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FIFTH CIRCUIT
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No. 09-50692, Intl Women's Day March Com, et al v. City of
San Antonio, et al
USDC No. 5:07-CV-971

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No. 09-50692

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

INTERNATIONAL WOMEN'S DAY MARCH PLANNING COMMITTEE,
an unincorporated association, and **SAN ANTONIO FREE SPEECH
COALITION,** an unincorporated association,
Plaintiffs-Appellants,
v.
CITY OF SAN ANTONIO,
Defendant-Appellee.

**On Appeal from the United States District Court
for the Western District of Texas, No. 5:07-cv-00971**

**BRIEF OF THE ACLU FOUNDATION OF TEXAS AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

International Women's Day March Planning Committee v. City of San Antonio,

No. 09-50692.

Amicus Curiae the American Civil Liberties Union Foundation (“ACLUF”) of Texas is a 501(c)(3) nonprofit corporation. The ACLUF of Texas has no corporate parents, and no publicly-held corporation owns any part of any of the organization.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

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IDENTITY AND INTERESTS OF AMICUS CURIAE

The American Civil Liberties Union (hereinafter “ACLU”) is a national, non-profit, public-interest organization that exists to defend and preserve the individual rights and liberties guaranteed to all people in this country by the Constitution and laws of the United States. Since its founding in 1920, the ACLU has vigorously defended the Bill of Rights, including the guarantee of freedom of speech, expression and association set forth in the First Amendment to the United States Constitution. The American Civil Liberties Union Foundation of Texas (hereinafter “ACLUF of Texas”) is the state affiliate of the national organization and has over 13,000 members across the state. The ACLUF of Texas has litigated numerous cases involving the protection of First Amendment freedoms, including a recent challenge to a parade ordinance in Houston, Texas in *Black Heritage Society v. City of Houston*, No. H-97-0052, 2008 WL 2769790 (S.D. Tex. July 11, 2008). The ACLUF of Texas has an interest in this case because the challenged ordinance unconstitutionally restricts the exercise of First Amendment rights in a quintessential traditional public forum on the streets of San Antonio.

INTRODUCTION AND SUMMARY OF ARGUMENT

The challenged decision raises several fundamental questions under the First Amendment, and *amicus* writes to explicate the law applicable to this one: Does the government speech doctrine apply to permit the City of San Antonio (“the City”) to engage in viewpoint discrimination by waiving clean-up and traffic costs for processions whose viewpoint the City supports, while imposing those costs on permit holders whose processions have not been officially sanctioned? Because the City’s imposition of costs necessarily varies with the viewpoint of each procession’s speech, *amicus* respectfully submits that the answer to this question is clearly “no.”

Ordinance No. 2008-03-13-0201 (“the Ordinance”), adopted by the San Antonio City Council on March 13, 2008, regulates all organized “processions” on the streets of the City of San Antonio, a forum “immemorially...held in trust for the use of the public” to express itself. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (internal quotation marks and citation omitted). Organizers of a “procession” must apply to the Chief of Police and pay a \$75 fee for a procession permit. R. 642 § 19-633(F). Upon receiving a permit application, the Chief of Police is required to determine the additional costs necessary “to adequately safeguard the flow of participant and non-participant

traffic in order to minimize congestion” as well as post-parade cleanup. R. 645 § 19-636(C).

The Ordinance exempts three processions from traffic control costs exceeding \$3,000. These processions are the Diez y Seis Parade, Martin Luther King March, and Veterans Day Parade (the “Exempted Processions”).¹ R. 645-46 § 19-636(D). The City of San Antonio waives the Ordinance’s traffic control personnel costs on behalf of the private sponsors of the Deiz y Seis parade due to its “broad appeal, historic tradition, cultural significance, and other public benefits,” and waives the costs associated with both traffic personnel and traffic control devices for the Martin Luther King March and the Veterans Day Parade because of their “broad appeal, historic tradition, cultural significance, association with a national holiday or a day given statewide recognition, and other public benefits.” *Id.*

The District Court found that the City’s waiver of the costs for these undisputedly private processions constituted not viewpoint discrimination but permissible government speech under the Supreme Court’s decision of *Rust v. Sullivan*, 500 U.S. 173 (1991), and *Regan v. Taxation With Representation of*

¹ *Amicus* focuses its discussion on the three events for which costs are waived under the Ordinance, but notes that other processions, including the Fiesta-related parades and the Cesar Chavez March have also received waivers by separate City Council action as discussed in Appellants’ opening brief. Appellants’ Opening Brief pp. 19-20; R. 2192.

Wash., 461 U.S. 540 (1983). *See also* R. 565-70.

The District Court erred in upholding the Ordinance because it incorrectly applied the government speech doctrine to the Ordinance's viewpoint discrimination in assessing the procession fees and costs detailed above. *See id.* Because government speech was not at issue, the viewpoint discrimination here is constitutionally impermissible. Accordingly, *amicus* urges this Court to reverse the District Court's decision granting summary judgment for the City.

ARGUMENT

I. THE DISTRICT COURT ERRED IN PERMITTING THE ORDINANCE'S VIEWPOINT DISCRIMINATION UNDER THE GOVERNMENT SPEECH DOCTRINE.

The District Court's grant of the City's motion for summary judgment² was erroneous as it found that the Ordinance's waiver of permit costs and fees for the Exempted Processions constituted government speech rather than impermissible viewpoint discrimination within a traditional public forum. R. 569. Although the government speech doctrine has found a place in First Amendment jurisprudence, its application to the Ordinance's cost waivers for the Exempted Processions is misplaced. The District Court's decision to apply the government speech doctrine in this situation means that some private speakers face higher barriers to expression

² The District Court incorporated the reasoning set forth in its prior ruling on Appellant's motion for a preliminary injunction in its brief disposition of the Respondent City's motion for summary judgment. R. 3165-68.

in the public streets than others based solely on the City's assessment of the viewpoint each expresses—classic (and impermissible) viewpoint discrimination. Although the Exempted Processions may relate to important matters of public interest, the Supreme Court has long recognized that the government may not skew the “building of our politics and culture” by manipulating the public forum. *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95-96 (1972). The government speech doctrine was not intended to change this fundamental First Amendment principle.

A. The District Court Failed To Consider Either Of The Supreme Court's Two Recent Pronouncements On Government Speech.

The District Court's application of the government speech doctrine to find that the Ordinance could properly impose higher costs to expressive processions other than the Exempted Processions without triggering strict scrutiny was based on a misunderstanding of the doctrine. Indeed, the District Court in its February 21, 2008 Preliminary Injunction Order stated that “[t]he Supreme Court has not yet clearly demarcated the boundaries of government speech versus non government speech.” R. 569. Subsequently, the Supreme Court did further explicate the government speech doctrine in *Pleasant Grove City v. Summum* 129 S. Ct. 1125 (2009), relying heavily on the Court's other recent decision in *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005). Nevertheless, District Judge Biery did not address either precedent in adopting District Judge Rodriguez's reasoning in his

post-*Pleasant Grove* orders granting the City’s motions to lift the preliminary injunction and for summary judgment. R. 551-587; R. 3165-3168. Instead, the District Court erred by continuing to rely on a misapplication of the Supreme Court’s earliest discussions of the government speech doctrine—*Rust v. Sullivan*, 500 U.S. 173 (1991) and *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983)—to find that “viewpoint-based funding decisions can be sustained.” Preliminary Injunction Order at 16 (quoting *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001)).

However, the “First Amendment forbids viewpoint discrimination in the regulation of a traditional public forum.” *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 325 (2002). The government “may not select which issues are worth discussing or debating in public facilities.” *Police Dep’t of Chi. V. Mosley*, 408 U.S. 92, 95-96 (1992). Because the Exempted Processions constitute private speech in a public forum, they were not eligible for the more lenient standard reserved for government speech. *Pleasant Grove*, 129 S. Ct. at 1132.

Pleasant Grove City v. Sumnum provided the clarification that the District Court missed below by establishing rather clear boundaries for government speech when it affirmed the City of Pleasant Grove’s content-based selection among privately donated monuments for the city park as permissible government speech. 129 S. Ct. 1125, 1134 (2009). Key to the ruling was the finding that *city* was

exclusively maintaining a permanent monument display on scarce public land.

Id. at 1134. The Supreme Court then articulated the boundaries of the government speech doctrine: the speech in question must (1) “convey and have the effect of conveying a government message,” and (2) be under the government’s “effective[] control[]” and subject to its “final approval authority.” *Id.* (quoting *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560-61 (2005)).

With respect to the first prong, the Supreme Court found that public parks, such as the public park containing the monument display at issue in Pleasant Grove “are often closely identified in the public mind with the government unit that owns the land.” *Id.* at 1133. This finding was bolstered by the fact that the monument display was permanent, which the Court found to have created a strong and lasting association with the City, the owner of the park containing the monument. *Id.*

With respect to the second prong, “effective control,” the Court recognized that though private donors at one point owned the monuments, the government obtained effective control over the monuments since “[a]ll rights previously possessed by the monument’s donor [had] been relinquished.” *Id.* at 1134. Thus, the Court found that the City “took ownership of that monument and put it on permanent display in a park that it owns and manages and that is linked to the City’s identity,” a “dramatic form of adoption” that made it clear to the public that

the monument display was a message by the government, in a forum controlled by it, and as a result, government speech. *Id.*

The Supreme Court's emphasis on government control of the content of the expression at issue was an outgrowth of its detailed treatment of the government speech doctrine in *Johanns v. Livestock Mktg. Ass'n*. In *Johanns*, the Supreme Court held that the government's sponsoring of beef promotional advertising did not implicate the First Amendment just because private entities were involved in developing the government's messages. 544 U.S. at 569. The Supreme Court drew a clear line about the kind of control the government must exercise to qualify under the government speech doctrine: "When, as here, the government ***sets the overall message to be communicated and approves every word that is disseminated***, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages." *Id.* at 562 (emphasis added).

Under both *Johanns* and *Pleasant Grove*, the Ordinance fails to constitute government speech, as the regulated speech neither had the effect of conveying a City-sponsored message nor was it "effectively controlled" by the City.

B. Pleasant Grove Makes Clear That The Government Speech Doctrine Does Not Apply To Private, Transitory Speech In A Public Forum.

The Supreme Court has long defended the principle that public streets and parks have “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 local questions.” *Perry*, 460 U.S. at 45. “In order to preserve this freedom, government entities are strictly limited in their ability to regulate private speech in such ‘traditional public fora.’” *Pleasant Grove*, 129 S. Ct. at 1132 (quoting *Cornelius*, 473 U.S. at 800).

Pleasant Grove turned, in part, on the permanence of the monument display at issue, as this permanent display on a government park would be viewed by the public as a clearly conveyed message by the government about the City’s history. *Id.* at 1134. The Supreme Court held that while a park could accommodate “a very large number of orators,” it would be “hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression.” *Id.* at 1137. *Accord People for the Ethical Treatment of Animals, Inc. v. Gittens* 414 F.3d 23, 28 (D.C. Cir. 2005) (stating that the government speech doctrine would not apply where “a private organization is planning a parade and the permitting authorities restrict the points of view the organization may express.”). Thus, although the Pleasant Grove park

was a public forum, the monuments in the park were found to be government speech because they constituted a “dramatic form of adoption” of a particular message by the City on account of their permanent occupancy of space within the park. *Pleasant Grove*, 129 S. Ct. at 1134.

Processions are different. Unlike the monument display in *Pleasant Grove*, privately-organized processions in the public streets of San Antonio do not permanently occupy those streets or create a strong association with any government message in the minds of the public. *See id.* Indeed, a finding to the contrary would effectively eviscerate the historic importance of expressive techniques like processions and parades to express often contentious or controversial viewpoints. Therefore, traditional public forum principles, and not the government speech doctrine, must apply to transitory forms of expression, such as the processions at issue in this case. *See id.* at 1137. The District Court’s failure to apply public forum principles was error.

C. Lower Courts Applying *Pleasant Grove* Have Illustrated That Government Speech Cannot Supplant A Public Forum.

Courts applying *Pleasant Grove* have been careful to stay within the boundaries articulated in that case, limiting government speech only to those instances where the government exercised direct control over the forum at issue and was closely associated with it. In no case applying *Pleasant Grove* has the

government speech doctrine been found to subsume a private activity in a traditional public forum, such as the public streets of San Antonio.

For example, in *Sutcliffe v. Epping School District*, No. 08-2587, 2009 WL 2973115 (1st Cir. Sept. 17, 2009), the First Circuit applied *Pleasant Grove* in finding that the town of Epping was not required to add a hyperlink on the town's website to the plaintiff advocacy group's website. *Id.* at *18. The Court reasoned that the town's website was government speech under *Pleasant Grove* since the town-operated website was closely associated with the town itself, and controlled by it, as it conveyed "information about [the town]...and ...a limited number of hyperlinks to external sites, approved by the Board of Selectmen..." *Id.* at *17.³

Green v. Haskell County Board of Commissioners, 568 F.3d 784 (10th Cir. 2009), similarly applied *Pleasant Grove* in finding that county approval of a private request to erect a monument of the Ten Commandments on the county courthouse lawn constituted government speech. *Id.* at 797 n.8. In so holding, the Tenth Circuit concluded that the placement of monuments on the lawn of the county courthouse was "simply not one of those 'situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech.'" *Id.* (quoting *Pleasant Grove*, 129 S. Ct. at 1132).

³ In reaching this conclusion, the First Circuit noted that "[t]he public forum doctrine is not a natural fit for the issues raised by this case" as it "first [arose] in the context of *streets and parks*." *Id.* at *16 (emphasis added).

Thus, in *Green and Sutcliffe*, government speech under *Pleasant Grove* was found where the forum at issue was closely associated with the state itself and where the state controlled the content of the speech in this forum.⁴

In contrast, the government speech doctrine has not been applied in fora not closely associated with the government.⁵ For example, in *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009), the Eighth Circuit determined that custom automotive license plates in the state of Missouri were private, not government speech, and could not be regulated by the state based on their content, despite the fact that the state maintained its licensing program and that Missouri license plates bear the state's seal. *See id.* at 863-64. The Eighth Circuit reached this conclusion by finding that the “primary purpose of Missouri’s specialty plate program is to allow private organizations to promote their messages and raise money and to allow private individuals to support those organizations and their messages,” and

⁴ *See also Ill. Dunesland Pres. Soc’y v. Ill. Dep’t of Natural Res.*, No. 09-1535, 2009 WL 3271194, *4-5 (7th Cir. Oct. 14, 2009) (concluding that the government did not have to include plaintiff’s pamphlet in a government-maintained magazine rack on a state-operated beach, relying, in part, on *Pleasant Grove*).

⁵ Other courts besides the Eighth Circuit in *Roach* have also focused on whether a reasonable observer would perceive the speech at issue to be by the government, as opposed to a private speaker. *Choose Life of Ill., Inc. v. White*, 547 F.3d 853, 856 (7th Cir. 2008) (assessing specialty license plate program by “focusing on the following inquiry: Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?”); *Pleasant Grove*, 129 S. Ct. at 1142 (Souter, J., concurring) (“[T]he best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige....”).

therefore a “reasonable and fully informed observer” would understand that the messages on the custom plates were private, not government speech. *Id.* at 867-68. Accordingly, the Eighth Circuit found the state’s discretionary review of the contents of specialty license plates was impermissible viewpoint discrimination. *Id.* at 871. Federal district courts applying *Pleasant Grove* have also rejected the government speech doctrine in the context of fora that were not clearly controlled by the government. *See, e.g., Liberty and Prosperity 1776, Inc. v. Corzine*, No. 08-2642 (JBS), 2009 WL 537049, *8 (D.N.J. Mar. 3, 2009) (rejecting government speech doctrine in the context of a town hall discussion with the governor of New Jersey); *Mobley v. Tarlini*, No. 09-815, 2009 WL 2096235 (E.D. Pa. July 15, 2009) (rejecting government speech doctrine in the context of a town council meeting).

These recent cases illustrate that the government speech doctrine under *Pleasant Grove* is to be applied narrowly, and only to fora that are both exclusively controlled by the government and closely associated with it. The appropriate analysis under *Pleasant Grove* is whether the forum *itself* is government controlled, not whether certain speech within a public forum is government speech. Put differently, the District Court’s decision does not conform with *Pleasant Grove* because no reasonable observer would consider the streets of San Antonio to be associated with the government, or the content of the Exempted Processions to be controlled by it. These threshold determinations preclude any finding that the

government speech doctrine applies to permit the Ordinance's viewpoint-based discrimination.

D. Other Circuits That Have Applied The Government Speech Doctrine Pre- And Post-*Pleasant Grove* Have Also Required Government Control Of The Content And Forum.

Both pre- and post- *Pleasant Grove*, many federal courts of appeals have adopted a government speech formulation that is instructive. The Fourth Circuit articulated a government speech doctrine that consisted of a non-exhaustive list of four factors based on the Supreme Court's formulation of the doctrine in *Johanns*, and that was later adopted by courts in the Eighth and Ninth Circuits post-*Johanns* as well. See, e.g., *Roach v. Stoaffer*, 560 F.3d 860 (9th Cir. 2009); *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008). The four factors are: "(1) the central 'purpose' of the program in which the speech in question occurs; (2) the degree of 'editorial control' exercised by the government or private entities over the content of the speech; (3) the identity of the 'literal speaker' and (4) whether the government or the private entity bears the 'ultimate responsibility' for the content of the speech." *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618, 622 (4th Cir. 2002).

In *Arizona Life Coalition, Inc. v. Stanton*, the Ninth Circuit adopted the four-factor test to hold that the Arizona License Plate Commission's "de minimis editorial control over the plate design and color [did] not support a finding that the

messages conveyed by the organization constitute government speech.” 515 F.3d at 966. Evidence of the fact that the government lacks control over the content of the plate is the fact that “the statutory requirements address[ed] who may speak, not what they may say.” *Id. Roach v. Stouffer*, discussed above, was a post-*Pleasant Grove* case that applied a similar four-factor test with a similar result. *Roach*, 560 F.3d at 868. *See also Sons of Confederate Veterans*, 288 F.3d at 618, 622 (holding that regulation of logos on license plates was impermissible viewpoint discrimination of private speech); *Turner v. City Council of the City of Fredericksburg, Va.*, 534 F.3d 352, 354-55 (4th Cir. 2008) (applying the four factors to determine that legislative prayer was speech attributable to the government as opposed to speech given in a personal capacity).

Where the central purpose of the procession is expressive activity in a public forum, where the “literal speakers” are the permit holders and not the City, and where the City maintains control only over who may speak and when, and not the content of the speech, all four factors weigh decisively in favor of categorizing the processions as private speech.

E. The Exempted Processions Are Not Effectively Controlled By The City Of San Antonio And Are Therefore Not Government Speech.

The plain language of the Ordinance demonstrates that the City has no control over the *content* of the Exempted Processions’ message; rather, it only has control over *who* may speak free of the bulk of the Ordinance’s cost restrictions—

three processions with “broad appeal, historic tradition, cultural significance, and other public benefits.” R. 645-46 § 19-636(D). The Ordinance does not allow the City to supervise the Exempted Processions. And, the Ordinance only authorizes permit applications by *private* parties who are charged fees. R. 640 § 19-631. Thus, the City has not usurped control of the Exempted Processions, but rather has singled them out for a financial subsidy that other private processions do not receive. This kind of “de minimis” control, also found in the *Arizona Life Coalition* license plate case, hardly establishes that the government wields any control over the message of the speech; thus, there is no question that the government is not the speaker. *See Arizona Life Coalition*, 515 F.3d at 616.

Preferential subsidies for independently derived *private* speech based on content is not the same as government speech. The Exempted Processions do not “convey and have the effect of conveying a government message” like a permanent monument display in Pleasant Grove park or government-controlled message regarding beef consumption. *See Pleasant Grove*, 129 S. Ct. at 1134. This is because the “message” that must be analyzed is not the few processions the City favors, but every procession that is the subject of the Ordinance’s discriminatory classification scheme, meaning any other procession through San Antonio’s streets. The public would simply not associate the privately organized Diez y Seis, Martin

Luther King, Jr., or Veteran's Day parades – as opposed to every other private procession through the City's streets – with the City of San Antonio.

Neither does the City have “final approval authority” over the content of the private processions the Ordinance regulates. The Ordinance indicates only that the City pays for the costs associated with traffic control personnel and traffic control devices, and allows subsidies for certain favored groups. R. 645-46 § 19-636(D). Unlike in *Johanns*, where the record demonstrated that “the Secretary exercise[d] final approval authority over every word used in every promotional campaign,” or in *Pleasant Grove*, where the “City took ownership of the monument and put it on permanent display in a park that it owns and manages,” the City has provided no factual basis to demonstrate that it exercises control over the three Exempted Processions other than generally agreeing with the message that is being conveyed and regulating who may speak. *See Johanns*, 544 U.S. at 561; *Pleasant Grove*, 129 S. Ct. at 1134; R. 645-46 § 19-636(D). This is impermissible viewpoint discrimination in a traditional public forum, not government speech.

F. The Government Speech Cases On Which The District Court Relied Are Inapplicable To The Ordinance.

The District Court's finding that the City properly exempted the favored processions was premised on its conclusion that the government speech doctrine applied to the Ordinance. However, the District Court relied on cases—*Rust v. Sullivan*, 500 U.S. 173 (1991) and *Regan v. Taxation with Representation of*

Washington, 461 U.S. 540 (1983)—that are simply inapplicable to viewpoint-based restrictions on speech in a public forum. An examination of these two cases underscores how they differ from *Pleasant Grove* and *Johanns*, which articulate the appropriate boundaries of government speech against which to test the City’s Ordinance.

In *Rust*, the Supreme Court determined that a federal family planning program that prohibited doctors from counseling patients about abortion did not violate the doctors’ First Amendment rights. 500 U.S. 173 (1991). Congress had established program clinics that provided subsidies for doctors to advise patients on a variety of family planning activities, but forbade doctors employed by the program from discussing abortion, a topic Congress considered to be outside the scope of family planning. *Id.* at 179-80. Funding recipients argued that the regulations amounted to impermissible viewpoint discrimination since the funding scheme favored an anti-abortion viewpoint over a pro-abortion viewpoint. *Id.* at 192. The Supreme Court held that no viewpoint discrimination had taken place, but rather, the government had “merely chosen to fund one activity to the exclusion of the other.” *Id.* at 193.

Rust is easily distinguishable from the case at hand because the speech took place exclusively in the context of a government-funded program and therefore constituted government speech. When government speech is at issue, “viewpoint-

based funding decisions can be sustained.” *Velazquez*, 531 U.S. at 541. At issue in *Rust* was purely government speech uttered within the scope of a government-funded program. *See Rust*, 500 U.S. at 196; *see also Velazquez*, 531 U.S. at 541 (clarifying that the *Rust* Court applied the government speech doctrine). Since the government funded the program, and the government was clearly trying to convey its own message, the government had the right to limit the doctors’ speech. The San Antonio Ordinance is different because it regulates *all* private processions in traditional public fora.

Regan v. Taxation with Representation of Washington is inapposite as well. 461 U.S. at 543-44. In *Regan*, the Supreme Court upheld an internal revenue statute that granted tax exemption for certain nonprofit organizations that did not engage in substantial lobbying activities. Internal revenue statute section 501(c)(3) granted tax-exempt organizations a subsidy by allowing them to accept tax-deductible contributions, but also prohibited them from using that subsidy to fund lobbying activities. The organizations were free, however, to express their views and get the tax subsidy by returning to a “dual structure,” and separately incorporated tax-exempt arms of their organizations could continue with separately funded lobbying activities under Section 501(c)(4). *Id.* at 544, 548. In reaching this conclusion, the Supreme Court noted that tax code classifications presented a special case, and that “[l]egislatures have especially broad latitude in creating

classifications and distinctions in tax statutes.” *Id.* at 547, 548 (citing *Madden v. Ky.*, 309 U.S. 83, 87-88 (1940)).

By analogizing this case to *Regan*, the District Court tried to characterize the Ordinance as a means by which the City simply decided not to pay a subsidy, stating that the “assessment of costs is no more a ‘restriction’ than the taxes complained of by the Plaintiff in *Regan*.” R. 567, n. 45. The District Court found that a government decision to tax lobbying activity was no different than the City’s decision to require payment of traffic control and clean-up services for every procession but the Exempted Processions. *Id.*

The Court erred in analogizing the City’s Ordinance to the tax restrictions in *Regan*. Not only was the First Amendment not even implicated in *Regan*, but unlike the City Ordinance at issue here, the funding restrictions at issue in *Regan* were not based on the viewpoint of the lobbying. *Regan*, 461 U.S. at 548. Both the Supreme Court and the District Court in this case noted that “the case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas.” *Id.* See also R. 567. In fact, the District Court explicitly recognized that the *Regan* Court did not address “how it would approach a situation where the government took content or viewpoint into consideration when subsidizing non-governmental speech.” *Id.* Since the

viewpoint-based regulations like those at issue here are not addressed in *Regan*, the District Court erred in relying on that decision.

Moreover, there was no speech or comparable forum for speech at issue in *Regan*. The regulation at issue was a federal tax code – something that the Court recognized clearly did not infringe upon any First Amendment rights or even “regulate[] any First Amendment activity.” *Regan*, 461 U.S. at 548. The organization of non-content based tax classifications in the exercise of the federal government’s constitutional power to tax and spend is a far cry from the elevation of three particular privately-sponsored processions over all others in the streets of San Antonio.

II. THE ORDINANCE DISCRIMINATES AMONG PERMIT APPLICANTS ON THE BASIS OF THE VIEWPOINT THEY WOULD EXPRESS.

The Ordinance discriminates in the imposition of costs on permit applicants based on the viewpoint of their processions by (1) waiving costs for those few viewpoints that the City has decided to favor, and (2) passing the costs of clean-up and traffic control onto other permit holders, a decision that necessarily varies with the viewpoint of the speaker. *See Forsyth Cty., Ga. V. Nationalist Movement*, 505 U.S. 123, 134 (1992). The Ordinance allowances for the Exempted Processions clearly constitute forbidden viewpoint-based regulations in a traditional public forum. *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 325 (2002). The Supreme Court

specifically held that granting waivers to favored speakers is unconstitutional. *Id.*

The Equal Protection Clause also forbids viewpoint discrimination. In *Police Department of Chicago v. Mosley*, the Supreme Court held that the neither the First Amendment nor the Equal Protection Clause allow the government to “grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.” 408 U.S. at 96. “Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they have to say.” *Id.*

A. The Ordinance’s Exemption Of Certain Processions Is Based On Viewpoint.

The Ordinance’s preferential exemption of traffic control costs is based on the City’s admitted assessment of the “broad appeal, historic tradition, or cultural significance” of the Deiz y Seis Parade, as well as the “association with a national holiday or a day given statewide recognition” for the Martin Luther King, Jr., and Veteran’s Day Parade. R. 645-46 § 19-636(D). This express preference for three processions is plainly based on the City’s assessment of the content of the processions, and the City’s conclusion that this viewpoint has mass appeal and is historically significant. This mode of preferring certain Exempted Processions requires the City to pass on to other permit holders traffic control and traffic personnel costs based on the viewpoint of the speech at issue. The City therefore

ends up passing costs off only to those forms of speech that the City does not deem to have qualities such as “broad appeal, historic tradition, or cultural significance.”

Id. The scope of the non-qualifying speech is broad indeed, encompassing popular and unpopular speech alike.

Preferential treatment of the selected processions does not survive the strict scrutiny applied to such viewpoint-based restrictions in traditional public fora. In a traditional forum such as public parks, which have “immemorially ... been held in trust for the use of the public” to express themselves, a City may not discriminate amongst which viewpoints are allowed access. *Perry*, 460 U.S. at 45. Although the City can “regulate competing uses of public forums,” content- and viewpoint-based restrictions on speech are rigorously scrutinized. *Forsyth*, 505 U.S. at 130. “When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.” *Carey v. Brown*, 447 U.S. 455, 461-62 (1980). Providing waivers of cost for the Exempt Processions is not a narrowly tailored means of achieving the Ordinance’s stated public goal of achieving “a safe, organized system of granting access to the public streets, to ensure that at least a portion of the costs the City pays for assisting with public processions is recouped.” R. 571.

The District Court has impliedly agreed with this conclusion, using the government speech exception to trump what is clearly viewpoint-based regulation of private speech. *See* R. 566, quoting *Velazquez*, 531 U.S. at 541 (stating that viewpoint-based regulation of speech is generally unconstitutional, but may be sustained if government speech is at issue). Since government speech is not at issue, viewpoint-based discrimination cannot be sustained.

B. Viewpoint-Based Subsidies Are Impermissible.

The District Court incorrectly stated that its “decision to favor the selected events more than the City already favors other events in no way disadvantages other events, which have no claim to any subsidization in the first place.” R. 572; *Regan*, 461 U.S. at 550. However, the issue is not whether the government must subsidize speech, but rather whether the government can impose greater restrictions on expression in a traditional public forum based on its disagreement with, or lack of support for, the content and viewpoint expressed. The answer is clearly no.

The situation at issue in this case is more akin to the scenario in *Rosenberger v. Rector and Visitors of University of Virginia*. 515 U.S. 819 (1995). In *Rosenberger*, the Supreme Court held that “[i]t does not follow ... that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage

a diversity of views from private speakers.” *Id.* at 834. The Ordinance, like the program in *Rosenberger*, is “designed to facilitate private speech, not to promote a governmental message.” *Velazquez*, 531 U.S. at 542.

III. CONCLUSION

To let stand the government speech rationale invoked by the District Court would have a particularly perverse result. The City concedes—as it must—that it cannot control the viewpoint of speech on the streets of San Antonio, that most traditional of public fora. Yet, the City can justify the ordinance at issue through the government speech doctrine *only* if it has the ability to exercise that type of control. The streets of San Antonio are not the equivalent of a monument display maintained by the government (*Pleasant Grove*), a comprehensive government-funded family planning program (*Rust*), or a federal tax code that does not make content-based funding decisions (*Regan*). Because it does not “control the message” of procession organizers on its streets, the City cannot invoke the government speech doctrine to grant privileged access to those streets on the basis of speakers’ viewpoints. For this reason, *amicus* respectfully requests that this Court reverse the District Court’s order granting summary judgment for the City.

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**CERTIFICATE REGARDING
FED. R. APP. P. 32(a) AND 5TH CIR. R. 32.3**

I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,029 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Times New Roman type — a proportionally spaced typeface — using Microsoft Word 2003.

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Date: October 28, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October 2009, I caused to be served by overnight Federal Express, two bound paper copies and one CD containing an electronic copy of the foregoing “Brief of the American Civil Liberties Union Foundation of Texas as *Amicus Curiae* in Support of Plaintiffs-Appellants” to each of the following addresses:

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