IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PEOPLE AGAINST POLICE VIOLENCE; THOMAS MERTON CENTER; and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PITTSBURGH BRANCH,	)	
Plaintiffs,	)	Civil Action No.:_____
v.	)	
CITY OF PITTSBURGH,	)	
Defendant.	)	

PLAINTIFFS' LEGAL MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Plaintiffs incorporate by reference the factual allegations contained in the Verified Complaint.

ARGUMENT

Under Fed. R. Civ. P. 65, this Court must weigh four factors when deciding whether to grant a motion for preliminary injunction: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the non-moving party; and (4) whether granting preliminary relief will be in the public interest.[1] Balancing the factors in this free-speech case, where

[1] American Civil Liberties Union v. Reno, 217 F.3d 162, 172 (3d Cir. 2000) (citations omitted).

irreparable harm is legally presumed, clearly weighs in favor of granting the requested injunction.

1. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR FIRST AMENDMENT CLAIM BECAUSE CHAPTER 603 IS VERY SIMILAR TO THE ORDINANCE DECLARED FACIALLY UNCONSTITUTIONAL BY THE U. S. SUPREME COURT IN FORSYTH COUNTY, GEORGIA V. NATIONALIST MOVEMENT.[2]

Plaintiffs are likely to prevail on the merits of their First Amendment Claim. Plaintiffs in this action allege that Chapter 603 is fatally flawed under well-established First Amendment jurisprudence in at least three ways.[3] But since the City has denied Plaintiffs' permit application based on the sections requiring a permit and authorizing the police chief to order a pre-payment of police-security fees, this Court can resolve the legal dispute by ruling just on the facial challenge to those provisions. Only if the Court finds that the ordinance is likely to be facially constitutional must it address the as-applied challenges, which Plaintiffs address just briefly at the end of this section.

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[2] Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123 (1992).

[3] See Verified Complaint, ¶¶19-21: (1) the ordinance is not sufficiently specific and detailed to guide the City's decisions about the use of its public forums, i.e., parks, streets and sidewalks, and it confers on City officials too much discretion to deny and otherwise improperly condition expressive activities; (2) the ordinance imposes unconstitutional financial obligations on people and groups wishing to engage in expressive activities; and (3) the ordinance does not contain the procedural due process protections that must attend any regulation of First Amendment activities.

a. Defendants Bear the Burden of Proof and Persuasion in this First Amendment Case.

At the outset, Plaintiffs note that unlike most legal disputes, in First Amendment cases Defendants carry the burden of proof and persuasion.[4] In other words, once Plaintiffs have shown a restraint on free expression, the burden shifts to the government agency to justify the restraint under the relevant First Amendment standard.[5] Strict scrutiny applies in this case.

b. Political Parades and Rallies in Public Parks, Squares and Streets Is Entitled to the Highest First Amendment Protection.

Political marches on city streets and demonstrations outside public buildings are quintessential First Amendment activities entitled to maximum constitutional protection.[6] "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between

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[4] United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816, (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions") (citations omitted); Phillips v. Borough of Keyport, 107 F.3d 164, 172-73 (3rd Cir. 1997)(en banc), cert. denied, 522 U.S. 132 (1997) (accord).

[5] Phillips, 107 F.3d at 172-73 ("When a legislative body acts to regulate speech, it has the burden, when challenged ... of satisfying the relevant First Amendment standard").

[6] Boos v. Barry, 485 U.S. 312, 318 (1988). See also, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston 515 U.S. 557, 568-69 (1995) (parades are constitutionally protected expression).

citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."[7] When expressive activities, like parades and rallies, take place in quintessential public fora, such as streets and sidewalks, the "government's ability to permissibly restrict expressive conduct is extremely limited..."[8]

c. Permit Systems to Regulate Public Forum Uses Are Constitutional Only If They Contain Narrow, Specific Standards to Guide Decision-makers, and the City's Ordinance Fails the Test under the Supreme Court's Decision in Forsyth County v. Nationalist Movement.

Although permit systems regulating the use of public forums are considered a type of prior restraint on free expression, the

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[7] Hague v. C.I.O., 307 U.S. 496, 515-16 (1939).

[8] United States v. Grace, 461 U.S. 171,177 (1983). Public streets, parks, and sidewalks have long been recognized as quintessential, traditional "public forums." Id. Traditional public forums are the most protected type of government property. The Supreme Court described the three types of public forums in Perry Education Ass'n v. Perry Local Educators' Association, 460 U.S. 37 (1983). "Traditional" public forums include "places which by long tradition or government fiat have been devoted to assembly and debate." Id. at 45-46. Typically, these are parks, streets and sidewalks. "Limited" public forums are considered to be "public property which the State has opened for use by the public as a place for expressive activity." Id. In such a forum, the "Constitution forbids the [government] to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." Id. (citations omitted). "Nonpublic" forums are those which have no specific relation to open or free communication. Id. This case concerns only traditional public forums.

Supreme Court has recognized that government has an interest "to regulate competing uses of public forums," and may, accordingly, utilize a permit scheme to impose reasonable time, place and manner restrictions.[9] Permit systems must, however, satisfy stringent constitutional requirements.

The Supreme Court has identified four criteria for evaluating permit systems. First, the system "may not delegate overly broad licensing discretion to a government official."[10] Second, "any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message...."[11] Third, the scheme "must be narrowly tailored to serve a significant governmental interest...."[12] And, fourth, it "must leave open ample alternatives for communication."[13] Forsyth, which is both factually and legally on point, controls the analysis of Chapter 603 and dictates a decision that Chapter 603 is facially unconstitutional.

In Forsyth County, the Court reviewed an ordinance that required groups and organizations to obtain a permit before holding

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[9] Forsyth County, 505 U.S. at 130.

[10] Id. (citation omitted).

[11] Id. (citation omitted).

[12] Id. (citation omitted).

[13] Id. (citation omitted).

parades, assemblies and demonstrations on public property.[14] The ordinance also required permit applicants to defray law enforcement costs by paying a fee, "the amount of which was to be fixed 'from time to time' by the Board."[15] Forsyth County subsequently amended the foregoing provision to provide that "every permit applicant 'shall pay in advance for such permit, for the use of the County, a sum not more than $1000.00 for each day such parade, procession, or open air public meeting shall take place."[16] When the Nationalist Movement applied to hold a rally on the courthouse steps to protest the Martin Luther King, Jr. holiday, the County assessed a $100 fee.[17] Rather than pay the fee, the Nationalist Movement filed suit challenging the ordinance as facially unconstitutional. The District Court refused to issue the injunction, holding that the $100 fee was reasonable and that the ordinance as applied was not unconstitutional.[18] The Eleventh Circuit reversed, holding that the allowable $1000 per day fee was

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[14] Id. at 126-27.

[15] Id. at 126.

[16] Id. The County administrator also had authority "to adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed." Id. at 127.

[17] Id.

[18] Id. at 127-28.

excessive.[19] The Supreme Court affirmed, but on grounds that the ordinance is unconstitutionally overbroad, which is precisely the problem with Pittsburgh's Chapter 603.

The constitutional infirmity of overbroad legislation "is that it sweeps protected activity within its proscription."[20] Where a law "imposes a direct restriction on protected First Amendment activity, and where the defect in the [law] is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the [law] creates an unnecessary risk of chilling free speech, the [law] is properly subject to facial attack."[21] An overbreadth challenge is also appropriate when a law "delegates overly broad discretion to the decisionmaker...."[22]

The Supreme Court has regularly stricken systems where government officials have been given unlimited discretion to

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[19] Id. at 128-29.

[20] Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (legal restraint invalid if it "does not aim specifically at evils within the allowable area of [government] control, but ... sweeps within its ambit other activities that constitute an exercise" of protected expression).

[21] Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 968 (1984) (citations omitted). See also, City Council of Los Angeles v. Taxpayers For Vincent, 466 U. S. 789, 796 (1984) (law "seeks to prohibit such a broad range of protected conduct that it is constitutionally overbroad"); Erznoznick v. City of Jacksonville, 422 U. S. 205, 217 (1975) ("[W]here the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack....").

[22] Forsyth County, 505 U.S. at 129-30 (citations omitted).

approve or deny expressive activities.[23] A unanimous Supreme Court reaffirmed the importance of constraining official discretion over expressive activities last year.[24] The Court noted that the danger of arbitrary, politically-motivated, and discriminatory censorship is significant when standards do not constrain the censors.[25] Indeed, the Court observed, the Constitution's framers were most mindful of English abuses involving "administrative official[s] who enjoyed unconfined authority to pass judgment on the content of speech."[26] Citing Forsyth County and the "risk" that "licensing oficials [who] enjoy unduly broad discretion in determining whether to grant or deny a permit ... will favor or disfavor speech based on content," the Court reiterated the First Amendment requirement that "time, place and manner regulation[s] contain adequate standards to guide official[s'] decision[s] and render [them]

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[23] See, e.g., FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225 (1990); City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757 (1988); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

[24] Thomas v. Chicago Park District, 534 U.S. 316 (2002). In Thomas, the Court dealt with the narrow issue of whether government must initiate judicial proceedings if it denies a permit under a content-neutral permitting system. Since Chapter 603 is not content neutral due to its overbreadth, see discussion infra, Thomas does not apply.

[25] Id. at 320-21.

[26] Id. at 320.

subject to effective judicial review."[27]

The Supreme Court applied the well-established overbreadth jurisprudence to the Forsyth County ordinance and concluded that it was indeed overbroad and, thus, facially unconstitutional. A permitting system, the Court ruled, must contain "narrow, objective, and definite standards to guide the licensing authority." Otherwise, since the decision whether to issue a permit "'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."[28]

Applying this overbreadth law to the Forsyth County ordinance, the Court concluded that the law gave unfettered discretion to government officials to determine what to charge or even whether to charge anything for administrative or police fees, required no explanation of the decision, did not provide for administrative or judicial review, and did nothing to prevent officials from "encouraging some views and discouraging others through the arbitrary application of fees."[29] The Court reasoned that such

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[27] Id. at 323 (citations omitted).

[28] Forsyth County, 505 U.S. at 131 (citations omitted).

[29] Id. at 133. The entire passage reads as follows:

"The decision how much to charge for police protection or

(continued...)

discretion in setting fees based on law enforcement and administrative needs in a particular situation leads inevitably to determinations based on the content of the speakers' message, and such content-based determinations "cannot be tolerated under the First Amendment."[30] The flaw identified by the Forsyth Court is identical to the flaw that afflicts Chapter 603.

Chapter 603 vests complete discretion in City officials to determine who needs a permit and under what conditions:

> No person shall conduct or participate in any parade, procession, assemblage or meeting occupying, marching or assembling upon any street, wharf or public square of the city, to the interference, interruption or exclusion of other persons in their legal right to the use thereof, without a permit being issued therefor by the Superintendent of Police.

§603.03(a). Depending on the circumstances, one or five or ten people could interfere with other people's use of the public space. Consequently, everyone wishing to hold a parade or assembly arguably must apply for a permit.

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[29](...continued)
administrative time -- or even whether to charge at all -- is left to the whim of the administrator. There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official."

[30] Id. at 133-35.

As in Forsyth, Chapter 603 authorizes City officials to assess fees for police security, but does not provide any standards or guidance for when to charge the fee or in what amount. §603.02 reads as follows:

> CROWDS REQUIRING POLICE OR PARAMEDIC PROTECTION.
> (a) Where the presence of uniformed or nonuniformed police officers at events attracting large crowds is deemed a necessary protection to the public by the Superintendent of Police, he or she shall have full authority to require the person or organization conducting such event to employ the number of uniformed or nonuniformed police officers as may be designated by him or her.

The ordinance does not define "large crowds," again leaving it to the Police Chief's "sole determin[ation]."[31] Therefore, City officials have complete and unfettered discretion to decide when a crowd is "large," whether police protection is necessary, and how many officers to employ. The difference between this language and the Forsyth County ordinance is legally insignificant.[32] Neither ordinance contains anything approaching the "narrow, objective, and definite standards to guide the licensing authority..." required by

[31] Chapter 603 defines "large crowds" as follows: "The number of persons as are solely determined by either the Superintendent of Police to require necessary police protection or the Chief of the Bureau of Emergency Medical Services to require paramedic protection." §603.01(a).

[32] The Forsyth County ordinance stated that the "the amount of [the fee] was to be fixed 'from time to time' by the Board." Forsyth County, 505 U.S. at 126.

the First Amendment.[33]

Finally, Plaintiffs note that the fact that the City has not yet assessed a fee for this Saturday's march, and might in the end even assess something nominal, is irrelevant to the analysis. In Forsyth County, the government assessed a $100 fee. The Court held that the actual application was "irrelevant to a facial challenge." Regardless whether there was a $1000 cap or something "more nominal," the actual amount was irrelevant because a standardless permitting system allowed content-based decisions.[34] Even a "small" financial burden is unconstitutional if it discriminates based on content.[35]

Given that Chapter 603 lacks any "narrow, objective, and definite standards to guide the licensing authority..." in assessing security fees, and the Supreme Court in Forsyth County declared unconstitutional a similar standardless fee-setting ordinance, Plaintiffs are likely to prevail on the merits of their First Amendment claim.

d. If the Court Rejects Plaintiffs' Argument That Chapter 603 Is Facially Unconstitutional, it must Assess Whether the City Has Applied the Ordinance in a Discriminatory Manner.

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[33] Id. at 131 (citations omitted).

[34] Id. at 136.

[35] Id.

If the Court accepts Plaintiffs' argument that Chapter 603 is facially unconstitutional, it need proceed no further at this preliminary injunction stage. Conversely, if the Court rejects the facial challenge, Plaintiffs respectfully request that the Court consider the argument that the ordinance is unconstitutional as-applied.

Even if Chapter 603 is deemed to be content-neutral, the City's arbitrary and discriminatory application of the waivers and security fees renders the ordinance unconstitutional as applied. As the unanimous Thomas Court held last year, "Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional...."[36]

The City has, as described in paragraph 24 of the Verified Complaint, applied the security fee arbitrarily and discriminatorily. For intance, in 1991 it demanded the security fee for a march by the Committee in Support of People in El Salvador (CISPES), but then backed down when threatened with suit.[37] In 1996 it demanded security fees from anti-police-misconduct marchers, but then either waived or did not require them from the

[36] 534 U.S. at 325 (parenthetical in original).

[37] Verified Complaint, ¶21.b.

police union.[38] In 1997 the City indicated that it would seek security costs from the KKK, but again never pursued them.[39] Also in 1997, the City acceded to the ACLU's threat of suit to waive security fees for the Three Rivers Pride Committee and returned fees that had been assessed the preceding two years.[40] Last year, the City refused to issue a permit to the Committee for Peace in the Middle East to hold a protest against guest lecturer, Benjamin Netanyahu, Israel's former prime minister, unless they paid nearly $700 in security fees.[41] Again, under threat of suit, the City never collected the fee.[42] Perhaps the most stark example of arbitrary and discriminatory handling of security fees occured this month. The City has demanded that Plaintiffs in this case, and the NAACP in seeking to hold a November 8 rally to support war veterans,[43] pre-pay security costs. At the same time, the City waived security fees for the Thomas Merton Center's November 15 protest against the Free Trade Area of the America's (FTAA), despite the fact that this march will involve closing more streets

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[38] Verified Complaint, ¶21.d.

[39] Verified Complaint, ¶21.e.

[40] Verified Complaint, ¶21.f.

[41] Verified Complaint, ¶21.l.

[42] Id.

[43] Verified Complaint, ¶21.p.

and likely require greater police protection.[44]

Given the history, even if this Court were to conclude that Chapter 603 is facially constitutional, it should still issue the requested injunction because the City's history of applying the security fee requirement is arbitrary and discriminatory and, therefore, violates the First Amendment.[45]

2. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE COURT DECLINES TO ISSUE THIS INJUNCTION.

As the Supreme Court has noted, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[46] Plaintiffs have advertised and

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[44] Verified Complaint, ¶21.q.

[45] Plaintiffs have also alleged that Chapter 603 violates the First Amendment in other ways, namely, by imposing insurance bond and liability waiver requirements, a forty-five-day advance notice provision, and failure to require administrators to decide on a permit application within a finite time. Plaintiffs do not brief or advance those arguments herein, but reserve the option to do so if the Court rejects the arguments raised above.

[46] Elrod v. Burns, 427 U.S. 347, 373-374 (1976) (emphasis added). See also, Swartzwelder v. McNeilly, 297 F.3d 228, 241-42 (3d Cir. 2002) (restriction on First Amendment rights – in this case police officer's court testimony – constitutes irreparable harm); American Civil Liberties Union, 217 F.3d at 180 (generally in First Amendment challenges plaintiffs who meet the merits prong of the test for a preliminary injunction "will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights.") (citation omitted); Abu-Jamal v. Price, 154 F.3d 128, 135-36 (3d Cir. 1998) (same). See also, 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed.1995) ("When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

planned to hold a march and rally on Saturday, November 1. They have a First Amendment right to hold such a parade on Pittsburgh's streets and a rally in front of the Allegheny County Courthouse. The City's application of a security fee pursuant to a facially unconstitutional ordinance cannot be allowed to interfere with those activities.

3. DEFENDANTS WILL SUFFER NO IRREPARABLE HARM IF THIS INJUNCTION ISSUES.

The requested order will not prejudice the City's ability to maintain public safety, crowd control and orderly traffic flow. The only thing the City stands to lose if this injunction is granted is a few dollars.

4. GRANTING THE INJUNCTION WILL SERVE THE PUBLIC INTEREST.

The free exchange of ideas on Pittsburgh's streets and sidewalks is in the public interest. "[T]ime out of mind, public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum."[47] Enjoining the City from unduly and unfairly burdening political activities in Pittsburgh's public forums is in the public interest.

CONCLUSION

[47] Frisby v. Schultz, 487 U.S. 474, 480 (1988) (citation omitted).

WHEREFORE, Plaintiffs respectfully request that this Court issue a TRO/preliminary injunction enjoining the Defendant City of Pittsburgh and its officials, employees, agents, assigns and others who may be acting in concert with it, from requiring Plaintiffs, and others similarly situated, to pay for police protection as a condition of getting a permit under Pittsburgh City Code Chapter 603, and to order the City to issue Plaintiffs their requested permit to hold a non-violent march from Freedom Corner in Pittsburgh's lower Hill District to the Allegheny County Courthouse on Grant Street and then to hold a political rally on the sidewalk and street in front of the Courthouse on Saturday afternoon, November 1, 2003.

Respectfully submitted,

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