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, Defendants.	NUMBER: 08-803 JUDGE BARBIER MAG ROBY CIVIL RIGHTS ACTION 42 U.S.C. § 1983 DECLARATORY AND INJUNCTIVE RELIEF

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

INTRODUCTION

Plaintiffs seek an injunction from this Court enjoining Defendants from canceling Plaintiffs' second line in violation of the First and Fourteenth Amendment rights to freedom of speech. Plaintiffs are members of historic and widely revered benevolent societies in the New Orleans African American community. The freedom of speech of these institutions, more commonly known as "Social Aid and Pleasure Clubs," is threatened due to the unreasonable and unexplainable revocation of a parade permit previously granted for February 4, 2008. Plaintiffs seek emergency relief from this Court to protect their First and Fourteenth Amendment rights to freedom of expression.

Plaintiffs are entitled to injunctive relief because (1) the permit revocation violates the First Amendment prohibitions on restrictions on freedom of speech, (2) the Plaintiffs will suffer

irreparable harm by not being allowed to hold their second line parade should the order not issue, (3) enjoining the revocation of the permit would not substantially harm Defendants or others, as the event was scheduled in its current form at Defendants' request and (4) the public interest would be served by such an injunction.

STATEMENT OF FACTS

I. BACKGROUND OF SECOND LINES

Plaintiff Social Aid and Pleasure Club Task Force is an umbrella organization with members from various "Social Aid and Pleasure Clubs" in the City of New Orleans. 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. 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.

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.

"The (parade) 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.

II. THE IMMEDIATE DISPUTE BEFORE THE COURT

Last fall, Plaintiffs began negotiations with the New Orleans Police Department ("NOPD") regarding the scheduling of their annual parade. This Task Force parade is an event intended to unify the second line community, and involves various Social Aid and Pleasure Clubs parading together. Although second lines date back to over a hundred years ago, the Task Force parades are the product of a recent attempt by the clubs to work together. For example, in 2006, the Task Force second line was for the right to housing, and the right to return to New

Orleans after Katrina. In 2007, the Task Force second line was formed as an event against violence. Members held placards calling for an end to the violence in their communities and in support of second lines.

The dates proposed by Plaintiffs for the parade were rejected by NOPD, because of conflict with BCS, and with the NBA AllStar game. NOPD suggested the alternative date of February 4, 2008. This date was accepted by Plaintiffs, who completed an application dated August 24, 2007. See attached Exhibit 1.

The NOPD also mandated other unusual provisions to be included in the parade permit to accommodate police staffing requirements, in light of it being Lundi Gras. The restrictions included a two (2) hour parade rather than the usual four (4) hour parade, and a parade route confined to a downtown location. These modifications were accepted by Plaintiffs. Defendant NOPD also requested that Plaintiffs begin the parade later in the day, so that officers could sleep in prior to the event; Plaintiffs agreed to this provision as well. Accordingly, Plaintiffs paid the permit fee of $50.25 and obtained a parade permit from NOPD for February 4, 2008 with the provisions outlined above. See attached Exhibit 2.

Pursuant to these events, Plaintiffs proceeded to organize the approved second line parade, including hiring three bands, purchasing special Mardi Gras colored outfits, and advertising the event. Plaintiffs incurred expenses of approximately $7,000.00 in booking the bands. See attached Exhibit 2.

On or about January 22, 2008, a NOPD representative contacted Plaintiff Jackson and verbally requested that she change the route of the parade, to accommodate his traffic concerns. She agreed to this. However, she later received a call from him asking that she move the event

from Monday, February 4, 2008 to another date within the carnival period, including Sunday, February 3, 2008.

Plaintiffs did not know why they were being asked to move the parade, so undersigned counsel for Plaintiffs sent a public records request to the NOPD. Plaintiffs' counsel also spoke with Defendants' counsel, who advised that he would contact her back the following day, but he failed to do so. See attached Exhibit 3. Plaintiffs considered whether they could move the event to accommodate the NOPD. However, they were unable to do so, because some of the chief participants in the event- the musicians- are unavailable on the dates, and also because some of the proposed alternatives conflict with individual club parades. Plaintiffs later were told that Zulu was applying pressure upon the NOPD to cancel Plaintiffs' event. See attached Exhibit 2.

On January 29, 2008, NOPD began to apply improper pressure on Plaintiffs to force them to cancel the parade on Monday, February 4. Specifically, a NOPD official believed to be "Sergeant Ross" called representatives of some second line organizations. He advised members of the individual second line organizations that if they insisted on proceeding with the Lundi Gras event, they would "jeopardize" their annual parades. These witnesses understood the call to mean that the NOPD would deny permits to the second line organizations in the future for each organization's upcoming annual parade. The calls were extremely intimidating to the witnesses, and, upon information and belief, some organizations were sufficiently intimidated such that they are not participating in the Lundi Gras event. See attached Exhibits 4, 5 and 6.

On the night of January 29, 2008, three uniformed NOPD officers delivered a letter to the president of the Social Aid and Pleasure Club Task Force, Plaintiff Jackson. This letter directed the second line organizations not to parade as scheduled on Monday, February 4, 2008. See attached Exhibit 7. On January 31, 2008 Plaintiffs' counsel delivered a letter to Defendants'

counsel advising of Plaintiffs' intention to file the above-captioned matter, and advising of their intention to seek injunctive relief from this Court. See attached Exhibit 8. Within a few hours Defendants filed a lawsuit in state court, in a transparent attempt to deprive this Court of jurisdiction. See attached Exhibit 9. Their efforts must fail, however, as the state court action seeks a TRO to prevent Plaintiffs from parading without a permit. That lawsuit is moot, as Plaintiffs do not intend to parade without a permit. Plaintiffs have filed this action to obtain a permit so that they may parade lawfully, as the NOPD has unconstitutionally revoked their permit.

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' REVOCATION OF THEIR PERMIT CONSTITUTES A VIOLATION OF THE FIRST AMENDMENT.

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

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 actions at issue in the present case place burdens and restrictions on Plaintiffs' protected expression. As such, they are subject to exacting judicial review.

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

At the outset, Plaintiffs note that unlike most legal disputes, in First Amendment cases *Defendants* carry the burden of proof and persuasion. United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816, (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions") (citations omitted); Phillips v. Borough of Keyport, 107 F.3d 164, 172-73 (3rd Cir. 1997)(*en banc*), *cert. denied*, 522 U.S. 132 (1997) (accord). In other words, once Plaintiffs have shown a restraint on free

expression, the burden shifts to the government agency to justify the restraint under the relevant First Amendment standard.[1] The Defendants cannot satisfy their heavy burden.

C. Defendants Cannot Revoke Plaintiffs' Parade Permit

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 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).

The New Orleans City ordinances require that any person seeking to parade 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. If the Superintendent of Police is going to deny the permit, he must state the reasons therefor in writing, and must suggest alternatives to the applicant. MUNICIPAL CODE; CITY OF NEW ORLEANS Sec. 154 §§ 1660, 1661. If the Superintendent decides to deny a permit, he shall mail that denial to the applicant in writing. MUNICIPAL CODE; CITY OF NEW ORLEANS Sec. 154-1663. The law requires that once a permit is filed, the Superintendent of Police shall act upon it. MUNICIPAL CODE; CITY OF NEW ORLEANS Sec. 154-1661.

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

The First Amendment standard in this type of case 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 Defendants' actions fail this test.

As outlined in Exhibit 2, the NOPD granted the permit five months ago, and modified it a couple of times since then. There have been no developments of which Plaintiffs are aware which would justify the revocation of this permit; at the time it was issued all parties knew the size of the parade, and knew that it was scheduled on Lundi Gras. Assuming, *arguendo*, that Defendants have a significant governmental interest in public safety, Defendants have not shown that this prohibition on parading is narrowly tailored to achieve that end. They have not put forth any legitimate reason for reversing their previous decision to grant the permit.[2]

After Plaintiffs complied with Rule 65 and notified Defendants that they were filing this action, Defendants filed for a TRO in state court, seeking to enjoin Plaintiffs from parading without a permit. That TRO is moot, because, had Defendants complied with local rules and custom to determine Plaintiffs' position, they would have learned that Plaintiffs do not intend to parade without a permit. Plaintiffs are seeking redress from this Court because they want to obey the law. Indeed, Plaintiffs submitted a permit because they want to obey the law.

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[2] Obviously, the objection of Zulu is not sufficient basis for denying a permit; as outlined above the government can only silence speech where it has a significant interest, and the objection of Zulu, with all due respect to Zulu, does not amount to such an interest.

Defendants' state court action is significant because the language therein is very telling. In their petition, Defendants state that "the decision was substantially based upon the previously scheduled Lundi Gras Festivities held by Zulu and Rex Carnival organizations at the Riverwalk/ Woldenberg Park. With Monday's light parade schedule until Monday evening normally providing a "breather" until Tuesday's dawn till dusk carnival activities, the Police Department could not, in good conscience, authorize the added strain an additional parade would require of its officers." See attached Exhibit 9. These paragraphs are telling. First, they purport to explain that Plaintiffs permit was canceled after consideration of the Zulu and Rex events at Woldenberg Park. However, these are annual events, and therefore were scheduled at the time that Plaintiffs applied for their permit, and therefore do not justify revoking a permit granted five months ago. Second, Defendants state that they cannot accommodate Plaintiffs' event because Monday provides a "breather" before Mardi Gras. Plaintiffs again answer that this was the case when the permit was originally granted. Additionally, there are only approximately 100 main line participants in the event on Lundi Gras. The event lasts two hours. With a parade of 100 people, it is difficult to understand why the NOPD would need more that 10 or 15 officers for the event. It has been publicly reported that the NOPD has some 1300 officers at present. Plaintiffs do not mean to understate their appreciation for the hard work of the police department during carnival season. However, it is difficult to conceive of 10-15 officers being such an enormous strain on resources that it is necessary to cancel this event.

To allow the parade in the immediate case to be cancelled allows the continuance of what appears to be an arbitrary permitting scheme. To be constitutional, a parade permitting scheme must not afford an unconstitutional amount of discretion to the issuing official. *Forsyth v. The Nationalist Movement*, 505 U.S. 123, 133 (1992). The behavior of the NOPD in the immediate

case indicates that the issuing official, Defendant Riley, possesses an unconstitutional degree of discretion. It cannot be consistent with the First Amendment to maintain a permitting scheme that allows a person to think for five months that they have a parade permit, and then allows an official to yank that permit six days before the event, based upon factors that existed at the time of application. This scheme affords too much discretion to the issuing official, and raises serious due process concerns.

As cited above, the Municipal Code requires the Defendants to act upon a permit application immediately. MUNICIPAL CODE; CITY OF NEW ORLEANS Sec. 154-1661. Defendant Riley is to mail reasons for a rejection in writing. *Id.* at 154-1663. He did not comply with that in the immediate case. If this requirement is to be ignored by the Defendants at will, it would seem, then, that "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. .... The First Amendment prohibits the vesting of such unbridled discretion in a government official." *Id.* at 133.

For these reasons, the Plaintiffs are extremely likely to succeed in their claim that the actions of the Defendants in denying them the right to parade are unconstitutional. The fact that it is clear that Plaintiffs will succeed on the merits of their challenge to these actions mitigates heavily in favor of this Court granting the requested temporary restraining order.

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).[3]

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 an arbitrary decision by the City. Cultural expression and solidarity have never been more important than as we work together to rebuild this City.

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

The requested order will not prejudice the City's ability to maintain public safety, crowd control and orderly traffic movement. The City has provided no evidence to the contrary, despite Plaintiffs having requested this information on January 22, 2008. Moreover, any argument that the Defendants lack the resources is belied by the fact that there has been no change in circumstances since the permit was initially approved in August of 2007.

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[3] *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 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 line set to parade. Additionally, resources have been invested in this event, including the most precious resource of sweat equity. Plaintiffs have worked extremely hard to make this parade happen, including recruiting sponsors and interested persons from outside of Louisiana. If the parade is cancelled they will forever have lost this opportunity. Plaintiffs cannot simply move the parade to another date. The bands are not available, and they have structured the entire event as a Mardi Gras theme, because of the Lundi Gras date.

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

An injunction restraining Defendants from canceling this parade 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).[4] 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 they are not bound to follow rules in deciding who may speak in the public sphere, and when.

[4] *See also, 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).

CONCLUSION

For the reasons set out above, this Court should issue a temporary restraining order prohibiting Defendants from canceling Plaintiffs' parade on Monday, February 4, 2008, or from otherwise interfering with the conduct of same.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Memorandum in Support of Motion for TRO has been served on Defendants via facsimile, and by placing same in the U. S. Mail, proper postage prepaid, this 1st day of February, 2008.

Katie M. Schwartzmann