Memorandum

To: Members of the Haines Borough Assembly

Cc: Jan Hill, Mayor; William E. Seward, Manager

From: Mike Denker, 203 Union St. / P.O. Box 298, Haines, AK 99827

Date: June 27, 2016

Re: Haines Borough Busking Performance Policy – Item 1.i.

I wish to submit this memorandum regarding the Borough's "Busking Performance Policy" for the public record of the June 28, 2016 Borough Assembly meeting. My concern is that Item 1.i. of the Policy violates the First Amendment of the United States Constitution. As such, the Borough could be exposed to potential legal liability should this item of the policy be enforced.

I am available to answer any questions should the Assembly need more information. I would also recommend this memorandum be forwarded to the Borough attorney for further legal review considering the fundamental rights involved.

Note: A "Short Answer" has been provided for the reader's convenience. This section is on page 2 of the document. Page numbers have been provided in the "Short Answer" to guide the reader to the various sections of the memorandum.

Question Presented

Item 1.i. of the Haines Borough "Busking Performance Policy" states, "Buskers shall provide performances, including lyrics that are appropriate for all ages." The question presented is whether Item 1.i. of the Policy violates the First Amendment of the United States Constitution.

Short Answer

Yes. Item 1.i. of the "Busker" Policy violates the First Amendment for the reasons stated below. Pgs. *3 - 18.*

I.

Performing in outdoor public areas such as sidewalks and parks is expressive activity protected by the First and Fourteenth Amendments. The First and Fourteenth Amendments prohibit a local municipality from abridging the right of free speech. Performing in outdoor public areas, also known as "busking", is expressive conduct protected by the First Amendment. Protection for forms of expression such as "busking" extends to traditional public forums such as sidewalks and parks. *Pgs. 3 – 4.*

II.

Item 1.i. of the Policy fails to align with the rules developed by the Supreme Court for protecting the First Amendment rights of free speech and expression in traditional public forums such as sidewalks and parks. First, on its face, Item 1.i. fails to adhere to the "content-neutral" standard set by the Supreme Court for regulating speech and expression in traditional public forums such as sidewalks and parks. Second, the language of Item 1.i. is unconstitutionally overbroad by sweeping within its control both protected and unprotected speech and expression. Third, the language of Item 1.i. is unconstitutionally vague by failing to define exactly what constitutes "lyrics that are appropriate for all ages." Lastly, the "Busker" Policy fails to identity outdoor public areas that serve as "alternative channels of communication" for performances with otherwise protected lyrical content that is not appropriate for all ages. *Pgs. 5 - 13.*

III.

The Haines Borough fails to have the sufficient justification required by the Supreme Court to infringe upon the First Amendment rights of free speech and expression in traditional public forums. First, the Borough's stated purpose for using the "Busker" Policy fails to align with the "compelling interest" standard for abridging speech and expression in a traditional public forum. Second, the language of the "Busker" Policy does not meet the "narrowly tailored" requirement for abridging speech and expression in a traditional public forum. *Pgs. 13 - 18.*

Facts

On June 23, 2016, the Haines Borough announced a new administrative policy "pertaining to performing in outdoor public areas." See *Haines Borough Administrative Policy, Busking Performance Policy*, June 23, 2016. Performers, also know as "Buskers", are allowed to perform in outdoor public areas so they "add to the community and cultural experience" within the Borough. *Id*. The intent of the policy is "to provide an atmosphere in which these performances can occur without disrupting the other activities within the Borough." *Id*.

The "Busker" policy provides guidelines that all performers in outdoor public areas must follow. Item 1.i. of the policy states the following:

> "Buskers shall provide performances, including lyrics that are appropriate for all ages." *Id*.

The policy concludes by stating it is "pursuant to titles 5 and 12 of the Haines Borough Code." *Id*.

Discussion

I.

Performing in outdoor public areas such as sidewalks and parks is expressive activity protected by the First and Fourteenth Amendments.

A. The First and Fourteenth Amendments prohibit a local municipality from abridging the right of free speech.

The First Amendment prohibits the federal government from abridging the right of free speech. *U.S. Const., Amend. I.* Thus, when originally drafted, the First Amendment was not applicable to state and local governments.

The Supreme Court's "Incorporation Doctrine" now prohibits state and local governments from abridging First Amendment rights through application of the Due Process Clause of the Fourteenth Amendment. See *Legal Information Institute*, "Incorporation Doctrine", www.law.cornell.edu. In *Gitlow v. New York*, 368 U.S. 652 (1925), the Court applied the Due Process Clause to state action abridging the First Amendment right of free speech and expression. The Court stated, "the freedom of speech and of the press are among the personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow v. New York*, at 652. Thus, state and local

governments are now prohibited from abridging the First Amendment right of free speech and expression.

B. Performing in outdoor public areas, also known as "busking", is expressive activity protected by the First Amendment.

The courts have recognized that performing in outdoor public areas, also known as "busking", is protected under the Free Speech Clause of the First Amendment when that activity is licensed as required by local municipalities. See *Friedrich v. City of Chicago*, 619 F. Supp., 1129. (D.C. Ill 1985). Some notable cases cited in the *Friedrich* case referenced above include:

(1) As applied to street musicians, *Davenport v. City of Alexandria, VA*, 710 F.2d 138, 150 (4th Cir. 1983);
(2) As applied to live entertainment, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65, 101, S.Ct. 2176, 2181 (1981); and
(3) As applied to rock concerts, *Cinevision Corp. v. City of Burbank*, 745, F.2d 560, 567 (9th Cir. 1984)

Thus, the courts have ruled that "busking" in outdoor public areas is expressive activity for First Amendment purposes.

C. Protection for forms of expression such as "busking" extends to traditional public forums such as sidewalks and parks.

Public forums are public places that are "historically associated with the free exercise of expressive activities." *United States v. Grace*, 461 U.S. 171, 176-178 (1983). These *traditional* public forums include streets and parks that "by long tradition…have been devoted to assembly and debate" and "communicating thoughts between citizens." *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37 (1983). Included within these traditional public forums are sidewalks, which have traditionally performed the same function in a society. See *United States v. Grace*, 176–178. Thus, the First Amendment protects "busking" as an expressive activity in traditional public forums such as sidewalks and parks.

II.

Item 1.i. of the Policy fails to align with the rules developed by the Supreme Court for protecting the First Amendment rights of free speech and expression in traditional public forums.

Item 1.i. of the "Busker" Policy abridges the First Amendment right to perform in traditional public forums such as sidewalks and parks for the reasons stated below.

A. On its face, Item 1.i. fails to adhere to the "content-neutral" standard set by the Supreme Court for regulating speech and expression in traditional public forums such as sidewalks and parks.

Restricting Expression Based on Content in Traditional Public Forums

First Amendment protections are nowhere stricter than in traditional public forums such as streets, sidewalks and parks. *Perry Ed. Ass'n v. Perry Local Ed. Ass'n,* 460 U.S. 37, 45 (1983). The traditional public forum "ha[s] immemorially been held in trust for use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id*.; quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939). To pass constitutional muster, government restrictions of speech and expression in traditional public forums must be: 1) "Content Neutral"; 2) "narrowly tailored to serve a significant government interest"; and 3) "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

Regulating Speech Based on Content or Viewpoint is "Presumptively Invalid"

Numerous Supreme Court rulings have held "the very core of the First Amendment is that government cannot regulate speech based on its content." *Constitutioinal Law - Principles and Policies* / Erwin Chemerinski - 4th Ed., (Aspen Student Treatise Series), 2011, Pg. 960. The Court has stated, "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosely,* 408 U.S. 92, 95-96 (1972). Accordingly, content-based speech regulations are considered to be "presumptively invalid." *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992). The Court also considers Government regulation that targets the viewpoint of speech

and expression as, "the most egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of VA*, 515 U.S. 819, 828-829 (1995). Hence, government regulation that, *on its face*, discriminates speech based on content or viewpoint is valid only if "necessary to serve a compelling state interest and...narrowly drawn to that end." See *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, at 45.

Types of Unprotected Content

Of course, not all types of content are entitled to receive First Amendment protection. *FCC v. Pacifica Foundation*, 438 U.S. 726, 727-728 (1978); *Schenk v. United States*, 249 U.S. 47, 52 (1919). First, incitement or illegal activity that fails to meet the "Clear and Present Danger" test has been ruled unprotected by the First Amendment. See *Constitutional Law – Principles and Policies,* Chemerinsky, Pgs. 1018 – 1032. Second, most types of "fighting words" have also been identified as an unprotected form of speech and expression. *Id*., Pgs. 1033 – 1048. Third, defamatory falsehoods have been found unprotected under the First Amendment. See *New York Times v. Sullivan*, 376 U.S. 254 (1964). Finally, most forms of sexually oriented speech have been found to lie outside of the First Amendment. *Constitutional Law – Principles and Policies, Chemerinsky, Pgs. 2048 – 1078.*

Profanities and indecent language Generally Protected

With a notable exception, the First Amendment generally protects expression containing profanities and indecent language. *Id.*, Pg. 1067. Consider the Court's decision in *Cohen v. California*, 403 U.S. 15 (1971). In this case, the Court considered the constitutionality of a person who wore a jacket with the words "Fuck the Draft" into a corridor of the Los Angeles Courthouse. *Cohen v. California*, at 15. The Court held, "absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display of this single four-letter expletive a criminal offense. *Id.,* at 15. The Court reasoned, "At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected." *Id.*, at 18. They also considered the impact a conviction could have in this case:

"We cannot indulge the facile assumption that one can forbid particular words

> without running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expressing of unpopular views." *Cohen v. California*, at 26.

Constitutional law scholar Erwin Chemerinsky remarks, "*Cohen* reflects the basic First Amendment principle that the government may not prohibit or punish speech simply because others might find it offensive*." Constitutional Law – Principles and Policies, Chemerinsky*, Pg. 1068; Cited also, *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning is protected by the First Amendment.)

An exception for profane and indecent language is the broadcast media. In *FCC v. Pacifica Foundation*, the Court ruled the Federal Communications Commission did not violate the First Amendment by prohibiting and punishing a radio broadcast that contained indecent and language over broadcast media. See *FCC v. Pacifica Foundation*, at 726 – 727. The Court reasoned:

> "The broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *FCC v. Pacifica Foundation*, at 748.

Therefore, profanities and indecent language may be restricted in the medium of broadcast media.

Applying the Court Rules Regarding Content in Traditional Public Forums to Item 1.i. of the Policy

In this matter, Item 1.i. of the policy clearly fails to adhere to this "content-neutral" standard required by the Supreme Court. Item 1.i. differentiates between two distinct types of performances and lyrical content; content that is "appropriate for all ages", and content that is <u>not</u> appropriate for all ages. Additionally, the current language allows for enforcement of the most egregious form of content-based restriction; restricting content based on viewpoint.

Consider the hypothetical performance of a person in a Big Bird suit singing a song in a local park. According to the language of Item 1.i., this performance would be allowed if Big Bird were singing a song titled, "*Chocolate Chip Cookies*

are Good For You!" However, the performance may be in breach of the policy if Big Bird were singing a song titled "*Marijuana Cookies are Good for You!*" Given this hypothetical, the lyrical content of Big Bird's *Marijuana* song very likely would become a target of enforcement under Item 1.i. because the lyrics may be viewed as ***not*** "appropriate for all ages." In fact, enforcement would be all the more egregious here because Item 1.i.'s language targets Big Bird's viewpoint of what type of cookies "are good for you".

Consider also the hypothetical of a street performer singing a song criticizing the US intervention in Syria, and who also happened to be wearing a shirt containing a profanity that represented this same viewpoint. First, the Court has found that this type of political speech "lies at the heart of the First Amendment", *Lane v. Franks*, 573 U.S. ___(2014), Pg. 6; See also *Cohen v. California*, Pg. 18. As such, political speech of this order receives the highest level of First Amendment protection. However, under the "appropriate for all ages" provision of Item 1.i., the content and viewpoint of the performers shirt and lyrics could be found in breach of Borough's "Busking" Policy because of the content of the song and the profanity on the shirt. Thus, the language of Item 1.i. allows for core First Amendment political speech in a traditional public forum to be suppressed because of the content and viewpoint of the performance.

Restricting Expression Based on Content in Traditional Public Forums- Conclusion

For these reasons, Item 1.i. of the "Busker" Policy does not meet the "content-neutral" standard set by the Supreme Court for restricting speech and expression in traditional public forums. Item 1.i. unconstitutionally allows otherwise protected expression such as political speech to be restricted in traditional public forums based on the lyrical content and viewpoint of the message. In doing so, the burden is on the Borough to prove the "appropriate for all ages" provision of Item 1.i. is narrowly tailored to serve a compelling government interest. See *Perry Educ. Ass'n. v. Perry Local Educ. Ass'n.*, at 45. Thus, Item 1.i. will require significant rework to align with constitutional standards regulating expression in traditional public forums.

B. The language of Item 1.i. of the "Busking" Policy is unconstitutionally overbroad by sweeping within its control both protected and unprotected speech and expression.

"Overbreadth" Doctrine

Unconstitutionally overbroad regulation of speech and expression "hangs over [people's] heads like the Sword of Damocles." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting). Government regulation of speech is considered unconstitutionally overbroad if it "does not aim specifically at evils within the allowable area of [government] control, but…sweeps within its ambit other activities that constitute an exercise" of protected speech or expression. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Challenges to government regulation of speech and expression under the Supreme Court's "overbreadth" doctrine "can be made only when (1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory way of severing the law's constitutional from its unconstitutional applications so as to excise the latter clearly in a single step from the law's reach." *American Constitutional Law* / Lawrence H. Tribe - 2nd Ed. p. cm. – (University Textbook Series), 1988, Pg. 1022.

Application of the "Overbreadth" Doctrine to Item 1.i. of the "Busking" Policy – Test 1

Item 1.i. of the "Busker" Policy is clearly unconstitutionally overbroad given these standards. Under the first part of the inquiry, otherwise protected lyrical content that is ***not*** appropriate for all ages "is a significant part of the [policy's] target." *American Constitutional Law*, *Tribe*, Pg. 1022. Case in point, the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). However, sophisticated, politically-charged lyrical content that seeks to bring about these types of social changes may be deemed as inappropriate content given the wording of Item 1.i.

For instance, Big Bird's *Marijuana* song seeks to change the social perception of marijuana cookies. But because this viewpoint may be deemed ***not*** appropriate for all ages, this otherwise protected expression in a traditional public forum becomes the target of Item 1.i. enforcement. Thus, Item 1.i. fails the first part of the "overbreadth" inquiry because this protected activity seeking social change is a significant part of Item 1.i. enforcement.

Application of "Overbreadth" Doctrine to Item 1.i. of the "Busking" Policy – Test 2

Moving to the second part of the inquiry, there is no way to adequately "sever" unconstitutional lyrical content from constitutional lyrical content given the current language of Item 1.i. Essentially, ***all*** lyrical content above the intellectual level of a five-year old is a target of enforcement under the "appropriate for all ages" provision, no matter if that content is protected or unprotected under the First Amendment.

For instance, Item 1.i. targets enforcement of Big Bird performing a song with sophisticated, college-level lyrics that personally challenges an individual spectator to a fight. However, Big Bird would also be a target of Item 1.i. enforcement if performing a song with sophisticated, college-level lyrical content that sought to change the political perception of US intervention in Syria. The current wording of Item 1.i. is flawed under the second inquiry of the Court's "overbreadth" doctrine because there is no way to adequately sever Big Bird's unprotected "fighting words" song from Big Bird's protected "US Intervention in Syria" song because it is all above the intellectual level of a five-year old. As such, language clarifying the unprotected types of content within the reach of Item 1.i. needs to be drafted into the policy to adequately secure protected First Amendment speech and expression.

"Overbreadth" Doctrine - Conclusion

To overview, the language of Item 1.i. is unconstitutionally overbroad by sweeping within its control both protected and unprotected lyrical content from traditional public forums within the Borough. Item 1.i. fails the first "Overbreadth" test because protected lyrical content is a significant target of policies language. Item 1.i. fails the second "Overbreadth" test because, given the current language of the provision, there is no way to adequately "sever" unconstitutional lyrical content from constitutional lyrical content. Thus, Item 1.i. of the policy will need significant rework to comply with the Court's "Overbreadth" doctrine.

C. The language of Item 1.i. of the "Busking" Policy is unconstitutionally vague by failing to define exactly what constitutes "age appropriate lyrics."

The "Vagueness" Doctrine

Government policies that regulate speech and expression are

unconstitutionally vague "when people of common intelligence must necessarily guess at [their] meaning[s]." *Connally v. General Constr. Co*., 269 U.S. 385, 391 (1926). In *NAACP v. Button*, 317 U.S. 415, 432-433 (1963), the Court stated, "standards of permissible statutory vagueness are strict in the area of free expression." The Court continued, "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." See *NAACP v. Button*, at 432-433. Thus, government policies regulating speech and expression must be drafted with specificity to adequately protect First Amendment rights.

Applying the "Vagueness" Doctrine to Item 1.i. of the "Busking" Policy – Test 1

The language of Item 1.i. of the "Busking" Policy is unconstitutionally vague by failing to define exactly what constitutes a performance that is "appropriate for all ages." As such, it requires the public to guess exactly what type of content qualifies under this vague provision. A person is necessarily left to wonder if Item 1.i. of the policy targets viewpoints about certain topics that may be deemed controversial by the Borough administration, or if it targets certain language within the content of a performance. Therefore, because the public is left to guess what the "appropriate for all ages" provision means, Item 1.i. of the Policy fails the first test of vagueness set out by the Court.

Applying the "Vagueness" Doctrine to Item 1.i. of the "Busking" Policy – Test 2

The vague language of Item 1.i. also fails the "narrow specificity" standard required by the Court in *NAACP v. Button*. Recall that "narrow specificity" is required so that "First Amendment freedoms [have] breathing space to survive." *NAACP v. Button*, at 432 – 433. By failing to be specific about what type of content is deemed "appropriate for all ages", arbitrary enforcement of Item 1.i. is inevitable. Borough administrators enforcing the "appropriate for all ages" may mistakenly overreach in First Amendment protected expression. Thus, the failure to be "narrowly specific" in the drafting of Item 1.i.'s language results in very little secure space for First Amendment rights to "breathe."

Vagueness Doctrine - Conclusion

In conclusion, Item 1.i. fails the tests for "Vagueness" set out by the Supreme

Court. The provision fails the first test because the public is left to guess exactly what it means for a performance to be "appropriate for all ages." The Policy fails the second test because the language of Item 1.i. is not drafted with "narrow specificity" and threatens to suffocate the "breathing space" First Amendment freedoms need to survive. Therefore, the language of Item 1.i. requires significant rework to conform to the "Vagueness" Doctrine set out by the Supreme Court.

D. The "Busking" Policy fails to identity outdoor public areas that serve as "alternative channels of communication" for performances with otherwise protected lyrical content that is *not* appropriate for all ages.

Alternative Channels of Communication Required

As stated, one of the requirements for regulating speech and expression in a traditional public forum is ample alternative channels must be left open to allow for communication of restricted and protected content. See *Ward v. Rock Against Racism*, at 798. This allows areas to remain open for the free and open interchange of ideas the First Amendment is designed to protect. See *Roth v. United States*, at 484.

Applying the Alternative Channels of Communication Requirement

The "Busking" Policy fails to identify such alternative channels. Nowhere in the policy does it identify where in the Borough's open public spaces "busking" that is ***not*** deemed "appropriate for all ages" is allowed to be performed. In essence, "busking" performances deemed "inappropriate" under Item 1.i. by administration officials are prohibited in all public areas in the Borough. Thus, by not providing alternative channels of communication for otherwise protected First Amendment "busking" performances that is not "appropriate for all ages", the public is only provided "busking" content at the intellectual level of a five-year old.

Alternative Channels of Communication - Conclusion

By implementing a policy making "age ***in***appropriate" lyrical content impermissible in all open, outdoor public spaces within the Borough, the free interchange of ideas and expression is restrained. Essentially, Item 1.i. of the Policy permits only busking suitable for a five-year old. Thus, the Policy's failure to identify alternative public spaces for lyrical content not appropriate for all ages violates the Supreme Court's rules for protecting First Amendment speech and

expression in traditional public forums.

III.
The Haines Borough fails to have the sufficient justification required by the Supreme Court to infringe upon the First Amendment rights of free speech and expression in traditional public forums.

As stated above, to pass constitutional muster government restrictions of speech and expression in traditional public forums such as streets, parks and sidewalks must be: 1) "Content Neutral"; 2) "narrowly tailored to serve a significant government interest"; and 3) "leave open ample alternative channels for communication of the information." See *Ward v. Rock Against Racism,* at 798. However, government regulation that, *on its face*, discriminates speech based on content is valid only if it is "necessary to serve a compelling state interest and...narrowly drawn to achieve that end." See *Perry Educ. Ass'n. v. Perry Local Educ. Ass'n*, at 45.

As demonstrated above, Item 1.i. of the "Busking" Policy restricts otherwise protected expression based on the content of the performance and lyrics. Lyrical content that is deemed not appropriate for all ages is impermissible under the Policy in traditional public forums within the Borough. Therefore, the Borough's justification for using the Policy must be narrowly tailored to serve a compelling government interest as per the rules developed by the Supreme Court. Unfortunately, the Borough fails to meet this standard.

A. The Borough's stated intent for using the "Busking" Policy fails to align with the "compelling interest" standard for abridging speech and expression in a traditional public forum.

The Borough's intent for enforcing Item 1.i. is "to provide an atmosphere in which [busking] performances can occur without disrupting the other activities within the Borough." *See Policy*. The question is whether restricting age ***in***appropriate "busking" performances that disrupt other activities within the Borough is considered a sufficient "compelling government interest" to abridge protected First Amendment activity in traditional public forums. The answer is dependent upon level of disruption, and the activity disrupted.

Compelling Government Interests

Black's Law Dictionary defines a "compelling state interest" as "one which

the state is forced or obliged to protect." *Black's Law Dictionary*, 6th Ed., 1990, Pg. 282. To rise to this level, a municipality must have "a serious need for such state action." *Id*. In other words, a municipality must be compelled to act because of a legitimate, serious threat to an interest the municipality is obliged to protect.

Compelling state interests are so important they outweigh fundamental rights protected by the Constitution. It seems reasonable that speech and expression could be restricted under a "compelling state interest" argument provided the activity is shown to negatively affect public health and safety. Examples here could include affecting the safety of travel and movement, or negatively affecting the ability of vital government functions to take place in an efficient manner.

Outside of these obvious examples, there are other times when restriction of speech and expression may rise to the "compelling interest" requirement. In *Terminiello v. Chicago*, the Court weighed the question whether a person giving a speech that vigorously criticized various political and racial groups could be convicted under a city ordinance forbidding any "breach of the peace". A "breach of the peace" was defined to mean that which "stirs people to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." *Terminiello v. Chicago*, at 4. The full response from the *Terminiello* Court is highly instructive here:

> "The function of free speech in our system of government is to invite dispute. It 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. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942), is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." See also *Bridges v. California*, 314 U.S. 252, 262 (1941); *Craig v. Harney*, 331 U.S. 367, 373 (1947).

According to the *Terminiello* Court, a "disruption" is ***not*** a compelling government interest if:

(1) the activity invites dispute;
(2) the activity induces conditions of unrest;
(3) the activity creates dissatisfaction with conditions as they are;

(4) the activity stirs people to anger;
(5) the activity is provocative and challenging;
(6) the activity strikes at prejudices and preconceptions and is unsettling.

In fact, the Court identifies these levels of disruption as the exact reason free speech is protected in our society. Thus, the Court held a municipality may censor or punish expression if "shown likely to produce a ***clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest***." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (emphasis added); see also *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

The Court weighed a similar question in the famous flag-burning case *Texas v. Johnson*, 491 U.S. 397 (1989). In this case the Court weighed the question whether a person could be convicted of burning the U.S. flag in violation of a Texas statute. The Court held this "flag desecration" constitutional. In the opinion, the Court stated,

> "Expression may not be prohibited on a basis that an audience that takes serious offense to the expression may disturb the peace, since the government cannot assume that every expression of a provocative idea will incite riot, but must look to the actual circumstances surrounding the expression." See *Texas v. Johnson*, at 397.

However, the Court here acknowledged that a finding to prevent "invitation to exchanging fisticuffs", i.e. "fighting words", as well as to prevent "imminent lawless action" may have been a compelling justification to convict Mr. Johnson in the flag-burning case.

Additionally, the Court has held a municipality may not "shut off discourse solely to protect others from hearing it…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) (emphasis added). However, the *Cohen* Court also qualified the privacy interest in public spaces by stating, "we are often 'captives outside the sanctuary of the home and subject to objectionable speech.'" *Id*.; quoting *Rowan v. Post Office Dept*., 397 U.S. 728 91970). Thus, substantial privacy interests may not suffice as an argument outside of the home in traditional public forums such as streets, sidewalks and parks.

Therefore, it appears that to satisfy a compelling government interest argument within a traditional public forum, the "disruption" must rise to the level of

an imminent fight, imminent lawless action, an imminent "clear and present danger", or "reasonable ground to believe that the evil to be prevented is a serious one." See *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). These "serious evils" would most likely include "defamatory falsehoods", *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964), or most forms of sexually-oriented content found to lie outside of the First Amendment, See *Constitutional Law – Principles & Policies*, *Chemerinsky*, Pgs. 1048 – 1078.

Applying the Borough's Interest for Enforcing the "Age Appropriate" provision to the Compelling Government Interest Requirement

In this matter, it is difficult to reconcile the Borough's interest for enforcing the "age appropriate" provision of Item 1.i. to the Court's "compelling state interest" requirement. Recall that the Borough's interest here is "to provide an atmosphere in which [busking] performances can occur without disrupting the other activities within the Borough." *See Policy*. According to the compelling interest requirement set out by the Court, restricting "busking" performances that contain with lyrics "not appropriate for all ages" in a traditional public forum within the Borough is only justified where: (1) the content rises to the level of imminent threats of a fight; (2) there is an imminent threat of lawless action; (3) there is an imminent "clear and present danger", or; (4) reasonable grounds to believe a serious evil such as a defamatory falsehood, sexually-oriented content, or other unprotected content were to occur. Additionally, disruptions to a significant Borough interest such as public health and safety could also justify such restrictions.

There is no connection between the Borough's "age appropriate" content provision of Item 1.i. and the compelling interest standards of fighting words, imminent threats, imminent threats of lawless action, or threats of serious evils. Not all "busking" content that is ***in***appropriate for all ages rises to the level of fighting words, imminent threats, or threats of serious evils. Additionally, not all content that is ***in***appropriate for all ages disrupts vital Borough interests such as public health and safety. Accordingly, Item 1.i.'s unconstitutional "overbreadth" that was mentioned earlier reaches deep into First Amendment territory due to the vague nature of the language in Item 1.i. Thus, the Borough's stated purpose for using Item 1.i. fails to align with the compelling interest standard set out by the Court for restricting protected First Amendment expression in a traditional public forum.

This leads to the next section of the argument addressing Item 1.i.'s "tailoring".

B. The language of the "Busker" Policy does not meet the "narrowly tailored" requirement for abridging speech and expression in a traditional public forum.

Because Item 1.i. targets the content of a "busking" performance in traditional public forums, the burden is on the Borough to prove the provision is narrowly tailored to serve a compelling government interest. See *Perry Educ. Ass'n v. Perry Local Educ. Ass'n,* at 45. The last section discussed what Borough interests could be considered compelling under the rules developed by the Supreme Court. This section will answer whether the language of Item 1.i. is "narrowly tailored" to meet these permissible compelling interests. As will be shown, the language of Item 1.i. is improperly tailored under the Court guidelines for restricting protected expression in a traditional public forum.

Narrow Tailoring

As discussed earlier, unconstitutionally overbroad laws "regulate substantially more speech than the constitution allows to be regulated." See *Constitutional Law – Principles and Policies*, *Chemerinsky*, Pg. 972. This "overbreadth" can occur because the law has been drafted with insufficient specificity or is otherwise vague in its language. Thus, a law that is vague or lacks specificity about exactly what activity is prohibited has the potential to abridge First Amendment rights.

The Supreme Court has developed rules for protecting First Amendment rights in traditional public forums such as streets, sidewalks and parks. As stated, when a law restricting speech in a traditional public forum is declared content-based, the burden is on the government to show the law is drafted "narrowly" to only serve a compelling government interest. See *Perry Educ. Ass'n v. Perry Local Educ Ass'n*, at 45. This means the language must be of sufficient specificity to only serve the government's compelling interest, and go no further into First Amendment territory. Thus, failure to narrowly tailor the language of law risks unconstitutionality on "overbreadth" grounds because more speech is regulated than that which was the target of the law.

Therefore, to be "narrowly tailored" in this context means to draft a law with sufficient specificity to serve a permissible government objective without abridging other First Amendment rights retained by the people.

Applying the Narrowly Tailored Requirement to the Language of Item 1.i.

Item 1.i. fails to meet the narrowly tailored requirement set out by the Court for restricting protected First Amendment expression in traditional public forums.

First, the language of Item 1.i. was drafted with insufficient specificity to serve the Borough's permissible interests. As stated, there must be a compelling interest for the Borough to restrict protected First Amendment expression in a traditional public forum. However, there is no reason to believe that allowing performances with content ***not*** appropriate for all ages would create such dire consequences such as an imminent threat to justify banning all such performances. Language should be drafted into the policy identifying those types of performances that rise to the level of permissible unprotected performances.

Second, the language's insufficient specificity results in unconstitutional overbreadth. By banning all "busking" performances that are ***not*** appropriate for all ages, the language mistakenly targets performances that are protected under the First Amendment. These include performances with sophisticated, college-level lyrics that express dissatisfaction with current U.S. policies, such as a song with lyrics critical of the U.S. intervention in Syria. The Court has stated that this type of speech by citizens on matters of public concern "lies at the heart of the First Amendment." *Lane v. Franks*, 573 U.S. 214, Pg. 5. As such, the Borough's argument that such content may be "disruptive of other activities in the Borough" fails to justify restricting such content given that there is no compelling government interest served by such restriction. Only if such a performance would lead to the dire consequences justifying compelling state action such as "fighting words" or an imminent threat could this argument be close to constitutional justification.

Narrow Tailoring - Conclusion

Therefore, the language of Item 1.i. fails to satisfy the "narrowly tailored" requirement set out by the Court for restricting protected expression in a traditional public forum. The language was drafted with insufficient specificity to serve the Borough's permissible interests. Additionally, the language's insufficient specificity results in unconstitutional "overbreadth." Thus, significant reworking of Item 1.i. will be required to properly tailor the provision with constitutional requirements.

Conclusion

Based on the information presented in this memorandum, Item 1.i. of the Haines Borough "Busking Performance Policy" violates the First Amendment of the United States Constitution. First, performing in outdoor public areas such as sidewalks and parks, also known as "busking", constitutes expression that is protected by the First and Fourteenth Amendments. Second, Item 1.i. of the Policy fails to align with the rules developed by the Supreme Court for protecting the First Amendment rights of free speech and expression in traditional public forums such as sidewalks and parks. Third, the Haines Borough fails to have the sufficient justification required by the Supreme Court to infringe upon the First Amendment rights of free speech and expression in traditional public forums such as sidewalks and parks.

As such, the Borough must rework Item 1.i. of the Policy to conform to constitutional standards. Should there be any questions with this information, it is recommended the memorandum be forwarded to the Borough attorney for further legal review.

Haines Borough
Administrative Policy

Busking Performance Policy

Applicable to: All persons seeking to perform in public areas of the borough. This policy outlines standards and requirements:

Effective Date: *June 23, 2016*

1. Thank you for your interest in performing within the Borough of Haines. Buskers are permitted to perform in public areas within the Haines Borough, adding to the community and cultural experience. In order to provide an atmosphere in which these performances can occur without disrupting the other activities within the borough, follow the guidelines below:
    a. Buskers may perform in public areas, except within 200 feet of a school, private residence (not their own), or church while in session, a clinic or funeral at any time, and except in public areas excluded by the Borough Manager.
    b. Buskers shall not block roadways, sidewalks, crosswalks, driveways, stairways, curb cuts, handicapped access ramps nor block access to buildings, vessels, parks, businesses, or be within 20 feet of a fire hydrant. If the performance attracts a crowd sufficient to obstruct the public right-of-way, a peace officer may disperse the portion of the crowd that is creating the obstruction.
    c. Buskers shall not perform before the hour of 9:00 am and after the hour of 9:00 pm.
    d. Buskers shall remove all props, trash and other items from the public immediately after the performance ends.
    e. Throughout the cruise ship season (May-September), performances are permitted on the cruise ship dock, as long as buskers are considerate of other nearby performances, vendors and do not impede the point of embarkation nor violate the port security zone.
    f. Buskers may not actively solicit donations. A donation container is permitted.
    g. Buskers may not amplify sound.
    h. Buskers, who possess a business license issued by the Borough of Haines, may display and offer for sale CDs or other recordings of their music, but may not actively solicit sales.
    i. Buskers shall provide performances, including lyrics that are appropriate for all ages.
    j. There is no vehicle access for buskers to the cruise ship area. Buskers shall only park their vehicles in designated public parking areas.
2. This policy is pursuant to titles 5 and 12 of the Haines Borough Code.

William E. Seward

Digitally signed by William E. Seward
DN: cn=William E. Seward, o=Haines Borough, ou=Borough Manager, email=wseward@haines.ak.us, c=US
Date: 2016.06.23 08:12:01 -08'00'

William E. Seward
Borough Manager

June 23, 2016
Date