To: BART Board of Directors,

This memo responds to the recently proposed protest and internet access policies that have subsequently exposed BART to legal liabilities. The body of this memo will provide guidance for protecting the proposed policies from legal challenges.

Protest Policy

For more than 25 years, BART has had a policy regarding the exercise of First Amendment rights, restricting its exercise to the unpaid areas of BART. The newly proposed protest policy seeks to extend First Amendment restrictions to include ticketing areas, parking lots, public streets and sidewalks. As stated BART is overstepping its bounds. While BART has the goal of providing safe and speedy transportation for all of its customers, the public sidewalk and streets adjacent to entrances are not part of BART property and can not be regulated by BART. The US Supreme Court case Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) asserted that:

> It has often been held that publicly owned streets, sidewalks, and parks are so historically associated with the exercise of First Amendment rights that access to them for purposes of exercising such rights cannot be denied absolutely. Lovell v. Griffin, 303 U.S. 444 (1938); Hague v. CIO, 307 U.S. 496 (1939); Schneider v. State, 308 U.S. 147 (1939); Jamison v. Texas, 318 U.S. 413 (1943).

The Court then affirms that when restricting First Amendment expression one must pay close attention to the time, place, and manner of the expression. In

addition the intended use of the area must be considered, as well as the opportunity for protestors to express themselves in alternate channels.

The court held that Lloyd's privately owned and operated shopping center was open to the public with the intent that they will come and shop, and not to entitle respondents to exercise their First Amendment rights. In addition activists had other opportunities to express themselves, on the surrounding streets and sidewalks. As a result the citizens were exposed to diverse ideas and viewpoints and the restrictions on their First Amendment rights were reasonable. Although BART facilities are not private property, they do not operate their service system to provide a platform for their customers to express themselves, rather they are in the business of moving people safely and speedily. Similar to the Lloyd case, citizens who ride BART have the chance to become informed outside BART facilities. It is recommended that BART narrow its protest policy by not including public sidewalks and streets. With these modifications BART could still extend its policy to include unpaid areas by asserting that their property is not intended for use as a public forum, and satisfying a reasonableness test.

The US Supreme Court case International Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) affirms that an airport terminal is not a public forum, and regulations banning First Amendment expression need only satisfy a reasonableness standard. The Court defines a regulation to be reasonable as long as the regulation is “not an effort to suppress the

speaker's activity due to disagreement with the speaker's view," thus the regulation is content neutral. The Court explicitly states:

> A public forum does not exist merely because persons are freely permitted to enter a government owned site. Indeed, the Court has ". . . expressly rejected the suggestion that 'whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a "public forum" for purposes of the First Amendment.'" United States v. Albertini, 472 U.S. 675, 686 (1985) (quotingGreer, 424 U.S. at 836); see also United States v. Grace, 461 U.S. 171, 177 (1983).

The Port Authority wanted to prevent solicitation and the distribution of handbills within the airport terminals. The Court found that the regulation was permissible because solicitations may slow the path of possible contributors, cause duress or commit fraud. The Court also asserts that:

> Even in a public forum, the government is not powerless to regulate First Amendment activity... content-neutral regulations may be enforced if they are reasonable and narrowly tailored to serve significant governmental interests, and leave open ample alternative channels of communication. E.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. at 46; Clark, 468 U.S. at 293.

BART's concerns are similar to the Port Authority's in that the First Amendment limitations it imposes are to promote passenger safety, prevent platform overcrowding, and ensure the best possible service to its customers. The protest policy is content neutral, paying no mind to the subject matter, viewpoint conveyed. In addition BART provides customers alternative channels for expression, customers are free to express themselves on the publicly operated streets, and sidewalks surrounding BART facilities.

Internet Policy

The proposed internet policy has formalized the conditions under which internet service will be provided to BART customers. This includes the ability to terminate service at will, block social networking sites, and filter content related to planned or ongoing protests. As stated, the policy leaves BART susceptible to legal challenges. The US Supreme Court case New York Times v. United States, 403 U.S. 713 (1971) ruled that the First Amendment protected the right of the New York Times' to print the classified materials. The Court asserted that:

> Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, (1963); see also Near v. Minnesota, 283 U.S. 697 (1931). The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint.

BART must meet its "heavy burden" of showing a justification for a prior restraint. The internet policy must clearly specify the conditions under which, BART plans to terminate internet service, and these conditions must clearly show justification for the restriction. The US Supreme Court case Brandenburg v Ohio, 395 U.S. 444 (1969) established that “the government cannot punish inflammatory speech unless it is directed to inciting and likely to incite imminent lawless action.” Thus, a citizens speech is not protected if the they intend to incite a violation of the law that is both imminent and likely. The Court further asserts that:

> The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

According to the precedents set by the US Supreme Court if BART plans to impose restrictions on internet service they must show justification for prior

restraint, and prove that protestors intend to incite a violation of the law that is both imminent and likely. Thus, BART can terminate service only in circumstances that meet the strict criteria detailed above.

The executive director of the First Amendment Center at Vanderbuilt University, Gene Policinski, stated that, "Government can legitimately stop speech for public safety purposes, but it has to be the narrowest possible response, it has to be reasonable, and there has to be an imminent threat." The US Supreme Court case Ward v. Rock, 491 U.S. 781 (1989) relaxes the standards that Policinski was referring too. The Court established that municipalities that restrict the time, place, or manner of protected speech in a public forum need not seek out the least intrusive manner. The Court asserted that:

> The requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.

In Ward v. Rock it was determined that New York City had a substantial interest in limiting excessive noise and the regulation was "content neutral". BART's internet policy, while not the least restrictive means, meets the criteria established in the Ward case.

BART previously restricted internet service in an attempt to prevent platform overcrowding, which is very dangerous due to the increased possibility that people will fall from the platforms onto the trackway. Additionally, if trains are forced to stop in tunnels for long periods of time, this delays the arrival of emergency medical help for passengers in need of assistance. Thus, BART is

championing a compelling government issue, public safety. BART's service restriction was narrowly tailored, they did not simply shut off service throughout the entire system. They restricted service on the platform level only. Service was fully available at the street level and at all above-ground BART stations and trackways. Additionally, this proper time, place, and manner restriction does not discriminate based on content. The internet service interruption did not affect the First Amendment rights of any individual who chose to protest in a lawful manner, in the areas of BART facilities that are open for expression. The service restriction only interrupted the planned illegal activity on BART platforms. It is also important to note that BART did not attempt to shut down the protest, they simply turned off the cell phone service to prohibit the ease of communication between protestors. Although this restriction may have served as an inconvenience to customers, BART took additional measures to ensure that they had alternate means of communication. BART deployed more than 120 extra BART uniformed Police Officers and Operations personnel carrying radios in order to assist patrons. Additionally, passenger courtesy phones are available on each platform, and each train car has intercoms allowing passengers to contact operators for assistance.

Aside from the ability to terminate internet service at a whim, the proposed policy seeks to grant BART the authority to block, or censor communications specifically related to planning protests. The precedents for censorship of First Amendment expression are vastly different than for blocking expression. The 3rd U.S. Circuit Court of Appeals case American Civil Liberties

Union v. Mukasey, 534 F.3d 181 (3rd Cir. 2008) ruled that the Child Online Protection Act (COPA) violated the First and Fifth Amendment. The court found that COPA failed to meet the strict scrutiny test for restrictions on protected speech. The test states that the restriction must serve a “compelling government interest”, be “narrowly tailored” to serve the interest, and use the least restrictive means available. The court concludes that:

> We do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection.

While BART’s internet policy serves the compelling government interest to protect its passenger, it fails to meet the second criteria of the test. The internet policy is insufficiently narrowly tailored because although it seeks to limit the communication of planning illegal activities, it would broadly restrict content to all passengers.

The US Supreme Court case United States v. American Library Association, 539 U.S. 194 (2003) ruled that the Child Internet Protection Act was not unconstitutional. The Court held that internet access in public libraries "is neither a 'traditional' nor a 'designated' public forum."

The case relied on the fact that a public forum is only created when the government makes an affirmative choice to open up an area for such use. Furthermore the court asserts that:

> Libraries do not acquire internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak.

Essentially the internet is just another channel for making information available. Another major reason that the Court did not view the restriction as an unconstitutional is that the filter could simply be turned off if an adult required it to be for any legitimate purposes. Again BART's internet policy would fail a strict scrutiny test due to its lack of narrowness. Additionally, the filter can not simply be turned off upon request, as it could in the library.

As BART proceeds with with finalizing their protest and internet policy it is important that they remain true to their core mission of providing safe, efficient, and reliable public transportation services. Extending their protest policy to include publicly owned streets and sidewalks does not in any way support BART's core mission. BART's internet policy is subject to the same scrutiny. While BART having the ability to terminate service under certain conditions may be essential to meeting the values outlined in their core mission; the ability for BART to block or filter content is not. I urge member of the BART Board of Directors to pay close attention to the legal liabilities outlined in this memo, and to weigh the constitutional concerns of the proposed policy before proceeding.

Best Regards,

Michael Hintze