



October 24, 2017

By Hand Delivery

The Honorable Martin J. Walsh
Mayor, City of Boston
1 City Hall Square
Boston, MA 02201

William B. Evans
Police Commissioner, City of Boston
One Schroeder Plaza
Boston, MA 02120

Re: Rally Scheduled for November 18, 2017

Dear Mayor Walsh and Commissioner Evans:

We—the New England First Amendment Coalition (NEFAC), the Massachusetts Newspaper Publishers Association (MNPA), the New England Chapter of the Society of Professional Journalists (SPJ-NE), the American Civil Liberties Union (ACLU), and the ACLU of Massachusetts (ACLUM), on its own behalf and on behalf of individual Boston-based journalists—write to express our concern that journalists were improperly excluded from the buffer zone around the Boston Common’s Parkman Bandstand during the rally on August 19, 2017, and to seek assurances that this exclusion will not be repeated at the rally that has reportedly been scheduled for November 18.

On August 19, the City of Boston banned journalists from coming close enough to the “Free Speech” rally to hear, adequately see, or talk to the rally participants. Less than one week after the heartbreaking events that unfolded at protests in Charlottesville, Virginia, the government imposed a viewpoint-based litmus test for admission to the rally and prevented journalists from providing essential media coverage on matters of public concern. Journalists could not hear what participants said, record or photograph the proceedings near the Bandstand, or interview participants, including about the reasons for their involvement and views. We therefore request that significant changes be made to comply with the First Amendment, while ensuring public safety, with regard to the “Rally for the Republic” planned for November 18.

The Media Organizations and Journalists

NEFAC is a non-partisan, non-profit organization that supports the rights of New England journalists, including those whose access to the August 19 event was impeded by restrictions imposed by the City of Boston. The coalition's mission is to advance and protect the five freedoms of the First Amendment, and the principle of the public's right to know, in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. In collaboration with other advocacy organizations, NEFAC also seeks to advance understanding of the First Amendment across the nation and freedom of speech and press issues around the world. NEFAC is a broad-based coalition of people who believe in the power of transparency in a democratic society. Its supporters include lawyers, journalists, historians, librarians and academics, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment.

MNPA is a voluntary association representing virtually all newspapers published in Massachusetts. It represents those newspapers in legal and legislative matters of common concern. Its overarching purpose is to support a free, vigorous and diverse press, independent of government control. In particular, the MNPA focuses on preserving freedom of speech and the public's right to know.

SPJ is a membership organization of thousands of journalists nationwide dedicated to the perpetuation of a free press as the cornerstone of our nation and our liberty. SPJ-NE includes journalists throughout the Northeastern United States. SPJ-NE, like the national organization, believes that to ensure that the concept of self-government outlined by the United States Constitution remains a reality into future centuries, the American people must be well-informed in order to make decisions regarding their lives and their local and national communities. It is the role of journalists to provide this information in an accurate, comprehensive, timely, and understandable manner.

The ACLU is a nationwide, non-profit, non-partisan organization of more than 1.2 million members dedicated to defending and preserving the individual rights and liberties that are guaranteed by the United States Constitution and other federal and state laws. ACLUM is the Massachusetts affiliate of the national ACLU. The protection of free speech and assembly liberties is a priority for both the ACLU and ACLUM, and ACLUM intends to dispatch monitors to the event on November 18 to ensure that these rights are respected. ACLUM is a signatory to this letter on its own behalf, as well as on behalf of individual journalists whose access to the August 19 rally was impeded by the City-imposed restrictions.

Factual Background

Journalists at the August 19 rally were categorically barred from entering the barricades and therefore from approaching the Bandstand, even though some members of the public were allowed inside. It has been reported that members of the general public were allowed inside if they could establish they were affiliated with or supported the views of the demonstration organizers.

Though the August 19 event was scheduled in or about late July 2017, this prohibition on press access was made explicit only one day before the rally, and its true magnitude was not apparent until the day of the rally. It was not until Thursday, August 17 or Friday, August 18—approximately one day before the planned event and six days after violence occurred at demonstrations related to removal of a Robert E. Lee statue in Charlottesville, Virginia—that the Boston Police Department posted a memorandum entitled “Media Restrictions and Guidelines for Coverage of Events in the Boston Common on Saturday, August 19, 2017” (Media Restrictions Memo). The Media Restrictions Memo said that “NO media personnel will be allowed inside the barricaded area around the Bandstand.”

Moreover, Commissioner Evans has said that the restrictions were imposed for the purpose of keeping journalists from reporting on the people at the Bandstand. Commissioner Evans has stated that he wanted to take journalists “out of the mix” due to a concern that their presence at the Bandstand would “agitate” people.¹ Likewise, both Mayor Walsh and Commissioner Evans have indicated that the restrictions were justified at least in part by the City’s disapproval of the expected message of the rally participants.²

Though the Memo highlighted that the ban would apply only to media personnel, the Memo did not say how large the barricaded area would be, so journalists were not aware until they arrived at the event that they would not be permitted to get close enough to hear, see, or speak with people at the Bandstand. The “barricaded area” turned out to be an enormous buffer zone that reportedly created a distance of 40-50 yards between the Bandstand and the places where journalists were permitted.

¹ Interview of Commissioner William B. Evans, Boston Public Radio (Sept. 5, 2017), available at <http://news.wgbh.org/2017/09/05/boston-public-radio-podcast/police-commissioner-evans-no-deliberate-attempt-block-media>.

² Sarah Betancourt, *Boston authorities should not have blocked media from covering protest*, Columbia Journalism Review (Aug. 21, 2017), at <https://www.cjr.org/criticism/boston-white-nationalism-protest-media.php> (in WCVB interview, Mayor Walsh: “why give attention to people spewing hate”); Bruce Gellerman, *A Debate Over Speech As a Boston Common Rally Is Cut Short*, WBUR (Aug. 20, 2017), at <http://www.wbur.org/news/2017/08/20/gellerman-free-speech-rally> (Commissioner Evans: “their message isn’t what we want to hear”).

As a result, and as was the subject of post-rally reporting, journalists could not hear or adequately see what was occurring at the Bandstand. And journalists did not have access to event participants in order to interview them about their views or their reasons for being at the event.³ These restrictions adversely affected coverage by members of the undersigned journalistic organizations and the individual journalists represented by ACLUM.

Legal Issues

The categorical exclusion of journalists from the Bandstand area on August 19 violated their rights under the First Amendment to the U.S. Constitution and Articles 1 and 16 of the Massachusetts Declaration of Rights. As you know, these constitutional provisions guarantee freedom of speech and assembly. The courts have recognized that these guarantees protect not only the right to speak but also the right of the press to gather information and the right to hear what is being said.⁴ Exclusion of journalists from the huge buffer zone erected around the Parkman Bandstand on August 19 impermissibly prevented journalists from hearing what the rally participants were saying and from interviewing individuals about the reasons for their participation.

Expression is most protected in traditional “public forums,” including streets, sidewalks, and parks. *See, e.g., Hague v. C.I.O.*, 307 U.S. 496, 515 (1939); *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 564 (1972). The Boston Common of course is such a forum. *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (describing the Common as the “apotheosis of a public form”). Public fora restrictions are not constitutional even as to so-called “time, place and manner” restrictions, unless they are reasonable, content neutral and narrowly tailored to achieve a significant public interest. *See, e.g., id.; Ward v. Rock Against Racism*, 492 U.S. 781, 791 (1989).

Here, the restriction was quite obviously content-based because entry to the Bandstand area depended on the content of the First Amendment activity intended by the individual seeking entry. Speakers and attendees who intended to engage in speech related to the rally were permitted to enter; journalists who intended to engage in newsgathering about that speech were not. Additional evidence that the restriction was content-based arises from Commissioner Evans’s acknowledgment that the buffer zone was established at least in part to prevent media coverage from

³ Beth Healy, ‘Free speech’ rally speakers, little heard, end event quickly, Boston Globe (Aug. 19, 2017), at <https://www.bostonglobe.com/metro/2017/08/19/rallyside/kWEqzFMeB7mbO3yyHRhJYP/story.html>; see also Betancourt, *supra* n.2; Gellerman, *supra* n.2.

⁴ *See, e.g. Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-606 (1982) (discussing First Amendment protection for listening to what is happening in a traditional public forum).

“agitat[ing] the crowd.” But, as the Supreme Court reiterated in *McCullen v. Coakley*, 134 S. Ct. 2518, 2531-32 (2014), restrictions that are “concerned with undesirable effects that arise from ‘the direct impact of speech on its audience’ or ‘[l]isteners’ reactions to speech,’” are not content neutral. The restrictions therefore cannot be justified as reasonable regulations of “time, place and manner.”⁵

Moreover, there are strong bases to conclude that the exclusion of journalists from the Bandstand area was also viewpoint-based. *See Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218, 2226-27, 2230-31 (2015). As noted above, it has been reported that individuals were allowed inside the “barricaded area” as long as they could establish they were affiliated with or supported the views of the demonstration organizers. In addition, while journalists were permitted to access the thousands of people who marched in response to the rally at the Bandstand, they were taken “out of the mix” when they sought to access speakers at the Bandstand. This one-sided exclusion may have been due to the City’s and the Boston Police Department’s disapproval of the expected message of the rally participants.⁶ Government censorship of constitutionally-protected newsgathering activity because of government’s disapproval of the views being expressed is clearly unlawful.⁷

Wholly apart from what we believe to be the content- and viewpoint-based nature of the restriction, the press had a right of access to the rally under the First Amendment and Article 16. Rallies on the Common and other public spaces traditionally have been open to the public, a tradition that serves the significant interest of educating the public about the views of residents on matters of public concern. *See generally Globe Newspaper Co. v. Superior Court*, 457 U.S. at 605-06 (First Amendment right of access to trials is based on tradition of public trials and accompanying benefits to the public). “Instead of acquiring information about [public events] by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. . . .

⁵ As a practical matter, the restrictions may have fed the very agitation about which the Commissioner was concerned. Because journalists were excluded, the general public was largely constrained to rely on rumor and speculation in assessing what was being said at the Bandstand.

⁶ *See supra*, n.2.

⁷ Even if the buffer zone and related restrictions could fairly be characterized as content neutral, which we believe they cannot, they are not narrowly tailored to achieve a significant governmental interest. In *McCullen*, 134 S. Ct. at 2537-40, the Court found a 35-foot buffer zone to be unconstitutional because it was not narrowly tailored to meet the governmental interest in ensuring patients of clinics that provide abortion services were not impeded in their access or harassed or intimidated. The Court pointed out that numerous alternatives were open to the government, including enforcement of laws specifically targeted against harassment or intimidation. And, here of course, a much smaller buffer zone, coupled with allowing credentialed press access inside the buffer zone to hear, to interview and to photograph rally participants, would be more narrowly tailored.

While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This ‘contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system. . . .’” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (citation omitted). These rights cannot be restricted absent a compelling interest and means that are narrowly tailored to meet that interest, which the August 19 restrictions certainly were not. *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 606.

Most fundamentally, the press has a right to be where members of the public are. On August 19, this right was not honored at the Boston Common.

Conclusion and Next Steps

For these reasons and many others, we urge you to revise the procedures for the upcoming November 18 rally and to announce them well in advance of November 18. Specially, we would ask that:

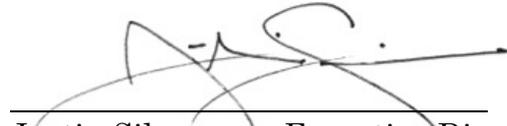
- 1) The revised procedures be made public no later than November 11;
- 2) The revised procedures allow close-up access by credentialed journalists to public areas where speakers assemble; and
- 3) The revised procedures ensure that no member of the press is given less access than any member of the public.

We are grateful for and support the City’s concern about protecting public safety, and we stand ready to engage in a dialogue about methods to protect public safety in a manner that comports with important First Amendment principles. Indeed, we would ask for an opportunity to meet with you at your earliest convenience to discuss revised procedures for November 18. Please contact Matthew Segal or Ruth Bourquin at ACLUM to arrange a time to discuss these issues.

Thank you for your consideration of these concerns and our request for a meeting.

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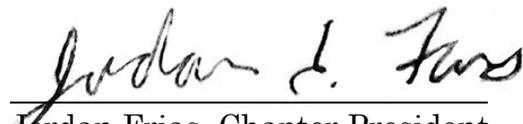
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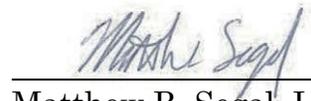
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