

**NO. 09-50692**

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

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**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.

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On Appeal from the United States District Court  
for the Western District of Texas, San Antonio Division  
U.S.D.C. No. 07-CV-971

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**BRIEF OF APPELLANTS,  
INTERNATIONAL WOMEN'S DAY MARCH PLANNING COMMITTEE  
and SAN ANTONIO FREE SPEECH COALITION**

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Coalition

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**ORAL ARGUMENT REQUESTED**

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons 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.

### **A. Parties:**

Plaintiffs-Appellants: International Women's Day March Planning Committee  
San Antonio Free Speech Coalition

Defendant-Appellee: City of San Antonio, Texas

Individual Defendants, voluntarily dismissed early in the case:  
Phil Hardberger, Former Mayor of San Antonio  
Sheryl L. Sculley, City Manager of San Antonio  
William P. McManus, Chief of Police of San Antonio  
Ten Individual Council Members

### **B. Attorneys:**

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/s/ Amy Kastely  
Amy Kastely

## STATEMENT REGARDING ORAL ARGUMENT

This case involves a somewhat complex history and raises quite significant First Amendment issues. Last year, prior to the Supreme Court's decision in *Pleasant Grove, Utah v. Summum*, 129 Sup. Ct. 1125 (2009), the District Court ruled that the government speech doctrine should apply to remove the City's content-based waivers of permit-related charges from scrutiny under the First Amendment. On the City's Motion for Summary Judgment, made after *Pleasant Grove* was decided, the District Court declined to reexamine its government speech analysis, and entered summary judgment for the City on this basis.

International Women's Day March & Coalition believe that oral argument would be helpful to the Court clarifying the background to the case and the somewhat peculiar posture of the case.

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## **STATEMENT OF JURISDICTION**

The International Women's Day March Planning Committee and the San Antonio Free Speech Coalition appeal the final decision of the Western District of Texas, San Antonio Division, dated June 30, 2009, granting summary judgment for the City of San Antonio on all claims. This Court has jurisdiction pursuant to Title 28 U.S.C. §1291.

International Women's Day March Planning Committee and the San Antonio Free Speech Coalition filed a Notice of Appeal on July 27, 2009.



## STATEMENT OF ISSUES

**Issue One:** Whether, under the Supreme Court’s recent decision in *Pleasant Grove v. Summum*, 129 S.Ct. 1125 (2009), a City may impose a requirement that Parade Permit holders pay for all City-ordered police, clean-up, and rentals; waive those charges for fifteen to thirty events whose message the City likes and wants to promote; and then escape application of the First Amendment by describing the favored events as “government speech.”

**Issue Two:** Whether the summary judgment record contains sufficient evidence to permit a reasonable trier of fact to find for International Women’s Day March & Coalition on those elements within their burden of proof and to raise genuine issues of material fact on elements within the City’s burden of proof on the claim that the City’s Parade Ordinance and policies constitutes an unreasonable prior restraint.

**Issue Three:** Whether the District Court erred in finding that a Parade Permit process in which the City Council reserves for itself unlimited discretion to waive Parade Permit charges is permissible under the First Amendment.

## STATEMENT OF THE CASE

### *A. Course of Proceedings and Disposition in the District Court*

Plaintiffs/Appellants, the International Women's Day March and Planning Committee and the San Antonio Free Speech Coalition (hereinafter collectively referenced as "International Women's Day March & Coalition"), filed this case on November 29, 2007 as a facial and as-applied challenge to the City of San Antonio's Parade Ordinance and policies.

The Original Complaint was brought against the City and thirteen individual city officials, all of whom were sued in their official capacities. The thirteen individual city officials were voluntarily dismissed on January 14, 2008. Although the Notice of Appeal named only the City of San Antonio as Appellee, the record was submitted to this Court with all thirteen defendants and Appellants have conformed to that style.

The lawsuit seeks permanent injunctive relief against application of one aspect of the City of San Antonio's Parade Ordinance and policies: the process in which some, but not all, parade permit holders are required to pay for police services, clean-up services, and traffic control device rentals ordered by the City in connection with the permitted event. The International Women's Day March, planned for March 8, 2008, could not afford to pay for the City-ordered services

and rentals (estimated at four-thousand to eight-thousand dollars) yet was too large (estimated at 1200 participants) to risk proceeding without a Parade Permit.

The Original and Amended Complaints allege four grounds for permanent injunctive relief under the First and Fourteenth Amendments to the U.S. Constitution: (1) the City's Parade Ordinance and policies establish impermissible viewpoint-based restrictions on speech; (2) the City's Parade Permitting Ordinances vest unduly broad discretion in the Police Department and the City Council; (3) the City's Parade Permitting Ordinances impose burdensome cost requirements on organizers without providing an adequate alternative forum or a waiver for indigent organizers; and (4) the City's Parade Ordinance establish different requirements for "First Amendment" versus "Non-First Amendment" processions, without providing any meaningful definitions to distinguish the two, rendering the Ordinances both vague and overbroad.

Following a hearing, the District Court Preliminarily enjoined the City from imposing charges for City-ordered services and rentals as a condition for issuance of a Parade Permit. The District Court's Order found that the International Women's Day March & Coalition had shown a likelihood of success on several of their claims and not on others.

On June 28, 2008, the City moved for dissolution of the Preliminary Injunction on the basis of various amendments to the City Parade Ordinance in

March 2008. On October 2, 2008, the City moved for Summary Judgment on the same basis. Without ruling on these motions, the District Court set the case for trial on January 26, 2009 and held a pre-trial conference on January 15, 2009.

At the pre-trial conference, District Judge Xavier Rodriguez announced that he had decided to recuse himself from the case and shortly thereafter, the case was reassigned to District Judge Fred Biery, who cancelled the trial date and indicated that he would not set the case for trial until he had decided all pending motions.

The International Women's Day March & Coalition then moved for leave to supplement its Response to the City's Motion for Summary Judgment with evidence produced by the City in its pre-trial disclosures. On March 31, 2009, the District Court granted the City's Motion to Dissolve the Preliminary Injunction.

On May 11, 2009, the International Women's Day March & Coalition filed an Advisory informing the Court of the U.S. Supreme Court's recent decision analyzing the application of the government speech doctrine in traditional public fora, *Sumnum v. Pleasant Grove, Utah*, 129 Sup. Ct. 1125 (February 25, 2009). On June 30, 2009, the District Court denied International Women's Day March & Coalition's Motion to Supplement, granted summary judgment for the City, and dismissed the case in its entirety.

The District Court did not explain this decision other than to say that it was "[b]ased on the arguments and authorities contained in the Defendant's Motion for

Summary Judgment and Reply and this Court's findings in its March 31 Order.”  
The International Women’s Day March & Coalition filed their Notice of Appeal on July 27, 2009.

***B. Statement of Facts***

***1. Background to the Current Ordinances***

In 2006 and early 2007, two large Immigration Rights Marches were held in San Antonio to protest proposals in the U.S. Congress to criminalize undocumented immigrants and all who care for them. Participants numbered between 20,000 and 30,000. Neither event could obtain a Parade Permit, because the organizers could not afford to pay charges that were estimated to be well more than \$10,000. Efforts by the SAPD to hold someone responsible for these unpermitted events failed. In the months following these marches, representatives from the SAPD and City staff undertook to strengthen the City Parade Ordinance and permit polices. (R. 2312 ¶9)

***2. The March 2007 Proposal***

On March 1, 2007, the SAPD presented a Request for Council Action seeking enactment of a revised Parade Ordinance (R. 2183). In meetings with individual City Council Members, an Assistant City Manager and representatives of the SAPD explained that the proposal was generated by a review of the City's parade

permitting policies and practices following the Immigration Rights Marches of 2006. (R. 2312 ¶6) This proposal included:

- a. Repeal of the exemption of parades "of a political nature" from cost-shifting fees;
- b. Increase the scope of liability from an "intentional" violation of the Ordinance (which presumably would reach only to the organizers of a march) to anyone found to "engage in, participate in, aid, organize, promote, form or start, or cause or allow the same to be done for any procession without having first obtained a procession permit;"
- c. Increase the maximum penalty for liability from \$500 to \$2,000;
- d. Exemption for the following events from some or all City-ordered services and rentals fees: (1) the 60+ Mardi Gras Parade; (2) the San Fernando Good Friday Procession; (3) the Diez y Seis Parade; (4) the San Antonio Marathon; (5) the Veterans Day Parade; and (6) the Martin Luther King March; and
- e. The requirement that all permit applicants provide insurance in the amount of \$1 million.

The Request for Council Action accompanying this proposal, did not state any reason for these changes other than to continue regular review of City operations "to ensure public safety." The Request for Council Action states that there will be no fiscal impact from the changes. (R. 2329)

### ***3. The November 2007 and March 2008 Ordinances***

On November 29, 2007, the San Antonio City Council adopted Ordinance No. 2007-11-29-1193 (R. 2201) regarding marches and parades on public streets and sidewalks (hereinafter "2007 Parade Ordinance"). This Ordinance is different from

the March 1, 2007 proposal, but like that proposal, the November 29<sup>th</sup> Ordinance repeals the exemption of parades “of a political nature” from cost-shifting fees. In its place, the Ordinance provides that the City will “absorb” \$3,000 of the costs of traffic control personnel and devices for "First Amendment events." (R. 2214 ¶6)

On March 13, 2008, following the District Court's entry of a Preliminary Injunction in this case, the City Council enacted Ordinance No. 2008-03-13-0201, an amended version of the 2007 Parade Ordinance (hereinafter "2008 Parade Ordinance"). (R. 2214)

The 2008 Parade Ordinance directs the Chief of Police to create a Standard Operating Procedure for issuance of permits and assessments of traffic control costs. (R.2214 §19-636) On June 23, 2008, the Chief of Police approved Procedure 214: Processions (Parades, Runs, Walks, and Cycling Events) (hereinafter "SAPD Procedure 214"). ( R. 649)

#### ***4. The Current Parade Permit Process***

Parade Permits are issued by the SAPD. To obtain a permit, someone involved with the event organizing generally must meet with the SAPD Permit Officer and explain to him the purpose of the event, the number of expected participants, the number of expected vehicles and/or animals, and the proposed route, day, and time of the event. (R. 2948) The Permit Officer then compiles and prints an “Application for Procession Permit” for the representative to sign. Some,

but not all, of the application forms include a statement in which the applicant commits himself or herself to pay all on-duty and overtime wages for police officers that the City assigns to the procession and to pay all rental fees for whatever traffic control devices that the City orders.

The commitment to pay is omitted from the Permit Applications for those processions conveying a message which the City approves and wants to promote. .After determining that a proposed procession is not among those that have the City's endorsement, the SAPD Permit Officer must decide whether the proposed procession is a "First Amendment Procession," or a "Non-First Amendment Procession." To do this, the Permit Officer must work through the following definitions from section 19-630 of the 2008 Parade Ordinance: (R. 2214)

"Procession" shall mean a group of persons moving along, by whatever means, in an orderly, formal manner on any street, alley, or public thoroughfare from a point of origin to a point of termination or a group of persons moving along, by whatever means, in an orderly, formal manner anywhere else in the city from a point of origin to a point of termination in such a way as to impede the normal flow or regulation of pedestrian or vehicular traffic.

"Procession Permit" shall mean the procession permit required by this article.

"First Amendment Activity" shall mean 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.

"First Amendment Procession" shall mean a procession, the sole or principal object of which is First Amendment activity.

"Non-First Amendment Procession" shall mean a procession the sole or principal object of which is not First Amendment activity.

If the Permit Officer decides that the planned procession is “a Non-First Amendment procession,” then the following requirements apply: (1) the permit application must be signed at least 45 days prior to the procession date; (2) the organizer must submit a certificate of insurance for the procession, naming the City as beneficiary and covering liability of up to one million dollars; and (3) the organizer must give notice of the procession to all residences and businesses along the route. If the procession is categorized as a “First Amendment procession,” then (1) the application may be signed up to two days before the procession; (2) insurance is not required but the City and the Permit Officer will “recommend and encourage” it, (3) notification to residences and businesses is “recommended” but not required; and (4) the City will “absorb” the first \$3000 of the traffic control devices and traffic control personnel costs on behalf of the permit holder. (R. 2214 §19-636)

At some point during this or a subsequent meeting, the Permit Officer may prepare a written estimate of the number of on-duty and overtime police officers the City will require and an estimate of the cost the applicant will have to pay if the procession does occur. The City’s records suggest that this is an extremely malleable amount.

Perhaps the most striking example of this in the summary judgment record involves an Immigration March that occurred on Thursday October 12, 2006, from

4 pm to 8 pm. See (R. 941 ¶6) The Permit Officer Meeting was held, the application was signed, SAPD determined that 54 police officers were needed for the event, and the applicant was given a cost estimate of \$9,091. That application was denied because the applicant had outstanding fees owed to the SAPD. Eight days later, a second application was submitted by a different organizer for the exact same date, time, and route. Without explanation, this applicant was told that 24 officers would be needed, and was given an estimate of \$3305.

If the individual does not sign these documents, the application is deemed withdrawn and no record is kept. For the 2008 International Women's Day March, the charges for these services and rentals totaled more than \$6,000. (R. 2678)

### **SUMMARY OF THE ARGUMENT**

All of the issues on this appeal for an order of summary judgment are subject to the Court of Appeals' de novo review

The summary judgment record indeed, the City's Parade Ordinance itself, contains clear evidence of the City's determined policy to favor those processions whose message the City endorses, while imposing costly requirements on other potential permit applicants. The International Women's Day March and Coalition have clearly satisfied their burden of proof on this claim.

What is in dispute is whether the summary judgment record is sufficient to satisfy the City's burden of proof in establishing that the City's policy of waiving

charges and providing free access to the public forum while erecting barriers to all others, can escape First Amendment scrutiny as “government speech.”

International Women’s day March & Coalition has satisfied its burden of proof on their claims of unreasonable prior restraint and has shown genuine issues of material fact regarding whether the challenged charges are narrowly tailored to serve a significant governmental interest. In addition, the summary judgment record reveals genuine issues of material fact concerning alternatives to street marches and whether the City Parade Ordinance and policies sufficiently curtail the discretion of City officials as to avoid the risk of content-based determinations.

## ARGUMENT AND AUTHORITIES

### A. *Standard of Review Applicable to all Issues on Appeal*

Each of the issues presented by this appeal is subject to the Court of Appeals' de novo review of an order of summary judgment, under which the Court of Appeals applies the same legal standards applicable in the district court. *Knowles v. City of Waco, Tex.*, 462 F.3d 430, 433 (5th Cir. 2006). Summary judgment is appropriate only when the record discloses that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed R. Civ. P. 56(c).

To establish that there are one or more genuine issues of material fact regarding an issue as to which the non-movant would have the burden at trial, the non-movant must identify evidence in the summary judgment record that would be sufficient to allow a reasonable trier of fact to find for the non-movant on each element for which the non-movant carries the burden of proof. *Celotex v. Catrett*, 477 U.S. 317, 325 (1986). And to establish that there are one or more genuine issues of material fact regarding a matter that would be within the movant's burden of proof at trial, the non-movant must show either (1) that the movant has not identified sufficient summary judgment evidence to meet his or her burden on this

matter or (2) that there is summary judgment evidence that disputes the movant's evidence on that matter.

In making this evaluation, the Court must consider all of the summary judgment evidence identified by the non-movant as credible, must draw all reasonable inferences in favor of the non-moving party, must evaluate the evidence in the light most favorable to the non-moving party, and may not weigh the persuasive value of conflicting evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Ramirez v. City of San Antonio*, 312 F.3d 178, 181 (5th Cir. 2002).

***B. The District Court Erred in Granting Summary Judgment for the City on the Claim of Viewpoint-Discrimination.***

In 1937, with the nation in economic crisis and families devastated by unemployment, some spoke of the greed of corporate leaders and the excesses of wealth that had thrown working people to the streets. Knowing that these ideas lacked broad appeal to the people of Jersey City, the Mayor and Council prohibited leafleting in the public streets and gatherings in the parks without the approval of a City official. Later, the Mayor justified his actions: these ideas are not the sort of thing we want to promote, and the City government, which owns the streets and parks, doesn't have to let people use it for things we don't like. The Mayor's frankness amused everyone in the courtroom except his own attorneys.

This is the case that occasioned Justice Roberts' oft-quoted words:

Wherever the title of streets and parks may rest, they 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 questions. ... The privilege...to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

*Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939). Today as in the past, the right to use public streets, sidewalks, and parks for purposes of assembly, communication among residents, and discussion of pressing local, nation, and global urgency is crucial to an aspiring democracy.

The City of San Antonio has done nothing so egregious as Jersey City. Yet the City's frankness has been surprising to some. Proclaiming the right to express and promote its own opinions, the City admits to waiving what amounted to 94% of the charges that procession permit holders would otherwise have to pay under the Procession Ordinance as a form of government speech, immune from scrutiny under the First Amendment.

These are the facts that gave rise to the International Women's Day March & Coalition's claim of viewpoint discrimination.

**1. *The elements of this claim***

The First Amendment forbids content- or viewpoint-based discrimination in the regulation of a traditional public forum. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939). *Thomas v. Chicago Park District*, 534 U.S. 316, 325 (2002) ("Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional."). Viewpoint discrimination also violates the Equal Protection Clause. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (invalidating Chicago's ban on demonstrations near schools on Equal Protection grounds).

Viewpoint discrimination can take the form of targeting one side of a political conflict, as in *Hague*, or it can involve exclude an entire issue from the public forum, as in *Mosley*. Either way, the harm of viewpoint-based discrimination in a traditional public forum is great. As Justice Thurgood Marshall observed:

"To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship." *Id.* at 95-96. In *Mosley*, Chicago enacted an ordinance that prohibited pickets or demonstrations within 150 feet of a primary or high school with the exception of "peaceful picketing of any school involved in a labor dispute." Earl Mosley read about the ordinance in the newspaper and called the Police Department to see what effect it might have on the

peaceful campaign he had been conducting. For the past seven months, as frequently as he could, Mr. Mosley had picketed Jones Commercial High School in Chicago. "During school hours and usually by himself, Mosley would walk the public sidewalk adjoining the school, carrying a sign that read: 'Jones High School practices black discrimination. Jones High School has a black quota.' His lonely crusade was always peaceful, orderly, and quiet, and was conceded to be so by the city of Chicago." *Id.* at 93. He was told he must stop. *Id.*

The injury of viewpoint discrimination is not merely that it chills speech and deprives Mr. Mosley of the opportunity to express his thoughts and inform his neighbors; it deprives all of us of important information about our communities and constructs an illusion of well-being. Drivers passing by Jones High School, neighbors, and the students themselves may now learn of a labor dispute at the school, but other problems would be left unnamed.

"Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not 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. And it may not select which issues are worth discussing or debating in public facilities." *Id.*

The elements of a claim of viewpoint discrimination in a public forum are (1) that the complainant seeks to engage in expression protected by the First

Amendment and (2) that the government is restricting or burdening that expression because of the content of the message or because of the views the speaker is assumed to have. Cf. *Rosenberger v. \** After evidence supporting these elements is presented, the burden of proof shifts to the government to show, under strict scrutiny, that the discrimination is necessary to some compelling governmental interest. *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) ("When government regulation discriminates among speech-related activities in a public forum the First Amendment mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized."); *Beckerman v. City of Tupelo, Miss.*, 664 F.2d 502, 511, 514 (5th Cir. 1981) ("Differential treatment of groups based on the content of their speech is established to be unconstitutional.").

***2. The summary judgment evidence does not support the entry of summary judgment for the City on viewpoint discrimination claim***

***a. International Women's Day March & Coalition have presented sufficient summary judgment evidence to satisfy their burden of proof on this claim.***

The Ordinance expressly exempts the Diez y Seis Parade from paying the otherwise mandatory costs of traffic control personnel because of its "broad appeal, historic tradition, cultural significance, and other public benefits," Ordinance §19-636(C). It also exempts the MLK March and Veterans Day Parade from paying the costs of both traffic control personnel and devices for the same reasons,

in addition to their "association with a national holiday or a day given statewide recognition." *Id.* Moreover, in her presentation to City Council on November 29, 2007, the Assistant City Manager told Council members that the Fiesta parades (approximately 10-12) and the Cesar Chavez March are also exempted from City-ordered services and rentals fees "because they have separate ordinances." (R. 2192)

A clearer example of viewpoint-based discrimination is difficult to imagine. Obviously, processions that address a subject, or express a viewpoint that is—in the City's judgment—not popular, of recent vintage, culturally insignificant, or otherwise publicly inadequate are significantly penalized because they must pay to parade while their more favored counterparts need not. Indeed, the City has repeatedly insisted that it can and does waive fees for some processions because of the City's agreement with the ideas, message, or popular appeal of those processions.

What is also clear in the City's Parade Ordinance and policies is that the City does believe in the value of active public space, of communication among residents, of community celebration. This is the difference between San Antonio and Jersey City. And on this point, the International Women's Day March Committee & Coalition certainly would agree with the City. The position of the International Women's Day March & Coalition is not that the City should stop

allowing ready access to the public forum for speakers with which it agrees, to the contrary, we believe that the First Amendment must require ready and responsible access for all. And to be clear, the International Women’s Day March & Coalition is not “demanding a handout” or wanting to “force the City to let them march around and around the City with a police escort.” What we ask is that all residents, all speakers be allowed responsible access.

***b. The City has not met its burden to prove that the viewpoint-based discrimination is necessary to some compelling governmental interest.***

Granting favorable treatment to the privately organized Diez y Seis Parade, MLK March, the Veterans Day Parade, the 12 different Fiesta-related parades, the Cesar Chavez March, the 60+ Mardi Gras Parade, and however many others the City Council decides to favor in the future, is not tailored, narrowly or otherwise, to serving the City's stated interests in maintaining public order or recouping its expenditures on controlling traffic during and cleaning up after processions. The only justifications the City identifies for its favoritism—the events' popularity, historic and cultural content, and association with federal or local holidays are based on the content of the processions, and therefore are constitutionally insufficient. *See Mosely*, 408 U.S. at 96

**3. *The City also has not met its burden for summary judgment under the Government Speech Doctrine.***

In arguments to the District Court, the City has characterized its practice of waiving parade permit fees for favored groups and messages as government speech, which is not subject to First Amendment review. The City claims that its decision to “sponsor” some parades and to “subsidize” these events by 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.”

In his Order of February 21, 2008, the District Court Judge Rodriguez identified the tension between the “government speech” doctrine, articulated in the line of cases stemming from *Rust v. Sullivan*, 500 U.S. 173 (1991) and *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001), and the “viewpoint discrimination” doctrine, developed in *Rosenberger v. Rector, Visitors of University of Virginia*, 515 U.S. 819 (1995) and its progeny. Framing the City’s practice of 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 District Court concluded that it was more like government speech and therefore was permissible content-based discrimination.

This ruling was made prior to the U.S. Supreme Court’s decision in *Pleasant Grove, Utah v. Summum*, 129 Sup. Ct. 1125 (February 25, 2009). Yet the District

Court relied of this ruling to enter summary judgment, in apparent conflict with the Supreme Court's clear directives regarding further expansion of the government speech doctrine into traditional public fora.

The Supreme Court warned that the government speech doctrine does not give the government "a free hand to regulate speech on ... public streets and parks," *Id.* at 1132. In particular, the Court indicated that the powerful label of "government speech" cannot attach to "transitory forms of expression," like "speeches, demonstrations, marches, and parades in public streets and parks," *id.* at 1129, 1137.

Finally, the Supreme Court made clear that that an expression is "government speech" only if (1) it is clearly understood by viewers or listeners to be a message from the government and (2) its message is directly determined and controlled by the government, *id.* at 1134.

The District Court gave no explanation why it chose not to follow the Supreme Court's strong suggestion, or why the City was not asked to at least present evidence sufficient to meet the test laid out by the Supreme Court.

***C. The District Court Erred in Granting Summary Judgment for the City on the Claim of Unreasonable Prior Restraints***

International Women's Day March & Coalition's Second Amended Complaint alleges that the City's Parade Permitting Process constitutes an improper prior restraint because it violates established Constitutional standards in three respects:

(1) its restrictions are not narrowly tailored to serve significant government interests; (2) the process does not leave ample and available alternative opportunities for speech assembly; and (3) the process grants unduly broad discretion to City officials to increase, reduce, or waive charges for City-ordered services and rentals.<sup>1</sup>

***1. The Elements of This Claim***

“Public streets a[re] the archetype of a traditional public forum’ and from ‘time out of mind ... have been used for public assembly and debate.’” *Knowles v. City of Waco, Tex.*, 462 F.3d 430, 433–34 (5th Cir. 2006) (quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)). For this reason, efforts by government to restrict or otherwise burden the use of public streets for political debate, community education, cultural expression, spiritual gathering, are “sharply circumscribed,” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) and carry a “heavy presumption” against validity. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

While the government does have the authority to mediate competing uses by regulating their time, place, and manner, that regulation is subject to careful

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<sup>1</sup> The Second Amended Complaint states these as two separate claims, (numbers two and three). In the interest of brevity, they are discussed here as one claim.

review. If the government restricts speech based on its content, then the regulation is presumed to be unconstitutional except in the rare case in which the government can prove that the restriction is “necessary” to a “compelling interest.” *Burson v. Freeman*, 504 U.S. 191, 198 (1992). If, instead, the regulation is “content-neutral,” then it will be upheld only if the restraint is “narrowly tailored” to serve a “significant” government interest. *United States v. Grace*, 461 U.S. 171, 177 (1983). In either case, the regulation must leave open “ample alternative channels of communication” *Ward v. Rock Against Racism*, 491 U.S. 781, 787 (1989), and it may not give City officials broad discretion to modify the restrictions in individual cases, because there is too great a risk that an official will exercise his or her discretion to benefit favored speech and to further burden disfavored speech. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-133 (1992).

To establish that there are genuine material issues of fact and that the City is not entitled to summary judgment on their prior restraint claims, International Women’s Day March & Coalition must present sufficient evidence to permit a reasonable trier of fact to find (1) that the plaintiffs are seeking to engage in speech and/or assembly that is protected by the First Amendment and (2) that the challenged law or policy does burden or restrain protected speech and/or assembly. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984) (“[T]o place the burden upon the Government to justify impingements on First

Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies”); *Celotex v. Catrett*, 477 U.S. 317, 325 (1986).

These are the only two elements of this claim that are within the International Women’s Day March & Coalition’s burden of proof. If this showing is made, then the burden of proof shifts to the City to identify the significant or compelling interest served by the restriction, to establish that the restriction is narrowly tailored or essential to serving that interest, and to show that ample available alternative means of communication and assembly are available. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 816 (2000) (“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.”). This allocation of the burdens of proof contrasts sharply with the presumption of validity that normally attaches to legislation. It is a testament to the overarching importance of free speech and assembly to our democracy.

***2. The summary judgment evidence establishes genuine issues of material fact regarding the prior restraint claim***

***a. International Women’s Day March & Coalition have presented sufficient summary judgment evidence to satisfy their burden of proof on this claim.***

The Declaration of Graciela Sánchez, (R. 2677) a long-time member of the International Women’s Day March Planning Committee, explains that the International Women’s Day March Planning Committee was formed in 1985 for

the purpose of organizing events each year or near March 8th, which is celebrated around the world as International Women's Day. The events organized by the International Women's Day March Planning Committee are designed as an opportunity for participants to express solidarity with all women and to inform participants and the public about issues affecting women around the world.

The Declaration of Amanda Haas, (R. 2381) a founding member of the San Antonio Free Speech Coalition explains that the Coalition is an unincorporated association formed to promote and protect free speech in San Antonio. Members of the Free Speech Coalition are organizations and individuals who have applied in the past and/or intend to apply in the future for permits to hold political and expressive marches, parades, or races on public streets and sidewalks in San Antonio to raise public awareness of various political, social, economic, and environmental issues.

The City's Parade Permit Ordinance and policies prohibit any person from organizing a "procession" without have first obtained a permit. "Procession" includes any "group of persons moving along, by whatever means, in an orderly, formal manner ... in such a way as to impede the normal flow or regulation of pedestrian or vehicular traffic." 2008 Parade Ordinance (R. 640). There is no minimum number of people to whom this applies. The City's Parade Permit Ordinance and policies require Parade Permit holders to pay unspecified charges to

the SAPD, third party barricade rental companies, and to various City departments involved with street cleaning services. 2008 Parade Ordinance §19-636 (R. 640) This evidence is sufficient to allow a reasonable trier of fact to conclude that the challenged Ordinance and policies do restrain protected speech and assembly. The burden should now shift to the City to prove that the Parade Permit process is narrowly tailored to serve significant government interests and leaves ample alternative public space available for expression and assembly.

***b. The record reveals genuine issues of material fact regarding whether the burdens on First Amendment rights imposed by the City are narrowly tailored to serve a significant government interest.***

As this Court insightfully reasoned in *Horton v. City of Houston*, 179 F.3d 188 (5th Cir. 1999), must resist the temptation to simply “rubber-stamp” “regulations ... which burden speech.” Instead, the government should be required to “show that the fee requirement promotes a substantial governmental interest that would be achieved less effectively absent the regulation.” *Horton v. City of Houston*, 179 F.3d 188 (5th Cir. 1999) (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)). And the government must show what money actually was generated through the restriction on speech and to what purpose it was put” “If the revenue is minimal -- that is, if it fails ..... to make any realistic dent in the costs borne by [taxpayers for police costs generally] -- then the district court may conclude that the fee suppresses protected speech without providing any asserted benefits.

The Court's analysis in *Horton* has particular significance to this case because of the City's long history of "requiring" Parade Permit holders to bear substantial charges to pay for whatever police, clean-up, and rentals the City orders and then waiving payment of these charges for more than 90% of the money "required." See Payment Records of the SAPD Permit Officer at R. This record surely must cast doubt on the City's claimed interest in husbanding precious funds.

In this case, the City has repeatedly insisted that the charges for City-ordered services and rentals are "narrowly tailored" to meet the City's interest in "traffic control," "public safety," and "covering the cost of traffic control and clean-up." (R. ) and it has offered no evidence to establish its interests or to support the claim that the burdens it places on speech are narrowly tailored to serve those interests.

***c. The summary judgment evidence reveals genuine issues of material fact on whether the City's restrictions leave ample alternative public space, particularly for marches with more than 100 participants***

As to alternative avenues of communication, '[w]hile the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate.' *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812, (1984).

City representatives have repeatedly described §19-632 of the 2008 Parade Ordinance as providing “free alternatives” for assembly and collective speech. This section states:

Sec. 19-632. Exceptions to Application. This article shall not apply to:

- (1) the movement of persons in an orderly, formal manner from a point of origin to a point of termination on a sidewalk, so long as the movement does not impede the normal flow or regulation of pedestrian or vehicular traffic; or
- (2) a public assemblage that does not involve the movement of persons in an orderly, formal manner from a point of origin to a point of termination.

***d. The summary judgment evidence reveals genuine issues of material fact about whether the City’s sidewalks are safe and viable locations for marches and processions.***

***1) The risk of confrontation or arrest.***

Section 19-632(1), quoted above, is merely a restatement of the definition of “procession” in section 19-630(4), which says, in brief, that a procession is “a group of persons” moving “from a point of origin to a point of termination” anywhere in the city “in such a way as to impede the normal flow or regulation of pedestrian or vehicular traffic.”

A march on sidewalks, then, is a “free alternative” only for those events with few enough participants and ample enough sidewalks so that the group of people can march on the sidewalk without impeding the “normal flow or regulation” of pedestrian or vehicular traffic. (R. 2383, ¶¶6, 8; R. 2677: ¶¶30-31)

What sidewalk march organizers and participants risk, however, is that the group will be too large, or the sidewalk too small or inaccessible, so that the “normal flow” of pedestrian traffic will be impeded. (R. 2383: ¶¶6, 8; R. 2677: ¶31)

This possibility includes the risk that the march will inconvenience and anger pedestrians, which can undermine the communicative purpose of the march. During an anti-war march in the Spring of 2003, for example, some pedestrians became understandably disturbed by the crowded sidewalks and began shoving and verbally attacking marchers. (R. 2677: ¶¶24, 30-31)

The circumstances of too many marchers or too small sidewalks also put marchers at risk of arrest for violation of Texas Penal Code § 42.03 (Obstructing Highway or Other Passageway). (R. 2902: 108:9- 109:23) Moreover, the risk of arrest for an alleged violation of § 42.03 is well known among young or politically active San Antonians because this is one of the charges used against youth, public demonstrators, and leafletters. Just recently, Johnny Martinez and Tom Keene, both well-respected peace and anti-death penalty activists, were standing on a broad sidewalk holding a banner to mark the execution of a Texas prisoner.

A police officer confronted Mr. Martinez, ordering him to drop the banner because he was obstructing the sidewalk. Mr. Martinez said “Let’s move back” to Tom Keene but the police officer immediately grabbed Mr. Martinez by the arm

and neck and threw him to the sidewalk, causing bloody cuts and bruises to Mr. Martinez's face. Mr. Martinez is 71 years old. He was arrested for violation of § 43.02 and taken to jail, where he was held for more than 24 hours. (R. IWDMP-937: ¶¶1 -2, and 4-6)

Not surprisingly, many people who want to march in response to a particular issue will not participate if the march is on the sidewalk, because of the risk of confrontational interactions with the police or disgruntled pedestrians. (R. 2383: ¶¶8-10)

An alternative that puts marchers at risk of conflict with pedestrians is not viable. And an alternative that invites marchers to break the law and put themselves at the mercy of police officers is not viable.

**2) *Lack of access for physically challenged marchers.***

James LeRoy Lawson is a certified professional engineer whose mobility depends on a wheelchair. Since 2002, Mr. Lawson has devoted his skills and energies to realizing the promise of access made to Americans with disabilities in the Federal Americans with Disabilities Act (ADA), 104 Stat. 328, 42 U. S. C. §12101 et seq. Mr. Lawson moved to San Antonio in July 2007 and has been working primarily on sidewalk issues since then. (R. 2390: ¶¶1 -6)

Mr. Lawson's work over the past 14 months has included meeting with many City officials about the City's failure to comply with ADA mandates regarding

sidewalk accessibility and pursuing complaints with the Federal Highway Administration, which is charged with investigation and enforcement of ADA mandates regarding access to the public right of way. (R. 2390: ¶¶6)

Mr. Lawson's Declaration includes a copy of the report "Citywide Pedestrian Infrastructure Health" issued in February 2008 by the San Antonio Office of Disability Access. In this Report, the Office of Disability Access concludes: "Both private sector and public sidewalks are aging and neglected;" "Many existing sidewalks in San Antonio do not meet ADA minimum standards;" the City has "400 miles of sidewalk gaps;" "1,036 tripping hazards were identified on downtown sidewalks;" numerous downtown sidewalks lack curb ramps; and "symptoms of an unhealthy pedestrian infrastructure are wide-spread and numerous."

Lorinda Carr is a disabled Air Force bioenvironmental engineer who needs a wheelchair to get around. Ms. Carr has participated in the MLK March for many years. Before being in a wheelchair, Ms. Carr also participated in the Dia de Los Muertos procession organized by the Institute of Mexican Cultures and the International Women's Day March. (R. 2309: ¶¶2 -4) As long as those marches are confined to the sidewalks, however, Ms. Carr cannot participate:

"San Antonio sidewalks are overwhelmingly inaccessible to people in wheelchairs. In some areas, there are no sidewalks. In the downtown area, there are many sidewalks that don't have curb ramps. And where there are

sidewalks and curb ramps, there frequently are fire hydrants or telephone poles that are placed in the middle of the sidewalk or even right in the middle of a curb ramp, so people in wheel chairs cannot pass. Similarly, many sidewalks in the downtown area are so badly cracked that they are totally impassable if you are in a wheelchair. Even newly designed areas, like Main Plaza, are built with stone sidewalks that might be aesthetically appealing to the eye but are very difficult to traverse in a wheelchair.”

(R. 2309: ¶¶8; R. 2677: ¶¶26-27)

The ADA requires that Local Government Entities make public services accessible to Americans with disabilities.

Surely the obligation to ensure viable alternatives to the public street extends to ensuring that those alternatives are accessible by those who are physically challenged. In San Antonio, where sidewalks do not comply with the ADA, sidewalk marches are not ample and appropriate alternatives to street marches.

*e. Static Demonstrations.*

The second purportedly “free alternative” to street marches is “a public assemblage that does not involve the movement of persons in an orderly, formal manner from a point of origin to a point of termination.” (§19-632(2))

One place that is repeatedly suggested for a “free” static assemblage is at the steps of City Hall. Yet such an assemblage may not impede pedestrian or vehicular traffic without incurring the same risks as a sidewalk march, and the area known as the “steps of City Hall” cannot accommodate more than approximately one-hundred people without seriously impeding pedestrian traffic.

The only other place for static assemblage is in a park. Yet use of the City's parks for demonstrations and rallies is sharply curtailed and riddled with unconstitutional barriers. The City Park Special Event Permit Ordinance grants unbridled discretion to the Department of Parks and Recreation to grant or deny a Special Event Permit for the use of City parks for special events, including rallies and demonstrations protected under the First Amendment. (R. 2269)

In addition, the City Park Use Fee Ordinance imposes revenue-generating fees for the use of City parks for special events. These fees are not designed to recoup actual costs of a rally or demonstration. (R. 2269)

- f. The record reveals genuine issues of material fact regarding whether the City's Parade Permit grants overly broad discretion*
  - 1) There are genuine issues of material fact as to whether the City's Parade permit Ordinance grant unduly broad discretion to the City Council, the SAPD and the Public Works Department to adjust the charges for different permits*
    - a) The 2008 Parade Ordinance grants unduly broad discretion to the Police Department Discretion granted to the City Council.*

In *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010 (9th Cir. 2008), the Ninth Circuit held that a permitting scheme that reserved unbridled discretion in the City Council to pass ordinances waiving 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 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.

The holding of the Sixth Circuit is supported by *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), 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. *Id.* at 151.

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."

The Eleventh Circuit followed the insights of these cases to hold that provisions in the City of Atlanta's Festival Ordinance that exempt "city sponsored" or "city co-sponsored events" from the permitting and fees requirements of the Ordinance are unconstitutional. *Camp Legal Defense Fund v. City of Atlanta*, 451 F.3d 1257, 1275-1276 (11<sup>th</sup> Cir. 2006).

In evaluating the constitutionality of the Parade Ordinance, the Court must consider the City's own implementation and interpretation of it. *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 131 (1992). In this case, the City continues to insist that City Council retains the power to 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.

***b) The 2008 Parade Ordinance grants broad discretion to the Police Department.***

Section 19-636(C) of the 2008 Parade Ordinance directs as "the Chief of Police or his or her designee to determine the number of police officers and traffic

control devices reasonably necessary to control traffic in the area of the requested procession.”

The Ordinance states that “The chief or designee will consider the following factors” and lists seven factors, which include (1) the route, other roads, public transportation, and emergency vehicle routes that may be affected by the event (listed factors 1, 3, 4); (2) the date and time of the event and the volume of vehicular and pedestrian traffic typical on and along the route for that time of the year, day of the week, and time of the day (factors 6, 7); (3) the anticipated number participants (factor 2); and (4) the intersections that will require barricades or traffic control personnel and whether officers can be assigned to move along with the event (factors 4,5). (R. 2214)

The Ordinance does not limit the police department’s discretion to consider information beyond these factors. Indeed, in order to comply with the Texas Manual of Uniform Traffic Control Devices, the police department will have to consider how long the march will be in the streets and in specific intersections or city blocks interrupting vehicular traffic or how long the march will be on the sidewalks interrupting pedestrian traffic. (R. 2214)

Similarly, the Ordinance does not preclude or dissuade the police department from considering possible public responses to the march, any controversy associated with the march, the risk of illegal activity by nonparticipants in the area

of the march, or any number of other factors that lower-level officers may deem relevant. (R. 2214)

The Ordinance states “Any additional costs for police personnel deemed necessary to provide security due to the nature of the event will not be assessed to the permit holder.” The terms “security” and “nature of the event” are not defined. (R. 2214: § 19.636)

The Ordinance states: “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 suggests that barricades will be required for every permitted march, unless, of course, a “barricade plan” could require no barricades. (R. 2214: § 19.636)

The Ordinance states: “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 require 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.” (R. 2214: § 19.636)

The difference in cost between SAPD officers and other peace officers is very large. (R. IWDMP-939) Moreover, in the past, alternative peace officers have

volunteered their time for many events, so the opportunity to use non-SAPD traffic personnel will likely have a significant effect on the amount that a Parade Permit holder will have to pay. Yet the Police Department is given unbridled discretion to grant or deny a request to use non-SAPD officers. (R. 2214: § 19-636)

***c) SAPD Procedure 214 grants broad discretion to individual police officers.***

- (1) SAPD Procedure 214 lists “factors in determining routing and staffing” similar to those in the ordinance, but it does not say anything about how these “factors” are to be applied. (R. 2227)
- (2) SAPD Procedure 214 does indicate that a “barricade plan” should comply with the Texas Manual of Uniform Traffic Control Devices, which suggests that the Permit Officer, at least, will have to consider how long the march will interfere with traffic at any intersection or city block along the route, even though that is not one of the enumerated factors. (R. 2227: §214.06(D))
- (3) Nothing in SAPD Procedure 214 precludes or dissuades the Permit Officer and Traffic Shift Officers from considering possible public responses to the march, any controversy associated with the march, the risk of illegal activity by non-participants in the area of the march, or any number of other factors that the officers may deem relevant. (R. 2227)
- (4) SAPD Procedure 214 does not refer to any distinction between “security” and other costs and it does not include any definition of “security.” (R. 2227)

- (5) SAPD Procedure 214 directs that the Permit Officer design a “barricade plan” only “when necessary.” (R. 2227: 214.05(B)(6))
- (6) SAPD Procedure 214 does not mention a “traffic control plan” and it does not provide any information about how a “permit holder” may obtain the Chief of Police’s approval of this plan. (R. 2227)
- (7) SAPD Procedure 214.07 sets out five different “Types of Processions,” with five different traffic control arrangements. Each of the five includes a brief description of the kinds of parades, the number of participants, and the length of the procession for which each traffic control arrangement would be appropriate. (R. 2227: 214.07)
- (8) The Types of Processions listed in SAPD Procedure 214 overlap in seemingly arbitrary ways. Under Procedure 214.07, a march with 1,000 participants and a 0.75 mile route would 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. (R. 2227: 214.07)
- (9) Lt. O’Dell, the sole drafter of Procedure 214, testified that he does not believe that Procedure 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 [Procedure 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;” (R. 2902: 24:23-25:11) “It doesn’t limit our ability to make a determination that something else might be more appropriate under the circumstances.”(R. 2902: 25:9-25:11) Discussing section 214.07 (Types of Processions) Lt. O’Dell testified: “I don’t know that [Procedure 214] provides guidance. It’s merely an example of what it might look like. I don’t know that anyone would take guidance... ”(R. 2902: 27:24-28:1)

***d) Experienced police officers may exercise this discretion to reach vastly differing results and to employ potentially unconstitutional subjective evaluations.***

This risk was dramatically demonstrated in the example mentioned earlier, where the same march was determined for one applicant to required fifty-four and for another only twenty-four..

Permit Officer William Jenkins and Traffic Shift Lieutenant Chuck O’Dell both testified that they require more officers and barricades for marches that they personally know to have undisciplined or slow participants. (R. 2902: 33:23-34:1) Lt. O’Dell named the Cesar Chávez March as one with difficult participants, for example, and described the work of some of the 54 officers assigned to that march: “they constantly kind of run up and kind of -- almost like herding cats, put 'em

back in the protected part of the roadway.” (R. 2902: 94:22-95:6) Officer O’Dell continued: “I actually counted the people on the Cesar Chavez March one day, because I knew they were inflating their estimate beyond any reasonable person's belief. I counted barely over 1,000. And they were claiming 28 or 30,000, I think, in the newspaper the following day.” (R. 2902: 96:1-96:13)

Regarding the 2006 Immigration March, Lt. O’Dell testified: “They had no intent to comply with the law. It was obvious that they were gonna overwhelm us with numbers and do whatever they wanted.” (R. 2902: 127:3-127:6)

**2) *Discretion Granted to the Public Works Department. San Antonio’s parade permitting policies and practices grant broad discretion to unidentified city officials to set clean-up fees.***

Section 19.636 of the 2008 Parade Ordinance states that the Parade Permit holder will be required to pay for all costs of “cleaning up the procession route.” Presumably, the amount of this fee will be set by City employees in the Public Works Department, but nothing in the 2008 Parade Ordinance specifies this.

The 2008 Parade Ordinance does not limit or guide the unidentified official’s discretion to set these fees. The Ordinance does not preclude or dissuade individual employees in the Public Works Department from including normal on-duty staff costs, costs related to cleaning the procession route before the march, costs related to illegal activity by non-participants in the area of the march, the perceived “value” of the march’s message, or lack thereof, whether or not the march

participants are thought to be tax-paying San Antonio residents, or any number of other factors that the employees may deem relevant.

### CONCLUSION

With apologies to the Court for the sometimes tedious recitation of evidence that a no-evidence motion for summary judgment necessarily calls forth, Appellants International Women's Day March Committee & Coalition respectfully requests that the Court reverse the order of summary judgment and remand the case for trial on the merits, with whatever further direction this Court may prescribe.

Respectfully submitted,

      /s/ Amy Kastely

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellant was sent by certified mail, return receipt requested, on the following counsel of record on the 20th day of October, 2009.

/s/ Amy Kastely  
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### **CERTIFICATE OF COMPLIANCE**

Pursuant to 5TH CIR. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5TH CIR. R. 32.2.7(b).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5TH CIR. R. 32.2.7(b)(3), THE BRIEF CONTAINS :
  - A. 9,823 words, OR
  - B. \_\_\_\_\_ lines of text in monospaced typeface.
2. THE BRIEF HAS BEEN PREPARED in proportionally spaced typeface using: Word 2007, Times New Roman, 14 pt.
3. THE UNDERSIGNED HAS PROVIDED AN ELECTRONIC VERSION OF THE BRIEF.
4. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN 5TH CIR. R. 32.2.7, MAY RESULT IN THE COURTS STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

/s/ Amy Kastely  
Amy Kastely