

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
(SPRINGFIELD)

CIVIL ACTION NO. 1:17-cv-30167

RINALDO DEL GALLO, III,
Plaintiff,

v.

THE CITY OF BOSTON,
et al.,
Defendants.

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY
INJUNCTION

The Defendants, City of Boston (“City”), Mayor Martin Walsh (“Mayor Walsh”), Police Commissioner William Evans (“Commissioner Evans”), Commissioner Christopher Cook (“Commissioner Cook”), and Captain John Greland (“Captain Greland”) (collectively the “Defendants”), respectfully request that this Court deny Plaintiff, Rinaldo Del Gallo’s (“Plaintiff” or “Del Gallo”) Motion for Preliminary Injunction on the grounds that he has failed to provide any evidence to establish the three prongs necessary for this Court to grant injunctive relief. Specifically, the Plaintiff has failed to demonstrate: (1) that he has standing to challenge the issuance of a permit for a date other than the one requested by another individual; (2) that there is an actual controversy warranting the Court’s intervention; and (3) that the Defendants have in any way violated his constitutional rights with respect to its actions regarding a rally that is anticipated to occur on November 18, 2017 (“November Rally”).¹ In short, there is no basis for the Court to issue any prospective injunctive relief against the Defendants because the Plaintiff

¹ Although the Plaintiff in his Complaint and Motion for a Preliminary Injunction alleges facts and claims regarding his participation in a rally held on Boston Common on August 19, 2017 (“August Rally”), his requests for relief for purposes of his Motion for a Preliminary Injunction relate to the City’s actions with respect to the November Rally. The Defendants therefore address their arguments to those claims without waiving any rights associated with the response to the underlying allegations.

never requested a permit from the City, the City has committed to not preventing the Plaintiff from speaking on Boston Common and using amplification to do so, and the City has committed to not preventing members of the press from attending any rally or similar gathering on the Boston Common. As a result, Plaintiff's request for a preliminary injunction must fail.

FACTS

1. On September 18, 2017, the Boston Parks and Recreation Department ("BPRD") received a permit application for a rally to be held on Saturday, November 18, 2017 at the Parkman Bandstand in the Boston Common. *See* Attached Exhibit 1, Affidavit of Christopher Cook, ¶4.
2. The permit application estimated 2,000 attendees and requested to go from 10:00 a.m. to 3:00 p.m. *See* Attached Exhibit 1, Affidavit of Christopher Cook, ¶4.
3. The name on the permit application was Mark Sahady. *See* Attached Exhibit 1, Affidavit of Christopher Cook, ¶4.
4. Rinaldo Del Gallo has not applied for a permit for use of the Boston Common. Rinaldo Del Gallo's name did not appear on the permit application and the City does not have a record of any permit application submitted by Rinaldo Del Gallo for any event to be held on November 18, 2017. *See* Attached Exhibit 1, Affidavit of Christopher Cook, ¶5.
5. At the time the application was received, a large-scale event was already scheduled and permitted for the Boston Common. That permit was issued on March 1, 2017. The event is scheduled for 8:00 a.m. to 12:00 p.m, not including time required to break down the equipment used during the event, which will take approximately 2-2.5 hours. *See* Attached Exhibit 1, Affidavit of Christopher Cook, ¶6.

6. Between September 18, 2017 and October 26, 2017, various BPRD employees met with Mr. Sahady, and other rally organizers identified by Mr. Sahady, who sought to hold their event on November 18, 2017. It was explained to Mr. Sahady and the other rally organizers that an event was already scheduled at the Boston Common on the date they requested, and that it was logistically difficult to hold two large-scale events on adjacent areas of the Boston Common on the same day. *See* Attached Exhibit 1, Affidavit of Christopher Cook, ¶8.
7. The rally organizers identified by Mr. Sahady were involved in a similar permitted rally that took place on Boston Common in August 2017. Based on events during that rally, including the number of participants and counter protestors present, the Boston Police Department (“Department”) had concerns about public safety with two events occurring on the Boston Common on November 18, 2017. For example, the August Rally included no more than 200 participants; however, during the event, approximately 40,000 counter protestors arrived and attempted to disrupt the permitted rally. The disruption created an extremely contentious environment, culminating in physical altercations between participants and counter protestors. Additionally, individuals assaulted officers by biting, spitting, punching, pushing, and hitting them with objects. Objects thrown at officers and rally attendees included bottles, bottles filled with urine, traffic cones, rocks, other small objects, and what officers described as petroleum-based gel-type starter fluid for home grill use. *See* Attached Exhibit 2, Affidavit of William Ridge, ¶¶6-8.
8. A number of arrests were made during the August Rally, including charges for Affray, Disorderly, Unlawful Possession of a Firearm/Ammunition, Assault and Battery, Disturbing the Public Assembly, Resisting Arrest, Assault and Battery with a Dangerous

Weapon, Carrying a Dangerous Weapon/Knife, Drinking Alcohol in Public, Trespassing, Assault and Battery on a Police Officer, Disturbing the Peace, Delinquent to wit Assault and Battery with a Dangerous Weapon, Delinquent to wit Disorderly Person.

Additionally, officers recovered weapons and tactical gear, including loaded firearms, knives, tactical vests, and ball bearings concealed in a bag. *See* Attached Exhibit 2, Affidavit of William Ridge, ¶10.

9. During the August Rally, Department Captain John Danilecki was in the process of escorting rally speakers from the Parkman Bandstand to a secure area for transport due to public safety concerns. While in the Deer Park, located on Boylston Street (approximately 1,200 feet from the Parkman Bandstand), Captain Danilecki was approached by Rinaldo Del Gallo. Del Gallo indicated that he was with the event organizers and was trying to get to the secure area. Captain Danilecki personally granted Del Gallo admission so that he could join other participants in the secure area. By this time, the speaking program had concluded and participants were leaving the event area. *See* Attached Exhibit 3, Affidavit of John Danilecki, ¶¶4-5.
10. Organizers of the August Rally were permitted to use sound amplification devices and were afforded access to electrical outlets contained within the Parkman Bandstand; however, the only devices utilized by the organizers were megaphones. *See* Attached Exhibit 2, Affidavit of William Ridge, ¶7.
11. On October 26, 2017, BPRD Commissioner Christopher Cook denied Mr. Sahady's permit application for Saturday, November 18, 2017, but granted him a permit for the same location and the same time on the following day, Sunday, November 19, 2017. *See* Attached Exhibit 1, Affidavit of Christopher Cook, ¶9.

12. The City understands that Mr. Sahady still plans to hold his event on Saturday, November 18, 2017 in the absence of a permit. The City will not seek to interfere with the rights of any individual to speak on the Boston Common on November 18, 2017. Additionally, the City intends to allow media access to all areas available to event participants. Finally, the City will not seek to interfere with any individual's use of sound amplification on the Boston Common on November 18, 2017, provided that such sound amplification complies with City of Boston Ordinance §16-26.1.² See Attached Exhibit 1, Affidavit of Christopher Cook, ¶10; Exhibit 2, Affidavit of William Ridge, ¶14.

ARGUMENT

To obtain a preliminary injunction, the Plaintiff bears the burden of persuasion, and the Court considers: “(1) the likelihood of success on the merits; (2) the potential for irreparable harm to the movant in the absence of an injunction; (3) the balance of the movant's hardship if relief is denied versus the nonmovant's hardship if relief is granted; and (4) the effect, if any, of the decision on the public interest.” *The Maine Educ. Assoc. Benefits Trust v. Cioppa*, 695 F.3d 145, 152 (1st Cir. 2012). Importantly, with regard to the City, the Plaintiff does not seek a traditional, prohibitory preliminary injunction. Rather, the Plaintiff asks for a mandatory preliminary injunction requiring the City to issue a permit for an event to take place on November 18, 2017. “The moving party has a greater burden when it seeks a ‘mandatory’ preliminary injunction that would compel the non-moving party to perform an affirmative act rather than a ‘negative’ injunction that would prevent the non-moving party from engaging in a certain activity for the period before trial.” *Northeastern Univ. v. BAE Systems Info. and Elec.*

² City of Boston Ordinance 16-26.1 defines “unreasonable noise” as any noise measured in excess of 50 dBa between the hours of 11:00 p.m. and 7:00 a.m., or in the excess of 70 dBa at all other hours; or in the absence of an applicable noise level standard or regulation of the Air Pollution Control Commission, any noise plainly audible at a distance of three hundred (300) feet or, in the case of loud amplification devices or similar equipment, noise plainly audible at a distance of one hundred (100) feet from its source by a person of normal hearing.

Systems Integration Inc., C.A. No. 13-12497-NMG, 2013 WL 6210646, at *7 (D. Mass. Nov. 27, 2013). Indeed, “[b]ecause a mandatory preliminary injunction alters rather than preserves the status quo, it normally should be granted only in those circumstances when the exigencies of the situation demand such relief.” *Braintree Laboratories, Inc. v. Citigroup Global Markets Inc.*, 622 F.3d 36, 41 (1st Cir. 2010) (quotations omitted). Courts are disinclined to issue mandatory preliminary injunctions “unless the facts and the law clearly favor the moving party.” *Northeastern Univ.*, 2013 WL 6210646, at *7 (quotations omitted).

A. THE PLAINTIFF IS UNLIKELY TO SUCCEED ON THE MERITS OF HIS CLAIMS THAT THE CITY INFRINGED ON HIS RIGHTS UNDER THE FIRST AMENDMENT WHERE HE DOES NOT HAVE STANDING TO CHALLENGE THE CITY’S ACTIONS, WHERE HE FAILS TO ALLEGE AN ACTUAL CONTROVERSY, AND WHERE HE FAILS TO SHOW THAT THE CITY’S ACTIONS CONSISTITUTE A PRIOR RESTRAINT ON SPEECH.

1. The Plaintiff Cannot Establish A Direct Injury And, As A Result, He Does Not Have Standing To Challenge The Denial Of A Permit.

“In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To establish standing, the plaintiff seeking to invoke a federal court’s jurisdiction must first show that he has suffered or is threatened by injury in fact to a cognizable interest. *Lujan*, 504 U.S. 555, 560 (1992); *See also Save Our Heritage, Inc. v. Fed. Aviation Admin.*, 269 F.3d 49, 55 (1st Cir. 2001). The injury alleged must be “concrete, particularized, and actual or imminent.” *Clapper v. Amnesty Int’l USA*, 133 S.Ct. 1138, 1147 (2013) (internal quotation omitted). In order to be “particularized,” an injury “must affect the plaintiff in a personal and individual way.” *Lujan*, 504 U.S. at 560 n. 1. An allegation of future injury may suffice if the threatened injury is “certainly impending,” or there is a “substantial risk that the harm will occur.” *Id.* at 1150 (internal quotations omitted). “Allegations of *possible* future injury,

however, are insufficient.” *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (emphasis added). Second, the plaintiff must show a causal connection between the asserted injury and the challenged action of the defendant and this causal connection cannot be overly attenuated. *Lujan*, 504 U.S. at 561.

Here, as an initial matter, the Plaintiff does not have standing to seek relief on behalf of the organizers for the November Rally. The instant lawsuit is filed on behalf of Del Gallo individually, *not* the November Rally organizers. Additionally, the Plaintiff’s name does not appear on the permit application for the November Rally, nor does the City have any record of a permit application from Del Gallo himself in connection with any event scheduled for November 18, 2017. *See* Attached Exhibit 1, Affidavit of Christopher Cook, ¶4. In fact, nowhere in the pleadings has the Plaintiff represented himself as speaking on behalf of the November Rally organizers in charge. As a result, the Plaintiff does not have a “particularized” legal interest in the denial of the permit application because the denial does not affect him in a “personalized and individual way.” *See Lujan*, 504 U.S. at 560 n. 1. Moreover, the November Rally event organizers are not parties to this lawsuit and, in any event, it is axiomatic that Del Gallo does not have standing to seek redress on behalf of *other* individuals or entities. *See Lujan*, 504 U.S. at 560 (“a plaintiff must show that *he* or *she* suffered an invasion of a legally protected interest”) (emphasis added). Accordingly, Del Gallo does not have standing to request the issuance of a permit, or any other injunctive relief, on behalf of the November Rally organizers.

Turning next, then, to the relief requested on his own behalf, Del Gallo does not have standing because he cannot demonstrate that an injury in fact is “currently impending” or that there is a “substantial risk that the harm will occur.” Del Gallo’s sole basis for injunctive relief is the alleged “past treatment” he received at the August Rally. Del Gallo alleges that, on that

date, the Department prevented him from speaking even though he was a scheduled speaker. *See* Motion for Preliminary Injunction, ¶4. He further alleges that the Parkman Bandstand was “cordoned off” from the public, making it difficult for the public to hear what the speakers were saying. *Id.* Next, Del Gallo alleges that the City “refused to allow the media within the Parkman Bandstand or anywhere sufficiently near it to hear those who were speaking.” *Id.* Finally, he alleges that the City “refused to allow sufficient amplification from Parkman Bandstand.” *Id.*

As an initial matter, these assertions are factually inaccurate. First, Del Gallo *was* permitted to enter the “cordoned off” area near the Parkman Bandstand and was in fact granted access by a Boston police officer. *See* Attached Exhibit 3, Affidavit of John Danilecki, ¶4. Captain Danilecki personally granted Del Gallo admission to the secure area so that he could join other rally participants. *Id.* Second, no one prevented Del Gallo from speaking. Rather, the program had concluded by the time Del Gallo arrived at approximately 12:30 p.m. and officers were in the process of voluntarily extricating rally participants to a safe location. *Id.* at ¶5. At no point did the police (or any other City employee) seek to curb Del Gallo’s speech as relied upon in support for his request for a preliminary injunction. In stark contrast, the event was allowed to continue as permitted and it was only when event organizers, with assistance from the Department, sought to vacate the area safely that the event concluded. *See* Attached Exhibit 2, Affidavit of William Ridge, ¶¶9-10. Finally, the November Rally organizers *were* permitted to bring amplification devices; however they simply elected not to, opting to use megaphones instead. *Id.* at ¶7.

Even assuming, *arguendo*, that Del Gallo’s stated assertions were true, Del Gallo *still* cannot demonstrate that an injury-in-fact is “certainly impending” or that a “substantial risk [of harm]” is likely because the City has already indicated to November Rally organizers that it will

not interfere with any individual's right to speak on the Boston Common on November 18, 2017. *See* Attached Exhibit 1, Affidavit of Christopher Cook, ¶14; Exhibit 2, Affidavit of William Ridge, ¶14. This commitment includes Del Gallo. Additionally, the City does not intend to interfere with an individual's use of sound amplification equipment on November 18, 2017, provided that any such equipment complies with applicable City of Boston Ordinances. *See* Attached Exhibit 2, Affidavit of William Ridge, ¶14. Finally, the City has indicated that it intends to allow media access to all areas available to event participants and will seek to ensure the safety of all event participants, including speakers and organizers. *Id.* As a result, any contention by Del Gallo that an injury-in-fact is impending is unsupported, entirely speculative and in direct contradiction to the specific assurances given by the City to November Rally organizers that it will not interfere with any individual's right to speak on the Boston Common on November 18, 2017. As he cannot establish that he will suffer a direct injury, Del Gallo does not have standing for the injunctive relief requested and the motion must be denied.

2. Assuming That The Plaintiff Can Establish That He Has Standing, The Plaintiff Is Unable To Show That There Any Actual Claim Justifying The Court's Intervention.

The Plaintiff has not requested a special event permit to hold an event on the Boston Common on November 18, 2017, and the applicant who requested a permit for an event on that date is not a party to this lawsuit. *See* Attached Exhibit 1, Affidavit of Christopher Cook, ¶¶4-5. Plaintiff, therefore, is unable to bring claims on behalf of the permit applicant alleging that the City has violated its First Amendment Rights. Further, even if Plaintiff had requested such a permit, he makes clear in his motion that he understands that the organizers intend to go forward with the rally on November 18, 2017. *See* Motion for Preliminary Injunction, ¶53. In his request for a preliminary injunction, the Plaintiff is then left with a request to enjoin the City from

preventing him from speaking at the rally. The City, however, has stated that it will not interfere with the right of any individual, including Del Gallo, to speak on the Boston Common on November 18, 2017. *See* Attached Exhibit 1, Affidavit of Christopher Cook, ¶14; Exhibit 2, Affidavit of William Ridge, ¶14. Therefore, there is no actual claim which justifies the Court's intervention.

Moreover, it is important to note that while a special event permit from the BPRD is required to reserve a particular location within Boston's Parks for exclusive access or to arrange a larger-scale event that includes staging or sound amplification, an individual is in no way restricted from exercising his/her right to speak in a traditional public forum such as the Boston Common. *See* Attached Exhibit 1, Affidavit of Christopher Cook, ¶3. In this case, a special event permit was requested for the November Rally to secure exclusive use of the Parkman Bandstand, an electrical source and sound amplification, and space for 2000 attendees. *See* Attached Exhibit 4, September 18, 2017 Permit Application (#9004109). Due to a previously permitted event on Boston Common on November 18, the City issued a permit for the November Rally for the next day, Sunday, November 19. *See* Attached Exhibit 5, October 26, 2017 Letter and Issued Permit. The City has taken no action, and does not intend to take any action, to prevent the Plaintiff, or any other individual, from speaking on Boston Common on Saturday, November 18. Thus, Plaintiff's claim that the City may attempt to suppress his speech is without merit.

3. The Plaintiff Cannot Succeed on the Merits of His Claim that The City's Act of Granting a Permit to Resist Marxism More Than Ten Days After its Request Constitutes a Prior Restraint on Speech.

Even assuming that the Plaintiff has standing and has established a claim necessitating the Court's intervention, Plaintiff cannot succeed on the merits of his claim that the City's act of

granting a permit to Resist Marxism to conduct a large-scale event at the Parkman Bandstand on Boston Common more than ten days after its request constitutes an interference with or prior restraint on speech. First, the City granted a permit to Resist Marxism twenty-three (23) days prior to its request event date. *See* Attached Exhibit 1, Affidavit of Christopher Cook, ¶13. Thus, the group had sufficient notice of the City’s decision prior to the requested and permitted event dates, and its speech was not, as the Plaintiff, alleges, “interrupted” for any length of time. *See* Plaintiff’s Complaint, ¶211. Further, Plaintiff has not presented any evidence that such “delay” was intended to suppress the group’s speech. *See Baker v. Coxe*, 230 F.3d 470, 476 (1st Cir. 2000) (finding no evidence to suggest defendants’ delay in issuing permit was the result of plaintiff’s desire to engage in speech). On the contrary, during the period of time between the City’s receipt of the event request on September 18 and its issuance of a permit on October 26, City officials spoke with and met with Resist Marxism representatives—including meeting at least twice in person—to discuss the scheduling challenges presented by the previously permitted Camp Harborview event, as further detailed below. *See* Attached Exhibit 1, Affidavit of Christopher Cook, ¶8.

Second, while the Department’s permit guide states that an event request will be approved or denied within ten (10) days, there is no limit on the number of days prior to an event that an applicant may submit an event request. *See* Attached Exhibit 6, Permit Guide, “How to Reserve a Park for Special Events/Wedding” (the “Guide”). *See also* Attached Exhibit 1, Affidavit of Christopher Cook, ¶4. In fact, the City may issue a permit to an applicant at any time prior to his or her event, and an applicant may call or walk into BPRD’s office in addition to applying online. *See* Attached Exhibit 1, Affidavit Christopher Cook, ¶4. This is therefore not a case where delay, even for an extended period, “compels the speaker’s silence.” *See Riley v.*

National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 801-802 (1988) (finding solicitation statute’s licensing requirement invalid where it contained no deadline for state action and where, for each day that state failed to act, speaker was prevented from engaging in speech). Finally, Plaintiff notes that the City’s actions have had no effect on the organizer’s planning efforts, and that “[the event] will proceed with or without a permit on November 18th.” See Plaintiff’s Complaint, ¶200. Therefore, Plaintiff cannot maintain that the City’s actions have suppressed or have in any way affected his plans to speak on November 18, 2017. As such, Plaintiff has failed to set forth any credible evidence to establish his likelihood of success on the merits and his request for a preliminary injunction must be denied.

4. The City Acted Appropriately When It Granted A Permit For November 19, 2017, Rather Than November 18, 2017, For The November Rally Due To Previously Scheduled Use Of The Area.

As detailed above, a permit application was submitted on the evening of September 18, 2017, for an event to take place on November 18, 2017, from 10:00 am to 3:00 pm, at the Boston Common Parkman Bandstand. At the time of the submission, the City had already issued a permit for use of the Boston Common Parade Ground for the Camp Harbor View Citython 5K from 8:00 am to 12:00 pm.³ While the Plaintiff is correct in noting that the permit did not include use of the Parkman Bandstand, he fails to take into consideration the logistical and public safety implications of two (2) large scale events on adjacent areas within the Boston Common at overlapping times that necessitated the issuance of the later received rally permit for November 19, 2017.

³ The permit was issued by the Boston Parks and Recreation Department on March 1, 2017, well before the rally permit was submitted for consideration, and includes street closures, large tents, a stage, tables, portable toilets, moving vehicles and crowds. See Attached Exhibit 1, Affidavit of Christopher Cook, ¶6. See also Attached Exhibit 5, October 26, 2017 Letter and Issued Permit.

Organizers of the November Rally previously applied for and received a permit for a “Free Speech Rally,” that was held on the Boston Common in August 2017. *See* Attached Exhibit 2, Affidavit of William Ridge, ¶6. Much like the Plaintiff attempts to do here, the Department relied on the events from the August Rally to properly conclude that simultaneous events on the Boston Common on November 18, 2017, posed too great a risk to public safety and the November Rally could only be permitted for a subsequent date. For example, the number of rally participants, coupled with counter protesters, at the August Rally totaled more than forty thousand (40,000) people present during the event.⁴ *Id.* at ¶8. Additionally, the counter protesters at the August Rally sought to disrupt the permitted event and ultimately created an extremely contentious environment, culminating in physical altercations, between the participants and counter protestors. *Id.* Additionally, individuals assaulted officers by biting, spitting, punching, pushing, and hitting them with objects. Objects thrown at officers and rally attendees included bottles, bottles filled with urine, traffic cones, rocks, other small objects, and what officers described as petroleum-based gel-type starter fluid for home grill use. *Id.*

Also, during the August Rally, the counter protesters began to overwhelm the designated area and the Department, in conjunction with the organizers, decided to evacuate the area to ensure the safety of all involved. *See* Attached Exhibit 2, Affidavit of William Ridge, ¶9. Additionally, due to the mood and behavior of the counter protesters that were attempting to enter the secure area, there was a need to deploy Public Order Platoons to further ensure the safety of the August Rally participants. *Id.* The extraction began at approximately 12:30 p.m. and by this time the scheduled program had concluded.⁵ *Id.* While attempting to extricate the participants, the crowd became extremely hostile, with various items thrown at the officers,

⁴ The counter protesters greatly outnumbered rally participants. *Id.*

⁵ Organizers and speakers from the August rally were taken to a secure area and then transported in protected transport vehicles. *See* Attached Exhibit 2, Affidavit of William Ridge, ¶10.

resulting in some injuries. *Id.* at ¶10. Also, while clearing the crowd from the evacuation route, a number of arrests were made and contraband was confiscated, including loaded firearms, knives, tactical vests, and ball bearings concealed in a bag. *Id.*; *See also* Attached Exhibit 3, Affidavit of John Danilecki, ¶3. For example, arrests were made for Affray, Disorderly, Unlawful Possession of a Firearm/Ammunition, Assault and Battery, Disturbing the Public Assembly, Resisting Arrest, Assault and Battery with a Dangerous Weapon, Carrying a Dangerous Weapon/Knife, Drinking Alcohol in Public, Trespassing, Assault and Battery on a Police Officer, Disturbing the Peace, Delinquent to wit Assault and Battery with a Dangerous Weapon, Delinquent to wit Disorderly Person. *See* Attached Exhibit 2, Affidavit of William Ridge, ¶10.

The Plaintiff asserts that the November Rally could be permitted for November 18, 2107, with a later start time to avoid conflict with the road race; however, this position fails to take into account the advance preparation and planning that is required to ensure the safety of all in attendance at such an event.⁶ It also fails to acknowledge that the permit application, which the Plaintiff did not submit, sought exclusive access to a portion of the Boston Common sufficient to accommodate 2,000 people. *See* Attached Exhibit 1, Affidavit of Christopher Cook, ¶4. Again, based on the security measures implemented in advance of the August rally, security measures would need to be taken that would likely disrupt the originally permitted road race. *See* Attached Exhibit 2, Affidavit of William Ridge, ¶12. For example, the Department needs to create a perimeter in an effort to separate participants and counter protesters, as well as to prevent vehicles from entering and exiting the park, as well as ensuring the safe passage of public safety personnel, attendees and onlookers, and ensuring the ability to handle overflow of attendees or

⁶ Also, a later start time would require a later end time, taking the event into the evening hours. Allowing an event to continue after sundown creates additional public safety concerns not accounted for during the August rally. For example, additional lighting is required to ensure visibility by both attendees and law enforcement securing the area. There has been no discussion with event organizers about additional lighting for the November Rally. *See* Attached Exhibit 2, Affidavit of William Ridge, ¶13.

onlookers for the rally. *Id.* The inability to implement these precautions in advance may affect the Department's ability to maintain order between participants and counter protesters, as occurred in August 2017, and endanger the safety of those in attendance. *Id.* The fact that the Plaintiff asserts that the City could accommodate a later start time that presumably does not conflict with the previously permitted event does not automatically result in the conclusion that the City's modification is not constitutionally sound.⁷ *See Irish Lesbian and Gay Organization*, 918 F. Supp. 732, 744 (S.D.N.Y. 1996) (noting that "[t]he First Amendment does not require the least restrictive or least intrusive means for regulating the time, place and manner of protected speech."). Also, the City does not control whether crowds remain or disperse after a particular event. Rather, the City is concerned with permitting events in a manner that best allows it to offer public safety services to participants and spectators of events occurring on a particular day. *See Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) (noting right to free speech does not necessarily entitle speaker to his or her chosen place and time). As such, the Plaintiff's assumptions that a later start time would alleviate the public safety concerns identified by the City are insufficient to establish that the City acted in violation of the Plaintiff's rights when it issued a permit for the November Rally for the next available date.

As a result of the large crowds and disruptive, sometimes criminal, behavior that occurred at the August Rally, the City properly denied the permit application for November 18, 2017 and, in the alternative, issued a permit for Sunday, November 19, 2017, when no conflicting events were scheduled for the Boston Common. *See Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (noting prohibition of parade on congested street during high-traffic times

⁷ While the permit issued for the road race reflects an end time of 12:00 pm, that does not include the time required to breakdown the event and remove any equipment from the Boston Common. This process is expected to take approximately two (2) to two and a half (2.5) hours after the conclusion of the event. *See* Attached Exhibit 1, Affidavit of Christopher Cook, ¶6.

could constitute reasonable time, place and manner restriction). As detailed above, the Department's expectation that the November Rally would create a significant risk to public safety was based on specific incidents stemming from the August Rally involving several of the same participants. Therefore, in light of the reasonable potential for violence associated with such an event, the determination to issue a permit for the subsequent date, where the rally would be the only event on the Boston Common, was reasonable, lawful and not a violation of the Plaintiff's rights, and he cannot establish otherwise in support of his request for a preliminary injunction.

B. THE PLAINTIFF WILL NOT SUFFER IRREPARABLE HARM IF THE INJUNCTION IS DENIED AND THE BALANCE OF HARMS WEIGHS IN THE CITY'S FAVOR WHERE THE CITY'S INTEREST IN PRESERVING PUBLIC SAFETY OUTWEIGHS THE PLAINTIFF'S INTEREST.

As detailed above, the Plaintiff has not, nor will he, suffer any harm relative to the November Rally. Therefore, any alleged harm propounded by the Plaintiff in support of his request for a preliminary injunction is insufficient to overcome the public safety risks identified by the City created as a result of simultaneous events of this magnitude on the Boston Common and justify the issuance by this Court of a specific event permit, the details of which the Plaintiff has not even attempted to set forth in his request for injunctive relief. As previously indicated, the Plaintiff has not filed the above captioned lawsuit on behalf of the organization responsible for planning the November Rally, nor has he indicated any authority to speak on their behalf in any filings to date. On the contrary, the Plaintiff has filed as an individual and has not represented that he, at any point, applied for and was denied the right to speak on the Boston Common on November 18, 2017. Furthermore, the Plaintiff fails to assert any irreparable harm to him and instead seeks to rely on vague generalizations regarding the impact on "members of our group" to support the request for a preliminary injunction. *See* Motion for Preliminary

Injunction, ¶52. For example, Plaintiff's references the alleged harm to others, including speakers who have bought air tickets, and reserved hotels, while at the same time reported that nobody has changed, or otherwise modified their plans and the November Rally intends to go forward on November 18, 2017. *See* Motion for Preliminary Injunction, ¶19, 53. As a result, the risks to public safety detailed above clearly outweigh any alleged harm to the Plaintiff resulting from the permitting of the November Rally for Sunday instead of Saturday and the Plaintiff remains free to exercise his speech rights in a reasonable, alternative manner. *See Coalition to Protest Democratic Nat. Convention*, 327 F.Supp. 2d 61, 72-73 (D. Mass. 2004) (considering strain on police resources in holding that balance of harms favored city in denying plaintiff's request to enjoin city from reworking parade route while Democratic National Convention was in session); *Irish Lesbian and Gay Organization*, 918 F. Supp. at 748 (holding balance of harms weighed in favor of city where "the City's legitimate interest in preserving public order outweighs any hardship [plaintiff] suffers by not being able to hold its protest parade at its preferred time and place"); *Black Tea Society v. City of Boston*, 378 F.3d 8, 15 (1st Cir. 2004) (holding that public safety is a valuable consideration when weighing effect of proposed injunctive relief on public interest).

Thus, this is not a case where the "exigencies of the situation demand [injunctive] relief" and Plaintiff's request must be denied. *See Braintree Laboratories, Inc. v. Citigroup Global Markets Inc*, 662 F.3d 36, 41 (1st Cir. 2010). On the contrary, a mandatory injunction in this case, ordering the City to grant a permit for November 18, 2017, in the manner demanded by the Plaintiff and not the permit applicant, would significantly compromise the City's ability to

adequately ensure public order and safety—while an order denying Plaintiff’s requested relief would have no effect on his right to speak.⁸

CONCLUSION

WHEREFORE, for the foregoing reasons, the Court should deny Rinaldo Del Gallo’s motion for a preliminary injunction.

⁸ Again, the City does not intend to prohibit the use of the Parkman Bandstand on Saturday November 18, 2017, for the November Rally. Nor does it intend to preclude the use of amplification devices, in accordance with the City’s Ordinance. Finally, the City will not seek to interfere with the speaking program as determined by the November Rally organizers and it will seek to ensure the safety of all event participants, as was done during the August Rally. Finally, the City intends to allow media access to all areas available to event participants. *See* Attached Exhibit 2, Affidavit of William Ridge, ¶14.

Respectfully submitted,

DEFENDANTS, MARTIN WALSH,
WILLIAM EVANS, CHRISTOPHER COOK,
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Date: November 16, 2017

CERTIFICATE OF SERVICE

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

/s/ Nicole I. Taub

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