

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

MARGARET BETZ,)	
)	
Plaintiff,)	
)	
vs.)	CIVIL ACTION FILE
)	NO. 4:04-CV-087
)	
CHATHAM COUNTY, and)	
CITY OF SAVANNAH,)	
)	
Defendants.)	

**MOTION FOR PRELIMINARY INJUNCTION
AND BRIEF IN SUPPORT**

INTRODUCTION

This suit is a facial challenge to various ordinances and regulations passed or otherwise enforced by the City of Savannah and Chatham County in anticipation of the G-8 Summit, which will take place June 8-10 on Sea Island, with concluding events taking place in Savannah. The Plaintiff, Margaret Betz, is a professor at Savannah College of Art and Design, a participant in groups which have requested and received permits for activities in the Savannah area during the G-8, and a local citizen who hopes to participate in future expressive activities which are protected by the First Amendment.

In anticipation of the G-8, the Defendants passed identical ordinances which regulate parades and public gatherings; Savannah also had in place existing ordinances and regulations which affected activities proposed by the Plaintiff or those on whose behalf permits were sought.

After attempting unsuccessfully to resolve differences with the Defendants informally (including a detailed letter proposing changes), and with the G-8 drawing near, counsel for Ms. Betz filed the Complaint in this case challenging these ordinances and regulations. As promised in a letter faxed to the Defendants the previous day, the Complaint was faxed to the Defendants the afternoon after it was filed. Savannah immediately made substantial changes to the applicable ordinances, and changes to the regulations are currently being negotiated. Chatham County failed to respond to any offers to negotiate changes to its ordinance, and made only a single change to its ordinance in response to this suit.

The Plaintiff expects to be able to arrive at a final resolution of the issues remaining in the dispute with Savannah without further litigation. However, at present, it appears no such resolution is possible with respect to Chatham County, and thus, Ms. Betz maintains her request for injunctive relief against Chatham County. However, because Ms. Betz is not presently seeking a permit for G-8 activities in Chatham County (outside of Savannah), and, at this point, does not anticipate seeking such a permit prior to the G-8, a temporary restraining order enjoining enforcement of the Chatham County ordinance during the G-8 is not necessary. Rather, the Plaintiff moves, pursuant to Fed. R. Civ. P. 65, for a preliminary injunction enjoining the future enforcement of the County's public gathering ordinance on the ground that it is facially unconstitutional, in that it violates the First and Fourteenth Amendments to the United States Constitution, as well as Article I, section I, paragraph V of the Georgia Constitution. The Plaintiff respectfully requests that the Court consolidate the preliminary injunction hearing with the merits pursuant to Fed. R. Civ. P. 65(a)(2), set an appropriate briefing schedule and hearing

date, consistent with the notice requirements of Fed. R. Civ. P. 65(a)(1),¹ and enjoin Chatham County from enforcing its public gathering ordinance.

FACTUAL BACKGROUND

The upcoming annual Summit of the Group of Eight world leaders is scheduled for Sea Island, Georgia for June 8-10, 2004. Glynn County and the City of Brunswick are directly affected by the Summit on nearby Sea Island. Chatham County and Savannah are host to the Summit's media center, and thus the Savannah area will also attract many people hoping to communicate their messages to the world leaders and the rest of the world.

A. Legal Background of Public Gathering Ordinances

On information and belief, the G-8 Legal Subcommittee recommended to these affected municipalities that they pass public gathering ordinances (or amend existing ordinances) with features similar to those in the Augusta protest ordinance challenged and upheld by the district court in *Burk v. Augusta*, No. 03-00042-CV-1, 2003 WL 22048248 (April 7, 2003), rev'd 365 F.3d 1247 (11th Cir. April 15, 2004). Thus, all four counties and cities passed very similar "public gathering" ordinances in early 2004. In particular, Savannah passed its public gathering ordinance on February 19, 2004, and Chatham passed its public gathering ordinance on March 12, 2004.

On April 15, 2004, after all of these ordinances had been passed, a panel of the Eleventh U.S. Circuit Court of Appeals reversed (2 to 1) the district court in *Burk v. Augusta*, holding that the Augusta protest ordinance was unconstitutional in the following ways: (1) by applying to "protests and demonstrations," and not to other expressive activity, it was unconstitutionally

¹ See *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1210 (11th Cir. 2003).

content-based, *Burk*, 365 F.3d at 1255; (2) the ordinance was not sufficiently narrowly tailored because it applied to groups as small as five, which did not implicate Augusta’s asserted public safety interests, *id.*; and (3) Augusta’s indemnification provision, which was to be “in a form satisfactory to the County Attorney,” placed unbridled discretion in the County Attorney to determine what indemnification would be “satisfactory,” *id.* at 1256. A concurring opinion added that the ordinance would be unconstitutional even if it were not content-based. *Id.* at 1257.

B. Attempts at Negotiating Changes to the Public Gathering Ordinances

On April 14, 2004, the ACLU of Georgia, acting on behalf of persons interested in obtaining permits for free speech activities during the G-8, sent a letter (a true and correct copy of which is attached hereto as Exhibit A) to officials in Glynn County, Brunswick, Chatham County, and Savannah. The letter indicated that these new ordinances had “significant constitutional problems in their scope, application requirements, standards for denial and revocation, and place impermissible limits on free speech activity generally,” and asked whether the officials would be “willing to come to the table and resolve constitutional problems with your ordinances and ensure that the constitutional rights of citizens are protected consistent with reasonable security needs for the G-8 Summit.” Exh. A, at 1. Only Savannah responded, and the process quickly lost momentum.²

On May 2, 2004, undersigned counsel filed suit against Brunswick and Glynn County,

² Mayor Johnson of Savannah responded, indicating in a letter (a true and correct copy of which is attached hereto as Exhibit B) a willingness to “discuss your concerns with the City of Savannah’s Public Assembly Ordinance,” though it requested more specifics regarding the ACLU’s concerns “since our ordinance differs from those of the other jurisdictions.” Exh. B, at 1. The ACLU responded with a letter thanking Savannah for its response, and requesting that its attorneys call to further discuss the ordinance. *See* Exh. C. These overtures to negotiations proceeded no further.

Attorneys for Glynn County and Brunswick claimed that they did not receive the letter.

the areas most directly impacted by the nearby Summit, to formally challenge the public gathering ordinances enacted there. The district court immediately scheduled a conference to begin to mediate a resolution to the suit, both as to the facial challenge, and as to the permit applications of the plaintiffs in that case. The night before that first conference, Glynn County amended its ordinance to make substantial changes in response to the suit. Facilitated by the district court's mediation, counsel subsequently negotiated additional changes in the manner in which Glynn County would apply its revised ordinance, and negotiated language for acceptable amendments to Brunswick's Ordinance. (A copy of the original ordinance and the amendments thereto are attached as Exhibit D.) Brunswick's City Commission approved those amendments the evening of May 20, 2004, and faxed those amendments to Plaintiff's counsel on Monday, May 24, 2004.

Now, with time short, but able to use Brunswick's ordinance as a model to propose, the ACLU and cooperating counsel returned their attention to Savannah and Chatham County. On Wednesday, May 26, 2004, Plaintiff's counsel faxed a six-page letter to Mayor Johnson, Chairperson Hair, and counsel for Savannah and Chatham (a true and correct copy of which is attached hereto as Exhibit E). The letter detailed the principal problems with the ordinances and regulations, suggesting solutions for each problem, and attaching the Brunswick ordinance and other relevant cases and ordinances as examples of acceptable solutions. The letter warned that counsel anticipated filing a complaint shortly in order to protect the client's interests, but that counsel nevertheless "believe[d] that, ultimately, an acceptable negotiated solution may better serve our client's needs as well as the public interest." Exh. E, at 1. The Complaint in this case was filed the following day, and counsel faxed it to the Defendants as soon as counsel could

confirm with the Court that the Complaint had been filed. *See* Exh. F.³

Savannah responded immediately and substantially to this last letter and subsequent suit. On the night after the complaint was filed, the Savannah City Commission passed amendments to the challenged ordinances which addressed most of the concerns raised in the letter with respect to the ordinance, relying in part on language from the Brunswick ordinance. (Savannah's amendments are attached hereto as Exhibit H.) Savannah has also committed, in subsequent conversations with counsel, to a few additional minor changes, and to recommend changes to the challenged regulations (which are not passed by the Commission), based on changes to be proposed by Plaintiff's counsel.

By contrast, counsel for Chatham County has failed to respond to most of the issues raised in Plaintiff's letter and Complaint, either informally or in its amendments passed Friday, May 28, 2004. To the best of Plaintiff's knowledge, that amendment made only a single change to the ordinance, modifying the indemnification provision, rather than making the more extensive changes made by the other three entities. (*See* Exh. I, containing Chatham County's new indemnification provision.) The remaining Chatham County provisions challenged in the Complaint remain in force.

LEGAL PROVISIONS AT ISSUE

As originally passed, Chatham County's public gathering ordinance was identical to Savannah's. Thus, it will be useful to identify the provisions that were originally present in both

³ On Tuesday, June 1, counsel sent the service copies of the Complaint received back from the Court via Federal Express to the Defendants, along with a Notice and Request for Waiver of Service, pursuant to Fed. R. Civ. P. 4(d)(2). According to Federal Express, those packages arrived this morning, Wednesday, June 2, 2004. *See* Exh. G. Thus, Defendants have received notice of this suit and the request for preliminary injunction, as required by Fed. R. Civ. P. 65(a).

ordinances, and to compare the amendments that Savannah made to its public gathering ordinance to the change made to Chatham's ordinance, as well as to the similar provisions in the amended Brunswick ordinance.

A. Scope of Ordinance – Discretion and Tailoring

The Savannah and Chatham public gathering ordinances, as originally passed, require a permit for “any parade or public assembly.” Compl., ¶ 8. A “[p]arade” includes “any march, demonstration, procession or motorcade consisting of persons, animals, or vehicles or combination thereof upon the streets, parks or other public grounds ... with an intent of attracting public attention that interferes with the normal flow or regulation of traffic upon the streets, parks or other public grounds.” *Id.* A “[p]ublic assembly” includes “any meeting, demonstration, picket line, rally or gathering for a common purpose that interferes with the normal flow or regulation of pedestrian or vehicular traffic or occupies any public area or facilities open to the general public.” *Id.*, at 4-5. The ordinances thus require a subjective (and, as argued below, excessively discretionary) determination as to whether a demonstration or procession has an “intent of attracting public attention” or “interferes with the normal flow or regulation of traffic.” This subjective aspect of the scope of the ordinances is important because the ordinances did not set a threshold size for gatherings to which the ordinance is applicable. Thus, the officers’ discretion does not have objective limits or guidelines such as the size of gathering.

Savannah has changed this provision to limit the scope of the ordinance to parades or groups of 100 or more persons. Exh. H, at H-4; *cf.* Brunswick Ordinance, Exh. D, at D-11. Chatham has not changed this provision.

B. Indemnification – Now Moot

The ordinances required the Applicant to submit an “indemnification and hold harmless agreement . . . in a form satisfactory to the County [City] Attorney.” Compl., ¶ 17.

Savannah changed the ordinance to strike this requirement, and has committed to similar changes to its regulations. Exh. H, at H-4; *cf.* Exh. D, at D-4; D-11.

This is the only provision that Chatham County has changed. The provision now reads:

An indemnification and hold harmless agreement in favor of Chatham County, Georgia, its elected officials, officers, agents, and employees, in a standard indemnification and hold harmless agreement form, the language of which is contained hereinafter, or in a form satisfactory to the applicant.

Exh. I, at 1. The ordinance goes on to set out the “standard indemnification” language. *Id.* Pretermitted the issue of whether the “standard” indemnification has the proper scope, the provision also permits an indemnification “in a form satisfactory to the *applicant.*” *Id.* (emphasis added). Thus, as to this provision, the Plaintiff considers its challenge to this provision of the ordinance to be moot.

C. Advance Application Requirements – Narrow Tailoring

As provided for in the original ordinances, the County [City] Manager had “ten working days of receipt of an application” to review the application and “render a decision.” Compl., ¶ 15. Time limits for appeal were similarly set at 10 days. *See id.* Additionally, the ordinance did not allow an exception for demonstrations which arose on a shorter notice (*e.g.* in the event that one seeks to protest a newly-declared policy or war), if such demonstrations could otherwise be accommodated. *Compare* Exh. D, at D-15 (allowing exception for spontaneous protests).

In addition to modifying its ordinance to apply only to groups of 100 or more, as

indicated above, Savannah has modified this provision to allow for permits to be requested up to five days prior to the proposed event, and the appeal time limits were similarly changed. Exh. H, at H-5. Chatham has not changed this provision.

D. Disclosure of Prior “Substantially Similar Activity” – Anonymous Speech

As originally passed, the applicant must provide a disclosure of “whether the applicant or the entity for whom the application is being made has in the past conducted or participated in an event of a substantially similar nature to that which is the subject of the application,” as well as legal or administrative claims arising out of such activity, whether the Applicant was plaintiff or defendant. Compl., Exh. A-3 – A-4. Thus, for instance, the ordinance would require an individual applicant to disclose all prior protests in which the individual may have participated as a member or supporter, which raise a conflict with the right to anonymous participation in advocacy groups. The provision would also require, for example, an applicant organization like the ACLU to disclose all suits it has brought on behalf of plaintiffs like Ms. Betz, and thus may present an undue burden to such entities.

Savannah has not yet changed this provision. However, counsel has agreed to make the change that was made in the Brunswick ordinance at some point in the future, and not to enforce this disclosure requirement (or request it on the application) in the meantime. *Compare* Exh. D, at D-14 – D-15 (eliminating prior event disclosure, and requiring only disclosure of being defendant or responding party). Chatham has not changed this provision.

E. Standards for Denial or Revocation of a Permit -- Discretion

The original versions of the ordinances contained the following bases for denial of a permit application, which were challenged in the Complaint:

- (1) “unduly restrict and/or congest (vehicular or pedestrian)[traffic]”

(2) “present an unreasonable danger to the health or safety of participants in the event or other members of the public”

(3) “unreasonable disturbance of the peace,” “unreasonably burden lawful commerce,” or “unreasonably intrude upon the privacy or property of citizens”

Compl., ¶ 20. These standards may also be applied as a basis for revoking the permits. As discussed in more detail below, the Plaintiff contends these standards are unreasonably subjective and place excessive discretion in the hands of permitting officials.

Savannah amended its ordinance to (a) amend the language of the first provision to allow denial in the event the activity is “likely to substantially restrict and/or congest (vehicular or pedestrian)” traffic; and (b) eliminate the third provision. Exh. H, at H-5; *cf.* Exh. D, at D-16. Thus, in its present form, there are two bases for denial: “likely to substantially restrict and/or congest (vehicular or pedestrian)” traffic, and will “present an unreasonable danger to the health or safety of participants in the event or other members of the public.” Exh. H, at H-10; *cf.* Exh. D, at D-16. Chatham has not changed these provisions.

ARGUMENT AND CITATION OF AUTHORITY

I. THRESHOLD ISSUES

A. Plaintiff Has Standing to Bring a Facial Challenge.

Plaintiff, a permit applicant with plans to conduct future protests, has standing to bring a facial and overbreadth challenge to the permit scheme. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-56 (1988); *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984) (plaintiffs may “challenge laws written so broadly that they may inhibit the constitutionally protected speech of third parties”). As the Supreme Court held:

[I]n the area of freedom of expression an overbroad regulation may be subject to a facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable This exception from the general standing rules is based upon an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court. *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992).

Both “the Supreme Court and this [Circuit] consistently have permitted facial challenges to prior restraints on speech without requiring the Plaintiff to show no conceivable set of facts where the application of the particular government regulation might or would be constitutional.”

United States v. Frandsen, 212 F.3d 1231 (11th Cir. 2000); *Abramson v. Gonzalez*, 949 F.2d 1567, 1573 (11th Cir. 2000).

B. Standard for a Preliminary Injunction

A plaintiff seeking a preliminary injunction must establish:

- (1) a substantial likelihood that plaintiff will prevail on the merits;
- (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted;
- (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant; and
- (4) that granting the preliminary injunction will not disserve the public interest.

Teper v. Miller, 82 F.3d 989, 992 n.3 (11th Cir. 1996); *Johnson v. United States Dep’t of Agriculture*, 734 F.2d 774, 781 (11th Cir. 1984); Fed. R. Civ. P. 65(b). A plaintiff need only show a substantial likelihood of success on at least one count of the complaint, not all counts.

Atlanta School of Kayaking, Inc. v. Douglassville-Douglas County Water and Sewer Authority, 981 F. Supp. 1469, 1471 (N.D. Ga. 1997).

II. PLAINTIFF BETZ HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Roth v. United States*, 354 U.S. 476, 484 (1957). “Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy.” *Cox v. Louisiana*, 379 U.S. 536, 552 (1965). Thus, demonstrations, protests, and similar forms of expression are highly protected. *Id.* at 551-52. Furthermore, participating in political discourse in public streets and parks is doubly precious under our Constitution. While the use of the public streets and sidewalks may sometimes be regulated, “it must not, in the guise of regulation, be abridged or denied.” *Hague*, 307 U.S. at 516.

Permit requirements, which restrict expression before it occurs, are prior restraints and subject to the most exacting review. *Frandsen*, 212 F.3d at 1236-37; *Burk v. Augusta-Richmond Cty.*, 365 F.3d 1247, 1251-52 (11th Cir. 2004); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). “Prior restraints are presumptively unconstitutional and face strict scrutiny.” *Burk v. Augusta-Richmond Cty.*, 365 F.3d 1247, 1251 (11th Cir. 2004); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (“exacting scrutiny” applied).

One exception to the rule that a prior restraint must satisfy strict scrutiny is where the government validly uses a permitting system to regulate the time, place or manner of speech. *Southeastern Promotions*, 420 U.S. at 556; *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). The requirements for a valid time, place and manner restriction are as follows: (1) the regulation must not vest unbridled discretion in an administrative official; (2) it must be content-neutral; (3) it must leave open ample alternatives for expression, and (4) although it need not satisfy strict scrutiny, it must still be narrowly tailored to serve a substantial (rather than compelling) state interest. *Forsyth*, 505 U.S. at 130.

Because Chatham’s public gathering ordinance requires any number of persons who wish to conduct a march or demonstration or to gather on public property in the county for a common purpose to first obtain a permit, it is a prior restraint. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *Church of Scientology Flag Serv. v. City of Clearwater*, 2 F. 3d 1514, 1547-48 (11th Cir. 1993). Thus, against the “heavy presumption” of invalidity, this Court must review this permit ordinance – a prior restraint – that:

- (1) empowers public officials with excessive discretion to deny or revoke permits.
- (2) applies to even one person who engages in planned or spontaneous free speech activities;
- (3) effectively prohibits spontaneous free speech activities;
- (4) requires protesters to waive their right to anonymous speech by disclosing prior protest activities;

A. The Ordinance Does Not Provide “Objective and Precise” Standards of Application.

The Chatham County public gathering ordinance vests unbridled discretion in licensing officials in two ways. First, it vests discretion in officials to determine whether a demonstration or procession has an “intent of attracting public attention” or “interferes with the normal flow or regulation of traffic,” such that a permit is required. Second, it vests discretion in officials reviewing a permit application to determine whether the proposed event will “unduly restrict and/or congest (vehicular or pedestrian)[traffic],” will “present an unreasonable danger to the health or safety of participants in the event or other members of the public,” will cause an “unreasonable disturbance of the peace,” will “unreasonably burden lawful commerce,” or will “unreasonably intrude upon the privacy or property of citizens.” These provisions, singly or in combination, vest unbridled discretion in officials applying this prior restraint.

In *City of Lakewood v. Plain Dealer Publishing Co.*, the Supreme Court identified two concerns with unbridled discretion in a licensing scheme. First, “the mere existence of the licensor’s unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, *even if the discretion and power are never actually abused.*” 486 U.S. at 757 (emphasis added). Second, “the absence of express standards makes it difficult to distinguish, ‘as applied,’ between a licensor’s legitimate denial of a permit and its illegitimate abuse of censorial power.”⁴ *Id.* at 758. In either case, a facial challenge is appropriate because the chilling effect on speech can never be cured by as-applied judicial review, while the absence of guideposts renders the official’s decision “effectively unreviewable” in an as-applied challenge. *Id.*

In *Lady J. Lingerie v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999), the Eleventh Circuit described the rigor of the requirement that an ordinance not vest unbridled discretion in a licensing official:

The standard incantation of the *Shuttlesworth* principle is that statutes may not give public officials “unbridled” discretion to deny permission to engage in constitutionally protected expression. This implies that some measure of discretion is acceptable, but the cases show that **virtually any amount of discretion beyond the merely ministerial is suspect. Standards must be precise and objective.**

Such is not the case with [the ordinance at issue]. None of the nine criteria is precise and objective. All of them--individually and collectively--empower the [licensing authority] to covertly discriminate against adult entertainment establishments under the guise of general “compatibility” or “environmental” considerations.

Id. at 1369 (emphasis in bold added, citations omitted). Indeed, the Supreme Court has

⁴ The Lakewood Court more specifically noted, “Without these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is

stated that where a permit scheme “involves *appraisal of facts, the exercise of judgment, and the formation of an opinion* by the licensing authority,” it is unconstitutional. *Forsyth*, 505 U.S. at 131 (citation omitted) (emphasis added). While complete rigidity may not be required, the Supreme Court and this circuit do require criteria much more objective and precise than those in the Ordinance. Like the ordinance at issue in *Lady J. Lingerie*, the Chatham ordinance’s definitions of “public gathering” and “parade” and its standards for denial of a permit are not precise and objective. It is therefore unconstitutional.

permitting favorable, and suppressing unfavorable, expression.” 486 U.S. at 758.

It is true that the Supreme Court in *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), approved in passing the discretionary “unreasonable danger” basis for denial of a permit. But this Ordinance differs significantly from the one at issue in *Thomas*, where “unreasonable danger” was the *only* discretionary standard. 534 U.S. at 324. Standing alone, that criterion could be narrowed by reference to caselaw discussing the level of “danger” that would be necessary to override the right to free expression. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949); *Monroe v. State Court of Fulton County*, 739 F.2d 568, 575 (11th Cir. 1984) (“Only if violent acts are both *likely* and *imminent* as a result of the speech may the speech be suppressed.”). However, the Ordinance combines the “unreasonable danger” standard with concerns over “undue traffic congestion,” an “unreasonable disturbance of the peace,” an “unreasonabl[e] burden [on] lawful commerce,” or an “unreasonabl[e] intru[sion] upon the privacy or property of citizens.” The combination of these factors makes it much more likely that improper considerations will creep into the official’s enforcement and permitting decisions.

Not only does the text of the Ordinance not meet the Supreme Court’s standard in *Forsyth*, 505 U.S. at 131, this level of discretion does not meet more explicit constitutional standards set by this Court. As noted above, in *Lady J. Lingerie v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999), the Eleventh Circuit found that licensing criteria for adult entertainment establishments vested too much discretion in the decisionmakers and rendered the ordinance unconstitutional. For instance, the court even held a provision requiring sufficient access by emergency services to be “neither precise nor objective” because “[i]t does not say, ‘there must be *x number* of doors per square foot.’” *Id.*

Although *Lady J. Lingerie* was issued before the *Thomas* case, the principle of only “ministerial discretion” guided by “precise and objective” standards has been reaffirmed by the 11th Circuit after *Thomas*. *Café Erotica of Florida, Inc. v. St. Johns County*, 360 F.3d 1274, 1284 (11th Cir. 2004); *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1312 (11th Cir. 2003). For instance, in *Fly Fish*, the 11th Circuit held unconstitutional a provision allowing denial of a license if “the granting of the application would violate either a statute or ordinance or an order from a Court of law that effectively prohibits the applicant from obtaining an adult entertainment establishment license,” or “if the applicant fails to comply with Florida law regarding corporations, partnerships, or fictitious names.” *Fly Fish*, 337 F.3d. at 1312. The court quoted *Lady J. Lingerie* and stated that the ordinance “exceeds the limits of ‘ministerial discretion’” because it allowed “officials to decide which statutes or ordinances apply, whether the applicant has violated those laws, and whether they ‘effectively’ prohibit the applicant from obtaining a license.” *Id.* at 1313. Similarly, in *Café Erotica*, the Eleventh Circuit held that a sign ordinance provision allowing an official to determine whether the proposed sign conformed with the Standard Building Code vested too much discretion in the hands of that official. *Café Erotica*, 360 F.3d at 1284.

For the same reasons the Eleventh Circuit invalidated the criteria in the ordinance in *Lady J. Lingerie* and its progeny, the Chatham Ordinance is also facially unconstitutional. The criteria in the Ordinance are undeniably valid considerations to be taken into account, at least when deciding whether to grant a license for a large public gathering. The problem is not that the government cannot regulate the time, place and manner of such a gathering, but that it cannot do so in such a vague manner as to allow the licensing official the ability to “covertly discriminate”

against the applicant. Under the rule as stated in *Lady J. Lingerie*, the definitions and criteria given in the Ordinance are “suspect” because they go “beyond the merely ministerial.” 176 F.3d at 1362. The denial criteria cannot survive this scrutiny because none of the challenged criteria are “precise and objective” in the sense conveyed by the Eleventh Circuit’s examples and ruling.⁵

The vagueness in the definitions of “public gathering” and “parade” is even more significant because the ordinance does not limit the number of persons to which it applies. Thus, the subjective determination of “intent of attracting public attention” and the potential for interference with “normal traffic flow” cannot be read out of the ordinance by the fact that any large group would presumably fall into these categories. The potential for censorship in applying these definitions is buttressed by the discretionary standards for denial or revocation of a permit. Thus, the discretion granted by this Ordinance renders it unconstitutional.

B. The Ordinance Applies to Small Groups, and Thus Is Not Narrowly Tailored

Like the ordinance at issue in *Burk*, the Chatham County Ordinance requires a permit for small groups, and even single person free speech activities. § 18-402. As the Supreme Court stated in *Watchtower Bible & Tract Soc’y v. Village of Stratton*, 536 U.S. 150, 165-66 (2002), “[i]t is offensive – not only to the values protected by the First Amendment, but to the very notion of a free society – that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.” It has long been established that a government does not have a sufficient interest in public safety, order and aesthetics

⁵ To import that example into the analysis here, this Ordinance might validly have required demonstrators to be set back a certain number of feet from the street, that demonstrations in a pedestrian right-of-way must leave open a pedestrian path of a designated width, and/or that sound amplification within a residential zone must remain below a certain decibel level.

to require a permit of individual persons wishing to leaflet or canvass door-to-door. *Schneider v. New Jersey*, 308 U.S. 147, 157, 163-65 (1939) (striking down permit requirement for all persons wishing to canvass or solicit door-to-door); *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) (striking down permit requirement for all persons wishing to distribute literature).

Likewise, the government does not have a sufficient interest in requiring permits individuals and small groups who wish simply to express their views on public property. *Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir. 1994) invalidated an ordinance requiring a permit for demonstrations and other public gatherings in a park as not narrowly tailored. Although the ordinance itself applied by its literal terms to single persons, the city asserted it would not be so applied. The Ninth Circuit found this ordinance objectionable because “the City did not proffer a reading of the ordinance that would, for example, have limited it to groups larger than Dr. Grossman’s,” *id.*, which was six to eight people, *id.* at 1202. It noted in particular that most other cities had ordinances governing gatherings of at least fifty persons. *id.* at 1207, n.13; *see also Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002) (50 person permit ordinance). The court noted that “[s]ome type of permit requirement *may* be justified in the case of large groups, where the burden placed on park facilities and the possibility of interference with other park users is more substantial.” *Id.* at 1206 (emphasis in original).⁶ Other courts have consistently agreed with the

⁶ *Grossman* also noted that the city’s interests in safety and convenience of park users “do not sufficiently match” the substantial restriction on speech because, for instance, a group of 100 family members and friends could have had a noisy picnic in the park secure in the knowledge that they would be unimpeded by law enforcement officers,” but “Dr. Grossman’s small group **silently carrying signs or wearing t-shirts** would be classified as law-breakers subject to forcible removal by armed police.” 33 F.3d at 1207 (emphasis in original). The Ninth Circuit concluded, “[i]n short, the ordinance did not simply burden speech; it discriminated **against** speech.” *Id.*

reasoning and outcome of *Grossman* and rejected permit requirements for small groups.⁷

In rejecting Augusta’s ordinance, which like the instant ordinances applied to small groups of five, the Eleventh Circuit similarly found that a properly crafted ordinance should have targeted “only larger groups.” *Burk v. Augusta-Richmond Cty.*, 365 F.3d at 1255 (“**It is clear that regulating as few as five peaceful protestors (e.g. silently sitting in on the edge of the sidewalk) is not the least restrictive means of accomplishing the County’s legitimate traffic flow and peace-keeping concerns.**”). As this Circuit noted, even “content-neutral permitting requirements” have been invalidated where “their application to small groups rendered them insufficiently tailored.” *Id.* at 1255 n.13 (collecting cases striking down permit requirements for small groups).

Thus, whatever governmental interest there may be in requiring permits for larger groups of protesters, those interests do not apply to small groups and the Ordinance is not sufficiently tailored to the asserted interests. The permit requirements apply to use of all public space – streets, rights-of-way and parks – whether or not it is a space that normally would be expected to have a free flow of “traffic,” and regardless of whether the proposed speech is incident to conduct that is a particular

⁷ See, e.g., *Douglas v. Brownell*, 88 F.3d 1511, 1524 (8th Cir. 1996) (invalidating parade permit requirement in part because it was applicable to groups of only **ten or more**, which the court doubted was “sufficiently tied to the City’s interest in protecting the safety and convenience of citizens who use the public sidewalks and streets”); *Community for Creative Nonviolence v. Turner*, 893 F.2d 1387, 1392 (D.C. Cir. 1990) (invalidating permit ordinance governing free speech activities engaged in by **two or more** people at a subway station because it “also restricts many incidents of free expression that pose little or no threat to WMATA’s ability to provide safe and efficient transportation and an equitably available forum for public expression”); *Cox v. City of Charleston*, 250 F. Supp. 2d 582 (D.S.C. 2003) (invalidating parade permit requirement because it did not “contain any exemption for **small gatherings or sole protesters**”); *Diener v. Reed*, 232 F. Supp. 2d 362 (M.D. Pa. 2002) (invalidating permit requirement that applied even to **single** speakers, applying *Grossman*); *Reyes v. City of Lynchburg*, 300 F.3d 449, 462-465 (4th Cir. 2002) (Michael, J., dissenting) (explaining why, if the majority had reached issue, ordinance requiring permit for broad range of gatherings was not narrowly tailored because it applied even to **small groups**).

nuisance or is dangerous.⁸ They even apply to small, informal, and impromptu expressions of support that do not present traffic and public safety concerns. *See Watchtower*, 536 U.S. at 165-68 (stating that requiring a permit of individuals wishing to go door-to-door to speak is “offensive” because it conceivably applies to persons wishing to exhort their neighbors to vote against the mayor). For these reasons, and as *Burk* and the cases its cites show, the scope of the permit requirements are not narrowly tailored to serve a substantial or compelling government interest, and are therefore unconstitutional.

C. The Ordinance Does Not Allow Spontaneous Speech

The Chatham County ordinance states that “it shall be *unlawful* to engage or conduct any parade or public assembly without first receiving a permit” § 18-402. The County has ten (10) days from the date of the application to review the application and render a decision. §18-405 (1). The Ordinance contains no exceptions to the ten (10) day rule. Thus, an Applicant must submit an application ten (10) days before the proposed event to ensure compliance with the ordinance. The ordinance, therefore, impermissibly bans spontaneous protests. *See Grossman*, 33 F.3d at 1204.

For free speech activities, timing is “often of the essence.” *Shuttlesworth*, 394 U.S. at 149. Indeed, “it is often necessary to have one’s voice heard promptly, if it is to be considered at all.” *Id.* Thus, “[a] delay ‘of even a day or two’ may be intolerable when applied to ‘political speech in which the elements of timeliness may be important.’” *NAACP v. Richmond*, 743 F.2d 1346, 1355 (9th

⁸ *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 477 (1988) (finding ordinance banning picketing “before or about the residence or dwelling of any individual” to be reasonable restriction because the ordinance is limited to focused picketing, and allows more general marching, picketing and protesting).

Cir. 1984) (citing *Carroll v. President of Princess Anne*, 393 U.S. 175, 182 (1969)).

The Chatham government's interests in public safety cannot justify a ten (10) day notice requirement. Indeed, in *Grossman*, 33 F.2d at 1205, the court held that a seven (7) day notice requirement is unconstitutional because it "burden[s] substantially more speech than is necessary to further the government's legitimate interests," of "protecting the *safety* and convenience of park users." Similarly, in *Douglas v. Brownell*, 88 F.3d 1511, 1523-24 (8th Cir. 1996), the court concluded that "the *five-day* notice requirement restricts a substantial amount of speech that does not interfere with the city's asserted goals protecting pedestrian and vehicle traffic, and minimizing inconvenience to the public."⁹

That the ten (10) day requirement applies to small groups and even individuals who spontaneously gather to protest, makes the provision even more egregious than those advance notice requirements already struck down by other courts. In *Douglas v. Brownell*, 88 F.3d 1511, 1523-24 (8th Cir. 1996), the court "point[ed] out that applying the permit requirement to groups as small as *ten* persons compounds our conclusion." The court stated that the advance notice requirement is unconstitutional because applying the advance notice requirement to "such a small group" is not likely "to be tied to protecting the safety and convenience of citizens who use the public sidewalks." See also *Rosen v. Port of Portland*, 641 F.2d 1243, 1247-48 (9th Cir. 1981) (permit ordinance unconstitutional because "[i]t regulates *all forms* of communication

⁹ See also *Church of the American Knights of the Ku Klux Klan v. City of Gary*, 334 F.3d 676, 682 (7th Cir. 2003) (The failure to include an "exception for spontaneous demonstrations unreasonably limits free speech" even where there is an "unwritten policy of waiving the permit requirement for a 'spontaneous' demonstration."); *NAACP*, 743 F.2d at 1355 (holding that a twenty (20) day notice requirement was unconstitutional where the City's interest was in regulating traffic); *Hotel Employees Union v. City of Lafayette*, No. C-95-3519 SAW, 1995 WL 870959 at *1 (N.D. Cal. Nov. 2, 1995) (holding that ten (10) days notice is not justified by an interest in "prevent[ing] obstruction, delay or other interference with normal vehicular and pedestrian traffic flow, and to ensure compliance with traffic laws").

with the public *by groups and individuals*. Any person who wishes to communicate with the public, by uttering a few words, by silently distributing literature, or ‘otherwise’ is subject to regulation.”). Likewise, a protest with only one person is unlikely to create safety, traffic, or commerce concerns, thus demonstrating that the ordinance regulates more speech than necessary to meet the County’s interests.¹⁰ Because the permit schemes unconstitutionally restrict spontaneous protest, they are unconstitutional.

D. The Ordinance Invades the Right to Anonymous Speech

The Defendant’s permit application process compels disclosure of *prior protest activities by the applicant or entity* “of a substantially similar nature” to the subject protest and further compel disclosure of “where and when such prior event(s) took place.” § 18-404 (3).¹¹ The ordinance impairs anonymous political speech. Citizens have a historical and constitutionally protected right to protest anonymously, and compelling disclosure of “similar” free expression activity is not supported by a substantial or compelling government interest, is overbroad and is an unconstitutional burden on free speech. As the Supreme Court recently stated:

[O]ur cases involving the distribution of unsigned handbills demonstrate there are a significant number of persons who support causes anonymously. “The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible. *Watchtower Bible and Tract Soc. of N.Y. v. Village of Stratton*, 536 U.S. 150, 166 (2002) (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S.

¹⁰ The ten (10) day advance notice requirement also does not leave open alternative channels of communication. As explained above, timing is often of the essence for expressive activities: “Where spontaneity is part of the message, dissemination delayed is dissemination denied.” *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 (emphasis added). The advance notice requirement, however, prohibits any small group or individual from demonstrating in public, regardless of the urgency of the message, if the individual or group has not been issued a permit. With no option for spontaneous expression, the message could be silenced.

¹¹The permit application process also seeks certain basic identifying information about the applicant and protest as well as information concerning prior civil and criminal proceedings and judgments.

334, 341-42 (1995)).

Accord Talley v. California, 362 U.S. 60 (1960) (invalidating city ordinance that prohibited anonymous leafleting). In *Talley*, *McIntyre* and *Watchtower*, the Supreme Court struck down permit requirements for free speech activity because the ordinances compelled disclosure of one's identity. See also *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 199-202 (1999) (disclosure forms and identifying badge requirements for petition circulators unconstitutionally "discourage[] participation in the petition circulating process by forcing name identification without sufficient cause"). The Eleventh Circuit too has condemned a requirement that political billboards include the name of the sponsor of the message:

Such requirement makes sense for commercial messages but not for political ones. Under the County's interpretation, ... a sign displaying "Vote for John Smith" would also have to include [the sponsor's identification.] Such an interpretation is inconsistent with the Supreme Court's direction that "an author's decision to remain anonymous ... is an aspect of the freedom of speech protected by the First Amendment." *Café Erotica of Fla., Inc. v. St. Johns Cty.*, 360 F.3d 1274, 1288 (11th Cir. 2004).

See also *Crue v. Aiken*, 137 F. Supp. 2d 1076, 1089 (C.D. Ill. 2001) (granting preliminary injunction against pre-clearance requirement that compelled students and faculty to disclose their protest activities as intruding upon "anonymous" and "political speech").

Defendant's permit application form compels disclosure not only of the applicant's prior protest activities, but all protest activities of the "entity." It is difficult to imagine how large entities or a coalition of groups could gather a complete and accurate compilation of the dates, times and locations of all of their protest activities. Moreover, the compelled disclosure requirement demands the applicant and others to disclose all prior protests without temporal limitation – Vietnam War demonstration or civil rights demonstrations in the 1960's or even a rally against alcohol prohibition

in the 1920's.¹² This wholesale violation of the First Amendment's "respected tradition of anonymity in advocacy of political causes" is an impermissible and unconstitutional compelled disclosure under Defendants' permit ordinances. *McIntyre*, 514 U.S. at 343.

III. THE EQUITIES WEIGH IN FAVOR OF A PRELIMINARY INJUNCTION

As the Supreme Court has noted, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) *see also Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (citing 11 Wright & Miller, *Federal Practice & Procedure*, § 2948, at 440 (1973) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.")). Plaintiff Betz, as a local resident and activist, is currently participating in free speech activities, and anticipates participation in future activities to which the Chatham County ordinance will apply. Because the chilling and loss of her First Amendment rights is an irreparable injury, the Court would even be empowered to issue a temporary restraining order. But, at the very least, Betz may bring a pre-enforcement challenge to ensure that her speech will not be abridged as threatened by this ordinance. This abridgment of speech cannot be remedied otherwise, either at law or in equity.

On the other hand, because the Defendant is the Chatham County government and its agents, it can have no legitimate interest in suppressing constitutionally-protected free speech. The Chatham County government does have an interest in public safety and order. However, the Chatham County ordinance reaches too far, and encroaches on the rights of Ms. Betz and other citizens to engage in free expression. Therefore, granting plaintiffs the requested injunctive relief

¹² If a protester was **convicted** of a crime directly related to conduct at a prior protest, perhaps the government would have the right to know that fact. However, the compelled disclosure of all prior **legal** protest activities by the applicant and others is overbroad and unconstitutional.

will not result in any foreseeable, serious harm to the Defendant, or to the public.

CONCLUSION

Wherefore, Plaintiff Margaret Betz respectfully requests that this Court issue a preliminary injunction enjoining Chatham County from enforcing its public gathering ordinance.

This 2nd day of June , 2004.

Bondurant, Mixson & Elmore, LLP
1201 West Peachtree Street
Atlanta, Georgia 30309
Phone (404) 881-4100
Fax: (404) 881-4111

American Civil Liberties Union/Georgia
70 Fairlie Street
Suite 340
Atlanta, Georgia 30303
Phone: (404) 523-6201
Fax: (404) 577-0181

303 Tenth Street
PO Box 3248
Augusta, Georgia 30914-3248
Phone: (706) 737-4040
Fax: (706) 736-3391

Jeffrey O. Bramlett
Georgia Bar No. 075780
Sarah M. Shalf
Georgia Bar No. 637537
ACLU Cooperating Attorneys

Gerald Weber, Legal Director
Georgia Bar No. 744878
Margaret Garrett, Staff Attorney
Georgia Bar No. 255865

John P. Batson
Georgia Bar No. 042150
ACLU Cooperating Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **MOTION FOR PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT** by sending a copy thereof by First Class Mail, postage prepaid, as follows:

Chairperson Dr. Billy B. Hair
Chatham County Commission
124 Bull Street, Suite 200
Savannah, GA 31412

Mayor Otis S. Johnson
City of Savannah
2 East Bay Street
Savannah, GA 31401

Sarah M. Shalf