IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

INTERNATIONAL WOMEN'S DAY MARCH PLANNING COMMITTEE, AN UNINCORPORATED ASSOCIATION, AND SAN ANTONIO FREE SPEECH COALITION, AN UNICORPORATED ASSOCIATION, *Plaintiffs*	§ § § § § § § §	
v.	§	SA-07-CA-0971-XR
CITY OF SAN ANTONIO, *Defendant*	§ § §	

DEFENDANT CITY OF SAN ANTONIO'S RESPONSE TO PLAINTIFFS' MOTION FOR MODIFICATION OF THE EXISTING PRELIMINARY INJUNCTION OR ENTRY OF A SECOND PRELIMINARY INJUNCTION

TO THE HONORABLE XAVIER RODRIGUEZ:

NOW COMES CITY OF SAN ANTONIO, DEFENDANT in the above styled and numbered cause, and files this its Response to Plaintiffs' Response to Motion For Modification Of The Existing Preliminary Injunction Or Entry Of A Second Preliminary Injunction and by way of reply would show unto the Court as follows:

1. Plaintiffs' initially filed suit to challenge the City of San Antonio's new ordinance regarding processions, enacted in November, 2007. Plaintiffs requested a preliminary injunction and the same was granted by this Court on February 21, 2008. After amending the contested ordinance, Defendant moved to dissolve the injunction. In response, Plaintiffs moved to modify the injunction or to enter a new preliminary injunction.

2. Defendant objects to Plaintiffs' Motion to Modify or to Enter a New Preliminary Injunction as Plaintiffs have wholly failed to provide any evidence to support said Motion. The majority of Plaintiffs' arguments are nothing more than conjecture and conclusion with no cited evidence. Of the occasions on which citations are provided, many are non-specific, citing to a

statute or deposition in its entirety, requiring undersigned counsel and the court to sift through evidence and authority to determine what, if anything, supports Plaintiffs' claims. Finally, even as to those citations that are specific, Plaintiffs failed to attach any of the cited evidence. As such, Plaintiffs' Motion is not properly supported and should be denied.

3. Even absent Plaintiffs' evidentiary failings, Plaintiffs Motion is without merit. Each argument made by Plaintiffs is nothing more than a second bite at the proverbial apple. Plaintiffs' arguments are nothing more than new spins of the arguments previously made, and which have already been found insufficient to support a preliminary injunction. This is evidenced by the fact that none of the new basis for injunctive relief arises from the amendment to the parade ordinance enacted in March, 2008, but rather turn on language contained in the prior, November 2007, ordinance.[1]

4. Plaintiffs' appear to be seeking a new injunction on the allegation that the City Council and Individual City Officials have unconstitutionally broad discretion to fund or waive "cost-shifting" fees for "favored" permit applicants. This allegation is based not on evidence but by statements made by counsel at the hearing on the preliminary injunction discussing the right of citizens to petition the Defendant for sponsorship of their events. Plaintiffs argue that this is "unbridled discretion." In support of this contention, Plaintiffs rely on the case of *Long Beach Area Peace Network v City of Long Beach*, 522 F3d. 1010 (9th Cir, 2008) In *Long Beach*, plaintiffs challenged a city ordinance regarding special event permits. The ordinance included a provision specifically allowing the City "in its discretion, to fund or waive the permit fee and the departmental services charges." Thus, the ordinance envisioned that fees would be waived at the

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[1] The only challenge to the 2008 Ordinance concerns the amount of discretion afforded to the SAPD in assessing costs. This argument appears to be in response to Defendant's Motion to Dissolve and has been addressed by Defendant in its Reply. To the extent that Plaintiffs intended those arguments to be the basis of their Motion to Modify/for New Preliminary Injunction, Defendant hereby incorporates by reference its Reply filed concurrent with this Response.

discretion of the City. The Court took issue with the fact that the ordinance provided no parameters of what types of events might have their fees waived.

The 2008 Ordinance does not provide for waiver of fees except for the three events specifically set forth in the ordinance. The 2008 Ordinance does not envision the waiver of fees. However, this does not mean that, through a full legislative process, Defendant could not choose to expend its funds to support other events of cultural or historical interest. This is a different scenario from the *Long Beach* case.

Plaintiffs raise much the same argument in their contention that the "permitting scheme" constitutes unconstitutional viewpoint discrimination. To support this contention, Plaintiffs rely on past history, prior to the adoption of the present ordinance. Defendant previously informed the Court that, in the past, informal fee waiver had occurred. Plaintiffs have no evidence that such informal waivers will continue under the current ordinance. If in fact such activity did occur, it could possibly give rise to a constitutional challenge. However, no such challenge currently exists in this case.

This Court has already addressed this question in its Order issuing the preliminary injunction on February 21, 2008. (Dk. #38) As this Court pointed out, the Supreme Court has found that "where governmental provision of subsidies is not aimed at the suppression of dangerous ideas, its power to encourage actions deemed to be in the public interest is necessarily far broader." (Dk. #38, fn. 58, citing to *Regan v Taxation with Representation of Washington*, 461 U.S. 540, 550 (1983) Plaintiff has offered no evidence that under the 2008 Ordinance, informal fee waiver will persist. Unlike the scenario in *Long Beach*, the 2008 Ordinance does not provide for unbridled waiver of permit fees – it only provides for waiver in three cases. However, to the extent that Defendant chooses to expend funds through its legislative process to

sponsor additional events, the analysis is more appropriate under the Supreme Court's analysis in *Regan*.

5. Plaintiffs' next assertion is a reassertion of the contention that the 2008 Ordinance is not narrowly tailored to further a significant government interest. Plaintiffs offer no evidence to support this contention. Plaintiffs write off any government interest in recouping costs expended to provide traffic control to parade events by merely speculating that by seeking to recover traffic costs, Defendant must be attempting to "deter protected speech and assembly." Plaintiffs have no evidence to support this contention. Plaintiff cannot point to a single First Amendment event which was unable to occur because of excessive traffic costs. To this end, Plaintiffs offer now evidence to support their outlandish contention that "the City has been calling out the National Guard" for street marches for a long time. In fact, this flies in the face of Plaintiffs prior lament that the City has not pursued costs against many of the processions in the last four years. Plaintiffs argue that the ordinance is overbroad because "it erects an indeterminate barrier that predictably causes many potential march organizers to cancel their plans." Yet, Plaintiff fails to identify even one such march organizer. Plaintiffs state that "when individuals contact the City for information about parade permits, they are routinely told that 'new events' will cost several thousands of dollars." Again, Plaintiffs fail to offer even the slightest evidence to support this statement. Plaintiffs also state that the City has conceded that it "does not attempt to recoup costs for on-duty officers in any situation other than marches or parades." Again, this statement is not supported by any evidence and in fact is a mischaracterization.

6. Finally, Plaintiffs once again claim that the 2008 Ordinance is vague and overbroad on the theory that the Ordinance does not define "First Amendment Procession" to Plaintiffs' liking. In fact, the definition of First Amendment activity encompasses "all activity and associative activity protected by the United States and Texas Constitutions." The breadth of this statement

actually works to the benefit of event planners as it encompasses a broad spectrum of events that will benefit from the provision of $3000.00 worth of Defendant's traffic control services. Plaintiffs offer no evidence that the portions of the 2008 Ordinance infringes on the ability to exercise rights under the First Amendment, nor do they offer any evidence that the Ordinance will have a chilling effect on free speech.

7. Plaintiffs have failed to provide any evidence to support the need for a modified or new preliminary injunction. Plaintiffs have offered no new arguments not previously addressed by this court, or arguments that could have been addressed by the preliminary injunction currently in place. Accordingly, Plaintiffs' motion should be in all things denied.

WHEREFORE, PREMISES CONSIDERED, DEFENDANT CITY OF SAN ANTONIO prays this Court deny Plaintiffs' Motion to Modify or for Entry of a New Preliminary Injunction in all things, and for such other and further relief, both in law and in equity, to which this Defendant may be entitled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system that will send notification of such filing to the following:

Amy H. Kastely
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__________/s/____________________
DEBORAH LYNNE KLEIN