UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SOCIAL AID AND PLEASURE CLUB TASK FORCE, ET AL Plaintiffs, – Versus – CITY OF NEW ORLEANS, LOUISIANA; C. RAY NAGIN, Mayor, City of New Orleans, in his official capacity; WARREN J. RILEY, Superintendent, New Orleans Police Department, in his official capacity; KATHLEEN BLANCO, Governor, State of Louisiana, in her official capacity, Defendants.	NUMBER: JUDGE: MAG: CIVIL RIGHTS ACTION 42 U.S.C. § 1983 DECLARATORY AND INJUNCTIVE RELIEF RE: UNCONSTITUTIONALITY OF NEW ORLEANS ORDINANCES AND STATE STATUTE

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs seek an injunction from this Court enjoining Defendants from imposing unconstitutional fees and bonding requirements upon Plaintiffs in violation of the First and Fourteenth Amendment rights to freedom of speech, as well as the right to equal protection of the laws. Plaintiffs are members of historic and widely revered benevolent societies in the New Orleans African American community.

> The cultural significance of the main line organizations is etched into the African-American Community. This is how La Nouvelle Orleans is promoted throughout the international community. Historically, the purpose of the main line organizations was to provide members with their own venue for musical expression, positive community endeavors, financial hardship funds and benevolence specific to the African-Americans. It is unfortunate that the pride, dignity, and civility of previous generations has been neglected and abandoned. Second lining and jazz funerals are La Nouvelle Orleans; as much as red beans and rice.

T. Jackson Affidavit, Exhibit A.

The freedom of speech of these institutions, more commonly known as "Social Aid and Pleasure Clubs," is being unconstitutionally restricted due to the excessive and unreasonable police escort and bonding requirements being imposed upon them in order to carry on a tradition that has been in existence for over a century – their annual second line parades. Plaintiffs seek emergency relief from this Court to protect their First and Fourteenth Amendment rights to freedom of expression. The annual second line parades are an internationally recognized forum for expressing the unique culture and diversity of the African American community in New Orleans. They provide a public educational opportunity for both the citizens and tourists of New Orleans regarding its music, culture and history.

Plaintiffs are entitled to injunctive relief because (1) the police fees and bonding requirements violate the First Amendment prohibitions on restrictions on freedom of speech, as well as the Fourteenth Amendment Equal Protection Clause (2) the Plaintiffs will suffer irreparable harm by not being allowed to hold second line parades should the order not issue, (3) enjoining the imposition of the unreasonable and unconstitutional fees would not substantially harm Defendants or others, and (4) the public interest would be served by such an injunction.

Unless the enforcement of these statutes is enjoined, the Plaintiffs face a substantial and immediate threat of detention, search, arrest, prosecution and imprisonment for the exercise of their protected rights of free speech and expression.

STATEMENT OF FACTS

Plaintiffs are members of "Social Aid and Pleasure Clubs." These historic benevolent clubs are cherished cultural beacons of light, hope and purpose in the African American community both from a historical perspective and in present day New Orleans. The first Social Aid and Pleasure Clubs were formed in the late 20th century, following the Civil War, with the

goal of providing loans, assistance, counsel, and a means of education to freed slaves. The clubs collected dues from members to support families in times of need, such that a club was able to assist members who fell on hard times, by paying bills or funding medical care. "(They) provided many of the services we associate with insurance companies today." Breunlin Affidavit, Exhibit B. However, more importantly, "they are often referred to as a 'second family'" also. *Id.* For example, when a member died, the club could hold a jazz funeral and parade through the streets of the member's neighborhood, as a way of honoring that person and supporting the deceased's family.

The clubs continue today, and "club members participate in a year-long cycle of events. They attend their clubs' monthly or weekly meetings; organize and staff fund raisers such as dances, bus rides and raffles; and generally participate in the major life events of club members and their families." Regis, Helen A, "*Second Lines, Minstrelsy, and the Contested Landscapes of New Orleans Afro-Creole Festivals*," Cultural Anthropology 14(4): 472 at 474 (1999). "It is this year-long calendar of intersecting social events that creates the enduring social networks of the second-line community, composed of club members and their supporters, and which creates the immediate social context for the parades...." *Id.*

Once a year, on its anniversary, each club engages in a "second line" parade, which is an important cultural tradition for the New Orleans African American community, and the New Orleans community at large. Since the Civil War these parades have occurred; created and carried out by the City's Social Aid and Pleasure Clubs. "Nearly every Sunday afternoon from mid-August to late March, New Orleans's poorest neighborhoods are transformed through traditional performances known as "second line parades." *Id.* "Weekly parades create joyful experiences in the city's most "blighted" neighborhoods- Central City, Treme, and Carrollton-

neighborhoods marked by deteriorating buildings, urban "decay," and crime." *Id.* at 478. "The leaders of the Social Aid and Pleasure Clubs, embodying local notions of respectability and order, become people who are in control of the street and take hold of the public imagination." *Id.* at 480.

> Prince of Wales is the second oldest club still parading, founded in 1928. ...Since our club is so old, many of our members have been participating with the club for generations.

Stern Affidavit, Exhibit C.

> I grew up with second lines, in the heart of the second line; I am a die heart second liner. Life just doesn't seem right if there is not a gathering of clubs on Sunday. For those four hours it is a way to give celebration to the people who participate, it is a way for us to feel free, it is an ancient tradition that allows us to represent our people and their struggle. The culture comes from our ancestors – to take it away is like taking away a reflex, it is like taking away our joy. It is what our families look forward to on Sundays.

W. Jackson Affidavit, Exhibit D.

> I have been going to the second lines since I was a kid. When I was about ten years old, there was a guy in the neighborhood called Uncle Pit. Uncle Pit loved the second lines. He used to figure out which kids liked to second line. On Sundays, when second line season started, he would gather all of the kids in the neighborhood who loved the second lines and take us to the parades in his truck. He would make sure we got home after the parades and got to where we needed to be. At the time, I was living in the Desire Housing Development and there were no second lines in our neighborhood. Every year, we would look forward to second line season and be looking for Uncle Pit.
>
> When I was about fifteen years old, a man by the name of Wilbert Thomas and Miss Bernice were running a community center called Garden Plaza where elderly people lived. One day, I saw some fliers saying they were forming a second line club and there was no age limit. I was really excited. I took one of the fliers and went straight over there in person. I joined right away and told some other friends about it. It was about thirty kids from age eight to sixteen and about twenty-five adults. We had two divisions – one for the adults and one for the kids. My friend Louis Pierre was the president and I was the vice-president for the kids. We were called the Ninth Ward High Steppers. We wore white Levi's jeans, green and white striped polo style shirts with our names embroidered on the front and the name of the club on the back. We wore green sun visors and green Converse All-Star high tops. The day was a beautiful clear day. I remember it like it was yesterday. People in the neighborhood were so excited to see a parade that they were lining the street and screaming our names. I wasn't shy or nervous or anything. It was a great day.

Woods Affidavit, Exhibit E. Indeed, for most members, the second line parades are a way of connecting with history and family.

> "My father passed away on September 12, 2001. I got involved with New Generation because I wanted to carry on my father's tradition. Now I bring my daughter to the second lines just like my father brought me. Next year, my daughter is going to parade with the We Are One Social and Pleasure Club. It's very important to me to pass on this tradition and keep it alive."

Palmer Affidavit, Exhibit F.

Thus, throughout their history, the clubs have been an important cultural and educational mainstay for both the City of New Orleans at large, and, more specifically, the African American community. The clubs and their members continue to fill vital roles in their communities today.

> We try to help out in our community. We take our elderly neighbors to the doctor and to other places they wouldn't be able to get to on their own. Our Club members go to church every week as a family. We try to go to each member's church and sit together. We also give a large donation to each club member's church when we go there. Every year, we provide school supplies to the kids before they go back to school. We are very active members of our community and are proud of the contributions we make. We always get a lot of good feedback from the neighborhood.

Lewis Affidavit, Exhibit G.

> The Revolution members visit hospitals, providing support for family members of members and associates. At Thanksgiving time members may give away baskets to the needy. We have a club picnic every year in honor of giving something back to the family members who support one another. We also do jazz funerals if a member dies. If a member loses a family member, the club provides help with a funeral or a repass, if the family needs it.

Allen Affidavit, Exhibit H.

> We founded our club to be able to do things in our community. We try to provide services in different parts of the city, but we especially were active in the 3rd Ward. We go to several nursing homes and talk with the elderly to see what we can do to help them. We help the kids in our community with homework, take them to the park and play football and basketball, buy them lunch, and try to be a parental figure for kids in the community that need that. We put flyers out in our neighborhood, and let them know if they want their kids to come to the park we will help them with homework. Some kids need help with their reading or writing and we have people there to help them.

Hookfin Affidavit, Exhibit I.

> We try to do things to help the community – especially the kids. We do an annual Easter Egg hunt and we do a back to school giveaway for the kids. We give them school supplies to start off the school year. The local stores in the neighborhood supply the items so we get them involved too. The neighborhood businesses always helped us out and we were very appreciative. We tried to keep everything in the neighborhood.

Woods Affidavit, Exhibit E.

> We are involved in our community as well. We sponsor kids that are less fortunate and assist them in getting school supplies and school uniforms. Each club member adopts a child and takes them on the kids trip. We also try to educate the community on the importance of the culture.

T. Jackson Affidavit, Exhibit A.

The second lines themselves, indeed, are a positive cultural force. "Each Sunday afternoon parade, which celebrates the anniversary of a particular social club, creates a four-hour pedestrian route through distinct neighborhoods. It connects neighborhoods separated by social and geographic distance, such as the historically Anglophone 'uptown' and francophone 'downtown areas.' The route also transcends more recent notions of 'turf' based on localized entrepreneurial 'crews' or 'gangs' engaged in the drug trade. Children in New Orleans grow up thinking about neighborhoods in these terms. The parades empower participants to walk through terrain that they might otherwise perceive as hostile....The clubs that sponsor these parades are quite explicit about their role as an alternative force on these streets." Regis, Helen A, "*Second Lines, Minstrelsy, and the Contested Landscapes of New Orleans Afro-Creole Festivals*," Cultural Anthropology 14(4): 472 at 479 (1999). "One of the founders of the Pigeon Town Steppers told me that his club was organized to make something positive happen in their crime-ridden neighborhood—'something other than all this shooting and killing.'" *Id.* "...(T)heir

contemporary public performances speak to current issues facing inner city residents at the end of the 20th century." *Id.* at 482.

On January 15, 2006, Plaintiff New Orleans Social Aid and Pleasure Club Task Force organized a historic second line, which garnered the participation of 32 clubs, parading together for the first time in history. The event was to highlight the cultural tradition, and the need for housing, jobs, education, and healthcare in New Orleans in the wake of Hurricane Katrina. At the last minute, Captain Bryson of the New Orleans Police Department denied the parade the right to move through his district. Plaintiff Task Force was forced to re-route the parade to a downtown route. Unfortunately, at the end of the parade there was a shooting, which occurred in the crowd watching the second line. The shooting in no way involved the second line participants, and was perpetrated by violent individuals who decided to use the gathering as an opportunity to carry out their personal agendas.

On January 31, 2006, a memorandum was written by Defendant Warren J. Riley, Superintendent of New Orleans Police Department, stating, "(i)n order to create a safer environment before, during, and after second line parades, the New Orleans Police Department has modified the police requirements for such events." The memorandum provides increased police requirements for second line parades, and further stated that Plaintiffs must prove compliance with La RS 14:326, which requires that a bond be posted by any entity seeking to parade. Letter from Defendant Riley, Exhibit J.

Pursuant to this directive from Defendant Riley, NOPD Captain Harry P. Mendoza, Commander of the Traffic Division, calculated the new police fees to be charged the second line parades. He concluded that the new requirements will result in a charge of $4,445.00 per Parade. Memorandum from Mendoza, Exhibit K. After negotiations with the Plaintiffs, the NOPD

lowered the cost to $3760, but the prices increased from there according to the size of the parade. After further meetings with the Plaintiffs, the NOPD agreed to lower the fee to $2200.

Unfortunately, there was another shooting in a crowd waiting for the arrival of a second line parade following the Task Force's negotiations with the NOPD. The crime was again in no way affiliated with the second line event, and, fortunately, police immediately apprehended the perpetrator. However, the NOPD again raised the fee to $3760. The police also required the Plaintiffs to comply with the bonding requirements set forth in the state permit statute, as outlined below. Plaintiffs asked Defendant Riley if they could hold a silent parade to denounce the violence. They sought to conduct a parade with no bands, wherein they stopped and held prayer service at the place of the shooting. This request was denied outright. Plaintiffs did not know how to seek review of that denial.

Plaintiffs do not have the financial means to afford the increased fees and bonding requirements. They are presently seeking donations to cover the costs of the fees, but it is questionable whether they will be successful, and donors state that the financial backing will not be available in the future. Letter from Norman Dixon Fund, Exhibit L; Hirsch Affidavit, Exhibit M. Additionally, one of the most special elements of the Social Aid and Pleasure Club tradition is that the clubs have functioned independently, beholden to no one. Although the clubs may have members who are not African American, they are proudly a self-sufficient African American tradition; indeed, such was the precise catalyst behind their formation back in the 19th Century.

The new requirements effectively prevent Plaintiffs from holding any second line parades. Second line parades are an integral part of Plaintiffs' culture. In the wake of Hurricane

Katrina, as neighborhoods struggle to rebuild, these cultural traditions have become even more significant.

> All of us have gotten closer since the storm. The fellowship has been more important. We don't have to worry about anyone missing our meetings or being late or anything. We hold our meetings at one of the club member's house now. The second lines are a way of bringing people back together. Even though there's nothing left where we parade, we are doing our route. We're making our stops. We want to rebuild our neighborhood and get everyone home. We want to remember and honor everything we had and everything we lost. And we want to be part of rebuilding it back to what it was.

Woods Affidavit, Exhibit E.

> The hurricane made us more important. We need our history back, and we need it back better than ever. We strived hard before Katrina, and now after Katrina we need to be back, still strong and able to parade in the streets. During Katrina we lost everything, and need to make a strong come back. This is important because it is part of the black heritage tradition.

Hookfin Affidavit, Exhibit H.

> Second lining to me is a boost in my life. It is my culture, my living history. I love being a part of history. It is people coming together to express our unity regardless of whether it is good times or bad times. We have funerals that are second lines, and some that signify new life. The brass band brings us together. No matter what problems one may face in life, the second line community is there for you. When there is a celebration, a memorial, or even when people want to protest the injustice in their lives, we can come together, clapping our hands and singing, see our friends and family, and get the strength to overcome.

Sanders Affidavit, Exhibit N.

Second lines are a means of expression, as well as a source of pride and inspiration for Plaintiffs.

> Second lines are an opportunity for people to come together and spend time with friends and family. There is a sense of community when everyone comes together as one to enjoy themselves. Second lining gives members a lot of respect because it is a positive way for us to give back to our community. The youth look up to us, the community supports us, and we try to support them. Without parades, our musicians would suffer and our cultural tradition will die.

Anderson Affidavit, Exhibit O.

Plaintiffs fear that if the requirements are not rescinded, this very important speech and expression will cease to exist.

THE APPLICABLE LEGAL STANDARD

Preliminary relief is appropriate when a movant demonstrates "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Speaks v. Kruse*, 445 F.3d 396, 399- 400 (5th Cir. 2006). "When analyzing the degree of 'success on the merits' that a movant must demonstrate to justify injunctive relief, the Fifth Circuit employs a sliding scale involving the balancing the hardships associated with the issuance or denial of a preliminary injunction with the degree of likelihood of success on the merits." *McWaters v. Federal Emergency Mgmt. Agency*, 408 F. Supp. 2d 221, 228 (E.D. La. 2006). "Moreover, when the other factors weigh in favor of an injunction, a showing of *some* likelihood of success on the merits will justify temporary injunctive relief." *Id.* As set out below, Plaintiffs easily meets the relevant standard.

ARGUMENT

I. PLAINTIFFS ARE EXTREMELY LIKELY TO PREVAIL ON THEIR CLAIMS THAT DEFENDANTS' ENFORCEMENT OF STATE AND CITY ORDINANCES CONSTITUTES A VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

A. The Plaintiffs' Speech is "Protected Speech" Within the Meaning of the First Amendment

The initial question in any action alleging a First Amendment Speech Clause violation is whether the plaintiff's speech even falls within ambit of the protections afforded by the Constitution. In the instant action, Plaintiffs' speech is clearly "protected speech" within the

meaning of the First Amendment to the United States Constitution. "A parade is, by its nature, a pristine form of speech." *Toga Soc., Inc. v. Lee*, 323 F.Supp. 2d 779, 790 (E.D. La. 2004), *quoting New York County Board of Ancient Order of Hibernians v. Dinkins*, 814 F.Supp. 358, 366 (S.D.N.Y.1993), *citing Perry Educ. Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969); *Cox v. Louisiana*, 379 U.S. 536, 554-55, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965). The statutes at issue in the present case place burdens and restrictions on Plaintiffs' protected expression. As such, they are subject to exacting judicial review.

The second step in determining the degree of First Amendment protection to be afforded a speaker is determined by the forum involved. Specifically, courts look at whether the plaintiff is seeking to exercise her rights in public, semi-public, or non-public forum. The immediate case obviously involved a public forum; "(r)egulation of First Amendment activity on public streets is subject to the highest form of review...." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1988). Because the permit requirements, including the police escort fees and bonding provisions, are "prior restraints" on free speech, there is a "heavy presumption" against their validity. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). As the Supreme Court has made clear, "prior restraints upon speech... are the most serious and least tolerable infringements on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975).

B. New Orleans Municipal Code § 154-1658 Violates the First and Fourteenth Amendments to the United States Constitution

The New Orleans City ordinances require that any person seeking to parade or march first obtain a permit. MUNICIPAL CODE; CITY OF NEW ORLEANS Sec. 154-1651. A person parading without a permit is guilty of a misdemeanor, and is subject to arrest or fine. MUNICIPAL CODE; CITY OF NEW ORLEANS Sec. 154-1652. The parade permitting provisions, contained in the Municipal Code at Sec. 154-1651 *et seq.*, and recited in Plaintiffs' Complaint, violate the Constitution for a myriad of reasons. However, for the purposes of this Motion, Plaintiffs only seek emergency, interim relief as to one provision of the New Orleans Municipal Code. Specifically, Plaintiffs request that the Court enjoin the Defendants from enforcing §154-1658, which allows Defendant Riley the discretion to assess police escort fees.

On its face, § 154-1658 is content-neutral, meaning it does not differentiate between certain types of speech. Where a restriction on speech is content-neutral, and is a reasonable "time, place and manner" restriction, courts apply "intermediate scrutiny." This requires that the restriction not delegate overly broad discretion to the licensing authority, that it be "narrowly tailored to meet a significant governmental interest," and that it "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *Lionhart v. Foster*, 100 F.Supp.2d 383 (E.D. La. 1999). *Forsyth* holds that an ordinance must meet all four of the requirements to be constitutionally valid. The New Orleans ordinance, § 154-1658, fails this test.

The New Orleans ordinance affords Defendant Riley an impermissible amount of discretion in setting police escort fees, as evidenced by the immediate case, in which Plaintiffs are being made to pay fees based upon anticipated violence in the crowd. The ordinances provide that the police chief shall determine how many officers are needed for a given event. "After the

application for a written route clearance has been filed, the superintendent of police shall consider the application and *such other information as he may otherwise obtain* and shall assign the number of police officers as he determines necessary to accompany the parade from the time of assembly of the parade until such time that the parade shall terminate." MUNICIPAL CODE; CITY OF NEW ORLEANS Sec. 154-1656, *emphasis added.* Based on his assessment of the appropriate number of officers, the Code then provides "when the superintendent of police determines that the parade organizers shall provide compensation for the assigned police officer, the organizers shall be notified of the amount to be paid. The amount shall be paid to the department of finance at the time that parade organizers obtain the permit. No permit shall issue until such amount has been paid." MUNICIPAL CODE; CITY OF NEW ORLEANS § 154-1658(b). The Code does not provide for any review of his decision, and only states that the fee shall be paid prior to permit issuance. *Id.*

The Code does not enunciate any standards, other than the parade application itself, to be used by the Chief in calculating the amount of the fee. Indeed, it seems to contemplate that he may opt not to impose the fees at all, in stating, "*when* the superintendent determines that the parade organizers shall provide compensation...." *Id., emphasis added.*

In *Forsyth*, an ordinance requiring permits for parades and demonstrations that also imposed fees to reimburse the county for an increased police presence was found to be an unconstitutional violation of the plaintiff's First Amendment rights. *Forsyth v. The Nationalist Movement*, 505 U.S. 123, 133 (1992). The *Forsyth* ordinance provided that when the costs of protecting participants in a protest or demonstration exceeded normal policing costs, the costs were borne by the participants. *Id.* The Court found the ordinance unconstitutional because the county administrator was vested with the

discretion to vary the estimated costs of police protection, which required him to "necessarily examine the content of the message that is conveyed". *Id.* at 134. The Court also noted "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 arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official." *Id.* at 133.

Similarly, the Sixth Circuit has held that the fee assessed must not permit speculation about the degree of violence a parade might provoke, and that the protection of the marchers must be provided without consideration of the cost. *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir. 1991). While the number of observers and counter-participants should be taken into account in assessing the appropriate number of police, those numbers should not be a factor in determining the amount of any fee to be imposed. *See also, Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985). The ability of Defendant Riley to set police escort fees based upon potential disruption in the crowd makes speech, and especially controversial speech (as defined by him, without review) available only to those individuals wealthy enough to assume the cost, effectively pricing some speakers out of the "marketplace of ideas" which we as Americans so deeply cherish. In short, the provisions contain "the possibility of censorship through uncontrolled discretion." *Forsyth v. The Nationalist Movement*, 505 U.S. 123, 133 (1992). They allow the Defendant City to "charge a premium in the case of a controversial political message delivered before a hostile audience." *Id.* at 136.

Defendant Riley's discretion to charge a higher fee for certain parades and marches due to disruptions in the crowd creates, essentially, a heckler's veto over unpopular speech. The ordinance gives the superintendent of police the discretion to consider "such other information as he may otherwise obtain," which in the present case, is violence of the crowd. Courts have held that a municipality may not set a fee at the amount required to protect a speaker from the crowd, because if such a position were espoused, police could charge higher fees for unpopular viewpoints. *Forsyth*, 505 U.S. at 133. *See Also United Food & Commercial Workers Union Local 442 v. City of Valdosta*, 861 F. Supp. 1570 (M.D. Ga. 1994). "It is the duty of the state to protect, rather than restrict, those who express unsettling views. Thus, the problem of police protection must be addressed through methods that do not offend the Constitution." *Rosen v. Port of Portland*, 641 F.2d 1243, 1248 (9th Cir. 1981). The ordinances at issue in the immediate case are clearly unconstitutional because they afford Defendant Riley excessive discretion. It should be noted that the test is not "whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Forsyth* at 133, n. 10.

In the present case, Defendants will be unable to show that the city ordinances are constitutional, due to the jurisprudence cited above. The city ordinances vest overly broad discretionary authority in Defendant Riley, as he assesses the "cost" of speech. The variable fees necessarily require Chief Riley to make content-based determinations, and here, the Defendants are assessing and applying the $3760 permit fee solely to the Social Aid and Pleasure Clubs. Where a 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." *Forsyth* at 131.

Under this standard, enforcement of New Orleans ordinance § 154-1658 should be enjoined by this Court. Both the Department and the citizenry are struggling, post-Katrina, to deal with a host of issues which have made policing and the maintenance of public safety difficult. As we struggle together to deal with the "new normal," however, the City must respond to new challenges within the confines of the Constitution.

C. State Statute LA R.S. 14:326 Violates the First and Fourteenth Amendments to the United States Constitution

LA R.S. 14:326 requires a permit for marches, protests and demonstrations, but exempts many organizations, including labor organizations, police and firefighter organizations, labor unions, municipality-sponsored events, Mardi Gras, school parades, and fairs. LA R.S. 14:326(C). The aforementioned organizations are also exempt from the requirement that they post a $10,000 bond for the event. LA R.S. 14:326 (B). The bond requirements are included to provide security to the government for losses sustained as the result of a protest, parade, or demonstration. *Id.* As with the permit requirement, certain groups are exempt from the bond requirement. *Id.* at (C).

In this way, LA R.S. 14:326 is a content-based burden on speech. It only applies to Plaintiffs because the *content* of Plaintiffs' speech does not fall into any exempted category. Plaintiffs seek to engage in the same conduct as do other groups, but other groups are exempted from the challenged requirements. Plaintiffs' message determines whether the speech is subject to restriction, and that is an impermissible content-based determination. *Arkansas Writers' Project, Inc., v. Ragland*, 481 U.S. 221, 230 (1987). The burden is on the Defendants to show

that their restrictions are narrowly tailored to serve a compelling government interest. *Davenport v. City of Alexandria*, 710 F2d 148 (4th Cir. 1983). This they cannot do.

The Fifth Circuit held that a parade ordinance that granted exceptions to students and municipal authorities was unconstitutional as differential treatment based upon the content of speech. *Beckerman v. City of Tupelo, Miss*, 664 F.2d 502, 514 (5th Cir. 1981). The *Beckerman* court ruled that the distinctions were content-based because it found that the permit-exempt groups would presumptively create similar traffic disruptions as the non-exempt groups, and therefore, the only reason for the distinction was the content of the speech of the non-exempt speakers, which is a violation of the Constitution. *Id.* Last month the Fifth Circuit again struck down an ordinance due to it containing exemptions for certain speech. *Knowles v. City of Waco, Texas*, 2006 WL 2441317 (5th Cir. 2006). Other courts considering permit schemes that provide exemptions have reached the same conclusion as has the Fifth Circuit. *See*, *Trewhella v. City of Lake Geneva*, 249 F. Supp. 2d 1057, 1068 (E.D. Wis. 2003); *Ohio Citizen Action v. City of Avon* Lake, 986 F. Supp. 454, 458 (N.D. Ohio 1997); *Hotel Employees & Res. Employees Union, Local 2850 v. City of Lafayette*, 1995 WL 870959 at *2 (N.D. Cal. 1995); *N.J. Freedom Org. v. City of N.B.*, 7 F. Supp. 2d 499, 509 (D.N.J. 1997); *Sullivan v. City of Augusta*, 406 F. Supp. 2d 92, 109 (D.Me. 2005).

It is abundantly clear that a statute providing exemptions, as does the challenged state statute, violates the Constitution as a content-based burden on freedom of speech. As such, the enforcement of La R.S. 14:326 must be enjoined by this Court.

For these reasons, the Plaintiffs are extremely likely to succeed in their claim that LA RS 14:326 and New Orleans Municipal Code 154-1658 are unconstitutional. There is no ambiguity in the case law, which is directly on point. These permit schemes are unconstitutional. The fact

that it is abundantly clear that Plaintiffs will succeed on the merits of their challenge to these statutes mitigates heavily in favor of this Court granting the requested preliminary injunction.

II. SHOULD A PRELIMINARY INJUNCTION NOT ISSUE, THE PLAINTIFFS FACE A SUBSTANTIAL THREAT OF IRREPARABLE HARM.

"It has been repeatedly recognized by the federal courts that violation of constitutional rights constitutes irreparable injury as a matter of law." *Springtree Apartments, ALPIC v. Livingston Parish Council*, 207 F. Supp. 2d 507, 515 (M.D. La. 2001). As the Supreme Court has held, "the loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *see also Deerfield Medical Ctr. v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981) ("We have already determined that the constitutional right of privacy is either threatened or is in fact being impaired and this conclusion mandates a finding of irreparable injury."); *Killebrew v. City of Greenwood*, 988 F. Supp. 1014, 1016 (N.D. Miss. 1997) ("Plaintiffs' claims are primarily based upon violation of their constitutional rights under the Equal Protection Clause of the Fourteenth Amendment, and thus, the threat of irreparable injury is present as a matter of law."); *Murillo v. Musegades*, 809 F. Supp. 487, 497 (W.D. Tex. 1992) ("Irreparable injury is established upon movants showing constitutionally protected rights have been violated."); *Wiggins v. Stone*, 570 F. Supp. 1451, 1453 (M.D. La. 1983) ("[I]t is well established that deprivation of a constitutionally protected right constitutes irreparable injury[.]"); 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."). This reasoning essentially collapses the "likelihood of success on the merits" and "irreparable harm" prongs of the

injunctive inquiry where constitutional rights are at stake. *Forum for Academic & Inst. Rights v. Rumsfeld*, 390 F.3d 219, 246 (3rd Cir. 2004).

The presumption of irreparable harm entitling a movant to injunctive relief arises in these circumstances because where constitutional rights are at stake, monetary compensation is not an adequate remedy. The second line parades are an expression of the diversity and culture, both socially and racially, of the City of New Orleans. They provide a cultural, historical, and musical educational opportunity for both the citizens and tourists of New Orleans. Monetary damages will not remedy the loss the Plaintiffs will experience as the result of being denied the ability to parade due to unreasonable and unconstitutional fees, especially in post-Katrina New Orleans, as Plaintiffs seek to rebuild their lives. Cultural expression and solidarity have never been more important. Plaintiffs are struggling to find the money to pay the police fees. Some have received money from outside sources, which is not sustainable. Some parades have been cancelled and others postponed. Many other parades are at risk of being cancelled. Additionally, Plaintiffs spend an entire year preparing for these events. These fees determine whether they can or cannot parade. Therefore, even Plaintiffs with parade dates as far out as March of 2007 need immediate relief from this Court such that they may begin preparations for the parades. The harm is already occurring, and it is severe.

III. THIS THREATENED INJURY FAR OUTWEIGHS ANY HARM THAT WILL RESULT IF THE INJUNCTION IS GRANTED.

The NOPD has a basic obligation to keep New Orleans safe for all residents. The cost of this task may not be passed along to private citizens, which is what is happening in the immediate case. The NOPD should be patrolling the streets of New Orleans with or without a second line event; the obligation to prevent crime does not arise only when there is a second line.

Therefore, the burden on the Defendants should the fees and bonding requirements be lifted is minimal.

Conversely, the burden on Plaintiffs if the fees and bonding requirements are not enjoined is severe. This is a point in history where the New Orleans community is rebuilding itself. Members of the Social Aid and Pleasure Clubs are trying to move back to this City, and, as we all know, living in this City right now takes strength. There is a very real threat- indeed, it is nearly a certainty- that if the permit and bonding requirements are not enjoined, most second line parades will not occur this year. Should the restrictions remain in place, the parades certainly will not occur next year. Ultimately, these fees will result in the eradication of a critical component of African American culture, community and heritage, precisely when New Orleans most needs that sense of community. Plaintiffs stand today at a unique point in history, as the African American community of New Orleans struggles to return to the City. The second line parades are extremely important at this moment in history, as an expression of a culture that existed pre-Katrina, and which is attempting to carry on post-Katrina.

Additionally, the second line parades are a positive force in the City's African-American community. As outlined extensively in the attached affidavits, the clubs work to provide support and services in that community. For example, the theme of the Lady Rulers Social Aid and Pleasure Club is a theme of non-violence. Jones Affidavit, Exhibit P. Taking these positive forces off of the street is severely damaging to the City's black community, as well as to the City overall. "Second lining gives members a lot of respect because it is a positive way for us to give back to our community. The youth look up to us, the community supports us, and we try to support them. Without parades, our musicians would suffer and our cultural tradition will die." Anderson Affidavit, Exhibit O.

"The African American working class tradition of second lining in New Orleans has a long history that dates back to before the Civil War. Yet it speaks to contemporary issues of inner city life, such as how to maintain strength, dignity, and community in the face of deteriorating urban economies and entrenched patterns of chronic joblessness and underemployment, deteriorating public services, gangsterism, and police brutality. The second line parades create alternative moral and aesthetic orders within some of the most blighted neighborhoods in the city, creating spaces of conviviality where crime and fear of crime work to atomize the community." Regis, Helen A, "*Second Lines, Minstrelsy, and the Contested Landscapes of New Orleans Afro-Creole Festivals*," Cultural Anthropology 14(4): 472 at 495 (1999).

The harm to the Plaintiffs in not granting the injunction significantly outweighs any burden to the Defendants; Plaintiffs will never be able to return to this place in time to replicate the second lines set to parade one year after the devastation of this City.

IV. THE PUBLIC INTEREST WILL BE SERVED BY GRANTING THE REQUESTED RELIEF.

An injunction restraining Defendants from imposing unreasonable and unconstitutional fees on the Social Aid and Pleasure Clubs will serve the public interest. It is well-settled law that the public interest is always served by ensuring compliance with the Constitution and civil rights law. *See, e.g., Valley v. Rapides Parish School Board*, 118 F.3d 1047, 1056 (5th Cir. 1997) (finding that public interest would be undermined if unconstitutional actions of a school board were permitted to stand); *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (holding that it is always in the public interest to prevent violation of constitutional rights). "The public interest is best served by enjoining a statute that unconstitutionally impair First Amendment rights." *Forum for Acad. & Inst. Rights v. Rumsfeld,*

390 F.3d 219, 246 (3rd Cir. 2004). Further, the public has a substantial interest in promoting the well-being of the community and maintaining the historic and educational functions of the second line parades. An injunction would eliminate Defendants' unmistakable and destructive message that particular groups seeking permits for parades promote dangerous forms of speech and should be further regulated through higher permit fees.

CONCLUSION

For the reasons set out above, this Court should issue an injunction prohibiting Defendants from imposing the unconstitutional state statute and municipal ordinances.

Carol Kolinchak (#22495)
1340 Poydras Street, Suite 2110
New Orleans, Louisiana 70112

Cooperating Attorney for the American Civil Liberties Union Foundation of Louisiana

Katie Schwartzmann (#30295)
P.O. Box 56157
New Orleans, Louisiana 70156

Staff Attorney for the American Civil Liberties Union Foundation of Louisiana

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Memorandum in Support of Motion for Preliminary Injunction has been served on Defendants via hand delivery, and by placing same in the U. S. Mail, proper postage prepaid, this 16th day of November, 2006.

Katie M. Schwartzmann