



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

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***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)