



route,” and that “parades of a political nature” will not be subject to such costs.

During discussions between City representatives and members of the Plaintiff organizations, including Amy Kastely, attorney for Plaintiffs in this action, Plaintiffs asserted that the term “political” in the Prior Ordinance, must be interpreted as it is within First Amendment jurisprudence, meaning all matters or issues of public concern. *See, e.g.*, Cass Sunstein, *Free Speech Now*, 59 U. Chi. L. Rev. 255 (1992) (speech is “political ... when it is both intended and received as a contribution to public deliberation about some issue.”); Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 79 (1960) (“the consideration of matters of public interest”); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 347 (1995) (“core political speech need not center on a candidate for office ... the speech in which Mrs. McIntyre engaged – handing out leaflets in the advocacy of a politically controversial viewpoint – is the essence of First Amendment expression”).

It was our understanding that this view was accepted by the City representatives and that the City representatives recognized that the City had been misinterpreting the Prior Ordinance. It was our understanding, then, that if enforcement of the New Parade Ordinance were enjoined by the Court, then Plaintiffs and other organizers of marches “of a political nature,” would not be charged for police, traffic barricades, or clean-up costs.

If this is not the City’s position, then Plaintiffs will ask the Court for leave to amend our Motion for Preliminary Injunction to include the request that the Court preliminarily enjoin Defendants from charging any First Amendment or political march, parade, or procession for the cost of police, traffic barriers, and/or clean-up under either the New Parade Ordinance or the Prior Parade Ordinance. If this practice is not enjoined until final determination of the constitutionality of the New Parade Ordinance, Plaintiffs will suffer significant impairment of their rights under the First and Fourteenth Amendments. As courts have repeatedly recognized, any unconstitutional infringement of free speech is irreparable. *See, e.g. Deerfield Med. Ctr. v. Deerfield Beach*, 661 F.2d 328, 338 (5th Cir.1981)(citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (“It is well settled that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction.”).

## **2. Plaintiffs have a strong likelihood of success on the merits.**

As discussed in Plaintiffs’ Supplemental Memorandum in Support of Their Motion for Preliminary Injunction, there are two major problems with the New Parade Ordinance. One involves the grant of broad discretion to the Chief of Police, which includes the directive to have sufficient

“traffic control personnel” to “safeguard the safety of event participants and the general public.” The second set of issues involves the different costs assessed to different marches, based on their content, subject, and/or viewpoint.

Regarding the discretion granted to the Chief of Police, Defendants rely on *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (1<sup>st</sup> Cir. 1991) for their argument that the New Parade Ordinance is constitutional in its grant of discretion to the Chief of Police and its direction to charge permittees for the cost of police to safeguard participants and observers. See Defendants’ Response at 6-9. This reliance was misguided. *Stonewall Union v. City of Columbus* was decided prior to the U.S. Supreme Court’s decision in *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992), which is without doubt the leading case on discretion and the imposition of “user fees” on marches and parades. Indeed, the earlier Supreme Court case of *Cox v. New Hampshire*, 312 U.S. 569 (1941), which Defendants do discuss, mentions the possibility of a user fee only in *dicta*, and that *dicta* was called into question just two years later, in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); see *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11<sup>th</sup> Cir. 1985).

Since *Forsyth County*, only two U.S. Courts of Appeal have considered the issue of user fees for street marches. In *Nationalist Movement v. City of York*, 481 F.3d 178 (3<sup>rd</sup> Cir. 2007) the Third Circuit found the City of York’s user fee scheme to be unconstitutional, and in *Sullivan v. City of Augusta*, \_\_\_ F.3d \_\_\_ (1<sup>st</sup> Cir. December 14, 2007), the First Circuit upheld, in part, the imposition of traffic control costs in the City of Augusta’s parade ordinance. In upholding Augusta’s Ordinance, the First Circuit emphasized that the Augusta ordinance, unlike San Antonio’s New parade Ordinance, specifically prohibited any charge for police protection.

Defendants’ argument on the Second set of issues, regarding the difference in cost imposed on different marches, relies on *Rust v. Sullivan*, 500 U.S. 173 and the lower court decision in *Sullivan v. Augusta*, 406 F. Supp. 92 (D. Maine 2005). As Plaintiffs discuss in their Supplemental Memorandum, *Rust* does not apply to the regulation of speech in a traditional public forum. In this context, viewpoint neutrality is required:

“Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional...”

*Thomas v. Chicago Park District*, 534 U.S. 316, 325 (2002) (discussing the Chicago ordinance requiring a permit for large gatherings or parades).

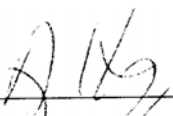
*Forsyth* and its progeny clearly prohibit the imposition of user fees through broad discretion and the evaluation of public safety. San Antonio’s New Parade Ordinance and Defendants’ interpretation of the Prior Parade Ordinance are clearly unconstitutional under these authorities.

*Thomas*, together with the Supreme Court's leading case on viewpoint discrimination, *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) (discussed in Plaintiffs' Supplemental Memorandum) clearly prohibit content-based discrimination in the imposition of costs for access to the traditional public forum of street marches. San Antonio's New Parade Ordinance and Defendants' interpretation of the Prior Parade Ordinance are clearly unconstitutional under these authorities.

**3. The balance of harms and the public interest clearly favor entry of a preliminary injunction in this case.**

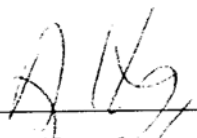
Defendants' argument on these elements is essentially that the City should not have to bear the costs of street marches, the same costs that are borne as part of the cost of running a city and part of the price we all pay for democratic freedoms. No other major city in Texas imposes user fees on free speech street marches and, to our knowledge, neither does any other major city in the nation. It is not a large burden for the City of San Antonio to bear for the course of this lawsuit.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiffs' Reply in Support of Their Motion for Preliminary Injunction has been delivered by hand to: Asst. City Attorneys Deborah Klein and Cathy Sheehan, Attorneys for Defendants on this 20<sup>th</sup> day of December, 2007.

  
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Amy Kastely