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Office of the Chief Counsel  
Federal Aviation Administration  
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November 4, 2014  
VIA MAIL AND FAX

**AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION**

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**OFFICERS AND DIRECTORS**  
SUSAN N. HERMAN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

Dear Mr. Govan,

We write to express our profound concern over revelations that the Federal Aviation Administration recently enacted a no-fly zone over Ferguson, Missouri that was intended to prevent media coverage of an unfolding news event. An air ban singling out media aircraft is an unacceptable and unlawful abridgement of the rights of a free press. It is particularly alarming when implemented during events at which law enforcement may be engaging in practices that violate constitutional rights. We request that a more stringent and constitutionally-appropriate analysis be applied to any future request for flight restrictions in the vicinity of Ferguson, Missouri.

On August 12<sup>th</sup>, the Federal Aviation Administration (“FAA”) approved a no-fly zone over Ferguson, Missouri (TFR 4/2599, Aug. 12, 2014, enclosed as Appendix A). There is substantial evidence, derived from public documents and obtained by the Associated Press, that the TFR was enacted to suppress aerial press coverage; if this proves accurate, the evidence supports a conclusion that TFR 4/2599 was enacted in violation of the media’s First Amendment rights.<sup>1</sup>

While we understand there are diverse and complex considerations that factor into a decision to close any airspace, muzzling the media cannot be one of them. The use of the extraordinary federal power to shut down airspace should be used only as extraordinary circumstances require.<sup>2</sup> The suppression of a free press is

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<sup>1</sup> See Associated Press, *AP Exclusive: Ferguson No-Fly Zone Aimed at Media* (Nov. 2, 2014), available at <http://bigstory.ap.org/article/674886091e344ffa95e92eb482e02be1/ap-exclusive-ferguson-no-fly-zone-aimed-media>.

<sup>2</sup> See 14 C.F.R. § 91.137 (listing proper reasons for enacting a TFR above an event of “public interest,” including “to protect persons and property,” permit disaster relief aircraft, or “prevent unsafe congestion.”). See also 14 C.F.R. § 91.139 (emergency air traffic rules); Dept. of Transportation Order JO 7210.3Y (Eff. April 3, 2014), available at



properly omitted from the extreme circumstances that justify closure of airspace.

Aerial newsgathering provides a unique and important perspective on breaking news, allowing for coverage that would otherwise be impossible to obtain on the ground. This is particularly true in Ferguson, where in addition to repeat violations of First Amendment rights on the ground, there is extensive evidence of racial profiling, excessive use of force, and an overly militarized police force. The failure to allow press in the airspace above this unfolding national news event risks obscuring potentially unconstitutional police practices involving use of force and detentions, and thus risks preventing the public and advocacy groups from adequately addressing such practices.

As federal law recognizes, there may be individual circumstances during which temporary and limited restrictions on aerial craft—which are applied evenly to *all* non-government aircraft—are appropriate. But what the documents from the FAA St. Louis-area air traffic control reveal is that TFR 4/2599 was not a necessary or even-handed ban that happened to include the media; on the contrary, the ban was apparently *designed to exclude* media, as other non-governmental air traffic was exempted from the ban and permitted to travel within the no-fly zone.

It is flatly unconstitutional for the government to single out the media for unfavorable treatment. While the media is subject to generally-applicable laws, the Supreme Court has explicitly held that government action taken for the purpose of thwarting news reporting violates the First Amendment. *See, e.g., Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936);<sup>3</sup> *Minneapolis Star &*

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[http://www.faa.gov/air\\_traffic/publications/atpubs/fac/1901.html](http://www.faa.gov/air_traffic/publications/atpubs/fac/1901.html) (listing possible causes including “toxic leak or spills,” “volcanic eruptions,” “hijacking,” “wildfire suppression.”).

<sup>3</sup> The *Grosjean* Court explained the extreme impropriety of using broad laws as a pretext to discriminate against the press (emphasis added): “The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. **It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties.** A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.” *Grosjean*, 297 U.S. at 250.

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*Tribune Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575, 585 (1983) (“differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional.”).

In Ferguson, Missouri, there is a particularly high risk of such “presumptively unconstitutional” motives, where law enforcement officers have repeatedly violated the First Amendment rights of the public, media representatives, and photographers to document the public protest and police reaction in the wake of Michael Brown’s killing.<sup>4</sup> Furthermore, the documents indicate that FAA employees were *aware* that the purpose of the flight restriction was to exclude media from the airspace above Ferguson, and appear to have been willing to permit exemptions for non-media craft as requested by local law enforcement. The motives behind the initial TFR request and the FAA’s administration of the ban give cause for constitutional alarm. The ACLU and the ACLU of Missouri have taken whatever steps necessary to protect First Amendment rights on the ground in Ferguson, and we hope that we will not have to extend this fight to the air.

In light of the above, we request that the FAA immediately adopt specific procedures for evaluating any future request for a no-fly zone near Ferguson. Specifically:

- The FAA should request incident reports or other documentation of factual evidence from Missouri state or local law enforcement to support any TFR request in the Ferguson area based on public safety needs;<sup>5</sup>
- The Office of Chief Counsel should review any TFR requested in the vicinity of Ferguson before its approval, to ensure proper respect for the First Amendment’s prohibition on targeting media for unfavorable treatment;

<sup>4</sup> See ACLU of Missouri, “ACLU secures agreement for right to record police,” (Aug. 15, 2014), available at <http://www.aclu-mo.org/newsviews/2014/08/15/aclu-secures-agreement-right-record-police>; ACLU of Missouri, “Judge grants preliminary injunction in ACLU’s 5-second rule lawsuit,” available at <http://www.aclu-mo.org/newsviews/2014/10/06/judge-grants-preliminary-injunction-aclus-five-second-rule-1>.

<sup>5</sup> We understand that TFR 4-2699 was requested due to an incident of gunfire aimed at the sky; however, there is no incident report, property damage, or other recorded evidence that supports the truth, or extent, of such concern. A broad TFR should not have been enacted based on this summary claim by local police.

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- The FAA should balance the public interest in accurate and thorough news reporting on events in Ferguson with any request for closure, and ensure that TFR limits (both of height and circumference) are no larger than strictly necessary to protect public safety based on identifiable and fact-based needs;
- The FAA must administer any future Ferguson-area TFRs equally against all non-governmental aircraft within the no-fly zone;
- The FAA should document and report to the public and to the DOJ any future requests for TFRs in or around Ferguson; the reasons offered for any request, along with the supporting documentation or evidence; the FAA's determination thereof.

Given the evidence that TFR 4/2699 was enacted and administered in an unconstitutional manner, the above guidelines are required to avoid future violations of the First Amendment. The media has a right to report on the ongoing news in Ferguson; the people of Missouri, and the American public, have a constitutionally-protected right to hear it. We ask that you refuse any attempt to enlist the FAA in another unconstitutional suppression of those hallowed rights.

Thank you your time and attention to this request. Please do not hesitate to contact us if you wish to discuss the contents of this letter.

Sincerely,

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Anthony E. Rothert  
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CC:

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# APPENDIX A: FDC Temporary Flight Restriction 4/2699 (Ferguson, MO)



- [TFR List](#)
- [TFR Map](#)
- [Map Airports](#)
- [TFR Help](#)
- [PilotWeb](#)
- [SUA](#)

**NOTAM**

**Number :** FDC 4/2699 [Download shapefiles](#)

**Issue Date :** August 12, 2014 at 1318 UTC

**Location :** FERGUSON, Missouri near ST LOUIS VORTAC (STL)

**Beginning Date and Time :** August 12, 2014 at 1315 UTC

**Ending Date and Time :** August 18, 2014 at 2000 UTC

**Reason for NOTAM :** TO PROVIDE A SAFE ENVIRONMENT FOR LAW ENFORCEMENT ACTIVITIES

**Type :** Hazards

**Replaced NOTAM(s) :** N/A

**Pilots May Contact :** KANSAS CITY (ZKC) ARTCC, 913-254-8500



- Jump To:**
- [Affected Areas](#)
  - [Operating Restrictions and Requirements](#)
  - [Other Information](#)

**Affected Area(s)** Top

**Airspace Definition:**

On the ST LOUIS VORTAC (STL) 129 degree radial at

Center: 11 nautical miles. (Latitude: 38°44'28"N, Longitude: 90°18'12"W)

Radius: 3 nautical miles

Altitude: From the surface up to and including 3000 feet MSL

**Effective Date(s):**

From August 12, 2014 at 1315 UTC

To August 18, 2014 at 2000 UTC

- [Click for Sectional](#)
- [NOTAM Text](#)

**Operating Restrictions and Requirements**

No pilots may operate an aircraft in the areas covered by this NOTAM (except as described).

ONLY RELIEF AIRCRAFT OPERATIONS UNDER DIRECTION OF ST

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