



FleetCenter, in a geographically and structurally constrained setting, to nominate Presidential and Vice Presidential candidates and to adopt a party platform. The process of securing the area for conducting the DNC will begin this evening. The DNC will be the first national political convention to be held following the September 11, 2001 terrorist attacks on New York's World Trade Center that were launched from Boston's Logan Airport. It has been designated by the President as a National Special Security Event, and, in light of recent experience with such events, the Secret Service and the Boston Police Department have developed extraordinarily stringent security measures in connection with it.

Plaintiffs in these cases, filed earlier this week, are loose coalitions of political activists who oppose various elements of the Democratic Party's official agenda, and wish to protest against the DNC. They respectively challenge (1) the denial of permits for parade routes immediately next to the outer security perimeter of the FleetCenter, and (2) the demonstration zone being constructed to permit protesters to be adjacent to the transportation node through which the vast majority of delegates and invited guests to the DNC must pass in order to enter the FleetCenter.

Plaintiffs in the first action, No. 04-11608 ("the Coalition action"), seek to conduct parades -- on Sunday, July 25, the day before the DNC opens, and on each of the following four days of

the convention -- along Causeway Street, the public way abutting the FleetCenter. The City issued parade permits, but refused to allow the parades to proceed along Causeway Street. The permits directed the parades along Valenti Way, a street one block south of Causeway Street. The revised parade routes would also afford participants in the parades the opportunity to progress into a fenced-in designated demonstration zone ("DZ"). The Coalition does not wish to enter the DZ at all. In any event, it challenges the City's refusal to allow parades on Causeway Street as violating the First Amendment.

Plaintiffs in the second action, No. 04-11620 ("the Bl(a)ck Tea action"), were prepared to use the DZ, and Bl(a)ck Tea plaintiffs applied for, and received, permits to do so. They would use the DZ if it were to be redesigned and reconstructed, but challenge the precise manner in which the DZ is now being constructed, and the rules that will apply therein and nearby, as violating the First Amendment.

In expedited proceedings conducted earlier this week, both sets of plaintiffs moved for preliminary injunctions.<sup>1</sup> In an

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<sup>1</sup>I note that there are some potential questions concerning precisely which plaintiffs are proper in each action. In the Coalition action, it appears that only plaintiffs ANSWER Boston and USWA Local 8751 have standing, because only they applied for (and were denied) permission to parade along Causeway Street. In the Bl(a)ck Tea action, it is possible that all plaintiffs have standing; several of these plaintiffs seek to represent a class. In any event, there is no present dispute that there is at least one plaintiff in each action capable of raising all the relevant claims for the purposes of the motions for preliminary

oral ruling from the bench yesterday, I concluded that the Coalition plaintiffs had demonstrated a likelihood of success on the merits of their claim that prohibition of their parade route along Causeway Street on Sunday would violate the First Amendment, and granted the requested preliminary injunction limited to the Sunday parade only. By contrast, because of the limited range of options reasonably available, I denied the Bl(a)ck Tea plaintiffs the preliminary injunctive relief they requested. The oral rulings were designed to expedite resolution of the injunctive requests and facilitate prompt assertion of appellate rights for any party that chose to do so. This Memorandum is designed to provide an expanded written explanation for my rulings.

## I. BACKGROUND

### A. Facts

I find the following facts based on the submissions of the parties, including affidavits, maps, documents, and the proffers made during expedited hearings over the past two days.

Importantly, this information was supplemented by a view of the relevant area that I conducted on Wednesday, accompanied by counsel for the parties; the officials with operational responsibility for the security arrangements, Superintendent

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injunctions. There is consequently no occasion to make more detailed standing determinations at this stage.

Robert Dunford of the Boston Police Department ("BPD") and Special Agent Scott Sheafe of the United States Secret Service; and a number of the individual plaintiffs in the cases.

1. The Larger Security Environment

Security arrangements for the DNC have radiated out from the "hard security zone," which comprises the FleetCenter and the immediately adjacent area. The hard security zone is under the jurisdiction of the United States Secret Service. Only those with official convention, press, VIP, staff, or other credentials may enter, and to do so they must pass through a magnetometer into the hard zone, where they are subject to search.

Extraordinary measures -- which are not at issue in these cases -- are being taken to secure the areas west, north, and east of the FleetCenter.

The Thomas P. O'Neill Federal Building, next to the FleetCenter on the west, will be closed to the public for the duration of the DNC.

North Station, the principal railway terminal for travel between Boston and points north and west, and part of which is an element of the FleetCenter itself, will also be closed beginning this evening at about 8:00 PM. This closure -- like those of the portion of the Charles River north of the FleetCenter, and nearby public transportation -- will continue for the entire time period of the DNC.

Each day that the DNC is in formal session, beginning

several hours before the start of proceedings and continuing until several hours after their conclusion, Interstate 93 (which passes just to the east of the FleetCenter) will be closed. Interstate 93 is the major roadway to points well north and south of the City of Boston itself, and the closure will require a massive reordering of traffic patterns in the metropolitan area.

The "soft security zone," lying roughly south of the hard zone surrounding the FleetCenter, is the general area of the dispute in this litigation. The soft zone is approximately coincident with the area known as the Bulfinch Triangle, which is bounded by Merrimac Street along the southwest, New Chardon Street along the south, Washington Street along the east, and Causeway Street along the north.

Causeway Street is thus the southern dividing line between the hard zone and the soft zone. Beginning this evening, only 20 feet of sidewalk along the south side of Causeway Street will be in the soft zone. An opaque fence will be erected next to the sidewalk along the roadway to the north to mark the southern boundary of the hard zone.

The City retains final jurisdiction over the soft zone. Anyone may enter it; restaurants, bars, and stores will be open. Anywhere in the soft zone, leafleting and small stationary demonstrations of 20 persons or less may be conducted without a permit. Demonstrations of between 21 and 50 people require a permit; the City has committed to processing such permit

applications within two days. The principal restrictions in the soft zone are that (1) no vehicles will be allowed other than for public safety personnel, and (2) no tables or chairs will be allowed to be brought in.

No random security checks will be conducted on pedestrians entering or using the soft zone, and they will be permitted to carry bags and backpacks while there. However, if the BPD determines that the streets of the soft zone have reached their maximum capacity -- approximately 2,000 persons for Causeway Street, and 12,000 persons for all the side streets combined -- then it will temporarily restrict entry until a sufficient number of people have left so as to make room for new arrivals.

2. The Specific Locations at Issue

a. Causeway Street

Without the hard zone security fence running through it, Causeway Street is ordinarily four lanes wide at its eastern end. At the western end -- in front of the Thomas P. O'Neill Federal Building, and just west of the intersection of Portland Street -- it narrows to three lanes. Elevated MBTA (Green Line) tracks, which will not be used for transportation during the DNC, are overhead, providing a sort of roof over the surface area of approximately the southern three lanes of the road.

In early planning, the BPD intended to cede all of Causeway Street to the hard zone. However, after complaints from various sources, including businesses on Causeway Street, the City made

certain adjustments. It built out the sidewalk on the south side of Causeway Street to a total width of approximately 20 feet. The southern portion of the Causeway Street corridor -- the expanded southern sidewalk, and the businesses that front it -- were left within the soft zone. Various street furniture -- stanchions, bollards, streetlights, and the like -- continue, however, to punctuate and obstruct this expanded sidewalk.

To mark the hard zone at the northern edge of the expanded sidewalk, the Secret Service will install an eight foot fence, covered with a wire mesh designed to withstand assault by persons who might attempt to breach it. The fence will be lined with an opaque fabric scrim, specifically designed to prevent visibility. The purpose of this scrim, according to the BPD, is "to protect the delegates and other attendees, and to prevent hostile viewers from determining the strength and positioning of [] law enforcement assets." Emergency and other public safety equipment will be able to use the roadway in the hard zone behind the fence, which is designed to provide, if necessary, for simultaneous operation of emergency vehicles and emergency evacuation.

Thus, the extended sidewalk on Causeway Street's southern (soft zone) side will be bounded on the north by an opaque and imposing fence and on the south by the walls and plate glass windows of the ordinary structures (restaurants, bars, etc.) that line the street's south side. On the expanded Causeway Street

sidewalk, as elsewhere in the soft zone, the City will permit pedestrians movement and small or spontaneous demonstrations. However, the City has stated its intent to deny all applications for parade permits.

b. Designated demonstration zone

The "designated demonstration zone" is located in the soft zone just south of the corner of Haverhill Street and Causeway Street. The DZ is a roughly rectangular space of approximately 26,000 to 28,000 square feet -- very approximately 300 feet by 90 feet. The long direction runs north-south along Haverhill Street, and the eastern edge faces the outdoor parking lot that will be used as a bus terminal for arriving and departing DNC delegates.

A written description cannot begin to convey the ambience of the DZ site as experienced during the view. Most -- at least two-thirds -- of the DZ lies under unused Green Line tracks. The tracks create a space redolent of the sensibility conveyed in Piranesi's etchings published as Fanciful Images of Prisons. It is a grim, mean, and oppressive space whose ominous roof is supported by a forest of girders that obstruct sight lines throughout as the tracks slope downwards towards the southern end.

At the northern end, inboard of the girders, there is a small stage wrapping around an unused MBTA building. The City is

providing a sound system and will allocate access to the stage itself through a permitting system.

Directly underneath the tracks, the clearance is generally the height of an adult. However, at the edges of the tracks, including on the eastern side abutting the line parallel to the stage, diagonal girders slope at approximately sixty degree angles to the ground. At their highest point these girders are above six feet, but for most of their distance they are well below it. Thus, in practice, the area under the tracks is quite restricted by the girders. During the view, I observed that a person of normal height could not carry a sign underneath the girders without lowering it to head level or lower. If that were done, no one on the other side of the girders would be able to see it once it was raised again beneath the tracks.

As a consequence, the only feasible space for demonstrations within the DZ is between a line parallel to the back of the stage and the fence marking the eastern edge next to the bus terminal. Although the City calculated that some 4,000 persons could be accommodated in the entire DZ, this effectively useable area can accommodate approximately 1,500 persons. Moreover, as a result of questions raised by my questions during the view concerning the safety of egress, the City concedes that it must limit the capacity of the DZ to no more than 1,000 persons.

The DZ is surrounded by two rows of concrete jersey barriers. Atop each of the jersey barriers is an eight foot high

chain link fence. A tightly woven mesh fabric, designed to prevent liquids and objects from being thrown through the fence, covers the outer fence, limiting but not eliminating visibility. From the top of the outer fence to the train tracks overhead, at an angle of approximately forty-five degrees to horizontal, is a looser mesh netting, designed to prevent objects from being thrown at the delegates.

On the overhead Green Line tracks themselves is looped razor wire, designed to prevent persons from climbing onto the tracks where armed police and National Guardsman will be located. The use of razor wire and armed personnel in this way is not unique to the DZ; it represents a more general use of the elevated Green Line structure for a security vantage, beginning at the DZ and continuing on the Green Line tracks along Causeway Street and Martha Road, to oversee the southern and western boundaries of the hard security zone.

c. Bus terminal

The bus terminal is designed to accommodate buses for DNC attendees in two parallel rows. Buses in the western row, the only part of the bus terminal effectively within sight and sound of the DZ, will park along a yellow line that runs at an angle to the eastern edge of the DZ. The line creates a funnel between the DZ and the bus that is 39 feet at its northernmost and narrowest point and then widens as it moves to the south. The line was drawn at this angle because of the constraints of the

bus terminal site, principally in order to permit safe and efficient queuing for reboarding of buses when an expected 14,000 persons simultaneously emerge from the hard zone after the conclusion of the formal DNC sessions each day. This queuing area must also accommodate a fixed and preexisting MBTA headhouse tunnel ventilation structure.

Delegates and invited guests will also, of course, pass through this queuing area between the buses and the DZ wall after disembarking, when they will proceed to the northern end of the bus terminal, and then be processed through a 29 machine "magnetometer village" on Causeway Street and into the hard zone.

Delegates and invited guests arriving or departing via buses on the opposite or eastern bus row of the terminal will have essentially no visibility from or to the DZ because of the distance and the mesh screen. By contrast, those arriving or departing via buses in the western row may be able to hear and, to some extent, see demonstrators in the DZ, depending on precisely which bus they take and whether they walk in relative proximity to the DZ fence. It will be, however, completely impossible to pass a leaflet from the DZ to a delegate or other DNC guest, even one who wants to approach the edge of the DZ to receive the literature.

## **B. Procedural History**

### **1. The Coalition action**

On June 11, 2004 two persons -- members of plaintiffs ANSWER Boston and USWA Local 8751 -- submitted a set of applications to the City for permission to conduct five daily parades, including one on Sunday, July 25 beginning at 2:00 PM, and thereafter on each day from Monday, July 26 through Thursday, July 29 beginning between 6:00-7:00 PM, just before the DNC will convene. The applications included proposed parade routes passing along Causeway Street. On July 7, 2004, after denying the applicants permission to march on Causeway Street, the City provided an alternate route by which the parades would proceed along Rip Valenti Way, a quieter street one long block to the south of, and parallel to, Causeway Street. After various unsuccessful negotiations, plaintiffs filed a complaint and motion for preliminary injunction last Monday, July 19.

2. The Bl(a)ck Tea action

As a result of early discussions with interested parties, including the American Civil Liberties Union and National Lawyers Guild, which represent the plaintiffs in these actions, the City undertook to provide a designated demonstration zone within sight and sound of the DNC delegates. On March 15, 2004 the ACLU and NLG (including several counsel in this case) expressed displeasure with the site that the City initially proposed, and instead requested that "[t]he area which has been set aside for the delegates' buses should be modified or relocated to allow placement of the 'demonstration area' in the area at the

intersection of Haverhill and Causeway Streets."

The City complied with this request, and furthermore undertook to make available a stage and sound system. Various parties, including some plaintiffs, applied for and received permits to conduct rallies in the DZ.

The DZ was built out on or about Monday, July 19; before then it had been covered by debris and construction material. After viewing its construction, the Bl(a)ck Tea plaintiffs filed both a complaint and a motion for preliminary injunction last Wednesday, July 21.

## II. LEGAL PRINCIPLES

### A. Standard of Review

A district court presented with a motion for a preliminary injunction must consider "(1) the likelihood of success on the merits; (2) the potential for irreparable harm if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest." Charlesbank Equity Fund II v. Blinds To Go, Inc., 370 F.3d 151, 162 (1st Cir. 2004). "Likelihood of success is the main bearing wall of the four-factor framework." Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 16 (1st Cir. 1996). The greater the likelihood of success on the merits, the less risk of

irreparable harm to the plaintiff must be shown. Id. at 19.

The court has "wide discretion in making judgments regarding the appropriateness vel non of preliminary injunctive relief." Charlesbank Equity Fund II, 370 F.3d at 162. In the First Amendment context, even if relief is to be granted, the court "cannot simply order whatever a City is physically capable of doing, without regard to considerations of public health, safety, convenience, and cost," but rather "must make a sound exercise of equitable discretion that considers all the relevant circumstances. The invalidity of a permit regulation cannot automatically entitle a plaintiff to hold its event precisely as it wishes." Million Youth March v. Safir, 155 F.3d 124, 126 (2d Cir. 1998) (modifying injunction).

**B. General First Amendment Principles**

The parties essentially agree on the basic principles of law. I will set forth the generally-agreed principles, and then apply those principles to the facts of this case where the real disputes reside.

The First Amendment to the United States Constitution proscribes abridgement of "the freedom of speech . . . or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. Protest speech falls squarely within the protection of the First Amendment's guarantees of freedom of speech and assembly. See

Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969) (describing privilege of citizens to assemble, parade, and discuss public questions in streets and parks). However, it is well-settled that the First Amendment does not guarantee unlimited access to government property for expressive purposes. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992) (government "need not permit all forms of speech on property that it owns and controls"). Whether restrictions on access to public property impermissibly infringe on free speech rights depends largely on the character of the property at issue. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983).

There is a "heavy presumption" against the validity of a prior restraint on speech. Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992). Notwithstanding this presumption, the government may impose permit requirements in order to regulate competing uses of public fora. Id. A permit scheme regulating the time, place, and manner of speech is permissible, so long as it (1) does not "delegate overly broad licensing discretion to a government official," (2) is content-neutral, (3) is narrowly tailored to serve a significant government interest, and (4) leaves open ample alternatives for communication. Id.; New Eng. Reg'l Council of Carpenters v. Kinton, 284 F.3d 9, 20 (1st Cir. 2002).

Because these requirements are framed conjunctively, all

four must be satisfied, and failure to satisfy even one renders the permit scheme invalid. The third and fourth criteria, however, tend to be closely aligned. Narrow tailoring means that "the means chosen are not substantially broader than necessary to achieve the government's interest." Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989). However, "the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Id.

### III. ANALYSIS

#### A. The Causeway Street Parade Ban

##### 1. The Merits

Causeway Street is a traditional public forum. As a public street, it is in the class of places that "'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" Perry, 460 U.S. at 45 (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)). Furthermore, because Causeway Street is the only street open to the public that fronts the FleetCenter, it is the symbolic "doorstep" of the DNC.

There is no argument here of excessive administrative discretion, so I turn to the other three criteria for evaluating the validity of permit schemes in a public forum.

a. Content-neutrality

The restriction against parades in the soft zone applies to all parades, regardless of content, let alone viewpoint. While plaintiffs contend that the parade ban on Causeway Street will affect the content of their message, they do not contend that the restriction itself is content-based, and indeed I find that it is "justified without reference to the content of the regulated speech." Ward, 491 U.S. at 791. Consequently there is no meaningful argument that the second requirement is not satisfied.

b. Narrow Tailoring

The narrow tailoring requirement is satisfied where the regulation promotes "a substantial government interest that would be achieved less effectively absent the regulation" but does not "burden substantially more speech than is necessary to further the government's legitimate interests." Id. at 799. The regulation need not be the least restrictive means of serving the government interest; it must simply be "not substantially broader than necessary to achieve the government's interest." Id. at 800. In short, the "essence of narrow tailoring" is that the regulation must "focus[] on the source of the evils the [government] seeks to eliminate . . . and eliminate[] them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." Id. at 800 n.7; Jews for Jesus v. Mass. Bay Transp. Auth., 984 F.2d 1319, 1323 (1st Cir. 1993) (relevant questions

are "whether [the City's] interest is sufficiently substantial to justify the effect of the [restriction] on [plaintiffs'] expression, and whether that effect is no greater than necessary to accomplish the [City's] purpose").

The principal interest advanced by the City to justify the parade ban on Causeway Street is public safety. The soft zone portion of Causeway Street is indeed narrow, and because of the hard zone perimeter on the north side, access for law enforcement is limited. According to Chief Paul Burke of the Boston Fire Department, an engine company fire truck is approximately 28 feet wide and requires an additional 10-12 feet (i.e., 38-40 feet total) for the firefighters to maneuver properly; a ladder fire truck is approximately 40 feet wide and needs another 35 feet (i.e., 75 feet total).

This geometry has two implications. First, the security planners had a real and significant interest in maintaining the maximum width possible on Causeway Street within the hard zone for emergency vehicle access and evacuation purposes, to protect the large crowds at the FleetCenter and elsewhere within the hard zone. Second, the southern, soft zone portion of Causeway Street is effectively off-limits to emergency vehicles in any event, with or without a parade.

The fire department and other public safety agencies are concerned about their ability to direct movement within the soft zone should it become necessary to evacuate that zone due to the

