UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

TEXANS UNITING FOR REFORM AND FREEDOM Plaintiff	)	
v.	)	CIVIL ACTION NO. SA-07-CA-0859 FB
SAN ANTONIO BEXAR COUNTY METROPOLITAN PLANNING ORGANIZATION and SHEILA McNEIL Defendants	)	

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

COMES NOW Plaintiff Texans Uniting for Reform and Freedom (TURF) and files this Motion for Preliminary Injunction to preserve the status quo pending the resolution of this legal action against Defendants San Antonio Bexar County Metropolitan Planning Organization and Shelia McNeil ("Defendants"), and would respectfully show the Court the follows:

A. Statement of Facts

Plaintiff adopts by reference the contents of the Appendix of Facts hereto, containing the detailed Affidavits of SAMPO Board member Tommy Adkisson, SAMPO Board member David McQuade Leibowitz, and TURF chairman Terri Hall. In the interest of avoiding unnecessary length, Plaintiff does not restate the contents of the Appendix of Facts here.

B. Argument and Authorities

A preliminary injunction should be granted if a plaintiff can show (1) a substantial likelihood of success on the merits, (2) a substantial threat of immediate and irreparable harm for which there is no adequate remedy at law, (3) that greater injury will result from denying the preliminary injunction, and (4) that granting the preliminary injunction will not disserve the public interest.

Speaks v. Kruse, 445 F.3d 396, 399-400 (5th Cir. 2006); *Roho, Inc. v. Marquis*, 902 F.2d 356, 358 (5th Cir.1990); *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987); *Gresham Park Community Org. v. Howell,* 652 F.2d 1227, 1232 (5th Cir.1981); *Canal Auth. V. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974); See also *Ingram v. Ault*, 50 F.3d 898, 900 (11th Cir. 1995).

a. The Plaintiff Has a Substantial Likelihood of Success on the Merits.

TURF has a substantial likelihood of success on the merits. The evidence will show that the Defendants have engaged in, and will continue to engage in unless enjoined by the Court, a concerted campaign of denying to the members of TURF their fundamental right of access to the political process on the basis of the substance of their viewpoint, i.e., their opposition to converting free public highways into toll roads, in violation of TURF members' rights to Freedom of Speech under the First Amendment to the U.S. Constitution and to Equal Protection of the Law under the Fourteenth Amendment. The evidence will also show that the Defendants have engaged in, and will continue to engage in unless enjoined by the Court, the dilution, minimization, and devaluation of TURF members' precious rights to vote by permitting unelected members of the SAMPO Board to cast SAMPO Board votes equal in weight to the SAMPO Board votes of elected SAMPO Board members and thus to dilute and cancel out TURF members' votes for their elected representatives, in violation of TURF members' fundamental rights to Equal Protection of the Law.

1. <u>The Guarantee of Equal Protection of the Laws</u>

"Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996). In the landmark decision of *Romer v. Evans, supra,* the Supreme Court struck down on Equal Protection grounds an

amendment to the Colorado Constitution that prohibited the passage of any legislation designed to protect homosexuals from discrimination. Even though homosexuality is not a suspect classification, the Court held the amendment to be an unconstitutional deprivation of Equal Protection of the Laws because, "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself denial of equal protection in the most literal sense." *Romer*, 517 U.S. at 533. Even in the case of a non-suspect classification, the Court pointed out, a disadvantaging state action that is "born of animosity toward the class of persons affected" violates the guarantee of Equal Protection. *Romer*, 517 U.S. at 634. "'If the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare … desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" *Id.,* quoting *Department of Agriculture v. Moreno,* 413 U.S. 528 (1973). The Colorado constitutional amendment fell afoul of the guarantee of Equal Protection because "It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Romer v. Evans,* 517 U.S. at 635.

Query: May a state, consistent with the Equal Protection Clause, achieve through governmental conduct what it may not achieve through affirmative legislation? Of course not! The actions of a state are undertaken as much through the conduct of the state in its executive capacity as through the state's affirmative enactments of law in its legislative capacity. Essentially, the Equal Protection Clause requires that those similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); and selective enforcement of an otherwise valid law or regulation that is motivated by

"improper considerations, such as race, religion, or the desire to prevent the exercise of a constitutional right," *Bryan v. City of Madison*, 213 F.3d 267, 277 (5th Cir.2000), will violate the guarantee of equal protection of the laws. *Beeler v. Rounsavall*, 328 F.3d 813, 817 (5th Cir.2003). A legislative bill stating that opponents of toll roads cannot present motions in opposition to toll roads at SAMPO Board meetings, or a legislative bill stating that SAMPO Board members who oppose toll roads do not have the same right to have their motions heard as Board members who favor toll roads, or a bill stating that opponents of toll roads cannot look away from the Board chairman when giving public comments in public forum sections of Board meetings, would clearly be dead on arrival Constitutionally. By the same token, the SAMPO Board may not achieve the same results as such hypothetical, Constitutionally odious legislative bills through the conduct described in the Affidavits.

This lawsuit stands at an intersection of the First Amendment's protection of Freedom of Speech and the Fourteenth Amendment's guarantee of Equal Protection of the Laws. As such, the claims of TURF and its members stand at the highest levels of the invocation of core Constitutional rights. When unequal treatment under the law is motivated by the desire to suppress Free Speech, the essence of our Constitutional fabric is torn.

2. Viewpoint and Content Discrimination

It is axiomatic that the First Amendment protects the right of citizens to speak on the affairs of government. *Mills v. Alabama*, 384 U.S. 214, 218 (1966); see also *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)(holding that "speech concerning public affairs is more than self-expression, it is the essence of self-government"); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587(1980)(concurrence of Justice Brennan describing the First Amendment as embodying "more than a commitment to free expression and communicative

interchange for their owns sakes; it has a structural role to play in the securing and fostering of our republican system of self-government). Political speech is "at the core of what the First Amendment is designed to protect." *Virginia v. Black*, 538 U.S. 343, 365 (2003).

In *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943), the Court held unconstitutional a West Virginia law that required school students to salute the U.S. flag. Justice Jackson's opinion for the Court provided one of the most profound and eloquent descriptions of the First Amendment's role in American society ever penned: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette* at 642.

Another milestone in the Supreme Court's jurisprudence on the subject of viewpoint discrimination was *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503 (1969. *Tinker* involved viewpoint discrimination by a school district that sought to punish students for wearing black armbands to school to protest the Vietnam War. The students in *Tinker* were suspended based on the political viewpoint of their speech. The Court found that "[c]learly, the prohibition on expression of one particular opinion… is not constitutionally permissible." *Tinker*, 393 U.S. 511.

"The government must thus abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). See also *Chiu v. Plano Independent Sch. Dist.*, 260 F.3d 330, 350-51 (5th Cir.2001). "Government action that prohibits speech based on its viewpoint threatens core First Amendment values such as freedom of thought, freedom of

speech, fostering intellectual and spiritual growth, a robust exchange of ideas necessary to a properly functioning democracy, and the ability to self-govern." *Esperanza Peace and Justice Center v. City of San Antonio*, 316 F.Supp.2d 433, 445 (W.D.Tex.2001).

The Defendants cannot muster a compelling interest to justify limiting speech in the manner described in the Affidavits contained in this Motion's Appendix of Facts. At no time in MPO Board proceedings have proponents of toll roads been excluded from the process as have the opponents of toll roads. The sole reason for this discriminatory exclusion is the determination of the business interests who support the construction of toll roads for the profits they anticipate reaping, and their political allies on the SAMPO Board, to clamp down on the desires of the mass of voters-citizens who oppose converting free public highways into toll roads to have their voices and their aspirations heard and considered. This disparate treatment is neither narrowly tailored nor rational because "There is no significant state or public interest in curtailing debate or discussion" of an act of government. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981),

3. Whose rights are violated?

Fundamentally, this lawsuit and this Motion for Preliminary Injunction are about the rights of TURF's members ***as voters*** who aspire to participate in the processes of our republican democracy through votes that carry full and equal weight and meaning, and are not diluted, minimized, or devalued by arbitrary government action. In the landmark decision of *Baker v. Carr,* 369 U.S. 186, 208 (1962), the Supreme Court recognized that a citizen's right to cast a "vote free of arbitrary impairment by state action" is a justiciable right guaranteed by the Equal Protection Clause. When the voices and potential impact of these voters' elected representatives, such as for example, but by no means limited to, County

Commissioner Adkisson and State Representative Leibowitz, are cancelled out by the SAMPO Board votes of non-elected staff employees of TXDOT or the City of San Antonio or VIA Metro Transit Authority whose Board votes are given equal weight to the Board votes of the elected representatives who are accountable to citizens-voters, the general election votes of those citizens-voters for their elected representatives are unconstitutionally devalued. When the voices and potential impact of the citizens-voters' elected representatives are snuffed out by the arbitrary exclusions of motions they wish to present in SAMPO Board proceedings, the general election votes of the citizens-voters for their elected representatives are unconstitutionally devalued. When the political allies of the private business interests who seek to profit off the construction of toll roads through construction contracts or engineering contracts manipulate SAMPO Board meeting procedures so as to prevent full participation or full access for the elected representatives of citizens-voters because the pro-tolling interests are determined to obtain for themselves an antiseptic forum that minimizes and belittles the public impact of the citizens-voters' opposition to toll roads, the general election votes of the citizens-voters for their elected representatives are unconstitutionally devalued.

When the meaning of *Baker v. Carr* is viewed in juxtaposition to the meaning of *Romer v. Evans*, it becomes clear that the fundamental right of equal access to the political process, guaranteed by the Equal Protection of the Laws, is not confined to the beneficiaries of suspect classifications (as are protected statutorily by the Voting Rights Act of 1965 as amended). Permitting non-elected technical or ministerial staff to sit as voting members on the SAMPO Board and cancel the Board votes of the elected representatives of citizens-voters clearly dilutes the citizens-voters' general election votes for their elected representatives. This dilution serves no compelling state interest. The technical

expertise of staff employees can be easily harvested without permitting them to serve as voting members equal to the elected representatives. While there may be a dearth of prior existing case law directly on point, it is often the case in the history of Constitutional jurisprudence that Constitutional infirmities escape notice until the occurrence of ultimate excesses to which such infirmities lead. We submit that this case demonstrates the inevitable excesses and thus brings this particular Constitutional infirmity into focus at this time and place.

b. Plaintiff Will Suffer Irreparable Harm if a Preliminary Injunction is not granted.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Thus, the U.S. Court of Appeals for the Fifth Circuit has recognized that "[i]t is well settled that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981); see also *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996). Due to the wholesale evisceration of fundamental First Amendment and 14th Amendment rights, TURF and its members have suffered irreparable injury, and the facts presented in the Affidavits demonstrate the strong likelihood that a vote and significant final action will be taken on December 3 as the end result of a decision-making process that has been fundamentally dismissive of TURFs' members fundamental rights of access to the political process. We respectfully urge the Court to issue a preliminary injunction as specifically prayed-for below, so as to prevent the self-serving business interests and their political allies who have manipulated the processes from consummating their putsch on December 3 without resolution of the significant Constitutional questions presented by the Plaintiff.

C. Prayer for Relief

Plaintiff respectfully prays that the Court issue a Preliminary Injunction to preserve the status quo pending further deliberations and proceedings, by ordering the Defendants, their agents and representatives, and all persons acting in privity with them, to cease and desist from considering final action that would have the effect of approving the construction of toll roads at the SAMPO Board meeting scheduled for December 3, 2007; and further that the Court issue a Preliminary Injunction to preserve the last peaceable lawful status quo by ordering Defendant McNeil, her agents and representatives, and all persons acting in privity with her, to cease and desist from preventing any SAMPO Board member from offering for consideration any motion relating pro or con to the subject of toll roads, subject to every SAMPO Board member's obligation to submit agenda items sufficiently in advance of meetings to enable the timely posting of the agenda in accordance with the Texas Open Meetings Act.

Respectfully submitted,

DAVID VAN OS & ASSOCIATES P.C.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing was served upon Defendant's counsel through the Court's electronic filing system on November 19, 2007 as follows:

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