No. 09-50692

IN THE 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 UNICORPORATED ASSOCIATION

APPELLANT

VS.

CITY OF SAN ANTONIO,

APPELLEE

On Appeal from the United States District Court
Western District of Texas
San Antonio Division, Cause No. SA-07-CA-0971-FB

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record in Cause No. 09-50692 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.

1. Plaintiff/Appellant International Women's Day March Planning Committee;

2. Plaintiff/Appellant San Antonio Free Speech Coalition

3. Amicus Curiae (Appellant) American Civil Liberties Union Foundation of Texas;

4. Appellee/Appellee City of San Antonio;

5. Counsel for Appellant, Amy H. Kastely, 405 N. Saint Mary's Street, San Antonio, Texas, 78212;

6. Counsel for Amicus Curiae, Lisa Graybill and Taylor Fleming, ACLU Foundation of Texas, P.O. Box 12905, Austin, Texas 78711-2905;

7. Counsel for Amicus Curiae, Edward P. Davis, Benjamin C. Geiger and Michelle Leung, Orrick, Herrington & Sutcliffe, LLP, 405 Howard Street, San Francisco, California 94105;

8. Counsel for Amicus Curiae; Siddartha Vinkatesan, Orrick, Herrington & Sutcliffe, LLP, 1000 Marsh Road, Menlo Park, California, 94025; and

9. Counsel for Appellee, Deborah Lynne Klein, Assistant City Attorney IV, City Attorneys' Office, City of San Antonio, 111 Soledad, 10th Floor, San Antonio, Texas 78205.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary in this matter as the facts and legal arguments are adequately presented in the briefs and record and because the decisional process would not be significantly aided by oral argument. Although Appellee does not believe oral argument is necessary, it does not waive its right to appear and argue should the Court disagree.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW (RESTATED)

1. Whether or not the District Court erred in granting summary judgment in favor of Appellee on Appellant's claim that the City of San Antonio's March 2008 Parade Ordinance violates the First and Fourteenth Amendments' prohibition of viewpoint discrimination.

2. Whether or not the District Court erred in granting summary judgment in favor of Appellee on Appellant's claim that the City of San Antonio's March 2008 Parade Ordinance violates the First and Fourteenth Amendments' prohibition of unreasonable prior restraints.

STATEMENT OF THE CASE

A. Nature of the Case

This case raises constitutional challenges to the City of San Antonio's City Code provisions related to Parades, Runs, Walk and Related Events. Appellants' brought suit alleging that the Code provisions are unconstitutional under the First and Fourteenth Amendments because they create viewpoint discrimination and unreasonable prior restraints to use of public roads in the City of San Antonio.

B. Course of Proceedings and Disposition in Court Below

This suit was originally filed on November 29, 2007 seeking to enjoin City Ordinance 2007-11-20-1193, which created the new City Code Chapter 19, Article XVII (Parades, Runs, Walks and Related Events). R. 17-25. On December 20, 2007, the District Court, Judge Xavier Rodriguez presiding, held an evidentiary hearing on the request for preliminary injunctive relief. TRANSCRIPT HRG ON PRELIMINARY INJUNCTION, DECEMBER 20, 2007. After allowing for additional briefing, the Court issued its order Granting in Part Preliminary Relief on February 21, 2008, effectively enjoining the City of San Antonio from enforcing the ordinance.[1] R. 551-587.

On or about June 27, after City Council amendment of the ordinance in conformity with the Court's February 21, 2008 Order, the City moved to dissolve

the permanent injunction. R. 631-663 The City then filed its Motion for Summary Judgment, seeking dismissal of all of Appellants' claims. R. 1313-1360.[2] On January 15, 2009, Judge Rodriguez recused himself, and the case was transferred to the Honorable Judge Fred Biery. R. 3118-3119. On March 31, 2008, Judge Biery issued an order dissolving the Preliminary Injunction on the basis that the City's code amendments addressed the constitutional concerns previously raised by Judge Rodriguez. R. 3154-3161. On June 30, 2009, Judge Biery issued an Order granting the City's Motion for Summary Judgment in all things and entered judgment accordingly. R. 3165-3168. Appellants subsequently filed this appeal. R. 3169.

STATEMENT OF FACTS

On November 29, 2007, the City of San Antonio enacted Ordinance 2007-11-29-1193, creating City Code Chapter 19, Article XVII (Parades, Runs, Walks and Related Events). R. 61-69. Prior to this enactment, the City had two separate code provisions, one relating specifically to runs and walks, and the other related to parades. R. 112-120. These codes were relatively similar to each other. Both required application for a permit to host the respective events and further required payment of costs associated with the events. The only waiver of such fees provided

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[1] The City had not been enforcing the ordinance from the time of the filing of suit until the February 21, 2008, order.

for in the earlier code provisions were for events of "political nature." This term was not defined.

In an effort to streamline the City Code and to provide for fee waiver for First Amendment events, the City drafted and enacted the November 2007 Ordinance. Where the earlier code provisions had four tiers of permit fees, depending on the size of the event, the new Ordinance provided for a flat permit fee. The new Ordinance also established a no-cost alternative for public expression. Permit holders continue to be responsible for costs associated with traffic control. The costs are determined by the route, time of day, time of year and anticipated number of individuals in procession. For all "First Amendment" events, the first $3,000.00 of traffic costs will be absorbed by the City. "First Amendment Activity" is defined as "all expressive and associative activity that is protected by the United States and Texas Constitutions, including speech, press, assembly, and the right to petition, but not including commercial advertising." R. 61-69.

In December 2007, Appellants filed suit challenging the constitutionality of the November 2007 Ordinance on several grounds, and sought a preliminary injunction to prevent the enforcement of the Ordinance. R. 17-25. The preliminary injunctive relief, granted on February 21, 2008, was based on three grounds. R. 551-587. The Court found 1) that the ordinance vested too much discretion in the

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[2] Volume 12 of the Record on Appeal that was received by Appellee Counsel did not bear the

Chief of Police to determine the costs assessed against permitees, focusing primarily on the fact that the Department had no policies to guide them in such assessments; 2) that the ordinance did not clearly distinguish between traffic control costs and security costs; and 3) that the ordinance impermissibly excluded funeral processions and government agency processions. R. 585. With respect to the other challenges, the court stated that it did not find the subsidization of certain events unconstitutional. R. 586. The Court also found that the costs assessed by the City are narrowly tailored to serve the significant government interests of covering traffic control and clean up costs, and that the City had provided ample alternatives for indigent groups. R. 579, 584.

In issuing the preliminary injunction, the Court noted that the decision was a close one and indicated that these concerns could be remedied through subsequent action by the City of San Antonio. R. 561-562, 565. On March 3, 2008, the City of San Antonio enacted City Ordinance 2008-03-13-0201, amending the prior ordinance. R. 639-648. Additionally, on June 23, 2008, the San Antonio Police Department adopted Standard Operating Procedure 214. R. 650-662. Appellants filed their Second Amended Petition, now challenging the amended Ordinance as well as the 1988 ordinance which the November Ordinance repealed. R. 719-771

In the second amended petition, Appellants alleged three causes of action:

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Viewpoint based discrimination in violation of First and Fourteenth Amendments and Civil Rights Act of 1866

Unreasonable Prior Restraint in Violation of First and Fourteenth Amendments and Civil Rights Act of 1866

Irreparable vagueness in the definition of "First Amendment Procession" violation of First and Fourteenth Amendments and Civil Rights Act of 1866

Summary judgment was granted to the City of San Antonio as to each of these claims. On appeal, Appellants have only raised the issues of viewpoint discrimination and unreasonable prior restraint.

SUMMARY OF THE ARGUMENT

The District Court properly granted summary judgment in favor of Appellee City of San Antonio. The evidence clearly establishes that the Ordinance currently in place is a narrowly tailored restriction enacted for a significant government interest. The evidence also shows that there are ample and adequate alternatives to paying costs for traffic control for a street event. There is no evidence that the ordinance is facially flawed by creating an environment of viewpoint discrimination nor is there evidence that it is facially flawed by placing unreasonable prior restraints on the public expression. There is no evidence of an "as applied" constitutional violation.

ARGUMENT AND AUTHORITIES

A. Basic First Amendment Speech Principles

It is undisputed that streets "have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions." ***Hague v Committee for Industrial Org.*** 307 U.S. 496, 515 (1939) It is equally undisputed that a municipality's right to "impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties, but rather as one of the means of safeguarding the good order upon which they ultimately depend. ***Cox v New Hampshire*** 312 U.S. 569, 574 (1941)

The government may impose reasonable time, place and manner restriction on the exercise of First Amendment rights, "provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. ***Ward v Rock Against Racism***, 491 U.S. 781, 791, 109 S.Ct. 2746 (1989) (*quoting* **Clark v Community for Creative Non-Violence** 468 U.S. 288, 293, 104 S.Ct. 3065 (1984)) *see also* **City Council of Los Angeles v Taxpayers for Vincent** 466 U.S. 789, 812, 104 S.Ct. 2118 (1984)([A] restriction on expressive activity may be invalid if the remaining modes of communication are inadequate). The validity of public assembly regulations is supported by exemption for indigent speakers or by the

existence of alternative forums available at no cost. ***Stonewall Union v City of Columbus*** 931 F.2d 1130, 1138 (6th Cir. 1991).

The Supreme Court has further recognized a government entity's right to engage in and support speech of its own without triggering a requirement to fund other speech. *See* ***Rust v Sullivan*** 500 U.S. 173 (1991); ***Legal Services Corp. v Valazquez*** 531 U.S. 533, 541 (2001) These courts distinguished between laws that single out a disfavored group on the basis of speech content, which are unconstitutional, from government action supporting speech that advances permissible government goals.

Appellants raise facial constitutional challenges to the Parade Ordinance.[3] In such cases, plaintiffs carry a heavy burden and must demonstrate "a *substantial* risk that application of the provision will lead to the suppression of speech." ***National Endowments for the Arts v Finley*** 524 U.S. 569, 580 (1998) *citing to* ***Broadrick v Oklahoma*** 413 U.S. 601, 615 (1973) (emphasis added.). Courts should be reluctant to invalidate legislation on a facial challenge "on the basis of its hypothetical application to situations not before the Court." ***FCC v Pacifica Foundation*** 438 U.S. 726, 743 (1978) *see also* **Red Lion Broadcasting Co. v FCC**

[3] Appellants indicate they made both a facial and an "as-applied" challenge. However, at the time suit was filed and through the majority of this lawsuit, the new Ordinance was under injunction and thus not applied. Thus the challenge to that Ordinance can only be a facial one. With respect to the prior Ordinance, Appellants did not address "as applied" challenges at summary judgment nor in their appeal. Moreover, since that Ordinance has been repealed, such challenges would be moot.

395 U.S. 367, 396 (1969)(*We will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable but will deal with those problems if and when they arise.*) In the present case, Appellants have no evidence of a substantial risk of suppression of speech, but merely offer hypotheticals to support their allegations. As such, their challenges cannot stand.

B. The Court properly granted summary judgment in favor of Appellee on the claim of Viewpoint Discrimination.

Appellants challenge the grant of summary judgment in favor Appellee on their claim that enforcement of the Parade Ordinance creates viewpoint discrimination. To support this challenge on appeal, Appellants claim that they "provided sufficient summary judgment to satisfy their burden of proof on this claim." APPELLANT'S BRIEF AT P. 20. However, they fail to point to any evidence to support this contention. In fact, Appellants wholly failed to carry their burden to establish even a question of fact on this issue, or alternatively, Appellee provided sufficient evidence to negate this claim and thus the District Court properly granted summary judgment on this issue.

Viewpoint discrimination occurs when a government entity allows one message while prohibiting the messages of those who can reasonably be expected to respond. ***Rosenberger v Rector and Visitors of University of Virginia***, 515 U.S. 819, 894 (1995). *See also* ***First Nat. Bank of Boston v Bellotti*** 435 U.S. 765, 785-

786, 98 S.Ct. 1407, 1420-1421, (1978). This inherently involves intentional conduct by the government entity to discourage one viewpoint and to advance another. ***United States v Kokinda*** 497 U.S,720, 736, 110 S.Ct. 3115, 3124 (1990).

Appellant offered no evidence to the Court below that the Appellee had an intent to discourage one viewpoint and to advance another, nor could Appellants, on appeal, point to any such evidence. Appellants' only argument, on this issue, appears to be that since the Appellee sponsors certain events, there is viewpoint discrimination. The evidence has establish that in enacting the Parade Ordinance, the City Council chose to identify three parades that it intended to sponsor, and therefore exempt from the requirements of the code provisions – the Martin Luther King Parade, the Veterans Day Parade and the Diez y Sies Parade. R. 645-646. The Council set forth in the Ordinance that these parades are of such cultural and historical significance that the City wishes to sponsor these events. Separately, the evidence has established that the City Council, through proper legislative process, has in the past enacted Ordinances specifically related to the Fiesta Parades and the Cesar Chavez parades and indicating City sponsorship of these events. Appellants argue that such sponsorship creates viewpoint discrimination. In arguing this point, Appellants either intentionally ignore the line of Supreme Court cases that have established the concept of government speech, or have chosen to misinterpret it. *See* ***Johanns v Livestock Marketing Assn***., 544 U.S. 550, 553, 125 S.Ct. 2055

(2005); ***Columbia Broadcasting System, Inc. v Democratic National Committee*** 412 U.S. 94, 93 S.Ct. 2080 (1973); ***Board of Regents of Univ. of Wisconsin System v Southworth*** 529 U.S. 217, 229, 120 S.Ct. 1346, (2000) ***Rosenberger,*** 515 U.S. at 819; ***National Endowment for the Arts v Finley*** 524 U.S. 569, 598, 118 S.Ct. 2168 (1998)

In ***Rust v Sullivan***, 500 U.S. 173, 111 S.Ct. 1759 (1991), the Supreme Court considered the concept of government speech in the context of legislative decisions to limit Title X funds to projects advocating abortion as a method of family planning. ***Rust*** *at* 173, 1759. As stated by that Court:

> [T]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

The Court further found that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." ***Id.*** The whole concept of government speech is based on the underlying fact that if the speech does not reflect the voice of the majority of the electorate, the remedy is through the political process. *See* ***Southworth***, 529 U.S. at 235

Appellants argue that the recent Supreme Court decision in ***Pleasant Grove v Summum,*** 129 S. Ct. 1125 (2009) expresses "clear directives regarding further

expansion of the government speech doctrine into traditional public fora." APPELLANT BRIEF AT P. 24. More specifically, Appellants provide an alleged quotation from that opinion that "government speech" cannot attach to "transitory forms of expression, like speeches, demonstrations, marches, and parades in public streets and parks." APPELLANTS' BRIEF AT P. 24. This is an egregious distortion of the Court's opinion in that case.

In ***Pleasant Grove***, the Court considered a government's right to refuse acceptance of a statute from a non-mainstream religious group for placement in a public park, when a statute of the Ten Commandments was already in place in that park. The Court found that public forum principles were not appropriately applied in the context of such a case since public parks can only accommodate a certain number of permanent monuments. ***Pleasant Grove*** *at* 1137. The Court did not abandon the government speech concept – that is that a government entity is entitled to say what it wishes. ***Id.*** *at* 1131.

Appellants' reliance on ***Pleasant Grove*** is unfounded. The Supreme Court has clearly upheld the tradition of a government's right to subsidize it's own speech, which is what the evidence reflects Appellee has done. The Parade Ordinance provides for the subsidization of three specific events - the Martin Luther King Day March, the Diez y Seis parade and the Veteran's Day parade. The ordinance clearly sets forth that these events are sponsored based on their "broad

appeal, historic tradition, cultural significance and other public benefits." R. 645-646. Appellants offer no argument nor point to any evidence in the record that the Appellee's decision to subsidize these events, or any other events subsidized through a legislative enactment, in someway hinders others' abilities to express their viewpoints through the use of public streets.

Absent evidence to support Appellants' claims that the Parade Ordinance creates viewpoint based discrimination, Appellee City was entitled to summary judgment as a matter of law and the judgment of the District Court should be affirmed.

C. The District Court properly granted summary judgment in favor of Appellant on the claim of unreasonable prior restraint.

Appellants' second issue is that the District Court improperly granted summary judgment on their claim that the Parade Ordinance is an unreasonable prior restraint. Appellants base their claim of unreasonable prior restraint on three allegations – that the ordinance is not narrowly tailored to serve a significant government interest, that the ordinance does not provide ample alternatives and that the ordinance provides overly broad discretion in its application. As will be shown below, the evidence provided to the Court below amply established each of these elements and Appellants failed to offer sufficient evidence to create a fact issue.

Significant in review of this case is the fact that Appellants have never raised an argument that the Parade Ordinance is not content neutral. Content neutral regulations are reviewed under an "intermediate scrutiny" standard, which calls for narrow tailoring to serve a legitimate, content neutral government interest, but it need not be the least restrictive nor the least intrusive regulation possible. ***Ward*** *at* 798. Content neutral regulations are constitutional if they do not delegate overly broad licensing discretion to a government official, are narrowly tailored to serve a significant government interest and leave open other channels for communication. ***Thomas v Chicago Park District*** ,534 U.S. 323, 122 S.Ct. 775 (2002). Appellee established each of these elements at the Court below and summary judgment was properly granted.

1. The Parade Ordinance is narrowly tailored to address a significant government interest.

Appellants argue that the City failed to establish that the Parade Ordinance was narrowly tailored because of "the City's long history of 'requiring' Parade Permit holders to bear substantial charges . . . and then waiving payment of these charges for more than 90% of the money 'required." APPELLANTS' BRIEF AT P. 30. This overly broad and conclusory statement is not supported by any record citation. Appellants claim that the Appellee provided no evidence of an interest in "traffic control" "public safety" and "covering the cost of traffic control and clean-up." Appellants ignore the fact that the Courts have long recognized that public safety is

a legitimate and significant government interest. Traffic control, to allow pedestrians the safe and unfettered use of the streets, is inherent in the concept of public safety.

Appellants also ignore the fact that, at the time of filing the Motion for Summary Judgment, the Court had already found that the Appellee had expressed a significant government interest and that the costs assessed by the City were in fact narrowly tailored to serve that government interest. R. 579. Evidence was presented at the hearing on Preliminary Injunction that the City does have a public safety interest and that the costs assessed are narrowly tailored to serve that interest. Specifically, Assistant Chief David Head testified:

> . . .[t]he budget concerns are numerous. The events that the City sponsors now are budgeted for every year, and so we anticipate those costs and are included in the costs that we budget for. To state that the City will absorb all costs for all marches, whether it be First Amendment or otherwise, is to assume a tremendous liability financially to the entire community. . .

Tr. P. 124, l. 23- p. 125, l. 5. Assistant Chief Head further testified concerning the traffic safety impact of parade events. Tr. P. 125 l. 19-16.

The Court pointed out that Appellants had failed to show that the City was charging for anything beyond the reasonable and necessary costs associated with basic vehicular and pedestrian traffic safety services plus the expected costs for clean-up." R. 579. Moreover, in response to the Motion for Summary Judgment, while appellants did assert a claim that the ordinance was not narrowly tailored to

further a "compelling" state interest, they offered to competent evidence to support this argument.

Appellants' arguments also overlook a very important aspect of the Parade Ordinance; an aspect that must be considered in any determination of whether or not the Parade Ordinance creates an unreasonable prior restraint. Section 19-635(C) provides an appeal process should an applicant believe that the traffic costs are excessive. R. 645. The Ordinance specifically provides that "No costs shall be owed during the appeal until the Office of the City Manager has rendered its decision." R. at 645. This same section provides that invoicing of costs does not occur until after the event. R. at 645. These provisions are mirrored in the San Antonio Police Department's Standard Operating Procedure 214 related to parades. Procedure 214.12.B.3 provides that no costs are to be owed during the pendency of an appeal; Procedure 214.05.B. provides that applicants are advised of estimated costs before the event; Procedure 214.05.C instructs the officer designing the parade route and staffing to work with the applicant to reduce costs. R.659, 653. Each of these provisions indicates that rather than attempting to create a prior restraint, much less an unreasonable one, the City's goal is to allow events to take place regardless of disagreement. This further supports that the Parade Ordinance is narrowly tailored to meet the significant government interest.

2. The City has provided ample, adequate alternatives for expression of First Amendment rights.

Appellants also contend that the ordinance fails to meet constitutional muster because it fails to provide ample alternatives. Again, this matter was addressed at the hearing on Preliminary Injunction and ruled upon by Judge Rodriguez in his Order granting said Injunction. Judge Rodriguez found that, in fact, ample and adequate alternatives do exist. R. 584.

The Parade Ordinance specifically states that no permit is required for events on the sidewalk or in public parks. R. 640. It also indicates that the City will absorb the first $3,000.00 in traffic costs for First Amendment events. R. 645. While Appellants take issue with the first two alternatives, which will be discussed below, they completely ignore, as they did in the District Court, the fact the City has established routes that can be used for under $3,000. TR. p. 107 l. 3 – p. 108, l. 20.

With regard to the issue of sidewalk marches, Appellants contention is that since sidewalk marches may not be convenient in every case, they are not an adequate alternative. This is a meritless argument. Moreover, Appellants' evidence consist of statements by disabled individuals that not all sidewalks are ADA compliant. While this may raise an issue under the ADA, that is not the subject of this lawsuit. This evidence is also insufficient as it is speculation. Moreover, Appellants have failed to provide evidence that such persons could not

participate in a static event, in a parade routed specifically to cost less than $3,000 or in a sidewalk event on sidewalks that are ADA compliant.

Appellants' evidence related to Mr. Martinez and Mr. Keene is equally insufficient to establish an issue of unreasonable prior restraint. Neither Mr. Martinez nor Mr. Keene is a plaintiff in this lawsuit. At most, assuming the statement of Mr. Martinez to be true and correct, he may have established a claim for an "as applied" challenge. However, the facts as set forth by Mr. Martinez do not establish that sidewalks, static events and routes that can be managed under $3,000 do not provide ample, adequate alternatives.

Appellants challenge to the option of a static event is equally without merit. Appellants claim, without any supporting evidence, that the area in front of City Hall "cannot accommodate more than approximately one-hundred people without seriously impeding pedestrian traffic." APPELLANTS' BRIEF AT P. 35. Appellants claim use of other parks is not feasible, claiming that the City's Park Special Event Permit Ordinance is unconstitutional. Again, while that may be the basis of a separate lawsuit, which Appellee does not concede, it has not been challenged in the present case.

Additionally, reading that ordinance reveals yet another flaw in Appellants' logic. The only portion of the City's Code pertaining to park usage cited by Appellants is a section concerning hours of operation and curfew. While the

provision cited does reference "special events" it does not in any way set forth any limitations or requirements on persons gathering in a city park to express themselves, except for curfew restrictions. The evidence provided by Appellants does not establish that such a gathering is a "special event" or that they would be precluded from such a gathering. If an organization seeks to reserve a park to the exclusion of others, or reserve and use other facilities, such as pavilions or access to electricity, that is of a separate nature and covered by other provision. Appellants offer no evidence that they cannot gather for purposes of a protest in a City park.

3. The Parade Ordinance does not vest overbroad discretion in any government official or body.

Appellants' final contention is that the Parade Ordinance grants overly broad discretion to the City Council, the San Antonio Police Department and the Department of Public Works. With respect to the San Antonio Police Department, the City Council by and through the Parade Ordinance, has been granted a level of discretion. The question is whether or not that discretion is overly broad. The answer is no.

Assuredly, Appellants can prove that some discretion remains in these determinations, but this does not equate with evidence of **unduly broad** discretion. In fact, in some circumstances, such as this ordinance, a level of discretion is

necessary in order to protect constitutional rights. As stated by the Supreme Court in ***Thomas* v *Chicago Park District*,**534 U.S. 316, 325 (2002):

> The prophylaxis achieved by insisting upon a rigid, no-waiver application of the ordinance requirements would be far outweighed, we think, by the accompanying senseless prohibition of speech (and other activity in the park) by organizations that fail to meet the technical requirements of the ordinance but for one reason or another pose no risk of the evils that those requirements are designed to avoid. On balance, we think the permissive nature of the ordinance furthers, rather than constricts, free speech.

In a similar manner, the limited discretion that remains with the SAPD to adjust traffic control personnel or devices based on needs of a particular event is more permissive in nature than restrictive.

The Parade Ordinance in this case is most similar to that upheld by the Sixth Circuit in ***Sullivan v City of Augusta***, 511 F.3d 15 (1st Cir., cert. denied) In ***Sullivan,*** the First Circuit considered the Supreme Court decisions in both ***Cox v New Hampshire****,* 312 U.S. 569 (1941) and ***Forsyth County v Nationalist Movement****,* 505 U.S. 123 (1992*).* The ***Sullivan*** Court noted that the concern in ***Forsyth*** was the unfettered discretion given to the county administrator. The Court acknowledged that ***Forsyth*** "stands as a clear warning against vesting government officials with excessive discretion in regard to fee-setting" but noted that the discretion granted to the administrator in **Forsyth** "far exceeded that granted .... to the Augusta Police Chief and Police Department." ***Sullivan*** *at* 35. The Court went on to note that the only real discretion left to the Augusta police was discretion in

determining the number of officers assigned for traffic control purposes. ***Id.*** *at* 36. Here, as in Augusta, the only discretion is the number of officers and/or traffic control devices to be used. As no formula can be developed for assessing specifically the exact traffic control needs in every given situation, this discretion is warranted.

In contrast, the cases cited by Appellants do not support their position in this case. Appellants first point to ***Long Beach Area Peace Network v City of Laguna Beach*** 522 F.3d 1010 (9th Cir.). This opinion was amended and superseded. Regardless, the case is not on point. In Long Beach, the Tenth Circuit found that portions of their parade provisions were not narrowly tailored to meet a significant government interest. Moreover, the discretion retained by the City Council in that case was significantly broader than in the San Antonio Ordinance. In ***Shuttlesworth v City of Birmingham***, 394 U.S. 147 (1969), the matter at issue was the Birmingham City Council's unbridled discretion to prohibit parades based on their own ideas of "public welfare,, peace, safety, health, decency, good order, morals or convenience." ***Shuttlesworth*** *at* 151. The San Antonio Ordinance is not nearly so broad and it provides much greater guidelines in determining traffic costs. The City of San Antonio's Ordinance does not focus on the prohibition of parades but rather is replete with efforts to facilitate the exercise of free speech in balance with the interests of the public in safety. Finally, the decision in

Association of Community Organizations for Reform Now (ACORN) v Municipality of Golden 744 F.2d 7339 (10th Cir. 1984) concerned a content based challenge to an ordinance that allowed a City Council to waive the city's "no solicitation" ordinance for specific groups. Such a situation does not occur under the San Antonio Ordinance.

Appellants' challenge to the discretion given to the San Antonio Police Department must also fail. There is no evidence that the discretion given is overly broad. As discussed above, some discretion must be given or else the ordinance would be so rigid as to be more restrictive than necessary and thus not narrowly tailored. Appellants cite a list of factors that they contend create overbroad discretion with the police. They assert that the language in the Ordinance does not limit the SAPD's ability to consider information beyond the factors set forth in the Ordinance. As an example, they complain that the SAPD will have to consider "how long the march will be in the streets and in specific intersections." APPELLANT BRIEF AT P. 39. Appellants contend this is not authorized by the Ordinance. In fact, such consideration is inherent in the directive that the SAPD is to consider the anticipated number of participants, the intersections that will require traffic control personnel versus barricades, and the time and route of the event.

Appellants contend that the Ordinance is an overbroad delegation of discretion because it does not instruct officers to consider "possible public responses to the march, and controversy associated with the march, the risk of illegal activity by nonparticipants in the area of the march." APPELLANT BRIEF AT P. 39-40. These factors are not included because, as was previously raised by Appellants in this lawsuit, they cannot be factors in determining traffic control. The ordinance is clear that consideration of such issues goes to the question of security, and the ordinance being content neutral, security costs are not assessed to applicants.

Appellants' other challenges to the ordinance are also meritless. Appellants complain that because the Ordinance references the creation of a barricade plan, this suggests that "barricades will be required for every permitted march." There is no evidence to support this supposition. Finally, Appellants jump to the conclusion that the SAPD is given "unbridled discretion to grant or deny a request to use non-SAPD officers." This is a blatant misstatement of the Ordinance. The Ordinance only requires use of SAPD officers in the downtown business district, and if there are insufficient officers to staff such event, non-SAPD officers may be used. Anywhere else in the City, applicants are free to contract with any other licensed peace officer to perform traffic control. This cannot be the basis of a facial challenge of unreasonable prior restraint.

Appellants raise these same challenges in alleging that individual officers also have overbroad discretion. For the same reasons, Appellants argument fails. Appellants also complain about the fact that the Standard Operating Procedures set forth examples of types of events to give some guidance to staffing. Again, said examples provide some discretion without being so rigid as to become a prior restraint. This balancing may give discretion to the police in developing a traffic control plan, but it is not overbroad discretion. In a similar manner, the fact that two officers may come to differing results in developing a plan does not make the Ordinance facially unconstitutional.

Finally, with respect to the issue of clean up costs, these costs are also subject to the appeals process and are not required to be paid prior to the event, since they could not be determined until the event has occurred. Since the event can go forward, and since applicants would have ample time to appeal through the City system or even bring an "as applied" lawsuit if necessary, without affecting their ability to exercise their First Amendment right.

CONCLUSION AND PRAYER

The District Court properly granted summary judgment in favor of Appellee City of San Antonio in this case. There is no evidence that the City's Parade Ordinance violates the First or Fourteenth Amendments by creating viewpoint

discrimination. The evidence does establish that the Ordinance is narrowly tailored to serve a significant government interest, that ample alternatives exist and that there is not overbroad discretion granted to anyone in the enforcement of the Ordinance. As such, the Parade Ordinance does not violate the First or Fourteenth Amendments by crating unreasonable prior restraints on the expression of First Amendment Free Speech Rights.

WHEREFORE PREMISES CONSIDERED, APPELLEE CITY OF SAN ANTONIO prays this Court affirm the judgment of the District Court in all things, and for such other and further relief, both in law and in equity, to which this Appellee may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this Brief for Appellee has been dispatched with an electronic copy of same to a third party commercial carrier for delivery to the Clerk for the United States Court of Appeals for the Fifth Circuit and a true and correct copy of same, including an electronic copy, has been served by certified mail, return receipt requested, in accordance with Federal Rule of Appellate Procedure 25(c)(1)(B) on this the 23rd day of November, 2009, to the following:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains less than 5850 words, including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the type face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Word 2002, sp3, in Times New Roman, 14-point font for the main body and headings, and 12-point font for footnotes.

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