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# LEGAL IMPLICATIONS OF INT 0467-2014, THE NEW YORK CITY “MASCOT LAW” BILL: COMMENTARY, LEGAL ARGUMENTS AND LOOPHOLES TO CONSIDER

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## ABSTRACT

There has been much debate about the recently proposed New York City Administrative Code bill, INT 0467-2014, which will require costumed individuals soliciting in public places to pay a fee in order to obtain a license to solicit. Namely, the debate stems around claims that the bill violates the First Amendment, is overly broad, and places an unreasonable financial restriction on poor applicants. These arguments are the product of a misinterpretation of the text and a misapplication of the law—careful reading of the bill demonstrates that the bill does not violate the First Amendment, is limited in scope to those intended costumed individuals who solicit compensation in public places, and does not place an unreasonable financial burden on applicants.

## INTRODUCTION

On September 10, 2014, New York City Council member Andy King of the Bronx proposed a bill “. . . to amend the administrative code of the city of New York, in relation to licensing of solicitation by costumed individuals.”<sup>1</sup> (herein, “Mascot Law”)<sup>2</sup>. This bill would make it illegal for

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<sup>1</sup> ANDY L. KING, ET. AL., *A Local Law to Amend the Administrative Code of the City of New York*, THE NEW YORK CITY COUNCIL, Int 0467-2014, September 10, 2014, available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1903343&GUID=5A45C651-7373-4589-86B4-F77DD0FD5CFC&Options=ID|Text|&Search=Costumed+individuals> (last visited September 29,

“costumed individual[s]” to solicit in public places without a license to do so.<sup>3</sup> There has been much opposition to this bill.<sup>4</sup> However, much of the outcry is misguided.

Part I of this Article will give an overview of the proposed legislation. The full text of the Mascot Law will be reproduced in Part A. Under each relevant subpart of the Mascot Law, I will provide observations, commentary, legal arguments, and loopholes for both supporters and opponents of the Mascot Law to consider. Part II will analyze and critique three prevalent critiques, namely that (1) the Mascot Law violates the First Amendment, (2) the Mascot Law is overly broad, and (3) the Mascot Law places an unreasonable financial restriction on poor applicants, made against the Mascot Law in recent New York news.<sup>5</sup> Part III is the conclusion.

## I. OVERVIEW OF THE MASCOT LAW

If passed, Mascot Law, Int. No. 467, would be Subchapter 33 of Chapter 2 of title 20 of the administrative code of the City of New York. The regulation is titled “Costumed Individuals.” The text of the Mascot Law is reproduced below, along with legal commentary<sup>6</sup> to consider below each relevant subpart:

2014).

<sup>2</sup> I call it the Mascot Law for simplicity’s sake since that is the type of costume this law would have the greatest effect on, a full bodied costume providing anonymity, as opposed to the costume law because it does not affect all types of costumed individuals. Further, I do not call it the superhero law because not all the costumes are of superheroes and I do not want to use any copyrighted names in my shorthand, as there has already been enough copyright infringement by many of the costumed individuals wearing unauthorized reproductions of costumes of copywritten TV and movie characters.

<sup>3</sup> *Id.* at § 20-541.

<sup>4</sup> *E.g.*, Christopher Robbins, *Does NYC’s Proposed Costume Law Go Too Far?*, GOTHAMIST (Sept. 11, 2014), [http://www.gothamist.com/2014/09/11/costume\\_law\\_nyc.php](http://www.gothamist.com/2014/09/11/costume_law_nyc.php).

<sup>5</sup> This note will not discuss the copyright infringement aspects of the current solicitation situation in Times Square, New York City, which would require an entire textbook. In short, aside from original characters/mascots, ie, The Naked Cowboy, or public domain characters (i.e., The Statue of Liberty), other characters, such as Spiderman, Elmo, Mickey Mouse, etc., are breaking copyright law and showing utter disregard for intellectual property owners by soliciting and even misleading the public into thinking they are representing Disney, Marvel, etc. *See, e.g.*, *Naked Cowboy v. CBS*, 844 F. Supp. 2d 510 (S.D.N.Y. 2012).

<sup>6</sup> Without turning this into a Constitutional Law lesson on statutory interpretation, where the words of a statute are clear and unambiguous, courts do not need to inquire any further into the meaning of the statute. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003). There is a judicial assumption that the words of a statute mean what an “ordinary” or “reasonable” person would understand them to mean. *See William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (3d. ed. 2001), 819. The general exception is where the plain meaning would produce an “absurd result.” *See, e.g.*, *United States v. Granderson*, 511 U.S. 39, 47 n.5 (1994) (dismissing an interpretation said to lead to an absurd result); *see also Dewsnap v. Timm*, 502 U.S. 410, 427 (1992); *Public Citizen v. Department of Justice*, 491 U.S. 440, 454 (1989).

§ 20-540 Definitions.<sup>7</sup> For purposes of this subchapter, the following words and terms shall have the following meanings:

a. “Costume”. An article of clothing, accessory, mask, paint, or other object that: (1) obscures or shrouds the face of a person beyond recognition; or (2) causes a person to resemble a character rather than his or her own personal identity;

The key words in this definition of “costume” are “face” and “identity.” The word “identity” is preceded by “personal,” which implies that the individual will determine her own identity. Therefore, for example, if the individual, who may be male or female, identifies as the opposite gender and resembles that gender, it would not be considered a “costume” under this law, unless it “obscures or shrouds” her face “beyond recognition.” Similarly, if the individual personally identifies herself as Batman, Mickey Mouse, a naked cowgirl, or a pirate, any “article of clothing, accessory, mask, paint, or other object” she wears, if in line with her personal identity, could not be considered a costume, unless, again, “obscures or shrouds” her face “beyond recognition.”

b. “Costumed individual” Any person wearing a costume; and

c. “Public space”. All publicly owned property between the property lines on a street as such property lines are shown on the City Record including but not limited to a park, plaza, roadway, shoulder, tree space, sidewalk or parking space between such property lines. It shall also include, but not be limited to, publicly owned or leased land, buildings, piers, wharfs, stadiums and terminals. Nothing in this subchapter shall supersede existing agency rules or regulations or prohibit a city agency from establishing time, place and manner restrictions on activity licensed under this subchapter that occurs on property under its jurisdiction.

The geographic area defined as “public space” does not include the quasi-public space such as the porch or common area in an apartment building so this would not affect costumed “trick-or-treaters” during Halloween that enter these areas to solicit candy. Mascot could technically go door to door and solicit in these same quasi-public areas.

d. “Solicit”. To accept, or request by spoken word, signs, gestures or any other means, a fee, donation, tip, payment or any other form of

<sup>7</sup> § 20-540 defines a number of terms very carefully and specifically. Any interpretation of this law must be read in conjunction with this strict application of the definitions to the rest of the regulation in mind. These definitions are important because they suggest that the Mascot Law intended for these terms to have a specific meaning that might differ in important ways from its common usage.

compensation.

The key phrase in this definition is “any other form of compensation.” This phrase would imply that the words “fee, donation, tip, payment,” are all forms of compensation. Compensation is given in exchange for something, tangible or intangible.

e. “Solicit in an aggressive manner”. (1) Approaching or speaking to a person, or following a person before, during or after soliciting, if that conduct is intended or is likely to cause a reasonable person to (i) fear bodily harm to oneself or to another, damage to or loss of property, or the commission of any offense as defined in section ten of the penal law upon oneself or another, or (ii) otherwise be intimidated into giving money or other thing of value, or (iii) suffer unreasonable inconvenience, annoyance or alarm;

(2) Intentionally touching or causing physical contact with another person, an occupied vehicle without that person’s consent in the course of soliciting or intentionally touching or causing physical contact with another person in the company of the person being solicited without that person’s consent in the course of soliciting;

(3) Intentionally blocking or interfering with the safe or free passage of a pedestrian or vehicle in the course of soliciting by any means, including unreasonably causing a pedestrian or vehicle operator to take evasive action to avoid physical contact; or

(4) Using violent or threatening gestures toward a person solicited or another person in the company of the person being solicited.

These definitions of “solicit in an aggressive manner” address the crux of all the negative media reports of mascots’ behavior that likely prompted this regulation.<sup>8</sup>

<sup>8</sup> See David J. Goodman *Man Dressed as Spider-Man Is Arrested After Scuffle With Police in Times Square*, NEW YORK TIMES, July 27, 2014, available at [www.nytimes.com/2014/07/28/nyregion/man-dressed-as-spider-man-is-arrested-after-scuffle-with-police-in-times-square.html](http://www.nytimes.com/2014/07/28/nyregion/man-dressed-as-spider-man-is-arrested-after-scuffle-with-police-in-times-square.html) (last accessed Oct. 14, 2014) (describing that in 2012, an individual dressed as Spiderman refused a \$1 tip in exchange for a picture with a tourist couple in Times Square, New York City, since it was too small. A police officer told the tourist couple that they could tip whatever they wanted. The individual dressed as Spiderman told the police officer to mind his own business and when asked for identification, he could not produce any. The individual dressed as Spiderman then punched the officer in the face when the officer moved to arrest him. He was charged with assaulting an officer and resisting arrest); see also Larry Celona & Kathryn Cusma, *Times Sq. Spidey ‘hits ma’*, NEW YORK POST, February 11, 2013, available at [http://www.nypost.com/p/news/local/manhattan/times\\_sq\\_spidey\\_hits\\_ma\\_gvqapVfQTS6nlMiw9mQQP?utm\\_medium=rss&utm\\_content=Manhattan](http://www.nypost.com/p/news/local/manhattan/times_sq_spidey_hits_ma_gvqapVfQTS6nlMiw9mQQP?utm_medium=rss&utm_content=Manhattan) (last accessed October 14, 2014) (describing how in 2013, a different individual dressed as Spiderman fought a woman); see also Colleen Long & Karen Matthews, *Cookie Monster, Elmo: Monster behavior in Times Square?*, USA TODAY, April 9, 2013, available at [www.usatoday.com/story/news/nation/2013/04/09/cookie-monster-elmo-times-square-](http://www.usatoday.com/story/news/nation/2013/04/09/cookie-monster-elmo-times-square-)

§ 20-541 License required. a. It shall be unlawful for any costumed individual while wearing a costume to solicit in return for posing for photographs or otherwise interacting with the public in public places without having first obtained a license in accordance with the provisions of this subchapter.

The key phrase in this subsection is “unlawful for any costumed individual . . . to solicit in return.” This subsection has many implications, first of which clarifies the definition of “solicit,” since it is clear that to solicit means to get compensation for something, whether it be posing for a photograph or interacting with the public in public places. Therefore, if a costumed individual is not posing or otherwise interacting, and a member of the public photographs her and then gives her money or candy, there is no solicitation. Furthermore, if an unmasked character who personally identifies as a naked cowgirl or ninja (church of fling spaghetti monster case), she is not wearing a costume, as her dress does not cause her to resemble a character other than the one she personally identifies as. If the Mascot Law were put in place, and a tourist wanted to take picture with a masked mascot with no license, there is nothing stopping her from doing so. Furthermore, if she were to, unsolicited and out of the goodness of her heart, give a donation to said mascot, this would be permissible as it was an act of her own free, unprompted, will. There is no case law required for the notion that a person’s own money may be spent or given away as she sees fit, so long as it is not for an illegal purpose. So an individual who truly wants to practice her right to express herself<sup>9</sup> through a masked costume

trouble/2069037/) (describing how in 2013, Osvaldo Quiroz-Lopez, 33, was charged with assault, child endangerment and aggressive begging when he dressed as a Cookie Monster and shoved a toddler); see also Rocco Parascandol, Kerry Burke, and Denis Slattery, *Times Square performer dressed as Super Mario arrested after allegedly groping woman*, NEW YORK DAILY NEWS, December 20, 2012, available at <http://www.nydailynews.com/new-york/times-square-super-mario-performer-arrested-alleged-groping-article-1.1224124> (last accessed October 14, 2014) (describing how in 2012, Damon Torres, age 34, dressed as Super Mario groped a pedestrian and was charged with forcible touching and marijuana possession) ; Barbara Ross, *Anti-Semitic Times Square Elmo Sentenced to one year in prison for \$2 million extortion attempt from Girl Scouts*, NEW YORK DAILY NEWS, Wednesday, October 9, 2013, available at <http://www.nydailynews.com/news/crime/anti-semitic-elmo-year-jail-girls-scout-extort-article-1.1480585> (last accessed October 14, 2014) (describing how Dan Sandler was arrested in Times Square, dressed as Elmo, while shouting an anti-Semitic rant; he was also later sentenced to one year in prison for attempting to extort \$2 million from the Girl Scouts); see also Dana Sauchelli & Jamie Schram, *Two Men Dressed as Statute of Liberties Brawl*, NEW YORK POST, June 13, 2014, available at <http://nypost.com/2014/06/13/two-men-dressed-as-statue-of-liberties-brawl/> (A brawl broke out between two statue of liberty impersonators fighting for soliciting territory) (last accessed October 14, 2014); see also Larry Celona, *‘Woody’ From ‘Toy Story’ arrested on sex charges*, NEW YORK POST, January 10, 2014, available at <http://nypost.com/2014/01/10/man-dressed-as-woody-arrested-on-sex-charges/> (last accessed October 14, 2014) (describing how an individual dressed as Woody from Toy Story was arrested and charged with forcible touching and sexual abuse for groping numerous women in Times Square).

<sup>9</sup> U.S. CONST. AMEND. I.

would not be required to pay for or display her permit, or be fingerprinted for that purpose.

It is true, according to Professor Jesse Choper, a professor of public law at the university of California at Berkeley, that “people do have a right to talk to people . . . and you do have a right, if you aren’t blocking anyone’s path, to say ‘would you consider giving me some money’.”<sup>10</sup> In Professor Choper’s scenario, a costumed person has the right to talk to anyone she wishes, and the Mascot Law would leave the situation untouched, if that is the complete interaction between the parties. Thus, this law would have no actual effect and the above, for a lack of a better word, “loophole,” is not actually a way to bypass the law - the law does not affect anyone within those specific boundaries.

However, a legal argument would be made on a case by case basis in the above situation—the Court would look at the actual facts and action, not what the actual exchange or true donation is called. For example, in prostitution, calling payment a donation does not legalize the illegal activity.

b. It shall be unlawful for any costumed individual to sell, lend, lease or in any manner transfer his or her license or any interest therein to another person.

§ 20-542 License term; fees.

a. All licenses issued pursuant to this subchapter shall be valid for two years unless sooner suspended or revoked. The commissioner shall establish by regulation the expiration date of such licenses.

b. The biennial license fee for a license or a renewal thereof shall be one hundred and seventy dollars. The department shall waive or defer all or part of the biennial license fee where, because of the indigence of the applicant, the payment of the fee would work an unreasonable hardship on the applicant. The commissioner shall promulgate rules and regulations to implement a process for considering requests for waiver of the biennial license fee based on hardship to the applicant.

c. The fee for issuing a duplicate license when the original has been lost, destroyed or mutilated shall be ten dollars.

It is important to recognize the rest of paragraph “b,” which takes into

<sup>10</sup> Tatiana Schlossberg, *Councilman to Propose Bill to Regulate Costumed Characters Soliciting in Times Square*, NEW YORK TIMES, Sept 8, 2014 available at [http://www.nytimes.com/2014/09/09/nyregion/councilman-to-propose-bill-to-regulate-costumed-characters-soliciting-in-times-square.html?src=twr&\\_r=0](http://www.nytimes.com/2014/09/09/nyregion/councilman-to-propose-bill-to-regulate-costumed-characters-soliciting-in-times-square.html?src=twr&_r=0) (last accessed: Oct 2, 2014).

account the waiver of the biennial license fee of \$175, which essentially grants access to anyone who wishes to join this profession, regardless of income.<sup>11</sup> The presence of the rest of the paragraph, which most critics of the regulation seem to selectively ignore, or possibly because they have not read the regulation themselves, or lack the capacity to interpret the language, makes the argument that the passing of the Mascot Law would close this door off to low-income individuals, when it clearly does the opposite.

§ 20-543 Application; fingerprinting fee.

a. Each person applying for a license or renewal thereof under this subchapter shall file an application in such form and detail as the commissioner may prescribe and shall pay the fee required by this subchapter. An applicant for any such license shall be fingerprinted by the department for the purpose of securing criminal history records from the state division of criminal justice services. The applicant shall pay a processing fee as required by the state division of criminal justice services. Notwithstanding the foregoing, the commissioner need not require applicants for licenses required under this subchapter to be fingerprinted if criminal history records concerning such applicants are not available from the state division of criminal justice services.

This is another subsection promulgated likely by the public concern of sex offenders wearing costumes and masks, hidden from public while still in plain view. As with previous subsections of the Mascot Law, this paragraph must be looked at in its entirety. This subsection serves to exclude convicted sex offenders.<sup>12</sup> Clearly, convicted sex offenders are not a protected class under the Civil Rights Act of 1964.<sup>13</sup> Furthermore, the last sentence, which does not require fingerprinting for those license applicants who do not have a criminal record, will not serve to prevent any ordinary citizen with no criminal record from obtaining a license.

b. In addition to any other information required, the commissioner shall require the following information:

<sup>11</sup> For an explanation of why this regulation also does not prevent citizenship status from access to the profession, see §20-543(b), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1903343&GUID=5A45C651-7373-4589-86B4-F77DD0FD5CFC&Options=ID|Text|&Search=Costumed+individuals>.

<sup>12</sup> See §20-544(b) available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1903343&GUID=5A45C651-7373-4589-86B4-F77DD0FD5CFC&Options=ID|Text|&Search=Costumed+individuals>.

<sup>13</sup> PUB.L. 88-352, 78 Stat. 241; see e.g., California Attorney General Opinion No. 05-301 (April 26, 2006) (providing that sex offenders are not a protected class for purposes of housing discrimination under the Fair Employment Housing Act).



1. The name and home address of the applicant.
2. Three prints of a full-face photograph of the applicant taken not more than thirty days prior to the date of the application.
3. An applicant who is a non-resident of the city shall provide the name and address of a registered agent within the city or designate the commissioner as his or her agent upon whom process or other notification may be served.
4. No city officer or employee shall inquire about an applicant's immigration or citizenship status as part of an application made pursuant to this section. Information about an applicant's immigration or citizenship status shall not affect the consideration of the application for a license under this subchapter or renewal thereof.
5. Licenses and renewals thereof shall be issued to the applicant and shall be nontransferable.

Critics of the Mascot Law have argued that the passing of this regulation would exclude non-documented citizens from this profession. However, subpart 4 makes it clear that an applicant, will not face deportation simply by applying. Furthermore, no doors to this profession are closed, as all that is required for a mascot license under this subsection is a name, address, and photograph—No citizenship papers or identification are required. Therefore, nothing, barring a criminal history indicating bad moral character, would prevent a non-documented citizen from obtaining a license to enter this profession.

§ 20-544 License approval or denial.

a. Upon the approval of an application the commissioner shall issue a license to the applicant.

b. A license shall be issued only where an applicant is at least eighteen years of age, satisfies the commissioner that such applicant possesses good moral character, and meets any additional criteria established by the commissioner by regulation as he or she deems necessary to effectuate the purposes of this subchapter. For purposes of this section, good moral character shall mean that the applicant is not registered as a sex offender with the division of criminal justice services of the state of New York or convicted of another criminal offense with a direct relationship to the activities permitted by a license under this subchapter.

It is hard to argue that a registered sex offender should be allowed to wear a disguise or "costume" and regularly and closely interact with

vulnerable, potential victims, such as children. The door is not left open for any unrelated criminal offense since the last sentence of this subpart contemplates only those other criminal offenses with a “direct relationship to the activities permitted by a license, i. e., soliciting for compensation. This section was likely shaped with those negative incidents highlighted by media in mind.

c. In addition to any of the powers that may be exercised by the commissioner pursuant to this subchapter or chapter one of this title, or the rules or regulations thereto, the commissioner may refuse to issue or renew a license if the applicant has pending any unanswered summons or unsatisfied fines or penalties for violation of chapter one of this title or this subchapter or the regulations promulgated thereto; has been convicted of a misdemeanor for violation of this subchapter; or for any cause set forth in any other section of chapter one of this title, subdivision b of this section or elsewhere in this subchapter as a ground for suspension or revocation or the issuance or continuation of the license would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Like any license or permit, violations of the rules will result in the refusal to renew the license. For those critics that complain about this regulation since multiple unaddressed violations could mean suspension or revocation of the license, the rules are clearly and specifically written and if they are followed, no penalties will be imposed and licenses may be renewed, unsuspended, and unrevoked.<sup>14</sup>

#### § 20-545 Hearings.

Unless otherwise specifically provided, notice and hearings upon the suspension or revocation of a license or the imposition of penalties provided in section 20-552 shall be in accordance with the provisions of chapter one of this title and the rules and regulations thereto.

There is no special “costume court” set up to hear the grievances. Until the number of licenses granted and costumed individuals require, a specialized court set up to hear these matters would be an extreme waste of judicial resources.

#### § 20-546 Display of license.

a. Each licensee shall carry his or her license on his or her person and it shall be exhibited upon demand to any police officer, authorized officer or employee of the department or other city agency.

<sup>14</sup> See §20-458.

b. The license shall contain the licensee's name, his or her license number and a non-removable photograph of the licensee. It shall be worn conspicuously by him or her at all times while he or she is wearing a costume and engaged in solicitation

c. The licensee may be required by a police officer, authorized officer or employee of the department or other city agency to remove portions of a costume that obscure the licensee's face in order that the officer may verify that person wearing the costume is the authorized licensee whose photograph appears on the displayed license.

The display of the mascot license under the Mascot Law has multiple effects. The displaying of the license will, among other things, ensure compliance with the license requirement, ensure safety for the customers, and will serve to identify those who violate the law to the regulatory body. Because there is no other identifying personal information on the license, such as an address or social security number, mascots do not have to worry about their safety more than any other law-abiding citizen.

§ 20-547 Notification of change.

Whenever any information provided on the application for a license or renewal thereof has changed the licensee shall notify the commissioner within ten days of such change.

§ 20-548 Restrictions on location of licensed activity.

a. No licensee shall solicit in an aggressive manner.

b. No licensee shall solicit on any sidewalk unless such sidewalk has at least a twelve foot wide clear pedestrian path to be measured from the boundary of any private property to any obstructions in or on the sidewalk, or if there are no obstructions, to the curb. In no event shall a licensee solicit on any part of a sidewalk other than that which abuts the curb.

c. No licensee nor his or her property shall touch, lean against or be fixed permanently or temporarily to any building or structure including, but not limited to lamp posts, parking meters, mail boxes, traffic signal stanchions, fire hydrants, tree boxes, benches, bus shelters, refuse baskets or traffic barriers.

d. No licensee nor his or her property shall be located against display windows of fixed location businesses, nor shall they be within twenty feet from any entranceway to any building, store, theatre, movie house, sports arena or other place of public assembly, or within twenty feet from exits, including service exits, to buildings that are exclusively residential at the street level.

Subpart d can be seen to protect the corporate mascots from both copyright laws and liability. It is reasonable and plausible that a customer of a soliciting mascot may assume that the mascot represents the business or corporation the mascot's unauthorized, copyright-violating costume represents. For example, it is also more likely Mars Inc. will pursue a copyright infringement lawsuit against a belligerent and unauthorized imitation M&M costume immediately outside of its store, as opposed to where all the other Mascots are gathering in the open space in Times Square.

e. No licensee shall solicit within any bus stop or taxi stand, within the portion of the sidewalk abutting any no standing zone adjacent to a hospital as defined in subdivision one of section 2801 of the New York state public health law, or within ten feet of any driveway, any subway entrance or exist, or any corner. For purposes of this subdivision, ten feet from any corner shall be measured from a point where the property line on the nearest intersecting block face, when extended, meets the curb.

f. In no case shall a licensee solicit so as to restrict the continued maintenance of a clear passageway for pedestrians or vehicles.

g. No licensee shall solicit on the median strip of a divided roadway unless such strip is intended for use as a pedestrian mall or plaza.

h. No licensee shall solicit within the geographical areas under the jurisdiction of any city agency in violation of rules or regulations promulgated by the agency. In the absence of rules or regulations of a city agency, this section shall apply. Nothing in this subchapter shall supersede existing agency rules or regulations or prohibit a city agency from establishing time, place and manner restrictions on activity licensed under this subchapter that occurs on property under its jurisdiction.

i. Where exigent circumstances exist and a police officer or other authorized officer or employee of any city agency gives notice to a licensee to temporarily move from any location such licensee shall not solicit from such location. For purposes of this subdivision, exigent circumstances shall include, but not be limited to, unusually heavy pedestrian or vehicular traffic, existence of any obstructions in the public space, an accident, fire or other emergency situation, a parade, demonstration or other such event or occurrence at or near such location.

j. No licensee shall solicit over any ventilation grill, cellar door,

manhole, transformer vault or subway access grating.

k. No licensee shall use equipment, stands, vehicles, racks or displays in connection with activity under this subchapter.

l. No licensee shall solicit:

1. within ten feet from sidewalk cafes;
2. within five feet from (a) bus shelters, (b) newsstands, (c) public telephones or (d) disabled access ramps.

One important thing to note about this subsection is that these restrictions do not prevent a costumed individual from physically being in any of the aforementioned locations, just that they cannot do so while soliciting. Therefore, so long as a costumed individual is not actively soliciting, this law does not prevent them from, for example, standing inside a sidewalk cafe, waiting for the bus at a bus stop, or taking the subway.

§ 20-549 Suspension and revocation of license.

Any license issued pursuant to the provisions of this subchapter may be suspended or revoked by the commissioner upon notice and hearing for any of the following causes:

- a. Fraud, misrepresentation, or false statements contained in the application for the license or any renewal application;
- b. Four or more violations of any provision of this subchapter or the regulations promulgated thereto within a two-year period;
- c. Violation of chapter one of this title or this subchapter or the regulations promulgated thereto; provided, that in the event of a conflict between the provisions of such chapter and the provisions of this subchapter, the provisions of this subchapter shall prevail;
- d. Failure to answer a summons or notice of violation, appear for a hearing, or pay a fine or civil penalty imposed pursuant to the provisions of chapter one of this title or this subchapter or the regulations promulgated hereunder; or
- e. Conviction of a misdemeanor under this subchapter.

When a license is issued, it is subject to the rules and regulations of the issuing regulatory body. It is a basic understanding that any type of license can be taken away for failure to abide by the rules. This is not a new concept unique to the Mascot Law. Therefore, any critique of the

suspension or revocation of the failure to abide by the rules is misguided.

§ 20-550 Regulations. The commissioner shall make such rules and regulations as he or she deems necessary for the proper implementation and enforcement of this subchapter.

This subsection of the Mascot Law may seem problematic to some as it seems to imply that the commissioner has absolute power to create additional, unlimited regulation . However, the key phrase to focus on is “necessary for the proper implementation and enforcement of *this subchapter*.” (emphasis added) The rules made would not increase any power or take away any additional rights from license-holders as they must be for the proper implementation and enforcement of the Mascot Law.

§ 20-551 Penalties. a. Any person who violates section 20-541 of this subchapter shall be guilty of a misdemeanor punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment for not more than three months or by both such fine and imprisonment.

§20-541 deals with the license requirement for costumed individuals to solicit and the unlawfulness of “sell[ing], lend[ing], leas[ing] or in any manner transfer[ing] his or her license or any interest therein to another person.” Similar to the requirement of a driver’s license to drive, a costumed solicitation license requirement to solicit requires penalties for failure to comply. Where a license is not obtained in the first place, revocation or suspension of a future license is not an adequate deterrent to break the law. By imposing both civil and criminal penalties, compliance will be maximized.

b. Except as provided in subdivision a of this section, any person who violates a provision of this subchapter or any rule promulgated pursuant to this subchapter shall be guilty of an offense punishable as follows:

1. For the first violation, a fine of not less than twenty-five dollars nor more than fifty dollars;
2. For the second violation issued for the same offense within a period of one year of the date of the first violation, a fine of not less than fifty dollars nor more than one hundred dollars;
3. For the third violation within a period of two years of the date of the first violation, a fine of not less than one hundred dollars nor more than two hundred and fifty dollars; and
4. For any subsequent violations within a period of two years of the

date of the first violation, a penalty of not more than five hundred dollars.

c. In addition to the penalties set forth in subdivisions a and b of this section, any person who violates any provision of this subchapter or any rules promulgated pursuant to this subchapter shall be subject to a civil penalty of not less than one hundred dollars nor more than five hundred dollars per day.

d. A proceeding to recover any civil penalty pursuant to this section shall be commenced by the service of a notice of violation which shall be returnable to the environmental control board. The board shall have the power to impose the penalties prescribed under this section.

By providing a penalty ladder, there is assurance that harsh penalties are not imposed for first time offenders and are applied to repeat offenders.

§ 20-552 Enforcement. a. Authorized officers and employees of the department, the police department and any department designated by the commissioner, and any police or peace officer shall have the power to enforce any provision of this subchapter or any rule or regulation promulgated pursuant to this subchapter. This provision shall in no way restrict any other power granted by law to an officer or employee of any city agency.

b. Any police officer may seize the costume used by an unlicensed costumed individual in violation of section 20-541. If a forfeiture proceeding is not commenced, the owner or other person lawfully entitled to the possession of such costume may be charged with the reasonable cost for removal and storage payable prior to the release of such costume unless the charge of unlicensed activity has been dismissed.

This subsection allows for an enforcement tool for police to ensure paraphernalia used to break the law is not used to commit further crimes, much like a computer may be seized from someone who possesses child pornography. Because there is a hearing process in place, this would ensure only those costumes found to be used in the commission of unlicensed soliciting will be charged a fee for the removal and storage of the costume.

§ 20-553. Failure to produce license; presumptive evidence of unlicensed activity.

In any civil or criminal action or proceeding, failure by the person who is required to be licensed pursuant to the provisions of this subchapter to exhibit upon demand a license in accordance with the provisions of this subchapter to any police officer or authorized officer

or employee of the department or other city agency shall be presumptive evidence that such person is not duly licensed.

§ 2. Effect of invalidity; severability. If any section, subsection, sentence, clause, phrase or other portion of this local law is, for any reason, declared invalid, in whole or in part, by any court of competent jurisdiction, such portion shall be deemed severable, and such invalidity shall not affect the validity of the remaining portions of this local law, which remaining portions shall continue in full force and effect.

This section of the Mascot Law will allow the rest of the law to remain in place if the Courts were to find any single part of the law invalid, and is broad enough to even sever a Constitutionally-offensive subsection.

§ 3. This local law shall become effective 120 days after it shall have become law, except that the commissioner of the department shall take all actions necessary, including the promulgation of rules, if necessary, to implement this local law on or before the date upon which it shall take effect.

Without this explicit grant of power to the commissioner to take actions in order for the law to be effectively enforced prior, such as create curriculum to train Police in dealing with soliciting or non-soliciting, and costumed, uncostumed or non-costumed, this proposed Mascot Law would likely not become truly effective 120 days after it becomes law.

## II. ANALYSIS OF CRITIQUES AGAINST THE MASCOT LAW

### A. *This Law Violates the First Amendment*

The First Amendment states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.<sup>15</sup>

According to the American Civil Liberties Union of New York, the First Amendment generally protects an individual's right to dress up like a mascot and walk down a public street.<sup>16</sup> Furthermore, the mascot's

<sup>15</sup> U.S. Const. amend. I.

<sup>16</sup> Luke Swiderski, 'Elmo' sent to jail as Times Square characters raise concerns, REUTERS, Oct 9, 2013, available at <http://www.reuters.com/article/2013/10/09/us-usa-newyork-elmo-idUSBRE9981BM20131009> (last accessed Oct. 14, 2014).



requests for cash are carefully worded as “donations” or “tips,” and so the mascots are not working, but panhandling or “busking,” which ACLU claims is also protected by the First Amendment.<sup>17</sup>

However, freedom of speech is not a trump card to do or say whatever one wants. Easy examples include not being able to incite violence,<sup>18</sup> promote child pornography,<sup>19</sup> or shout “fire” inside a crowded theater when the theater is not on fire.<sup>20</sup> As the law stands today, without a background check, a convicted sex offender may freely hide behind a mascot costume and inappropriately touch children,<sup>21</sup> undeterred and undetected. The First Amendment does not allow stuffing a bulky mascot costume full of explosives/weapons and prancing undetected into one of the most populated areas of not only New York City, but of the world.<sup>22</sup> A license may not completely prevent a terrorist attack like this, but a background check and fingerprinting will deter it and make it more difficult. This is analogous to the random police searches on the New York City subway.<sup>23</sup> As that law demonstrates, even though you may refuse to consent to a search, the safeguard is there to allow police to protect the peace and deter terrorist activity.

According to Cornell Law School Constitutional Law Professor emeritus Steven Shiffrin,<sup>24</sup> a law like this may not pass constitutional muster. “Wearing costumes is a form of First Amendment expression, and the First Amendment does not permit government to charge its citizens as a precondition of exercising their rights . . . This principle takes on special force

<sup>17</sup> *Id.*

<sup>18</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>19</sup> *New York v. Ferber*, 458 U.S. 747 (1982).

<sup>20</sup> *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>21</sup> I highlight children because although the elderly, men, and women may also be touched inappropriately and anonymously, children are more vulnerable.

<sup>22</sup> See generally, Michael Pearson, *Gunman turns ‘Batman’ screening into real-life ‘horror film’*, CNN, July 20, 2012, available at <http://www.cnn.com/2012/07/20/us/colorado-theater-shooting/index.html> (last accessed October 14, 2014) (James Holmes, a costumed and masked gunman, opened fire on a crowded theater in Colorado, killing 12 and wounding 58 individuals, during a movie premier of *The Dark Knight Rises*).

<sup>23</sup> See Sewell Chan & Kareem Fahim, *New York Police Department, Mass Transit Bag Inspection Program, A.K.A. Container Inspection Program*, THE NEW YORK TIMES, July 22, 2005, available at [http://www.nytimes.com/2005/07/22/nyregion/22york.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2005/07/22/nyregion/22york.html?pagewanted=all&_r=0); see also *Macwade v. Kelly*, Docket No. 05-6754-cv, 2006 U.S. App. Lexis 20587 (2nd Cir. 2006) (2nd Circuit panel unanimously upheld suspicionless, random searches of subway travelers’ baggage and containers); see also, Timothy Williams & Sewll Chan, *In New Security Move, New York Police to Search Commuters’ Bags*, NEW YORK TIMES, July 21, 2005, available at [www.nytimes.com/2005/07/21/nyregion/21cnd-security.html?pagewanted=print&\\_r=0](http://www.nytimes.com/2005/07/21/nyregion/21cnd-security.html?pagewanted=print&_r=0) (last accessed October 13, 2014).

<sup>24</sup> Steven H. Shiffrin, *Professional Biography*, CORNELL LAW SCHOOL, available at <http://www.lawschool.cornell.edu/faculty/bio.cfm?id=72>.

when the charge is exorbitant and when the purported justification for its imposition is so obviously a pretext.”<sup>25</sup>

As explained earlier,<sup>26</sup> the license fee can be waived due to indigence of the applicant and the unreported and untaxed earnings of costumed individuals soliciting can place them high above the poverty line. Therefore, the \$175 charge can hardly be considered exorbitant. The purported justification for the imposition of the Mascot Law, namely, safety, is also not a pretext, as demonstrated by the number of incidents involving violent and perverted soliciting, costumed individuals in Times Square.

George Washington University Constitutional Law professor Jonathan Turley stated “[y]ou have people on Wall Street who violate the law, and we don’t subject people in Armani suits to special regulations,”<sup>27</sup> while likely being facetious, this gives a poor analogy to the Mascot Law. Armani suits are obviously not a prerequisite to working on Wall Street. If by people working on Wall Street, he means Wall Street Stock Brokers and Traders, there is already a requirement that these individuals are licensed.

According to Eugene Volokh,<sup>28</sup> a Constitutional Law professor at University of California Los Angeles, the United States Supreme Court has never addressed the issue of whether panhandling is constitutionally protected or not.<sup>29</sup> Public Law Professor Jesse Choper of University of California at Berkeley was correct when he said “[i]f you can prove they are there to seek money, not simply conveying a message . . . they are subject to greater regulation.”<sup>30</sup>

In an article with the Gothamist, Volokh cited to *Bery v. City of New York*,<sup>31</sup> where the 2<sup>nd</sup> Circuit Court of Appeals, struck down a New York City law requiring people selling paintings and photographs to obtain a license, commenting that the city’s argument, that this is business being

<sup>25</sup> Christopher Robbins, *New Law Would Require \$175 Permit to Wear a Costume in Times Square*, GOTHAMIST, Sept. 10, 2014, available at [http://gothamist.com/2014/09/10/times\\_square\\_elmo\\_permit.php](http://gothamist.com/2014/09/10/times_square_elmo_permit.php) (last accessed October 14, 2014).

<sup>26</sup> See Fan, *infra*, p. 7; see also Fan, *infra*, p. 8.

<sup>27</sup> Associated Press, *New York Targets Times Square Elmos and Cookie Monsters*, THE GUARDIAN, July 30, 2014, available at [www.theguardian.com/world/2014/jul/30/new-york-times-square-elmo-cookie-monster](http://www.theguardian.com/world/2014/jul/30/new-york-times-square-elmo-cookie-monster) (last accessed October 14, 2014).

<sup>28</sup> Eugene Volokh, <http://www2.law.ucla.edu/volokh/> (last visited on Nov. 16, 2014).

<sup>29</sup> Christopher Robbins, *Does NYC’s proposed Costume Law Go Too Far?*, GOTHAMIST (Sept. 11, 2014), available at [http://gothamist.com/2014/09/11/costume\\_law\\_nyc.php](http://gothamist.com/2014/09/11/costume_law_nyc.php) (last accessed October 14, 2014).

<sup>30</sup> Associated Press, *New York Targets Times Square Elmos and Cookie Monsters*, THE GUARDIAN, July 30, 2014, available at [www.theguardian.com/world/2014/jul/30/new-york-times-square-elmo-cookie-monster](http://www.theguardian.com/world/2014/jul/30/new-york-times-square-elmo-cookie-monster) (last accessed October 14, 2014).

<sup>31</sup> 97 F.3d 689 (2d Cir. 1996).

carried on in a public place which means the city can regulate, “doesn’t fly.”<sup>32</sup> However, this case is not binding on State and City Courts.<sup>33</sup> Furthermore, Volokh glosses over *Mastrovincenzo v. City of New York*.<sup>34</sup> In *Mastrovincenzo*, the Second Circuit placed a limitation on the meaning of “paintings” in the *Bery* injunction, and the protection of “paintings” could only be applied to “painted canvases.” Therefore, *Bery* is not even instructive on the issue of the Mascot Law.<sup>35</sup> In *Mastrovincenzo*, street vendors selling painted graffiti challenged a New York City ordinance that prohibited the selling of goods and services on city sidewalks without a license, much like the issue at point with the Mascot Law.

Using the reasoning in *Mastrovincenzo*, with the costumed individuals in Times Square, their “sale of services” is likely not protected under the First Amendment, since the costumes do not serve a predominantly expressive purpose and their motivation for the sale of their interactions and photographs are not “self-expression.” Assuming, arguendo, it could be said that the primary motivation for their costuming is self-expression, the Mascot Law is content-neutral in time, place and manner, which would require intermediate First Amendment scrutiny. Here, there is no violation of the costumed individuals’ rights because the Mascot Law serves a compelling governmental interest in “reducing urban congestion for the convenience and safety of its citizens, in maintaining the tax base and economic viability of the City,” and protection of copyright. Furthermore, it is narrowly tailored and costumed individuals clearly have sufficient “alternative channels of communication.” Public Law Professor Jesse Choper of University of California at Berkeley was correct when he said “[i]f you can prove they are there to seek money, not simply conveying a message . . . they are subject to greater regulation.”<sup>36</sup>

Volokh goes on to say “The fact that the money isn’t something you have to give in exchange for a tangible item doesn’t change the fact that it’s clearly a form of business.” However, there is no service provided, as you are allowed to take a picture with anyone or otherwise interact with anyone

<sup>32</sup> *Id.* at 695.

<sup>33</sup> See, e.g., Barbara A. Bintliff, *Mandatory v. Persuasive Case Authority*, 9 PERSPECTIVES: TEACHING LEGAL RESEARCH AND WRITING, 83-85 (2001).

<sup>34</sup> 435 F.3d, 438-39 (2006).

<sup>35</sup> Furthermore, in *Bery*, the federal appellate court struck down the law because of the finite number of licenses. In contrast, with the Mascot Law, there is no limit to the license and grants access to anyone over 18 years of age, with a name and address, and without a criminal record.

<sup>36</sup> Associated Press, *New York Targets Times Square Elmos and Cookie Monsters*, THE GUARDIAN, July 30, 2014, available at [www.theguardian.com/world/2014/jul/30/new-york-times-square-elmo-cookie-monster](http://www.theguardian.com/world/2014/jul/30/new-york-times-square-elmo-cookie-monster) (last accessed October 14, 2014).

in public. On the other end of the spectrum, for those taking the photographs of the costumed individuals, in any public place, one has an absolute right to take pictures and video as a public place is not one in which you could have an expectation of privacy. In New York, the right to privacy is governed solely by a misappropriation statute. N.Y. Civ. Rights Law §§ 50, 51. Of course, like all laws and rights, there are limits. For example, one would not be able to take a picture or video of an upskirt, as there would be an expectation of privacy.<sup>37</sup> It follows that one cannot legally demand payment for being the subject of a legally taken photograph in a public place. The soliciting costumed individual does not have to interact or pose in the picture, though she may be photographed or videotaped since she has no expectation to privacy in public. This would be akin to someone charging others in a public place for breathing in the air he breaths out of his lungs. In both situations, you have an absolute right to refuse payment to the “providers,” as there is essentially no service. The interaction transforms from publicly taken pictures, which cannot be charged for, to essentially a service. This law aims for accountability. When you are licensed, you are under an agreement to perform in a respectful and honest manner and failure to live up to those standards will affect your ability to keep your license. This law can even be seen as codifying a profession. Furthermore, with a codified law in place, what Councilman King says, that this legislation would protect performers from hostile police action since “we’re all using the same playbook,” would be true since a costumed individual is still able to solicit, albeit from a more restricted area, and in a non-aggressive manner.

### *B. This Law is Overly Broad*

Currently, there is already a law in New York against aggressive panhandling.<sup>38</sup> The Mascot Law narrows-down and focuses in on a specific panhandling issue.

One Brooklyn Councilmember stated:

<sup>37</sup> See e.g., *State v. Morris*, 644 N.W.2d 114 (Minn. App. 2002).

<sup>38</sup> Under Penal Law § 240.70, engaging in Aggressive Begging, to “beg with the intent to intimidate another person into giving money or goods, by engaging in conduct which threatens the person solicited which by its nature would place a reasonable person in fear of harm . . . .” is a Class B Misdemeanor. See *Loper v. N.Y.C. Police Dep’t*, 999 F.2d 699 (2d Cir. 1993) (declaring New York’s previous prohibition against begging [Penal Law § 240.35 (1)] unconstitutional as a violation of the First Amendment protection of free speech); see also *Legislative Memo: Aggressive Begging*, N.Y. CIVIL LIB. UNION, <http://www.nyclu.org/content/legislative-memo-aggressive-begging> (last visited Nov. 18, 2014); N.Y. ADC. LAW § 10-136: Prohibition against certain forms of aggressive solicitation.

“I know the legislation was drafted out of some concern for safety, but I’m very concerned with the overcriminalization of minorities and immigrants . . . This bill further criminalizes the least among us who operate on the fringes of an informal economy . . . this seems very far and overreaching.”<sup>39</sup>

However, what public concern about police interpretation of this law should focus on is not the law itself, but rather the education and training of the law to police officers. Donna Lieberman, the executive director of the NYCLU, agrees in part, and said in a statement,

“Times Square is one of the most heavily patrolled public spaces in the city if not the country . . . The police have the tools they need to protect public safety and freedom of expression in the public square. Rather than pass new laws that can sweep too broadly and have unattended consequences, we should focus on training the NYPD to use the tools they currently have at their disposal.”<sup>40</sup>

An English Teacher, Matthew Christian, of BuskNY, proposes that this law would be broad enough to encompass trick or treating.<sup>41</sup> He is not an attorney and makes a very overarching claim since he reads the proposed wording incorrectly as it applies to the proposed bill. His focus, would appear to be on the definition of “solicitation,” which, standing alone, would include candy whilst trick or treating, soliciting compensation in the form of candy in exchange for interaction. However, the regulation must be read as a whole and the focus would be the section after, §20-541. The focus is for those costumed individuals posing for photographs in public or interacting. Additionally, while trick or treating you are entering an area between public and private property. This law would not apply toward that quasi-public porch or building. Furthermore, as explained in footnote 6 of this paper, when courts interpret statutes, the plain meaning is generally followed, except where it would produce an “absurd result.”<sup>42</sup> Police officers enforcing this law and arresting children in costumes trick-or-treating is obviously an example of an “absurd result.”

<sup>39</sup> Christopher Robbins, *Does NYC’s Proposed Costume Law Go Too Far?*, GOTHAMIST (Sept. 11, 2014, 2:43 PM), [http://gothamist.com/2014/09/11/costume\\_law\\_nyc.php](http://gothamist.com/2014/09/11/costume_law_nyc.php).

<sup>40</sup> Christopher Robbins, *New Law Would Require \$175 Permit To Wear A Costume In Times Square*, GOTHAMIST (Sept. 10, 2014, 9:57 AM), [http://gothamist.com/2014/09/10/times\\_square\\_elmo\\_permit.php](http://gothamist.com/2014/09/10/times_square_elmo_permit.php).

<sup>41</sup> Christopher Robbins, *Does NYC’s Proposed Costume Law Go To Far?*, GOTHAMIST, Sept. 11, 2014, available at [http://gothamist.com/2014/09/11/costume\\_law\\_nyc.php](http://gothamist.com/2014/09/11/costume_law_nyc.php) (noting that Matthew Christian’s stated “[i]t is difficult for us to see a valid public interest in requiring a license for any political speech in costume in the whole city,” and the [Mascot Law] is broad enough “as to require a license for trick-or-treating in Halloween anywhere in New York City.”).

<sup>42</sup> See *supra* fn.6.

### *C. This Law Places an Unreasonable Financial Restriction on Poor Applicants*

Brooklyn Councilmember Robert Cornegy suggests that the fees and penalties in the bill are “exorbitant for that class of worker. Depending on how the NYPD enforces this, you could get hour tickets in a week and lose your license.” Aside from the earlier §20-542 discussion<sup>43</sup> of the waiver of the biennial license fee of \$175, “because of the indigence of the applicant, the payment of the fee would work an unreasonable hardship on the applicant,” Busking costumed individuals operate on an informal economy and do not pay taxes on their earnings. Fees, compared to the earning potential of a Mascot, considering the low startup costs, etc., are negligible. The penalties are also nonexistent if no rules are broken and the Mascots act as the law requires them to, i.e., not groping, not being aggressive, not blocking paths, not screaming anti-Semitic statements, not shoving toddlers, not punching mothers or police officers in the face.

Though there are no definite values as to how much Mascots soliciting or aggressively soliciting earn, as all the income is untaxed and unreported, if what Alex Gomez, a spokesman for New York Artists United for a Smile, says is true, that the performers make about \$60-\$80 per day,<sup>44</sup> this would place performers high above the national poverty line.<sup>45</sup> The poverty line for a single person in the 48 contiguous states is \$11,670.<sup>46</sup> For each additional household member, the line rises about \$4,060.<sup>47</sup> Untaxed, if a mascot were to average \$70 per day, working between 5—7 days per week, a mascot could be expected to earn between \$18,200 and \$25,480.<sup>48</sup> However, an aggressive mascot solicitor would likely make more, and since a “\$1 tip is not adequate,”<sup>49</sup> a performer may yield hundreds of untaxed dollars per day. Since they are not reporting their income, it is

<sup>43</sup> See *supra*, Fan at p. 6.

<sup>44</sup> Tatiana Schlossberg, *Councilman to Propose Bill to Regulate Costumed Characters Soliciting in Times Square*, N.Y. TIMES, Sept. 8, 2014, available at [http://www.nytimes.com/2014/09/09/nyregion/councilman-to-propose-bill-to-regulate-costumed-characters-soliciting-in-times-square.html?src=twr&\\_r=0](http://www.nytimes.com/2014/09/09/nyregion/councilman-to-propose-bill-to-regulate-costumed-characters-soliciting-in-times-square.html?src=twr&_r=0) (last accessed: Nov 17, 2014).

<sup>45</sup> See Office of The Assistant Secretary for Planning and Evaluation, *2014 Poverty Guidelines*, US DEPT. OF HEALTH & HUMAN SERVICES, available at [aspe.hhs.gov/poverty/14poverty.cfm](http://aspe.hhs.gov/poverty/14poverty.cfm) (last accessed: Nov 17, 2014).

<sup>46</sup> *Id.*

<sup>47</sup> See *Id.*

<sup>48</sup> A mascot could earn as little as \$15,600 untaxed, working 5 days a week at \$60 per day or \$29,120 untaxed, working 7 days a week at \$80 per day.

<sup>49</sup> See David J. Goodman, *Man Dressed as Spider-Man Is Arrested After Scuffle With Police in Times Square*, NEW YORK TIMES, July 27, 2014, available at [www.nytimes.com/2014/07/28/nyregion/man-dressed-as-spider-man-is-arrested-after-scuffle-with-police-in-times-square.html](http://www.nytimes.com/2014/07/28/nyregion/man-dressed-as-spider-man-is-arrested-after-scuffle-with-police-in-times-square.html).

possible to “double-dip” and collect welfare or unemployment. Furthermore, on a busy, or busier day in Times Square, an overly aggressive mascot, forcing herself upon unsuspecting tourists or children and then demanding a minimum of \$5 as a “tip” may yield far more than the purported \$80 per day. Furthermore, on a busy, or busier day in Times Square, an overly aggressive mascot, forcing herself upon unsuspecting tourists or children and then demanding a minimum of \$5 as a “tip” may yield far more than the purported \$80 per day. For example, Steve Crass, acknowledging that “[s]ome of the characters are a little too aggressive,” dressed as a robot in fluorescent red and white plastic panels, said he has made as much as \$280<sup>50</sup> during his six-hour stint in front of Toys R Us.<sup>51</sup>

A worker was quoted “This is a job, and we’re not doing something wrong. Everybody needs a job.” This is a very sympathetic statement coming from a very sympathetic individual. However, if they are aggressively demanding “tips,” inciting violence, inappropriately touching children or other individuals, disturbing the peace, not reporting their earnings or not paying taxes, breaking copyright laws, are illegally in the US, then they are doing something wrong. The Mascot Law actually legitimizes something illegal—the off the books earnings of the mascots.

## CONCLUSION

This bill has support from New York City Mayor De Blasio.<sup>52</sup> This law is not a complete ban of all costumes, not a requirement for street

<sup>50</sup> If a mascot earns \$280 per day, working at 7 days a week, in one year, she would yield \$101,920 untaxed. It is possible that after reading that statement, even some underpaid attorneys may consider a second or supplemental profession, after taking into account the minimal startup costs of this “service business,” which is the cost of a costume, the ability to enter the profession without expertise, and the ability to work in an environment with nearly unlimited clientele at all hours of the day. As of now, no fingerprint or registration fee is required. It is also worth mentioning that the Costume Cultural Society, a New York City-based non-profit “arts association that supports the costuming arts, interactive theater and the growing “participatory culture arts movement,” of which the author of this Article is an active participant, gifts thousands of costumes every year to the uncostumed. See <http://www.actionartsleague.org/scarepark/css.html>.

<sup>51</sup> Colleen Long and Karen Mathews, *Cookie Monster, Elmo: Monster behavior in Times Square?*, USA TODAY, April 9, 2013, available at [www.usatoday.com/story/news/nation/2013/04/09/cookie-monster-elmo-times-square-trouble/2069037/](http://www.usatoday.com/story/news/nation/2013/04/09/cookie-monster-elmo-times-square-trouble/2069037/) (last accessed Oct 14, 2014).

<sup>52</sup> See e.g., Paula Duran, *Bill de Blasio Thinks Times Square ‘Elmo Craze’ Has Gone Too Far*, NEW YORK OBSERVER ONLINE, July 28, 2014, available at <http://observer.com/2014/07/bill-de-blasio-thinks-times-square-elmo-craze-has-gone-too-far/>; Mara Gay, *De Blasio: Regulate Elmo in Times Square*, WALL STREET JOURNAL ONLINE, July 29, 2014, available at <http://online.wsj.com/articles/de-blasio-regulate-costumed-characters-times-square-1406604248> (last accessed October 4, 2014).

performers to get licenses in order to work,<sup>53</sup> not a discriminatory practice that will make obtaining the permit impossible for low-income people, and not a law that will affect costumed trick-or-treaters during Halloween.

What is perplexing about some of the critiques made about the law, is that some of the commentators did not appear to have followed even a third of Harvard Law Professor Felix Frankfurter's most basic advice on statute interpretation, "Read the Statute, Read the Statute, Read the Statute!"<sup>54</sup> Like Councilmember King stated, "[t]his is common sense legislation. It's humanistic, it's not an attack on any person's social existence, it's not an attack on immigrants, it's not telling officers to write more tickets, it protects everybody."<sup>55</sup>

<sup>53</sup> Even without a permit, one may be allowed to take pictures as they wish with passersbys and passersbys may freely give their money to whoever they want; furthermore, if a street performer is not costumed, this specific law does not apply.

<sup>54</sup> Quote widely attributed to Professor Felix Frankfurter of Harvard Law School. *Cf.* Felix Frankfurter, SOME REFLECTIONS ON THE READING OF STATUTES, 47 COLUM. L. REV. 527 (1947).

<sup>55</sup> Christopher Robbins, *New Law Would Require \$175 Permit To Wear A Costume In Times Square*, GOTHAMIST, Sept. 10, 2014, available at [http://gothamist.com/2014/09/10/times\\_square\\_elmo\\_permit.php](http://gothamist.com/2014/09/10/times_square_elmo_permit.php) (last accessed October 14, 2014).