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U.S. CONST. amend. I:

Congress shall make no law . . . abridging the freedom of speech

N.Y. CONST. art. I, § 8:

Every citizen may freely speak . . . his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech

COURT OF APPEALS

Rogers v. New York City Transit Authority¹
(decided May 1, 1997)

Petitioner brought an Article 78 proceeding² before the New York Court of Appeals seeking review of the Appellate Division's reversal of a supreme court's judgment in his favor.³ Taken as of right on constitutional grounds, petitioner sought to annul the New York City Transit Authority's [hereinafter "NYCTA"] determination that he violated New York Code Rules and Regulations [hereinafter "NYCRR"] section 1050.6(b)⁴ in

¹ 89 N.Y.2d 692, 680 N.E.2d 142, 657 N.Y.S.2d 871 (1997).

² N.Y. C.P.L.R. § 7801 (McKinney 1994). An Article 78 proceeding is authorized pursuant to the following provision: "Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article." *Id.*

³ *Rogers*, 89 N.Y.2d at 696, 680 N.E.2d at 144, 657 N.Y.S.2d at 873.

⁴ N.Y. COMP. CODES R. AND REGS. tit. 21, § 1050.6(b). Section 1050.6 refers to "use of the transit system" and in subsection (b) states in pertinent part:

No person, unless duly authorized by the authority shall engage in any commercial activity upon any facility or conveyances. Commercial activities include: (1) the advertising, display, sale lease, offer for sale or lease, or distribution of food, goods, services or entertainment

that he conducted “unauthorized commercial activity” by selling political materials on a subway platform.⁵ The New York Court of Appeals found that the petitioner’s argument was unpersuasive and held that such action on the part of the NYCTA did not amount to an infringement of the right to free speech as guaranteed under both the Federal⁶ and New York State⁷ Constitutions.⁸ Accordingly, it affirmed the decision of the Appellate Division and held that the NYCTA’s regulatory and adjudicative actions were within constitutional bounds.⁹

On October 30, 1993, a few days before New York City elections were to take place, petitioner and other volunteers from a political group known as the Socialist Workers Party, set up a card table on the mezzanine level of the Jamaica, Queens subway station.¹⁰ They placed upon this table various pamphlets and literature about their organization.¹¹ While some of the literature was given away for free, other materials including the group’s weekly newspaper, *The Militant*, were offered for sale.¹² After a warning by a NYCTA officer that such action constituted unlawful sales activity, and a subsequent relocation outside the station, petitioner returned to the station and again erected the card table, replete with copies of the for sale *Militant*.¹³ Petitioner was then issued a ticket stating that he was in violation of the rule against the selling of such materials of this kind in the

(including the free distribution of promotional goods or materials)

Id.

⁵ *Rogers*, 89 N.Y.2d at 697, 680 N.E.2d at 145, 657 N.Y.S.2d at 874.

⁶ U.S. CONST. amend. I. The First Amendment provides in pertinent part: “Congress shall make no law . . . abridging the freedom of speech.” *Id.*

⁷ N.Y. CONST. art. I, § 8. This section provides: “Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.” *Id.*

⁸ *Rogers*, 89 N.Y.2d at 697, 680 N.E.2d at 145, 657 N.Y.S.2d at 874.

⁹ *Id.*

¹⁰ *Id.* at 696, 680 N.E.2d at 144, 657 N.Y.S.2d at 874.

¹¹ *Id.* at 697, 680 N.E.2d at 144, 657 N.Y.S.2d at 874.

¹² *Id.* at 696-97, 680 N.E.2d at 144, 657 N.Y.S.2d at 874.

¹³ *Id.* at 696, 680 N.E.2d at 145, 657 N.Y.S.2d at 874.

subway.¹⁴ Petitioner brought suit against the NYCTA after NYCTA Appeals Board sustained the judgment imposing a fifty dollar fine against the petitioner.¹⁵ The suit alleged that the hearing given by the NYCTA was unfair, that the petitioner's actions were permissible under Article 21, Section 1050.6(c) of the NYCRR,¹⁶ and that the NYCTA's actions were violative of his constitutional right to free speech.¹⁷ The supreme court ruled for the petitioner.¹⁸ The Appellate Division, First Department, reversed and the Court of Appeals affirmed that determination.¹⁹

The court's opinion opened with the statement that the Constitution does not provide absolute protections of "all forms of speech at all times on all kinds of property. . ."²⁰ without regard to "the nature of the activity, the property or the disruption that might be engendered by unregulated expressive activity. . ."²¹ Further, the Court of Appeals stated that the government, as owner of property can "preserve the property under its control for the use to which it is lawfully dedicated."²² In reviewing these powers, the *Rogers* court adopted the "forum based" analysis employed by the United States Supreme Court in numerous cases including *Cornelius v. NAACP*²³ and

¹⁴ *Id.*

¹⁵ *Id.* at 696, 680 N.E.2d at 144, 657 N.Y.S.2d at 874.

¹⁶ N.Y. COMP. CODES R. AND REGS. tit. 21, § 1050.6(c). This section lists exceptions to non transit activities that would otherwise be prohibited under subsection (b) provided that such uses do not interfere with the transit system's operation and provided that they are "conducted in accordance with the rules governing the conduct and safety of the public in the use of the facilities of the NYCTA." *Id.*

¹⁷ *Rogers*, 89 N.Y.2d 697, 680 N.E.2d at 145, 657 N.Y.S.2d at 874.

¹⁸ *Id.*, 680 N.E.2d at 144, 657 N.Y.S.2d at 874.

¹⁹ *Id.*

²⁰ *Id.* at 698, 680 N.E.2d at 145, 657 N.Y.S.2d at 874.

²¹ *Id.*

²² *Id.*

²³ 473 U.S. 788 (1985). In *Cornelius*, The NAACP brought an action against the director of the office of Personnel Management, which had a policy that prohibited legal groups from participating in a charity fund drive project entitled Combined Federal Campaign [hereinafter CFC], that targeted federal employees. *Id.* at 788. The NAACP argued that solicitation, as a form of speech, was constitutionally protected under the First Amendment and that the

*International Society for Krishna Consciousness v. Lee*²⁴ where regulations were assessed as being either content-based or viewpoint neutral.²⁵

In finding that petitioner's right to free speech was not violated, the Court of Appeals first distinguished the case at bar from those cases that involved content-based regulations.²⁶ Applying the public forum doctrine²⁷ and citing to the United States Supreme Court case of *Perry Education Association v. Perry Local Educator's Association*,²⁸ the *Rogers* court wrote that

policy instituted by the Office of Personnel was in violation of that right. *Id.* at 793. The Court held that the First Amendment does not forbid a viewpoint-neutral exclusion when that exclusions purpose was to stop any disruptive solicitation of federal employees at their work place. *Id.* Further, because the regulation applied to a non-public forum, reasonable regulation to ensure effectiveness in the CFC was allowable if reasonable and non capricious. *Id.* at 813.

²⁴ 505 U.S. 672 (1992). In *International Society*, a religious organization sued the New York Port Authority's prohibition of solicitation on its properties. *Id.* at 675. The Krishna's, as they are commonly known, had developed a technique to raise funds for their group by approaching travelers passing through the terminals of airports and asking for donations to their cause. *Id.* The Krishna's argued that such solicitation was protected as free speech under the First Amendment and that airport terminals were to be considered public forums and as such could not be subjected to restrictions on speech. *Id.* The Court held that airport terminals were not public forums and were not disallowed from imposing reasonable regulations designed to control the pedestrian traffic of a busy area, but nonetheless held the statute void because it was arbitrary in its prohibiting leafleting but not other methods of solicitation that would create just as much of a traffic burden. *Id.* at 692.

²⁵ *Id.*

²⁶ *Rogers*, 89 N.Y.2d at 698, 680 N.E.2d at 145, 657 N.Y.S.2d at 874.

²⁷ *Id.* This doctrine stands for the proposition that places that have traditionally been used for purposes of assembly, communicating thoughts between citizens and discussing public questions, and have by policy or by practice [been used] for indiscriminate use by the general public demand the application of the strictest judicial review when considering regulations that inhibit the exercise of free speech on that property. *See Hague v. CIO*, 307 U.S. 496 (1939); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1982).

²⁸ 460 U.S. 37 (1983). In *Perry*, a collective bargaining agreement between a town's Board of Education and a teacher's association gave that association the exclusive right to use an inter-school mail system. *Id.* at 39. Another

“regulations of time, place, and manner of expression may be permissible only when they are content neutral and narrowly tailored to serve a compelling government interest”²⁹ Further, the Court of Appeals held that the government is allowed to reserve property under its control for a specific use and can restrict the activities that take place on that property, including limiting it as a forum for free speech, so long as the regulation against such activity “is reasonable and not an effort to suppress expression because of disagreement with the speaker’s view.”³⁰ The court found the United States Supreme Court case of *International Society for Krishna Consciousness v. Lee*³¹ to be “particularly cogent and instructive” in its application of the public forum analysis with regard to property operated by a public authority.³² The court stated that a public forum analysis would have to take into consideration the ability of such facilities to accommodate expressive activity.³³ Furthermore, the court noted that the NYCTA’s primary function in owning property such as the subway platform was “unquestionably to facilitate the safe and efficient transport of passengers in a responsible manner.”³⁴ Thus, the *Rogers* court held, the NYCTA had a compelling interest in providing an efficient and safe environment for the riders who use the subway and may employ reasonable regulations that accomplish that goal.³⁵

Petitioner’s state constitutional argument was also rejected by the *Rogers* court and the case upon which he based that argument

teacher’s union which was not granted the right to use the system challenged the agreement as limiting their right to free speech as guaranteed by the First Amendment. *Id.* The Court held that plaintiff’s exclusion did not amount to a constitutional deprivation of First Amendment rights because the inter-school mail system was not considered to be a public forum for communication. *Id.* at 55.

²⁹ *Rogers*, 89 N.Y.2d at 698, 680 N.E.2d at 145, 657 N.Y.S.2d at 874.

³⁰ *Id.* at 698-99, 680 N.E.2d at 146, 657 N.Y.S.2d at 875.

³¹ 505 U.S. 672 (1992).

³² *Rogers*, 89 N.Y.2d at 700, 680 N.E.2d at 147, 657 N.Y.S.2d at 876.

³³ *Id.*

³⁴ *Id.* at 700-01, 680 N.E.2d at 147, 657 N.Y.S.2d at 876.

³⁵ *Id.*

was interpreted by the court to support his adversary's position.³⁶ Petitioner relied on *SHAD Alliance v. Smith Haven Mall*³⁷ for the argument that the State cannot exclude persons from public property for exercising their First Amendment rights.³⁸ The court held that since this case was overruled, it could be used as supplementary support for its judgment.³⁹ Stating that *SHAD Alliance* stands for the proposition that Article One, Section Eight of the New York State Constitution "does not provide the claimed separate right of access to privately owned places," the *Rogers* court, through analogy and extension to the quasi-public subway platform, found petitioner's rationale "not supportable."⁴⁰

Lastly, the *Rogers* court rejected the petitioner's argument that his actions were covered by 1050.6(c)⁴¹ which allowed "non transit expressive activity" and included some forms of expression (like artistic performances and religious proselytizing) that asked passerby's for donations.⁴² It found a distinction between the permissible activity of these performances as described in the statute and the impermissible commercial activity in which the petitioner was involved.⁴³ Finding the regulatory scheme as viewpoint-neutral and reasonable, the Court of Appeals held that the NYCTA was justified in its circumscribing "purveyors" because *not disallowing* them would result in a domination of vendors over those to which Subsection (c) was designed to apply; "Any other more generous view might lead to a veritable bazaar of expressive merchandise being authorized to

³⁶ *Id.*

³⁷ 106 A.D.2d 189, 484 N.Y.S. 849 (2d Dep't), *rev'd*, 66 N.Y.2d 496, 488 N.E.2d 1211, 498 N.Y.S.2d 99 (1985).

³⁸ *Rogers*, 89 N.Y.2d at 702, 680 N.E.2d at 148, 657 N.Y.S.2d at 877 (citing *People v. Leonard*, 62 N.Y.2d 404, 465 N.E.2d 831, 477 N.Y.S.2d 111 (1984)).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ N.Y. COMP. CODES R. AND REGS. tit. 21, § 1050.6(c).

⁴² *Rogers*, 89 N.Y.2d at 704, 680 N.E.2d at 149, 657 N.Y.S.2d at 878.

⁴³ *Id.* at 704, 680 N.E.2d at 148, 657 N.Y.S.2d at 877.

be churned for sale throughout the subway system.”⁴⁴ The court rejected defendant’s argument calling for a more expansive reading of what constituted expressive activity by reasoning that the rationale of the regulation was sound and that it was necessary to maintain a safe, controllable subway platform.⁴⁵

In concluding that the NYCTA’s regulation and its application to plaintiff were within federal constitutional perimeters, the *Rogers* court first found that subway stations were not public forums and that the NYCTA could impose regulations that restricted the use of properties under its control.⁴⁶ The *Rogers* court further noted that even applying the federal standard of strict judicial scrutiny to the NYCTA’s subway platforms upon a finding that such places were limited public forums (or even full fledged public forums) the regulations would still stand because the NYCTA evinced a compelling interest in providing “the service and securing [the] protection of the entire riding public.”⁴⁷ The *Rogers* court interpreted the New York State Constitution as exacting a similar standard to that imposed by the Federal Constitution and held that regulations of speech in public forums must satisfy the “sharpest scrutiny.”⁴⁸ Further, the court stated that when a governmental entity has opened up a space for limited public expression and debate, that entity may still regulate activities that take place on that space so long as the restrictions are reasonable in light of that area’s intended purpose and the regulations are not in response to the owner’s disagreement with the speaker’s viewpoint.⁴⁹ In its essential terms, the *Rogers* court adopted the standard employed by courts in the federal system.⁵⁰

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 705, 680 N.E.2d at 149, 657 N.Y.S.2d at 878.

⁴⁷ *Id.*

⁴⁸ *Id.* at 698, 680 N.E.2d at 146, 657 N.Y.S.2d at 874.

⁴⁹ *Id.* at 705, 680 N.E.2d at 150, 657 N.Y.S.2d at 879.

⁵⁰ See *International Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (holding that airport terminals were not public forums and could impose reasonable regulations designed to control pedestrian traffic).