



August 22, 2011

Via Email and Fax

Board of Directors
San Francisco Bay Area Rapid Transit District
300 Lakeside Drive, P. O. Box 12688,
Oakland, CA 94604-2688
Fax: 510-464-6011
boardofdirectors@bart.gov

Re: August 24, 2011 special board meeting¹

Dear Directors:

We understand that you will be meeting on August 24, 2011 to discuss BART's shutting down of cell phone service in advance of a demonstration that was planned for earlier this month. We are writing to urge you to adopt a policy that ensures that BART does not shut down cell phone service on its trains or platforms except in the most extraordinary circumstances,² and certainly not to interfere with demonstrations or other expressive activities. Our letter of August 12 sets forth many of the legal principles involved; a copy of that letter, with a correction regarding whether the man shot on in the Civic Center station was armed,³ is attached. In this letter we wish to ensure that our initial letter becomes part of the record and to further discuss some of the principles of free speech and assembly that are involved in this matter.

The people of our state have the right to speak freely as Americans and as Californians. Our supreme court has long held that cutting-off telephone service can infringe upon the rights guaranteed by the First Amendment, reasoning that because "the rights of free speech and press are worthless without an effective means of expression, the guarantee extends both to the content

¹ We ask that this letter be made part of the record of the August 24, 2011 special board meeting.

² A situation involving a cell-phone triggered bomb would be a prototypical example of such an extraordinary circumstance, as would a hostage situation where it is necessary to prevent the hostage takers from communicating with their accomplices. *See* Pub.Util.Code § 7907 (allowing cutting of phone lines in hostage situation).

³ The August 12 letter stated that Mr. Hill was "unarmed"; we have redacted that characterization from the attached letter and from the copy of it posted on our website.

of the communication and the means employed for its dissemination.”⁴ Our state constitution is even more protective of free expression than is the First Amendment.⁵ Thus, the California Constitution guarantees us the right to speak freely in areas where the federal protections apply only weakly, including, our supreme court has held, a train station.⁶ Of course, the government may regulate a speaker’s *conduct* in order to preserve public safety and prevent unreasonable disruption. But our supreme court has held that our state’s laws can be used to punish pure communication – such as the speech on BART’s cell phone network -- only where the speech creates “a clear and present danger of imminent violence.”⁷

And as the wording of our state constitutional protection for speech makes clear, the authority of the government to stop speech before it happens – as opposed to punishing it after the fact – is even more limited: “every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right.” Cal. Const. Art. 1, § 2. Under this provision, the “right to speak, write, and publish, cannot be abused until it is exercised, and before it is exercised there can be no responsibility.”⁸ If individuals go beyond what is permitted by our laws and protected by the constitution they may be held responsible for their actions; but BART cannot properly prevent protestors or other cell-phone users from speaking with one another on the telephone in the first place. Our courts have held that even private telephone carriers, whose actions are not constrained by the First Amendment, cannot shut-off service simply because they believe that their customers may be using their services to

⁴ *Sokol v. Public Utilities Commission*, 65 Cal.2d 247, 255 (1966) (“the disconnection of telephones not only may deprive the subscriber of the monetary value of his economic venture, but in such circumstances denies him an essential means of communication for which there is no effective substitute. Hence, this restraint upon communication by the subscriber also affects his right of free speech as guaranteed by the First Amendment of the federal Constitution.”).

⁵ *Kuba v. I-A Agricultural Ass’n*, 387 F.3d 850, 856 (9th Cir. 2004).

⁶ *In re Hoffman*, 67 Cal.2d 845 (1967); see *Fashion Valley Mall, LLC v. N.L.R.B.*, 42 Cal.4th 850 (2007) (right to speak in privately owned shopping malls); *Prisoners Union v. Department of Corrections* (1982) 135 Cal.App.930, 938 (prison must allow free speech in its parking lot); *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory* (1984) 154 Cal.App.3d 1157, 1162-1169 (free speech must be allowed in lab’s visitor center); *Kuba*, 387 F.3d 850 (free speech must be allowed in parking lot of public arena); see also *Brown*, 9 Cal.3d 612 (rally on college campus).

⁷ *In re Brown*, 9 Cal.3d 612, 621 (1973); see *id.* at 617 (punishment for disturbing peace must be “limited to disruption of public order by acts that are themselves violent or that tend to incite others to violence”).

⁸ *Balboa Island Village Inn, Inc. v. Lemen*, 40 Cal.4th 1141, 1159-60 (quoting *Dailey v. Superior Court*, 112 Cal. 94 ((1896)). The court in *Daily* held that under our state constitution a speaker’s “mouth could not be closed in advance for the purpose of preventing an utterance of his sentiments, however mischievous the prospective results of such utterance. He had the right of free speech, but at all times was responsible to the law for an abuse of that right.” 112 Cal. at 100.

facilitate crime.⁹ BART, which is bound to follow both the First Amendment and the California Constitution's Liberty of Speech clause, must not do so either.

Thank you for your attention to this important topic.

Sincerely,



Michael T. Risher
Staff Attorney

cc: Kenton W. Rainey, BART Chief of Police (via email)
Kenneth A. Duron, District Secretary (via email)

⁹ *People v. Brophy*, 49 Cal.App.2d 15, 33 (1942) (“The telephone company has no more right to refuse its facilities to persons because of a belief that such persons will use such service to transmit information that may enable recipients thereof to violate the law than a railroad company would have to refuse to carry persons on its trains because those in charge of the train believed that the purpose of the persons so transported in going to a certain point was to commit an offense”). Federal communications law also may affect BART’s authority to shut down service, because it prohibits cell-phone carriers from interrupting service without FCC authorization and prohibits non-carriers from interfering with a carrier’s signals. 47. U.S.C. §§ 214(a) (“No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate”), 333 (“No person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under this chapter”).



August 15, 2011

By United States and electronic mail

Kenton W. Rainey
BART Chief of Police
800 Madison Street
Oakland, CA 94607
krainey@bart.gov

Dear Chief Rainey,

On August 12, 2011, BART shut down wireless service in several stations to interfere with anticipated political demonstrations protesting the recent fatal shooting of an ~~unarmed~~ * passenger by BART police. News accounts report that BART has not ruled out doing so again today. Thousands of commuters use the wireless service in BART stations to engage in all manner of expressive activity – to communicate with loved ones, to engage in social networking, to report crime, and to read the news. All of this is peaceful expressive activity that is clearly protected by the First Amendment and California Constitution, yet all of this would be restrained should BART disrupt cell service today, as it did last week. The American Civil Liberties Union of Northern California demands that BART not disrupt wireless service today, and that it agree not to disrupt wireless service in the future in response to planned protest activity.

BART apparently justifies its position on the ground that there is no free speech on a BART platform. If BART has its way, that will certainly be the case this afternoon, but that does not make it lawful. While the government has no obligation to build a public park, once it does so, it cannot shut the park gates to speakers with whom it disagrees. BART's actions must be seen in the context of today's events. All over the world, people are using mobile devices to protest oppressive regimes, and governments are shutting down cell phone towers and the Internet to silence them. BART has never disrupted wireless service before, and chose to take this unprecedented measure for the first time last week in response to a protest of BART police. BART's decision was in effect an effort by a governmental entity to silence its critics. The First Amendment reflects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). BART's legitimate concerns with public

NANCY PEMBERTON, CHAIRPERSON | SUSAN MIZNER, JAHAN SAGAFI, FARAH BRELVI, ALLEN ASCH, VICE CHAIRPERSONS | DICK GROSBOLL, SECRETARY/TREASURER
ABDI SOLTANI, EXECUTIVE DIRECTOR | KELLI EVANS, ASSOCIATE DIRECTOR | CHERI BRYANT, DEVELOPMENT DIRECTOR | SHAYNA GELENDER, ORGANIZING & COMMUNITY ENGAGEMENT DIRECTOR
LAURA SAPONARA, COMMUNICATIONS DIRECTOR | ALAN SCHLOSSER, LEGAL DIRECTOR | MARGARET C. CROSBY, ELIZABETH GILL, LINDA LYE, JULIA HARUMI MASS, MICHAEL RISHER, JORY STEELE, STAFF ATTORNEYS
ALLEN HOPPER, NATASHA MINSKER, NICOLE A. OZER, DIANA TATE VERMEIRE, POLICY DIRECTORS | STEPHEN V. BOMSE, GENERAL COUNSEL

***CORRECTION: Our original letter incorrectly stated that the passenger was "unarmed."**

safety does not give it the power to act as censor and implement a total ban on speech, even if only temporary. While BART's disruption of wireless service may have been "on its face ... neutral as to content and speaker," BART's "purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional." *Sorrell v. IMS Health Inc.*, U.S., 131 S.Ct. 2653, 2664 (2011).

Against this backdrop, there can be no question that shutting down wireless service is an unconstitutional prior restraint. Such a move would be tantamount to prohibiting the printing and dissemination of all newspapers because of concerns that a single letter to the editor may include plans for a protest. In our constitutional regime, prior restraints on speech bear a "heavy presumption" of unconstitutionality. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

BART's justification for its August 12, 2011 conduct – that it was seeking to prevent disruptions that may have occurred in the past – is the typical rationale offered by those seeking to censor speech. But as the Supreme Court long ago explained, a prior restraint cannot be justified based on "the insistence that [it] is designed to prevent" speech that may "disturb the public peace." *Near v. Minnesota*, 283 U.S. 697, 721-22 (1931). Rather than public disruption, the "more serious public evil would be caused by authority to prevent publication." *Id.* at 722. Indeed, as the Ninth Circuit Court of Appeals has made clear: "[T]he proper response to potential and actual violence is for the government to ensure an adequate police presence..., and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure. ... Banning or postponing legitimate expressive activity because other First Amendment activity regarding the same subject has resulted in violence deprives citizens of their right to demonstrate in a timely and effective fashion." *Collins v. Jordan*, 110 F. 3d 1363, 1372 (9th Cir.1997). In other words, "the police must permit the speech and control the crowd." *Ovadal v. City of Madison*, 416 F.3d 531, 537 (7th Cir. 2005).

It bears emphasis that speech does not lose its protection merely because it may lead indirectly to disruption. Speech only loses its protection under the rare circumstances when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); see also *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (Speech is "protected against censorship or punishment, less shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.").

Further, disrupting wireless service would prohibit a wide variety of indisputedly peaceful, constitutionally protected speech that has nothing to do with any protest of BART

whatsoever. See, e.g., *City of Houston v. Hill*, 482 U.S. 451, 466 (1987) (ordinance unconstitutionally overbroad where it makes unlawful “a substantial amount of constitutionally protected speech”). At the same time, it would *undermine* BART’s safety rationale by precluding riders from reporting unlawful activity or communicating with family members about their whereabouts.

In short, BART’s effort to avoid disruption by entirely shutting down all speech transmitted through wireless devices was unconstitutional last week, and would be so again today. BART must immediately cease depriving its riders and lawful protestors of their constitutional free speech rights. We urge BART to commit immediately not to disrupt wireless service today, and to agree not to resort to such a method as a future response to anticipated protests. Members of the ACLU staff are meeting with you later today. We look forward to a productive discussion of this issue.

Sincerely,



Abdi Soltani
Executive Director



Alan Schlosser
Legal Director

cc: BART Board of Directors (via mail and electronic mail)
FCC, Office of Chairperson (via mail and electronic mail)
BART Office of the General Counsel (via facsimile)