place." *United States v. Kokinda*, 110 S. Ct. 3115, 3125 (1990) (Kennedy, J., concurring in the judgment). While Justice Kennedy concluded that the narrow, single-function purpose of a suburban post office—"that is, facilitating its customers' postal transactions"—justified a ban on solicitation, though evidently not on literature distribution, on the parking-lot-to-doorway ramp, *see id.* at 3126, today's airports present a different, far more complex, variegated, and interactive environment. In any event, the ban the Port has imposed is much broader than that at issue in *Kokinda*.

Next the Port asserts that "the public forum status of wharves, and their uses as sites of the distribution of literature, are clearly irrelevant to the case at bar because unlike air terminals, wharves 'served as business streets.'" Resp. Br. 34. But serving as streets and being streets are not the same thing; indeed, just as wharves once did, airports now *serve* as business streets within their context. Even if wharves and streets sometimes physically coincided, they certainly did not always do so. One of the ordinances struck down in *Schneider v. State*, 308 U.S. 147 (1939), for example, viewed streets and wharves as separable categories in its ban on handbilling "'in or upon any sidewalk, street, alley, wharf, boat landing, dock or other public place, park or ground within the City of Milwaukee.'" *Id.* at 155. The Port also says that "the 'exchange of ideas' in colonial port districts occurred in private places, such as clubs, coffee houses and taverns." Resp. Br. 34-35. While true as far as it goes, the Port's dip into history leaves out the simultaneous importance of public wharves in these activities. *See* Pet. Br. 22.

Similar inaccuracy characterizes the Port's argument that "the alleged role of rail terminals as public fora is irrelevant because rail terminals, unlike Port Authority air terminals, are located in the center of a city." Resp. Br. 35. It is actually the Port's claim that is irrelevant. *See Frisby v. Schultz*, 487 U.S. 474 (1988) (residential streets remote from city center were quintessential fora). In any event, as petitioners have noted, towns were often built up *around* railroad stations, Pet. Br. 26, a phenomenon repeated today as new business districts are created around airports. Contrary to the Port's apparent position, *see* Resp. Br. 35, moreover, airports are doing everything they can to attract and keep the attention of non-passengers, *see e.g.*, Pet. Br. 32-34. And the fact that the railroad stations were often privately owned, *see* Resp. Br. 35, does not gainsay the tradition carried over to metropolitan airports, all of which are publicly owned.

On its next point, the Port is compelled to feint in a different direction, but no more successfully. It does not dispute the widespread practice of religious groups' selling tracts to arriving immigrants at Ellis Island and its predecessors, Castle Garden and the Barge Office. That the authorities may have provided selective access that would be unacceptable today, what seems to be the Port's point, *see* Resp. Br. 35-36, is at best a sidelight to the central fact the transportation nodes have long been natural and appropriate places for the kinds of activities that petitioners have engaged in.

D. The Uses to Which a Forum Is Put Cannot Be Separated From Its Purpose.

Petitioners have presented extensive documentation, applicable to both the New York airports and airports nationwide, demonstrating that airports not only "facilitate," but are vital to, "the daily commerce and life" of

the communities which they serve. *Kokinda*, 110 S. Ct. at 3120. "If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of government property and its customary use by the public may control the case." *Id.* at 3125 (Kennedy, J., concurring in the judgment).

Airports have become commercial and social "gathering places." While "two people in Midtown Manhattan" might not "agree to meet at any of the Port Authority airports," Resp. Br. 35, a resident of Manhattan might well meet a traveler at the business conference facility at LaGuardia. *See* Laurie McGinley, *Airports Try to Ease the Pain of Waiting with New Ways for Fliers to Spend Money*, Wall St. J., Aug. 21, 1990, at B1.

Organizations also increasingly use airport venues like the Newark Airport Marriott Hotel for conventions and meetings, "instead of the glamour and status of a downtown hotel." Lynette Hazelton, *First Rate Conventions You Can Afford*, Black Enterprise, Mar. 1989, at 76. The reason is not that airports are isolated and remote, Resp. Br. 26-27, but because airports sites are efficient, *see* Katherine Rodeghier, *Airport Hotels Reap Day-Trip Conferences*, Crain's N.Y. Bus., Oct. 24, 1988, at 27.

Closely linked to the airport business centers is the growth of retail establishments to serve both travelers and non-travelers. Despite the Port's efforts to minimize this trend by counting articles in *Airport Services* magazine, Resp. Br. 38 n.26, the fact remains that the development of retail centers is "currently one of the most active areas of change in the airport facility." G.F. Doughty, *Review of Passenger Service Issues at Airports, in Airports for People* 9 (1988). This "striking trend," *Winged Victories*, Architectural Rec., June 1989, at 130, is not merely "ancillary" to the airports' purpose, Resp. Br. 39, but has become an integral to their function and design, *e.g.*, Paul H. Wright & Norman J. Ashford, *Transportation Engineering: Planning and Design* 622 (1989).

The impetus underlying this retail growth is that airports stand to gain from the increasing amount of time that travelers, as well as meeters and greeters and airport employees, spend in the terminals. The average passenger, for example, spends a "minimum of 45 minutes" of "dwell time" in the terminal. Greg Irsfeld, *Airport Concessions Reflect New Awareness of Market Demands*, Airport Services, May 1989, at 40. These people are not, as the Port suggests, Resp. Br. 24, frantically running along "terminal pedestrian routes" to catch a plane or arrange for ground transportation, but rather are waiting for a flight to depart.

Nor do "meeters and greeters" go to the airport strictly for "travel-related" purposes. To the contrary, "the meeter/greeter/well-wishers who come to the airport to pick up or see off passengers . . . spend a lot of time in the airport, an average of 65 minutes . . . . Those seeing travelers off come to have a meal and chat with departing customers. Those meeting arriving passengers come to the airport early and browse, shop and snack." Ira Weinstein & Juliette Madrigal, *Airport Customers and Their Needs for the 1990*, Airport Services, May/June 1991, at 18, 19.

The commercial development of airport terminals, including those at issue here,[3] confirms that while persons present in airports may spend much of their time engaged in travel related activities, a significant amount of the time is also spent in non-travel activities.

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[3] The record of this case, contrary to the Port's suggestion, Resp. Br. 36, substantiates the New York airports—the Nation's leading airport complex—as fitting solidly within this trend. Petitioners have described in detail the commercial goods, services, and amenities offered in the three airports, *e.g.*, JA 181-93. Secondary authorities are also important, however, to describe phenomena and trends nationwide, inasmuch as the outcome of this case will affect all airports. In any event, the Port acknowledges that its airports are not "atypical" of airports nationwide. Resp. Br. 23 n.14.

Price controls and other measures adopted by airports to govern such retail facilities, moreover, are not intended merely "to prevent unfair advantage being taken of the air traveler." Resp. Br. 38 n.25. Rather, the public "will find prices in the terminal competitive with about what they'd expect to pay off-airport," because of the airports' understandable preference that consumers spend their money in the airport rather than outside of it. Irsfeld, *supra*, at 42. The uses to which the Port Authority has put its terminals thus reinforce their status as public thoroughfares. Indeed, airports, including the New York area airports, have adjusted their priorities "to meet the changing customers' . . . . needs so they are viewed not just a place for airplanes, and not just as a place for passengers, but as a place for people." Weinstein & Madrigal, *supra*, at 20.

E. The Expressive Activities Permitted Under the Resolution Confirm That Airport Terminals Are Appropriate Places for the Distribution of Religious Literature and Solicitation of Donations.

Petitioners do not seek access to the airport terminals merely because they are "useful" for their activities. Resp. Br. 31. Rather, petitioners wish to distribute religious literature and solicit voluntary contributions in the airport concourses because they are public thoroughfares which provide "an appropriate place for the exercise of vital rights of expression." *Kokinda*, 110 S. Ct. at 3125 (Kennedy, J., concurring in the judgment).

Although the Port Authority regulation absolutely prohibits the distribution of literature, and the solicitation and receipt of voluntary contributions, many other forms of expression, including picketing, demonstrating, and political campaigning, are permitted so long as they do not constitute a "danger to persons or property," or "interfere" with waiting lines, pedestrian or vehicular travel, the issuance of tickets and boarding passes, luggage or cargo movement, security, government inspection procedures, and cleaning, maintenance, repair and construction activities. JA 523-24.[4]

On this basis alone, there is "a powerful argument that, because of the wide range of activities that the [Port] permits to take place [in the terminals], it is more than a nonpublic forum." *Kokinda*, 110 S. Ct. at 3125 (Kennedy, J., concurring in the judgment). The Port does not deny, for example, that political campaigning, with its attendant hordes of media, supporters, staff, and security, is permitted in the New York terminals, not to speak of airports nationwide. *See, e.g.*, Bill Turque et al., *Southern Voters: Beyond Bubbas and Yellow Dogs*, Newsweek, Mar. 9, 1992, at 35; Karen De Witt, *The 1992 Campaign*, N.Y. Times, Mar. 13, 1992, at A16. Recently, President Boris Yeltsin of Russia used JFK to address the media and set the stage for his meetings with leaders of the United Nations and his summit with President Bush. *See* Robert D. MacFadden, *Leaders Gather in New York to Chart a World Order*, N.Y. Times, Jan. 31, 1992, at A1. And large demonstrations for and against controversial public figures like Prof. Leonard Jeffries of CCNY are regularly permitted in the terminals, subject to reasonable restrictions designed to avoid interference with airport operations. See Don Broderick & Marianne Goldstein, *Prof Ducks Friends & Foes at JFK*, N.Y. Post, Aug. 15, 1991, at 2.[5]

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[4] The Port asserts that the "repetitive solicitation and distribution of literature . . . have the highest adverse effects on air travelers in an airport." Resp. Br. 42. The Port, of course, provides no proof or evidence of such adverse effects, *see e.g., United States v. Grace*, 461 U.S. 171, 182 (1983) (no evidence that "appellees' activities in any way obstructed the sidewalks or access to the building, threatened injury to any persons or property, or in any way interfered with the orderly administration of the building or . . . grounds"), and the record of this case is precisely the *opposite* of the Port's claim.

[5] In connection with the Jeffries demonstration, which was attended by 400 placard-waving supporters and 15 protesters *inside* the terminals, the Port Authority simply allowed Jeffries to leave the IAB through a back exit. *Id.*

Thus, although the Port Authority "may intend to impose some limitations on the [airport's] use," *Kokinda*, 110 S. Ct. at 3125 (Kennedy, J., concurring in the judgment), it is evident that the wide range of expressive activities that is permitted in airport terminals makes such facilities appropriate places for the distribution and sale of literature and the solicitation of voluntary donations from the public.

II. THE COURT BELOW ERRED IN UPHOLDING THE SOLICITATION BAN.

The Port Authority resolution prohibits both the distribution of literature and the solicitation of contributions. The panel majority below divided the ban, holding that the Port could prohibit solicitation, but not literature distribution.

The Port asserts that literature distribution has essentially the same "effects on pedestrian flow" as does solicitation, Resp. Br. 43, although it is unable to document any deleterious effects from either activity. The Port, moreover, suggests no severability. Because the Port neither distinguishes the effects of the activities nor seeks severance, the court of appeals erred in applying separate analyses to literature distribution and solicitation. Instead, it should have judged the resolution in its entirety —a total ban on both activities.

In any event, no differential impact from solicitation is of sufficient magnitude to justify the result it reached. Every form of speech has some external impacts. Yet the Constitution and common law consistently demand that such impacts be tolerated.

Minority religious organizations, like petitioners', frequently trigger official regulation, which is motivated not only by the unpopularity of their messages, *cf. Larson v. Valente*, 456 U.S. 228, 256-58 (1982) (differential regulation of solicitation designed "to get at . . . the people that are running around airports and running around streets"), but by the physical effects created by their particular means of expression.

For example, before the turn of the century, soon after the Salvation Army encamped on these shores, its noisy, cymbal-clanging, horn-playing street marches disturbed many American localities. The response was municipal ordinances banning or licensing parades with drums or musical instruments. The courts—relying more on natural or common law rights of association and assembly than on constitutional text—often struck them down. *See, e.g., In re Gribben*, 5 Okla. 379, 47 P. 1074 (1897); *City of Chicago v. Trotter*, 136 Ill. 430, 26 N.E. 359 (1891); *Rich v. City of Naperville*, 42 Ill. App. 222 (1891); *Anderson v. City of Wellington*, 40 Kan. 173, 19 P. 719 (1888); *In re Frazee*, 63 Mich. 396, 30 N.W. 72 (1886). Nor could convictions of Jehovah's Witnesses for breach of the peace stand when they carried Victrolas into Catholic neighborhoods to play virulently anti-Catholic propaganda. *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940). Although increased litter is an inevitable result of handbilling, the practice may not be banned to keep the streets clean. *Schneider v. State*, 308 U.S. 147, 162 (1939).

Disturbing or offensive speech must be tolerated, despite its psychological or economic impact. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (intentional infliction of emotional distress); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (organized boycott of businesses). Free speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). This Court has observed that "[m]uch that we encounter offends our aesthetic, if not our political and moral, sensibilities." *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 210 (1975).

Solicitation of funds is at the core of First Amendment protections. *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 789 (1988). While the state may regulate solicitation, it may not "unreasonably obstruct or delay

the collection of funds." *See Cantwell*, 310 U.S. at 305. A ban like that at issue here is an extreme form of obstruction. Speakers are disabled from seeking support, and willing listeners prevented from effectively expressing that support.

The Court has never sanctioned a complete ban of a traditional form of protected expression in a public forum. Indeed, like a complete ban on handbilling, so too would a total prohibition of solicitation "suppress a great quantity of speech that does not cause the evils that it seeks to eliminate, whether they be fraud, crimes, litter, traffic congestion, or noise." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 n.7 (1989).

The Port Authority regulation allows many forms of expression, but prohibits literature distribution and solicitation. Yet a request to donate to a particular cause is not inherently more intrusive than a request to sign a cause-related petition, or the delivery of a controversial speech. Many speakers link solicitation with the distribution of literature as a central feature of missionary evangelism. Given the Port Authority's failure to distinguish solicitation from literature distribution, an appeal for donations should be afforded equal constitutional dignity.

III. THE PORT AUTHORITY'S RESOLUTION IS NOT A REASONABLE REGULATION OF SPEECH EVEN IN A NONPUBLIC FORUM.

The Port next attempts to justify the Port Authority's total ban on literature distribution and solicitation as a reasonable regulation of speech in a nonpublic forum. Resp. Br. 40-45. The nonpublic forum cases support a more deferential standard, but not unquestioning acceptance of unsupported reasons. In cases involving the use of physical places, like *Taxpayers for Vincent* and *Kokinda*, the Court discussed at considerable length the extent to which the regulations were narrowly focused and directly connected to the governmental objectives.

In *Kokinda*, for instance, the regulation before the Court had been revised many times based on the Postal Service's long "real world" experience with solicitation at its facilities. 110 S. Ct. at 3124 (plurality opinion). The Postal Service was confronted with the administrative nightmare of drafting a rule that would apply appropriately at all of the "tens of thousands of post offices throughout the nation." *Id.* at 3122.

It is clear, *see* Pet. Br. 44-47, that the relationship between the Port Authority regulations and the interests they are alleged to serve lacks the "common sense" of the *Kokinda* rule. 110 S. Ct. at 3124. For example, even apart from the utter lack of evidence suggesting that expression has in any way exacerbated congestion, closing many uncrowded areas inside the terminals while relegating solicitation and literature distribution to the terminal exteriors, *see* Resp. Br. 42, ignores the crowded and hectic conditions from curbstone to portal. Shuttle buses, private cars, taxicabs, rental car vans, transit buses, skycaps, luggage carts and all the passengers and others using them are crowded into a few feet's width of pavement abutting moving traffic. *See* Brief Amicus Curiae of the Airports Ass'n Council Int'l at 22 (exterior sidewalks are "heavily congested areas" inappropriate for leafleting and solicitation).

Unlike the experiment with solicitation in *Kokinda*, the experience not only at the New York airports but at airports throughout the country points to the ease with which regulations short of a total ban satisfy any legitimate administrative needs. No one administrative agency is charged with regulating "tens of thousands" of airport facilities. The Port Authority and other airports are large and diverse complexes, covering square miles of land, virtual cities unto themselves. Airports are typically independent of one another, with a sizeable local administration well attuned to the particular requirements of each facility.

Because airports have been generally available for solicitation and distribution of literature for twenty years,

the experience of airport administrators fairly reflects not only the impact of petitioner's activities, but of *all* organizations that have desired to reach members of the public at airports. Thus, the concern in *Heffron*, 452 U.S. at 654, with the impact not only of one group but all possible groups has already been put to rest here.

The accumulated experience also belies the claims that petitioners in particular have caused problems requiring greater regulation. While the Port Authority points to unverified complaints during the period from 1975 through 1986, their nature and pattern is, if anything, a strong argument for the effectiveness of rules short of a total ban. For example, although there were forty complaints—overwhelmingly for technical violations—in 1976, the first full year for which records were kept, that number had dropped to *zero* in 1980. Although there were a smattering of complaints thereafter, they were almost entirely for administrative violations, like not wearing the proper identification tags or soliciting in the wrong area. In the seven years beginning with 1980, there were *no* complaints of "monetary deception" and only one complaint of "failure to identify or misrepresentation of organization." In sum, the assessment of the Deputy Director of Aviation, Morris Sloane, in 1985—that, with respect to petitioners activities, "the operation has gone fairly well"—seems more accurate than the Port Authority's belated attempt to smear the petitioners.[6]

[6] The Port Authority's effort not only includes a highly selective characterization of the experience at the New York airports, but a citation to a 1980 district court opinion involving supposed misconduct in an entirely different setting. *See International Soc'y for Krishna Consciousness v. Barber*, 506 F. Supp. 147 (N.D.N.Y. 1980), *cert. before appeal denied*, 451 U.S. 971 (1981), *rev'd*, 650 F.2d 430 (2d Cir. 1981); *see* Resp. Br. at 44. Even more astonishing, the Port Authority refers to an affidavit of Philip Douglas, counsel for certain airlines that have long been dismissed from the suit, in support of a motion to compel discovery. The Douglas affidavit (which was almost exclusively scurrilous hearsay) was found so irrelevant to the subject matter of this case as not even to be a basis for *discovery*.

IV. TO THE EXTENT THE ISSUE IS BEFORE THE COURT, THE PORT AUTHORITY RESOLUTION IS NOT A REASONABLE, TIME, PLACE AND MANNER REGULATION.

The Port, finally, seeks to justify the ban on distributing literature and soliciting donations as a valid regulation of speech in a public forum.[7] Without ever using the phrase, "time, place or manner," the Port argues that its restrictions "are reasonable and narrowly tailored to serve significant governmental interests, and leave open ample alternative channels of communication." Resp. Br. 46.

The present ban is far more sweeping than a time, place or manner rule. In the two cases upon which the Port primarily relies, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), far narrower rules were upheld that permitted substantial access to the forums in question. In *Clark*, a rule against camping was upheld against the claim that it interfered with demonstrators' sleeping in parks—which the Court assumed to be a kind of symbolic speech connected with a demonstration on behalf of the homeless. The rule, however, allowed 24-hour-per-day demonstrations, including tents erected in Lafayette Park, to continue uninterrupted, as long as the demonstrators remained awake. In *Ward*, the question was not whether rock music performances would be permitted in a particular arena, or even whether the volume of those performances could exceed a certain level, but whether the City of New York had chosen a reasonable means to enforce a maximum volume level.

[7] The Port admits it has not previously claimed that the Port rule was a valid, content neutral regulation of speech in a public forum, either in the trial court or the court of appeals. Resp. Br. 46. Instead, the Port has previously argued that the airports were not public fora, and has implicitly conceded that, if the airports *were* public fora, its regulation would be invalid. Therefore, the record does not permit a full consideration of whether the ban is a valid time, place or manner regulation, and the issue is not properly before the Court.

Here, by contrast, the Port Authority regulations ban *all* literature distribution and *all* solicitation from the terminal areas otherwise open to the public. These are, moreover, forms of expression not, like rock music and sleeping in the parks, near the periphery of the Free Speech Clause, but at its core.

Content neutrality, *see* Resp. Br. 46-47, cannot alone validate the Port's resolution. If it could, the public forum doctrine would be vitiated. Nor does the supposed availability of sidewalks outside the terminal as an alternative forum, *id.* at 47, advance the Port's cause with respect to the interior areas. As the district court noted, "plaintiffs have consistently limited their demands to the interior of the terminal buildings only." App. 35, 721 F. Supp. at 574. "[I]n defining the forum, we have focused on the access sought by the speaker." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 801 (1985).

Nor may it fairly be said that the Port Authority resolution is narrowly tailored. Resp. Br. 47. The interests claimed—congestion, annoyance of captive audiences, and fraud—are more than adequately addressed by other means, both in New York and elsewhere.

CONCLUSION

The public forum doctrine powerfully supports "the intellectual freedom which is essential to the progress of truth." *Cf.* Lord Acton, *Essays on Freedom and Power* 244 (Peter Smith 1972) (1948). This rationale of the court below would rob the doctrine of much of its force and deny to citizens significant opportunities for expression. The judgment should be reversed to the extent it upholds the Port Authority's resolution.

Respectfully submitted,

BARRY A. FISHER
Counsel of Record
DAVID GROSZ
ROBERT C. MOEST
FLEISHMAN, FISHER & MOEST
2049 Century Park E.
Suite 3160
Los Angeles, CA 90067
(310) 557-1077

DAVID M. LIBERMAN
2049 Century Park E.
Suite 3160
Los Angeles, CA 90067
(310) 277-9288

JAY ALAN SEKULOW
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, DC 20007
(202) 337-2273

JEREMIAH S. GUTMAN
EUGENE N. HARLEY
LEVY, GUTMAN, GOLDBERG & KAPLAN
275 Seventh Ave., Suite 1776
New York, NY 10001
(212) 807-0733

Counsel for Petitioners and Cross-Respondents

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