

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

The Coalition to March on the RNC and Stop the War, Plaintiff, vs. The City of St. Paul, Minnesota, Mayor Chris Coleman, St. Paul Police Chief John M. Harrington, Assistant St. Paul Police Chief Matthew D. Bostrom, Defendants.	Court File No. 08-835 JNE/JJG PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION
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The Coalition to March on the RNC and Stop the War (the “Coalition”) seeks entry of a preliminary injunction in order to protect its free speech rights under the United States Constitution. The Coalition has submitted a timely, valid application to obtain a permit for a parade demonstration (the “March”) on the first day of the Republican National Convention (the “Convention”), September 1, 2008. However, the City of St. Paul, Mayor Chris Coleman, and St. Paul Police Chief John M. Harrington, and Assistant Police Chief Matthew D. Bostrom (collectively “Defendants”) have chosen not to grant the Coalition’s requested March route and have instead adopted permit application procedures that impermissibly and unconstitutionally chill free speech and violate due process.

Despite recognizing that the Coalition has submitted a valid permit application, Defendants refuse to grant the Coalition any meaningful guarantee of where and when the Coalition will be permitted to exercise its free speech rights on September 1, 2008.

Given the massive scale and importance of the Convention and the complexities inherent in organizing a march involving tens of thousands of persons, it is imperative that the details of the Coalition's permit be determined now. Federal Judges have specifically instructed that it is critical for cities and permit applicants to negotiate these free speech issues well in advance of large scale events and that time be permitted for any disputes regarding a city's restrictions on free speech to reach resolution before the event occurs. Rather than work with the Coalition in an expedient fashion to secure free speech, Defendants have impermissibly altered and applied the city's permitting procedures, fashioning an unconstitutional procedure that leaves permit applicants in limbo as to when and whether their free speech rights will be secured. Ultimately, Defendants' application of the permitting scheme allows the St. Paul Police Department to regulate free speech with unfettered discretion and immunity from review.

Because the policies and procedures imposed by Defendants cause excessive and unnecessary delay and because the Defendants have failed to provide the Coalition with procedural due process, the Coalition respectfully requests that this Court protect free speech rights and prevent Defendants from implementing unconstitutional prior restraints on speech. The Coalition has no adequate remedy at law because denial of the Coalition's fundamental constitutional rights protected by the First and Fourteenth Amendments to the United States Constitution cannot be remedied by legal relief. Accordingly, the Coalition requests that this Court issue a preliminary injunction: (1) requiring Defendants to immediately grant in full the Coalition's permit application for the Coalition's requested September 1, 2008 parade demonstration; and (2) enjoining

enforcement of the St. Paul Police Department’s “Guidelines Regarding Issuance of Permits to Conduct Parades Pursuant to Section 366A of the St. Paul Legislative Code in Certain Areas of the City of St. Paul, Minnesota on September 1, 2008” to the extent such enforcement is inconsistent with the Legislative Code of St. Paul or with the United States Constitution.

STATEMENT OF FACTS

The Coalition to March on the RNC and Stop the War is an unincorporated association of groups and individuals with a common interest in organizing and leading a large-scale parade expressing opposition to the military occupation of Iraq within sight and sound of the Xcel Energy Center on the first day of the Convention. (Complaint ¶ 15; Affidavit of Meredith Aby (“Aby Aff.”) ¶ 2.) Among the groups leading the Coalition are: Anti-War Committee, AFSCME Local 3800, SDS—University of Minnesota, Twin Cities Peace Campaign, Welfare Rights Committee, and Women Against Military Madness. (Complaint ¶ 4; Aby Aff. ¶ 3.) Based upon communications with groups around the country and the experiences of past conventions, the Coalition reasonably estimates that, if a permit is granted, its September 1, 2008 march will involve as many as 50,000 people. (Complaint ¶ 4; Aby Aff. ¶ 4.) The March planned by the Coalition is intended to reach the audience of decision-makers within the Republican Party, as well as a global audience that can be reached through the media assembled to cover the Convention. (Complaint ¶ 15; Aby Aff. ¶ 5.)

The Anti-War Committee, one of the groups involved in organizing the Coalition, first applied for a permit to march during the Convention in 2006, shortly after it was

announced that St. Paul would host the Convention. (Complaint ¶ 13; Aby Aff. ¶ 6.) Despite the benefits to all parties of planning details of this large-scale event well in advance, the City of St. Paul refused to act on the Coalition’s permit application and stated that permits would not be accepted until 180 days prior to the Convention, citing St. Paul Legislative Code § 366A.04. (Complaint ¶ 13; Aby Aff. ¶ 6.)

On November 1, 2007, the Coalition properly submitted an application, pursuant to St. Paul Legislative Code § 366A.04, to conduct a recurring series of parade demonstrations in downtown St. Paul on several dates, the last of which is September 1, 2008.¹ (Complaint ¶ 14; Affidavit of Bruce Nestor (“Nestor Aff.” ¶ 2, Ex. A.) The Coalition’s application requested a permit for a march in which participants would assemble at the Minnesota State Capitol (the “Capitol”), march along John Ireland Boulevard to Kellogg Boulevard, around the Xcel Center on Washington Street and West 5th Street, then back on Kellogg Boulevard to the Capitol. (Complaint ¶ 17; Nestor Aff. ¶ 2, Ex. A.)

Because the March planned by the Coalition will both begin and end at the Capitol, the Coalition also applied to the Plant Management Division of the Minnesota Department of Administration (“PMD”), which is responsible for issuing permits for events held on State Capitol grounds. (Complaint ¶ 18; Nestor Aff. ¶ 3.) PMD initially refused to either grant or deny the Coalition’s permit application, stating that permits for the period of the Convention would only be issued on the schedule followed by the City

¹ The only event planned by the Coalition that is presently before the Court is the September 1, 2008 March.

of St. Paul. (Complaint ¶ 18; Nestor Aff. ¶ 3.) The Coalition notified PMD that its refusal to consider the Coalition's permit application violated PMD's own policies. (Complaint ¶ 19; Nestor Aff. ¶ 3.) After negotiation, PMD ultimately approved the Coalition's application on January 11, 2008. (Complaint ¶ 19; Nestor Aff. ¶ 3, Ex. B.) The Coalition has therefore secured both the starting and ending point of its planned March. Only approval of use of city streets during a specific time period on September 1, 2008 need be granted by Defendants.

During the months following the submission of its November 1, 2007 application, the Coalition and its legal representatives have negotiated with the St. Paul Police Department and City Attorney's Office to discuss the March and work toward receiving a permit. (Complaint ¶ 20; Nestor Aff. ¶ 4.)

During a meeting on January 17, 2008, the parties discussed the Coalition's planned March route at length. (Complaint ¶ 21; Nestor Aff. ¶ 5.) Defendants represented that they could not yet approve the Coalition's entire requested route, but that it made sense to approve those portions of the route that could be granted at that time. (Complaint ¶ 21; Nestor Aff. ¶ 5.) Specifically, Defendants represented that they could readily agree to grant "three sides of the square" – marching on the requested date, September 1, 2008, marching down to the Xcel Center from and returning to the State Capitol, and marching within sight and sound of the Xcel Center. (Complaint ¶ 21; Nestor Aff. ¶ 5.) Defendants represented that the only remaining issue which needed further consideration was on which specific streets in the immediate vicinity of the Xcel Center the Coalition would be permitted to march. (Complaint ¶ 21; Nestor Aff. ¶ 5.)

Defendants and the Coalition’s legal representatives agreed that the Coalition would submit a proposed agreement (the “Proposed Agreement”) for the March, which would memorialize the three sides of the square upon which the parties agreed. (Complaint ¶ 22; Nestor Aff. ¶ 5.) On January 25, 2008, the Coalition provided Defendants with its Proposed Agreement. (Complaint ¶ 22; Nestor Aff. ¶ 6, Ex. C.)

The City Attorney’s Office responded on February 8, 2008, providing the Coalition with a draft of “Guidelines Regarding Issuance of Permits to Conduct Parades Pursuant to Section 366A of the St. Paul Legislative Code in Certain Areas of the City of St. Paul, Minnesota on September 1, 2008” (the “Guidelines”). (Complaint ¶ 23; Nestor Aff. ¶ 6, Ex. D.) The Guidelines purport to provide that no permits for the “Parade Staging Area” and “Secondary Event Area” (defined terms collectively encompassing all of the area surrounding the Xcel Center in which the March would pass) would be approved prior to March 1, 2008, and that specific parade routes in the immediate vicinity of the Xcel Center would not be approved until “no later than May 31, 2008.” (Complaint ¶ 23; Nestor Aff. Ex. D.)

Attorneys for the Coalition expressed concern to Defendants that the Guidelines appeared to materially alter the agreement the Coalition believed it was reaching with Defendants. (Complaint ¶ 24; Nestor Aff. ¶ 7.) Defendants attempted to assuage those concerns by representing that, under the Guidelines, Defendants would provide the Coalition with some sort of document on or around March 1, 2008 which would secure the Coalition’s free speech rights by guaranteeing that the Coalition would be permitted to march from the Capitol to the Xcel Center on the first day of the Convention.

(Complaint ¶ 24; Nestor Aff. ¶ 7.) Defendants made oral representations that this march route would be within sight and sound of the Xcel Center. (Complaint ¶ 24; Nestor Aff. ¶ 7.)

On February 14, 2008, Attorneys for the Coalition sent a letter setting out their understanding of the City's representations in an effort to memorialize their conversations. (Complaint ¶ 25; Nestor Aff. ¶ 8, Ex. E.) The letter also stated that the Coalition's comments on the Draft Guidelines would be forthcoming. (Complaint ¶ 25; Nestor Aff. ¶ 8, Ex. E.) The City responded to the letter on February 19, 2008. (Nestor Aff. ¶ 8, Ex. E.) On February 29, Defendants issued finalized Guidelines before receiving comments from the Coalition. (Complaint ¶ 25; Nestor Aff. ¶ 9, Ex. F.)

On March 1, 2008, the St. Paul Police Department issued a "Conditional Alternative Permit" to the Coalition, permit number 08-032. (Complaint ¶ 27; Nestor Aff. ¶ 10, Ex. G.) The Conditional Alternative Permit grants a permit for the Coalition to conduct an event involving between 3 and 100,000 persons on September 1, 2008, but provides no march route or time at all. (Complaint ¶ 27; Nestor Aff. Ex. G.) The Conditional Alternative Permit does not even provide a "dispersal location" for the March, even though the Coalition already has a permit and will be staging an all-day rally at the State Capitol and has plainly requested a permit to march to and from the Capitol. (Complaint ¶ 27; Nestor Aff. Ex. G.)

Believing that its valid permit request was not secured by the Defendants' issuance of the "Conditional Alternative Permit," the Coalition sought to appeal the scope of that permit to the St. Paul City Council, as required by the St. Paul Legislative Code, by filing

a Notice of Appeal on March 6, 2008. (Complaint ¶ 28; Nestor Aff. ¶ 11.) Defendants refused to acknowledge the Coalition’s appeal and the City Council failed to consider the Coalition’s appeal at its next meeting. (Complaint ¶ 29; Nestor Aff. ¶ 11, Ex. H.) St. Paul City Attorney John J. Choi sent a letter to the Coalition dated March 7, 2008, stating that “your appeal is premature and therefore will not be considered by the City Council at this time.” (Complaint ¶ 29; Nestor Aff. Ex. H.) Mr. Choi explained this refusal to provide appellate review of Defendants’ decision by stating that “The Conditional Alternative Permit is not intended to serve as an actual or final permit as contemplated under, and typically issued pursuant to, Section 366A of the Code.” (Complaint ¶ 29; Nestor Aff. Ex. H.) Mr. Choi further stated that “[T]he Conditional Alternative Permit is not a denial of the Coalition’s permit application submitted to the SPPD on November 1, 2007. . .” (Complaint ¶ 29; Nestor Aff. Ex. H.)

Because Defendants have not granted a permit for the March route the Coalition timely requested and have refused to allow the Coalition to appeal Defendants’ decision, the Coalition has no other remedy but to seek judicial review from this Court.

ARGUMENT

I. STANDARD OF REVIEW

Whether the equitable remedy of a preliminary injunction should issue depends on four factors: (1) the probability that the movant will succeed on the merits; (2) the threat of irreparable harm to the movant should a preliminary injunction be denied; (3) the balance between this harm and the harm that granting the injunction will cause to the other parties litigant; and (4) the public interest.

Taylor Corp. v. Four Seasons Greetings, LLC, 315 F.3d 1039, 1041 (8th Cir. 2003); Edudata Corp. v. Scientific Computers, Inc., 599 F. Supp. 1084, 1086-87 (D. Minn. 1984).

II. THE COALITION IS ENTITLED TO INJUNCTIVE RELIEF

It is proper for this Court to protect the Coalition's free speech rights by granting its motion for preliminary injunction because: (A) the Coalition is likely to prevail on its First Amendment and Due Process claims because Defendants have applied the Code in a manner which confers upon the Police Department unbridled discretion, is not narrowly tailored, and deprives the Coalition of their protected liberty right without a hearing as required by the Code; (B) impingement of free speech rights constitutes irreparable harm; (C) the interest in protecting the Coalition from an actual violation of their free speech rights outweighs any harm Defendants may allege would arise from immediately granting the Coalition's permit; and (D) it is in the public's interest for this Court to protect free speech rights.

A. The Coalition Is Likely To Succeed On The Merits Because Defendants Have Violated The Due Process Clause And The City Has Placed An Unconstitutional Prior Restraint On Free Speech.

1. Prior Restraint

a. First Amendment principles.

The First Amendment to the United States Constitution proscribes abridgement of "the freedom of speech ... or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. Protest speech falls squarely within the protection of the First Amendment's guarantees of freedom of speech

and assembly. See Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) (describing privilege of citizens to assemble, parade, and discuss public questions in streets and parks). Accordingly, there is a "heavy presumption" against the validity of a prior restraint on speech. Forsyth County v. Nationalist Movement, 505 U.S. 123, 130, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). Therefore, the government may only place a content neutral restriction on the time, place, and manner of speech if it (1) does not "delegate overly broad licensing discretion to a government official," (2) is content-neutral, (3) is narrowly tailored to serve a significant government interest, and (4) leaves open ample alternatives for communication. Id.; New Eng. Reg'l Council of Carpenters v. Kinton, 284 F.3d 9, 20 (1st Cir. 2002). "Because these requirements are framed conjunctively, all four must be satisfied, and failure to satisfy even one renders the permit scheme invalid." Coalition to Protest the Democratic Nat'l Convention, v. City of Boston, 327 F. Supp. 2d 61, 69 (D. Mass. 2004). In this instance, Defendants are applying the St. Paul Legislative Code permit scheme in a manner which confers unfettered discretion upon the St. Paul Police Department and is not narrowly tailored. See Mony Life Ins. Co. v. Ericson, No. 07-1547, 2008 WL 298874, at *9 n.5. (D. Minn. Jan. 22, 2008) (citing Ada v. Guam Soc'y of Obstetricians & Gynecologists, 506 U.S. 1011, 113 S.Ct. 633, 121 L.Ed.2d 564 (an "as applied" challenge is one "in which a statute is alleged to be unconstitutional under the particular facts of the plaintiff's case."))

- b. Defendants are permitting the Police Department to exercise overly broad discretion.

It is well established that ordinances and statutes are unconstitutional when they allow the government to exercise unbridled discretion. Saia v. People of State of New York, 334 U.S. 558, 559-60, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948); see also City of Lakewood v. Plain Dealer Pub., 486 U.S. 750, 755-59, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988). As the court in City of Lakewood explained, where the government is granted unfettered discretion, it can make content based decisions under the guise of content neutrality:

Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

486 U.S. at 758 (citation omitted); see also Saia, 334 U.S. at 562 (In finding that a permit related to a sound ordinance was unconstitutional, the court noted that “[i]n the next one a permit may be denied because some people find the ideas annoying. Annoyance at ideas can be cloaked in annoyance at sound.”) Accordingly, courts continue to strike down any ordinance or statute that does not provide adequate safeguards to prevent the government from making content-based decisions. See Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 133 n.10, 112 S.Ct. 2395, 120 L.Ed.2d (1992); see also Int’l Action Center v. City of New York, 522 F. Supp. 2d 679, 690-93 (S.D.N.Y. 2007);

A.N.S.W.E.R. Coalition v. Hemphorne, No. 05-0071, slip op. 33-34 (D.D.C. Mar. 20, 2008).

Defendants are applying the Code in a manner that grants the Police Department unconstitutional, unbridled discretion over free speech, as is memorialized in the Guidelines. First, as discussed in further detail below, the City of St. Paul has permitted the Police Department to unilaterally alter the timeframe in which it is obligated to either grant or deny a permit. Compare St. Paul Leg. Code § 366A.09 with Guidelines §§ 1-3; (Complaint ¶ 26.) Second, the City has permitted the Police Department to issue a “Conditional Alternative Permit,” which, as discussed further below, is not a permit contemplated or authorized under the Code. Defendants have further asserted that their failure to follow the Code deprives the Coalition of their right to appeal to the City Council because the Coalition’s application has been neither granted nor denied. (Complaint ¶ 29; Nestor Aff. Ex. H.)

Finally and most importantly, the Guidelines purport to provide the Police Department the right to capriciously and without explanation alter and/or effectively deny the Coalition its free speech rights based upon a non-objective process. No section of the Code provides the Police Department with the right to alter a permit holder’s permit. The Guidelines, however, grant the Police Department broad discretion to alter a permit without following objective guideposts. Section 4(D) of the Guidelines provides that:

[I]t is possible that due to circumstances or information not yet known to the SPPD, these guidelines and any permits issues pursuant thereto, may need to be modified or revised. Accordingly, consistent with the good faith basis by which they were promulgated, the SPPD reserves the right to

modify and/or revise these guidelines, and any permits issued pursuant thereto, if necessary.

(Nestor Aff. Ex. F.) Again, this purported right bestowed upon the Police Department to alter a permit after it is issued does not exist in the Code, and if it were to exist it would need to be narrow in scope and provide objective reasons why a permit is to be altered. The Guidelines provide no objective standard for a citizen to understand or challenge what the Police Department determines to be “necessary” so as to warrant the alteration of their free speech rights. Rather, the Police Department is working under self-adopted legislation, which could, for example, be used as a pretext by Defendants to decide at any time when and where Defendants would prefer to allow the Coalition to march.

Importantly, under Section 4(D) of the Guidelines, there is also nothing preventing the Police Department from continuing to move the May 31, 2008 date upon which Defendants are allegedly going to issue more information about the Coalition’s permit. Accordingly, the Police Department could further delay acting upon the Coalition’s application until it becomes an effective revocation or denial based upon entirely subjective and ambiguous motives and leaves the Coalition with no time to effectively challenge the unconstitutional behavior. Such ambiguous application of the Code is ripe for content based abuse and is unconstitutional. See U.S. v. Wunderlich, 342 U.S. 98, 101, 72 S.Ct. 154, 96 L.Ed. 113 (1951) (Douglas, J., dissenting) (“Absolute discretion is a ruthless master. It is more destructive to freedom than any of man’s other inventions.”)

- c. The procedures Defendants have chosen to follow for considering and acting upon the Coalition's application are not narrowly tailored.

A regulation is narrowly tailored if "the means chosen are not substantially broader than necessary to achieve the government's interest." Ward v. Rock Against Racism, 491 U.S. 781, 800, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). The Eighth Circuit has further articulated that:

A narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative).

Republican Party of Minnesota v. White, 416 F.3d 738, 751 (8th Cir. 2005) (citing Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 222, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989)). Additionally, the government must establish that there is "a *real nexus* between the challenged regulation and the significant governmental interest sought to be served by the regulation." A.N.S.W.E.R. Coalition, No. 05-0071 at 18 (emphasis in original, internal quotes omitted) (quoting Community for Creative Non-Violence v. Kerrigan, 865 F.2d 382, 387 (D.C. Cir. 1989)).

A fundamental question in the analysis of whether a system of limitations on speech activity imposed in connection with a major political event is whether that system provides enough time prior to the event to evaluate the constitutionality of the system's ultimate decisions. In Coalition to Protest the Democratic Nat'l Convention, the coalition submitted permit applications on June 11, 2004 to conduct five daily parades at the Democratic National Convention ("DNC") in Boston from July 25, 2004 until July 29,

2004. 327 F. Supp. 2d at 68. As part of its permit, the coalition sought to march on Causeway Street, a request that was denied on July 7, 2004. Id. The coalition then brought a preliminary injunction motion on July 19, 2004. Id.

The United States District Court for the District of Massachusetts, in analyzing the geography of Causeway Street, found that it was only narrowly tailored to prohibit the marches during the weekdays of the convention, and granted the injunction and ordered that the coalition be permitted to march during the weekend because there would be less strain on the police department on Sunday because the rest of the soft zone would be “sparsely populated.” Id. at 73. The court found more problematic, however, the construction of a “demonstration zone,” which it found to create the impression of “an internment camp.” Id.

In Bl(A)ck Tea Society v. City of Boston, a related case arising out of restrictions imposed during the 2004 DNC, the First Circuit upheld the trial court’s ruling with respect to narrowly tailoring and noted that it reached its decision on a “hastily assembled record.” 378 F.3d 8, 14 (1st Cir. 2004). Judge Lipez, in his concurrence, noted that “[i]nevitably, the absence of time becomes an important element in determining whether a given time-place-manner restriction is narrowly tailored to serve a government interest in maintaining security”) Id. at 16 (Lipez, C.J., concurring) (citing United for Peace &

Jusitice v. City of New York, 323 F.3d 175, 178 (2d Cir. 2003).² Judge Lipez further explained that:

Time constraints shadowed every aspect of this case. In the future, if the representatives of demonstrators ask the courts to modify security measures developed over many months of planning for an event of this magnitude, they should come to court when there is enough time for the courts to assess fully the impact that modifications will have on the security concerns advanced. . . . However, for an event of this magnitude, taking place at a time of heightened national security, there is an inescapable need for firm, documented understandings well in advance of the event about arrangements to accommodate demonstrations. If the parties cannot reach satisfactory agreements, there must be adequate time to seek recourse in the courts. Adequate time means months or at least weeks to address the issues. It does not mean five days before the event begins.

378 F.3d at 16.

It is the time-sensitive nature of the narrowly tailored question which requires the Coalition to bring this lawsuit before the court now. In issuing and following the Guidelines, Defendants have altered the provisions of St. Paul's Legislative Code § 366A.08(a) that require a decision on the Coalition's application within 21 days. (Complaint ¶ 26.) Defendants have further decreed that they have no obligation to provide any details regarding the permit the Coalition will receive for its March on September 1, 2008 until May 31, 2008 (or later if the Police Department so decides) and that the Coalition has no avenue of appeal to challenge Defendants' decision. (Complaint ¶ 29.) The Coalition is seriously and reasonably concerned that Defendants' actions – which are already chilling the Coalition's free speech by making the planning of the

² The court in United for Peace noted that “‘short notice [and] lack of detail. . . are always relevant considerations’ in a First Amendment narrow tailoring analysis.” Bl(A)ck Tea, 378 F.3d at 16 (quoting United for Peace, 323 F.3d at 178).

large-scale March uncertain and more complicated – will ultimately leave insufficient time for necessary planning to occur and for a meaningful court remedy to be provided in the event Defendants do not voluntarily provide a constitutionally acceptable permit. (Complaint ¶ 32; Aby Aff. ¶¶ 6-7.) In short, the Coalition fears a repetition of the Boston scenario, in which too little time remained for the court to remedy limitations on free speech activity it acknowledged were unconstitutional and unacceptable.

The permitting procedures imposed by Defendants for September 1, 2008 are not narrowly tailored and violate the Coalition’s First Amendment rights in two ways. First, as discussed above, despite the fact the St. Paul Legislative Code requires that the Police Department grant or deny permit applications within 21 days after filing, under the “Guidelines” Defendants will not provide final determination of permits for September 1, 2008 until May 31, 2008, 212 days after the Coalition filed its application and only three months prior to the Convention. (Complaint ¶ 24; Nestor Aff. ¶ 2.) The Coalition has no legal assurance that the full details of its permit application will actually be granted (and not further delayed) on May 31. More fundamentally, no reasonable explanation has been provided as to why Defendants cannot approve *any* material details of the Coalition’s permit now. Defendants have cited “security concerns” as a basis for delaying resolution of the Coalition’s requests to use streets immediately surrounding the Xcel Center, but surely Defendants could reasonably grant the Coalition a permit for the streets around the State Capitol and between the Capitol and the Xcel Center (as well as a specific time) now. Defendants’ slow-moving process fails the narrow tailoring test and is unconstitutional; it improperly and unreasonably sets St. Paul on a course to repeat the

errors committed in Boston. This Court can and should avoid that result by issuing an injunction.

Second, in conjunction with the Guidelines' expansion of the time Defendants are given to grant or deny permit applications, Defendants have created permitting procedures that unconstitutionally preclude review of Defendants' decisions. Despite the fact that Defendants provided the Coalition with no meaningful promises in the Conditional Alternative Permit, Defendants have taken the position that the Coalition cannot appeal the overwhelming shortcomings of that permit. (Complaint ¶ 29; Nestor Aff. ¶ 11.) Defendants argue that any appeal is "premature" and state that no appeal can be brought until there is an actual "denial" of a permit application. (Complaint ¶ 29; Nestor Aff. Ex. H.) These procedures fail the narrow tailoring test. Defendants have created a process in which they have unfettered discretion to decide when and on what terms they will issue information about granted permits and to decide whether appeal of their decisions will be permitted. These procedures are unconstitutional and are likely to provide insufficient time to seek meaningful judicial relief. The Coalition requires injunctive relief to protect its right to free speech during this important event.

2. Due Process

The Due Process Clause of the 14th Amendment states that "[n]o State shall. . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1. In order to establish that a citizen's procedural due process rights have been violated, she must establish two elements: (1) that the state deprived her of "life, liberty, or property," and (2) that she was deprived of that interest without sufficient

“process.” Krentz v. Robertson Fire Protection District, 228 F.3d 897, 902 (8th Cir. 2000).

First, the Coalition is being deprived of its “liberty” because, as discussed in detail above, Defendants are preventing the Coalition from exercising its First Amendment free speech rights by imposing an impermissible prior restraint on speech that is not narrowly tailored. The Supreme Court has long recognized that First Amendment free speech rights “are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.” Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925). Accordingly, the Coalition satisfies the first element of the procedural due process test.

Second, the Defendants are depriving the Coalition of their free speech rights through insufficient process because they are failing to follow the parameters of the St. Paul Legislative Code. See J & B Entm’t v. City of Jackson, Mississippi, No. 3:06-CV-144WS, 2006 WL 1118130, at *10 (S.D. Miss. Apr. 7, 2006); see also Stauch v. City of Columbia Heights, 212 F.3d 425, 431 (8th Cir. 2000). In J & B Entm’t, the court addressed the issuance of a license pursuant to a licensing scheme for sexually oriented business. 2006 WL 1118130. The ordinance at issue required the city to reach a determination on an application within 30 days, but the city failed to timely respond. Id. at *9. The court determined that the city’s failure to act within 30 days, among other procedural defects, was unconstitutional, stating that “[w]here a city fails to comply with the provisions of its own Ordinance and the objective terms set out therein, then, by failing to follow its own established procedure the city denies the plaintiff its procedural

due process rights.” Id. at *10 (citing Browning-Ferris Indus. v. City of Maryland Heights, 747 F. Supp. 1340 (E.D. Mo. 1990); ATM Express, Inc. v. City of Montgomery, Alabama, 376 F. Supp. 2d 1310, 1333 (M.D. Ala. 2005)).³ Similarly, in Stauch, a case regarding rental unit licensing, the court held that procedural due process was violated where the city did not follow its municipal code and failed to provide the plaintiff with necessary notice and a hearing. 212 F.3d at 429-30.

Despite including a provision within the Guidelines stating that “[n]othing contained in these guidelines shall supersede, waive or be construed as being inconsistent or in conflict with . . . Chapter 366A of the Code,” the Guidelines do, in fact, materially conflict with the Code. (Complaint ¶ 26; Nestor Aff. Ex. F.) Code § 366A.08(a) provides that “[a]pplications filed more than sixty (60) days in advance of the event shall be processed within twenty-one (21) days.” Despite this provision, Defendants failed to process the Coalition’s application filed on November 1, 2007 until March 1, 2008. Once “granted” on March 1, 2008, the Conditional Alternative Permit fails to provide the Coalition with virtually any of the critical information regarding its planned March. (Complaint ¶ 26.) Through the Guidelines, Defendants have granted themselves until May 31, 2008 (or later if they choose) to make a decision and have attempted to block any right to review in the interim. Accordingly, the Guidelines conflict with Code § 366A.08(a) because the Guidelines hold permit applicants’ free speech rights in limbo in a way that is not permitted or contemplated by the St. Paul Legislative Code.

³ The court also noted that the city could not remedy or otherwise excuse its behavior by issuing plaintiff a “temporary license,” which was not even provided for under the Ordinance. J & B Entm’t, 2006 WL 1118130, at *10.

The Guidelines also conflict with the Coalition’s right to an appeal under Code § 366A.10(a), (b), which provide for review of permit denials by the St. Paul City Council. The Police Department did not initially approve the Coalition’s application for September 1, 2008. (Complaint ¶ 14.) Instead, the Police Department issued a “Conditional Alternative Permit.” Like the “temporary license” in J. & B. Entm’t, no authority exists under the Legislative Code to issue a “conditional alternative permit.” 2006 WL 1118130 at *10. The Police Department may issue an alternative permit pursuant to Section 366A.9; but only in the context of denying a permit application. See Code § 366A.9(a) (“The chief of police, in *denying* an application for a parade, race or public assembly permit, may authorize the conduct of the parade, race or public assembly at a date, time, location, or route different from that named by the applicant.”) (emphasis added). Therefore, pursuant to Code § 366A.10(a), a permit applicant is entitled to appeal the issuance of an alternative permit because denial of the initial permit is a precursor to the granting of an alternative route.

Because the Conditional Alternative Permit provides the Coalition with no meaningful protection of free speech rights, the Coalition appealed the scope of the permit to the City Council. (Complaint ¶ 29; Nestor Aff. ¶ 11.) Although § 366A.10(a) provides that the City Council will hear an appeal from a denial at its next council meeting if notice is given within 5 days after a denial of a permit, the City Council refused to hear the Coalition’s appeal because, according to the City Attorney, the appeal was premature since the Coalition’s application had yet to be either granted or denied. (Complaint ¶ 29; Nestor Aff. Ex. H.) The Code does not permit Defendants to act in this

manner. Additionally, given that the Police Department has reserved the right to alter the Guidelines in their entirety as they deem “necessary,” the Defendants have not actually bound themselves to *any* timeframe, which would ultimately allow the Coalition to seek a timely appeal if their permit is denied. Guidelines §§ 2, 3; (Complaint ¶ 26.) Therefore, by failing to follow the Code, the Defendants have denied the Coalition its right to a hearing and have violated due process. Accordingly, the Coalition respectfully requests that the Court issue a preliminary injunction requiring Defendants to comport with due process.

B. Because The City Is Violating The Coalition’s First Amendment Rights, Irreparable Harm Is Presumed.

An impermissible prior restraint on speech constitutes the loss of a First Amendment right, and the “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Accordingly, because the Coalition has alleged a violation of its First Amendment rights, irreparable injury is assumed because the Coalition has established that it is likely to succeed on the merits. (Complaint ¶¶ 31-35.)

C. The Balance Weighs In Favor Of Protecting Free Speech.

The Coalition’s burden to establish that the balance of harms weighs in its favor is minimized in this case because its “likelihood of success on the merits” is high and the “harm facing the [Coalition] is significant. . .” A.C.L.U. of Florida, Inc. v. Miami-Dade County School Board, 439 F. Supp. 2d 1242, 1293 (S.D. Fla. 2006) (citing Canal Auth.

Of State of Fla. v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974)). Furthermore, a court must weigh the Coalition's actual First Amendment injury against the Defendants' potential harm. See Summum v. Pleasant Grove City, 483 F.3d 1044, 1056 (10th Cir. 2007) (quoting O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 1009 (10th Cir. 2004) (Seymour, J., concurring in part and dissenting in part) ("Thus, the balance is between actual irreparable harm to plaintiff and potential harm to the government which does not even rise to the level of a preponderance of the evidence.")) Accordingly, Defendants cannot sustain an argument that the balance weighs in favor of overly broad and inconsistent application of the St. Paul Legislative Code because it is simply inconvenient for them to engage in expedient decision making. Summum, 483 F.3d at 1056 (quoting Int'l Society for Krishna Consciousness, Inc., 505 U.S. 672, 701, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992) (Kennedy, J., concurring) ("Inconvenience does not absolve the government of its obligation to tolerate speech.")).

Parades and marches are hallmark free speech exercises. The Coalition has engaged in long term planning to provide for a safe, organized march that expresses its constitutionally protected viewpoint. However, in order to organize and ensure the viability of their planned free speech activities, the Coalition must be granted a valid permit for a route capable of sustaining the March. (Aby Aff. ¶ 7.) The Capitol has complied with this critical need and has already granted the Coalition a permit for September 1, 2008. (Complaint ¶ 19; Nestor Aff. ¶ 3.) Defendants, however, have refused without sufficient justification to provide the Coalition with any meaningful guarantee that the Coalition will be granted a sufficient march route. Defendants'

decisions have damaged the Coalition's ability to timely organize in preparation to exercise its free speech rights. (Aby Aff. ¶ 7.) This injury outweighs any burden on Defendants that making a timely decision might present. Therefore, this factor favors the Coalition and supports the Coalition's motion for preliminary injunction.

D. The Public Interest Requires That The Guidelines Be Deemed Unconstitutional.

It is well established that it is in the public's interest to exercise its constitutionally guaranteed right to free speech. See Miami-Dade, 439 F. Supp. 2d at 1294 (quoting A.C.L.U. of Georgia v. Miller, 977 F. Supp. 1228, 1235 (N.D. Ga. 1997); A.C.L.U. v. Reno, 929 F. Supp. 824, 851 (E.D. Pa. 1996) ("No long string cite of citations is necessary to find that the public interest weighs in favor of having access to free flow of constitutionally protected speech.") (internal quotes omitted)); see also Summum, 483 F.3d at 1057 (quoting Pac. Frontier v. Pleasant Grove City, 414 F.3d 1221, 1237 (10th Cir. 2005) ("Vindicating First Amendment freedoms is clearly in the public interest.") (internal quotes omitted); Michael v. City of Granite City, Illinois, No. 06-CV-01-WDS, 2006 WL 2539719 (S.D. Ill. Aug. 31, 2006) (citing Joelner v. Vill. Of Washington Park, 378 F.3d 613, 620 (7th Cir. 2004) ("public interest in protecting First Amendment liberties is always high.")).

The Convention is a major political event and presents the important opportunity for citizens of this community and throughout the country to utilize their free speech rights. The Coalition wishes to exercise its free speech rights to express its opinion on the war in Iraq. Because the war in Iraq affects the lives and pocketbooks of citizens

throughout this country, it is particularly within the public interest to provide the opportunity for speech addressing this pressing issue. Accordingly, because it is within the public's interest for free speech to be promoted, this element of the test for preliminary injunction is satisfied.

CONCLUSION

Based upon the foregoing, the Coalition respectfully requests that the Court issue a preliminary injunction as follows: (1) ordering Defendants to grant the Coalition's permit application for the September 1, 2008 March; and (2) enjoining enforcement of the Guidelines to the extent such enforcement is inconsistent with the Legislative Code of St. Paul or the United States Constitution.

Dated: March 24, 2008.

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COALITION TO MARCH ON THE RNC
AND STOP THE WAR**