January 22, 2016

OPINION MEMORANDUM Ref: DRT 15-0769

TO: Director, Department of Revenue and Taxation

FROM: Attorney General

RE: Permissible First Amendment Activities Immediately Outside the Department of Revenue & Taxation Building

This Office is in receipt of your request for guidance in response to a request from representatives of the Jehovah's Witnesses seeking permission, in their words, to place literature carts "outside the RevTax [Revenue and Taxation] building, hopefully near the entrance so that your patrons can access Bible based magazines and books." We will assume the literature carts will be manned and that members of the Jehovah's Witnesses intend to communicate with persons entering and exiting your facility. We further assume that the content of the literature and expression by individuals which may be religious in nature is irrelevant to your inquiry.[1]

Question Presented

We view the question presented as whether the free speech clause of the First Amendment to the Constitution mandates that the Department of Revenue and Taxation (DRT) must allow the Jehovah's Witnesses to place their literature carts on government property, specifically, the property surrounding the entrance to your facility. It does not.

Analysis

Whatever First Amendment free speech rights may attach to government-owned property depends upon where it is exercised and how it is used.

> We begin by determining what kind of forum the Building is because the type and scope of restrictions the government may place on speech depends on where the speech occurs. *See White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir.1990). Federal courts have generally recognized three categories of public fora: (1) traditional public fora; (2) designated public fora; and (3) limited public fora. Traditional public fora are areas historically used by the public for assembly,

[1] Although the Jehovah's Witnesses' request for access to the area outside of the DRT building is coming from a religious organization, the analysis proceeds under the free speech clause of the First Amendment, not the establishment clause or the free exercise clause. *See*, *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995)("Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.")(citing *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981); and *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981)).

> such as sidewalks and parks. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). Designated public fora are those where "the government intentionally opens a nontraditional forum for public discourse." *DiLoreto v. Downey Unified Sch. Dist. Bd. Of Educ.*, 196 F.3d 958, 964 (9th Cir. 1999). Limited public fora are public property "limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009).

Reza v. Pearce, 806 F.3d 497, 502-03 (9th Cir. 2015); *cf. International Society for Krishna Conscious ness of Calf.*, 764 F.3d 1044 ((9th Cir. 2014) (describing three types of public fora as traditional, designated, and *nonpublic*); and *Preminger v. Peake*, 552 F.3d 757, 765 (9th Cir. 2008) (same). The analysis therefore turns on whether the property at issue is a traditional public forum; a designated public forum; or a limited or non-public forum

In *United States v. Kokinda*, 497 U.S. 720 (1990), Marsha B. Kokinda and Kevin E. Pearl were convicted of violating 39 CFR § 232.1(h)(1), which provided in relevant part: "Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited." Kokinda and Pearl were "volunteers for the National Democratic Policy Committee, who set up a table on the sidewalk near the entrance of the Bowie, Maryland, Post Office to solicit contributions, sell books and subscriptions to the organization's newspaper, and distribute literature addressing a variety of political issues." 497 U.S. 723-24. The Supreme Court noted that "[t]he postal sidewalk provide[d] the sole means by which customers of the post office may travel from the parking lot to the post office building and lies entirely on Postal Service property." *Id.* 497 U.S. 723 (editorial brackets in original). Kokinda and Pearl challenged their convictions asserting that the regulation they were convicted of violating was itself a violation of the First Amendment.

The Supreme Court upheld the convictions on the basis that the sidewalk near the entrance of the post office was not a traditional public forum and that as applied to the facts of that case the regulation at issue, which did not discriminate on the basis of content or viewpoint,[2] satisfied the reasonableness standard applicable to non-public fora as opposed to strict scrutiny. Strict scrutiny would be applicable to expressive activities at what are generally considered traditional public fora such as public streets and parks, in addition to government property that is expressly dedicated to speech activity.

The Court first observed, "The Government's ownership of property does not automatically open that property to the public." *Id.*, 497 U.S. 725. *See also*, *International Soc. for Krishna*

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[2] Content-based regulations or restrictions on the use of public property for expressive purposes are "presumptively unconstitutional," subject to strict scrutiny, and will survive constitutional review " 'only if they are the least restrictive means to further a compelling interest.' " *American Civil Liberties Union of Nevada v. City of Las Vegas*, 466 F.3d 784, 792 (9th Cir. 2006)("*ACLU II*")(citing *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 798-801 (1988); and quoting *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1145 (9th Cir.), amended by 160 F.3d 541 (9th Cir.1998)).

Consciousness, Inc. v. Lee, 505 U.S. 672 (1992)(it is "well settled that the government need not permit all forms of speech on property that it owns and controls"). Next, the Court explained the different levels of scrutiny applicable to the different purposes served by the government property in question.

> Regulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny. Regulation of speech on property that the Government has expressly dedicated to speech activity is also examined under strict scrutiny. *But regulation of speech activity where the Government has not dedicated its property to First Amendment activity is examined only for reasonableness.*

Id., 497 U.S. 726-27 (1990)(citing *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983))(emphasis added).

> Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the First Amendment does not guarantee access to property simply because it is owned or controlled by the government. In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. As we have stated on several occasions, the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.

Perry, 460 U.S. 46 (quotation marks and citations omitted). *See also*, *id.*, 460 U.S. at 53 ("when government property is not dedicated to open communication the government may—without further justification—restrict use to those who participate in the forum's official business.").

The analysis in this case therefore depends on whether the property near the entrance and extending into the parking lot surrounding the DRT building is a traditional public forum or has been designated by the government as a place for expressive activity.

In our view the property surrounding the entrance and extending into the parking lot is not a traditional public forum; furthermore, the government has never expressly dedicated these areas to speech activity of any kind. Although correspondence to you from the Jehovah's Witnesses draws comparisons to public literature dissemination campaigns that have been conducted at Times Square and Grand Central Terminal in New York City, and along the beach near the zoo in Waikiki in Honolulu, Hawaii, where Witnesses distributed literature to passersby from displays on tables, those examples are factually dissimilar. Rather, the property surrounding the entrance to the DRT building is more akin to the sidewalks that the Supreme Court described in *Kokinda*: