

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
WESTERN DIVISION**

Rinaldo Del Gallo, III,)	
Plaintiff,)	
v.)	No. 3:17-cv-30167-MAP
)	
Martin J. Walsh, et al.,)	
Defendants.)	

**MEMORANDUM *AMICUS CURIAE* OF THE
AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF
MASSACHUSETTS, INC., THE MASSACHUSETTS NEWSPAPER
PUBLISHERS ASSOCIATION, THE NEW ENGLAND FIRST
AMENDMENT COALITION, AND THE NEW ENGLAND CHAPTER OF
THE SOCIETY OF PROFESSIONAL JOURNALISTS
ON ISSUES OF PRESS ACCESS AND
IN SUPPORT OF NEITHER PARTY**

(leave to file granted on November 16, 2017)

Introduction

This case arises from plaintiff Rinaldo Del Gallo's claim that the City of Boston, the Boston Police Department (BPD), and various officials violated constitutional protections for speech, assembly, and association during events at the Boston Common on August 19, 2017. The complaint implicates not only Del Gallo's rights, and not only the rights of other civilians, but also the rights of people who sought to cover the events of August 19 in their capacity as *journalists*. This is because journalists were expressly excluded from a large barricaded area that the City and the BPD erected around the self-styled "free speech" rally on the Common.

This exclusion was improper. As explained below, it was both a content- and viewpoint-based restriction on speech, in violation of the First Amendment to the U.S. Constitution. Accordingly, *amici* respectfully submit that any injunctive relief issued by this Court should ensure that the exclusion of journalists will not recur—and that journalists will instead be afforded comprehensive and close-up access—at the rally reportedly planned for the Boston Common on November 18.

Interests of the *Amici Curiae*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan 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. The ACLU of Massachusetts, Inc. (ACLUM), is the Massachusetts affiliate of the national ACLU. The protection of free speech and assembly is a priority for both the ACLU and ACLUM. *See, e.g., Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011). The protection of

freedom of the press is also a priority. Indeed, ACLUM intends to dispatch monitors to the event on November 18 to ensure that the rights of the press are respected. ACLUM also represents individual journalists whose access to the August 19 rally was impeded by the City-imposed restrictions.

The Massachusetts Newspaper Publishers Association (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.

The New England First Amendment Coalition (NEFAC) is a nonpartisan, nonprofit 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.

The Society of Professional Journalists 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. The Society's New England Chapter (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 U.S. 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.

Background

I. The Events of August 19

On August 19, thousands of demonstrators assembled on or near the Boston Common, partly in response to a self-styled "free speech" rally at the Common's Parkman Bandstand. These events came one week after a violent white supremacist rally in Charlottesville, Virginia, during which a man drove his car into a crowd, killing a young woman and injuring 19 others.¹ In Boston, however, there were no reports of serious violence by any civilian.

¹ See Joe Heim, *Recounting a day of rage, hate, violence, and death*, WASH. POST., Aug. 14, 2017, at https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm_term=.d632d3a021f2.

In an apparent effort to physically separate the different groups, the City of Boston and the BPD erected barricades around the Bandstand. See Complaint ¶ 85. The outer barricades were perhaps 30 to 40 yards, or more, away from the Bandstand itself, making it virtually impossible for anyone outside the barricade to see, let alone hear, individuals who were speaking, rallying, or observing at the Bandstand. See *id.* ¶¶ 72, 132. Access to the Bandstand was possible only through gated passageways set up and controlled by BPD officers. See *id.* ¶¶ 72-82.

II. The Exclusion of Journalists

Journalists were categorically barred from entering the barricades, and therefore from approaching the Bandstand, on August 19. As *amici* understand it, the prohibition on press access was made explicit just one day before the rally, and its true magnitude was not apparent until August 19 itself. On or about Friday, August 18, it appears 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). See Complaint ¶¶ 42.d, 134.² The Media Restrictions Memo included the following prohibitions:

- “There will be NO designated media staging area inside the Common”;
- “Media Members are expected to remain mobile and refrain from long term stationary reporting which may incite and attract participants”;
- and

² See Lt. Det. Michael McCarthy, *Media Restrictions and Guidelines for Coverage of Events in the Boston Common on Saturday* (undated), available at https://www.boston.gov/sites/default/files/media_guidlines_for_saturday.pdf (last visited Nov. 15, 2017).

- “NO media personnel will be allowed inside the barricaded area around the Bandstand.”

Though the Media Restrictions Memo stated that media would be barred from the barricaded area, it did not say how large that area would be. Consequently, even assuming that journalists were generally aware of the Memo—an assumption that *amici* have no reason to accept as true—journalists would not have known until they arrived at the event that they would not be permitted to get close enough to hear, see, or speak with the people at the Bandstand.

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. See Complaint ¶¶ 27, 38, 50.e, 63.d, 123. 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. See, *e.g.*, *id.* ¶ 127.

III. Developments Since August 19

Facts emerging after the demonstration and rally on August 19 confirm that the exclusion of journalists was intentional, but also that the City and the BPD may be willing to take a different approach going forward.

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.

BPD Commissioner William B. Evans has conceded that the media restrictions were specifically intended to prevent journalists from reporting about 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.⁴ Likewise, Boston Mayor Martin J. 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.⁵

Following those remarks, it was reported that another self-styled “free speech” rally was being planned for November 18, 2017.⁶ In advance of that rally, on October 24, the *amici* wrote to Mayor Walsh and Commissioner Evans to express their concerns about the exclusion of journalists on August 19, and to seek public, written assurance that this exclusion would not be repeated at the rally planned for November 18. See Complaint ¶ 135.⁷ No such public assurance has previously been

⁴ 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>.

⁵ Sarah Betancourt, *Boston authorities should not have blocked media from covering protest*, COLUMBIA JOURNALISM REV., 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”).

⁶ See Travis Andersen, *Permit sought for 2nd free speech rally on Common, in November*, Boston Globe, Oct. 11, 2017, at <https://www.bostonglobe.com/metro/2017/10/11/group-seeks-permit-for-second-free-speech-rally-boston-common-november/ev9Q3eLoNetzkoojgGtzGI/story.html>.

⁷ See Letter from *Amici* to Boston Mayor Martin J. Walsh and BPD Commissioner William B. Evans, Oct. 24, 2017, at <https://aclum.org/wp-content/uploads/2017/10/CityofBostonNovember18Rally-October24.pdf>.

provided. Today, however, in its opposition to Del Gallo's motion for a preliminary injunction, the defendants have stated that "the City intends to allow media access to all areas available to event participants." Defendants' Br. in Opp. at 5; *see also id.* at 9, 18 n.8. Counsel for the City has made the following statement to counsel for the *amici*, and has authorized *amici* to share it here:

[I]t is the City's position that members of the media will not be restricted from entering any areas accessible to event participants. Additionally, members of the media will not be restricted on what equipment they can bring to the event. Of course[,] should public safety concerns arise, there may be restrictions put in place, but at this time there are no such restrictions anticipated.

Plaintiff Del Gallo's complaint addresses the exclusion of journalists. It seeks, among other relief, a preliminary injunction "[o]rder[ing] the defendants to not interfere with media coverage of any event when Rinaldo Del Gallo may be a speaker, including the Rally for the Republic event on November 18, 2017." Complaint ¶ 2.i; *see id.* ¶¶ 2.j, 213.d.

Argument

The categorical exclusion of journalists from the enormous buffer zone around the Parkman Bandstand on August 19, 2017, violated the First Amendment to the U.S. Constitution.⁸ This exclusion impermissibly prevented journalists from hearing what the rally participants were saying and from interviewing individuals about the reasons for their participation. Accordingly, any preliminary relief ordered by the

⁸ *Amici* also believe that the restrictions were inconsistent with Articles 1 and 16 of the Massachusetts Declaration of Rights, but because the Complaint in this case raises only federal constitutional claims with regard to the freedom of the press, this submission also addresses only the issues under the First Amendment.

Court in this case should, at a minimum, contain provisions ensuring broad press access to the rally that has reportedly been planned for November 18.

I. The exclusion of journalists on August 19 was unconstitutional.

The First Amendment guarantees freedom of speech and assembly. These guarantees are strongest 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 the “apotheosis of a public forum.” *Glik*, 655 F.3d at 84.

“[T]he government’s ability to restrict speech” within traditional public fora “is very limited.” *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014), (internal quotation marks omitted). A content-based law is “presumptively invalid,” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and can survive only if it is “the least restrictive means of achieving a compelling [government] interest.” *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000). Viewpoint-based laws are even more disfavored; they are generally prohibited. *See Watchtower Bible and Tract Soc. of New York, Inc. v. Sagardia De Jesus*, 634 F.3d 3, 11 (1st Cir. 2011). If a law is content- and viewpoint-neutral, intermediate scrutiny applies: the government “must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government’s interests, not simply that the chosen route is easier.” *McCullen*, 134 S. Ct. at 2540; *see also Ward v. Rock Against Racism*, 492 U.S. 781, 791 (1989). Under these standards, the exclusion of journalists on August 19 was unconstitutional in several respects.

A. The exclusion of journalists was impermissibly content- and viewpoint-based.

The exclusion of journalists on August 19 was expressly content-based and, in context, also appears to have been viewpoint-based. The exclusion was content-based because, under the BPD's Media Restrictions Memo, entry to the Bandstand area explicitly 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 could, at least in some instances, access the Bandstand; journalists who intended to engage in newsgathering about that speech could 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 "agitat[ing]" the crowd.⁹ As the Supreme Court reiterated in *McCullen*, 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.¹⁰

Similarly, comments by public officials supply 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). 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

⁹ *See* Interview of Commissioner Evans, *supra* n.4.

¹⁰ 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.

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. Government censorship of constitutionally-protected newsgathering activity because of government disapproval of the views being expressed is clearly unlawful.

B. The exclusion of journalists impermissibly excluded them from areas where members of the public were permitted.

Wholly apart from the content-based and viewpoint-based nature of the restriction, the press had a First Amendment right of access to the August 19 rally, which was violated by the outright prohibition on media access to the Bandstand. 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 citizens on matters of public concern. *See generally Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-606 (1982) (First Amendment right of access to trials is based on tradition of public trials and accompanying benefits to the public). Generally speaking, "the media's right of access is at least equal to that of the general public." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586 n.2 (1980) (Brennan, J., concurring) (citing *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974), and *Pell v. Procunier*, 417 U.S. 817, 834-35 (1974)).

Assuring media access that is at least equal to that of the general public helps to ensure that members of the public who cannot attend an event in person will have an opportunity to learn about it through "print and electronic media." *See Richmond Newspapers*, 448 U.S. at 572-73 (citation omitted). Indeed, even when

space is limited, it is commonplace to ensure media access through “preferential seating” or other arrangement. *See id.* at 581 n.18. Such access for journalists cannot be restricted absent a compelling interest and means that are narrowly tailored to meet that interest. *Globe Newspaper Co.*, 457 U.S. at 606.

Despite those principles, journalists were categorically prohibited from joining members of the public at the Bandstand on August 19. That prohibition contradicted the rule that the press has a right to be where members of the public are, and no adequate reason has been announced for imposing it.¹¹ Thus, even if it could reasonably be characterized as a “time, place, and manner” restriction rather than a content- or viewpoint-based restriction, the exclusion of journalists from the Bandstand area on August 19 was unconstitutional.

II. This Court’s ruling on Del Gallo’s request for preliminary injunctive relief should expressly protect media access to the rally planned for November 18.

Notwithstanding the restrictions imposed on journalists during the events of August 19, it appears that the City and the BPD may be prepared to accept broader press access for the events scheduled for November 18. *Amici* respectfully submit that, in light of plaintiff Del Gallo’s request for preliminary injunctive relief, this

¹¹ It is doubtful that such a justification could exist. In *McCullen*, for example, the Supreme Court held that a law establishing a 35-foot buffer zone was unconstitutional because it was not narrowly tailored to meet the state’s interest in ensuring patients of clinics that provide abortion services were not impeded in their access or harassed or intimidated. 134 S. Ct. at 2537-40. The Court noted 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 press access inside the buffer zone to hear, to interview, and to photograph rally participants, would have been more narrowly tailored.

broader press access should be made explicit. Specifically, when this Court rules on plaintiff Del Gallo's request for a preliminary injunction, it should order the defendants in this matter to:

- (1) allow close-up access by journalists to public areas where speakers assemble on November 18; and
- (2) ensure that no member of the press is given less access than any member of the public.

Conclusion

Amici respectfully request that this Court guarantee appropriate press access to the rally planned for November 18 when it rules on plaintiff Del Gallo's request for preliminary injunctive relief in this case.

Respectfully submitted,

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Dated: November 16, 2017

Certificate of Service

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on November 16, 2017.

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