

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

<b>THREE EXPO EVENTS, L.L.C.</b>	)	CASE NO. 3:16-cv-00513-D
	)	
Plaintiff,	)	
	)	<b>JUDGE SIDNEY A. FITZWATER</b>
-VS-	)	
	)	
<b>CITY OF DALLAS, TEXAS, <i>et al.</i>,</b>	)	
	)	
	)	
Defendant.	)	
	)	

**PLAINTIFF’S MEMORANDUM IN SUPPORT  
OF RENEWED MOTION FOR A PRELIMINARY INJUNCTION**

ROGER ALBRIGHT  
(State Bar No. 009 745 80)  
rogeralbright@gmail.com  
LAW OFFICES OF ROGER ALBRIGHT  
3301 Elm Street  
Dallas, Texas 75226-2562  
(214) 939-9222  
(214) 939-9229 (Facsimile)

J. MICHAEL MURRAY  
(Ohio Bar No. 0019626)  
jmmurray@bgmdlaw.com  
BERKMAN, GORDON, MURRAY & DeVAN  
55 Public Square, Suite 2200  
Cleveland, Ohio 44113-1949  
(216) 781-5245  
(216) 781-8207 (Facsimile)

Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument has been served upon the below-listed counsel of record, in compliance with Rule 5 of the Federal Rules of Civil Procedure, on this the 29<sup>th</sup> day of November, 2016:

Mr. Thomas P. Brandt (via e-mail: [tbrandt@fhmbk.com](mailto:tbrandt@fhmbk.com))  
Mr. Francisco J. Valenzuela (via e-mail: [fvalenzuela@fhmbk.com](mailto:fvalenzuela@fhmbk.com))  
Ms. Laura O'Leary (via e-mail: [loleary@fhmbk.com](mailto:loleary@fhmbk.com))  
Fanning Harper Martinson Brandt & Kutchin, P.C.  
Two Energy Square  
4849 Greenville Avenue, Suite 1300  
Dallas, Texas 75206

Mr. Scott Bergthold (via e-mail: [sbergthold@sdblawnfirm.com](mailto:sbergthold@sdblawnfirm.com))  
Law Office of Scott D. Bergthold  
2290 Ogletree Avenue, Suite 106  
Chattanooga, Tennessee 37421

Mr. Robert C. Walters (via e-mail: [Walters@gibsondunn.com](mailto:Walters@gibsondunn.com))  
Mr. James C. Ho (via e-mail: [jho@gibsondunn.com](mailto:jho@gibsondunn.com))  
Ms. Rebekah Perry Ricketts (via e-mail: [rricketts@gibsondunn.com](mailto:rricketts@gibsondunn.com))  
Mr. William T. Thompson (via e-mail: [wtthompson@gibsondunn.com](mailto:wtthompson@gibsondunn.com))  
Gibson Dunn & Crutcher  
2100 McKinney Avenue, Suite 1100  
Dallas, Texas 75201

Mr. Prerak Shah (via e-mail: [prerak.shah@texasattorneygeneral.gov](mailto:prerak.shah@texasattorneygeneral.gov))  
Office of the Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

/s/ Roger Albright\_\_\_\_\_  
Roger Albright  
J. Michael Murray

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
STATEMENT OF THE CASE. ....	1
I. THE DALLAS CONVENTION CENTER IS A DESIGNATED PUBLIC FORUM....	4
A. The Policy of the Convention Center Allows Access and Use for Assembly and the Presentation of Expression Without Regard to the Content of the Expression Presented or Views of Those Assembled. ....	7
B. In Practice, the Convention Center Has Granted Access and Use to a Diversity of Groups, Without Regard to the Content of the Expression Presented or Views of Those Assembled.. ....	13
1. The City has permitted a diversity of groups, organizations, and persons to use the Convention Center. ....	13
2. Until Dallas City Council passed the resolution prohibiting Plaintiff from using the Convention Center, the City had allowed access to all who could meet its content-neutral contractual requirements. ....	19
C. The Nature of the Convention Center as a Place Designed for and Promoted as a Place Where Persons and Groups of Varied Interests and Beliefs Are Invited to Meet Make It Suitable for Presentation of Expression. ....	23
II. RESOLUTION NO. 160308 DOES NOT ADVANCE A COMPELLING GOVERNMENTAL INTEREST AND IS NOT THE LEAST RESTRICTIVE MEANS TO ADVANCE THE CITY’S PUTATIVE INTERESTS. ....	26
III. RESOLUTION NO. 160308 BANNING PLAINTIFF’S USE OF THE DALLAS CONVENTION CENTER FOR ITS ADULT EXPO IS AN UNCONSTITUTIONAL PRIOR RESTRAINT ON EXPRESSION. ....	33
IV. RESOLUTION NO. 160308 IS AN UNCONSTITUTIONAL CONTENT-BASED REGULATION OF SPEECH. ....	34
V. PLAINTIFF WILL BE IRREPARABLY HARMED IF INJUNCTIVE RELIEF IS NOT GRANTED, AND THE GRANT OF SUCH RELIEF IS IN THE PUBLIC INTEREST AND MERITED BY THE BALANCE OF EQUITIES....	35
CONCLUSION. ....	35

# **TABLE OF AUTHORITIES**

	<b><u>Page</u></b>
<b>CASES</b>	
<i>Bourgault v. Yudof</i> , 316 F.Supp.2d 411 (N.D.Tex.2004). . . . .	7
<i>Bowman v. White</i> , 444 F.3d 967 (8th Cir. 2006). . . . .	7
<i>Chiu v. Plano Indep. Sch. Dist.</i> , 260 F.3d 330 (5th Cir. 2001). . . . .	25
<i>Church on the Rock v. City of Albuquerque</i> , 84 F.3d 1273 (10th Cir. 1996). . . . .	7
<i>Concerned Women for America Inc. v. Lafayette County</i> , 883 F.2d 32 (5th Cir. 1989). . . .	5-7,13
<i>Contrast, Campbell v. St. Tammany Par. Sch. Bd.</i> , 231 F.3d 937 (5th Cir. 2000) (cert. granted and remanded on other grounds, 553 U.S. 98 (2001)). . . . .	7
<i>DeBoer v. Vill. of Oak Park</i> , 267 F.3d 558 (7th Cir. 2001). . . . .	7
<i>Estiverne v. La. State Ass’n</i> , 863 F.2d 371(5th Cir. 1989). . . . .	25, 26
<i>Fairchild v. Liberty Indep. Schl. Dist.</i> , 597 F.3d 747 (5th Cir. 2010). . . . .	25
<i>Gregoire v. Centennial Sch. Dist.</i> , 907 F.2d 1366 (3d Cir. 1990). . . . .	13
<i>Hopper v. City of Pasco</i> , 241 F.3d 1067 (9th Cir. 2001). . . . .	13
<i>Justice For All v. Faulkner</i> , 410 F.3d 760 (5th Cir. 2005). . . . .	7
<i>Moore v. City of Van, Tex.</i> , 238 F.Supp.2d 837 (E.D. Tex. 2003). . . . .	6-7
<i>Perry Educ. Ass’n v. Perry Local Educators’ Ass’n</i> , 460 U.S. 37 (1983). . . . .	26
<i>Pro-Life Cougars v. Univ. of Houston</i> , 259 F. Supp. 2d 575 (S.D. Tex.), dismissed, 67 F. App’x 251 (5th Cir. 2003) . . . . .	7
<i>Reed v. Town of Gilbert, Az.</i> , 135 S.Ct. 2218 (2015). . . . .	34
<i>Seattle Mideast Awareness Campaign v. King Cty.</i> , 781 F.3d 489 (9th Cir. 2015). . . . .	7, 13

<i>Sons of Confederate Veterans, Virginia Div. v. City of Lexington, Va.</i> , 722 F.3d 224 (4th Cir. 2013).	13
<i>Southeastern Promotions, Ltd. v. City of W. Palm Beach</i> , 457 F.2d 1016 (5th Cir. 1972).	25
<i>Southeastern Promotions, Ltd. v. Conrad</i> , 420 U.S. 546 (1975).	26, 33
<i>Stewart v. D.C. Armory Bd.</i> , 863 F.2d 1013 (D.C. Cir. 1988).	11
<i>Universal Amusement Company, Inc. v. Vance</i> , 587 F.2d 159 (5th Cir. 1978) (en banc) <i>aff'd</i> 445 U.S. 308 (1980).	26
<i>Walker v. Tex. Div., Sons of Confederate Veterans, Inc.</i> , 135 S.Ct. 2239 (2015).	5, 25
<i>Women’s Health Link, Inc. v. Fort Wayne Public Transportation Corp.</i> , 826 F.3d 947 (7th Cir. 2016).	25

## STATUTES

Dallas City Code, § 31-32.1.	22
V.T.C.A. § 101.0125 (a)(16).	25
V.T.C.A., § 481.125.	22

### **STATEMENT OF THE CASE**

Dallas City Council passed a resolution directing the City Manager “to not enter into a contract with Three Expo Events, LLC, for lease of the Dallas Convention Center,” for its three-day adult entertainment expo. Resolution No. 160308, APP. 1. Plaintiff Three Expo contended that the City, by prohibiting its use of the Convention Center as a forum for its expo, violated its rights under the First Amendment. Three Expo filed a motion for a preliminary injunction seeking relief. Motion for Preliminary Injunction, (Doc. 6).

After briefing and oral argument, this Court denied Three Expo’s motion. Memorandum Opinion and Order (Doc. 43), Page ID 1876. The Court concluded Three Expo had not offered sufficient evidence establishing that the Dallas Convention Center was a “designated public forum,” a premise the Court found fundamental to the success of Three Expo’s claim. *Id.* at 19-22, Page ID 1894-97; *Id.* at 31 n.23, Page ID 1906.

Specifically, the Court wrote:

[T]he court concludes that Three Expo has not met its burden of establishing a substantial likelihood of success on the essential element that the Convention Center is a designated public forum and, in turn, that the Resolution is subject to strict scrutiny. As explained, determining the status of a forum is highly fact-intensive. *See Verlo*, 2016 WL 1395205, at \*24; *Hopper*, 241 F.3d at 1091; *Stewart*, 863 F.2d at 1014. Three Expo has failed to adduce any facts that would support the finding that the Convention Center is a designated public forum.

*Id.* at 21, Page ID 1896.

The Court found that Three Expo had not presented evidence establishing “that the City ha[d] opened up the Convention Center for all types of expressive activity.” *Id.* at 20-21, Page ID 1895-96. It noted, however: “Three Expo may be able to do so at a later stage in this litigation,” and stressed that “[n]othing in the court’s decision today will preclude Three Expo from attempting to prove at

a later procedural stage of the case that the Convention Center is a quintessential public forum or a designated public forum....” *Id.* at 21, 21 n.15, Page ID 1896.

Three Expo, having developed a factual record through discovery on that issue, now renews its motion. The facts demonstrate that Dallas’s Convention Center—from its inception to the present—was intended and has served as a vibrant public forum where expression has been welcomed, encouraged, and has flourished. The City’s policies and practices have established Dallas’s Convention Center as a place open for use by citizens of varied beliefs, passions, and interests.

On its website, the Convention Center describes its history underscoring that role: it proclaims that Rev. Martin Luther King, Jr. preached there in 1957, that “political aspirants and candidates routinely stumped” there during the 1960s, that “musicians from the Beatles and Led Zeppelin to Jimi Hendrix, Elvis, The Doors, Ike & Tina Turner, and Queen performed” there from the late 1950s to mid-1970s, that Mary Kay, Inc. held its first worldwide seminar there in 1974, and that it has undergone multiple expansions to make it one of the largest convention centers “in the nation.” Plaintiff’s Ex. 25, APP. 595. *See also*, Deposition Transcript of John Johnson at 152-53, APP. 566-67.<sup>1</sup> It has served as a forum for political rallies, concerts, dance and theatrical performances, gatherings of businesses, civic organizations, and hobbyists, sporting events, entertainment, and conferences on varying political, religious, and social issues, including the controversial. *See infra* at 14-19; DEF 07067, APP. 626.

The Convention Center has described itself as a forum subject to the First Amendment’s umbrella of protection, open to all types of expressive activities. Plaintiff’s Ex. 39, APP. 613-15 ;

---

<sup>1</sup> The deposition transcripts of John Johnson and Ronald King are included in the Appendix together with relevant exhibits referenced during the depositions and other material produced in discovery. All further references to the deposition transcripts will be designated by the deponent’s name followed by the page number on which the cited material appears.

DEF 7065-67, APP. 624-26; Plaintiff's Ex. 40, APP. 627-28. When constituents contacted Council Member Jennifer Staubach Gates questioning Three Expo's use of the Convention Center in the summer of 2015, she distributed a statement prepared by the Convention Center regarding its usage:

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

DEF 07065-66, 07071-74, APP. 620-25. The Convention Center's statement continued:

The Supreme Court has consistently held that expression beyond that of pure speech is protected by the First Amendment. Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.

Public officials with power cannot deny use of a forum in advance of actual expression, unless it meets an exception because the danger of censorship and abridgment of First Amendment freedoms is too great where officials have unbridled discretion over a forum's use.

Rejection based on content and anticipation that a production would violate the law, instead of permitting the show and relying on law enforcement authorities to prosecute anything illegal that may occur, is an unconstitutional prior restraint.

Governmental regulation of a place determined to be a public forum is limited by the constraints of the First Amendment. Any willful or purposeful effort by a municipality to suppress protected expression clearly conflicts with the First Amendment.

Excluding a performer because of the political views of a City Council member, or those of the crowd that they might attract, or because the performer may say unorthodox things, as well as considering such arbitrary factors as the lifestyle or race of the crowd that a performer would attract, is not constitutionally permissible.

Absent a compelling governmental interest, one cannot open the forum to some and close it to others solely in order to suppress the content of protected expression. Generally, selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

*Id.* The statement went on to list examples of "past controversial events," held there. *viz.* "Dallas



Safari (Black Rhino Shoot), Adult Video News Awards, Previous gun shows, Video Software Dealers Software Association (VSDA)-adult movie association annual meeting.” *Id.*

The Convention Center’s Manager of Event Services echoed this position in responding to one of the Convention Center’s clients: “[T]he Center is considered a limited public forum and denying this event the use of the Convention Center, in advance of actual expression, based on content, would constitute an unconstitutional prior restraint in violation of the First Amendment.” Plaintiff’s Ex. 40, APP. 627; King at 76-78, APP. 371-73.

The policies the Convention Center lives by and its practice of allowing use by a diversity of speakers cement its status as a designated public forum open “for all types of expressive activity.” Memorandum Opinion and Order (Doc. 43) at 20-21, Page ID 1895-96.

**I. THE DALLAS CONVENTION CENTER IS A DESIGNATED PUBLIC FORUM.**

This Court described the steps for analyzing a First Amendment claim challenging a restriction on the presentation of expression in a particular forum:

Claims under the First Amendment Free Speech Clause are typically analyzed in three steps. First, the court must “decide whether [the activity at issue] is speech protected by the First Amendment, for, if it is not, [the court] need go no further.” *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). Second, assuming the activity “is protected speech, [the court] must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic.” *Id.* And, third, the court must assess whether the government’s justifications for restricting speech in the relevant forum “satisfy the requisite standard.” *Id.*

Memorandum Opinion and Order, (Doc. 43) at 11, Page ID 1886.

The City acknowledged, and this Court accepted, that the first step was satisfied: Three Expo’s speech is protected by the First Amendment. *Id.* at 12, Page ID 1887. *See also* Defendant’s Responses to Plaintiff’s First Request for Admissions, Request No. 28, 29, 30, 31, 33, 34, APP. 274-

75 (admitting that Three Expo used and occupied space in the Convention Center for performances, display of products and demonstrations, exhibits, sale of sexually explicit DVDs, a competition/contest, and that its event program indicated that it used and occupied space for seminars and lectures).

The Court moved on to the second step: whether the Dallas Convention Center is a public forum. *Id.* It described the categories of forum recognized by the Supreme Court,<sup>2</sup> *id.* at 13-16, Page ID 1888-91, and identified the fighting issue in this case to be whether Dallas's Convention Center is "at least a *designated* public forum, which would place a heavier burden on the City to show that its action did not infringe Three Expos' First Amendment rights, or is a *limited* public forum, which imposes a lower burden." *Id.* at 17-18, Page ID 1892-93 (emphasis *sic*).

The Supreme Court in *Cornelius* provided guidance on how to distinguish the two:

[T]he Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent.

473 U.S. at 802 (citation omitted).

The Fifth Circuit applied these factors in *Concerned Women for America Inc. v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989) in evaluating the constitutionality of the Lafayette County and Oxford Public Library's denial of use of its auditorium to the plaintiff.

The library's written auditorium policy read:

The Auditorium of the Oxford branch of the First Regional Library is open for use

---

<sup>2</sup> The Court noted the confusion in terminology, particularly with regard to *limited public forum*, but noted it would use the terminology employed in *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239 (2015): (1) traditional public forum, (2) designated public forum, (3) limited public forum, and (4) nonpublic forum. Memorandum Opinion and Order, (Doc. 43) at 13 n.11, Page ID 1888.

of groups or organizations of a civic, cultural or educational character, but not for social gatherings, entertaining, dramatic productions, money-raising, or commercial purposes. It is also not available for meetings for social, political, partisan or religious purposes, or when in the judgment of the Director or Branch Librarian any disorder is likely to occur.

*Id.* at 33. The head librarian testified that, notwithstanding its written policy, she would grant permission to use the auditorium, if there were room on the calendar—as long as the group would not be meeting for a religious or political purpose, a policy consistently enforced by the library. *Id.*

The Prayer Chapter of the Concerned Women for America sought to use the library auditorium for a meeting, which customarily entailed discussion of family and political issues, prayer, and guest lectures. *Id.* at 33-34. The library denied its request—reasoning that use of the auditorium by a group with religious purposes would violate its policy. *Id.* at 34.

The Fifth Circuit, after examining the library’s written policy, turned its attention to its actual practice. It noted that—while never allowing access to a religious group—the library had allowed the following groups to use its auditorium:

(1) American Association of University Women (panel discussion on women in non-traditional occupations); (2) National Association of Retired Federal Workers (potluck luncheon and lecture on Alzheimer’s disease); (3) U.S. Navy (closed meeting of area recruiters to discuss recruiting strategies); (4) United Way (discussion of funding requests and the organization’s budget); (5) American Legion (regular post meeting); (6) Adult Program on AIDS (meeting on the topic of AIDS); and (7) Oxford Swim Club (general meeting at which members discussed rules and policies for their pool). The library also gave permission for a young girl to use the auditorium for her piano recital.

*Id.*

On that basis, the Fifth Circuit affirmed the district court’s grant of a preliminary injunction, finding the plaintiff had “shown a substantial likelihood of proving that the library has created a public forum by allowing diverse groups to use its auditorium.” *Id.* See also, *Moore v. City of Van,*

*Tex.*, 238 F.Supp.2d 837, 844 (E.D. Tex. 2003). The court wrote:

It is an elementary rule that the government may not exclude speech on the basis of its content from either a traditional public forum or forum created by government designation, unless the exclusion is necessary to serve a compelling state interest which cannot be served by a less restrictive action. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 803, 105 S.Ct. 3439, 3449, 87 L.Ed.2d 567 (1985).

*Id.* at 34-35.

**A. The Policy of the Convention Center Allows Access and Use for Assembly and the Presentation of Expression Without Regard to the Content of the Expression Presented or Views of Those Assembled.**

The Convention Center’s usage policy does not restrict access “ ‘to either a specific group of speakers or for discussion on a very narrow topic.’ *Bourgault v. Yudof*, 316 F.Supp.2d 411, 420 (N.D.Tex.2004).” *Bowman v. White*, 444 F.3d 967, 979 (8th Cir. 2006). It is open for general use by the public.<sup>3</sup>

Until the adoption of Resolution No. 160308, access to and usage of the Convention Center

---

<sup>3</sup> See *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1278 (10th Cir. 1996) (Senior Center “opened to the public for discussive purposes” was a designated public forum, despite limitations on age of participants and on subjects presented, as those “of interest to senior citizens”); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 582 (S.D. Tex.), dismissed, 67 F. App’x 251 (5th Cir. 2003) (Plaza on public university campus was a designated public forum where Dean’s office permitted various events to be held there); *Justice For All v. Faulkner*, 410 F.3d 760, 766 (5th Cir. 2005) (limitation to certain category of speaker does not preclude finding that public space is a designated public forum).

Contrast, *Campbell v. St. Tammany Par. Sch. Bd.*, 231 F.3d 937, 941 (5th Cir. 2000) (cert. granted and remanded on other grounds, 553 U.S. 98 (2001)) (public school buildings were limited public forum since school policy explicitly forbade partisan political activity, for-profit fund-raising, and religious services and school had not permitted “an indiscriminate range of uses”); *Seattle Mideast Awareness Campaign v. King Cty.*, 781 F.3d 489, 497 (9th Cir. 2015) (bus advertising program was limited public forum where policy established pre-screening of eligible ads and “fixed guidelines that imposed categorical subject-matter limitations”); *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 561 (7th Cir. 2001) (Village Hall available only for activities or events sponsored by local non-profits and not espousing a particular philosophy or belief, and subject to several other written requirements, was not a designated public forum).

was not limited by the subject matter of the event, and would not be denied “based on the content of the user’s expression.” Johnson at 110, APP. 524; Plaintiff’s Ex. 39, APP. 613-15.

A brochure prepared in 2002 describes the Center’s function and scope:

It is not a coincidence that the Dallas Convention Center, located in the heart of the Dallas Central Business District, is one of the largest, most versatile convention complexes in the nation.

Reflecting the spirit of a great city, the Dallas Convention Center attracts convention business from every corner of the nation. Size, flexibility and a vigilant staff make our city’s convention center the perfect destination for any kind of event.

Plaintiff’s Ex. 30 at DEF 01201, APP. 597. The brochure describes the center as “an exceptional space” for “any type of meeting,” and represents its permanent theater to be “an excellent setting for concerts, elaborate plays and musicals, or for opening sessions and business meetings.” *Id.*

John Johnson, the Assistant Director of the Convention Event Services Department, testified about the unrestricted usage policy set forth in the brochure:

Q. It doesn’t indicate that there are some types of events for which your convention center would not be the perfect destination, does it?

A. Correct, it does not.

Q. It goes on to say in the next paragraph—I won’t read the whole thing—“Inside our expanded center will be even more inviting, too, thanks to a new public arts program sponsored by the City of Dallas that encourages the use of original art to enhance the atmosphere of public buildings”; correct?

A. It says that, yes.

\* \* \* \* \*

Q. If you go to the second column of this page, the third paragraph says, does it not: “The arena in the Dallas Convention Center is an exceptional space for large meetings, concerts, or event additional exhibit space”; correct?

A. Correct.

Q. So any kind of a large meeting is welcome to use the Dallas Convention Center; correct?

A. Correct.

Q. No matter what the subject matter is; correct?

MS. O'LEARY: Objection; form.

Q. As long as it's lawful?

MS. O'LEARY: Objection; form.

Q. Is that correct?

A. Correct.

Johnson at 143-45, APP. 557-59.

Ronald King, the Executive Director for the Convention and Event Services Department, publicly confirmed its content-blind usage policy: he told the Dallas Morning News that the Convention Center "can't discriminate based on content." Plaintiff's Ex. 13, APP. 574; King at 87, APP. 382.

Assistant Director Johnson likewise confirmed that policy:

Q. In Interrogatory Number 9, you asked whether -- we were asking you whether, "prior to the approval of the Dallas resolution on February 10th, you had a policy or practice prohibiting discrimination against persons or organizations requesting access to use and occupy space in the convention center on the basis of race, creed, religion, political affiliation, type of industry or business, nature of the organization, or subject matter of the proposed event;" correct?

A. Correct.

Q. And your answer included the following: "Defendant states that the convention center follows the city's antidiscrimination policies. Defendant has a practice of not discriminating against persons and entities requesting use of the convention center based on their race, creed, religion and political affiliation;" is that correct?

A. That is correct.

Q. So you're open to Democrats as well as Republicans, correct, for meetings?

A. We have hosted both, yes.

Q. You're open to Libertarian; is that correct?

A. Correct.

Q. If someone's political affiliation was the Communist party, based on this policy, you couldn't discriminate against them and refuse to let them have access; correct?

A. Correct.

Q. The same is true of religion; correct?

A. Correct.

Q. Are you familiar with the Westboro Baptist Church?

A. I believe so.

Q. The people that go to funerals of dead servicemen --

A. Yes, I know.

Q. -- protesting?

A. Yes.

Q. Based on your policy, you would have no ability to discriminate against them and refuse to allow them to have a meeting at your convention center, correct, based on their religion?

MS. O'LEARY: Objection; form. You can answer.

THE WITNESS: Correct.

Johnson at 125-27, APP. 539-41.

The Convention Center's Scheduling Policy reinforces the breadth of the usages it welcomes:

The Dallas Convention Center is a multi-purpose facility owned and operated by the City of Dallas. The facility was developed with the primary objective of promoting and facilitating events and activities which generate economic benefits<sup>4</sup> to the city of Dallas.

In addition, the Dallas Convention Center has a secondary objective of providing services and facilities to respond to the needs of local organizations which promote business and generally enhance the quality of life for the community it serves.

Plaintiff's Ex. 30 at DEF 01202, APP. 598.

Under the Center's scheduling policy, "first priority is given to conventions, trade shows, corporate meetings and similar activities that are not open to the general public, or generate significant attendance from outside" the City. *Id.*

"Second priority for scheduling facilities and dates," the brochures states, "is available to consumer or public exhibitions, local corporate meetings, special events, banquets, entertainment events, business meetings and other activities which essentially draw from or appeal to the general public and/or local attendees and participants." *Id.* The policy contemplates a wide variety of consumer or public exhibitions and entertainment events. Johnson at 150-51, APP. 564-65.

---

<sup>4</sup> That one of the City's stated objectives in developing the Convention Center is "generating economic benefits," in no way dilutes its status as a public forum for the presentation of expressive activity. In *Stewart v. D.C. Armory Bd.*, 863 F.2d 1013 (D.C. Cir. 1988), the court wrote:

Even if it is conceded that the government's primary purpose in operating the Stadium is to make a profit (as opposed to, say, build civic pride and community), that does not end the inquiry. It is possible that appellants could adduce enough evidence about the compatibility of the commercial purposes of the Stadium with expressive activity, a consistent pattern of such activity at the Stadium, and/or its ultimate reflection in the Armory Board's policies and practices, that a finding that the government did indeed through its practices and/or policies "intend" to create a public forum would be warranted. As we have explained, it is from such objective factual indicia that real intent is often inferred even when expressed intent runs counter.

*Id.* at 1019. See Memorandum Opinion and Order, (Doc. 43) at 18, 21, Page ID 1893, 1896 (citing *Stewart*).



Three Expo's event fell squarely in this latter category: it was a consumer exhibition providing entertainment that "draw[s] from or appeal[s] to the general public." Assistant Director Johnson confirmed Three Expo's event satisfied the Scheduling Policy's criteria:

Q. And, in fact, the convention center stood to be paid substantial moneys by Three Expo if they were to book the event?

A. They paid a standard rental, yes, sir.

Q. And was it the case that you understood that there was an expectation that there would be perhaps thousands of people attending this event?

A. Yes, sir.

Q. And was that an expectation that would bring revenue to the city?

A. Sure.

Johnson at 37-38, APP. 451-52. *See also* King at 58-59, APP. 353-54.

When the Convention Center booked Three Expo's 2015 event, it viewed the event to be in keeping with the City's "policy and practice" of using the Convention Center "as an economic engine to promote economic growth and vibrancy in Dallas." Johnson at 128, APP. 542.

Plaintiff's event, in fact, fulfilled those expectations. Fifteen thousand people came through the Convention Center doors in addition to scores of out-of-town and local vendors. Area hotels housed out-of-town visitors and hosted auxiliary events, as did area nightclubs. The Expo also hired Dallas's citizens to staff its security and other needs. DEF 05842, APP. 636. And, of course, Dallas profited directly from Three Expo's payment to use the facilities and catering services. Johnson at 37-38, APP. 451-52.

Assistant Director Johnson testified he considered EXXXOTICA Dallas a success. Johnson at 73, APP. 487. So did his boss, Ronald King. King at 67, APP. 362.

**B. In Practice, the Convention Center Has Granted Access and Use to a Diversity of Groups, Without Regard to the Content of the Expression Presented or Views of Those Assembled.**

In practice, the Convention Center, like the library in *Concerned Women for America*, “has created a public forum by allowing diverse groups” to use it. 883 F.2d at 34. The Third Circuit emphasized the importance of a government’s practices with respect to the forum:

While the Supreme Court in *Perry*, and *Cornelius* opined that intent, as evidenced by a government’s statements, is a factor to be considered in forum classification, it also made it clear that the forum inquiry does not end with the government’s statement of intent. To allow, as would the dissent, the government’s statements of intent to end rather than to begin the inquiry into the character of the forum would effectively eviscerate the public forum doctrine; the scope of first amendment rights would be determined by the government rather than by the Constitution. Any forum classification must be rooted in the facts of the particular case; forum classification “should be triggered by what a school does, not what it says.” *Board of Education v. Mergens*, 496 U.S. at [244], 110 S.Ct. at 2369 (quoting 130 Cong.Rec. 19222 (1984) (statement of Sen. Leahy)). *Cornelius* and *Perry* direct that we look, therefore, not only at what Centennial says in its policy but at how that policy has been applied. Policy and practice are relevant in determining the government’s intent. *See, Perry*, 460 U.S. at 37, 103 S.Ct. at 948 and *Cornelius*, 473 U.S. at 802, 105 S.Ct. at 3448.

*Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1374 (3d Cir. 1990). *See also, Hopper v. City of Pasco*, 241 F.3d 1067, 1075 (9th Cir. 2001)(“What matters is what the government actually does...”); *Sons of Confederate Veterans, Virginia Div. v. City of Lexington, Va.*, 722 F.3d 224, 230 (4th Cir. 2013) (finding flag poles were a designated public forum because city “purposefully opened [them] to the public, or some segment of the public, for expressive activity”); *Seattle Mideast Awareness Campaign v. King Cty.*, 781 F.3d 489, 497 (9th Cir. 2015) (nature of forum depends on whether government has granted “general access” for expressive use by general public or class of speakers, or whether it has imposed “speaker-based or subject-matter limitations”).

1. The City has permitted a diversity of groups, organizations, and persons to use the Convention Center.

The Convention Center has granted access to a staggering diversity of groups, organizations, and persons for expressive activity.

It has allowed organizations, including the National Republican Party, the Republican Party of Texas, and the Texas Democratic Party, to use the Convention Center for political conventions. Defendant's Responses to Plaintiff's First Set of Admissions, Request No. 1, APP. 269. And it has allowed persons and groups to use the Convention Center for political speeches and rallies, including speeches by Adlai Stevenson and Richard Nixon; rallies for George Wallace, the National Indignation Convention, and Louis Farrakhan; as well as Televangelist James Robison's Freedom Rally, and Ross Perot's Speech-a-thon. *Id.* at Request No. 3, APP. 269.

It has allowed groups and organizations to use the Convention Center for religious events and meetings, including Eid al-Fitr services, the 2015 *Roe* Memorial Mass and Concert, and gatherings of the Church of Christ, the Southern Baptists, the Islamic Association of North Texas, the Catholic Pro Life Committee of North Texas, and the Catholic Diocese of Dallas. *Id.* at Request No. 2, APP. 269.

It has allowed persons and groups to use the Convention Center for presentation of musical performances, including concerts by Elvis Presley, the Jackson 5, Z.Z. Top, Jethro Tull, the Beatles, Queen, Led Zeppelin, Skrillex, Raging Pandas, Boys Noize, Bruce Springsteen, Prince, the Dallas Blues Festival, Frank Zappa, and Lady Antebellum. *Id.* at Request No. 4, APP. 269.

It has allowed persons and groups to use the Convention Center for dramatic performances and dance performances, including performances at the Conference of National Association of Dramatic and Speech Arts, by the Texas Thespians, and at the Dallas Alumni Greek Show. *Id.* at Request No. 5, APP. 270.

It has allowed persons and groups to use the Convention Center for public hearings, including

hearings regarding Trinity Parkway and a hearing regarding the legislative redistricting of the Texas Senate and House. *Id.* at Request No. 6, APP. 270.

It has allowed persons and groups to use the Convention Center for trade shows, including the Berkshire Hathaway Home Services Sales Convention, the Small Business Expo, the Texas Restaurant Association, the Texas Society of Architects, Texas EMS conference, and Rejuvenate Marketplace. *Id.* at Request No. 7, APP. 270.

It has allowed persons and groups to use the Convention Center for fan fests and meetings and gatherings of persons and groups to discuss and exchange ideas about common interests, including the American Numismatic Association, the Dallas Safari Club, car and motorcycle enthusiasts, craft hobbyists, those interested in comics, sci-fi, horror, anime, and gaming, those interested in zombie lore, those interested in travel and adventure, WrestleMania Axxess, the NFL experience, and the Final Four Fan Fest. *Id.* at Request No. 8, APP. 270.

It has allowed organizations to use the Convention Center for meetings and gatherings concerning political, social, and educational issues, including the U.S. Conference of Mayors; Movement Day of Greater Dallas, Family, Career and Community Leaders of America; the American Association of Museums; the American Library Association; national sororities and fraternities, and the Dallas Police Department Youth Forum. *Id.* at Request No. 9, APP. 270.

It has allowed persons and groups to use the Convention Center for cultural gatherings, including the North American Telugu Convention, Celebracion- a gathering of youth representatives addressing the challenges of Latino life, and Navarati Cultural Event. *Id.* at Request No. 10, APP. 271.

It has allowed persons and groups to use the Convention Center for athletic events, including volley ball tournaments, body-building and cheerleading competitions, the National Veteran

Wheelchair games, and the North American Gay Volleyball Association National Championships. *Id.* at Request No. 11, APP. 271.

It has allowed persons and groups to use the Convention Center for civic events, including graduation ceremonies, job fairs, military recruiting, and events providing hot meals, clothing, and medical screening and health care to the public. *Id.* at Request No. 12, APP. 271.

It has allowed persons and groups to use the Convention Center for events featuring broadcast personalities, including Mike Holmes of HGTV, religious radio broadcaster Pastor Paul Begley, and T.D. Jakes of T.D. Jakes Ministries, Inc. *Id.* at Request No. 13, APP. 271.

It has allowed Millionaire Blueprint<sup>5</sup>; NYKO<sup>6</sup>; and Black Diamond Leadership<sup>7</sup> to use the Convention Center for meetings and seminars. *Id.* at Request No. 14, APP. 271.

It has allowed Nerium Get Real Conference<sup>8</sup> and Perform Better<sup>9</sup> to use the Convention Center for beauty and fitness expos and seminars. *Id.* at Request No. 15, APP. 271-72.

It has allowed persons and groups to use the Convention Center for talent competitions, auditions, and pageants, including America's Got Talent and The Miss Gay America Pageant. *Id.* at Request No. 16, APP. 272; Plaintiff's Ex. 32, 33, 34, 35, APP. 606-11.

It has allowed persons and groups to use the Convention Center for educational conferences,

---

<sup>5</sup> <http://www.dallasconventioncenter.com/event/the-millionaire-blueprint/> ("The Millionaire Blueprint LIVE is a unique 1 day event to learn and hear from four different 7-Figure Income Earners.").

<sup>6</sup> <http://www.dallasconventioncenter.com/event/2016-nyko/> ("This 2-day intensive conference features business training from top leaders, 90-Day Game Plan training and preparation, information about our spectacular products and more.")

<sup>7</sup> [http://www.dallasconventioncenter.com/event/all-out/\(business training\)](http://www.dallasconventioncenter.com/event/all-out/(business%20training))

<sup>8</sup> <http://getrealconference.com/dallas-2016/>

<sup>9</sup> <http://www.dallasconventioncenter.com/event/perform-better/>

including the Texas Association of School Business Officials, and the National Education Association. Defendant's Responses to Plaintiff's First Set of Admissions, Request No. 17, APP. 272.

It has allowed persons and groups to use the Convention Center to provide shelter for evacuees from Hurricane Katrina. *Id.* at Request No. 18, APP. 272.

It has allowed the publisher of the Dallas Morning News to use the Convention Center to meet with its employees regarding reduction-in-force issues. *Id.* at Request No. 19, APP. 272.

It has allowed the Convention Center to be used for a gun show. *Id.* at Request No. 20, APP. 272.

And the Convention Center's grounds have been used by persons and groups for various protests and rallies, including a rally in support of legalizing marijuana, pro life rallies, protests against Ayatollah Ruhollah Khomeini, killing endangered animals, and the Ferguson, Missouri shooting, and an Occupy Dallas protest. *Id.* at Request No. 21, APP. 272-73.

Assistant Director Johnson confirmed that the Convention Center welcomed use by all comers:

Q. Religious meetings, political meetings, meetings about the arts, for example, would all be permitted?

MS. O'LEARY: Objection; form. You can answer.

THE WITNESS: Correct.

Q. BY MR. MURRAY: Meetings, essentially, to discuss any topic -- any lawful topic that would be of interest to people; correct?

MS. O'LEARY: Objection; form. You can answer.

THE WITNESS: Correct.

Q. BY MR. MURRAY: You have a 21,290-square-foot arena with 9,816 seats; is that correct?

A. That is correct.

Q. And what kinds of events are held in the arena, for example?

A. Concerts, general session.

Q. What's a general session?

A. It's a large corporation or a large convention where everyone joins for one large meeting. So it's like an annual meeting, so to speak. And occasional sporting events.

Q. I think the Republican National Convention was held there once.

A. It predates me, but I do believe it was there. I don't know if it was in the arena or not.

Q. You also have a 1,750-seat theater with dressing rooms; correct?

A. Correct.

Q. And that can be used for any artistic show, for example?

MS. O'LEARY: Objection; form. You can answer.

THE WITNESS: Correct.

Q. BY MR. MURRAY: A ballet could be held there; correct?

MS. O'LEARY: Objection; form. You can answer.

THE WITNESS: Correct.

Q. BY MR. MURRAY: Plays?

MS. O'LEARY: Objection; form. You can answer.

THE WITNESS: Correct.

Q. BY MR. MURRAY: Musicals?

MS. O'LEARY: Objection; form. Answer.

THE WITNESS: Correct.

Q. BY MR. MURRAY: Comedies?

MS. O'LEARY: Objection; form. You can answer.

THE WITNESS: Correct.

Q. BY MR. MURRAY: You mentioned concerts can be held in the arena; is that correct?

A. Correct.

Q. Whether it's rock and roll? You could have a rock and roll concert there? That's permitted; correct?

MS. O'LEARY: Objection; form. You can answer.

THE WITNESS: Correct.

Q. BY MR. MURRAY: You can have a hip hop concert there, if you want; correct?

MS. O'LEARY: Objection; form.

THE WITNESS: Correct.

Q. BY MR. MURRAY: You could have a blues concert? A jazz concert? Any kind of a musical concert that anybody wants to have; correct?

MS. O'LEARY: Objection; form.

THE WITNESS: Correct.

Q. BY MR. MURRAY: You -- all comers in that category; correct?

MS. O'LEARY: Objection; form.

THE WITNESS: Correct.

Johnson at 136-39, APP. 550-53.

The City has opened the doors of its Convention Center for use by citizens of varied beliefs, interests, and objectives to discuss, exchange, and present their ideas and expression.

2. Until Dallas City Council passed the resolution prohibiting Plaintiff from using the Convention Center, the City had allowed access to all who could meet its content-neutral contractual requirements.



The Convention Center's booking of and facilitating Plaintiff's 2015 event further evidence its practice and policy of allowing access to all comers who met its content-neutral contractual requirements, regardless of the content of the event or the identity of the group sponsoring it.

When J. Handy, Director of Three Expo, arranged to visit the Convention Center to assess its suitability for Plaintiff's adult expo, at no time was he told that the sexual content of the event disqualified its use of the Center. Johnson at 35, APP. 449. Assistant Director Johnson, who was fully aware of the nature of Plaintiff's event, testified:

Q. And you never told Mr. Handy that the expo would be something that would be inappropriate for the convention center during that site visit?

A. No.

Q. And you never told him that it would be inconsistent with the mission and purpose of the convention center?

A. No.

Q. Meaning that's correct?

A. That is correct.

Q. ....You never told him that the sexually oriented content of the expo would disqualify his event from being held there; isn't that correct?

A. That is correct.

*Id.* at 36-37, APP. 450-51. *See also*, King at 56-57, APP. 351-52.

After it was booked, the upcoming expo was, in fact, listed in the Convention Center's "good news report for 2014/2015." Johnson at 103, 106, APP. 517, 520; Plaintiff's Ex. 44, APP. 618-19.

When Three Expo's event had concluded and it expressed interest in booking the Convention Center for the following year, it was not discouraged from returning. Director King gave Johnson the go-ahead to discuss booking a return of the event in 2016. King at 72, APP. 367. Consequently, Johnson told Handy to "please go ahead and make a formal request for dates," which was the first

step in the booking process. Johnson at 81-82, APP. 495-96.

In the months that followed, Handy communicated with Johnson about securing a written contract to formalize the event. *Id.* at 92-95, APP. 506-09. On January 19, 2016, Johnson wrote to Handy in an email, that he was “doing [his] very best to get [Plaintiff’s] contract written and out to [Plaintiff] hopefully sometime next week if everything goes as planned.” *Id.* at 95-96, APP. 509-10; Plaintiff’s Ex. 12, APP. 573.

Everything did not go as planned, however. On February 10, 2016, City Council adopted Resolution No. 160308. The Convention Center was no longer authorized to enter into a contract with Three Expo to stage its event. *Id.* at 102, APP. 516. Johnson testified that ***had Resolution No. 160308 not been adopted, the Convention Center was prepared to go forward with the contract.*** *Id.*

The City has identified only three events—other than Three Expo’s—for which it denied permission to use the Convention Center, on grounds other than scheduling conflicts or failure to reach an agreement on terms of use. Defendant’s Answers and Objections to Plaintiff’s First Set of Interrogatories, Answers to Interrogatory No. 1, No. 2, APP. 280-81.<sup>10</sup>

Two of the three events were “cannabis convention[s],” and a third would have included the display and sale of marijuana pipes. *Id.* Permission to use the Convention Center was denied for these three events “because the City does not allow drug paraphernalia at the Convention Center.” *Id.* at Answer to Interrogatory No. 2, APP. 280-81. In fact, the City doesn’t just “not allow drug

---

<sup>10</sup> In its Answers to Interrogatories, the City claimed that a fourth event, “Lights All Night,” an 18-and-over year-end electronic music festival, which had been held at the Convention Center in 2011, 2013, and 2014, was not permitted to return because of failure to abide by the terms of their contract. APP. 281. Johnson, during his deposition, clarified that the event did not return to the Convention Center because the organizers had missed the deadline for a rental deposit to secure the booking and may not have complied with the requisite insurance coverage. Johnson at 119-20, APP. 533-34.

paraphernalia at the Convention Center,” it does not allow it anywhere in the City; possession of drug paraphernalia is a criminal offense under the Dallas City Code, § 31-32.1. *See also* V.T.C.A., § 481.125. The City, therefore, denied access to the Convention Center for an event, the fundamental component of which was a criminal offense under its Code.<sup>11</sup> Johnson at 52, APP. 466.

That was not the case with Three Expo’s event, however. Johnson testified:

Q. You did not take that position with Three Expo Events, though, did you, that it was incapable of complying with the ordinances of the City of Dallas?

A. Correct.

Q. And that would have included the sexually oriented business ordinance of the City of Dallas; correct?

A. All applicable laws and ordinances.

Q. Is that one of them?

A. Sure.

*Id.*; *See also* DEF 07074, APP. 623.<sup>12</sup>

Johnson testified further:

---

<sup>11</sup> The contract form used by the Convention Center contains a provision expressly prohibiting the display of drug paraphernalia by any exhibitor. Contract No. 6769-02, § 26, APP. 104.

<sup>12</sup> The Convention Center articulated its position:

Exxxotica is a traveling show and its use of the KBHCCD for a temporary 3-day event does not establish our KBHCCD as [a Sexually Oriented Business (SOB)]. An SOB is defined in the Dallas City Code as an “adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, escort agency, nude model studio, or other commercial enterprise **whose primary business** of which is the offering of a service or sexual gratification to the customer.” KBHCCD’s primary use of the building is as a trade center and therefore cannot be designated as an SOB. Additionally, there is no nudity allowed during the event.

*Id.* (emphasis *sic*).

Q. So then other than the – so then I think it’s accurate to say, is it not, that other than the three denials involving marijuana and cannabis issues of illegality, the only event–client that was turned down in the last 11 years, for reasons other than scheduling conflicts, would have been the plaintiff, Three Expo Events; is that correct?

A. Sure.

\* \* \* \* \*

Q. Any ...applicant [other than Plaintiff], between January 1st, 2005 and February 10th, 2016, that asked to use space in the convention center was not turned down based on the content of their program, their event, their message, or the otherwise content of their convention; correct?

A. To my knowledge, that is correct.

Johnson at 120, 125, APP. 534, 539.

Johnson also testified that Dallas City Council’s adoption of a resolution directing “the city manager, director of convention and event services, or any other authorized representative” to not enter into a contract with Three Expo Events was the only such resolution ever adopted during the past 11 years. *Id.* at 121, APP. 535.

**C. The Nature of the Convention Center as a Place Designed for and Promoted as a Place Where Persons and Groups of Varied Interests and Beliefs Are Invited to Meet Make It Suitable for Presentation of Expression.**

In addition to the City’s policies and practices, “the nature of the property and its compatibility with expressive activity” marks the Convention Center as a designated public forum. *Cornelius*, 473 U.S. at 802 (citation omitted) (describing “a municipal auditorium and a city-leased theater [that] were designed for and dedicated to expressive activities” as examples of designated public forums).

The Dallas Convention Center began as a public auditorium—a place designed specifically for the presentation of speech.

When the auditorium opened in 1957, the Dallas Morning News reported, “although the

auditorium is designed around convention requirements, it will also accommodate other civic affairs, including athletic events, speeches, concerts, ice shows, circuses and carnivals, religious programs, pageants and exhibits of all kinds.” “Auditorium Will Serve Many Purposes,” Dallas Morning News, APP. 634-35.

In 1973, when the auditorium was expanded into a convention center, 300 trade association executives and convention managers were invited to its dedication, marked by a “gamut” of events “from bands and classical music performances, dramatic theater, tumbling, painting displays, ice skating to professional sporting teams demonstrations.” “Big Dedication Ceremony Scheduled,” Dallas Morning News, December 7, 1973, APP. 632. Its \$37 million expansion was described as “capable of handling anything from small professional meetings to national Democratic or Republican conventions.” “Convention Center Opens Saturday,” Dallas Morning News, December 7, 1973, APP. 633.

And in 1984 when a new wing was added, Dallas Morning News’ architecture critic declared that its design “[made] the building more expressive.” D. Dillon, “Dallas’ center has been made more expressive than many,” Dallas Morning News, August 15, 1984, APP. 630-31.

In embracing that role, the Convention Center currently promotes the diversity of events held there (“BIG sporting events...International conferences...BIG trade shows, meetings, and conventions”) and trumpets the expanse of its exhibit space, ballrooms, meeting rooms, and arena and 1,750 seat theater with dressing rooms. Plaintiff’s Ex. 24 at DEF 01214, APP. 593; King at 91-93, APP. 386-88. The Dallas Sports Commission declares it is so “versatile that it can be used for almost any event imaginable: major sporting competitions, key national and international conventions, meetings, concerts, trade and consumer shows, theater productions, special events.” Plaintiff’s Ex. 31, APP. 600-01; Johnson at 151-52, APP. 565-66. *See also*, King at 101, APP. 396

(Convention Center is “a good destination for a whole myriad of events”).

The Convention Center, therefore, stands in contrast to those forums that have been found to limit their access to specific speakers or narrow topics. It is not a charitable fund-raising drive, *Cornelius*, 473 U.S. at 790; a vanity license plate program, *Walker*, 135 S.Ct. at 2243; a school “Math Night” program, *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330 (5th Cir. 2001); a professional journal, *Estiverne v. La. State Ass’n*, 863 F.2d 371 (5th Cir. 1989); nor the public comment portion of a school board meeting. *Fairchild v. Liberty Indep. Schl. Dist.*, 597 F.3d 747, 759 (5th Cir. 2010). Rather it is a City-owned, City-operated, and City-financed building designed and used for expressive activities. Defendant’s Responses to Plaintiff’s First Request for Admissions, Request No. 22, No. 23, APP. 273.<sup>13</sup>

The Convention Center’s Event Guide tells the potential user that once it has “determined to book [its] event” there, the Convention Center staff will aid it in “reaching your guests and exhibitors with important messages before, during, and after your event.” APP. 115. Sections of the Guide are devoted to banners and signage, APP. 119, exhibit halls, APP. 124, lecterns, APP. 129, meeting rooms and ballrooms, APP. 130, and public address systems. APP. 135.

The Convention Center’s “essential purpose and character...is the promotion of communication and expression for the benefit of the general citizenry,” which has served for many years, as a forum where “many ideas and opinions... have been ventilated.” *Southeastern Promotions, Ltd. v. City of W. Palm Beach*, 457 F.2d 1016, 1019 (5th Cir. 1972). It is a facility that Dallas “created to be, [and] has subsequently opened up for use as, a site for expressive activity.” *Women’s Health Link, Inc. v. Fort Wayne Public Transportation Corp.*, 826 F.3d 947, 951 (7th Cir. 2016).

---

<sup>13</sup> By statute, Texas deems operation of “civic, convention centers, or coliseums,” to be a governmental function. V.T.C.A. § 101.0125 (a)(16).

**II. RESOLUTION NO. 160308 DOES NOT ADVANCE A COMPELLING GOVERNMENTAL INTEREST AND IS NOT THE LEAST RESTRICTIVE MEANS TO ADVANCE THE CITY'S PUTATIVE INTERESTS.**

Content-based exclusions from designated public forums must satisfy strict scrutiny. Memorandum Opinion and Order, (Doc. 43) at 13-14, Page ID 1888-89 *citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Estiverne*, 863 F.2d at 376. That means Dallas must demonstrate that its exclusion of Three Expo from its Convention Center is necessary to serve a compelling governmental interest and is narrowly drawn to that end. *Id.* at 13, Page ID 1888.

The City cannot make that case.

There is no compelling governmental interest justifying the City's prior restraint on Three Expo's expression. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 550-52 (1975) (advisory jury's determination that musical was obscene did not justify prior restraint); *Universal Amusement Company, Inc. v. Vance*, 587 F.2d 159, 165 (5th Cir. 1978) (en banc) *aff'd* 445 U.S. 308 (1980) (instances of past misconduct cannot justify restraining "future conduct that may fall within purview of the first amendment"). See Memorandum Opinion and Order (Doc. 43) at 31 n.23, Page ID 1906.

Both Director King and Assistant Director Johnson testified they were aware from the start, that Three Expo's event was "some kind of adult entertainment show" that included the sale and display of "intimate things," and "video/DVDs/magazines/swag with nudity or naked women ...on the covers." King at 28, APP. 323; Johnson at 26-27, APP. 440-41. They involved the Dallas Police Department and the City Attorney's office in advance of the event.

The day before the event, J. Handy of Three Expo met with representatives of the Convention Center, City's Attorney's office, and the Police Department for roughly an hour to discuss it. Johnson at 57, APP. 471; King at 61, 63, APP. 356, 358; Plaintiff's Ex. 15, APP. 531-82.

Director King testified:

Q. And, in fact, you attended that meeting?

A. That's correct.

Q. And the purpose of that meeting, as this e-mail indicated, was to discuss overall logistics, protest plans, security, communication structure, and any other items remaining; correct?

A. That's correct.

Q. And the city attorney's office was going to be present, correct?

A. Yes.

Q. DP – Dallas Police vice was going to be present?

A. Yes.

Q. Your staff was going to be present, or part of your staff; is that correct?

A. That's correct.

Q. And of course the – Mr. Handy for Three Expo?

A. That's correct.

King at 62, APP. 357.

Assistant Director Johnson described the discussions at the meeting:

Q. And do you recall that Mr. Handy said, on more than one occasion, that if anyone saw a problem while the expo was going on, that it should be brought to his attention and they would take care – fix the problem at once?

A. Yes.

Q. Was there any statement made at the meeting that pasties and G-Strings would not be acceptable?

A. I'm certain they were discussed. But to what extent, that was handled by vice.

Q. Well, they were present at the meeting; were they not?

A. Correct.



Q. Isn't it true that during the meeting, you yourself, asked what would happen if a Super Bowl incident where a pastie fell off occurred?

A. That sounds vaguely familiar.

Q. And wasn't it the case that the police indicated they would expect the expo to take immediate action to cover up the exposed nipple and areola?

A. If that's what it says, yes. I don't remember the exact conversation.

Q. But you do remember raising the question?

A. I remember reading or have said this, yes.

\* \* \* \* \*

Q. And is it true that Mr. Handy said that "Certainly if a pastie fell off, we would immediately take action to make sure that it got replaced"?

A. I assume, yes.

Q. And there was no statement made at that time that pasties would not be sufficient attire?

A. I don't remember.

Johnson at 58-59, APP. 472-73. *See also* King at 63, APP. 358 (testifying that Handy "was very cooperative").

On the first day of the expo, Johnson and King did a "walk-through" of the event with Mr. Handy and three or four attorneys from the City Attorney's office and Lieutenant Keough of the Vice Unit of the police department. Johnson at 62-63, APP. 476-77; King at 64-65, APP. 359-60. King testified:

Q. And what – tell me about what you did that day with [Handy].

A. So it was a large group of people – it may have been roughly this same group of people that walked through the expo with him. The vice officers really took the lead, as I recall, on the walk-through, and discussion was had as to what was allowable and not allowable.

Q. And you were present during these discussions?

A. I was.

Q. And the persons who were making those statements were the vice officers?

A. That's my recollection, yes.

King at 64-65, APP. 359-60.

Johnson testified further:

Q. And at the time that these walk-throughs occurred, there were people there, exhibitors?

A. Some. It was not open to the public yet.

Q. Right.

A. Yes.

Q. But some of the exhibitors were there?

A. Some, yes.

Q. And some of the stars, for lack of a better term, were there?

A. I don't remember exactly, but I do know there were people behind the booths, yes.

Q. And some of them were wearing pasties?

A. I believe.

Q. And no one told [Mr. Handy] that that was – you didn't tell [Mr. Handy] that that was not sufficient attire?

A. I don't believe so.

Johnson at 63-64, APP. 477-78. The only complaint raised involved a couple of posters depicting total nudity. *Id.* at 65, APP. 479. And in keeping with Mr. Handy's promise that Three Expo would fix any problems "at once," brought to its attention, Three Expo's show manager covered the offending portions of the posters. *Id.* at 66, APP. 480. *See also*, King at 65, APP. 360.

Johnson was present at the Convention Center during the entire event—spending time in the

exhibit halls, lobby, offices and overlooking the event space. *Id.* at 67, APP. 481. He testified that he was “available to address any problems which would have required executive authority.” *Id.* at 68, APP. 482. In his affidavit submitted in opposition to Plaintiff’s Motion for Preliminary Injunction, Johnson testified he “saw numerous women wearing only pasties or tape covering their nipples and areolas and otherwise exposing their whole breasts.” Plaintiff’s Ex. 18 at ¶ 11, APP. 587. He apparently did not view that as a problem that needed to be corrected, however. Johnson testified:

Q. You also said: “I was not focused on determining whether any violations of law were taking place or on whether any violations of Mr. Handy’s agreements with the city were occurring. But if I had recognized any, I would have addressed them;” correct?

A. Correct.

Q. Did you address them -- did you address any of -- did you have any issue to address with Mr. Handy in connection with that?

A. The one we previously spoke of.<sup>14</sup> And I don’t remember -- I’m sure there were a few minor things -- pipe and drape too close to the wall, this and that. But yes.

Q. Can you remember any others?

A. Not off the top of my head, no, sir.

Johnson at 68-69, APP. 482-83.

Nor did officers of the Dallas Police Department raise any particular concerns about the abbreviated costumes or any other issue. After the first day of the event, John Lawton, a Dallas police officer assigned to the event, reported to his superiors at 10:18 p.m.:

Wanted to make sure you are aware that there has been no major incidents at the EXXXOTICA expo 2015 so far tonight. There was one possible intoxication arrest made by the constables working off-duty.

---

<sup>14</sup> As noted above, Johnson testified that he took issue with some posters depicting nudity, which Plaintiff’s show manager remedied by covering the offending portions of the posters. *Id.* at 65-66.

Plaintiff's Ex. 38, APP. 612; Johnson at 74, APP. 488.

At the close of the second day of the event, Johnson similarly reported to one of his superiors, the Assistant City Manager:

Exxxotica is closing now. All guest (*sic*) are gone. Final exhibitors leaving now. No other issues other than two arrests. Show opens tomorrow at 1 and closes at 7 for the final day.

Plaintiff's Ex. 42, APP. 616-17; Johnson at 76, APP. 490.

The expo concluded. Johnson testified he considered it to be a success, without any serious problems. *Id.* at 73, APP. 487. Director King likewise considered the event a success. King at 67, APP. 362.

Afterward, King held a debriefing with his staff, attorneys, and vice officers. King at 70-71, APP. 365-66. King testified:

The vice officers gave their reports. As I recall, they didn't see anything out of line that was not handled during the show. A lot of discussion was given towards the protestors.

*Id.* at 71, APP. 366. King later told the press, that the event had gone off like any other, and the only complaints stemmed from the protestors. *Id.* at 88, APP. 38. He gave Johnson the go-ahead to discuss booking the event again in 2016. *Id.* at 72, APP. 367.

The Convention Center would have issued a contract to Three Expo for its May 2016 event—but for City Council's adoption of Resolution No. 160308.

Johnson testified:

Q. So as of February 10th, 2016, you were no longer authorized to enter into a contract to book the EXXXOTICA for those May dates in 2016, correct?

A. Correct.

Q. Now, had the resolution not been adopted, you were prepared to go forward with the contract, correct?

\* \* \* \* \*

A. Sure.

Johnson at 102, APP. 516.

That is the record Dallas City Council had before it when it adopted the resolution banning Three Expo's use of the Convention Center. In the eyes of the Convention Center staff, there had been no serious problems, and they viewed the event as a success. They were ready to proceed to enter into a contract with Three Expo for use of the Convention Center in 2016. By all objective measures, there was no legitimate governmental interest—let alone a compelling one—advanced by the resolution.

As for serving as the least restrictive means of addressing any problems with the event, the resolution flunks that requirement. Not long after the 2015 event, J. Handy wrote to Johnson and Erika Bondy, Johnson's subordinate:

Now that the dust has settled, I just wanted to once again thank you both (as well as the rest of your team) for your help with this year's event. All things considered, everything ran as smooth as possible and you guys were a huge reason why.

I know there are some points that need to be addressed moving forward with the Dallas event, but I wanted to reach out to you guys and let you know that there is certainly interest in returning to Dallas in 2016.

I'll take your lead on the correct steps to take moving forward. Just keep me in the loop.

Plaintiff's Ex. 9, App. 637-38; Johnson at 78-81, APP. 492-95.

Johnson responded:

Thanks for your message. I'll be sure to pass the sentiment along to our staff. We will run some traps on our end and are planning to have a debriefing about the event and protesters. Hopefully, no one has to be subjected to that, or at least so closely ever again. I'll be happy to share with you the results of the meeting and any future changes may result.

In the meantime, please go ahead and make a formal request for dates to Sonja and

we'll see what we can do. It will take us some time, as we will, once again, want to run this information by all interested parties.

Plaintiff's Ex. 9, APP. 637.

Handy acknowledged that there were "some points that need to be addressed" and pledged to follow the Convention Center's staff's lead "on the correct steps to take moving forward." Johnson told him that the Convention Center was going to "run some traps" and have a "debriefing about the event," the results of which he offered to share with Handy, as well as "any future changes that may result."

Plaintiff and the Convention Center had mutually agreed to work together to ameliorate "some points that needed to be addressed" and to implement "future changes," as needed. That sensible process for addressing any legitimate issues the City might have had was stopped dead in its tracks, however, by the adoption of Resolution No. 160308. A prior restraint on the future expression to occur at the next Exxxotica is hardly the least restrictive remedy for any perceived problems with the prior Expo, which all regarded as a success.

**III. RESOLUTION NO. 160308 BANNING PLAINTIFF'S USE OF THE DALLAS CONVENTION CENTER FOR ITS ADULT EXPO IS AN UNCONSTITUTIONAL PRIOR RESTRAINT ON EXPRESSION.**

The City of Dallas has prohibited Plaintiff from using its Convention Center to present its expression because of disapproval with its content. It has interposed a prior restraint, "forbidd[ing] [plaintiff's] use of [a] public place[] to say what [it] wanted to say." *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). See Plaintiff's Memorandum in Support of Motion for a Preliminary Injunction (Doc. 7) at 8-12, Page ID 94-98); Plaintiff's Reply Brief (Doc. 30) at 4-7, Page ID 1736-39).

This Court in denying Plaintiff's Motion for a Preliminary Injunction, observed:

Prior restraints are generally disfavored and subject to strict scrutiny....Prior restraints

in a nonpublic forum, however, have been upheld as long as they were reasonable and viewpoint neutral....Accordingly, a restriction on expression that would otherwise be deemed a prior restraint if it had been applied in a public forum is valid in a nonpublic forum as long as it is reasonable and viewpoint neutral.

Memorandum Opinion and Order (Doc. 43) at 31 n.23, Page ID 1906 (citations omitted).

Dallas Convention Center is a public forum—by policy, practice, and design. Resolution No. 160308, which was adopted to prevent Three Expo Events from presenting its adult expo at the Convention Center because of the Mayor’s and Council’s disapproval of its sexually explicit content, is therefore an unconstitutional prior restraint of the first order.

#### **IV. RESOLUTION NO. 160308 IS AN UNCONSTITUTIONAL CONTENT-BASED REGULATION OF SPEECH.**

On its face, Resolution No. 160308 discriminates against Plaintiff’s expression based on its content. In its Whereas clause, it identifies the type of event Plaintiff seeks to host—“a three-day adult entertainment expo.” It then directs the City Manager not to enter into a contract with the Plaintiff for lease of the Convention Center. It, therefore, treats Plaintiff’s event “less favorably” because of its content. *Reed v. Town of Gilbert, Az.*, 135 S.Ct. 2218, 2224 (2015). Strict scrutiny applies.

But even if the Resolution were considered to be facially content neutral, strict scrutiny would still apply. The Court in *Reed* explained:

Our precedents have also recognized a separate and additional category of laws that, although facially content neutral, will be considered content-based regulations of speech: laws that cannot be “‘justified without reference to the content of regulated speech,’ or that were adopted by the government “because of disagreement with the message [the speech] conveys,”....Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

*Id.* at 2227 (citation omitted).

Here, the record makes clear that the guiding reason for Resolution No. 160308's adoption was the Mayor’s and Council’s disapproval of the content of the expression presented at Plaintiff’s expo and their disagreement with the message it conveyed. APP. 23-24. In order to survive, the

resolution must advance a compelling governmental interest, and be the least restrictive means to achieve that purported interest. It does neither.

**V. PLAINTIFF WILL BE IRREPARABLY HARMED IF INJUNCTIVE RELIEF IS NOT GRANTED, AND THE GRANT OF SUCH RELIEF IS IN THE PUBLIC INTEREST AND MERITED BY THE BALANCE OF EQUITIES.**

In addition to demonstrating a substantial likelihood of success on the merits, Plaintiff has established that the remaining factors meriting entry of a preliminary injunction have been met, as set forth in Plaintiff's original Motion for a Preliminary Injunction (Doc. 7) at 14-15, Page ID 100-01, and warrant granting Plaintiff's renewed motion.

**CONCLUSION**

Plaintiff's motion for a preliminary injunction should be granted, and Defendant should be enjoined from enforcing Resolution No. 160308 and ordered to permit Plaintiff's use of the Convention Center in 2017, subject to normal scheduling issues, as would have happened, but for the adoption of Resolution No. 160308.

/s/ Roger Albright

ROGER ALBRIGHT

(State Bar No. 009 745 80)

rogeralbright@gmail.com

LAW OFFICES OF ROGER ALBRIGHT

3301 Elm Street

Dallas, Texas 75226-2562

(214) 939-9222

(214) 939-9229 (Facsimile)

J. MICHAEL MURRAY

(Ohio Bar No. 0019626)

jmmurray@bgmdlaw.com

BERKMAN, GORDON, MURRAY & DeVAN

55 Public Square, Suite 2200

Cleveland, Ohio 44113-1949

(216) 781-5245

(216) 781-8207 (Facsimile)

Attorneys for Plaintiff