



January 12, 2018

Secretary Ellington E. Churchill, Jr.  
Maryland Department of General Services  
301 West Preston Street  
Baltimore, MD 21201

Re: DGS Free Speech Regulations, COMAR § 04.05.01.07.A

Dear Secretary Churchill:

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION OF  
MARYLAND

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ANDREW FREEMAN  
GENERAL COUNSEL

I write on behalf of the Caucus of African American Leaders (“CAAL”) and the American Civil Liberties Union of Maryland (“ACLU”) concerning COMAR § 04.05.01.07.A, which, when read in conjunction with COMAR § 04.05.01.01.A, prohibits groups conducting demonstrations on Lawyers’ Mall (and any other properties owned or controlled by the Department of General Services, including outdoor venues) from political soliciting or from soliciting donations from participants or observers. Pursuant to these regulations, CAAL twice recently has been told that that the group cannot solicit contributions at events they hold on Lawyers’ Mall, even after they formally raised concerns about this prohibition.

As the ACLU has previously indicated to DGS, and as detailed below, this rule is a facially unconstitutional restriction on speech protected by the First Amendment. The need to address this constitutional violation is particularly urgent now that the General Assembly’s 2018 session has gotten underway, with numerous gatherings and demonstrations planned for the Mall over the coming months. For this reason, and given our prior expressions of concern about this that went unheeded, we intend to seek a court injunction prohibiting enforcement of the regulation unless you inform us by **February 1** that you will immediately suspend enforcement, at least on Lawyers’ Mall and other large outdoor areas controlled by DGS, until a new regulation that does not infringe on First Amendment freedoms can be promulgated.

### The Regulations at Issue

The COMAR regulations governing DGS property state as follows:

#### **.07 Soliciting and Debt Collection**

- A. The soliciting of alms, money, or contributions, commercial soliciting, the display or distribution of commercial advertising, political soliciting, or the collection of private debts, is prohibited on the property, except as permitted by §B of this regulation.

A separate COMAR provision, 04.05.01.01A, defines what property is covered by this prohibition, and plainly includes Lawyers’ Mall within its definition: “‘Property’ means State public buildings, improvements, grounds, and multiservice centers under the jurisdiction of the Department of General Services.” Although one of the exceptions

noted in §B of the soliciting prohibition is for local campaigns for charity, and CAAL arguably could fit within that exception, DGS has specifically informed CAAL that it may not solicit for charity during events on Lawyers' Mall, making clear that the organization is not viewed as falling within this exception by the State. See attached email from Maryland Capitol Police Col. Michael Wilson to CAAL convener Carl Snowden.

Mr. Snowden contacted Col. Wilson about the soliciting ban in connection with a candlelight vigil the group was organizing in mid-October to rally support for victims of the brutal attack by a gunman in Las Vegas. One victim of this attack was from Annapolis, and the group was hoping to raise funds to aid her recovery during its vigil. See email from Snowden to Col. Wilson, Attachment B. CAAL also held a Racial Justice Rally and March on October 1, 2017, also on the Mall. In both instances, CAAL was warned that DGS rules prohibited the group from soliciting monetary donations on Lawyers' Mall, thus preventing the group from engaging in this activity, in violation of their First Amendment freedoms.

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Long prior to the communications between CAAL and DGS, the ACLU had expressly advised DGS and its attorneys that the soliciting ban was unconstitutional as applied to a public area like Lawyers' Mall. In 2011, Del. Peter Hammen (who was then the Chairman of the House Health and Government Operations Committee) asked Daniel Friedman (who was then the Chief Counsel to the Maryland General Assembly, and who is now a judge on the Court of Special Appeals) to convene and chair a workgroup to review the regulations regarding expressive conduct on State-owned properties. The workgroup was an outgrowth of HB 1078, <http://mgaleg.maryland.gov/2011rs/bills/hb/hb1078f.pdf>, filed by Delegates Sandy Rosenberg and Michael Smiegel, which would have mandated a review and revision of such regulations by state agencies. The ACLU's David Rocah was asked to participate in this workgroup, and at the request of its convener undertook a comprehensive review of Maryland state regulations governing speech rights on public properties. Following this review, Mr. Rocah, Delegate Rosenberg, and Mr. Friedman, conducted a series of meetings with agency officials and counsel to discuss the problems identified with specific regulations. As to the DGS COMAR regulation on solicitation, Mr. Rocah advised DGS that the rule violated the First Amendment. Notwithstanding this advice, DGS failed to take any action to amend the regulation.

### The No-Soliciting Rule is Unconstitutional as Applied to Lawyers' Mall

The First Amendment protects the public's right to engage broadly in free speech in areas considered open public forums, and, as explained below, this protection includes the right to solicit monetary donations in a forum like Lawyers' Mall.

#### *1. Soliciting money is protected by the First Amendment.*

The U.S. Supreme Court long ago established that solicitation of "donations or payment" is a form of speech protected by the First Amendment. See *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) ("[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are within the protection of the First Amendment."); *Watchtower Bible and Tract Soc. v. Vill. of Stratton*, 536 U.S. 150 (2002) (ordinance requiring permit for door to door solicitation violated First Amendment.)

## 2. *Lawyers' Mall is a "traditional public forum."*

Constitutional speech protections are at their highest in areas that the public historically and traditionally has used to engage in the sharing of ideas and information. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (“Because of the historic role as a venue open to the public for discussion and debate, a traditional public forum receives special protection under the First Amendment.”) Graced by a statue of constitutional hero Thurgood Marshall, Lawyer’s Mall is such a “traditional public forum.” See, e.g., *Warren v. Fairfax Cty.*, 196 F.3d 186 (4th Cir. 1999) (*en banc*) (mall stretching in front of Fairfax County government complex constituted a traditional public forum); *Pinette v. Capitol Square Review and Advisory Bd.*, 30 F.3d 675 (6<sup>th</sup> Cir. 1994) (public plaza surrounding the Ohio State Capitol building was traditional public forum); *Lederman v. U.S.*, 291 F.3d 36, 41 (D.C. Cir. 2002) (holding sidewalk adjacent to Capitol traditional public forum). Like the government plazas at issue in the *Warren* and *Pinette* cases, Lawyer’s Mall historically has served as an open forum for public use in statehouse demonstrations, protests and gatherings, and thus it is a “traditional public forum” for purposes of constitutional analysis.

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In a traditional public forum, restrictions on free speech are scrutinized under the strictest standard of review. *McCullen*, 134 S. Ct. at 2530, citing *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). Indeed, the Supreme Court recently clarified that a content-based restriction like a no-soliciting rule is considered presumptively unconstitutional. *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015)<sup>1</sup> (“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed”). Courts applying the *Reed* rule in the context of panhandling and soliciting bans have found restrictions like the DGS rule to be unconstitutional content-based restrictions. E.g., *Norton v. City of Springfield, Ill.*, 806 F.3d 411, 411-13 (7<sup>th</sup> Cir. 2015) (On rehearing following *Reed*, appellate court found ordinance restricting oral requests for donations could not be considered content neutral and thus violated First Amendment); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 232-34 (D. Mass. 2015) (On remand from Supreme Court in light of *Reed*, court held panhandling ordinance posed an unconstitutional, content-based restriction on free speech); *Homeless Helping Homeless, Inc. v. City of Tampa*, 2016 WL 4162882\* (M.D. Fla. 2016) (Rule prohibiting solicitation of donations was content-based restriction that could not constitutionally be applied in public areas of the City.)

These authorities compel the conclusion that the DGS soliciting ban is likewise unconstitutional. The DGS regulation singles out specific speech for prohibition – the soliciting of donations – expressly based on its content. The rule applies, by its terms and in practice, to all DGS properties, including public fora such as Lawyers’ Mall. This, the Constitution forbids. To the extent the soliciting ban is applied to groups engaged in free speech and activities on Lawyers’ Mall, it is unlawful.

Given the time sensitive nature of this issue, CAAL and the ACLU are prepared to take prompt legal action to challenge the DGS soliciting ban as an unconstitutional restriction

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<sup>1</sup> The Supreme Court’s decision in *Reed* clarified the way courts should evaluate whether a rule or restriction is content based, and abrogated pre-existing Fourth Circuit rulings that had misunderstood the analysis. *Cent. Radio Co. Inc. v. City of Norfolk*, 811 F.3d 625, 632 (4th Cir. 2016) (noting abrogation of existing Fourth Circuit case law and reformulation of content neutrality test under *Reed*); *Cahaly v. Larosa*, 796 F.3d 399, 404–05 (4th Cir. 2015) (same).

on the public's First Amendment freedoms on Lawyers' Mall. As a courtesy, however, we offer you the opportunity to resolve this matter amicably, through your voluntary suspension of enforcement of the regulation until such time as a new rule can be put into place that meets constitutional standards. If we do not hear from you agreeing to such a compromise by February 1, 2018, we will assume you do not agree with our analysis, and proceed accordingly.

Thank you very much for your consideration. We look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read "Deborah A. Jeon". The signature is fluid and cursive, with a large initial "D" and a long, sweeping tail.

Deborah A. Jeon  
Legal Director

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Cc: Col. Michael Wilson  
Valerie L. Green, Esq.  
Hon. Sandy Rosenberg

## Attachment A

**From:** Michael Wilson -DGS- <[michael.wilson@maryland.gov](mailto:michael.wilson@maryland.gov)>  
**Sent:** Thursday, October 12, 2017 12:51 PM  
**To:** Carl Snowden  
**Cc:** Terry Custer; Rebecca Labs; Todd May  
**Subject:** Re: Solicitation on State Grounds

Carl, as stated previously, I have included the COMAR regulations that prohibit solicitation on State property, with few exceptions:

This reference is from Title 04, Subtitle .05, Chapter .01, Regulation .07

**.07 Soliciting and Debt Collection.**

**A. The soliciting of alms, money, or contributions, commercial soliciting, the display or distribution of commercial advertising, political soliciting, or the collection of private debts, is prohibited on the property, except as permitted by §B of this regulation.**

B. Permissible solicitations require the prior approval of the occupying agency head for scheduling, safety, security, and traffic purposes. Permissible solicitations are limited to:

- (1) Solicitation by national or local campaigns for savings bonds, health, welfare, and charity;
- (2) Solicitations by labor organizations for membership or dues as authorized by law;
- (3) Recruitment campaigns for the Armed Forces, National Guard, and other federal or State agencies, as previously approved by the occupant agencies;
- (4) Operation of vending facilities and concessions as part of the operation of the property for the benefit of employees and the public;
- (5) Personal notices posted by employees on authorized bulletin boards; and
- (6) Activities on portions of the property leased to other individuals or organizations.

Colonel Michael Wilson  
Maryland Capitol Police  
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410-767-4677 (office)

## **Attachment B**

Chief Wilson,

Thank you for returning my telephone call on Friday, October 8, 2017. Apparently, the email I previously sent you was blank. I apologize. I wanted to outline what my inquiry consisted of.

As I mentioned to you, individuals wanted to organize a candlelight vigil at the Thurgood Marshall Memorial for the victims of the mass murder that occurred in Las Vegas. One of the victims is from Maryland. She lost an eye and is in a comma.

We were informed that any solicitation on State Grounds is prohibited. If this is true, do that also apply to citizens who exercise their constitutional rights to petition their government also would be prohibited from soliciting for whatever cause they are advocating for?

Again, thank you for looking into this matter.

**A Luta Continua,**

**Carl O. Snowden, Convener  
Caucus of African-American Leaders**