DAVID ROCAH
STAFF ATTORNEY

October 8, 2007

John B. Howard, Jr.
Deputy Attorney General
Office of the Attorney General
200 St. Paul Pl.
Baltimore, MD 21202

Dear J.B.,

AMERICAN CIVIL
LIBERTIES UNION OF
MARYLAND FOUNDATION
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In keeping with your request that the ACLU advise you of anticipated litigation against the State, and in light of the efforts to resolve the *ACORN v. Dickerson* case, I write to advise you of a case we have been unable to resolve, despite good faith attempts, and to make a final offer of settlement.

As you can see from the enclosed correspondence, the Maryland Transit Administration has taken the position that it can restrict photography of MTA "vehicles, stations, or other public areas," even when the photographer is not even standing on MTA property. As noted in our original letter to the MTA Police Chief and MTA General Counsel, we believe such a restriction (whether applied on or off MTA property) violates the First Amendment, and we are aware of no statute or regulation that purports to authorize the MTA police to regulate perfectly lawful behavior in this way (nor does the MTA response cite any).

When a member of our staff was told she could not take photographs of MTA property (which she was doing in connection with her work), we assumed that the directive was the result of an overzealous or misinformed police officer. We are frankly surprised that the MTA's General Counsel believes the directive is legally defensible. Although we have already made one attempt to resolve this matter amicably, given what we believe to be the clarity of the legal questions presented, we are offering the State one final opportunity to reconsider its position.

We are particularly puzzled by the MTA's contention that "The First Amendment does not protect photography because the mere act of taking a photograph does not communicate any idea." Not even the poorly considered dictum in *Porat v. Lincoln Towers* on which the MTA relies takes such a broad and radical view, and every decision we are aware of to have considered the question has concluded that photography is indeed constitutionally protected expressive activity under the First Amendment. In addition to the cases cited in our original letter, the Second Circuit has held "Paintings, photographs, prints, and sculptures … always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection." *Bery v. City of New York*, 97 F.3d 689, 696 (2d. Cir. 1996). Other courts concur. *See Trebert v. City of New Orleans*, 2005 U.S. Dist. LEXIS 1560 at *9 (E.D. La. Feb 1, 2005); *Christensen v. Park City Mun. Corp.*, 2006 U.S. Dist. LEXIS 66738 at *6 (D. Utah Sept. 15, 2006); *see also Hurley v. Irish-Amer. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) ("a narrow, succinctly articulable message is not a condition of constitutional protection [under the First Amendment], which if confined to expressions conveying a 'particularized message,' *cf. Spence v. Washington*, 418 U.S. 405, 411, (1974) (*per curiam*), would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll."). More importantly, the act of taking a

photograph cannot be analytically or logically separated from the photograph itself, or its display. The MTA's position is the equivalent of saying that despite the First Amendment's protection of free speech, the "mere act" of writing words on a page could be prohibited on MTA property. Needless to say, we do not think that is the law.

Although many of the cases have, not surprisingly, dealt with photography as an expressive art form, we think the reasoning and conclusions apply with equal or even greater force to the incident that led to our original complaint, where one of our employees was taking photographs to investigate a complaint we had received concerning free speech activities on MTA property (that investigation led to our filing *ACORN v. Dickerson*, No. 07-cv-00092 (D. Md., filed Jan. 11, 2007)). The Supreme Court has long recognized that the activities of groups like the ACLU in bringing public interest litigation are at the core of the First Amendment's protection. *In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963).

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Several other transportation agencies, including New York City's MTA and Union Pacific Railroad in Chicago (which uses Metra tracks), have reconsidered similar policies in light of challenges, and have recscinded or abandoned efforts to enact them. *See* Sewell Chan, *The Subway New Yorks Proudly Call Home*, N.Y. Times, July 3, 2005, at § 4, col. 5, p. 3; *Photos OK on Metra platforms*, Chicago Tribune, August 29, 2006, at Metro, Zone C, p. 4. We hope the MTA will do the same now.

We have engaged the services of cooperating counsel from the law firm Dickstein Shapiro, and have drafted a complaint in anticipation of litigation. Please let me know no later than October 26 how you wish to proceed. If I do not hear from you, we will assume that you wish to have the courts resolve the question, and shall proceed accordingly. If, as we hope, you wish to discuss the matter, I am available at your convenience.

Sincerely,

David Rocah
Staff Attorney

cc: Jodi Trulove, Esq.
Amber Garza, Esq.