The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VICTOR MENOTTI, THOMAS SELLMAN, TODD STEDL, and DOUG SKOVE,

Plaintiffs,

v.

CITY OF SEATTLE; PAUL SCHELL, Mayor of Seattle; NORMAN STAMPER, Chief of Police, Seattle Police Department; and S. D. STEVENS, a Seattle Police officer,

Defendants.

No. C00-372R (BJR)
WTO Proceedings

(Consolidated Motion)

PLAINTIFFS' JOINT REPLY IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Noted on Motion Calendar for September 7, 2001

ORAL ARGUMENT REQUESTED

ROBERT HICKEY; KENNETH HANKIN; JENNIFER HUDZIEC; STEPHANIE LANE; CARROLL JACKSON; DENISE COOPER; NICOLE PEARSON; and EMILY MALONEY, on behalf of themselves and all others similarly situated, Plaintiffs, v. CITY OF SEATTLE, a municipality; PAUL SCHELL, Mayor of the City of Seattle; NORMAN STAMPER, Former Chief of Police of the City of Seattle, Defendants.	NO. C00-1672R (BJR) (Consolidated Motion)
LIFE HAS MEANING a/k/a MARY ELIZABETH WILLIAMS, Plaintiff, v. CITY OF SEATTLE; PAUL SCHELL; NORM STAMPER; JOHN DOE #1, JOHN DOE #2, JOHN DOE #3, JOHN DOE #4, JOHN DOE #5, JOHN DOE #6, JOHN DOE #7, JOHN DOE #8, JOHN DOE #9, JOHN DOE #10, JOHN DOE #11, JOHN DOE #12, JOHN DOE #13, JOHN DOE #14, JOHN DOE #15, JOHN DOE #16, Defendants.	NO. C00-1998 C (BJR) (Consolidated Motion)
MICHAEL CROWLEY, Plaintiff, v. CITY OF SEATTLE, *et al*., Defendants.	NO. C00-855R (BJR) (Consolidated Motion)

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I. INTRODUCTION

The City offers no evidence to counter the Plaintiffs' overwhelming evidence that the City prohibited all protests in downtown Seattle for three full days in December 1999. The uncontroverted evidence proves that the City instituted a content-based policy to prohibit even peaceful free speech and assembly. Perhaps most important: the City does not offer a shred of evidence to suggest that it allowed any type of peaceful protest within the No Protest Zone ("NPZ"). Nor does the City dispute that as a matter of law, a policy to exclude speakers from a traditional public forum based on the anticipated content of their political speech would be unconstitutional.

Rather than dispute the facts or law on Plaintiffs' Joint Memorandum in Opposition to Defendants City of Seattle's Motion for Partial Summary Judgment and in Support of Plaintiffs' Joint Cross-Motion for Partial Summary Judgment ("Cross-Motion"), the City focuses its defense on the motives of its policy makers, who assert that their subjective motivation was to ensure public safety rather than to stifle speech. Even when viewed most favorably to the City, evidence of motive does not raise a material issue. There is no "motive defense" to a constitutional free speech claim. The City pursued its goals by means of viewpoint discrimination and unfettered discretion in enforcement. The resulting policy was unconstitutional. Because Plaintiffs' Cross-Motion is virtually unchallenged both legally and factually, the Court should grant Plaintiffs' Cross-Motion.

II. REPLY ARGUMENT

On cross-motions for summary judgment, the Court decides each motion separately while considering all of the evidence submitted on both. *Fair Housing Council v. Riverside Two*, 249 F.3d 1132, 1135-36 (9th Cir. 2001). This brief will first clarify what is at issue. Defendant City of Seattle's Motion for Partial Summary Judgment ("Opening Br."), sought partial summary judgment on six issues.[1] The issue in Plaintiffs' Cross-Motion and the City's "Issue No. 3" overlap. Both seek a ruling on the constitutionality of the NPZ, even though they are phrased differently.

[1] Of the City's six issues, Plaintiffs argued that the Court should deny several of the City's requests because the issues are not in controversy; ruling would require the Court to issue an advisory opinion. Plaintiffs did not concede these issues, as the City claims.

The City's Opening Br. asked whether the Mayor "employed" the City of Seattle's Emergency Ordinance in a constitutional manner "when he established … the restricted zone," Opening Br. at 4, a question that goes to the City's use of the ordinance as applied. The City now reframes its motion in terms of a facial challenge to Order Number 3, and asks the Court to disregard all other as-applied evidence regarding the NPZ's establishment. The City is free to narrow its motion on reply. However, it has failed to address Plaintiffs' as-applied challenge to the City's NPZ Policy, of which Order Number 3 was only a part.[2] Plaintiffs' Cross-Motion argued both that Order Number 3 was a facially unconstitutional restriction on free speech, and that the NPZ Policy (of which Order Number 3 was only a part), as applied on the streets of Seattle, was unconstitutional.

A. The City Does Not Dispute the Facts that Prove an Unconstitutional Policy

The City does not dispute any of the facts Plaintiffs submitted in support of the Cross-Motion. There is no challenge to the authenticity or admissibility of any exhibit. Those undisputed facts paint a damning picture:

- The City's Order Number 3 was a content-based policy that excluded protesters. It was carefully drafted to allow all categories of people into the downtown Seattle core except protesters. Order Number 3's language is undisputed. [Exs. 10, 11, 12 to Declaration of Michael S. McNamara, submitted in support of Plaintiffs' Joint Memorandum in Opposition to Defendant City of Seattle's Motion for Partial Summary Judgment and in Support of Plaintiffs' Joint Cross-Motion for Partial Summary Judgment ("McNamara Decl.").]

- Beginning on the evening of November 30, 1999, and continuing throughout the remainder of the week, the downtown Seattle core remained calm and free from widespread civil unrest. [Deposition of Edward Joiner (hereinafter "Joiner Dep."), McNamara Decl., Ex. 4 at 48-49]. Even the City's own police report evidence definitively shows that widespread unrest was limited to November 30. [Decls. of Captain Pugel, Captain Caldwell, and Lieutenant Low, submitted in support of City's Opening Br.] In spite of the complete lack of a continuing emergency situation, the City maintained its No Protest Policy for duration of the WTO Conference.

[2] In addition to the NPZ Policy challenged in this joint Cross-Motion, some Plaintiffs have alleged they were damaged by other policies, including failure to train or supervise. The City's opposition to the brief of Plaintiff Life Has Meaning on that topic is not well taken. Plaintiffs stipulated that they would attempt joint briefing on common issues, but the order allows them to file separate briefs on issues unique to individual cases. See Stipulation and Order (filed July 9, 2001) and Menotti Plaintiff's Response to Motion to Consolidate (filed July 2, 2001). Plaintiff Life Has Meaning offered briefing on how the City's failure to train its officers on use of force damaged her. This question was not shared by the other three groups of plaintiffs. The City suffered no prejudice from the Life Has Meaning brief, since it had adequate time and pages to reply.

- A policy decision was made on the afternoon of November 30 to selectively prohibit demonstrators and protesters from a 25-block area. [Deposition of Paul Schell, ("Schell Dep."), McNamara Decl. Ex. 2 at 84, 118-120, 169; McNamara Decl. Ex 4, Joiner Dep. at 42-43.]

- The exclusion was to be based on the officers' perceptions of individuals' political purpose. [Schell Dep., at 17, 18, 135, 139-140, 147-48, 183-85.] If they were there to display signs or pass out leaflets, they were barred, but if they were engaged in non-expressive activity – like shopping – they were allowed in. [Schell Dep. at 178-184; Joiner Dep. at 19-20.]

- Line officers had unfettered discretion to exclude persons deemed not to be engaging in "reasonable activity." Political protest was not a reasonable activity. [Deposition of Harvey Ferguson ("Ferguson Dep."), McNamara Decl., Ex. 13 at 139, 145; Operations Order prepared by Assistant Chief Harvey Ferguson, McNamara Decl., Ex. 14; Deposition of Norman Stamper ("Stamper Dep."), McNamara Decl., Ex. 7, at 191]

- This policy was disseminated to line officers through oral and written instructions. [McNamara Decl., Ex. 14; Declaration of James Pugel in Support of Defendant's Opening Br., Ex. A at 9; Joiner Dep. at 60-61, 76, 77; handwritten notes of Captain Cindy Caldwell, McNamara Decl., Ex 17.]

- Officers implemented the policy by barring people who went to the zone for purposes of political speech, but allowing in others. Those expressing political views about the WTO were told they were in violation of the "No Protest Zone," and were subject to sanctions that ranged from orders to leave, to confiscation of expressive material, to arrest. [Declarations of Ron Matyjas, Martha Ehman, Andrew Russell, Lauren Holloway, Rita Herkal; Deposition of Sue Bastian, McNamara Decl., Ex. 29 at 12-23.] This applied even to people who supposedly were allowed into the area by the strict terms of Order No. 3. *See* Decl. of Gendler; and Deposition of Victor Menotti at 57, Appendix L to Declaration of James Lobsenz in Support of Menotti Plaintiffs' Motion for Partial Summary Judgment on Liability.

- With Mayor Schell at his side, Chief Joiner announced to the world that "We're going to adopt a policy . . . [to] prohibit any demonstration within that core area for the remainder of the week. Our position is that anyone who goes into that area to protest will be arrested." [Composite quotation taken from videotape of 7:30 a.m. televised press conference on December 1, 1999 and transcript of CNN . . . , Reply Declaration of Steve W. Berman in Support of Plaintiffs' Joint Cross-Motion for Partial Summary Judgment ("Berman Decl.," Ex. 1.)

These facts were corroborated without contradiction by every witness deposed, from the Mayor through the entire SPD chain of command, from Chief Stamper and Chief Joiner through the captains, lieutenants, sergeants, and line officers.

The City nonetheless claims an insufficient showing of municipal policy, arguing that only the Mayor's actions are relevant.[3] This argument fails legally and factually. Municipal policy is

[3] The City's Reply in Support of its Motion for Partial Summary Judgment and in Opposition to the Plaintiffs' Cross-Motion for Partial Summary Judgment, at 23-24 (hereinafter "Opposition Br.").

determined by those officials with final decision making authority for that area, even if they are not the chief executive. *City of St. Louis v. Praprotnik*, 485 U.S 112, 127 (1988); *Pembaur v. Cincinnatti*, 475 U.S. 469, 481 (1986). The Court identifies the final decision-makers as a matter of law, based on state or local law and practice. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989); *Praprotnik*, 485 U.S. at 127. Final decision-making authority may be shared among different officials, and may also be delegated by one official to another. *Pembaur*, 475 U.S. at 483. Ratification of a subordinate's decision by the final policy-maker is another method of establishing municipal policy. *Praprotnik*, 485 U.S. at 127. Mayor Schell is, of course, the chief executive for the City and possesses the authority under the City's emergency powers ordinances. SMC 10.02. But the City cannot dispute that Mayor Schell delegated to the Police Department the authority to make policing decisions. [McNamara Decl., Ex. 2, Schell Dep. at 184-185] As Chief Joiner testified, he had "final decision-making authority." [McNamara Decl., Ex. 4 at 7-8.] The City also cannot dispute that Mayor Schell ratified Chief Joiner's decisions. [McNamara Decl., Ex. 2 at 136-140.] In addition, the City does not dispute that officers' actions in accordance with these decisions were identical across different times and locations, and thus were hardly isolated. (Opening Br. at II.B.6) A persistent and widespread pattern of conduct constitutes a "custom or usage" under section 1983 and therefore has the force of law even if it has "not received formal approval through the body's official decision making channels." *Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978); *Powe v. Chicago*, 664 F.2d 639, 651 (7th Cir. 1981).

B. The NPZ Policy was Unconstitutional

The NPZ Policy was unconstitutional because it: silenced a particular viewpoint; was not a reasonable time, place, or manner restriction; was overbroad; and allowed police officials unfettered discretion to prohibit speech. The reasons were set forth in Plaintiffs' August 7 Cross-Motion, but a few matters deserve mention on reply.

1. Order Number 3 was Facially Unconstitutional

Order Number 3, as distinguished from the larger NPZ Policy, of which it was a part, was a content-based speech restriction. The City argues that the Court should find that it was content-neutral because it did not explicitly mention protest or protesters. To disguise its unconstitutional purpose, the City structured its order to exclude everyone, but then made exceptions for every category of person except protesters. Two undisputed facts highlight Order Number 3's exclusion of protesters. First, the original Order Number 3 also excluded members of the press. McNamara Decl., Ex. 10. The City corrected this unintended exclusion, and subsequent revisions allowed the press inside. McNamara Decl., Exs. 11, 12. Second, to ensure that the definition of the allowable groups was sufficiently broad, the City added the vague phrase, "other personnel necessary to the operation of [downtown] businesses." McNamara Decl., Exs. 10, 11, 12. This phrase extended the blanket of allowable groups to include shoppers or delivery personnel – everyone except protesters.

Laws prohibiting street protest based on the identity of the speaker are invalid on their face. Just as the restrictions in *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) and *Carey v. Brown*, 447 U.S. 455 (1980) were invalid because they restricted the speech of all groups except a favored group, Order Number 3 is invalid because it is the opposite: it allowed all groups to be present and voice their opinions, except protesters.

2. The NPZ Policy Was Not a Reasonable Time, Place, or Manner Restriction

The City's NPZ Policy cannot be upheld as a reasonable time, place, or manner restriction because it was not content-neutral or viewpoint-neutral. Beyond this minimum requirement, a time, place or manner restriction on speech must also be narrowly tailored to serve a significant (or in Washington, compelling) state interest, and leave open ample alternative channels for communication. *Ward v. Rock against Racism*, 491 U.S. 781, 791 (1989). The NPZ Policy did not do so.

a. The NPZ Policy was neither a reasonable time restriction, nor did it leave open alternative channels for communication

Relying upon a handful of nighttime curfew cases, the City argues that Civil Emergency Order Number 3 was "just" a reasonable "time, place and manner restriction." But Order Number 3 cannot fairly be characterized as a "time" restriction. When used in constitutional parlance, acceptable "time" restrictions deal with hours (i.e., time of day). *Saia v. New York*, 334 U.S. 558, 560 (1948). For example, in *United States v. Chalk*, 441 F.2d 1277, 1983 (4th Cir. 1971), the court upheld a nighttime curfew against the plaintiffs' argument that it restricted their right to travel, citing the value of nighttime curfews specifically. See also, *Smith v. Avino*, 91 F.3d 105, 108 (11th Cir. 1996) (nighttime curfew, imposed after Hurricane Andrew, upheld against vagueness challenge on grounds that "it failed to advise residents of the parameters of their right to travel.")

When a governmental restriction on speech is imposed for a period of *days*, rather than for a specified portion of the 24-hour day, it leaves the category of a reasonable "time" restriction. If anything, the Order's selection of days indicates, on its face, the content discrimination. Order Number 3 ended when the WTO Conference ended. If accepted, the City's definition of a reasonable time restriction becomes a total ban on protest whenever protest is effective. If Order Number 3 is a reasonable time, then so is the duration of, for instance, the Democratic Convention or President Bush's visit to town.

The time period of the NPZ also runs afoul of the constitutional requirement that any restriction must "leave open ample alternative channels for communication." It is of no use to protesters to be able to approach the Convention Center after the WTO Conference had ended, and after its attendees had gone home. This is akin to saying that a candidate's supporters are free to distribute campaign literature once the election has been held. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976), *overruled on other grounds*, *Branti v. Finkel*, 445 U.S. 507 (1980). "The timeliness of political speech is particularly important." *Id.*, at 374 n.29; *Carroll v.*

Commissioners of Princess Anne, 393 U.S. 175, 182 (1968). In *Jacobsen v. United States Postal Service*, 812 F.2d 1151, 1154 (9th Cir. 1987) the Court observed:

> Where the precious First Amendment right of freedom of the press is at issue, the prevention of access to a public forum is, each day, an irreparable injury: the ephemeral opportunity to present one's paper to an interested audience is lost and the next day's opportunity is different.

b. The City's Time, Place or Manner Authorities are Distinguishable

The NPZ Policy's content-based nature distinguishes it from the abortion-clinic picketing statute upheld in *Hill v. Colorado*, 530 U.S. 703 (2000). The Colorado statute forbade any person engaged in expressive activity to "knowingly approach" within eight feet of another person without consent. *Id*. at 707. There were no exceptions allowing closer access for people with favored views. Plaintiffs' uncontroverted evidence of the City's implementation of the NPZ Policy, by contrast, proves that it excluded only selected people from the NPZ, based on their political expression. The City offers no evidence to suggest that it allowed any form of protest within the NPZ.

Hill and the other abortion clinic cases are further distinguishable on a number of other grounds, the most obvious being the amount of territory covered. *Hill* involved a zone of no more than 100 feet, and within that zone one could come within 8 feet of the target of ones' protest without consent, and even closer with consent. *Id*. at 707. The NPZ covered 25 city blocks, obviating any possibility of spoken communication or securing consent for close contact. "The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be an opportunity to win their attention." *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949). Based on *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997), and *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994), it appears the constitutionally acceptable width of a "bubble" around people seeking ingress to a building is something less than 36 feet (on a proper showing of need), and the bubbles may only be required within 100 feet or so of the ingress point. In addition, patients visiting their doctors are a captive audience with a heightened privacy interest surrounding medical decision-making. *Hill*, 530 U.S. at 716. By contrast, WTO delegates are political actors on their

way to perform political tasks. They are more like the Naval officers and dignitaries from *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) (75 yard security zone did not leave ample alternative channels of communication to reach intended audience.) American traditions of open government do not allow an asserted privacy interest of public figures to outweigh the public's interest in communicating with and about them. *See Boos v. Barry*, 485 U.S. 312 (1988); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

3. *Collins v. Jordan* is Indistinguishable

The City's attempts to distinguish *Collins v. Jordan*, 110 F.3d 1363 (9th Cir. 1997), are unavailing. First, the City's argument that *Collins* involved only qualified immunity does not make it any less applicable. The qualified immunity analysis simply confirmed that the law was "clearly established" at least as early as 1992 – and was certainly clear in 1999.

Second, the City argues that the civil disturbances in San Francisco were a "single event" or "single incident," (Opposition Br. at 8), whereas the WTO protests "essentially 'shut down' an entire city." (Opposition Br. at 4). Both assertions are wrong. The facts in *Collins* were:

> On April 30, 1992, the day after the verdict in the first Rodney King beating trial was announced, a number of peaceful, though angry, demonstrations occurred in various parts of San Francisco. There was also a large not-so-peaceful demonstration in the downtown Civic Center area that led to a number of violent incidents, mostly involving property damage, although a few involved minor injuries, as well.

Id., 110 F.3d at 1367 (emphasis added). The next-day arrests in *Collins* involved a crowd numbering in the hundreds, *id.*, some of whom threw objects at police, *id*. at 1368. This was closely analogous to the situation in Seattle. The City of Seattle "expected the vast majority of the protesters to be peaceful, and, in fact, it turned out that the vast majority of protesters were peaceful." (McNamara Decl., Ex. 2 (Schell Dep.) at 61-62.) There was, however, unrest in one area of downtown that Mayor Schell described as an eight-block area "around the Convention Center." [Videotape of November 30 televised press conference, McNamara Decl., Ex. 24.] Governor Locke concurred that it was business as usual "if you go a few blocks away from the heart of the Convention Center." *Id*.

Third, the City argues that *Collins* hinged on the geographical scope of the no-demonstration order: Seattle's covered 25 downtown blocks, where San Francisco's covered the whole City and County (the two are coterminous). In fact, *Collins* gave little weight to the geographical scope of the order. The Court reasoned broadly: "The law is clear that First Amendment activity may not be banned simply because prior similar activity led to or involved instances of violence." 110 F.3d at 1372. The *Collins* arrests occurred at 24th and Mission, not far from the Civic Center where the previous unrest had occurred. Nothing in the Court's opinion suggests that the outcome would have been any different if the same arrests had occurred directly at the Civic Center.

The similarities of *Collins* far outweigh its differences. The central error of the city and police in *Collins* was the contention that the First Amendment allows the banning of protests on "the inference of a continuing threat of past misconduct." *Id*. at 1372. Here, the police banned protest based on "our evaluation of what was going on, and the expectation that it would continue throughout the week." [McNamara Decl., Ex.A 4, (Joiner Dep.) at 25.] The Court explained: "The generally accepted way of dealing with unlawful conduct that may be intertwined with First Amendment activity is to punish it after it occurs, rather than to prevent the First Amendment activity from occurring in order to obviate the possible unlawful conduct." 110 F.3d at 1371-72. The rule applies equally here.

4. A State of Civil Emergency Does Not Justify the NPZ Policy

The City claims to agree that emergency powers are bounded by the Constitution, (Opposition Br. at 4-5), but the test it proposes – "reasonably necessary for the preservation of order," "in good faith" and with "some factual basis", *id*. at 5 – nowhere incorporates any consideration of constitutional limits. The cases the City relies upon take greater care to incorporate the Bill of Rights into their analysis. For example, *Chalk* involved a true curfew that barred all persons from the streets during nighttime hours. Because a curfew does not discriminate on the basis of viewpoint, the court considered it to be "like ordinances restricting loudspeaker noise and limiting parade permits," *id*. at 1280, in other words, restrictions on conduct with only incidental

burdens on speech. With this type of emergency order, the court concluded that the applicable test would be the same as outlined for regulations with incidental speech effects, like the draft-card burning law in *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

Following *O'Brien*, the *Chalk* court would have engaged in the customary level of constitutional review if the emergency restriction was not properly characterized as incidental. For example, *Chalk* noted that "a curfew limited to black neighborhoods … would be 'immediately suspect' because of the possibility of racial discrimination." 441 F.2d at 1283, quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944). The NPZ Policy did not have incidental impact on speech – it hinged entirely on speech. Under *O'Brien* (and therefore under *Chalk*), the usual high standard applies. For this reason, cases upholding true curfews in emergency situations are distinguishable from this case, where content discrimination was the tool used to resolve an emergency. Emergency conditions do not justify political profiling any more than racial profiling.

Finally, to the extent out-of-circuit cases like *Chalk* and *Smith* do express a different view of the law, they must be disregarded in favor of the controlling Ninth Circuit precedent of *Collins*.

5. The Constitution Does Not Leave the City Powerless to Enforce Criminal Laws

The City argues that a finding in favor of plaintiffs would leave the police "powerless to control and respond to riots." (Opposition Br. at 3). This is far from true. Demonstrators who break the criminal laws are subject to penalties. Police may arrest lawbreakers, using reasonable force when doing so. Prosecutors may charge defendants who commit crimes. WTO delegates have the full protection of the criminal law against those forms of "persistence, importunity, following, and dogging" that the legislature has declared illegal. (Opposition Br. at 14).

For purposes of this motion, the City's error was in creating an entirely new crime – entering or remaining downtown while protesting – that was independently unconstitutional. Adequately enforcing existing laws may have required more resources than the City chose to devote, and the City Council among others have criticized the police for inadequate preparation. [Report of the

WTO Accountability Review Committee, Seattle City Council, at 3, 8-9, McNamara Decl., Ex. 5] The City cannot rely on its own failed conference preparations as justification for infringing speech.

C. Policy-Makers' Motives Are Not Controlling

With the material facts beyond dispute, the City points instead to deposition testimony regarding the motives of Mayor Schell and Chief Joiner. Viewed most favorably to the City, this evidence would show that their actions were motivated not by a desire to suppress the anti-WTO viewpoint, but by a desire to create a "safe area" free of unlawful obstructions. (Opposition Br. at 24). The argument ignores the undisputed fact that the City chose to pursue that goal through content discrimination. Plaintiffs disagree that the asserted motive was content-neutral, given that it equates all political speech with unlawful civil disobedience and vandalism. But even if the safety motive is separated from a motive to censor, the City's motives are not controlling. Motives hostile to a particular viewpoint may be sufficient to find a free speech violation, but they are not necessary.

> The [Defendant] next argues that discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas. This assertion is incorrect; our cases have consistently held that "illicit legislative intent is not the sine qua non of a violation of the First Amendment." [Citation omitted.] [Plaintiff] need adduce "no evidence of an improper censorial motive." [Citation omitted.] As we concluded in *Minneapolis Star*: "We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." [Citation omitted.]

Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 117 (1991). The Court holds firm to this position while citing the same cases and language the City relies upon.

> Deciding whether a particular regulation is content-based or content-neutral is not always a simple task. We have said that the "principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)…. The purpose, or justification, of a regulation will often be evident on its face. But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content-based, it is not necessary to such a showing in all cases. [Citations omitted.] Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content. (Emphasis added; citations omitted.)

Turner Broad. Sys. v. FCC, 512 U.S. 622, 642-43 (1994). The City offers only the "mere assertion" of a content-neutral motive (and even that asserted purpose accepts the faulty premise that people expressing political ideas are likely lawbreakers). It is undisputed that the City's policy was to selectively ban demonstrations and protests in the NPZ. This violates the First Amendment regardless of motive. *Schneider v. State*, 308 U.S. 147, 162 (1939) ("whatever the motive, the ordinance was bad because it imposed penalties for the distribution of pamphlets").

D. The Effect of This Order on Individual Cases

The City correctly notes that Plaintiffs jointly seek only a ruling that an unconstitutional policy existed, so that if the motion is granted, each Plaintiff will still need to prove causation and damages. (Opposition Br. at 25). This is no reason to deny the Plaintiffs' joint Cross-Motion: Fed. R. Civ. P. 56(d) allows partial summary judgment deciding fewer than all the issues in a case. The Court hearing the individual cases will decide what effect the present order will have on those facts.

III. CONCLUSION

The City's admitted rationale for creating the NPZ was its belief that people engaged in political protest might also break the law, or that by their presence they would hinder the ability of police to arrest those who broke the law. Our free speech rules do not permit the silencing of people and ideas for these reasons.

> No doubt a plausible argument could be made that the political gatherings of some parties are more likely than others to attract large crowds causing congestion, that picketing for certain causes is more likely than other picketing to cause visual clutter, or that speakers delivering a particular message are more likely than others to attract an unruly audience. Our traditional analysis rejects such *a* priori categorical judgments based on the content of speech, requiring governments to regulate based on actual congestion, visual clutter, or violence rather than based on predictions that speech with a certain content will induce those effects. [Emphasis added, citations omitted.]

Boos v. Barry, 485 U.S. at 335 (Brennan, J., concurring).

The City's motion should be denied. Plaintiffs' Cross-Motion should be granted.

DATED this 4th day of September, 2001.

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