

obtained more extensive evidence regarding Defendant's Parade Permitting process and its interpretation of the 2008 Parade Ordinance. Because the City's Parade Ordinance has changed, Plaintiffs have filed their Second Amended Complaint, and additional evidence is now available, Plaintiffs have combined their Response to Defendant's Motion to Dissolve the Preliminary Injunction with a Motion for Modification of the Existing Preliminary Injunction or Entry of a Second Preliminary Injunction, so that all matters relevant to preliminary relief will be before the Court.

FACTUAL ALEGATIONS

In the interest of brevity, Plaintiffs incorporate and ask that the Court refer to the Factual Allegations in Plaintiffs' Second Amended Complaint (Dkt 51).

LEGAL BASIS

A preliminary injunction is warranted where Plaintiffs have demonstrated (1) substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not granted, (3) that the threatened injury outweighs the threatened harm to the Defendant and (4) that granting the injunction will not disserve the public interest.¹ No one factor is necessary or controlling; the Court may consider the particular intensity of specific factors, such as harm to Plaintiffs, even if other factors are not clearly established.²

On Defendant's Motion to Dissolve the Preliminary Injunction, Defendant bears the burden of proving that the prerequisites for the preliminary injunction no longer exist. On Plaintiffs' Motion for a Second or Modified Preliminary Injunction, Plaintiffs bear the burden of proof.

Plaintiffs' Likelihood of Success on their Constitutional Claims

Legal Framework

As this Court recognized in its Order of February 21, 2008, "it is important to bear in mind that the ordinance regulates access to the public streets. As the Supreme Court long ago held, streets 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public

¹ Mississippi Power & Light v. United Gas Pipe Line Co. 760 F.2d 618, 621 (1985).

² See, e.g. Siff v. State Democratic Executive Committee, 500 F.2d 1307 (5th Cir. 1974); Florida Medical Assoc. v. U.S. Dept. of Health, Education and Welfare, 601 F.2d 199 (5th Cir. 1979).

questions.”³ This is the origin of the public forum doctrine, which informs a significant portion of First Amendment jurisprudence. Today, as in the past, the existence of public space available for speech and assembly is crucial for a functioning democracy.

Under the public forum doctrine, public streets are not “owned” by the government. Instead, they are “held in trust” and “use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”⁴ Moreover, the people’s right to use the public streets includes not merely the right to drive and walk on the public streets, but also, at reasonable times and places, in a reasonable manner, to march, parade, and, most importantly, to demonstrate shared views on matters of matters of importance to our communities, even if those views include criticism of the government. Indeed, the Supreme Court has repeatedly recognized that political speech and assembly are at the core of First Amendment values and that marches and demonstrations that address significant and controversial issues are central to the activities protected by the public forum doctrine.⁵

Although all regulations impacting speech activity in traditional public fora are subject to strict scrutiny, the Supreme Court has repeatedly held that the government may regulate the “time, place, and manner” of speech and assembly in traditional public fora so long as the regulation (1) serves a significant governmental interest; (2) is “narrowly tailored” to serve that interest; and (3) leaves open viable alternatives for speech and assembly.⁶ In addition, the Supreme Court has held that the government may require a prior permit for organized marches and rallies in traditional public fora, so

³ Dkt. 38, at 5, quoting *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939).

⁴ *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.).

⁵ *See* *Edwards v. South Carolina*, 372 U.S.229 235 (1963) (stating that peaceable assembly at the site of the state government to protest government action is the “most pristine and classic form” of exercising First Amendment rights); *Carey v. Brown*, 447 U.S. 455, 467 (1980); *see also* *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self- government.”); *Thornhill v. State of Alabama*, 310 U.S. 88, 95 (1940) (“Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion.”). *Morse v. Fredrick*, 127 S.Ct. 2618, 2626 (“Political speech, of course, is at the core of what the First Amendment is designed to protect.”) *Virginia v. Black*, 538 U.S. 343, 365, (2003)). *Cf.* “*N.A.A.C.P. v. Claiborne Hardware*, 458 U.S. 886, 909 (1984) (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this court has more than once recognized by remarking on the close nexus between the freedoms of speech and assembly,” quoting *N.A.A.C.P. v. Alabama, ex rel. Patterson*, 357 U.S. 449, 460, (1958).

⁶ *Ward v. Rock Against Racism*, 491 U.S. 781, 787 (1989).

long as it articulates “narrow, objective, and definite standards to guide the licensing authority” and does not give “overly broad licensing discretion to a government official.”⁷

Finally, it is implicit in First Amendment jurisprudence that government money and effort will be spent to facilitate use of public fora for speech and assembly.⁸ Everyday use of public streets for driving, walking, and conducting business periodically has to give way for speech and assembly. Government is required to provide for the safe integration of these conflicting uses.

By the same token, it has been assumed for some time that government may collect reasonable fees in connection with the issuance of various licenses and permits and, more recently, that the government may charge “user fees” for various public services in an effort to strike a balance between government costs and user demand, so long as they do not significantly burden the exercise of fundamental rights, do not operate to deprive the poor of critical official resources, do not enable the government to exact a profit, and are not intended to restrict the exercise of constitutional rights.⁹

Yet, as the Sixth Circuit recently observed, “the Supreme Court has never enunciated a comprehensive approach to the constitutionality of a licensing fee charged for the exercise of First Amendment rights.” The Court has addressed or touched on the issue in three cases: *Cox v. New Hampshire*,¹⁰ which observed, in dicta, that a government could impose a fee designed to recoup some of the costs associated with street marches; *Murdock v. Pennsylvania*,¹¹ which held that a tax imposed on door-to-door solicitors is an unconstitutional burden on protected rights; and *Forsyth County v.*

⁷ *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 130-131 (1992).

⁸ *See, e.g.* *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996) (In more traditional public forums, the government shoulders the burden of administering and enforcing the openness of the expressive forum); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802-803 (1985) (“The right to use government property for one’s private expression depends upon whether the property has by law or tradition been given the status of a public forum”). *cf.* *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 162 (1939) (fact that city is financially burdened when listeners throw leaflets on the street does not justify restriction on distribution of leaflets). *See generally*, David Cole, *Beyond Unconstitutional Conditions: Charting Spheres Of Neutrality In Government-Funded Speech.*, 67 N.Y.U. L. Rev. 675 (1992) (“In a public forum, the mere refusal to subsidize speech of a particular content does violate the first amendment”)

⁹ *But cf.* *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, (1966) (poll tax); *Boddie v. Connecticut*, 401 U.S. 371, 382-83 (1971) (mandating affordable access to courts for divorce proceedings); *Griffin v. Illinois*, 351 U.S. 12, 18-19 (1956) (requiring states to provide criminal trial transcripts to defendants for appeal). *But cf.* *United States v. Kras* (upholding a filing fee for bankruptcy); *San Antonio Independent School District v. Rodriguez* (upholding local funding--analogous to a user fee--of public schools). *See, generally*, David G. Duff, *Benefit Taxes and User Fees in Theory and Practice*, 54 U. Toronto L.J. 391 (2004).

¹⁰ 312 U.S. 569, 576-77 (1941).

¹¹ 319 U.S. 105, 114 (1943).

Nationalist Movement,¹² which held that a cost-shifting fee in an amount determined in a discretionary fashion, which could include costs to protect participants from unruly hecklers, was unconstitutional. The Fifth Circuit addressed this issue in *Fernandez v. Limmer*,¹³ expressing concerns that were later articulated by the Supreme Court in *Forsyth County*.

Since *Forsyth County*, two Federal Circuit Courts have attempted to articulate the meaning of the Supreme Court authorities in cases involving cost-shifting fees connected with the exercise of First Amendment rights. The main difference between the two interpretations is in how they characterize the relationship among the three cases. In *Sullivan v. City of Augusta*, the First Circuit treated *Cox* as articulating the general rule -- that cost-shifting fees are constitutional -- while *Murdock* and *Forsyth* merely attached three limitations -- that government can't tax protected activity as a profit-making device, that costs generated by hecklers can't be shifted, and that the fee-determining official can't be given discretion to make content-based choices.

The Sixth Circuit has adopted a very different approach in *729 Inc. v. Kenton County*.¹⁴ Recognizing not only that the issue of fees was not squarely presented in *Cox* but also that both *Cox* (1941) and *Murdock* (1943) predated recent developments in First Amendment jurisprudence, the Sixth Circuit concluded that *Forsyth* "sharply limited *Cox*" by subjecting the cost-shifting fee to the rigorous analysis of strict scrutiny, including the requirements that the fee not be so high as to deter the exercise of First Amendment rights, that it be content-neutral, that it be narrowly tailored to serve a significant governmental interest, and that it leave ample and appropriate alternative places for speech and assembly.¹⁵

1. Plaintiffs Are Likely To Prove That the 2008 Parade Ordinance and SAPD Standard Operating Procedure Do Not Articulate "Narrow, Objective, and Definite Standards to Guide" the Determination of Cost-Shifting Fees to Be Imposed on the Permit Holder.

a. Traffic control costs

The 2008 Parade Ordinance

Section 19.636(C) of the 2008 Parade Ordinance is difficult to discern. It consists of the following sentences:

¹² 505 U.S. 123 (1992).

¹³ 663 F.2d 617 (5th Cir. 1981)

¹⁴ 515 F.3d 485 (6th Cir. 2008).

¹⁵ *Id.* at 502-503.

- “In reviewing the application for parade permit, the chief of police or his or her designee shall determine the number of police officers and traffic control devices reasonably necessary to control traffic in the area of the requested procession.”
- “The chief or designee will consider the following factors and identify the effect of each factor in assessing traffic control costs.” [seven factors are then listed]
- “The cost for SAPD officers will be set in accordance with the SAPD Collective Bargaining Agreement and that the cost for traffic control devices will be set in accordance with the City’s annual contract for traffic control devices.”
- “The permittee may choose to contract directly with a traffic control device provider subject to compliance with the Texas Manual on Uniform Traffic Control Devices.”
- “Traffic control personnel shall be in a number sufficient to adequately safeguard the flow of both participant and non-participant traffic in order to minimize congestion, as determined by the chief of police.”
- “Any additional police costs deemed necessary for security due to the nature of the event will not be assessed to the permit holder.”
- “Traffic control personnel shall be limited to the furthest extent practicable to city uniformed police officers, and may include, with approval of the chief of police, other uniformed, certified peace officers knowledgeable of traffic control laws.”
- “Events held within the downtown expressway loop requires [sic] the use of SAPD officers, unless staffing restraints would lead to the denial of the permit, in which case the use of other certified peace officers may be permitted by the chief.”
- “When available and safely practicable, the chief or designee shall utilize on-duty officers before off-duty officers.”
- “The permit holder shall obtain approval of the traffic control plan described above by the chief of police, including a barricade plan and an estimate of traffic control costs.”

This provision creates numerous uncertainties, including:

- is the SAPD required to estimate the total costs for traffic control personnel and devices?
- what is the connection between the factors to be considered in assessing costs and the determination of the number of police officers and traffic control devices reasonable necessary to control traffic?
- what additional factors may the SAPD consider in assessing traffic control costs?
- will the Parade Permit applicant be required to sign a statement saying that he or she will be personally responsible for payment of all required costs before the Permit Officer will record the application, as has been the Defendant’s practice?
- what factors should the SAPD consider in determining the number of traffic control devices to use?
- doesn’t the SAPD have to follow the Texas Manual of Traffic Control Devices¹⁶ (“TMUTCD”) in determining the number of traffic control devices to use?

¹⁶ The Texas Manual of Uniform Traffic Control Devices is created by the Texas Department of Transportation in conjunction with the Federal Highway Administration, which publishes the Manual on Uniform Traffic Control Devices at 23 C. F.R., Part 655, Subpart F. The Texas Transportation Code requires municipalities to comply with the TMUTCD and the S.A. Code of Ordinances does as well.

- may the chief of police delegate the task of approving the use of non-SAPD peace officers?
- may trained flaggers be used for some traffic control functions, as provided in the TMUTCD?
- where is the “traffic control plan” described?
- how and when does the permit holder get a “traffic control plan” and what must the permit holder do to obtain the chief of police’s approval of this plan?
- who will determine the fee that will be imposed on permit holders for clean-up costs and how will that person determine the amount of the fee?

This section does not provide “narrow, objective, and definite standards” for the determination of fees to be imposed on the permit holder. With such little guidance and no basis for accountability, SAPD is given broad discretion over this matter.

The SAPD Standard Operating Procedure.

Standard 214 describes a process for permit applications, in section .05, which is clearer and slightly different from that suggested in the Parade Ordinance. Section .06 lists “factors in determining Routing and Staffing” that are slightly more detailed than those in §19.636(C) of the Ordinance. Standard 214.07 then sets out five different traffic control arrangements, with a brief description of the kinds of parades for which each arrangement would be appropriate. These descriptions feature the number of participants and the length of the procession. So, for example, type “A. *Lead Car and Tail Car with Flankers*” is said to be “appropriate” when the estimate of participants is “less than 250,” with “no vehicle/floats or animals,” and the length is less than one-half mile. Examples of this type of procession include the Monte Vista 4th of July Parade. Type B. *Single Lane Closure* is then described as being appropriate when the estimated participants, including vehicles/floats and animals, exceeds 250 and/or the procession length exceeds one-half mile (no examples are given); type C. *Multiple Lane Closure*, when the estimate is for “less than 500 and/or the procession covers less than one mile (no examples are given);” type D. *Total Roadway Closure – Cross Traffic Allowed* when estimated participants exceed 500 and/or the length is greater than one mile (examples include the St. Patrick’s Day Parade and the Veterans Day Parade); and finally, type E. *Total Roadway Closure – No Cross Traffic* is described as “normally limited to large processions of significant importance to the community” (examples include the Fiesta parades, the S.A. Marathon, Race for the Cure, and the MLK March).

While the arrangements described in Standard 214.07 appear at first to provide specific guidance for the determination of traffic control costs, this impression dissipates on closer examination. The problem is that the categories overlap in seemingly arbitrary ways. For example, the participation estimate for the 2008 International Women’s Day March was 1,000 and it was 0.75 miles long.

Under Standard 214.07, that event could fit either in the relatively inexpensive category *B. Single lane closure*, which requires relatively few traffic barricades and only on-duty officers (for whom much less is charged than for off-duty officers) or in the very expensive category *D. Total Roadway Closure*, but not in the intermediate category *C. Multiple Lane Closure*.

Interestingly, Standard 214 does not even mention one factor that is critical to the determination of Temporary Traffic Control Plans under the TMUTCD, which is the length of time that march participants will be in the streets.¹⁷ Moreover, the permit application form used by the SAPD does not ask for this information.¹⁸ Yet in describing their process for determining the number of police officers and barricades to be required for a particular march, both Officer William Jenkins, the Permit Officer, and Lieutenant Chuck O'Dell, one of two primary Shift Supervisors, testified that they require more officers and barricades for marches that they personally know to be slow walkers. Officer Jenkins testified that the number of police officers and barricades depends in part on “the duration” of the march – that is the amount of time that participants will be in the streets -- which in turn depends on “how they [march participants] wanted to conduct themselves during that march” and that his many years on the SAPD gives him information about how the participants in particular marches will behave.¹⁹ Lt. O'Dell also testified that his evaluation of the traffic control needs for different marches depends in part on who the participants will be.²⁰

Lt. O'Dell was the sole drafter of Standard 214. Among Lt. O'Dell's duties as shift supervisor is determining the number of police officers to assign to parades and other special events occurring during his shift. In his deposition, Lt. O'Dell testified that he has not been trained on the TMUTCD and did not consult it when drafting the Standard 214. Moreover, Lt. O'Dell does not believe that Standard 214 should be read to limit or guide Permit Officer Jenkins in determining how many and what kind of traffic control barricades should be required: “There's nothing in there [Standard 214] that's meant to limit our ability to take all the events into consideration and either move up or down a notch in how we're gonna approach it.”²¹ “I don't know that [Standard 214] provides guidance. It's

¹⁷ For events like the 2008 International Women's Day March, in which participants will be in the streets less than one hour, the TMUTCD advises against the use of any traffic control barricades or side-street road closures. See TMUTCD, Part 6.

¹⁸ Instead, applicants are asked for the “disbanding time” which typically will occur after a rally or other event planned for the end of a march.

¹⁹ Id. at 138:11 – 140:16, 181:24 – 182:9.

²⁰ Deposition of Lt. O'Dell, 32:22 – 34:1

²¹ Id. at 24:23-25.

merely an example of what it might look like. I don't know that anyone would take guidance..."²²

Standard 214 does not provide "narrow, objective, and definite standards" for the determination of fees to be imposed on the permit holder. With such little guidance and no basis for accountability, the Shift Supervisor and the Permit Officer is given broad discretion over this matter.

b. Fees for Clean-up Costs

Section 19.636 of the 2008 Parade Ordinance states that the permit holder will or the SAPD Standard 214 provides any direction. It appears that this has been left entirely to the discretion of unidentified City staff.

2. Plaintiffs are Likely to Prove that Defendant's Parade Permitting Process Vests Unconstitutionally Broad Discretion in the City Council and Individual City Officials to Fund or Waive Cost-Shifting Fees for Favored Permit Applicants

Representatives of the City Attorney's Office and the City Manager's office have repeatedly maintained that the City Council retains the discretion to pass new ordinances waiving the fees imposed by the 2008 Parade Ordinance for specific events. Indeed, his interpretation was presented to the Court by the City Attorney at the hearing on Plaintiffs Motion for Preliminary Injunction: "Again, there is nothing to prevent a labor union from coming forward and seeking Council support and seeking an ordinance [providing funding for or a waiver of fees imposed by the Parade Ordinance], if they have a specific event, and seeking to see if they would garner that kind of support [on City Council]." ²³

In *Long Beach Area Peace Network v. City of Long Beach*,²⁴ the Ninth Circuit held that a permitting scheme that reserved unbridled discretion in the City Council to pass ordinances waiving or funding fees for traffic control and clean-up costs violated the First Amendment. The Court explained:

The permitting scheme of the Ordinance requires organizers to come to the City for permission to hold an expressive event. If a legislative body retains discretion to make an important decision as part of that permitting scheme - here, whether to fund an event or to waive fees and charges - that discretion is distinct from the general discretion a legislative body has to enact (or not enact) laws. Absent a preexisting permitting scheme, a city council

²² Id.

²³ Transcript of Hearing on December 20, 2007 132:22-25.

²⁴ 522 F.3d 1010 (9th Cir. 2008)

could not in advance impose service charges or other fees on a group seeking to hold a demonstration in a public forum. Cf. *Simon & Schuster, Inc.*, 502 U.S. at 115-16; *Rust v. Sullivan*, 500 U.S. 173, 194-95, 199-200, (1991). The Long Beach City Council's reserved authority to waive or fund charges is thus unlike its usual legislative authority. We conclude that in the First Amendment context, where a legislative body has enacted a permitting scheme for expressive conduct but has reserved some decision-making authority for itself under that scheme, that reserved authority is vulnerable to challenge on grounds of unbridled discretion.²⁵

The holding of the Sixth Circuit is supported by *Shuttlesworth v. City of Birmingham*, in which the Supreme Court evaluated an ordinance requiring participants in parades and other public demonstrations to obtain a permit from the City Commission, which was city of Birmingham's governing body. The Court concluded that because the city's ordinance "conferred upon the City Commission virtually unbridled and absolute power" to prohibit parades and demonstrations, it was facially unconstitutional.²⁶

The Tenth Circuit reached a similar conclusion in *Association of Community Organizations for Reform Now (ACORN) v. Municipality of Golden*, 744 F.2d 739, 747 (10th Cir.1984). The court held that the exercise of unbridled discretion by a city council in a permitting scheme was unconstitutional. It wrote:

We fail to see how it matters for First Amendment purposes whether unguided discretion is vested in the police or the city council. Vesting either authority with this discretion permits the government to control the viewpoints that will be expressed. Whether the city council or the police exercise this power, we believe that it runs afoul of the basic principle that "forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others."²⁷

As this Court observed in its Order of February 21, 2008, however, that even in a facial challenge to the new ordinance, "the Court must consider the City of San Antonio's 'authoritative constructions of the ordinance, including its own implementation and interpretation of it.'"²⁸ In this case, the City continues to insist that City Council retains the power to fund or waive fees imposed by the 2008 Ordinance whenever it chooses to "support" or "sponsor" a particular expressive event. This is not permissible under the First and Fourteenth Amendments.

3. Plaintiffs are Likely to Prove that Defendant's Permitting Scheme Constitutes Unconstitutional Viewpoint Discrimination

²⁵ 522 F.3d at 1042.

²⁶ At 151

²⁷ *Id.* at 747 (quoting *Taxpayers for Vincent*, 466 U.S. at 804, 104 S.Ct. 2118).

²⁸ Order, Docket 38, at 5 (quoting *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 131 (1992)).

In 2004, 99 Parade Permits were issued by the SAPD; the SAPD handled traffic control for 59 of those events; and in at least 27 of those 59, Defendant did not require the permit holder to pay for police services. In 2005, 99 Parade Permits were issued; the SAPD handled 42 events; and in at least 32 of those 42 events, Defendant did not require the permit holder to pay for police services. In 2006, 88 Parade Permits were issued; the SAPD handled 36 events; and in at least 17 of those 36 events, Defendant did not require the permit holder to pay for police services. In 2007, 80 Parade Permits were issued; the SAPD handled 46 events; and in at least 29 of those 46 events, Defendant did not require the permit holder to pay for police services.²⁹

In addition, the SAPD routinely allows off-duty police officers and on- or off-duty Sheriff's Officers, Constables, Park Police, Alamo Heights police, and various School District Police to "handle" traffic control for permitted parades. In most such cases, the SAPD takes no further interest in the event and allows the outside officer to determine all aspects of traffic control for the event.³⁰ Because of this, area peace officers can arrange low-cost marches and parades for groups with which he or she is affiliated or can set up a discount rent-a-cop business. Numerous police officers avail themselves of this extra income.

Some of the parades that did not have to pay for police services had been the subject of a City Council ordinance at some time in the past. Representatives of the City Attorney's Office and the City Manager's office have repeatedly maintained that other parades "sponsored" by the City in the past will be exempted from fees imposed by the 2008 Parade Ordinance. This interpretation was presented to the City Council immediately before the vote on the new Parade Ordinance by the Assistant City Manager who oversaw drafting of the ordinance,³¹ Others received fee waivers at the direction of staff members in the Mayor's Office, the City Manager's Office, the Office of Downtown Operations, or the SAPD.³²

29. Deposition of Officer William Jenkins, 85:23 to 87:14, attached to Plaintiffs' Motion for a Second Preliminary Injunction as Exhibit A.

³⁰ Deposition of Officer William Jenkins

31 Portions of the Transcript of the City Council Meeting on November 29, 2007 are attached as Exhibit B to Plaintiffs' Motion for a Second Preliminary Injunction. This evidence sheds light on the question raised in footnote 40 of the Order of February 21, 2008, whether the City has yet decided to "sponsor" more than the three parades listed in the Parade Ordinance.

32 The deposition and records of Officer Jenkins, who is the officer in charge of Parade permits and the collection of fees from permit holders, establish that he has repeatedly waived fees for police service based on a note or telephone call from superior officers in the SAPD, the City Managers Office, the Office of Downtown Operations, or the Mayor's office.

In arguments to the Court, the City maintains that its established practice of funding or waiving parade permit fees for favored groups and messages is permissible content-based discrimination under the “government speech” doctrine. Defendant argues that its decision to “sponsor” some parades and to “subsidize” these events by funding or waiving the fees for traffic control, clean-up, or both that are imposed on other, non-sponsored, street marches is a legitimate exercise of “government speech.” The 2008 Parade Ordinance lists three events that the City claims to sponsor.³³ In addition, representatives of the City Attorney’s Office and the City Manager’s office have repeatedly maintained that other parades “sponsored” by the City in the past will be exempted from fees imposed by the 2008 Parade Ordinance.³⁴ Indeed, this interpretation was presented to the City Council immediately before the vote on the new Parade Ordinance by the Assistant City Manager who oversaw drafting of the ordinance.³⁵

Moreover, neither the 2008 Parade Ordinance nor the SAPD Standard Operating Procedure addresses the established practice of informal fee funding or waiver. Although the City Attorney has not argued that each decision by a City Official to fund or waive the fees for a particular parade is a “sponsorship” decision and has insisted that “the door is shut” to informal fee waivers, the legal framework within which this practice developed remains unchanged and the practice itself is deeply engrained.³⁶ The good faith assurances of Defendant’s attorney cannot be taken as an authoritative construction of the City’s policies and practices regarding parade permit fees.³⁷ As the one court

33 §19-636(D) lists the Deiz y Seis Parade, the Martin Luther King March, and the Veterans Day Parade.

34 Parades that City Officials have indicated will be excluded from fees for traffic control and other fees imposed by the Parade Ordinance include 10-12 parades associated with the Fiesta, the Cesar Chavez March, the 60+ Mardi Gras Parade, and the San Antonio Marathon.

35 DVD and Transcript of the City Council Meeting of November 29, 2007.

36 In the December 20, 2007 hearing before this Court, the City Attorney insisted “that door has been basically closed at this point, because there is no longer that discretion of a group calling up the Council, their Council representative and saying: I would like a waiver of this or that. ... That is no longer provided for or is no longer considered under the terms of this new ordinance.” Hearing, December 20, 2007, at 17:7-13. It is misleading to suggest that informal fee waivers were “provided for” in the 1988 Parade Ordinance. The practice of informal fee waivers developed even though the 1988 Parade Ordinance used mandatory language: “The permit holder shall bear all costs relating to traffic control devices and any on-duty and overtime police required for the event.” The language of the 2008 Parade Ordinance is similar: “Each permit holder is responsible for the costs of (1) providing traffic control devices ...; (2) providing traffic control personnel; and (3) cleaning up the procession route.” Ironically, the only change between the 1988 and 2008 Parade Ordinances that relates to the City’s fee waiver practice is that the list of exemptions in the 2008 Parade Ordinance does not include “Parades authorized by separate ordinance” as did the prior law. Yet City officials confidently interpret the 2008 Ordinance to allow waiver of its mandatory fees for parades addressed in separate ordinances.

37 As the Supreme Court has observed, “[i]t is well settled that ‘a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.’ [I]f it did, the courts would be compelled to leave ‘[t]he defendant ... free to return to his old ways.’ *Friends of the Earth, Inc.*

explained: “The doctrine forbidding unbridled discretion ‘requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice.’”³⁸

Because the hearing on the Motion for Preliminary Injunction preceded discovery, evidence presented at that hearing was limited. Based on that limited evidence, this Court evaluated the City’s “sponsorship” argument on the assumption that only the three parades listed in the New Parade Ordinance itself would be exempted.³⁹ With convincing evidence of the City’s interpretation of the New Parade Ordinance and its existing practices, a reconsideration of Defendant’s “sponsorship” argument is needed.⁴⁰

The multitude of events for which the City funds or waives fees casts doubt on the claim that these are all instances of “government speech.” In its Order of February 21, 2008, the Court identified the tension between the “government speech” doctrine, articulated in a line of cases stemming from *Rust v. Sullivan* and *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001), and the “viewpoint discrimination” doctrine, developed in *Rosenberger v. Rector and Visitors of University of Virginia* and its progeny. Looking at the City practice of funding or waiving parade permit fees as a separate “subsidy program,” the Court then asked whether this subsidy program was designed to promote a broad range of views, as in *Rosenberger*, or to employ private entities to promote “government speech,” as in *Rust*. The Court concluded, on the basis of the evidence presented at the hearing, that it was more like government speech and therefore was permissible content-based discrimination.⁴¹

With greater evidence now available, it is clear that the City’s practice of favoring many groups and messages while burdening a relatively few others cannot be justified as “government speech.” An existing Ordinance of the City of San Antonio, Ordinance 68200, enacted October 27, 1988,

v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin’s Castle*, 455 U.S. 283, 289 (1982)); *cf. Sullivan v. City of Augusta*, 511 F.3d 16 (1st Cir. 2007).

³⁸ *Nationalist Movement v. City of Boston*, 12 F.Supp.2d 182, 194 (D.Mass.1998) (quoting *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 770, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988)).

³⁹ Order (Dkt 38) at fn 55.

⁴⁰ The City has repeatedly asserted that this Court should not concern itself with the City’s practice of waiving fees imposed by the Parade Ordinance for favored parades because those parades “have separate ordinances.” Transcript of Hearing dated December 20, 2007, at 15:3-10, 130:22-23. But as this Court observed in a different context, merely separating City actions into separate ordinances “should not and does not dispose of the underlying constitutional question.” Order (Dkt 38) at 21-22.

⁴¹ Order (Dkt 38)

establishes an open system for organizers of parades and marches to apply to the City for co-sponsorship, of which an important benefit would be the waiver of cost-shifting fees imposed on parade permit holders. The system include a public application process, a set of articulated criteria, and a limitation on the number of years that co-sponsorship would last.⁴² The preamble to this Ordinance states: “The City of San Antonio continues to recognize that special events are an integral part of the tourism industry in San Antonio and contribute to the ambience of the City, attract visitors and involve residents in the local community; and [the enactment of this ordinance] will provide guidance to the organizations when considering requests [for co-sponsorship].”

So, while the Court analyzed whether the City had established a separate program for special event sponsorship, the City actually had done just that. However, in the City’s established practice of parade permit fee funding or waiving, it has not used its existing system of sponsorship. Instead, it has chosen to maintain a discretionary, politically-controlled, and largely secret practice of content-based fee waivers. The doctrine of “government speech” cannot be used to justify this practice.

As this Court recognized in its February 21st Order, the rationale of the “government speech” doctrine includes the idea that “when the City speaks, either through itself or through private parties it funds, ‘it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.’”⁴³ In *Chiras v. Miller*,⁴⁴ the Fifth Circuit emphasized the careful analysis required in determining if a particular instance of content-based choice is “government speech.” The practice of fee funding or waiver maintained by the City is not “government speech” under this doctrine.

4. Plaintiffs are Likely to Prove that the Fees Imposed by the Parade Ordinance are Not “Narrowly Tailored” to Further a “Significant Governmental Interest”

a. Narrowly Tailored Fees, Costs, and Information

As the Sixth Circuit observed in *729, Inc. v. Kenton County Fiscal Court*,⁴⁵ there is an inherent risk of excess in a scheme that permits government to transfer its costs to private citizens:

When the government bears its own costs, one can expect (or at least hope for) a degree of frugality. Elected officials are often loath to incur prodigal or superfluous expenditures

⁴² A copy of this Ordinance is attached as Exhibit A.

⁴³ Order (Dkt 38) at 25, quoting *Velasquez* at 541. See also *Board of Regents of University of Wisconsin v. Southworth*, 529 U.S. 217 (2000).

⁴⁴ 432 F.3d 606 (5th Cir, 2005)

⁴⁵ 515 F.3d 485 (6th Cir. 2008).

because such waste puts them at an electoral risk. Commensurately, the government's decision to incur expenditures is generally immune from legal challenge by the taxpayers. [citation omitted] But once the government transfers the cost of a measure to private parties via a licensing fee, that measure becomes subject to private challenge. States generally may enforce their laws as vigorously, or with as much laxity, as they like. A state may choose to call out the National Guard to enforce an adult-entertainment ordinance, but leaving licensees with the check would go too far.

In San Antonio, the City has been “calling out the National Guard” for street marches for a long time. As mentioned earlier, the Texas Manual of Uniform Traffic Control Devices (“TMUTCD”) directs that street interruptions lasting less than one hour generally should be handled without the use of road closures and barricades. In his deposition, Permit Officer William Jenkins, who is the only officer in the permitting process who is certified on the TMUTCD, testified that while he generally looks to the Shift Supervisor to decide whether to close roads and erect barricades, he does not recommend against these actions, because he wants to protect himself and the City of San Antonio against a potential lawsuit.⁴⁶

Moreover, the City’s system of conditioning cost-shifting fees on parade permits is severely overbroad because it erects an indeterminate barrier that predictably causes many potential march organizers to cancel their plans. When individuals contact the City for information about parade permits, they are routinely told that “new events” will cost several thousands of dollars.

Similarly, the City’s practice of requiring parade permit holders to bear not only the costs of overtime officers, which would not have been incurred but for the march or parade, but also the costs of on-duty officers, costs that the City would have incurred regardless of whether the march or parade happened, violates the requirement of narrow tailoring. The City has conceded that it does not attempt to recoup costs for on-duty officers in any situation other than marches or parades. This targeting of one set of activities, which notably includes political marches that are at the core of First Amendment values, violates the requirement of “narrow tailoring.”

b. The Government’s Interest

Defendant maintains that the cost-shifting fees that it has imposed since 1988 by the Parade Ordinance are designed to further the government’s significant interest in recouping its costs in providing traffic control and clean-up for parades and marches. Yet when one views the City’s cost-shifting fee policies and practices as a whole, riddled as it is with excessive costs, extremely costly

⁴⁶ Deposition of Officer William Jenkins, 136: 5-19, 137: 16-18.

waivers, and very low returns,⁴⁷ it is difficult to believe that the system is maintained as a cost-reduction system. One must ask whether the system is maintained for some other reason, and inevitably one must look at the one thing that the system does well, and that is to deter protected speech and assembly.

5. Plaintiffs are Likely to Prove that the 2008 Parade Ordinance is Unconstitutionally Vague and Overbroad.

Under the 2008 Parade Ordinance, the requirement of insurance, the requirement of notification to neighboring communities, the deadlines for permit applications, and the amount of fees all depend on whether an event is characterized as a “First Amendment Procession,” which is defined as “a procession, the sole or principal object of which is First Amendment activity.” §19.630(7). “First Amendment Activity” is defined as “all expressive and associative activity that is protected by the United States and Texas Constitutions, including speech, press, assembly, and the right to petition, but not including commercial advertising.” §19.630(6).

Because the Ordinance's definitions of the two types of processions are “so indefinite that people ‘of common intelligence must necessarily guess at its meaning and differ as to its application,’” the distinction between them is meaningless. *Reeves v. McConn*, 631 F.2d 377, 383 (5th Cir.1980) (quoting *Connally v. General Construction Co.* 269 U.S. 385, 391 (1926)). Permit applicants are given no substantive guidance about what types of activity are protected under the United States or Texas Constitutions, other than the exclusion of “commercial advertising,” a term that, in addition to being vague, itself, incorrectly suggests that commercial speech is not entitled to constitutional protection. Ordinance § 19-630(6).⁴⁸ The Ordinance fails to specify what relative importance First Amendment activity must have to constitute a (or “not” a) “principal object” of a procession. Ordinance § 19-630(7)-(8). Nor does it specify whose opinion of a procession's “objects” is controlling: it could be that of the applicant, procession spectators, the Chief of Police, or someone else.

Moreover, the definition of “Non-First Amendment Processions” is overbroad because it includes those processions for which the “principal” but not “sole” object is constitutionally unprotected

⁴⁷ Each year for the past five years, the City has waived cost-shifting fees amounting to 2 or 3 times the total amount that the City has collected in cost-shifting fees.

⁴⁸ *See* *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-70 (1976) (commercial speech is entitled to some First Amendment protections).

activity. Ordinance § 19-636(8).⁴⁹ As a result, the Ordinance subjects some constitutionally protected activity to even earlier permitting deadlines than required for “First Amendment Processions,” §19-633(C), as well as a \$1 million insurance requirement, §19-636(E), and an obligation to provide advance notice to businesses and residences along the procession route, §19-636(F). Because each of these restrictions may serve as a substantial deterrent to those who wish to exercise protected First Amendment activity, the Ordinance provisions applicable to “Non-First Amendment Processions” must be struck down as overbroad.⁵⁰

Likelihood That Movant Will Suffer Irreparable Injury If The Injunction Is Not Granted.

As alleged above, enforcement and other implementation of the Defendant’s Parade Ordinance will substantially infringe Plaintiffs’ Free Speech and Equal Protection Rights and will substantially chill speech throughout San Antonio. These injuries cannot be measured or remedied.

A preliminary injunction may properly be granted where Plaintiffs' injuries cannot be redressed by the application of a judicial remedy after a hearing on the merits. Canal Authority of the State of Florida v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974). An injury is irreparable "if it cannot be undone through monetary remedies." Dillard v. City of Greensboro, 870 F.Supp. 1031, 1035 (M.D.Ala. 1994) quoting Cate v. Oldham, 707 F.2d 1176, 1189 (11th Cir. 1983).

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⁴⁹ See Beckerman, 664 F.2d at 507 ("A law is overbroad if it 'does not aim specifically at evils within the allowable area of control... but sweeps within its ambit other activities that constitute an exercise' of First Amendment rights.") (quoting Thornhill v. Alabama, 310 U.S. 88, 97 (1940))

⁵⁰ Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); see also Beckerman, 664 F.2d at 507 (licensing statute is overbroad when "the state achieves indirectly through the denial of a permit what it could not achieve directly through a blanket prohibition of the activity.").

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The Threatened Injury Outweighs The Damage The Injunction Might Cause The Opponent

Granting an injunction in this case will merely require Defendant to continue to follow existing ordinances. Under these circumstances, Plaintiffs risk far greater harm if the injunction is not granted.

The Injunction Will Not Disserve The Public Interest.

The public interest here is served by ensuring that the Constitutional rights of residents are respected and protected by Defendant. *State of South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

Accordingly, Plaintiffs respectfully request that a hearing on Plaintiffs' Motion for Modification of the Existing Preliminary Injunction or Entry of a Second Preliminary Injunction be set, and that, after the hearing, that the Court deny Defendant's Motion to Dissolve the Preliminary Injunction and grant Plaintiffs' Motion for Modification of the Existing Preliminary Injunction or Entry of a Second Preliminary Injunction, enjoining Defendant from enforcing its 2008 Parade Ordinance and from enforcing any prior version of its policy of requiring payment of costs for police, traffic control, and clean-up by parade permit holders until such time as the Court may enter final judgment in this case.

Respectfully submitted,

s/ Amy Kastely

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CERTIFICATE OF SERVICE

I hereby certify that on, August 21, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system that will send notification of such filing to Assistant City Attorneys Deborah Klein and Cathy Sheehan, Attorneys for Defendants.

/s/ Amy Kastely

Amy Kastely