

inconsistent. Dkt 62 at 5-7. Defendant does not respond to this argument, but instead ridicules Plaintiffs for making an argument they did not make: that “an ordinance ... must address each and every conceivable question that an individual may have.” Dkt 66 at 2.

- (2) Second, the SAPD Standard Operating Procedure 214, on Processions, does not resolve the ambiguities created by the Ordinance, including whether and how the SAPD will estimate the costs of traffic control devices, whether and how the applicant is to submit a traffic control plan for approval by the Chief of Police, and whether and how fees for clean-up will be determined. Dkt 62, at 7-8. Defendant responds to this point by saying that Standard Operating Procedure 214 was meant to be merely a “guide” and then cites this Court’s Order for something it does not say: “to set forth specific rigid formulas would have the affect of infringing on constitutional rights by the lack of flexibility.” Dkt 66 at 2-3 (citing the Dkt 38, fn. 33).
- (3) Third, neither the 2008 Parade Ordinance nor SAPD Standard Operating Procedure 214 addresses the single most important factor for a Temporary Traffic Control Plan under the Texas Manual on Uniform Traffic Control Devices (“TMUTCD”): the length of time that march participants will be on the streets and in any one intersection. The TMUTCD specifies that expensive road closures and barricades should not be used if the traffic interruption will last for less than one hour, because the installation of devices in such cases will actually increase the danger and traffic interruption.² Defendant responds to this argument with the assertion that “there is nothing in state or local law that requires a local authority to comply with the TMUTCD in any thing other than the design of the traffic control device.”³ Dkt 66 at 3 fn 1.

Compliance with the Manual of Uniform Traffic Control Devices, promulgated by the Federal Highway Administration, or an approved state version of the Manual (such as the TMUTCD) is mandated by Federal law.⁴ The Manual is applicable to all traffic control plans on “any street, highway, or bicycle trail open to public travel.”⁵

claims on their motions for preliminary injunction.

² Texas Manual on Uniform Traffic Control Devices §6G.02. A copy of this provision is included in the Appendix, attached hereto.

³ Defendant further responds to this argument by deriding Plaintiffs for another argument they did not make: that the Ordinance is deficient because it “does not set forth every possible factor to be considered.” Defendant’s Reply (hereinafter “Dkt 66) at 2.

⁴ The responsibility for developing uniform standards for traffic control devices is assigned to the Secretary of Transportation in 23 U.S.C. §§ 109(b), 109(d), 402(a) and is delegated to the Federal Highway Administrator in 49 CFR 1.48(b), (c), (n). Federal Register, Vol 51, No. 100, Monday, June 9, 1986, p. 20640. Compliance with the national Manual of Uniform Traffic Control Devices or an approved state version such as the TMUTCD is mandated by 23 C.F.R. 655.603. The TMUTCD has been approved by the Federal Highway Administration Division Administrator as being “in substantial conformance with the National Manual on Uniform Traffic Control Devices” and therefore the TMUTCD is mandatory for all governmental and private entities engaged in traffic control in Texas. 23 C.F.R. 655.603(b). The Texas Transportation Code assigns responsibility for development of the Texas Manual on Uniform Traffic Control Devices to the Texas Transportation Commission, Texas Transp. Code §544.001. The state Manual must conform not only with the mandatory standards contained in the federal Manual, but also with its “guidance statements.” 23 C.F.R. 655.603(b).

⁵ 23 C.F.R. 655.603. This regulation specifies that “[f]or the purpose of MUTCD applicability, open to public travel includes toll roads and roads within shopping centers, parking lot areas, airports, sports arenas, and other similar business and/or

(4) Fourth, Officer O’Dell, who is the primary author of Standard Operating Procedure 214 and one of three officers responsible for all decisions regarding street marches and the fees to be imposed on them testified with certainty that Standard Operating Procedure 214 will not in any way shape or restrict the broad discretion they had under prior City Parade Ordinances.⁶ Defendant does not respond to this point.⁷

b. Regarding the amount of discretion retained by the City Council. Defendant makes two points on this issue. First, Defendant seeks to distinguish *Long Beach Area Peace Network v. City of Long Beach*,⁸ which held that the retention of power by the City Council on the ground that the Long Beach Parade Ordinance states that the City Council may waive fees in separate ordinances, while the 2008 Parade Ordinance is merely interpreted by the City Manager, the City Attorney, and the Police Department to allow such waiver.⁹ Yet, as this Court observed in a different context, merely dividing a governmental action into separate ordinances cannot insulate the action from constitutional scrutiny.¹⁰ Moreover, contrary to the Court’s understanding that “separate ordinance” waivers “have not yet been granted,” Dkt 38, at 15 fn 40, several such waivers have already been passed, and City officials have clearly indicated that these “separate ordinances” will be given effect as a waiver of the cost-shifting fees in the 2008 Parade Ordinance.¹¹

Second, Defendant argues for a similarly specious distinction between a City Council decision to waive fees for Parade permittees and a City Council decision “to expend its funds to support” permittees by not collecting such fees.¹² Surely Constitutional rights should not turn on such spurious distinctions.

c. Regarding the City’s viewpoint discrimination.

This Court’s analysis of Plaintiffs’ likelihood of success on their claim of viewpoint discrimination in its February 21st Order was necessarily and explicitly limited to the three exemptions contained in the 2007 Parade Ordinance and to the limited evidence then available to Plaintiffs.¹³ Defendant now openly admits that it has added and will continue to add other events to the favored list but asserts that such additions

recreation facilities that are privately owned but where the public is allowed to travel without access restrictions. 655.603(a).

⁶ See Deposition of Officer O’Dell, 17:7-19:8; 24:23-25:11. Officer Jenkins testified that he had not read, had not been given a copy, and had not used Standard Operating Procedure 214 in any of his work regarding traffic control plans for parades and marches. Deposition of Officer Jenkins 43:12 – 46:22. This excerpt is included in the Appendix, attached hereto.

⁷ The only reference to the officers’ testimony in Dkt 66 or Response (Dkt 67) is to again rebut an argument that Plaintiffs did not make (“Plaintiffs take issue with the testimony of Lt. Charles O’Dell indicating that the Defendant would be flexible in considering the needs of each event.”) Dkt 66 at 3.

⁸ 522 F.3d 1010 (9th Cir. 2008), discussed in Plaintiffs’ Memorandum (hereinafter “Dkt 62”) at 9-10.

⁹ Dkt 67 at 2-3. Excerpts from the City Council Meeting of November 29, 2007 are included in the Appendix, attached hereto.

¹⁰ Dkt 38, at 21-22.

¹¹ Defendant’s Answer to Interrogatory #15 (which is included in the Appendix attached hereto), specifies three such events: “Defendant further states that pursuant to separate ordinance, it provides traffic control and clean up for the Cesar Chavez, the Battle of Flowers and Fiesta Flambeau parades.” A copy of the “separate ordinance” for the Cesar Chavez March is also included in the Appendix. The City also apparently has waived substantial traffic control fees and the permit requirement for the Cavaliers River Parade and the Christmas River Parade, even though these events are “Processions” under the 2008 Parade Ordinance. See Non-Permitted Events, produced by Defendant, which is included in the Appendix.

¹² Dkt 67 at 3.

cannot be considered by this Court because they are or will be contained in “separate” ordinances. Defendant also now admits to the widespread practice of informal viewpoint discrimination under the 1988 Parade Ordinance, as alleged by Plaintiffs, but asks the Court to accept, apparently on faith alone, that such practices will not continue. Finally, Defendant urges that *Regan v. Taxation with Representation of Washington*¹⁴ can and should be extended to apply regardless of how extensive the viewpoint discrimination is found to be.

First, Plaintiffs’ likelihood of success on its viewpoint discrimination claim does not depend upon a finding that the Defendant’s established practice of informal fee waivers will continue; it is enough that Defendant intends to enact “separate ordinance” waivers. Yet the City Attorney’s bald assertion to the Court regarding informal waives is disproved by the fact that on December 8, 2007, just days after the new 2007 Parade Ordinance was enacted, an informal waiver was granted for the Blue Santa Parade on the basis of an earlier email message: “Chief said to make this happen outside the permitting process.”¹⁵ The City also granted a waivers for the Christmas River Parade held on November 23, 2007, just days before the 2007 Parade Ordinance was passed.¹⁶ There was nothing in the prior Parade Ordinance that authorized informal waivers, and there is nothing in the 2008 Parade Ordinance that precludes them.¹⁷ In the absence of explicit, mandatory language, the Court must recognize the significant risk that established practice will continue. 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.’”¹⁸

In any event, *Regan v. Taxation with Representation of Washington* cannot be extended to justify the City’s parade permit fee policies. Even if the City were to consistently characterize traffic control personnel and equipment as a “benefit” or “subsidy,” *Regan* does not permit the City to select recipients of this “benefit” based on the content of their speech. Justice Rehnquist, writing for the majority, notes that his decision involves the special deference given to tax statutes¹⁹ and does not address government

¹³ Dkt 38, at 15 fn 40. These three are retained in the 2008 Parade Ordinance §19-636(D).

¹⁴ 461 U.S. 540, 550 (1983).

¹⁵ Email correspondence involving Councilmember Philip Cortez, Assistant City Manager Erik Walsh, Chief William McManus, Deputy Chief David Head, Deputy Chief Ray Torres, officer Jeff Humphrey, and Officer Jenkins, November 6-9, 2007. A copy of this correspondence is included in the Appendix, attached hereto.

¹⁶ Moreover, while the City Manager has stated that the City Council decided to end all informal waivers in 2005, SAPD records from 2006-2007 show fee waivers for approximately 46 events, most of which were informal waivers. See Deposition of Officer William Jenkins, 85:23 to 87:14, in the Appendix attached hereto.

¹⁷ A copy of the prior Ordinance has already been filed with the Court, as Docket 22-3.

¹⁸ *Friends of the Earth, Inc. 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).

¹⁹ *Regan*, 461 U.S. at 547. This limitation on the holding in *Regan* was recognized by the Fifth Circuit in *Rogers v. Commissioner of Internal Revenue*, 281 F.3d 1278 (5th Cir. 2001); *Apache Bend Apartments v. United States*, 746 F.2d 1049, 1063 (5th Cir. 1992); and *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049 (5th Cir. 1984).

“subsidies” given to overcome burdens “of the government’s own creation.”²⁰ Moreover, as the Supreme Court later explained: “*Regan* relied on a distinction based on preferential treatment of certain speakers--veterans' organizations--and not a distinction based on the content or messages of those groups' speech.”²¹

Indeed, among the Supreme Court decisions involving other than traditional public forums, the one with facts closest to the case at bar is *Lamb's Chapel v. Center Moriches Union Free School District*.²² The School District permitted many groups to use its facilities after school hours but did not allow any religious organizations to use them. Even though the use of school facilities was a “benefit” or “subsidy,”²³ and the School District was not intending to encourage public meetings or to create a forum for general public use, still the Court found the differential treatment to be unconstitutional viewpoint discrimination. Surely, the School District could not avoid the requirement of viewpoint neutrality by adopting a policy of charging rent and a service fee for the use of its facilities and then waiving that charge for all groups whose message it chose to “sponsor.” This is exactly what the City is attempting to do through its Parade permitting policies.

d. Regarding the City’s failure to “narrowly tailor” the permit fees to further a “significant governmental interest”

Defendant apparently concedes that applicable law requires any fees imposed on street march organizers to be narrowly tailored to further a significant government interest, but argues that Plaintiffs have not presented sufficient proof of the factual allegations underlying their claim on this issue. This is the reason why Plaintiffs have requested a hearing on their Motion for a Second Preliminary Injunction. Since it is not normally sufficient for a Court to enter an injunction on the basis of Declarations or other evidence that would not be admissible at trial, Plaintiff assumed that this evidence should not be submitted with their Motion. At a hearing, Plaintiffs will submit evidence showing that the street march organizers have been told that they will not be granted a permit unless they commit to paying an undetermined amount ranging from \$12,000 to \$25,000 and that street marches have been cancelled because of excessive cost estimates. Finally, on the question whether Defendant has recouped costs for on-duty officers in any situation other than marches or parades, Plaintiffs will submit Defendant’s Answer to Interrogatory # 14, in which Defendant states that it knows of no instance in which it has been paid for work done by an on-duty police officer.²⁴

²⁰ *Regan*, 461 U.S. at 549.

²¹ 515 U.S. 819, 834 (1995).

²² 508 U.S. 384 (1993)

²³ See *Rosenberger*, 515 U.S. at 887 (dissenting opinion) (In *Regan*, “the government built and maintained the building, while the speakers saved the rent for a hall”);

²⁴ INTERROGATORY NO.14: Describe in detail all instances in which Defendant has been paid by a person for work done by on-duty police officers other than work related to a procession during the relevant time period.

ANSWER: Defendant states that it has no knowledge of such instances.

A copy of this Interrogatory and Answer is included in the Appendix, attached hereto.

e. Regarding the unconstitutionally vague and overbroad definitions of “First Amendment” and “Non-First Amendment” events.

Defendant does not respond to Plaintiffs’ argument regarding the 2008 Parade Ordinance’s definitions of “First Amendment Procession” and “Non-First Amendment Procession” except to recite the first definition. Yet both Officer Jenkins and Lt. O’Dell, two of the three officers charged with applying these definitions, have both testified that they do not think they are “qualified” to understand the definitions and they don’t know how they are going to apply them other than to call the City Attorney’s office.²⁵

Conclusion

Despite Defendant’s efforts to bring the City’s Parade Ordinance and policies into line with the Constitutional requirements discussed in the Court’s Order of February 21st, significant Constitutional violations remain and enforcement of the 2008 Parade Ordinance will cause immediate and irreparable harm to Plaintiffs and to other San Antonio residents.

Accordingly, Plaintiffs ask that the Court set Plaintiffs’ Motion for a hearing and, after the hearing, modify the existing Preliminary Injunction to cover the 2008 Parade Ordinance or enter a new Preliminary Injunction enjoining enforcement of this or any other Ordinance or policy of the City of San Antonio that conditions the issuance of Parade permits on the applicant’s willingness to pay for on-duty and off-duty police officers, required traffic control devices, and clean-up.

Respectfully submitted,

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²⁵ See Deposition of Officer Jenkins 38:18-42:7 and Officer O’Dell 17:7-19:8. These excerpts are included in the Appendix.

CERTIFICATE OF SERVICE

I hereby certify that on, September 29, 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