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6 Attorneys for Defendants  
SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT  
7 AND BART DEPUTY POLICE CHIEF DAN HARTWIG

8 UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
10

11 DAVID MORSE,  
12 Plaintiff,  
13 vs.  
14 SAN FRANCISCO BAY AREA RAPID  
15 TRANSIT DISTRICT (BART); and BART  
16 Deputy Police Chief DAN HARTWIG, sued  
in his official and individual capacities,  
17 Defendants.  
18

Case No. C12-5289 JSC (DMR)

**DECLARATION OF KENTON W.  
RAINEY IN SUPPORT OF  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT OR, IN THE  
ALTERNATIVE, SUMMARY  
ADJUDICATION**

19 I, KENTON W. RAINEY, declare as follows:

20 1. I have personal knowledge of the following facts, and could and would testify  
21 competently thereto if called upon to do so.

22 2. I am currently employed by the San Francisco Bay Area Rapid Transit District as the  
23 Chief of Police for the San Francisco Bay Area Rapid Transit District Police Department. I have held  
24 this position since June 2010. I am a sworn peace officer in the State of California. I have been in law  
25 enforcement for approximately 35 years.

26 3. In August 2011, I contacted Contra Costa District Attorney Mark Peterson. I requested  
27 his legal opinion as to what would be necessary for prosecution of Penal Code §§ 185 and 369i(b).

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**EXHIBIT A**



OFFICE OF THE DISTRICT ATTORNEY  
CONTRA COSTA COUNTY

*Mark A. Peterson*  
DISTRICT ATTORNEY

To: Mark Peterson  
From: Feinberg  
RE: BART Protestors

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Penal Code § 185 prohibits the wearing of a mask only when (1) the purpose is to evade/escape discovery during the commission of “any public offense” or (2) the purpose is concealment/flight/escape when already charged with “any public offense.” Thus, wearing a mask is not by itself an arrestable offense. There must be an underlying public offense before the wearing of a mask becomes a misdemeanor.

However, Penal Code § 369i(b) makes it a crime for anyone whose entry/presence/conduct interrupts or hinders the safe and efficient operation of a railline or rail-related facility. This provides BART with the authority to arrest anyone for a misdemeanor if they are interfering with the trains *or* the train facility. (BART could then theoretically add on the wearing of the mask as an additional offense.)

There are no cases shedding light on what constitutes an interruption in “efficient operation” of the rail facility. The few cases that do discuss Penal Code § 369i revolve around automobiles parked on the tracks and not civilians on the platform/ticket gates, etc.

Penal Code § 369i(c) specifically notes that it does *not* prohibit picketing in the “immediately adjacent area of the property.” Perhaps the cleanest approach would be for BART to recognize an adjacent area where the demonstration may continue. With that in place, the failure to move to that adjacent area would clearly run afoul of Penal Code 369i.