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September 3, 2004

Ms. Katherine N. Lapp
Executive Director
The Metropolitan Transit Authority
347 Madison Avenue
New York, NY 10017

Re: *Proposed Ban of Photography on New York City Public
Transportation*

Dear Ms. Lapp:

Please accept this letter as a comment by the National Press Photographers Association,¹ the Radio-Television News Directors Association,² the Reporters Committee for Freedom of the Press³ and the Society of Professional Journalists⁴ on the proposed rules of the Metropolitan Transportation Authority of the State of New York (“MTA”) prohibiting photography, film, and video recording on all property owned by the New York City Transit Authority, the Manhattan and Bronx Surface Transit Operating Authority, and the Staten Island Rapid Transit Operating Authority (collectively, “NYCTA”), except when conducted by certain members of the press or other authorized individuals.

¹ The National Press Photographers Association is a non-profit professional organization dedicated to the advancement of photojournalism, its creation, editing and distribution, in all news media. The NPPA vigorously promotes freedom of the press in all its forms. The NPPA’s more than 10,000 members include still and television photographers, editors, students and representatives of businesses that serve the photojournalism industry.

² The Radio-Television News Directors Association is a professional association devoted to electronic journalism. The RTNDA’s more than 3,000 members include local and network news executives, educators, students, and others in the radio, television, cable and other electronic media worldwide.

³ The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedoms of information interests of the news media. The RCFP has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

⁴ The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, the Society promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

In these comments, we oppose adoption of the proposed rules because (1) they will violate the First Amendment rights of photojournalists and other photographers, (2) they will not achieve the MTA's goal of enhancing national security by preventing intelligence gathering activities on NYCTA property, and (3) they will impair the ability of photojournalists to perform their jobs effectively. We therefore respectfully request that the MTA reject the proposed rules and continue to permit photography on NYCTA property.

I. MTA's Proposed Rule Changes.

In May of 2004, the MTA released two proposed rules that prohibit photography, film, and video recording in and on all property owned by the NYCTA. The proposed rules both state that

No photograph, film or video recording shall be made or taken on or in any conveyance or facility by any person, except members of the press holding valid press identification cards issued by the New York City Police Department or by others duly authorized in writing to engage in such activity by the authority.⁵

A "conveyance" is "any subway or rapid transit car or train, locomotive, omnibus or other vehicle previously used or held for use by the authority as a means for transportation of passengers." N.Y. Comp. Codes R. & Regs. tit. 21, § 1050.2(e). The definition of "facility"

includes all property and equipment, including, without limitation, rights of way and related trackage, rails, signal, power, fuel, communication and ventilation systems, power plants, stations, terminals, signage, storage yards, depots, repair and maintenance shops, yards, offices and other real estate or personalty used or held for or incidental to the operation, rehabilitation or improvement of any rapid transit railroad or omnibus line of the authority.

Id. § 1050.2(b). If adopted, therefore, the proposed rule will ban all photography by uncredentialed photojournalists and other unauthorized individuals on all NYCT property, regardless of whether that property is used to provide direct public transportation services.

Under the NYCTA Rules of Conduct, an individual who violates the ban on photography will be subject to either criminal prosecution and "a fine not to exceed \$25 or a term of imprisonment for not longer than 10 days, or both; or . . . civil penalties imposed by the

⁵ An identical rule has been proposed for the Staten Island Rapid Transit Operating Authority. The proposed rule is set to replace the current § 1050.9(c) of the NYCT's Rules of Conduct. In relevant part, that provision provides that "[p]hotography, filming or video recording in any facility or conveyance *is* permitted except that ancillary equipment such as lights, reflectors or tripods may not be used. Members of the press holding valid identification issued by the New York City Police Department are hereby authorized to use necessary ancillary equipment." N.Y. Comp. Codes R. & Regs. tit. 21, § 1050.9(c) (emphasis added).

transit adjudication bureau in an amount not to exceed \$100 per violation. . . .” Id. § 1050.10(a)-(b). In addition, a person who is “observed” violating the ban “and who may receive or has received a notice of violation therefore is subject to ejection from the” NYCT facility in which the violation occurred. Id. § 1050.11.

MTA’s justification for this sweeping ban is the “further enhance[ment of] passenger security and safety. . . .” MTA Staff Summary, www.mta.nyc.ny.us/nyct/rules/staffsummary.htm; see also Robert D. McFadden, Citing Security, Subway Officials Seek Picture Ban, *The New York Times*, May 21, 2004, at B1 (“The world we live in has changed dramatically These changes to our rules of conduct are intended to enhance security and safety, not only for our customers but our employees as well.”) (quoting Lawrence G. Reuter, president of New York City Transit). It is not clear from the materials accompanying the proposed rule, however, what specific security and safety concerns are addressed by the ban. Presumably, the rules address a combination of national security and traditional passenger safety concerns.

II. The Proposed Rule Violates the First Amendment Rights of Photojournalists and Other Photographers.

A. Freedom of the Press

It is well established that a free and vigorous press is a vital component of a healthy democratic society. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (“We do not question the significance of free . . . press . . . to the country’s welfare.”); Mills v. Alabama, 384 U.S. 214, 219 (1966) (“Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”); see also U.S. Const. amend. I. New York in particular has a venerable history of protecting the press from oppression by state actors. See Baker v. F&F Inv. 470 F.2d 778, 782 (2d Cir. 1972) (noting that New York law “reflect[s] a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters”). Photojournalism is key to facilitating the press’s effective reporting of newsworthy events. Pictures, whether used to depict news events as they actually happen, to illustrate news that has happened, or to help explain anything else of public interest, are indispensable to the press’s fulfillment of its responsibility to keep the public accurately informed. Simply put, pictures help all people better understand any subject in the public domain.

Photojournalism, therefore, plays a crucial role in the proper functioning of our society. By providing visual images of newsworthy events, press photographers enhance both the quality and effect of news-reporting, thereby enhancing both the quality and effect of the dialogue among citizens that news-reporting engenders. “[A]nd since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of” a photojournalist’s ability to do his or her job “cannot be regarded otherwise than with grave concern.” Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936). Thus, when taking pictures of or filming newsworthy events, a photojournalist is fulfilling the important constitutional function

of providing for “an informed citizenry[, which] is the basic ideal upon which an open society is premised. . . .” Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (internal quotation marks omitted).

Because of the importance of the press, the Supreme Court has recognized that newsgathering is entitled to constitutional protection. See Branzburg, 408 U.S. at 707 (“[N]ewsgathering is not without its First Amendment protections. . . .”); id. at 681 (“[W]ithout some protection for seeking out news, freedom of the press could be eviscerated.”). Nonetheless, whatever special protection the press’s newsgathering activities are entitled to, it is clear that the protection “does not guarantee the press a constitutional right of special access to information not available to the public generally.” Pell v. Procunier, 417 U.S. 817, 833 (1974); see also Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978); Saxbe v. Wash. Post, 417 U.S. 843, 850 (1974). If the public can be excluded from access to information controlled by the government, then so can the press.

This principle of equal access to government controlled information, however, must remain flexible “in order to accommodate the practical distinctions between the press and the general public.” Houchins, 438 U.S. at 16 (Stewart, J., concurring). After all, the press and the public do not seek information with the same goal in mind. While a private individual will often seek information “for his own edification[,]” a member of the press “gather[s] information to be passed on to others, and his mission is protected by the Constitution for very specific reasons.” Id. at 17. From a freedom of the press perspective, therefore, it is adequate to grant a private individual access to NYCTA property while prohibiting photography by that person, for he “can grasp its reality with his own eyes and ears.” Id. A photojournalist, on the other hand, does not have equal access to NYCTA property if he is prohibited from taking pictures, because his sole goal in accessing the property “is to convey [its] sights . . . to those who cannot personally visit” it. Id. In other words, banning photography by uncredentialed photojournalists places the press on unequal footing with the general public. The First Amendment does not permit such discrimination.

As shown by the proposed rule’s exceptions for photography by credentialed journalists and by otherwise authorized individuals, the rule’s drafters were conscious of the special needs of the press. The proposed rule permits photography by “members of the press holding valid press identification cards issued by the New York City Police Department or by others duly authorized in writing to engage in such activity by the authority.” Unfortunately, these two exceptions do not cure the fundamental constitutional problems with the rule.

First, news photographers cannot predict when breaking news will occur and, when news does break, may be unable to obtain the necessary credentials or authorization for photographing on NYCTA property. According to the New York City Police Department, the press credential application process “takes approximately 3 to 4 weeks” to complete. Office of the Deputy Comm’n of Pub. Info., N.Y. City Police Dep’t, Frequently Asked Questions, at <http://www.nyc.gov/html/nypd/html/misc/pdfaq2.html>. Moreover, media from all over the world often visit New York City to work, and they are unlikely to possess press identification cards issued by the New York City Police. Under the proposed rule, these photojournalists will be

completely precluded from covering stories that break in New York City's subway system or on other NYCT property.

Second, even with the exceptions, the proposed rule is a prior restraint on newsgathering that creates the opportunity for an MTA official to deny permission to photograph if he or she disapproves of a story, a media outlet, or an individual photojournalist, with absolutely no mechanism for appeal of such a denial. See, e.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975) (characterizing as prior restraints laws that give "public officials the power to deny use of a forum in advance of actual expression"). As written, the proposed rule permits those who do not have press credentials to photograph on NYCT property if they are "duly authorized in writing . . . by the authority." All prior restraints on protected First Amendment activity, including the proposed rule, are accompanied by a "heavy presumption *against* the [restraint's] validity" Forsyth County v. The Nationalist Movement, 505 U.S. 123, 130 (1992) (emphasis added). Prior restraints may be permissible, but only if the discretion of the official charged with authorizing the protected activity is sufficiently limited by "narrow, objective and definite standards" See Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969).

In Shuttlesworth, the municipal ordinance at issue permitted denial of a license for a parade or public demonstration if "public welfare, peace, safety, health, decency, good order, morals or convenience" called for denial. Id. at 150. The Supreme Court held that these standards granted city officials too much discretion for the ordinance to survive First Amendment review. Id. By comparison, the MTA's proposed rule contains no standards whatsoever to guide MTA officials when authorizing photographers to photograph in or on NYCT property. Regardless of the intentions of those in control, such a standardless licensing system unavoidably creates the unconstitutional potential for abuse. See also Million Youth March v. Safir, 155 F.3d 124, 125 (2d Cir. 1998) (finding the "standardless nature" of a city official's discretion to deny permits for marches unconstitutional).

B. Freedom of Expression

In addition to its protection of the press's newsgathering activities, the First Amendment protects expression by all photographers, whether photojournalists or not. Because the proposed rule severely restricts the right to take pictures on NYCTA property – thereby infringing a photographer's freedom of expression – it violates the First Amendment. This conclusion holds true regardless of the constitutional analysis employed, whether that analysis was designed for reviewing restrictions on pure expression or on expressive conduct.

The visual arts, including photography, are expression protected by the First Amendment. See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569 (1995) (recognizing that the First Amendment protects the "painting of Jackson Pollock"); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (holding "that expression by means of motion pictures is included within the free speech . . . guaranty of the" First Amendment); Bery v. City of New York, 97 F.3d 689, 695 (2d Cir. 1996) ("Visual art . . . is similarly entitled to full First Amendment protection."). Just as the First Amendment protects the newsgathering process in addition to the final news report, it protects both publication of visual art and the

process that culminates in a piece of visual art. See Amato v. Wilentz, 753 F. Supp. 543, 562 (D.N.J. 1990), rev'd on other grounds, 952 F.2d 742 (3d Cir. 1991) (holding that state action prohibiting the filming of a movie violated the First Amendment); Baker v. City of New York, No. 01-CIV.4888(NRB), 2002 WL 31132880, at *5 (S.D.N.Y. Sept. 26, 2002) (noting that New York City admitted that the act of taking a photograph is protected First Amendment expression); cf. Gannett Satellite Info. Network, Inc. v. Metro. Trans. Auth., 745 F.2d 767, 772 (2d Cir. 1984) (reasoning that the sale of a newspaper – a crucial step in the process of disseminating information – is “[w]ithout question . . . protected by the First Amendment”). It is not just photographs that are protected expression, therefore, but also the act of *taking* a photograph – the very step in the expressive process that the proposed rule will prohibit.

1. The Proposed Rule Does Not Survive Review Under the First Amendment Public Forum Analysis.

a. For Photography Purposes, NYCTA's Stations are a Limited Public Forum.

When a regulation is directly aimed at pure expression, such as photography, the extent to which the government may regulate the expression varies with the character of the forum in which the expression occurs. Id. The Second Circuit recognizes four types of fora, with a descending level of First Amendment protection associated with each: traditional, designated, limited, and nonpublic. See Loper v. N.Y. City Police Dep't, 999 F.2d 699, 703 (2d Cir. 1993). In Gannett Satellite Info. Network, Inc., the Second Circuit determined that MTA stations qualify as a limited public forum if the expression at issue “is appropriate for the property . . . and is not incompatible with the normal activity of” the property. 745 F.2d at 772. From 1994 to today, the MTA has permitted photography on all NYCT property. See McFadden, supra, at B1; see also N.Y. Comp. Codes R. & Regs. tit. 21, § 1050.9(c). Indeed, the MTA itself even “sponsor[ed] an exhibition at Grand Central Terminal of photos . . . of life in the subways.” McFadden, supra, at B1. It is likely, therefore, that a court would conclude that photography is sufficiently appropriate to certain MTA property – including subway stations – to render the property a limited public forum.

b. Banning Photography Will Not Enhance Either National Security or Passenger Safety.

Because the proposed ban of photography on NYCTA property is a content-neutral regulation of expression in a limited public forum, see Ward v. Rock against Racism, 491 U.S. 781, 791 (1989) (reasoning that a “regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others”), it is constitutional only if it regulates the time, place or manner of expression, is narrowly tailored to serve a significant governmental interest, and leaves open ample alternate channels of communication, id.; Loper, 999 F.2d at 703. The proposed rule does serve a significant governmental interest – the safety and security of public transportation passengers. And it does regulate just the place and manner of expression. In the end the rule fails, however, because it is not narrowly tailored to serve the governmental interest and does not leave open adequate alternative channels of communication for photographers.

To satisfy the narrow tailoring requirement, the proposed rule must “promote[] a substantial government interest that would be achieved less effectively” without the rule, United States v. Albertini, 472 U.S. 675, 689 (1985), and it must not “burden substantially more speech than is necessary to further the government’s legitimate interests.” Ward, 491 U.S. at 800. In short, the MTA’s proposed ban of photography will not achieve its goals any more effectively than a rule that permits photography. Presumably, the rule was proposed to address either a national security related interest in preventing intelligence gathering by would-be terrorists, or a traditional passenger safety concern by preventing activity that obstructs the free-flow of passengers through NYCT property.

If the MTA is seeking to promote a national security interest with the proposed rule, banning all unauthorized photography will not achieve this goal. It is well known that modern cameras and other photography equipment are easily concealed from detection in cell phones, clothing, bags, or other items. Implementation of the proposed rule, therefore, is more likely to result in the MTA penalizing legitimate photographers for exercising a protected First Amendment right than in the prevention of further attacks on New York City.

Moreover, by banning *all* photography on NYCTA property by unauthorized individuals, the proposed rule will substantially burden more protected First Amendment activity than is necessary to the MTA’s national security goal. Namely, photojournalists who, because of the fast-breaking nature of news, do not have time to obtain press credentials will be less likely to respond to news events that occur on NYCTA property for fear of facing a criminal or civil penalty. The First Amendment does not tolerate such an unnecessary burden, even in the name of legitimate state interests.

If, on the other hand, the MTA is seeking to promote a more traditional passenger safety interest by preventing the obstruction of passenger movement through NYCTA property, banning all unauthorized photography will not achieve this goal either. Most photography is, at most, only minimally disruptive to the surrounding environment. Because cameras generally are handheld and compact, they do not obstruct the free movement of passengers through NYCTA property. This passenger safety concern would be better addressed by a rule that requires permits only for complex and large-scale photo shoots – the kind of photo shoot that is most likely to compromise passenger safety. By prohibiting all photography, regardless of its likelihood of endangering passengers, the proposed rule will “burden substantially more” expression than is necessary to accomplish the MTA’s goal. Id.

c. The Proposed Rule Does Not Leave Open Any Alternative Means for Photographing on NYCTA’s Property.

Finally, to be constitutional, a time, place, or manner regulation must leave open adequate alternative channels of communication that permit the same type of communication regulated by the rule. See id. at 701; Loper, 999 F.2d at 703. The proposed rule will survive this element of the First Amendment analysis only if the MTA leaves open adequate alternative options for photographing NYCT property. As it is currently drawn, however, the proposed rule provides no such alternative means. To the contrary, the photography ban applies to *all* NYCTA property, whether used for direct public transportation services or not, thus leaving no means for

an unauthorized photographer to take pictures or film in or on NYCTA property. And the authorization process itself is not an adequate alternative channel of communication because, as explained, it does not sufficiently protect First Amendment interests.

2. **Even If Reviewed Under the More Lenient *O'Brien* Analysis, The Proposed Rule is Unconstitutional.**

Even if reviewed under the more lenient standard applied to regulations of expressive conduct, rather than pure speech, the proposed rule violates the First Amendment. In United States v. O'Brien, 391 U.S. 367, 377 (1968), the Supreme Court established the test for determining the validity of a regulation of expressive conduct:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. In practice, though, so long as the regulation at issue is content neutral, the “O'Brien standard ‘in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.’” Young v. N.Y. City Transit Auth., 903 F.2d 146, 157 (2d Cir. 1990) (quoting Texas v. Johnson, 491 U.S. 397, 407 (1989)) (internal quotation marks omitted). Consequently, because the proposed rule fails the time, place, or manner restriction analysis, it is unconstitutional under the O'Brien expressive conduct analysis.

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The press is crucial to the proper functioning of our society. It is a vehicle for creating an informed public, and an informed public is the most effective safeguard against mismanagement of government. The MTA's proposed photography ban will significantly hinder the press's ability to report on newsworthy events that occur on NYCTA property. And when reviewed against the requirements of the First Amendment, the ban itself is unconstitutional. The proposed photography ban should be rejected, and photography should continue to be permitted in the New York City public transportation system.

Respectfully submitted,

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