



March 21, 2017

Fullerton City Council
303 W. Commonwealth Avenue
Fullerton, CA 92832
Email: council@cityoffullerton.com

Re: Onerous Permitting Requirements for First Amendment Activity

Honorable Members of the City Council,

We are deeply concerned by the onerous fees and other requirements the City has placed on people seeking a permit to exercise their First Amendment rights by marching in the street. City streets have, for “time out of mind, [] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Hague v. CIO*, 307 U.S. 496, 515 (1939). For this reason, “the government's ability to restrict expressive activity [in the streets] ‘is very limited.’” *Boos v. Barry*, 485 U.S. 312, 318 (1988). It is, therefore, troubling that Jeffrey Rosenblum was told that he would need to pay more than \$12,000, obtain a \$2 million insurance policy, and give 90 days notice to hold a March for Science in the City. These outrageous requirements clearly violate the First Amendment. The City must immediately begin revising its permit requirements and allow the March for Science to proceed without them.

The March for Science and Mr. Rosenblum’s Attempt to Apply for a Permit

Marches for science have been planned nationwide and internationally for April 22, 2017—Earth Day—in response to what many feel is “The mischaracterization of science as a partisan issue, which has given policymakers permission to reject overwhelming evidence.” Mr. Rosenblum sought to organize a sister march in Fullerton. After reaching out to the City, he received an e-mail from Rya Hackman of the Public Works Department that included the City’s Special Events application form and instructed him to contact the Traffic and Engineering Department. The application contained numerous fees and required 90 days advance notice.

He then spoke with Dave at the Traffic and Engineering Department and explained that he wanted to have a march on Commonwealth Avenue. Dave informed him that it was not likely that the City would approve of his event, but, if it did, the march would cost \$8,000 for a traffic control plan, \$4,000 for services such as police, and that he would have to purchase a \$2 million insurance policy from the City. The rationale for these exorbitant costs was an incident in Santa Monica when a driver passed through a barricade, killing people in the Third Street Promenade. The incident of which Dave spoke, however, occurred in a different county, well over a decade ago (in 2003) and involved a farmer’s market, which the City of Fullerton regularly holds, rather than a march.

The City's Heavy Handed Permit Requirements Violate the First Amendment

A requirement to obtain a permit before engaging in speech is a prior restraint. *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 130 (1992). “Prior restraints on speech, even in the form of restrictions rather than prohibition, are heavily disfavored and must be construed as narrowly as possible.” *E. Connecticut Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1055–56 (2d Cir. 1983) (citing *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)). The government, therefore, bears a heavy burden to justify any requirement to obtain a permit before engaging in speech. *NAACP Western Region v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984).

To comply with the First Amendment, permitting ordinances “(1) must not delegate overly broad discretion to a government official; (2) must not be based on the content of the message; (3) must be narrowly tailored to serve a significant governmental interest; and (4) must leave open ample alternatives for communication.” *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1037 (9th Cir. 2006).

The Ordinance Provides Unbridled Discretion to City Officials and Discriminates on the Basis of Content and Viewpoint

The City’s ordinance unconstitutionally provides unlimited discretion to government officials. If an ordinance subjects the exercise of First Amendment freedoms to a permit requirement, it must contain “narrow, objective, and definite standards to guide the licensing authority.” *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 151 (1969); *Niemotko v. State of Md.*, 340 U.S. 268, 271 (1951). “Unfettered discretion to license speech cannot be left to administrative bodies. Such discretion grants officials the power to discriminate and raises the spectre of selective enforcement on the basis of the content of speech. The dangers of discretion are particularly evident in parade permit schemes...” *Richmond*, 743 F.2d at 1357 (internal citations omitted).

The ordinance violates these principles in multiple ways. First, the Director of Engineering is vested with unlimited discretion to waive the ninety-day advance notice requirement; the ordinance lacks any standards guiding when a waiver is permitted. Chapter 8.71.040(A). An identical provision was held to be unconstitutional in *Richmond*. *Id.* at 1357. Similarly, the ordinance lists a dozen requirements to be imposed on special event permits. Chapter 8.71.050(A). Among these requirements is a provision vesting the Director of Engineering with the discretion to determine whether or not noise restrictions are necessary. *Id.* at 8.

Significant discretion is also bestowed on the Chief of Police. The ordinance grants the Chief of Police the discretion to determine whether police attendance at the event is necessary and, if so, how many officers are required. The City then requires the permittee to pay for the policing costs, which vary based on the Chief of Police’s exercise of unlimited discretion. *Id.* at



10. Courts have held very similar permitting arrangements violate the First Amendment. “In deciding how best to police the event and charge the speaker, 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 to conclude that this provision chills constitutionally-protected speech. *The Nationalist Movement v. City of York*, 481 F.3d 178, 186–87 (3d Cir. 2007).

Compounding the already significant discretion granted to the Chief, the ordinance provides that the Chief will consider, among other things, “the age of the attendees, the nature of the activity or event...and the experience of police departments locally and nationally with similar events.” *Id.* These factors provide unlimited discretion to the Chief and invite discrimination against events that would appeal to youth, communities of color, and any other disfavored speakers/speech. Factors such as the nature of the event and the experience of police with similar events quite explicitly call for content based decisions in violation of the Constitution. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992).

As if these provisions alone did not allow bias, discrimination, and selective enforcement to invade what should be a neutral process with “definite standards,” the ordinance goes on to provide that “Those having the responsibility to review and approve the application may stipulate additional provisions or requirements” without limitation. 8.71.050(B). Granting the reviewing official the power to create ad hoc requirements, like the \$8,000 road closure fee and \$4,000 services fee appear to be, is a far cry from providing “narrow, objective, and definite standards.”

The ordinance then provides total discretion as to whether to grant the event permit in total. Chapter 8.71.060(E). The section states that a “special event permit may be approved,” if certain findings are made. *Id.* It does not, however, require the permit to be granted in accordance with “narrow, objective, and definite standards.” *Shuttlesworth*, 394 U.S. at 151. An identical requirement was struck down by the California Court of Appeal in *Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 14 Cal. App. 4th 312, 325-28 (1993). There, the court held that “by using the word may as opposed to shall or some other imperative, [the ordinance] grant[ed] the City Manager or his designee unbridled discretion to deny or reject a special events application even if all the criteria set forth in th[e] Section have been met.” *Id.* at 325.

Furthermore, one of the findings on which this discretion rests constitutes viewpoint discrimination by banning speech that is critical of the City. “The special event permit may be approved given the following findings...2. The event will promote the City, its residents, and/or its businesses.” Under this unconstitutional rubric, events that laud the City as a wonderful place will be approved whereas events that criticize the City, which undoubtedly constitute protected speech, are disapproved. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828-31 (1995).



The Fees Quoted to Mr. Rosenblum and Those Contained in the City's Special Event Permit Application Form Are Not Narrowly Tailored

The fees the City seeks to charge violate the First Amendment because they are in no way connected to actual administrative costs and are, therefore, not narrowly tailored. “Licensing fees used to defray administrative expenses are permissible, but only to the extent necessary for that purpose.” *Fernandes v. Limmer*, 663 F.2d 619, 633 (5th Cir.1981), *reh'g en banc denied*, 669 F.2d 729, *cert. dismissed*, 458 U.S. 1124 (1982). However, absent a showing “that the administrative fee charged and to be charged [] is equal to the cost incurred or to be incurred” by the City, an “administrative fee cannot be sustained.” *Powers*, 723 F.2d at 1055–56 (2d Cir. 1983).

First, the permit application contains multiple flat fees for a special event permit. For example, the City appears to require payment of a \$100 unexplained “Community Development Permit Issuance Fee,” a “Public Works Engineering Permit Issuance fee” of either \$175 or \$450, although the application fails to explain how the applicable amount is determined, a “Public Works Engineering Inspection and plan check fee” of \$99, etc. All of these fees seem to be assessed regardless of the actual costs to the City (i.e. whether the review process takes five minutes or five days).

Moreover, the \$8,000 road closure fee and the \$4,000 miscellaneous services fee, which includes police, do not appear to be related to actual administrative expenses. It is difficult to understand how the costs of placing wooden barriers, detour signs, and other traffic control devices total \$8,000. Nor is it clear what other services would be provided for the \$4,000 fee, aside from policing, which seems exorbitant given that the City will already have police on duty. As such, we have requested an accounting of all costs related to road closures and other services required for other marches and parades, such as the Veteran’s Day parade and the Founder’s Day parade, in the attached Public Records Act request.

Additionally, the Special Event Permit form indicates that police department staffing costs will be “Billed hourly by Police Department after the event, only if police officers are required.” (emphasis in original). The City’s demand of Mr. Rosenblum that he pay a \$4,000 service fee—a fee that includes policing costs determined before the event—directly contradicts its own written policy. This deviation from written policy, the ludicrous amount of the fees, and the Engineering and Traffic Department’s indication that the City would not likely approve the event regardless, as well as its specious justification for the fees, all demonstrate that the true reason for the \$4,000 fee, like the accompanying \$8,000 fee, is to discourage community members from exercising their First Amendment rights. Quite simply, a city cannot require payment of a fee for the purpose of deterring “requests for the use of state property.” *Id.* at 1055-57.

The City’s attempts to recoup policing costs after the fact as indicated on the application form fare no better, however, because, in the absence of narrow, objective, and definite



standards, it “allows the City to charge a speaker not only for costs rightfully associated with its event, but with numerous other, content-based, costs.” *The Nationalist Movement v. City of York*, 481 F.3d 178, 185–86 (3d Cir. 2007).

For example, the City would incur expenses planning for the public's reaction to the speech, making available the necessary resources to contain potential counter-demonstrators, providing an appropriate level of police presence to control and pacify counter-demonstrators, and generally protecting the speaker. All of these actions would necessarily require a consideration of the content of the proposed speech and the anticipated reaction of the public.

Id. The Supreme Court “has held time and again: ‘Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.’” *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992) (quoting *Regan v. Time, Inc.*, 468 U.S. 641 (1983)).

In *Forsyth County*, the Supreme Court struck down an ordinance designed to recoup “the cost of necessary and reasonable protection of persons participating in or observing” parades and rallies, which was adjusted “to meet the expense incident to the administration of the Ordinance and to the maintenance of public order.” 505 U.S. at 126. As the Court explained, government may not “recoup costs that are related to listeners' reaction to the speech,” because speech “cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.” *Id.* at 134-35 & n.12.

The City’s Requirement of a \$2 Million Insurance Policy Is Unconstitutional

The City’s requirement that Mr. Rosenblum obtain a \$2 million insurance policy is unconstitutional because it is not narrowly tailored and because it further evidences the unfettered discretion bestowed upon government officials in making permitting decisions. Lower courts have repeatedly disapproved insurance policy requirements far lower than the \$2 million policy the City is requiring for the March for Science. *See, e.g., Powers*, 723 F.2d at 1057 (invalidating state transportation department's \$750,000 liability insurance requirement for political march); *Collin v. Smith*, 578 F.2d 1197 (7th Cir.1978) (\$300,000 liability insurance requirement declared unconstitutional), *cert. denied*, 439 U.S. 916 (1978).

Additionally, the insurance policy requirement, like numerous other aspects of the City’s treatment of permit applications, grants unfettered discretion to government officials. The “Addendum to City of Fullerton Application for a Special Event Permit” states that “Applicant shall maintain commercial general liability insurance coverage...with a limit of not less than \$1,000,000....” The City clearly interprets this provision to allow its officials to demand greater than \$1 million in insurance as it sees fit because Mr. Rosenblum was told he would need a policy of \$2 million. The only explanation for this discrepancy appears to be the content of the March for Science and/or the City’s desire to discourage First Amendment activity.



The insurance requirement also violates the First Amendment because it contains no language clearly specifying that the risks to be insured and/or the amount of insurance shall not be based in any way on the potential reaction of third parties to the content of protected speech. *See, e.g., Collin v. Smith*, 578 F.2d 1197, 1207-09 (7th Cir. 1978); *Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1029-30 (C.D. Cal. 2002).

The City’s Indemnification Requirement Is Unconstitutional

The indemnification provision contained in the Addendum similarly violates the First Amendment. Indemnification requirements can impermissibly chill free speech because “By signing the agreement, an organization exposes itself to an unknown amount of liability. The organization is required to defend the State against all third-party claims alleging some action by a member of the organization, even if those claims are frivolous.” *iMatter Utah v. Njord*, 980 F. Supp. 2d 1356, 1381 (D. Utah 2013), *aff’d*, 774 F.3d 1258 (10th Cir. 2014); *see also, Courtemanche v. Gen. Servs. Admin.*, 172 F. Supp. 2d 251, 274 (D. Mass. 2001) (“The government cannot properly reallocate its due burden by conditioning use of public facilities on the assumption of that burden by others without narrowly tailoring the reallocation to minimize the chilling effect on constitutional rights.”).

The provision states that:

Applicant shall indemnify, defend, and hold harmless City and its officers, officials, employees and volunteers from and against all claims, damages, losses and expenses, including attorney fees arising out of the event described herein, cause in whole or in part by any negligent act or omissions of the applicant, anyone directly or indirectly employed by or anyone for whose acts any of them may be liable, except where caused by the active negligence, sole negligence, or willful misconduct of the City.

This requirement is not narrowly tailored. For example, the provision attempts to make applicants liable for the City’s passive negligence. However, “requiring permittees to compensate third parties for harm caused by acts and omissions of the City impermissibly restricts speech.” *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1039 (9th Cir. 2009).

Those engaged in First Amendment protected activity cannot be treated worse than those engaged in other activities. *Courtemanche*, 172 F. Supp. 2d at 274 (“[C]ities do not condition use of public ways on the execution of indemnification/hold harmless provisions.”). “The traditional principles of tort liability, including vestiges of sovereign immunity and other specific limitations on governmental liability, are the accepted accommodation between the traditional availability of public amenities and concern the sovereign not be unduly burdened for providing them.” *Id.*



The Ninety Day Advance Notice Requirement Violates the Constitution

The City's 90 day advance notice requirement for permit applications is unconstitutional. Courts have repeatedly "struck down a variety of advance notice requirements on the ground that the length of the required notice period was too long." *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1044 (9th Cir. 2006) (citing *American Arab Anti-Dis. v. City of Dearborn*, 418 F.3d 600, 606-07 (6th Cir. 2005) (striking down a thirty-day advance notice requirement for events in parks, on streets, or in other public areas); *Church of the American Knights of the Ku Klux Klan v. City of Gary*, 334 F.3d 676, 682-83 (7th Cir. 2003) (striking down a forty-five-day advance notice requirement for demonstrations on city streets or public property)). Indeed, as the Ninth Circuit remarked, "There is [] no basis in logic for cities to demand notice far in advance of parades. Policemen and newsmen are frequently deployed on less than two days notice." *N.A.A.C.P., W. Region v. City of Richmond*, 743 F.2d 1346, 1357 (9th Cir. 1984) (striking down a 20 day advance notice requirement for a parade).

The Ordinance Lacks an Exception for those Unable to Afford Fees, Insurance, or Indemnification or for those Engaged in First Amendment Activity

Finally, the City Council must provide an exception to the ordinance's fee requirements for First Amendment activity and for indigents. For example, in *The Nationalist Movement*, the court found that the permit application fees of \$50 for residents and \$100 for non-residents were not unconstitutional because they were "nominal, [] not content based, and [were] narrowly tailored to allow the city to recoup the cost of processing the application," and because the ordinance contained a provision that waived all fees, including the application fee, security deposit, and certificate of insurance, for those speakers who could not afford the costs. 481 F.3d at 183; *Collin v. Smith*, 578 F.2d at 1208; *Invisible Empire Knights of the Ku Klux Klan v. City of West Haven*, 600 F.Supp. 1427, 1435 (D. Conn. 1985) (holding bond requirement unconstitutional because it applies to those unable to obtain a bond).

The ordinance also does not contain an exception or waiver of fees for organizers whose event or assembly is protected by the First Amendment, which poses a serious constitutional problem. See, *Santa Monica Food Not Bombs*, 450 F.3d at 1057.

The City Council must immediately rescind its unconstitutional ordinance and policies and replace them with an ordinance and policies that comply with the First Amendment. We understand that it may take some time to draft a new ordinance and accompanying policies, so we ask that Mr. Rosenblum's March for Science be immediately approved and that the City provide an exception for all fees, insurance, and other requirements based on his inability to pay and the fact that the march constitutes protected First Amendment expression. If you do not agree to rescind your illegal rules and implement legal rules and policies, the ACLU of Southern California will consider all legal means to respond to your refusal. Please respond by March 28,



2017 by contacting me at 714-450-3963 or at BHamme@aclusocal.org. I look forward to hearing from you.

Sincerely,



Brendan Hamme
Staff Attorney
ACLU Foundation of Southern California

Cc: Ms. Kimberly Barlow, City Attorney | khb@jones-mayer.com



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