

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

INTERNATIONAL WOMEN'S DAY MARCH PLANNING)	
COMMITTEE , an unincorporated association, and SAN)	
ANTONIO FREE SPEECH COALITION , an unincorporated)	
association,)	Civil Action No. SA-07-CA-0971-XR
Plaintiffs,)	
vs.)	Plaintiffs' Response to Defendant's
CITY OF SAN ANTONIO,)	Motion for Summary Judgment
Defendant.)	

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT**

TO THE HONORABLE JUDGE RODRIGUEZ:

NOW COME the **International Women's Day March Planning Committee** and the **San Antonio Free Speech Coalition**, Plaintiffs herein, and file this Response in Opposition to Defendant's Motion for Summary Judgment (Dkt. 77, 78).

FACTS SUPPORTED BY SUMMARY JUDGMENT EVIDENCE

The Parties

1. Plaintiff International Women's Day March Planning Committee is an unincorporated association formed in 1985 for the purpose of organizing a political march in San Antonio commemorating International Women's Day, an internationally recognized day honoring women around the world. International Women's Day has been observed around the world since the early 1900s. (Exh 25: ¶3). The International Women's Day March Planning Committee organized a march held in San Antonio in 1985 and an annual march held each year from 1992 on. (Exh 25: ¶5) On March 8, 2008, the Committee held its 18th International Women's Day March in San Antonio. (Exh 25: ¶6) The purpose of the International Women's Day March is to express solidarity with all women and to educate participants and the public about issues affecting women in San Antonio and around the world. (Exh 25: ¶4)
2. Plaintiff San Antonio Free Speech Coalition is an unincorporated association formed to promote and protect free speech in San Antonio. (Exh 18: ¶2) 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. (Exh 18: ¶4)
3. Defendant City of San Antonio (hereinafter the "City") is a municipality and a "person" capable of acting

under color of law. (Defendant’s Answer) In all of the acts described herein, the City and its agents, including the San Antonio City Council, acted under color of law, pursuant to a policy or practice of the City.

Background

4. For many years, the City of San Antonio has disregarded its First Amendment obligations as trustee for the public streets, sidewalks, and parks. As one Deputy Chief of Police conceded to the City Council, “Quite frankly, it [respect for First Amendment rights] wasn’t in our radar screen.” (Exh 34: IWDM 5763)
5. Control over the use of traditional public fora for political, cultural, and commercial expression and assembly has been treated by some city officials as a perquisite of political power and influence. (Exh 23: ¶8; Exh 26: IWDM 01139-01140; Exh 31: 30:23–33:8; 85:11–96:25; 118:5-118:15) Permit and fee requirements have been routinely waived for events sponsored, co-sponsored, or otherwise endorsed by the City or by individual high-ranking city officials. (Exh 23: ¶¶4-8; Exh 26: IWDM 5817-5831 (this is a table, created by Permit Officer Jenkins, showing the Parade Permitted events over the past 5 years and which were required to pay cost-shifting fees and which were not. Some of this information is set out in paragraphs 50-53 below) No Parade Permit has been required for some favored events, despite city ordinances requiring such permits. (Exh 26: IWDM 00271, 00272, 00274; 1988 Parade Ordinance) Similarly, favored events have been exempted from permit fees, police fees, traffic control device fees, cleanup fees, or some combination of these despite city ordinances requiring payment of such fees. (Exh 23: ¶¶4-8; Exh 26: IWDM 5817-5831)
6. At the same time, police officers threatened exorbitant fees and/or criminal prosecution to dissuade organizers and potential participants from street marches with controversial or unpopular messages.(Exh 20: ¶¶11, 13-14) These practices have generally succeeded: for 15 years prior to this Court’s Injunction Order of February 21, 2008, no street march addressing U.S. military actions, labor rights, environmental protection, reproductive rights, human rights, health care or any other political issue has occurred in San Antonio without the specific approval and endorsement of the City or some high-ranking city official, with the exception of 1996 Klu Klux Klan March and the 2006 Immigration March. (Exh 25: ¶29)

San Antonio Parade Ordinances

7. On February 4, 1988, the San Antonio City Council enacted Ordinance Number 66526 to be known as the “Parade Ordinance of the City.” (hereinafter “**1988 Parade Ordinance**”). The 1988 Parade Ordinance imposed a parade permit requirement (§19-433); defined a permit application fee of \$25 (§19-435(4)); required those permit holders whose events were “nonpolitical in nature” to pay overtime costs for up to twenty-five police officers; overtime clean-up crews, and traffic barricades (§19-440(b)); designated two alternative routes for parades in the downtown area (§19-441(1)); exempted “parades of a political nature” from the cost-shifting fees (§19-440(b)) and from the required use of designated routes (§19-441(4)); exempted “parades authorized by separate ordinance” from the entire Parade Ordinance (§19-434(4)); and provided that any “intentional” violation of the Parade Ordinance would be a misdemeanor, punishable by a fee of up to \$500. (Exh 1)

8. On July 7, 1988, the City Council Amended the Parade Ordinance to create a separate Article for Run, Walk, and Cycling Events. (Exh 2)
9. On September 11, 1997, the City Council passed Ordinance Number 86615, entitled “*Authorizing the Recovery of Actual Costs Associated with Police Officer (On-Duty and Off-Duty) Use in Providing Security and Traffic Enforcement for Parades/Special Events*” (hereinafter “**1997 Amendment**”). This Ordinance amended the Parade Ordinance to require Parade Permit holders for events of a “nonpolitical nature” to pay for on-duty police officers as well as off-duty officers. It also stated (in its extended title) that it would not apply to “city sponsored” parades and special events. The Request for Council Action accompanying this Ordinance treated this part of the title as if it were a provision of the Ordinance. The requirement of payment for on-duty as well as off-duty officers did not apply to Run, Walk, or Cycling Events. (Exh 3)
10. On September 15, 2005, the City Council adopted a new schedule of Parade Permit Application fees ranging from \$50 to \$200, depending on the number of police officers required for the event (hereinafter “**2005 Amendment**”). (Exh 4)
11. In 2006 and early 2007, following two large Immigration Rights Marches and several smaller marches and walk-outs protesting proposals in the U.S. Congress to criminalize undocumented immigrants and all who care for them, representatives from the SAPD and City staff undertook a re-examination of the City’s parade permitting policies and practices. (Exh 16: ¶9)
12. On March 1, 2007, the San Antonio Police Department presented a Request for Council Action seeking enactment of a revised Parade Ordinance (hereinafter “**March 2007 Proposal**”). (Exh 5) In meetings with individual City Council Members, Assistant City Manager Penny Post oak Ferguson 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. (Exh 17: ¶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. Exempt the following events from some or all cost-shifting fees: (1) the Community Initiatives Department 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. (Exh 5).
 - e. Require all permit applicant to provide insurance in the amount of \$1 million.
13. The Request for Council Action submitted with the March 2007 Proposal did not give any reason for these changes other than to continue regular review of City operations “to ensure public safety.” Most notably, the Request for Council Action does not claim that the changes were designed to augment recovery of police

costs and states that there will be no fiscal impact from the changes.

14. On November 29, 2007, the San Antonio City Council adopted Ordinance No. 2007-11-29-1193, 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 29th 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.” (Exh 6)
15. On March 13, 2008, following this Court’s Decision Granting in Part Plaintiffs’ Motion for Preliminary Injunction, the San Antonio City Council enacted Ordinance No. 2008-03-13-0201, an amended version of the 2007 Parade Ordinance (hereinafter “**2008 Parade Ordinance**”). (Exh 7)
16. 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. (§19-636) On June 23, 2008, the Chief of Police approved Procedure 214: Processions (Parades, Runs, Walks, and Cycling Events) (hereinafter “**SAPD Procedure 214**”). (Exh 8)

Other Relevant San Antonio Ordinances

17. On February 4, 1988, as a companion to the 1988 Parade Ordinance, the City Council passed Ordinance Number 66527, adopting policies and procedures for event organizers to apply for co-sponsorship by the City (hereinafter “**February 1988 Co-Sponsorship Ordinance**”). (Exh 9)
18. On October 27, 1988, the City Council adopted a revised version of the Co-Sponsorship Ordinance that remains in effect today (hereinafter “**Current Co-Sponsorship Ordinance**”). (Exh 10)
19. Section 22-28 of the San Antonio Code of Ordinances grants unbridled discretion to the Director of 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 (hereinafter “**City Park Special Event Permit Ordinance**”). (Exh 11)
20. Section 22-17 of the San Antonio Code of Ordinances impose fees for the use of City parks for special events (hereinafter “**City Park Use Fee Ordinance**”). These fees are revenue-generating. They are not designed to recoup actual costs of a rally or demonstration. (Exh 12)

San Antonio’s Process for Street March Permits

21. A Parade Permit is required for any “group of persons moving along, by whatever means, in an orderly, formal manner” on any street, alley, ... public thoroughfare ... [or] 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.” 2008 Parade Ordinance § 19.630(4). American Heritage Dictionary defines “impede” as

“To retard or obstruct the progress of.” The American Heritage Dictionary of the English Language (4th ed).

22. If a group impedes the flow of vehicular or pedestrian traffic without having a Parade Permit, each participant may be charged with violation of section 43.02 of the Texas Penal Code.
23. In order to obtain a Parade Permit, an individual or organizational representative must discuss the matter with the SAPD Permit Officer. Frequently, a representative of the organizing group will make an initial call to the Police Department and is directed to the Permit Officer. On several occasions, when the caller asked about a Parade permit for a street march addressing controversial public issues, such as the war in Iraq or the pollution left by Kelly Air Force Base, the SAPD Permit Officer responded to the inquiry with an exorbitant estimate of police fees, in the range of \$10,000, \$20,000 or \$25,000. (Exh 19: ¶¶3, 5; Exh 20: ¶¶3-5)
24. If the organizers are not dissuaded by the high estimate, a representative of the organizing group must meet with the Permit Officer in the Permit Officer’s office.¹ Additional police officers may attend the meeting. At the meeting, the Permit Officer does not give the representative an application form to fill out. Instead, the Permit Officer questions the person about the event. The Permit Officer then fills out an “application form.” During the questioning, the Permit Officer often argues with the person about aspects of the event plans, including the route, how many people will attend, how much of the street should be closed for the march, whether barricades are needed, and the like. (Exh 24: ¶¶2 -20; Exh 25: ¶¶7-21)
25. The Permit Officer asks for and records an “Assembly Time,” a “Start Time,” and a “Disbanding Time.” Typically, street marches are followed by a demonstration or rally with speeches, music, performances, and the like. The “Disbanding Time” is reasonably understood by most applicants as the time that the rally or demonstration is scheduled to end. (Exh 24: ¶¶2 -20; Exh 25: ¶¶7-21)
26. Most significantly, the Permit Officer does not ask nor record the amount of time that the street march will be in a particular intersection or city block, or even the total length of time that the march will be in the streets. Yet this is the crucial information for determining an appropriate traffic control plan. (Exh 24: ¶¶2 -20; Exh 25: ¶¶7-21) Instead of considering this crucial information, the Permit Officer just treats most events as if they were going to last for three hours: “I base almost every single event that I have on at least three hours,” he testified, because “. It’s just an easy number to control.” (Exh 31: 53:14-55:10)
27. Following this interrogation, the Permit Officer tells the person that s/he must sign the “application form” as an individual, even if s/he represents a group, coalition, association, or corporation that is organizing the event. The form specifies that the individual has read relevant portions of the San Antonio Code of Ordinances, although those Code sections are not provided to the individual. (Exh 25: ¶¶15, 17)

¹ The First Circuit found such a mandatory “meet and agree” interview with the Police Department to be an unconstitutional burden on First Amendment rights. *Sullivan v. City of Augusta*, 511 F 3d 16, 40 (1st Cir. 2007).

28. In addition, the Permit Officer typically tells the person an estimate of the cost for police for the event. The individual is required to sign a form containing this estimate and another form saying, in effect, that he or she will be personally responsible for all traffic control device costs for the event, as required by the SAPD. The individual is not given copies of any of these forms. (Exh 24: ¶¶11-12; Exh 25: ¶¶19, 21; Exh 31: 76:3-76:7)
29. If the person refuses to sign these forms, then the SAPD deems the application to have been withdrawn, takes no further action, and keeps no record of the meeting. (Exh 25: ¶16)
30. If the planned march route is outside of the downtown area, the Permit Officer sometimes tells an applicant that they can arrange for alternative peace officers to work the event, either by finding peace officers who will volunteer their time or by hiring peace officers. Alternative peace officers may include on-duty SAFFE or PAL officers who “volunteer” their time, off-duty SAPD officers, off-duty Bexar County Sheriff officers, on-duty or off-duty Park Police, on-duty or off-duty Constables, or on-duty or off-duty School District Police. (Exh 25: ¶29; Exh 26: IWDM 0024-00244; Exh 31: 102:15– 04:3)
31. If the event organizers arrange for alternative peace officers, then the SAPD usually grants a Parade Permit without receiving any further information about traffic control, regardless of whether the alternative peace officers have any traffic control experience. (Exh 31: 55:20-58:19) Sometimes, however, the SAPD does dictate the number of peace officers and traffic control devices, as a condition of the Parade Permit. (Exh 31: 123:6-129:5) If the applicant does not have other peace officers, the SAPD Permit Officer and Traffic Shift Commander determine the number of on-duty and off-duty officers and the number and type of traffic control barricades that will be required. (Exh 8: 214.05; Exh 30: 36:15- 44:1; Exh 31: 69:5-74:5)
32. If the cost estimate for police personnel changes from that told to the applicant, the applicant will sometimes, but not always, be informed of the change by the Permit Officer. (Exh 31: 76:25-77:13)

Facts Supporting Plaintiffs’ Claim that San Antonio’s Excessively High Cost-Shifting Fees Constitute Unreasonable Prior Restraints

33. **Unreasonably High Cost-Shifting Fees.** San Antonio’s parade permitting policies and practices impose unreasonably high traffic control fees for street marches protected by the First Amendment.
 - a. **Requiring payment for barricades far in excess of national and state standards.** The SAPD routinely requires traffic control personnel and devices far in excess of that deemed safe and effective by established national and state standards.
 - 1) Compliance with the national Manual of Uniform Traffic Control Devices (“MUTCD”), promulgated by the Federal Highway Administration, or an approved state version of the Manual (such as the Texas

MUTCD) is mandated by Federal law.² The Manual is applicable to all traffic control plans on “any street, highway, or bicycle trail open to public travel.”³ Temporary traffic control plans for special events are expressly included. (Exh 13: §6C.02).

2) Gregory Brinkmeyer is a licensed Professional Engineer who worked for the Texas Department of Transportation for nineteen years. For nine of those years, Mr. Brinkmeyer served as Engineer of Policy and Standards in the Traffic Operations Division. His job included primary responsibility for the Texas Manual on Uniform Traffic Control Devices (“TMUTCD”), which included developing material, interpreting content, writing and approving revisions, publication, and distribution. (Exh 14: ¶¶1 -7)

a) Mr. Brinkmeyer explains the application of the TMUTCD to events like a typical street march:

TMUTCD Section 6C.02 Work Duration states that “Work duration is a major factor in determining the number and types of devices used in temporary traffic control zones. The duration of a temporary traffic control zone is defined relative to the length of time a work operation occupies a spot location.”

Temporary traffic control planning and implementation should be based on the time frame that a spot location on the roadway system will be affected. For marches, typically a “short duration” or “mobile” operation type traffic control should be utilized.

The TMUTCD states “Appropriately colored or marked vehicles with high-intensity rotating, flashing, oscillating, or strobe lights may be used in place of signs and channelizing devices for short-duration or mobile operations.”

Additionally, the TMUTCD states “During short-duration work, it often takes longer to set up and remove the temporary traffic control zone than to perform the work. Workers face hazards in setting up and taking down the temporary traffic control zone. Also, since the work time is short, delays affecting road users are significantly increased when additional devices are installed and removed.” (Exh 14: ¶¶22-25)

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

3 23 C.F.R. 655.603. This regulation specifies “[f]or the purpose of MUTCD applicability, open to public travel includes toll roads and roads within shopping centers, parking lot areas, airports, sports arenas, and other similar business and/or recreation facilities that are privately owned but where the public is allowed to travel without access restrictions. 655.603(a).

- 3) Although the Police Department considers Officer Jenkins to be “certified on the TMUTCD,” there actually is no official “certification” for the TMUTCD. (Exh 29: 47:7–48:12) As Officer Jenkins explained in his deposition, his training on the TMUTCD consisted of a three-day course given by Texas A & M Extension Service in 2003 and a refresher course “last year.” (Exh 31: 48:9–48:18) The only “certification” that is given through such courses is a “Certificate of Attendance.”
- 4) The SAPD’s failure to comply with the Texas Manual on Uniform Traffic Control Devices not only creates longer and more significant traffic disruptions, it also results in traffic control rental costs substantially higher than they would be if the TMUTCD was followed. The relatively high costs for traffic control devices can be seen in the records of American Signal Equipment Company (Exh 27) and Flasher Equipment Company, (Exh 28) two of the City’s approved traffic control device rental companies.
- b. **Requiring payment for costs unrelated to reasonable traffic control.** The SAPD’s determinations of the required number of police officers and the required type and number of barricades are based on unconstitutional considerations.
- 1) **Requiring additional police officers because of the risk of illegal actions by non-participants.** Officer William Jenkins, who has been SAPD Permit Officer since 2003, testified about the police assignments and barricades required for the 2008 International Women’s Day March: Exh 31: 157:9-168:20. He explained why police officers are assigned to watch streets that are already blocked by barricades:
- Q. Could you indicate on the map where those officers are to be assigned and what they are to do?
- A. Jefferson and Pecan, cut all southbound traffic on command.
- Q. Okay. And so there's already a barricade there?
- A. Uh-huh.
- Q. Why would you need an officer also there?
- A. To go ahead and keep traffic moving on -- because you still have traffic coming at you on Jefferson south, and to keep Pecan moving. So he'd still be working traffic. Just because there's a barricade there, it's not gonna prevent people from going around a barricade.
-
- Q. Where is the next officer?
- A. Jefferson and Houston.
- Q. What is that officer supposed to do?
- A. Cut all westbound traffic on Houston Street on command.
- Q. Is there gonna be any westbound traffic on Houston Street?
- A. There could have been. Yes.
- Q. From where?
- A. From Houston over in this direction.
- Q. Isn't there a barricade on that street?
- A. Yes, there is.
- Q. So would it again be just cars that went around the barricade?

A. It could be, yes.

Requiring street march organizers to pay for police officers to prevent drivers from breaking the law by driving through or around traffic barricades is unreasonable. It costs approximately \$300 to rent the barricades and signs required to close one block of road. (Exh 27; Exh 28) American Signal Docs It costs approximately \$50- \$150 for a police office to watch the closed road. (Exh 26: IWDM 05327; Exh 31: 161:8 – 163:4)

2) **Requiring additional police officers and barricades to reduce the risk of legal liability.** Officer Jenkins explained his understanding of the Texas Manual on Uniform Traffic Control Devices, which govern the type and number of barricades that should be used for street marches and other temporary traffic interruptions:

Q. And so how do you determine what, what a traffic control plan should be in light of the manual?

A. I use one term in here, ma'am, whether I'm, whether I'm using neglect, or not. (Exh 31: 132:24-133:2)

In fact, the Texas Manual on Uniform Traffic Control Devices says nothing about neglect or negligence.

Office Jenkins' testimony continues:

Q. Okay. For, for work situations and incidents, part 6 of the Texas Manual on Uniform Traffic Control Devices divides the types of situations into different categories depending on how long the interference with normal traffic vehicular and pedestrian traffic will be; isn't that correct?

A. That's correct.

....

Q. So there's a short duration?

A. Short duration is one hour.

Q. Or less than one hour?

A. Uh-huh.

Q. Okay. And then on the next page, what does it say -- you'll see a highlighted portion marked with an "X". What does it say about traffic control devices for short duration interferences with traffic, normal traffic flow?

A. Normally takes longer to set up and remove the TTC zone than to perform the work. Workers face hazards in setting up and taking down the TTC zone. Also, since the work time is short, delays affecting road users are significantly increased when additional devices are installed and removed.

Q. Do you think that that advice has any bearing on parades or processions?

A. I think you are looking under the wrong section here.

....

Q. Okay. So are you suggesting that, that because parades involve walkers then you would not analyze it under the categories of duration in part 6 of the manual?

A. No. Because the ordinance -- what I have to do is I have to show that I am not neglecting -- or am negligent in what I'm doing. If we were to have an event and some car would run through and hurt some people, we're gonna go through litigation. (Exh 31: 137:14-137:18)

Q. Uh-huh.

A. And I have to prove some how, some way, ma'am, that I was not negligent in what I was doing.

Q. Okay. And, and you find in the manual the requirement that you do extensive barricading for parades and marches even though the duration of those events is very short?

....

THE WITNESS: I do barricading, ma'am, to go ahead and protect myself and protect the City of San Antonio for the event.

(Exh 31: 155:22-155:23) Requiring street march organizers to pay for excessive police and barricade costs because of some vague fear of tort liability is unreasonable.

3) **Charging for on-duty as well as off-duty police.**

- a) The 2008 Parade Ordinance provides that a Parade Permit holder must pay not only for the cost of overtime for off-duty officers, but also the cost of on-duty officers, a cost that the City would have incurred regardless of whether there was a street march.
- b) In no other situation does the City charge San Antonians for work done by on-duty police officers, a cost that residents have already paid for through their taxes. (Exh 36, Defendant's Answer to Interrogatory No. 14)

34. **Not narrowly tailored to further a compelling state interest.** San Antonio parade permitting policies and practices impose unreasonably high costs on street marches protected by the First Amendment.

- a. The available evidence suggests various reasons for the SAPD's proposal for revision of the City's Parade Ordinance, for the City Staff's recommendation that City Council approve this revision, and City Council's eventual approval of a revised version of the proposal in November 2007.
- b. None of this evidence suggests that recoupment of costs was a primary purpose. In the documentation submitted to City Council by the Police Department and the City Staff with the original March 2007 Proposal and the 2007 Parade Ordinance in November, the proponents of the revisions state clearly that the revisions are expected to have no fiscal impact.
- c. If anything, the evidence suggests that police officials and city staff wanted to discourage marches like the Immigration Marches of 2006. (Exh 16: ¶6; Exh 17: ¶6)

35. **Chilling effect on free speech.** The unreasonably high costs imposed by San Antonio's parade permitting policies and practices operate as prior restraints that significantly deter the exercise of First Amendment rights of free speech and assembly in San Antonio.

- a. The excessive estimates dissuade organizers from planning street marches. (Exh 19: ¶¶5 -7; Exh 20: ¶¶5 -6)
- b. The estimates that members of the International Women's Day March and the Coalition for Free Speech in San Antonio have received, of \$5,000- \$7,000 or more, undetermined until after the event, dissuade organizers from planning street marches. The \$3,000 reduction in fees for "Free Speech Events" will not significantly diminish the chilling effect of the City's cost-shifting fees, because organizers will still face an undetermined amount of fees ranging anywhere from \$2,000 to \$4,000 or more. (Exh 25: ¶¶22-23)

36. **No "ample and appropriate" alternatives for speech and assembly.** Despite repeated and apparently heartfelt assurances by City staff, San Antonio policies and practices do not leave ample and appropriate alternatives to street marches for the exercise of fundamental rights of assembly and speech.

- a. Vigilant protection for the right to assemble and to express participants' shared views is a fundamental tenet of democracy.
- b. City officials have repeatedly characterized §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.

c. Sidewalk marches.

1) The risk of confrontation or arrest.

- a) Section 19-632(1) 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."
- b) A march on sidewalks, then, is a "free alternative" only for those events with relatively few participants and ample sidewalks so that the group of people can march on the sidewalk without impeding the "normal flow or regulation" of pedestrian or vehicular traffic. (Exh 19: ¶¶6, 8; Exh 25: ¶¶30-31)
- c) 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. (Exh 19: ¶¶6, 8; Exh 25: ¶31)
- d) 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. (Exh 25: ¶¶24, 30-31)
- e) 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). (Exh 30: 108:9-109:23)
- f) Similarly, the risk of arrest for an alleged violation of § 42.03 is well known among politically active San Antonians because this is one of the charges used against public demonstrators or leafleters. Just recently, Johnny Martinez and Tom Keene, both well-respected peace and anti-death penalty activists,

were standing with a banner at the corner of Dolorosa and S. Flores, as they have every time the State of Texas executed a prisoner for the past ten years. 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. (Exh 22: ¶¶1 -2, and 4-6)

- g) 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. (Exh 19: ¶¶8-10)
- h) 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.**

- a) 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). Mr. Lawson moved to San Antonio in July 2007 and has working primarily on sidewalk issues since shortly thereafter. (Exh 21: ¶¶1 -6)
- b) 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. (Exh 21: ¶¶6)
- c) 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.”
- d) 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. (Exh 15: ¶¶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 places 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.” (Exh 15: ¶¶8; Exh 25: ¶¶26-27)

- e) The ADA requires that Local Government Entities make public services accessible to Americans with disabilities. Surely this includes access to the right to assembly and speech. In San Antonio, where sidewalks do not comply with the ADA, sidewalk marches are not ample and appropriate alternatives to street marches.

d. **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))

- 1) 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.
- 2) 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.
- 3) As mentioned earlier, 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. (Exh 11)
- 4) 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. (Exh 11)

Facts Supporting Plaintiffs’ Claim that the Discretion Granted to the City Council, the Police Department, and the Public Works Department to Set, Reduce, or Waive Cost-Shifting Fees Creates Unreasonable Prior Restraints

37. **Discretion Granted to the City Council.** San Antonio’s parade permitting policies and practices grant broad discretion to the City Council to waive or reduce cost-shifting fees for favored permit applicants. Representatives of the City Attorney’s Office and the City Manager’s office have repeatedly maintained that the 2008 Parade Ordinance does not apply to marches and parades that the City Council has already decided

to “sponsor.” (Exh 6: PowerPoint 11-29-07)

- a. Similarly, representatives of the City Attorney’s Office and the City Manager’s office have consistently maintained that the 2008 Parade Ordinance does not apply to marches and parades that the City Council may decide to “sponsor” in the future. “Again, there is nothing to prevent a labor union from coming forward and seeking Council support and seeking an ordinance [providing funding for or a waiver of fees imposed by the Parade Ordinance], if they have a specific event, and seeking to see if they would garner that kind of support [on City Council].” (Exh 32: 132:22-132:25)

38. **Discretion Granted to the Police Department.** San Antonio’s parade permitting policies and practices grant broad discretion to lower-level police officers to set or waive fees.

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

- 1) 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). (Exh 7)
- 2) 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. (Exh 7)
- 3) 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 non-participants in the area of the march, or any number of other factors that lower-level officers may deem relevant. (Exh 7)
- 4) 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. (Exh 7: §19.636)
- 5) 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 specify no barricades. (Exh 7: §19.636)

6) 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.” (Exh 7: §19.636) The difference in cost between SAPD officers and other peace officers is very large. (Exh 23) 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. (Exh 7: §19-636)

b. 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. (Exh 8)
- 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. (Exh 8: §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. (Exh 8)
- 4) SAPD Procedure 214 does not refer to any distinction between “security” and other costs and it does not include any definition of “security.” (Exh 8)
- 5) SAPD Procedure 214 directs that the Permit Officer design a “barricade plan” only “when necessary.” (Exh 8: 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. (Exh 8)
- 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. (Exh 8: 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*. (Exh 8: 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;" (Exh 30: 24:23-25:11) "It doesn't limit our ability to make a determination that something else might be more appropriate under the circumstances."(Exh 30: 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..."(Exh 30: 27:24-28:1)
- c. Experienced police officers may exercise this discretion to reach vastly differing results and to include potentially unconstitutional subjective evaluations.
- 1) This risk was dramatically demonstrated in the fall of 2006, when one Parade Permit application was submitted for a march to be held on October 12, 2006. The applicant received a cost estimate based on 54 police officers, the number that the Police Department had determined was necessary for traffic control during the event. This application was rejected for administrative reasons. Another organizer then submitted another application for the same march. Same route, same day and time, same number of estimated participants. This time the Police Department determined that 24 police officers would be required. (Exh 26: IWDM 01915-01925, 01926-01934)
 - 2) 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. (Exh 30: 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." (Exh 30: 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." (Exh 30: 96:1-96:13)

3) 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." (Exh 30: 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.

a. 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."

b. 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.

c. 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.

Facts Supporting Plaintiffs' Claim that San Antonio's Cost-Shifting Fees Include Irreparable Vagueness in the Definition of "First Amendment Procession."

39. The determination whether a particular march is a "First Amendment procession" or "Non-First Amendment procession" will affect the costs charged to the organizer (because the City will absorb the first \$3,000 in costs for "First-Amendment processions") and will determine crucial deadlines for permit applications. (2008 Parade Ordinance §§19-633(B), 19-636)

40. The 2008 Parade Ordinance defines "First Amendment Activity" 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." (§19-630(6))

41. Officer Jenkins and Lt. O'Dell, two of the three officers charged with applying these definitions, have both testified that they do not understand the definitions, they do not think they are "qualified" to interpret the definitions, and they don't know how they are going to apply them other than to call the City Attorney's office. (Exh 30: 17:7-19:8; Exh 31: 38:18-42:7)

42. The definition of First Amendment Activity incorrectly suggests that "commercial advertising" is not protected by the First Amendment.

43. The definition does not guide or restrict the exercise of discretion by lower-level police officials who are given the authority to apply it. The definition is not addressed to the pertinent issue of which “processions” are protected by the First Amendment and which are not. Certainly knowing that “press” is a protected activity does not provide guidance to the Parade Permit Officer.
44. In any fair reading of the definition, every procession for which a Parade Permit is required is a protected “First Amendment Activity,” because every procession is an assembly and is expressive.
45. Yet the 2008 Parade Ordinance clearly suggests that some processions are not protected “First Amendment Activity.” Yet to suggest this without providing a definition that delineates any reasonable distinction is again to give unbridled discretion to lower-level officials to favor or disfavor different messages and expressions as they see fit.
46. The Ordinance offers no process through which an applicant can determine in advance whether a planned event will qualify as a “First Amendment procession.”
47. The only process through which a Parade Permit applicant can challenge the Permit Officer’s decision whether or not an event is “First Amendment Activity” is to wait until the Police Department sends an invoice, which may be up to fifteen days after the march, and then to appeal the decision to the City Manager’s Office, which is empowered to make the “final decision” on the matter.

Facts Supporting Plaintiffs’ Claim that San Antonio’s Policies and Practices Regarding Parade Cost-Shifting Fees Constitute Viewpoint Discrimination.

48. **The “City-Sponsorship” Program.** The City is wrongfully engaging in viewpoint discrimination in its “co-sponsorship” program.
 - a. The City’s co-sponsorship program was established in 1988 (by Ordinance 66257) to encourage special events that benefit the public. The program was open to all, and City Council specifically directed that information about the program be widely distributed and that application forms be readily available.
 - b. The benefit of City co-sponsorship would be waiver of costs associated with traffic control and clean-up.
 - c. As amended, the co-sponsorship program limited City co-sponsorship of any event to no more than three years.
 - d. The Co-Sponsorship Ordinance is still in effect. It has never been repealed. Inexplicably, however, the co-sponsorship ordinance does not appear in the current Code of Ordinances.
 - e. At one time, apparently, the Parade Permit Officer provided information about the co-sponsorship program and co-sponsorship application forms to interested parade permit applicants, as a copy of the Ordinance and its prescribed application forms was in the Permit Officer’s Notebook that was given to Officer Jenkins when

he assumed the job in May 2003. (Exh 31, 28:14 – 32:25)

- f. Instead of fairly administering the co-sponsorship program adopted by City Council in a viewpoint neutral way, it appears that city officials simply ignored the Co-Sponsorship Ordinance and developed a practice of simple favoritism.
49. As stated above, San Antonio has a long history of formally and informally waiving cost-shifting fees for favored processions.
50. In 2004, 99 Parade Permits were issued by the SAPD; the SAPD handled traffic control for 59 of those events; and in at least 27 of those 59, Defendant did not require the permit holder to pay for police services. (Exh 31 85:19-87:16)
51. In 2005, 99 Parade Permits were issued; the SAPD handled 42 events; and in at least 32 of those 42 events, Defendant did not require the permit holder to pay for police services. (Exh 31 85:19-87:16)
52. In 2006, 88 Parade Permits were issued; the SAPD handled 36 events; and in at least 17 of those 36 events, Defendant did not require the permit holder to pay for police services. (Exh 31 85:19-87:16)
53. In 2007, 80 Parade Permits were issued; the SAPD handled 46 events; and in at least 29 of those 46 events, Defendant did not require the permit holder to pay for police services. (Exh 31 85:19-87:16)
54. In the 2008 Parade Ordinance, three events are exempted from cost-shifting fees. (2008 Parade Ordinance §19-636) In her presentation to City Council on November 29, 2007, Assistant City Manager told Council members that the Fiesta parades (approximately 10-12) and the Cesar Chávez March are also exempted from cost-shifting fees “because they have separate ordinances.” (Exh 26, IWDM 05560; Exh 34)
55. The 2008 Parade Ordinance specifies: “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 requires 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.” (2008 Parade Ordinance §19-636)
56. When the SAPD has given permission for a march organizer to use alternative peace officers such as off-duty police officers, Sheriff’s Officers, Constables, Park Police, Alamo Heights Police, and various School District Police to “handle” traffic control, the SAPD usually has not required the extensive barricades and other traffic control devices that the SAPD requires for marches that it handles. (Exh 31: 55:20-58:19) In this way, favored events are given another opportunity to march at a reduced fee.
57. The SAPD, on its own or at the request of various City Officials, has not charged some favored processions for on-duty officers, limiting its fee to overtime pay for off-duty officers. (Exh 23: ¶¶8)

58. An informal waiver was granted for the Blue Santa Parade on the basis of an email message: “Chief said to make this happen outside the permitting process.” (Exh 26: IWDM 01139-01140)
59. The City also granted a waiver for the Christmas River Parade held on November 23, 2007, just days before the 2007 Parade Ordinance was passed. (Exh 26: IWDM 00271)
60. There was nothing in the Parade Ordinance in effect during the years prior to 2007 that authorized informal waivers, and yet there was a well-established practice of fee waivers. (See paragraphs 50-53 above)
61. There is nothing in the 2008 Parade Ordinance that precludes informal fee waivers.

LEGAL ARGUMENT

Defendant’s Motion for Summary Judgment is based on the assertion that Plaintiffs cannot present evidence sufficient to warrant a trial on their claims. Defendant is mistaken, for there is ample evidence to support the essential elements in each of the Plaintiffs’ claims.

Summary judgment is warranted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro.⁵⁶ The party moving for summary judgment must demonstrate the absence of a genuine issue of material fact and the non-movant must identify specific facts in the summary judgment record demonstrating that there is a material fact issue concerning the essential elements of its case for which it will bear the burden of proof at trial. The Court must evaluate the summary judgment evidence in the light most favorable to the non-moving party.

In cases involving Constitutional rights, Summary Judgment may be inappropriate merely because of the complexity of the issues and the need for a fuller record to illuminate those complexities.⁴ In First Amendment cases, the issue of whether Defendant's conduct caused a chilling effect on those rights or whether Defendant acted reasonably will present issues of fact that cannot be resolved on a Rule 56 motion.⁵

Legal Framework

As this Court recognized in its Order of February 21, 2008, “it is important to bear in mind that the ordinance regulates access to the public streets. As the Supreme Court long ago held, 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.’”⁶ This is the origin of the public forum doctrine, which informs a significant portion of First Amendment jurisprudence. Today, as in the past, the existence of public space available for speech and assembly is crucial for a functioning democracy.

⁴ Barker v. Norman, 651 F.2d 1107 (5th Cir. 1981).

⁵ Wright, Miller & Kane, Federal Practice & Procedure § 2732.2 Summary Judgment in Constitutional and Civil Rights Cases (2008)

⁶ Dkt. 38, at 5, quoting Hague v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939).

Under the public forum doctrine, public streets are not “owned” by the government. Instead, they are “held in trust” and “use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”⁷ Moreover, the people’s right to use the public streets includes not merely the right to drive and walk on the public streets, but also, at reasonable times and places, in a reasonable manner, to march, parade, and, most importantly, to demonstrate shared views on matters of importance to our communities, even if those views include criticism of the government. Indeed, the Supreme Court has repeatedly recognized that political speech and assembly are at the core of First Amendment values and that marches and demonstrations that address significant and controversial issues are central to the activities protected by the public forum doctrine.⁸

1. Genuine Issues of Fact Exist Regarding Plaintiffs’ Claim that San Antonio’s High Cost-Shifting Fees Constitute Unreasonable Prior Restraints

Although all regulations impacting speech activity in traditional public fora are subject to strict scrutiny, the Supreme Court has repeatedly held that the government may regulate the “time, place, and manner” of speech and assembly in traditional public fora so long as the regulation (1) serves a significant governmental interest; (2) is “narrowly tailored” to serve that interest; and (3) leaves open ample and appropriate alternatives for speech and assembly.⁹ In addition, the Supreme Court has held that the government may require a prior permit for organized marches and rallies in traditional public fora, so long as it articulates “narrow, objective, and definite standards to guide the licensing authority” and does not give “overly broad licensing discretion to a government official.”¹⁰

It is implicit in First Amendment jurisprudence that government money and effort will be spent to facilitate use of public fora for speech and assembly.¹¹ Everyday use of public streets for driving, walking, and conducting

7 *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.).

8 *See Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (stating that peaceable assembly at the site of the state government to protest government action is the “most pristine and classic form” of exercising First Amendment rights); *Carey v. Brown*, 447 U.S. 455, 467 (1980); *see also Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”); *Thornhill v. State of Alabama*, 310 U.S. 88, 95 (1940) (“Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion.”). *Morse v. Fredrick*, 127 S.Ct. 2618, 2626 (“Political speech, of course, is at the core of what the First Amendment is designed to protect.”) *Virginia v. Black*, 538 U.S. 343, 365, (2003)). *Cf. N.A.A.C.P. v. Claiborne Hardware*, 458 U.S. 886, 909 (1984) (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this court has more than once recognized by remarking on the close nexus between the freedoms of speech and assembly,” quoting *N.A.A.C.P. v. Alabama, ex rel. Patterson*, 357 U.S. 449, 460, (1958)).

9 *Ward v. Rock Against Racism*, 491 U.S. 781, 787 (1989).

10 *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 130-131 (1992).

11 *See, e.g. Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996) (In more traditional public forums, the government shoulders the burden of administering and enforcing the openness of the expressive forum); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802-803 (1985) (“The right to use government property for one’s private expression depends upon whether the property has by law or tradition been given the status of a public forum”). *cf. Schneider v. State (Town of Irvington)*, 308 U.S. 147, 162 (1939) (fact that city is financially burdened when

business periodically has to give way for speech and assembly. Government is required to provide for the safe integration of these conflicting uses.

By the same token, it has been assumed for some time that government may collect reasonable fees in connection with the issuance of various licenses and permits and, more recently, that the government may charge “user fees” for various public services in an effort to strike a balance between government costs and user demand, so long as they do not significantly burden the exercise of fundamental rights, do not operate to deprive the poor of critical official resources, do not enable the government to exact a profit, and are not intended to restrict the exercise of constitutional rights.¹² Yet, as the Sixth Circuit recently observed, “the Supreme Court has never enunciated a comprehensive approach to the constitutionality of a licensing fee charged for the exercise of First Amendment rights.”¹³ The Court has addressed or touched on the issue in three cases: *Cox v. New Hampshire*,¹⁴ which observed, in dicta, that a government could impose a fee designed to recoup some of the costs associated with street marches; *Murdock v. Pennsylvania*,¹⁵ which held that a tax imposed on door-to-door solicitors is an unconstitutional burden on protected rights; and *Forsyth County v. Nationalist Movement*,¹⁶ which held that a cost-shifting fee in an amount determined in a discretionary fashion, which could include costs to protect participants from unruly hecklers, was unconstitutional. The Fifth Circuit addressed this issue in *Fernandez v. Limmer*,¹⁷ expressing concerns that were later articulated by the Supreme Court in *Forsyth County*.

Since *Forsyth County*, two Federal Circuit Courts have attempted to articulate the meaning of the Supreme Court authorities in cases involving cost-shifting fees connected with the exercise of First Amendment rights. The main difference between the two interpretations is in how they characterize the relationship among the three cases. In *Sullivan v. City of Augusta*,¹⁸ the First Circuit treated *Cox* as articulating the general rule -- that cost-shifting fees are constitutional -- while *Murdock* and *Forsyth* merely attached three limitations -- that government can't tax protected activity as a profit-making device, that costs generated by hecklers can't be shifted, and that the fee-

listeners throw leaflets on the street does not justify restriction on distribution of leaflets). See generally, David Cole, *Beyond Unconstitutional Conditions: Charting Spheres Of Neutrality In Government-Funded Speech.*, 67 N.Y.U. L. Rev. 675 (1992) (“In a public forum, the mere refusal to subsidize speech of a particular content does violate the first amendment”).

12 *But cf.* *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, (1966) (poll tax); *Boddie v. Connecticut*, 401 U.S. 371, 382-83 (1971) (mandating affordable access to courts for divorce proceedings); *Griffin v. Illinois*, 351 U.S. 12, 18-19 (1956) (requiring states to provide criminal trial transcripts to defendants for appeal). *But cf.* *United States v. Kras* (upholding a filing fee for bankruptcy); *San Antonio Independent School District v. Rodriguez* (upholding local funding--analogous to a user fee--of public schools). See, generally, David G. Duff, *Benefit Taxes and User Fees in Theory and Practice*, 54 U. Toronto L.J. 391 (2004).

13 729, Inc. v. Kenton County Fiscal Court, 515 F.3d 485 (6th Cir. 2008).

14 312 U.S. 569, 576-77 (1941).

15 319 U.S. 105, 114 (1943).

16 505 U.S. 123 (1992).

17 663 F.2d 617 (5th Cir. 1981)

18 511 F.3d 16 (1st Cir. 2007).

determining official can't be given discretion to make content-based choices.¹⁹

The Sixth Circuit has adopted a very different and much more persuasive approach in *729 Inc. v. Kenton County*.²⁰ Recognizing not only that the issue of fees was not squarely presented in *Cox* but also that both *Cox* (1941) and *Murdock* (1943) predated recent developments in First Amendment jurisprudence, the Sixth Circuit concluded that *Forsyth* “sharply limited *Cox*” by subjecting the cost-shifting fee to the rigorous analysis of strict scrutiny, including the requirements that the fee not be so high as to deter the exercise of First Amendment rights, that it be content-neutral, that it be narrowly tailored to serve a significant governmental interest, and that it leave ample and appropriate alternative places for speech and assembly.²¹

Applying this test to the facts in this case, Plaintiffs have presented sufficient Summary Judgment evidence to warrant the conclusion that San Antonio’s parade permitting policies and practices impose unreasonably high traffic control fees for street marches protected by the First Amendment. The Summary Judgment evidence shows that the SAPD routinely requires payment for barricades far in excess of national and state standards and payment for traffic control personnel to address a perceived risk of illegal conduct by third parties whose connection, if anything, to the street marches is that of a heckler. In addition, the evidence supports the conclusion that police officers determine the cost-shifting fees in part on the basis of vague fears of personal tort liability. Similarly, the City’s practice of requiring parade permit holders to bear not only the costs of overtime officers, which arguably would not have been incurred but for the march or parade, but also the costs of on-duty officers, costs that the City would have incurred regardless of whether the march or parade happened supports the conclusion that the City’s cost-shifting fees are unreasonable. See ¶ 33(3) above.

In addition, the evidence supports the conclusion that San Antonio’s parade permitting policies and practices are not narrowly tailored to serve a significant governmental interest. The available evidence suggests a variety of reasons for the SAPD’s proposal for revision of the City’s Parade Ordinance, for the City Staff’s recommendation that City Council approve this revision, and City Council’s eventual approval of a revised version of the proposal in November 2007, including a desire to avoid street marches similar to the 2006 Immigration Marches, a desire to simplify the Code of Ordinances, or a desire to keep up with other cities. But the evidence does not support the conclusion that the City’s purpose was actually to collect cost-shifting fees. See ¶35 above.

The Summary Judgment evidence also supports the conclusion that San Antonio’s parade cost-shifting fee policies and practices significantly chill or deter the exercise of First Amendment rights of free speech and assembly in San Antonio. See ¶36 above.

Finally, the Summary Judgment evidence supports the conclusion that San Antonio’s policies and practices

19 511 F. 3d at 32.

20 515 F.3d 485 (6th Cir. 2008).

21 *Id.* at 502-503.

provide no ample and appropriate alternatives to street marches for the exercise of the fundamental rights of assembly and speech. The evidence shows that sidewalk marches entail substantial risks of conflict, arrest, and inaccessibility. See ¶ 37c. Similarly, the alternative of static assemblages is not ample and appropriate in view of the unbridled discretion given to the Parks Department to grant or deny permits for use of city parks and the significant revenue-generating fees required for use of the parks. See ¶37d.

2. Genuine Issues of Fact Exist Regarding Plaintiffs’ Claim that the Discretion Granted to the City Council, the Police Department, and the Public Works Department to Set, Reduce, or Waive Cost-Shifting Fees Creates Unreasonable Prior Restraints

a. Discretion granted to the City Council.

In *Long Beach Area Peace Network v. City of Long Beach*,²² 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.²³

The holding of the Sixth Circuit is supported by *Shuttlesworth v. City of Birmingham*,²⁴ 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.²⁵

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

22 522 F.3d 1010 (9th Cir. 2008)

23 522 F.3d at 1042.

24 394 U.S. 147

25 394 U.S. 147, 151 (1969).

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."²⁶

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.²⁷

As this Court observed in its Order of February 21, 2008, however, that even in a facial challenge to the new ordinance, "the Court must consider the City of San Antonio's 'authoritative constructions of the ordinance, including its own implementation and interpretation of it.'"²⁸ 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. See ¶38 above. This is not permissible under the First and Fourteenth Amendments.

b. Discretion granted to the Police Department and the Public Works Department

As this Court held in its February 21, 2008 Order, the Supreme Court's decision in *Forsyth County, Georgia v. The Nationalist Movement*, 505 U.S. 123 (1992) establishes a rigorous limitation on the grant of discretion to lower-level officials to make decisions impacting important First Amendment rights. The Court explained:

A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.' ... The reasoning is simple: if the permit scheme "involves appraisal of facts, the exercise of judgment, and the formation of an opinion' by the licensing authority, 'the danger of censorship and of abridgement of our precious First Amendment freedoms is too great' to be permitted. *Id.* at 131.

Even before *Forsyth County*, the Fifth Circuit Court of Appeals held that the grant of broad discretion in the evaluation of street march permit applications is constitutionally impermissible. *Beckerman v. City of Tupelo*, 664 F.2d 502 (5th Cir. 1981). *Cf. Fernandez v. Limmer*, 663 F.2d 619 (5th Cir. 1981) (discretion in granting of airport solicitation permits is unconstitutional). Following *Forsyth County*, lower courts have consistently applied its holding that broad discretion in the determination of permit-related fees and costs is simply unconstitutional. Just recently, the Third Circuit Court of Appeals evaluated a permit system that required the permit holder to promise to pay "all costs of policing, cleaning up, and restoring the park; ... to reimburse the City for any such costs incurred by the City." *The Nationalist Movement v. City of York*, 481 F.3d 178, 181 (3rd Cir. 2007). The Court held that this requirement is unconstitutional because "the City is given unlimited discretion which could easily be used to punish (or intimidate) speakers based on the content of their messages. Given the substantial expense that could be levied upon a speaker, and the almost limitless possibility of abuse, it is an understatement

²⁶ 744 F.2d. at 747 (quoting *Taxpayers for Vincent*, 466 U.S. at 804, 104 S.Ct. 2118).

²⁷ *Camp Legal Defense Fund V. City of Atlanta*, 451 F.3d 1257, 1275-1276 (11th Cir. 2006).

²⁸ Order, Docket 38, at 5 (quoting *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 131 (1992)).

to conclude that this provision chills constitutionally-protected speech, (*id.* at 186-187).

The 2008 Parade Ordinance and SAPD Procedure 214 do not sufficiently guide and restrict the discretion granted to lower-level officials to set cost-shifting fees. Because the Ordinance is not tightly drafted, it necessarily requires the reader to pick and chose among provisions and to decide which of them are sensible and which are simply loose verbiage. This sloppy drafting itself confers unconstitutionally broad discretion on the city official who must interpret the Ordinance.

SAPD Procedure 214, similarly, is so vaguely written and so easily disregarded by its own author that it cannot be taken seriously as a guide .

3. Genuine Issues of Fact Exist Regarding Plaintiffs' Claim that San Antonio's Cost-Shifting Fees Include Irreparable Vagueness in the Definition of "First Amendment Procession."

Under the 2008 Parade Ordinance, the requirement of insurance, the requirement of notification to neighboring communities, the deadlines for permit applications, and the amount of fees all depend on whether an event is characterized as a "First Amendment Procession," which is defined as "a procession, the sole or principal object of which is First Amendment activity." (§19.630(7)). "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." (§19.630(6)).

Because the Ordinance's definitions of the two types of processions are "so indefinite that people 'of common intelligence must necessarily guess at its meaning and differ as to its application,'" the distinction between them is meaningless. *Reeves v. McCann*, 631 F.2d 377, 383 (5th Cir.1980) (quoting *Connelly v. General Construction Co.* 269 U.S. 385, 391 (1926)). Permit applicants are given no substantive guidance about what types of activity are protected under the United States or Texas Constitutions, other than the exclusion of "commercial advertising," a term that, in addition to being vague, itself, incorrectly suggests that commercial speech is not entitled to constitutional protection. Ordinance § 19-630(6).²⁹ The Ordinance fails to specify what relative importance First Amendment activity must have to constitute a (or "not" a) "principal object" of a procession. Ordinance § 19-630(7)-(8). Nor does it specify whose opinion of a procession's "objects" is controlling: it could be that of the applicant, procession spectators, the Chief of Police, or someone else.

Moreover, the definition of "Non-First Amendment Processions" is overbroad because it includes those processions for which the "principal" but not "sole" object is constitutionally unprotected activity. Ordinance § 19-636(8).³⁰ As a result, the Ordinance subjects some constitutionally protected activity to even earlier permitting deadlines than required for "First Amendment Processions," §19-633(C), as well as a \$1 million

²⁹ See *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-70 (1976) (commercial speech is entitled to some First Amendment protections).

³⁰ See *Beckerman*, 664 F.2d at 507 ("A law is overbroad if it 'does not aim specifically at evils within the allowable area of control... but sweeps within its ambit other activities that constitute an exercise' of First Amendment rights.") (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940))

insurance requirement, §19-636(E), and an obligation to provide advance notice to businesses and residences along the procession route, §19-636(F). Because each of these restrictions may serve as a substantial deterrent to those who wish to exercise protected First Amendment activity, the Ordinance provisions applicable to “Non-First Amendment Processions” must be struck down as overbroad.³¹

4. Genuine Issue of Fact Exist Regarding Plaintiffs’ Claim that San Antonio’s Polices and Practices on Parade Cost-Shifting Fees Constitute Viewpoint Discrimination.

In arguments to the Court, the City maintains that its practice of waiving parade permit fees for favored groups and messages is permissible content-based discrimination under the “government speech” doctrine. Defendant argues 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.” The 2008 Parade Ordinance lists three events that the City claims to sponsor.³² In addition, representatives of the City Attorney’s Office and the City Manager’s office have repeatedly maintained that other parades “sponsored” by the City in the past will be exempted from fees imposed by the 2008 Parade Ordinance.³³ Indeed, this interpretation was presented to the City Council immediately before the vote on the new Parade Ordinance by the Assistant City Manager who oversaw drafting of the ordinance.³⁴

Moreover, neither the 2008 Parade Ordinance nor the SAPD Procedure Operating Procedure addresses the established practice of informal fee waiver. Although the City Attorney has not argued that each decision by a City Official to waive the fees for a particular parade is a “sponsorship” decision and has insisted that “the door is shut” to informal fee waivers, the legal framework within which this practice developed remains unchanged and the practice itself is deeply engrained.³⁵ The good faith assurances of Defendant’s attorney cannot be taken as an

31 *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); see also *Beckerman*, 664 F.2d at 507 (licensing statute is overbroad when “the state achieves indirectly through the denial of a permit what it could not achieve directly through a blanket prohibition of the activity.”).

32 §19-636(D) lists the *Deiz y Seis* Parade, the Martin Luther King March, and the Veterans Day Parade.

33 Parades that City Officials have indicated will be excluded from fees for traffic control and other fees imposed by the Parade Ordinance include 10-12 parades associated with the Fiesta and the Cesar Chavez March. (Exh 26: IWDM 05560) The City has not disclosed the status of the 60+ Mardi Gras Parade and the San Antonio Marathon.

34 Exh 34 (DVD and Transcript of the City Council Meeting of November 29, 2007.)

35 In the December 20, 2007 hearing before this Court, the City Attorney insisted “that door has been basically closed at this point, because there is no longer that discretion of a group calling up the Council, their Council representative and saying: I would like a waiver of this or that. ... That is no longer provided for or is no longer considered under the terms of this new ordinance.” Hearing, December 20, 2007, at 17:7-13. It is misleading to suggest that informal fee waivers were “provided for” in the 1988 Parade Ordinance. The practice of informal fee waivers developed even though the 1988 Parade Ordinance used mandatory language: “The permit holder shall bear all costs relating to traffic control devices and any on-duty and overtime police required for the event.” The language of the 2008 Parade Ordinance is similar: “Each permit holder is responsible for the costs of (1) providing traffic control devices ...; (2) providing traffic control personnel; and (3) cleaning up the procession route.” Ironically, the only change between the 1988 and 2008 Parade Ordinances that relates to the City’s fee waiver practice is that the list of exemptions in the 2008 Parade Ordinance does not include “Parades authorized by separate ordinance” as did the prior law. Yet City officials confidently interpret the 2008 Ordinance to allow waiver of its mandatory fees for parades addressed in separate ordinances.

authoritative construction of the City's policies and practices regarding parade permit fees.³⁶ As the one court explained: "The doctrine forbidding unbridled discretion 'requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice.'" ³⁷

Because the hearing on the Motion for Preliminary Injunction preceded discovery, evidence presented at that hearing was limited. Based on that limited evidence, this Court evaluated the City's "sponsorship" argument on the assumption that only the three parades listed in the New Parade Ordinance itself would be exempted.³⁸ With convincing evidence of the City's interpretation of the New Parade Ordinance and its existing practices, a reconsideration of Defendant's "sponsorship" argument is needed.³⁹

The multitude of events for which the City waives fees casts doubt on the claim that these are all instances of "government speech." In its Order of February 21, 2008, the Court identified the tension between the "government speech" doctrine, articulated in a line of cases stemming from *Rust v. Sullivan* and *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001), and the "viewpoint discrimination" doctrine, developed in *Rosenberger v. Rector and Visitors of University of Virginia* and its progeny. Looking at the City 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 Court concluded, on the basis of the evidence presented at the hearing, that it was more like government speech and therefore was permissible content-based discrimination.⁴⁰

With greater evidence now available, it is clear that the City's practice of favoring many groups and messages while burdening a relatively few others cannot be justified as "government speech." An existing Ordinance of the City of San Antonio, Ordinance 68200, enacted October 27, 1988, establishes an open system for organizers of parades and marches to apply to the City for co-sponsorship, of which an important benefit would be the waiver of cost-shifting fees imposed on parade permit holders. The system includes a public application process, a set of articulated criteria, and a limitation on the number of years that co-sponsorship would last. (Exh 10) The preamble to this Ordinance states: "The City of San Antonio continues to recognize that special events are an

36 As the Supreme Court has observed, "[i]t is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.' [I]f it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.' *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982)); cf. *Sullivan v. City of Augusta*, 511 F.3d 16 (1st Cir. 2007).

37 *Nationalist Movement v. City of Boston*, 12 F.Supp.2d 182, 194 (D.Mass.1998) (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988)).

38 Order (Dkt 38) at fn 55.

39 The City has repeatedly asserted that this Court should not concern itself with the City's practice of waiving fees imposed by the Parade Ordinance for favored parades because those parades "have separate ordinances." Transcript of Hearing dated December 20, 2007, at 15:3-10, 130:22-23. But as this Court observed in a different context, merely separating City actions into separate ordinances "should not and does not dispose of the underlying constitutional question." Order (Dkt 38) at 21-22.

40 Order (Dkt 38)

integral part of the tourism industry in San Antonio and contribute to the ambience of the City, attract visitors and involve residents in the local community; and [the enactment of this ordinance] will provide guidance to the organizations when considering requests [for co-sponsorship].”

So, while the Court analyzed whether the City had established a separate program for special event sponsorship, the City actually had done just that. However, in the City’s established practice of parade permit fee waiving, it has not used its existing system of sponsorship. Instead, it has chosen to maintain a discretionary, politically-controlled, and largely secret practice of content-based fee waivers. The doctrine of “government speech” cannot be used to justify this practice.

As this Court recognized in its February 21st Order, the rationale of the “government speech” doctrine includes the idea that “when the City speaks, either through itself or through private parties it funds, ‘it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.’”⁴¹ In *Chiras v. Miller*,⁴² the Fifth Circuit emphasized the careful analysis required in determining if a particular instance of content-based choice is “government speech.” The practice of fee waiver maintained by the City is not “government speech” under this doctrine.

Accordingly, Plaintiffs request that Defendant’s Motion for Summary Judgment be denied in its entirety.

Respectfully submitted,

s/ Amy Kastely

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⁴¹ Order (Dkt 38) at 25, quoting Velasquez at 541. See also Board of Regents of University of Wisconsin v. Southworth, 529 U.S. 217 (2000).

⁴² 432 F.3d 606 (5th Cir, 2005)

CERTIFICATE OF SERVICE

I hereby certify that on, November 5, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system that will send notification of such filing to Assistant City Attorneys Deborah Klein and Cathy Sheehan, Attorneys for Defendants.

/s/ Amy Kastely

Amy Kastely