UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

Case No. : 07-21088-CIV-ALTONAGA-Turnoff

MIAMI FOR PEACE, INC., SOUTH FLORIDA PEACE AND JUSTICE NETWORK, and HAITI SOLIDARITY, INC.

Plaintiffs,

v.

MIAMI-DADE COUNTY, a political subdivision of the State of Florida,

Defendant.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT MIAMI-DADE COUNTY

LEGAL ARGUMENT

INTRODUCTION

The matter *sub judice* involves a straightforward challenge by several political organizations in South Florida to two code sections of the Miami-Dade County Code ("M-D County Code"). Specifically, Plaintiffs, Miami for Peace ("MFP"), South Florida Peace & Justice Network (SFP&JN"), and Haiti Solidarity ("HS") challenge **§ 30-274** of the M-D County Code, the ***Parades and Processions Ordinance*** that effectively regulates core political expression in traditional public fora, and Code **§ 21-31.1(b),** Miami-Dade County's ***Loitering Ordinance***.

Plaintiffs assert that M-D County Code's ***Parades & Processions Ordinance*** violates the First Amendment in numerous respects. First the challenged code section regulating parades is an **unlawful prior restraint** as it requires permission from the sheriff for any "parade" or "procession" in Miami-Dade County, but contains no standards for obtaining permission. The M-D County Code does not contain a **procedural process** for filing a permit, sets **no time framework** by which a decision to grant or deny the requested permit must be made, and sets **no standards** for making the decision. In short, the M-D County Code is overbroad, vague and lacks any standards or guidelines to check the unbridled discretion of Miami-Dade County ("County") officials to use content-based factors to decide who may or may not "speak" in the public fora. This law is presumptively unconstitutional, as are all prior restraints, and fails the test applied to reasonable time, place or manner regulations.

In addition, Miami-Dade County's ***Loitering Ordinance*** is violative of First Amendment free speech guarantees insofar as it is vague and overbroad, thereby

infringing upon expressive conduct in public fora, and it also transgresses Fourteenth Amendment due process rights because it criminalizes innocent conduct that is constitutionally protected as a recognized liberty interest .

FACTUAL BACKGROUND

The factual information relevant to this application are set forth in Plaintiffs' Concise Statement of Material Facts in Support of Motion for Partial Summary Judgment, dated March 17, 2008, and filed this date in support of Plaintiffs' Motion for Final Partial Summary Judgment

LEGAL ARGUMENT

POINT 1 - THE PLAINTIFFS ARE ENTITLED TO A DECLARATION THAT THE PARADES & PROCESSIONS ORDINANCE IS AN UNLAWFUL PRIOR RETRAINT THAT VIOLATES THE FIRST AMENDMENT

The Plaintiffs asserted in Count One of the Second Amended Complaint that Miami-Dade County Code § 30-274, its Parades & Processions Ordinance, is clearly violative of the First Amendment insofar as it constitutes an unlawful prior restraint due to its lack of basic procedural safeguards, because it vests unbridled discretion in public officials, and finally because Code § 30-274 is not a reasonable Time, Place or Manner regulation.

A. Miami-Dade County's Permit Scheme Constitutes an Unlawful Prior Restraint Insofar as the Ordinance Lacks Adequate Procedural Safeguards.

Code § 30-274, by its specific terms, mandates that no social or political procession or parade "shall occupy, march or proceed along any street or roadway except in accordance with a permit issued by the Sheriff." This Code section was specifically relied upon by Miami-Dade County in refusing to issue a permit for the "Reject the Bush Agenda" March and Rally planned for April 28, 2007.

The permit scheme embodied by M-D County Code § 30-274 is a classic prior restraint on constitutionally-protected expression. "A prior restraint on expression exists when the government can deny access to a forum for expression before the expression occurs." *United States v.Frandsen*, 212 F.3d 1231, 1236-37

(11th Cir. 2000); *Cooper v. Dillon*, 403 F.3d 1208, 1215 (11th Cir. 2005). As the *Cooper* tribunal noted, "[b]ecause **statutes silencing speech before it happens** are inimical to the tenets of free expression underlying a free society, these statutes are characterized as **prior restraints** on speech and are **subjected to strict scrutiny**." *Cooper*, 403 F.3d at 1214-15 (bold emphasis added); *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1251 (11th Cir. 2004).

Therefore, the provision in M-D County Code § 30-274 that requires prior approval by the Sheriff, before a politically-oriented march can occur on a public street, clearly places a prior restraint on free speech. There is a strong presumption against the constitutionality of prior restraints on free speech. *Bourgeois v. Peters*, 387 F.3d 1303, 1319 (11th Cir. 2004). This is because a "[p]rior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment." *Carroll v. Pres. & Commissioners of Princess Anne,* 393 U.S. 175, 181 (1968). Ordinances that place a prior restraint on speech by requiring "before-the-fact permitting and licensing schemes" to the point that they create "an impermissible risk of suppression of ideas" will be found to be unconstitutionally overbroad. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992).

A prior restraint must contain basic procedural safeguards to ensure that protected expression is not inhibited. At a minimum, it must allow for prompt judicial review in the event the permit is denied or unduly burdened. *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965). "Meaningful judicial review is the touchstone of the [prior restraint] test. 'Prompt judicial review must be available to correct erroneous denials of access to expression.'" *Bourgeois*, 387 F.3d at 1319-20. Because the challenged ordinance lacks any time for deciding a permit application, the County's Code misses the mark completely. *See Redner v. Dean*, 29 F.3d 1495, 1502 (11th Cir. 1994) ("[the] ordinance [is]. . . inadequate under any

interpretation of 'prompt judicial review' because it creates the risk that expressive activity could be suppressed indefinitely prior to any judicial review of the decision to deny a license").

B. Miami-Dade County's Permit Scheme Constitutes an Unlawful Prior Restraint Since the Ordinance Vests Unbridled Discretion in Public Officials.

By its express terms, M-D County Code § 30-274 requires persons interested in planning a parade or procession to obtain a permit from the "Sheriff." However, the Code does not indicate how one must apply for a permit, how long the process will take, what factors constitute the basis for approval or denial of a permit, or what administrative remedies are available upon the denial of a permit request. In sum, the Code is totally bereft of meaningful guidelines.

It is black letter law that any attempt to subject "the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). *See also Forsyth County*, 505 U.S. at 132-33. A law regulating speech in public fora fails if it "delegate[s] overly broad licensing discretion" to officials. *Id.* at 130.

> "It is settled . . . that an ordinance which . . . makes peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the *uncontrolled will* of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."

Shuttlesworth v. City of Birmingham, 394 U.S. 147, 149–51 (1969) *quoting Staub v. Baxley*, 355 U.S. 313, 322 (1957). (emphasis added).

When there are no clear standards upon which an official can make these decisions, or standards can be applied differently to different types of gatherings, an ordinance will not be upheld. *See Bourgeois*, 387 F.3d at 1317 (holding a restriction is invalid when no standards appear anywhere, no limitations are listed, and there is "no circumscribing of the absolute power" of the decision-maker). "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." *Forsyth County*, 505 U.S. at 130-31.

> Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. 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 whether the licensor is permitting favorable, and suppressing unfavorable expression.

City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 758 (1988).[1] The M-D County Code lacks the narrow and specific guidelines needed to check official discretion. Thus, it is not "narrowly drawn" in a manner sufficient to pass the First Amendment's dictates.

It matters not if M-D County may never have applied the Code in a content-based manner. A facial challenge to a permit scheme that "delegates overly broad discretion to the decision-maker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Forsyth*, 505 U.S. at 133, 133 n.10; *accord, City of Lakewood*, 486 U.S. at 757 ("mere existence of licensor's

[1] Even content-neutral time, place and manner rules require adequate standards to guide the decisionmaker's determination. *Thomas v. Chicago Park District*, 534 U.S. 316, 323 (2002).

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"). "The First Amendment does not permit the government to place burdens on speech and assembly in . . . an unprincipled, *ad hoc* manner[,]" *Bourgeois*, 387 F.3d at 1318, and neither this Court nor the public can "depend on the individuals responsible for enforcing [a regulation] to do so in a manner that cures [the law] of constitutional infirmities[.]" *Frandsen*, 212 F.3d at 1240.

Miami-Dade County Code § 30-274 requires permission issued by the sheriff for any "procession or parade," but contains absolutely no time for filing or time by which a permit would be decided. For nearly four decades, the United States Supreme Court has condemned similar laws imposing lengthy advance filing requirements. "[T]iming is of the essence in politics . . . and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth*, 394 U.S. at 163. Here, County officials are unconstrained, by any textual limits in the Code, from holding a permit request until the last moment, only then to deny it for unspecified reasons, leaving no opportunity to seek prompt judicial review of the denial of a permit.

The fatal lack of a time by which to decide a permit application is compounded here because the Code is devoid of standards on other key provisions. M-D County Code § 30-274 requires permission of the sheriff to "parade," but does not state how permission is obtained. "Excessive discretion over permitting decisions is constitutionally suspect because it creates the opportunity for undetectable censorship and signals a lack of narrow tailoring." *Burk v. Augusta Richmond County*, 365 F.3d 1247, 1256 (11th Cir. 2004). Because M-D County's Code embodies "[e]xcessive discretion over permitting decision" it fails this key test of constitutional adequacy.

C. Miami-Dade County's Permit Scheme Constitutes an Unlawful Prior Restraint Because the Ordinance is Not a Reasonable Time, Place or Manner Regulation.

County Code § 30-274 exempts only federal and state military forces, members of police and fire departments, and persons participating in funerals from the requirement of obtaining permission from "the Sheriff" before participating in a procession or parade on the public streets and roadways of Miami-Dade County.

The County regulates core expressive activity in virtually all public fora. "In such places, which occupy a 'special position in terms of First Amendment protection,' the government's ability to restrict expressive activity 'is very limited.'" *Boos v. Barry*, 485 U.S. 312, 318 (1988) *quoting United States v. Grace,* 461 U.S. 171, 177, 180 (1983). Time, place, and manner restrictions in traditional public fora are constitutional as long as they are content-neutral,[2] are narrowly tailored to serve a significant government interest, and leave open ample alternative channels to communicate the message. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). **The failure to meet any prong is fatal to the entire law.** *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 406 U.S. 36, 45 (1983) (emphasis added). The City's scheme violates all three prongs.

First, Miami-Dade County Code Section 30-274 is not a content-neutral regulation. To pass constitutional muster, a time, place or manner regulation of

[2] A content-based restriction is subject to the more stringent requirement that it be "necessary to serve a compelling state interest," and be "narrowly drawn to achieve that end." *Boos*, 485 U.S. at 321. However, it is not necessary to examine whether Section 30-274 of the Miami-Dade County Code meets this more stringent test, because as shown herein, it cannot even satisfy the less exacting standard for content-neutral time, place, and manner restrictions.

speech in a traditional public forum must be content-neutral. *Clark v. Community for Creative Non-Violence*, 468 U.S. at 293. If the decision involves the "appraisal of facts, the exercise of judgment, and the formation of an opinion," it is content-based and the "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted." *Forsyth*, 505 U.S. at 131 [internal citations omitted]. The County's Code contains **no** standards for deciding permits. Officials may decide based on the content of the speech and, for disfavored speakers, delay or deny the permit, or impose onerous conditions. For these reasons, M-D County Code § 30-274 is not content-neutral.

Second, even assuming content-neutrality, the County cannot meet its burden to prove that the permit scheme is narrowly-tailored. While "[t]he State . . . has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks . . . ," *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 768 (1994), at the same time, when First Amendment rights are at issue, the government has the burden of showing that the law is narrowly tailored and that there is evidence supporting its proffered justification. In this regard, it is important to underscore that "[courts] have never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000). *See also Turner Broadcast System, Inc. v. F.C.C.*, 512 U.S. 622, 644 (1994) ("When the government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease to be cured."). To prove narrowly tailoring, the County must show **actual**, not speculative harm, and that the disputed laws actually address that harm. *Id.*

Even a content-neutral law is not narrowly-tailored "[w]here the licensing official enjoys unduly broad discretion . . . to grant or deny a permit, [as] there is a risk that he will favor or disfavor speech based on its content." *Thomas*, 534 U.S.

at 323, *citing Forsyth County*, 505 U.S. at 131. "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.'" *Forsyth County*, 505 U.S. at 132 (citation omitted).

The Supreme Court "requires that a time, place and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Thomas v. Chicago Park District*, 534 U.S. 316, 323 (2002), *citing Niemotko v. Maryland*, 340 U.S. 268 (1951). The ordinance in *Thomas* included express bounds on the bases for denying a permit, required officials to process applications within 28 days and explain in writing any denials. *Thomas*, 534 U.S. at 32. These were held to be sufficiently specific and objective to insulate against the exercise of the "whim of the administrator." *Id.*, *citing Forsyth County*, 505 U.S. at 133. "They provide 'narrowly drawn, reasonable and definite standards' to guide the licensor's determination. . . . And they are enforceable on review – first by appeal to the General Superintendent of the Park District, . . . and then by writ of common-law certiorari in the Illinois courts[.]" *Thomas*, 534 U.S. at 32. By way of contrast, in the instant case Defendant Miami-Dade's Code lacks any standards and any opportunity for review.

Absent the safeguards present in *Thomas,* the County's permit scheme is unconstitutional. *See also City of Lakewood*, 486 U.S. at 769-70 (discretion impermissibly unfettered where official may impose "such other terms and conditions deemed necessary"); *Shuttlesworth*, 394 U.S. at 156-58 (unbridled discretion in regulation permitting decisions to grant or deny parade permit on grounds of "the public welfare, peace, safety, health"). Defendant's Code sets no time by which a permit request must be decided, enumerates no bases for granting or denying a request, and contains no standards for setting conditions on a permit.

Such "[e]xcessive discretion over permitting decisions is constitutionally suspect because it creates the opportunity for undetectable censorship and **signals a lack of narrow tailoring**." *Burk*, 365 F. 3d at 1256 (emphasis added).

Third, the permit scheme fails to leave open ample alternatives for communication. It is a cardinal rule of First Amendment law that "[the] streets [and sidewalks] are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Thornhill v. Alabama*, 310 U.S. 88, 105-106 (1940) [citations omitted]. The County's Code does not allow for ample alternatives for core expression within the County. If a permit for a parade or procession is not obtained, the group is thereby foreclosed from all public streets and highways in the County. Even the sidewalks are unavailable to Plaintiffs since they are potentially subject to arrest under the Miami-Dade County Loitering Ordinance found at M-D County Code § 21-31.1 (b).

POINT 2 - THE PLAINTIFFS ARE ENTITLED TO A DECLARATION THAT THE COUNTY'S LOITERING ORDINANCE IS AN OVERBROAD PROHIBITION THAT VIOLATES THE FIRST AMENDMENT

In Count Two of the Second Amended Complaint, the Plaintiffs assert that Miami-Dade County Code § 21-31.1 (b), the ***Loitering Ordinance***, is unconstitutional on its face because it is impermissibly overbroad and thereby capable of chilling the exercise of lawful First Amendment-protected core expressive activities.

The ***loitering*** provisions of § 21-31.1 (b) of the M-D County Code make it unlawful to be on a public street, public sidewalk, public overpass, public bridge or public place "to hinder or impede pedestrians or vehicles."

The overbreadth doctrine invalidates laws that inhibit the free exercise of First Amendment-protected activities. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). Peaceful protest on public sidewalks is a quintessential First Amendment activity. *See e.g., Perry*, 460 U.S. at 45; *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969). The City may not "make criminal the peaceful expression of unpopular views. . . . 'unless shown likely to produce a clear and present danger of a serious substantive evil that rises **far above public inconvenience, annoyance, or unrest**.'" *Terminiello v. Chicago*, 347 U.S. 1, 4-5 (1949).

The ability to restrict assemblies on sidewalks based on any conceivable "obstruction" is unlawful. In *Cox v Louisiana,* 379 U.S. 536 (1965), the Supreme Court overturned the convictions of civil rights activists. Two thousand students assembled peaceably at the state capitol building and marched to the courthouse, where fellow activists arrested earlier were being held. With official permission, but without a permit, they assembled on the sidewalk across the street from the courthouse and, in a lawful manner, rallied and marched. When they failed to disperse pursuant to a police order indicating that they had exceeded their time for demonstrating, they were arrested for obstructing a sidewalk.

An ordinance is overbroad where every application creates an impermissible risk of suppression of ideas, such as when an ordinance allows unfettered discretion in one decision-maker or where the ordinance sweeps too broadly to penalize constitutionally-protected speech. *Forsyth County*, 505 U.S. at 129-30. The Supreme Court has consistently held that ordinances are unconstitutionally broad under the circumstances noted in *Cox* and *Forsyth*, as these ordinances would allow punishment for peaceful protest involving disfavored views. The

Court also held that the conviction under a statute banning obstruction of public sidewalks was a clear violation of freedom of speech and assembly where the "obstruction" ordinance was coupled, as here, with the unfettered discretion of local officials to regulate the use of streets for peaceful parades and assemblies. Precedent requires that Miami-Dade County Code § 21-31.1(b) be invalidated by this tribunal.

POINT 3 - THE PLAINTIFFS ARE ENTITLED TO A DECLARATION THAT THE COUNTY'S LOITERING ORDINANCE IS FACIALLY INVALID BECAUSE IT OFFENDS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT ON THE GROUNDS OF VAGUENESS AND VIOLATION OF A PROTECTED LIBERTY INTEREST

In Count Three of the Second Amended Complaint, the Plaintiffs assert that Miami-Dade County Code § 21-31.1 (b), the ***Loitering Ordinance***, is unconstitutional on its face as being offensive to the Fourteenth Amendment's Due Process Clause, because: (1) it is an impermissibly vague prohibition, in that it fails to provide notice as to precisely what conduct falls within its sweep, and it authorizes arbitrary and discriminatory enforcement, and (2) it prohibits conduct that is protected by the liberty interest of the Due Process Clause.

Vagueness can invalidate a criminal law because either: (1) it failed to provide the kind of notice that allows ordinary persons to understand what conduct is prohibited, or (2) it authorizes or encourages arbitrary and discriminatory enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). M-D County's ***Loitering Ordinance*** is **unconstitutionally vague**, in part because there is uncertainty about what type of loitering would be considered criminal conduct, and which conduct would not fall within its sweep. *Id.* at 57. Courts have consistently invalidated laws or ordinances that do not join the crime of loitering with a second

specific element. *Id*. at 58. Miami-Dade County's Loitering Ordinance is unconstitutionally vague because it fails to alert the public as to what type of conduct is prohibited since M-D County could not "conceivably have meant to criminalize each instance a citizen stands in public." *See Id*. at 57.

Freedom to loiter "for innocent purposes" is **a liberty interest protected by the Due Process Clause** of the Fourteenth Amendment. *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999). The Supreme Court has held that a person's decision to remain in "a public place of his choice" or to move to another place upon his own inclination is "as much a part of . . . liberty as the freedom of movement inside frontiers that is 'a part of our heritage.'" *Id*. *citing Kent v. Dulles*, 357 U.S. 116, 126 (1958). Miami-Dade County Code § 21-31.1(b) unconstitutionally restricts the liberty interest of Plaintiffs by criminalizing standing or remaining on public streets, sidewalks, overpasses, bridges, and places. Plaintiffs have a constitutional right to stand or remain on a public place if their conduct does not completely obstruct a sidewalk, or if their presence is not injurious or threatening. Miami-Dade County's ***Loitering Ordinance*** violates this critically important due process right guaranteed by the Fourteenth Amendment, and is invalid.

POINT 4 - THE PLAINTIFFS HAVE DEMONSTRATED THEIR ENTITLEMENT TO FINAL PARTIAL SUMMARY JUDGMENT AS TO THEIR CLAIMS FOR BOTH DECLARATORY AND INJUNCTIVE RELIEF

A. Standard Governing Motions for Partial Summary Judgment.

Any party to an action can move for a motion for summary on all or part of any

claim. ***Fed. R. Civ. Pro.* 56 (c).** Further, "[a] summary judgment, interlocutory in character, may be issued on the issue of liability alone although there is a genuine issue as to the amount of damages." *Id.* Summary judgment is proper when, viewed in the light most favorable to the nonmoving party, there exists no genuine issue of material fact. *D Beach*, 486 F.3d (11th Cir. 2007).

B. The Plaintiffs are Entitled to a Declaratory Judgment as to Counts One, Two and Three of the Second Amended Complaint.

Any Court of the United States may declare the rights of any interested party seeking such a declaration, and it shall have the force and effect of a final judgment. *28 U.S.C. §2201*. Federal courts have jurisdictional authority to issue declaratory judgment and injunctive relief prohibiting the enforcement of an ordinance or statute when the ordinance or statute's application is unconstitutional. *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 331 (2006); *Beaulieu v. City of Alabaster*, 454 F.3d 1219 (11th Cir. 2006) (affirming the District Court's declaratory judgment against the City holding that their sign ordinance violated the First Amendment).

Plaintiffs are entitled to declaratory judgment under *28 U.S.C. §2201* because Miami-Dade County's Parade & Procession Ordinance is violative of the First Amendment, and because the Loitering Ordinance violates both the First Amendment and the Fourteenth Amendment, as delineated with specificity hereinabove.

C. The Plaintiffs are Entitled to a Permanent Injunction as to Counts One, Two and Three of the Second Amended Complaint.

A permanent injunction is proper if a plaintiff establishes four elements: 1) actual

success on the merits; 2) the likelihood of irreparable injury unless the injunction issues; 3) the threatened injury to the movant outweighs the damage caused to the County; and, 4) the injunction would not be adverse to the public interest. *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1268 (11th Cir. 2006). Plaintiffs readily meet each part of this test.

Plaintiffs assert that they meet the **"actual success"** prong of the permanent injunction test based on the arguments delineated in Points One through Three, *supra*.

As to the issue of **irreparable injury**, it has been specifically noted by the Eleventh Circuit Court of Appeals that the loss of First Amendment freedoms *unquestionably* constitutes irreparable injury. *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006), *quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976) (emphasis added). The Eleventh Circuit has held that there is a finding of irreparable harm when First Amendment rights are violated on an ongoing basis because the plaintiffs cannot be made whole by money damages when their free speech is chilled. *KH Outdoor, LLC*, 458 F.3d at 1272, *citing Northeastern Fla. Chapter of the Ass'n of Gen. Contractors of America v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). As noted above, Miami-Dade County Code § 30-274 constitutes an impermissible prior restraint on free speech, and the ***Loitering Ordinance***, M-D County Code § 21-31.1 (b) is overbroad, and accordingly, both code sections infringe upon First Amendment-protected core expressive conduct. Additionally, the County's continued enforcement of the Loitering Ordinance, with its abrogation of due process rights guaranteed by the Fourteenth Amendment, is similarly an injury that is irreparable in nature to those subjected to the loss of their freedom by the enforcement of the ordinance.

As to the **balance of hardships**, Plaintiffs assert that the injury to them and to others similarly situated in South Florida is that rights protected by the First and Fourteenth Amendments will be abrogated by the two M-D Code sections requiring advance permitting and unbridled discretionary authority to public officials. Such an egregious violation of civil rights poses a grave hardship to Plaintiffs when seeking to convey their political and social justice messages. The Defendant is not similarly harmed. Miami-Dade County may need to add additional law enforcement officers to enhance security, but such a hardship is no greater than any other increase in security a municipality would face when large numbers of people gather together, such as at a music concert or sporting event. Defendants are still free to maintain the peace by enforcing existing criminal laws to keep the area secure. The granting of injunctive relief to Plaintiffs will not alter this prerogative. As a result, when balancing the hardships, it is clear that the greater injury is to the Plaintiffs who are faced with restrictions on First Amendment-protected activity and the loss of Fourteenth Amendment due process rights.

The Plaintiffs assert that the granting of their request for a Permanent Injunction as to both Code § 30-274 and Code § 21-31.1 (b) is in the **public interest** in the case *sub judice*. "[T]he public interest is always served when constitutional rights, especially free speech rights, are vindicated." *University Books & Videos, Inc. v. Metropolitan Dade County*, 33 F. Supp.2d 1364, 1374 (S.D. Fla. 1999). "The public has no interest in enforcing an unconstitutional ordinance." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d at 1272. Furthermore, it is not in the public interest to support a governmental entity's expenditure of time, effort and money in order to enforce an unconstitutional ordinance. *Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956,

959 (5th Cir. 1981). The public interest is clearly in favor of Plaintiffs and, thus, injunctive relief should be granted.

CONCLUSION

Miami-Dade County Code § 30-274 violates the First Amendment in several key respects. The ***Parades and Processions Ordinance*** is an unlawful prior restraint. The Code is overbroad, and lacks any standards or guidelines to check the unbridled discretion of County officials to use content-based factors to decide who may or may not "speak" in public places. The ***Loitering Ordinance***, M-D County Code § 21.31.1(b), is unconstitutionally vague, overbroad and an abrogation of liberty interests, and thereby violates First Amendment free speech and Fourteenth Amendment due process rights. For the reasons mentioned hereinabove, the enforcement of both code provisions should be declared unconstitutional and that final summary judgment should be granted.

DATED : March 17, 2008

s/Robert W. Ross, Jr.

Robert W. Ross, Jr. FBN 921660
ROSS LAW FIRM
8461 Lake Worth Road
Suite 426
Lake Worth, FL 33467

Mara Shlackman FBN 988618
LAW OFFICES OF MARA SHLACKMAN, P.L.
757 SW 17th St., PMB 309
Fort Lauderdale, FL 33316

Tel: (561) 251-4896
bravelaw@bellsouth.net

Tel: (954) 523-1131
mara@shlackmanlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 17, 2008, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served on March 17, 2008, on all counsel identified on the attached Service List, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel who are not authorized to receive electronically Notices of Electronic Filing.

s/Robert W. Ross, Jr.
Robert W. Ross, Jr., FBN 921660
ROSS LAW FIRM, P.L.
8461 Lake Worth Road, Suite 426
Lake Worth, FL 33467
Tel: (561) 251-4896
bravelaw@bellsouth.net

Service List

Bernie Pastor
Asst. County Attorney
Miami-Dade County
111 NW 1st St.
Suite 2810
Miami, FL 33128
Tel: (305) 375-1506
pastor@miamidade.gov