UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

ROYAL CONFEDERATE KNIGHTS OF THE KU KLUX KLAN, and JORDAN N. GOLLUB,	]	
Plaintiffs,	]	
vs.	]	CV-02-N-1716-W
CITY OF YORK, ALABAMA, and CAROLYN GOSA,	]	
Defendants.	]	

Order

Presently before the court is the plaintiffs' motion for the entry of a preliminary injunction. Although the defendants responded to this motion with a motion to dismiss that they wish to have treated as a motion for summary judgment, the court refuses, at this time, to take up that motion. Neither does the court choose, at this time, to take up the issue of what other types of relief, such as a permanent injunction or monetary damages, the plaintiffs may be entitled to. The sole issue before this court is the plaintiffs' request for a preliminary injunction.

The plaintiffs bear the burden of demonstrating their entitlement to a preliminary injunction by showing that they meet the four requirements thereof. *Horton v. City of St. Augustine, Fla.*, 272 F.3d 1318, 1327 (11th Cir. 2001). First, the plaintiffs must demonstrate that they would be injured irreparably if the court were to refuse to issue the injunction. *Id.* Second, the threatened injury to the plaintiffs must outweigh the potential damage that the injunction, were it to issue, would cause to the defendants. *Id.* Third, the injunction must

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not disserve the public interest. *Id.* Finally, the plaintiffs must demonstrate a substantial likelihood of success on the merits of their claims. *Id.*

The court finds that the plaintiffs would be injured irreparably if the injunction does not issue. They have a constitutionally protected right to speak their views and associate with one another. The actions of the City of York threaten to violate their rights. As the Supreme Court of the United States has said, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The court further finds that, in balancing the parties' interests, the cost to the plaintiffs of the injunction not issuing far exceeds the cost to the defendants should the injunction issue. Indeed, the court fails to see how the defendants would be injured or damaged in the least by the plaintiffs' exercise of their constitutionally guaranteed rights to speak and associate.

As to the third element, the court finds that there would be no adverse effect on the public interest were the plaintiffs allowed to hold their march and demonstration. In fact, the court notes that the public interest is more in line with allowing the plaintiffs, and all other groups wishing to express their views, the right to do so freely without the limitations sought to be imposed by the defendants.

The final element, a demonstration of likely success on the merits, has also been met. As discussed below, the court finds that it is very likely that the plaintiffs will be able to show, on final disposition, that both of the provisions of the ordinance at issue in this case

are unconstitutional as violative of their First Amendment rights as guaranteed to them by the Fourteenth Amendment.

The first section of the challenged ordinance provides that a person or group seeking to assemble a crowd for a common purpose or hold a public meeting or parade must first apply for and obtain a permit to do so from the Mayor. In order to obtain this permit, the applicant must post a $2000 cash bond with the City to cover the cost of, among other things, the use of "public safety personnel" in the event of a public disturbance resulting from the gathering. Not every applicant, however, is required to post this bond. According to the ordinance, the Mayor has "complete discretion" to waive the bond requirement or allow the bond to be a signature bond should she, apparently in her sole discretion, "deem that the costs of clean up will be minimal; the risk of potential damage to city property will be minimal; and a public disturbance will be unlikely due to the nature of the parade."

It appears to the court that the Supreme Court's opinion in *Forsyth County, Georgia, v. The Nationalist Movement*, 505 U.S. 123 (1992), settles the question of whether the bond requirement of the ordinance is constitutional. Although "the [Supreme] Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally," *Forsyth County*, 505 U.S. at 130 (citing *Cox v. New Hampshire*, 312 U.S. 569 (1941)), "[i]t must not delegate overly broad licensing discretion to a government official . . . [and] must not be based on the content of the message." *Id.* (citing *Freedman v. Maryland*, 380 U.S. 51 (1965), and *United States v. Grace*, 461 U.S. 171 (1983)). The bond provision of the

ordinance at issue in this case, like the one in *Forsyth*, is unconstitutional for both of these reasons.

As to the discretion granted to public officials by laws akin to the one here at issue, the Supreme Court has said that "[a] government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.' . . . To curtail that risk, 'a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority.'" *Id.* at 130-31 (quoting *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) and *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969)). Such narrowly drawn, definite standards are not present in the challenged ordinance. The Mayor is allowed to waive the bonding requirement or refuse to waive it, entirely at her discretion. Her discretion is only fettered by the fact that she is required by the ordinance to evaluate three completely subjective factors; factors which cannot be objectively quantified prior to the occurrence of the event for which the application is sought. Moreover, the Mayor is not required to explain her decision, nor is her decision reviewable. As in *Forsyth*, "[n]othing in the law or its application prevents the [Mayor] from encouraging some views and discouraging others through the arbitrary application of fees." *Id.* at 133. "The First Amendment prohibits the vesting of such unbridled discretion in a government official." *Id.*

The bond requirement of the ordinance also appears to be unconstitutional because one of its purposes is to cover the cost of extra police in the event of a public disturbance.

In effect, all applicants will be charged a fee if their speech evokes an illegal response from the crowd that listens to the speech. Clearly, such a charge runs completely afoul of the First Amendment because it is a content-based, rather than a content-neutral, restriction on the right to speech. *Id.* at 134 ("Listeners' reaction to speech is not a content-neutral basis for regulation."). "Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." *Id.* at 134-35.

The defendants argue that the bond requirement amounts to nothing more than a nominal charge, pointing out that bond insurance of up to $5000 can be obtained for a premium payment of $50.[1] However, the Supreme Court has rejected the notion that a nominal licensing charge renders an unconstitutional licensing scheme constitutional. As the Court has said, "A tax based on the content of speech does not become more constitutional because it is a small tax." *Id.* at 136. For these reasons, the court finds that the plaintiffs have demonstrated a likelihood of success on the merits in regard to the bond requirement of the ordinance.

The plaintiffs are also likely to succeed in their quest to show the second section of the City of York's ordinance is constitutionally infirm. Section two prohibits marching in a parade while masked, except that "Mardi Gras masks, Halloween masks, or the like" are not prohibited. The City claims the anti-mask provision is an attempt to address its concern that violence may break out during the proceedings and the police may not be able to

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[1]The court notes, but does not separately address, serious issues in regard to whether unpopular groups could actually obtain such insurance at so low a premium. As one district court recently pointed out, "[C]ourts have concluded that insurance premiums may vary depending on the content of the demonstrators' message, the controversial nature of the organizations, . . . or the insurer's anticipation of listeners' hostility to the message." *Courtemanche v. General Services Admin.*, 172 F. Supp. 2d 251, 270 (D. Mass. 2001) (citations omitted).

identify the responsible persons. Plaintiff Jordan Gollub, Imperial Wizard of the Royal Confederate Knights of the Ku Klux Klan, stated in affidavit that many members of his organization seek anonymity while sharing their unpopular views, fearing the negative social and economic consequences of association with the Ku Klux Klan's ideology.

The Supreme Court has recently reiterated its well-established view that anonymous speech is protected under the First Amendment. *Watchtower Bible and Tract Societ of New York, Inc. v. Village of Stratton, et al.*,___ U.S. ___, 122 S.Ct. 2080, 2002 U.S. LEXIS 4422 (June 17, 2002). *See also American Knights of the Ku Klux Klan v. City of Goshen, Indiana*, 50 F. Supp. 2d 835, 839-40(N.D. Ind. 1999) and cases cited therein. By prohibiting anonymity, the York ordinance discourages participation in the Ku Klux Klan's activities and thereby burdens the free speech and association rights of the plaintiffs. "Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *National Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson,* 357 U.S. 449, 460-461 (1958). Furthermore, the restriction is subject to exacting scrutiny as a direct regulation of the content of expression. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995).

It appears that the ordinance will not survive such scrutiny, since the anti-mask provision is not narrowly tailored and serves no compelling state interest. To the extent the city's stated goal of identifying perpetrators of crimes is a compelling interest, there are many other, less restrictive, means to accomplish that goal. This court must conclude the plaintiffs will likely succeed on the merits of their challenge to section 2 of the ordinance.

Accordingly, and based on the foregoing, the plaintiffs' petition for preliminary injunction is **GRANTED**. The City of York is hereby enjoined from enforcing its July 1, 2002, ordinance, and is **ORDERED** to grant the plaintiffs' application for permission to conduct a peaceful march and parade in the City of York on July 26, 2002, subject only to reasonable time, place and manner restrictions. The court will schedule proceedings aimed at resolving the request for final injunctive relief at a later time.

Done, this 23rd of July, 2002.

EDWIN L. NELSON
UNITED STATES DISTRICT JUDGE