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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CENTRAL ALABAMA PRIDE, INC., an Alabama non-profit corporation,	)	
Plaintiff,	)	
vs.	)	Case No.: 2:08-cv-01533-KOB
LARRY LANGFORD, in his individual and official capacities as Mayor of the City of Birmingham,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Defendant, LARRY LANGFORD ("Mayor Langford), submits the following Memorandum of Law in Support of his Motion to Dismiss for Failure to State a Claim:

INTRODUCTION

Plaintiff has held a parade the past several years to celebrate gay pride week. This year the parade was held as in every other year. In fact, there is really no significant difference between the parade of 2008 and those of other years. Although personally opposed by Mayor Langford, the event nevertheless took take place without any interference. Plaintiff's supporters were able to march as they had done in previous years, and their banners were hung on city streets as they had in the past. The only real difference, and the one that is the basis for the Plaintiff's claims, is that Mayor Langford did not personally approve and celebrate Plaintiff's

cause in the way previous mayors had apparently done. Of course, there is no constitutional right to the Mayor's approval of Plaintiff's private agenda. Nor, by Plaintiff's own admission, is there any absolute right to have City workers hang Plaintiff's banners. In short, Plaintiff has not suffered any real and concrete harm; therefore, Plaintiff has failed plead any cause of action that would entitle it to relief in a court of law. Accordingly, the case should be dismissed.

STATEMENT OF FACTS

The following paragraphs, taken from both the Original and Amended Complaint, establish a lack of a claim. Where the statements are congruous from the first complaint to the present one, only one assertion will be made. However, in many places Plaintiff has added to its Original Complaint for the sole purpose of overcoming Mayor Langford's Original Motion to Dismiss. Many of the new claims are a complete about face from the former complaint, and therefore the new allegations should be taken with a grain of salt.

Plaintiff is an Alabama non-profit corporation and is exempt from the payment of taxes under the provisions of 26 U.S.C. § 501(c)(3). The Defendant is the mayor of the City of Birmingham. Each year from 1989 through 2007, the parade was given a permit, the mayor (initially, Richard Arrington and, following him, Bernard Kincaid) issued a proclamation in honor of the event and flags hung by city workers representing gay liberation festooned the parade route. The City has, over the years, hung flags or banners in support of events that take place in Birmingham. A couple of the entities and events that have used and otherwise participated in the banner forum is the City Stages music festival and the annual football game, the Magic City Classic. Mayor Langford was elected mayor of the City of Birmingham in

October 2007 and assumed the office on November 13 of that year. After initially refusing to give Plaintiff a parade permit, Mayor Langford changed his mind. **Mayor Langford agreed not to interfere with the parade**, so long as he did not have to sign the permit. Also he did not issue the proclamation that had always been issued in previous years.

It is at this stage where Plaintiff's Original and Amended Complaints take decidedly different approaches. In the Original Complaint, Plaintiff alleges, "No representation has ever been made to plaintiff's representatives that the hanging of its banners by city workers **would be a violation of any established city policy**." (Complaint ¶ 12) (Emphasis added) Not only does Plaintiff disavow any written policy in the Original Complaint, but that document never alleges that Mayor Langford's actions were a violation of any city custom or tradition. It was only after Mayor Langford's Original Motion to Dismiss that Plaintiff amended its complaint to add the custom and tradition charges. The Amended Complaint states, " . . . **as part of a custom and tradition** within the City that facilitates private expression by temporarily attaching entities' banners and flags recognizing private entities as well as events taking place within the City." (Amended Complaint ¶ 5) (Emphasis added) Perhaps more egregious is how Plaintiff's Amended Complaint completely contradicts the earlier statement regarding whether Mayor Langoford acted pursuant to a city policy. The Amended Complaint states, "Plaintiff alleges that Defendant's unilateral decision concerning the attachment of the banners to City utility poles, . . . **constitutes municipal policy**." (Amended Complaint ¶ 22) (Emphasis added) This is quite a turnaround from the Original Complaint. In fact, it is a complete one-eighty from the initial pleading. The only new information Plaintiff had between the Original and Amended Complaint

was Mayor Langford's first Motion to Dismiss. Therefore, it would be quite accurate to conclude that Plaintiff's new allegations are an attempt to overcome such a motion.

Not only did the initial complaint not allege a policy, custom, or tradition, but Plaintiff did not even request damages. Because of this, Mayor Langford's Original Motion to Dismiss alleged a lack of standing and particularized injury. Only after reading this document did Plaintiff amend its complaint to include damages. However, the inclusion of damages is a curious one. In the Amended Complaint, Plaintiff admits that it offered to pay the City for putting up the banners. The Complaint states, "Quinn **offered to have C.A.P. reimburse the City for any costs associated with having the banners attached** and **expressly offered to pay the City for twice the amount of time Defendant claimed would be required**." (Amended Complaint ¶ 18) (Emphasis added) It seems inequitable to offer to pay for services, and then turn around and demand reimbursement for them in a court of law. This is yet another example that Plaintiff is having to grasp at straws in order to overcome Mayor Langford's Motion to Dismiss.

Additionally, as set forth in the affidavit of Mayor Langford, Exhibit A to Defendant's Original Motion to Dismiss, it was Plaintiff itself that initially approached Mayor Langford and sought to involve him in this matter over which he has no actual authority. (This is contrary to both the Original and Amended Complaints which allege the Mayor unilaterally inserted himself into the matter. Original Complaint ¶ 10, Amended Complaint ¶ 14) Furthermore, it was Plaintiff that made a public issue of Mayor Langford's well-known views that do not agree with Plaintiff's private agenda. *See, e.g.*, "Gay Rights Activists Meet Resistance from Langford," www.**abc3340.com**/news/stories/0508/522789.html. Accordingly, it is undisputed that the parade did take place as scheduled on June 7, 2008.

SUMMARY OF ARGUMENT

Even though Plaintiff's request for a parade permit met some resistance, the parade went on as planned without interference from the Mayor. Although Mayor Langford did not issue a proclamation, the Birmingham City Council passed a resolution endorsing not only the parade but the entire week's activities regarding Gay Pride Week. Finally, Plaintiff was able to hang its banners and flags in the same way as all other years. Therefore, Plaintiff has not been deprived of any of its constitutional rights, and has been able to express itself as it so desired.

However, the court need not even delve into the merits of this case, because Mayor Langford is entitled to qualified immunity.

Accordingly, Plaintiff's action fails to satisfy the requirements of *Monell v. Department of Social Services of New York*, 436 U.S. 658, (1978), and its progeny. Under *Monell*, a plaintiff must show that the defendant acted in accordance with a policy or custom. Plaintiff here admitted in its Original Complaint that there is no such policy or custom under which Mayor Langford acted.[1] Again, it cannot be overstated that Plaintiff only added allegations of city policy after Mayor Langford filed his initial Motion to Dismiss. To come back now and say that there is, in fact, a city policy governing these situations is disingenuous at best. Therefore, the complaint should be dismissed..

Even if Plaintiff were able to cross these threshold hurdles, its causes of action would still fail. Mayor Langford's refusal to allow city employees to hang banners does not constitute

[1]Please see the "Statement of Facts" section above for actual language from the Original Complaint and Amended Complaint concerning this about face from Plaintiff.

viewpoint discrimination. The "banner forum" is not a designated public forum which would subject the Mayor's actions to strict scrutiny. Finally, Plaintiff's equal protection challenge fails because (a) the Mayor's actions were purely discretionary, and (b) Plaintiff did not suffer any loss cognizable under the law. Moreover, an equal protection claim requires that plaintiff be shown to be a member of a class; Plaintiff in essence posits a class of one, itself. But Plaintiff does not satisfy the narrow exception permitting class-of-one discrimination claims. Accordingly, Plaintiff's equal protection claim is without substance, and the complaint should be dismissed.[2]

ARGUMENT

I. PLAINTIFF'S COMPLAINT HAS NOT STATED A CLAIM THAT WOULD ENTITLE PLAINTIFF TO RELIEF AGAINST THE DEFENDANT.

This Court should dismiss Plaintiff's suit for failure to state a claim upon which relief could be granted. "A court may dismiss a claim when it is clear that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Fee v. Herndon*, 900 F.2d 804, 807 (5th Cir. 1990). When examining a complaint, the court "will accept all-well pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Doe v. Hillsboro Independent School Dist.*, 81 F.3d 1395, 1401 (5th Cir. 1996). While a motion to dismiss is analyzed on the

[2]In Mayor Langford's Original Motion to Dismiss, the Mayor stated that Plaintiff had no standing to bring this suit, since no particularized injury was alleged. As was mentioned above, Plaintiff amended its complaint to include damages. Mayor Langford asks that if this court finds that Plaintiff's damages claim to be fanciful, that it then determine whether Plaintiff does have standing. If Plaintiff's damages claim does fail, Plaintiff once again has no particularized injury which would give it standing, and the suit should be dismissed. *See also Hein v. Freedom From Religion Foundation*, __ U.S. __, 127 S.Ct. 2553 (2007).

pleadings alone, "documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central" to the underlying claim. *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004) (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2001)).

A. Mayor Langford is Entitled to Qualified Immunity.

Government officials are shielded from damage liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable official should have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "For executive officers in general, . . . qualified immunity represents the norm." *Id.* at 807. Qualified immunity is intended to protect from civil liability "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

This rule is driven by sound policy, and is based on "the general costs of subjecting officials to the risks of trial -- distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Id.* at 816. Government officials cannot be expected to determine the manner in which the law's gray areas may one day be clarified. *See Borucki v. Ryan*, 827 F.2d 836, 838 (1st Cir. 1987).

Although qualified immunity is considered an affirmative defense, once raised it is the plaintiff's burden to demonstrate that defendant's alleged error was clearly established. *Mitchell v. Forsyth*, 427 U.S. 511, 526 (1985). The issue is a question of law for the court. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam). Moreover, evidence concerning a defendant's subjective intent "is simply irrelevant." *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998). Nor

does an allegation of malice defeat an immunity defense if the defendant acted in an objectively reasonable manner. *Malley, supra,* 475 U.S. at 341.

Accordingly, Plaintiff has failed to plead a constitutional harm with specificity. The Supreme Court opined, "whether an official protected by qualified immunity may be help personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken."[3] *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Following this statement in *Anderson*, the Court looked at how this principle would be applied in a Due Process Clause scenario. *Id*. The Court indicated that the right to due process is a clearly established legal principle. Therefore, any action that violates the Clause, violates a clearly established right. The Court stated, "Much the same could be said of any other constitutional or statutory violation." *Id*. However, the Court held that "if the test of 'clearly established law' were to be applied at this level of generality, . . . **Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights**." *Id*. (Emphasis added) The Court concludes

[3]Courts often struggle to determine when a "new" legal concept is being applied or whether that rule is tethered to a clearly established right. Justice Harlan announced that the inquiry is, "to determine whether a particular decision has really announced a 'new' rule at all, or whether it has **simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law.**" Mackey v. United Staes, 410 U.S. 667, 695 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) (internal quotations omitted; emphasis added). In this instance, the constitutional wrong alleged by Plaintiff, is by no means closely analogous to well-established constitutional principles. Accordingly, Plaintiff has also failed to meet the "closely analogous" requirement, and the suit should be dismissed.

this principle by stating that case law establishes that "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id*. at 640.

In the present case, Plaintiff has only alleged a violation of an abstract right. Prohibiting city employees from hanging banners for an event, when there is no policy, custom or tradition to do so, cannot be said to have violated a "clearly established law." Reasonable officials could undoubtedly come to different conclusions on this issue. Therefore, it would be impossible for Mayor Langford to know that his actions were unconstitutional. Since the alleged violation is not a clearly established law, and Plaintiff has failed to allege any cause of action that would fall under this category, Mayor Langford has qualified immunity.

B. The Defendant Is Immune from Liability in His Official Capacity.

1. Actions Evidence Neither a Policy Nor a Custom of the Municipality of Birmingham.

As the Supreme Court has stated,

> A local government may not be sued under §1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Monell v. Department of Social Services of New York, 436 U.S. 658, 694 (1978). The Alabama Supreme Court paraphrased this standard when it held: "Stated differently, a municipality may be held liable under § 1983 only if 'action pursuant to official municipal policy of some nature

caused a constitutional tort.'" *Cremeens v. City of Montgomery*, 779 So.2d 1190, 1197 (Ala. 2000) (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 709 (1989)).

The Second Circuit Court of Appeals recently looked at this issue and held, "To prevail against a municipality on a §1983 claim, a plaintiff must demonstrate both an injury to a constitutionally protected right and that the injury 'was caused by a policy or custom of the municipality or by a municipal official responsible for establishing final policy.'" *Hartline v. Gallo*, 2008 WL 4489846, *6 (2nd Cir. 2008) (quoting *Skehan v. Village of Mamaroneck*, 465 F.3d 96, 108-09 (2nd Cir. 2006), overruled on other grounds, *Appel v. Spiridon*, 531 F.3d 138, 140 (2nd Cir. 2008)).[4] In this case, the Defendant's actions can in no way be characterized as upholding an official policy or custom of the municipality. Therefore, Mayor Langford is immune from liability and the Plaintiff's suit should be dismissed.

[4] Before even looking to whether there exists a policy or custom, the plaintiff must establish an injury to a constitutionally protected right.

a. The City of Birmingham does not have a policy concerning the hanging of banners for public parades.

According to Plaintiff's Original Complaint, the City of Birmingham does not have a policy directing the Mayor as to when banners may or may not be hung for various events in the city. (Complaint ¶ 12.) Therefore, under no set of facts could Mayor Langford be held liable for his actions pursuant to a written policy.

b. No custom has been created by the hanging of banners for other events.

"A custom is a practice that is so settled and permanent that it takes on the force of law." *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 489 (11th Cir. 1997). In this instance, the hanging of banners by city officials for certain events cannot be said to be a custom because it is not a practice so settled or permanent. Plaintiff alleges that city officials hang banners for city events such as the City Stages music festival and "Magic City Classic" football game among others.[5] (Complaint ¶¶ 6-7) However, Plaintiff does not claim with any certainty that city officials hang banners for ALL events, nor does Plaintiff assert any distinguishing characteristics on which the City might base a distinction between Plaintiff and others. Hanging banners for an event here and there in no way establishes a permanent custom that future mayors or other city officials must follow.

Not only must a custom be settled and permanent, but federal courts have held that, "to establish a . . . custom, it is generally necessary to show a persistent and wide-spread practice.

[5] The fact that the City Stages music festival may have been subsidized by the city or that the sponsors for the "Magic City Classic" are large for-profit corporations is immaterial. Events co-sponsored by the City are of a different kind than Plaintiff's private affair.

Moreover, actual or constructive knowledge of such customs must be attributed to the governing body of the municipality." *Depew v. City of St. Mary's*, 787 F.2d 1496, 1499 (11th Cir. 1986). Plaintiff here has failed to establish that the hanging of banners by City officials is a persistent and wide-spread practice, or that any such practice was known to Mayor Langford.

Plaintiff claims that its banners were hung for each parade from 1989-2007. (Complaint ¶ 5) However, the fact that banners were hung for a daily event once each year for a few years' running does not indicate that the City has a custom of doing so in all circumstances. The mayors who preceded Mayor Langford may have had many reasons for assisting the Plaintiff's parade in this way, just as Mayor Langford had many reasons for not permitting City workers to hang the banners in this instance. Accommodating one group in its request to have the city hang banners does not establish a persistent and wide-spread practice. Plaintiff has offered no evidence that former mayors, or the current Mayor, had a persistent practice of using city workers to hang banners for various events.

The Amended Complaint does make mention of a "banner forum." (Amended Complaint ¶¶ 6-10) This is clever nomenclature, but lacks substance in the argument. While the City's Traffic Engineering Department[6] has hung banners in the past, there is nothing in the Amended

[6]The devil is indeed in the details. Once again, Plaintiff has contradicted itself between the Original and Amended Complaints. In the first complaint, Plaintiff stated, "Applications for parade permits in Birmingham are routinely handled through the Birmingham Police Department." (Original Complaint ¶ 9). The Amended Complaint contradicts this statement and states, "Applications for parade permits in Birmingham are routinely handled through the Birmingham Department of Traffic Engineering." (Amended Complaint ¶ 13). While this may not seem like a big deal, it further underscores the fact that Plaintiff has not done its due diligence in filing the suit. There are way too many contradictions and inaccuracies to take Plaintiff at its word, and shatters its credibility to file such a suit.

Complaint that raises these few occurrences to the standard of a practice or custom which would then entitle Plaintiff to relief in a court of law. The mere fact that the poles have been used to hang banners in the past, and even have attachment posts that can hold flags or banners, does not mean the city created a forum where each and every organization is allowed to have its banners hung. To argue thus strains credulity.

Furthermore, as the *Depew* decision highlighted, the decision maker must have actual or constructive knowledge of that custom. *Depew*, 787 F.2d. at 1499. Looking only to the pleadings, Plaintiff has not alleged that Mayor Langford had actual or constructive knowledge of the supposed custom. While he may have known that banners were hung in the City from time to time, he may not have known that it was the City workers who hung them, or under what circumstances. Mayor Langford assumed office on November 13, 2007. He would only have had opportunity to learn of any such custom in the few months before Plaintiff approached him in May, 2008. The year 2008 would have been the first during his tenure as Mayor that he would have encountered Plaintiff and its parade.

There is nothing in the record to indicate that Mayor Langford would have, or could have, known of the custom before he was confronted by Plaintiff and its demands. The Magic City Classic game was held on October 25, 2007, almost a full month before he assumed the role of mayor. So, it is quite possible he would not have known who hung the banners for the event, and he would not know until the event was held again in October of this year. Likewise, the City Stages music festival is held the third weekend in June of every year. This event is weeks after

Plaintiff's annual parade. Therefore, these events are not proper comparisons to Plaintiff's parade.

Even if Mayor Langford knew that City workers had hung banners for Plaintiff in the past, this would not give him actual or constructive knowledge of a wide-spread custom of doing so for all the City's events. As stated earlier, mayors who preceded him may have hung the banners for certain reasons that can in no way imply an official custom of the City. Therefore, even if a custom did exist, which it clearly did not, Mayor Langford could not be said to have actual or constructive knowledge of that custom, and the complaint should be dismissed under *Monell*.

C. The Defendant Is Immune to Liability in His Individual Capacity.

The Plaintiff seeks to sue the Defendant in his individual capacity. The courts, both federal and state, have been wary of allowing suits against governmental actors in an individual capacity. The plaintiff in those cases must meet a high burden, and the Plaintiff in this case has failed to do so.

As a general rule the Fifth Circuit has held that, "when a plaintiff seeks damages under section 1983 for a discretionary action by an official . . . , who must exercise an exceedingly broad range of discretion in performing his official duties, the official should be entitled to qualified immunity upon a showing that he acted within the scope of his authority." *Douthit v. Jones*, 619 F.2d 527, 534 (5th Cir. 1980). It is undisputed that Mayor Langford is an official who must exercise a broad range of discretion in performing his duties. It is equally undisputed that the decisions that make up the basis of this amended complaint occurred while he was acting

in the scope of his authority. Once the defendant establishes these two things, the burden then shifts to the plaintiff to overcome the defendant's immunity by showing that the official did not act in good faith. *Id*. In order to show a lack of good faith, the Supreme Court has adopted a two part test.

In *Wood v. Strickland*, 420 U.S. 308 (1975), the Supreme Court laid out both an objective and subjective test for determining the individual liability of a government official in these types of situations. *Id*. at 322. The Court adopted the rule that an individual could be held personally liable for actions taken while discharging official duties only if " (1) (H)e knew or reasonably should have known that the action he took that the action he took within his sphere of official responsibility would violate the constitutional rights of the (individual) affected, or (2) if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the (individual). That is not to say that (officials) are 'charged with predicting the future course of constitutional law.'" *Familias Unidas v. Briscoe*, 619 F.2d 391, 403 (5th Cir. 1980), quoting *Wood*, 420 U.S. at 322.

1. Mayor Langford Neither Knew Nor Could Have Known That His Actions Would Violate the Plaintiff's Constitutional Rights, Because There is No Constitutional Right to Have a Banner Hung by City Workers.

There is no way that Mayor Langford could have known or should have known that denying the Plaintiff's request to have city workers hang their banners would violate the Plaintiff's constitutional rights. The threshold issue is whether there is a constitutional right to have banner's hung by city employees. If not, then Mayor Langford could not have violated a

constitutional right, and therefore, cannot be held personally liable. There is clearly no constitutional right to force city employees to hang banners for every and all festival that happens to take place within the confines of Birmingham's city limit. There is a constitutional right to freedom of association and free speech, but Mayor Langford did not infringe on any of these rights. The parade took place as planned and the banners were hung on the posts. The fact that the banners were not hung as long as the Plaintiff wanted does not equate to a deprivation of constitutional rights. Also, the Plaintiff's amended complaint makes no assertion that Mayor Langford has approved other requests to have city employees hang banners for certain events. The complaint only goes so far as to say that they are aware of other events in which banners have been hung. Mayor Langford has been mayor for over a year now, but the Plaintiff fails to plead any specific instances where the Mayor authorized city employees to hang banners. Therefore, according to the pleadings, it is not apparent that Mayor Langford has treated the Plaintiff any differently than other similarly situated organizations.

2. Mayor Langford's Action Did Not Involve Malicious Intent to Cause a Deprivation of a Constitutional Right, or Any Other Type of Injury to the Plaintiff.

The Plaintiff asserts that the actions of Mayor Langford were solely based on his distaste for the lifestyle choice of the Plaintiff. The Fifth Circuit has elaborated on what it takes to find malicious intent in these kinds of situations. The court held that the "Plaintiff may show by proof that an official either actually intended to do harm to the plaintiff, or took an action which, although not intended to do harm, was so likely to produce injury that the harm can be characterized as substantially certain to result." *Barker v. Norman*, 651 F.2d 1107, 1121 (5th Cir.

1981). The Plaintiff is unable to offer the proof necessary to overcome this burden. The actions of Mayor Langford did not harm the plaintiff and could not be characterized as such. The parade took place as originally planned. The banners were hung for the parade as in all other years. And the City Council passed a resolution in the absence of a mayoral proclamation. In essence, no harm was done to the Plaintiff. Because of the media that this issue attracted, the parade garnered much more publicity than if they were just to put out banners a week before the parade. Since Plaintiff cannot show proof that the Mayor's actions intended to cause harm or substantially did so, he cannot be said to have acted with malicious intent.

Therefore, Plaintiff has failed to meet its burden in order to overcome the Defendant's immunity. Plaintiff has not met either objective or subjective test which would pierce the Defendant's immunity.

3. The Alabama Supreme Court Demands That Mayor Langford be Immune From Monetary Damages in This Case.

The highest court in Alabama has made it abundantly clear that individuals in Mayor Langford's position are personally immune from monetary damages in suits such as this one. The Alabama Supreme court emphatically stated, "this Court has consistently held that a claim for monetary damages made against a constitutional officer in the officer's individual capacity is barred by State immunity whenever the acts that are the basis of the alleged liability were performed within the course and scope of the officer's employment." *Ex parte Davis*, 930 So.2d 497, 500-01 (Ala. 2005).

Coupling this legal principle with the others mentioned above, it is abundantly clear that Mayor Langford is entitled to qualified immunity. The Mayor has not violated a constitutional right; there is no policy or custom which governed the Mayor's decisions; he has not acted with malicious intent; and he cannot be sued for monetary damages in this suit. Therefore, Mayor Langford is immune in both his official and individual capacities and this lawsuit should be dismissed.

II. MAYOR LANGFORD HAS NOT ENGAGED IN VIEWPOINT DISCRIMINATION, AS HE HAS NOT ATTEMPTED TO REGULATE SPEECH.

Assuming Plaintiff could clear the Rule 12(b)(6) hurdles, its alleged causes of action are nonetheless without merit. Plaintiff's first cause of action is that Mayor Langford has engaged in viewpoint discrimination. The Supreme Court and several federal courts have spoken to this topic often, and the law concerning viewpoint discrimination is well-settled. The doctrine states that, "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 350-351 (5th Cir. 2001) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995)).

In order to state a claim for viewpoint discrimination, the governmental entity must have attempted to regulate speech. Mayor Langford has not sought to regulate speech. He has merely exercised his prerogative not to issue a mayoral proclamation or have City employees hang banners for the parade.[7] Indeed, Plaintiff admits that the Mayor "was not required to sign the

[7] Plaintiff's assertion that the Mayor is "the city's chief executive and final policy maker" is dead wrong. *See* Amended Complaint at ¶3. As the Mayor attests in his affidavit, the City

proclamation." *See* Amended Complaint at ¶25. As a matter of law, then, there could not have been any viewpoint discrimination in this refusal.

Had Mayor Langford truly engaged in viewpoint discrimination, he would have prohibited the parade from happening, refused any type of resolution to be issued, and forbidden both City officials and Plaintiff from hanging banners for the parade. However, the undisputed facts of the case show that the parade was held as planned, the City Council passed its own resolution endorsing the week's activities (with the Mayor's name on it, too), and the banners were hung for the parade. Thus, in the end, Plaintiff even obtained the very proclamation it had sought from the City, albeit from the City Council rather than the Mayor. But as the final policymaker in the City, the Council's resolution became, as Mayor Langford's affidavit attests, "the City's policy statement in support of their parade." *See* Ex. A at ¶10.

Additionally, any comments by Mayor Langford to the effect that he would not grant a permit for Plaintiff's parade, Compl. ¶9, are of no legal effect. Despite Plaintiff's unfounded assertion to the contrary, the unvarnished truth is that under the City's ordinances, the Mayor does not issue parade permits, the Traffic Engineering Department does. *See* Ex. A to Defendant's original motion at ¶¶6 and 7. Plaintiff's permit was in fact duly issued by the City's Traffic Engineering Department, and the parade was held without incident, as Plaintiff concedes.

Council, not the Mayor, is the final policymaker in Birmingham. *See* Affid. of Mayor Langford, Ex. A to Defendant's original motion to dismiss, at ¶8 (citing 1955 Ala. Act 452 as amended, Mayor Council Act, §3.07). Significantly, despite Plaintiff having been apprized of this fact before filing its amended complaint, it nevertheless failed to revise this demonstrably false allegation.

In other words, Plaintiff has disseminated its message just as it did in past years. No speech has been infringed by a governmental entity, and the threshold question in regard to viewpoint discrimination has not been satisfied. Therefore, Plaintiff's claim of viewpoint discrimination is without merit.

III. THE "BANNER FORUM" IS NOT A DESIGNATED PUBLIC FORUM, SO MAYOR LANGFORD'S ACTIONS NEED NOT PASS THE COMPELLING GOVERNMENT INTEREST TEST.

In the Amended Complaint, Plaintiff asserts that the flag poles that hold various banners have been transformed into a designated public forum. This assertion is incorrect. "Designated public fora . . . are created by purposeful government action." *Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666, 677 (1998). "**The government does not create a [designated] public forum by inaction or by permitting limited discourse**, but only by intentionally opening a nontraditional public forum for public discourse." *Id*. quoting *Cornelius v. NAACP Legal Defense & Ed. Fund. Inc.*, 473 U.S. 788, 802 (1985). (Emphasis added) Accordingly, "the government does not create a designated public forum when it does not more than reserve eligibility for access to the forum for a particular class of speakers, whose members must then, as individuals, obtain permission to use it." *Forbes*, 523 U.S. at 679. This last sentence handed down from the Supreme Court perfectly summarizes the case at hand. The City of Birmingham has allowed certain organizations or events to hang its banners on poles to advertise those events. This action alone, does not convert the "banner forum" into a designated public forum.

By looking at the pleadings, it is easy to discern which particular class of speakers the City has restricted the forum to - City sponsored events. The only two events listed in the

Amended Complaint, the City Stages Music Festival and the Magic City Classic football game, are both heavily sponsored by the City. The fact that Plaintiff has been able to hang its banners in the past does not turn the "banner forum" into a designated public forum. Plaintiff had to ask for permission to have the banners hung, and according to the legal precedent above, this requirement further proves that the "banner forum" is not a designated public forum. As the Supreme Court held, "the government retains the choice of whether to designate its property as a forum for specified classes of speakers."*Id*. at 680. The "banner forum" is an example where the City has exercised its discretion to not open up the forum to the general public.

Therefore, since the City has not opened up the forum, Mayor Langford's actions are not subjected to strict scrutiny or even a rational basis standard. Mayor Langford's refusal to have City employees hang Plaintiff's banners were perfectly constitutional.

IV. THE RATIONAL BASIS TEST IS INAPPLICABLE IN THIS SITUATION AS THE DEFENDANT HAS NOT ACTED PURSUANT TO LEGISLATION OR STATUTE.

Finally, Plaintiff argues that Mayor Langford has violated the Equal Protection Clause of the Fourteenth Amendment because there was no rational basis for his decisions. Plaintiff misunderstands the central tenets of the rational basis standard. The rational basis standard of review posits the most deferential standard in law:

> The first step in determining whether legislation survives rational-basis scrutiny is identifying a legitimate government purpose-a goal-which the enacting government body *could* have been pursuing. The *actual* motivations of the enacting governmental body are entirely irrelevant.... The second step of rational-basis scrutiny asks whether a rational basis exists for the enacting governmental body to believe that the legislation would further the hypothesized purpose. The proper inquiry is concerned with the *existence* of a conceivably rational basis, not

> whether that basis was actually considered by the legislative body. As long as reasons for the legislative classification may have been considered to be true, and the relationship between the classification and the goal is not so attenuated as to render the distinction arbitrary or irrational, the legislation survives rational-basis scrutiny.

United States v. Ferreira, 275 F.3d 1020, 1026 (11th Cir. 1992) (emphasis in original).

The preceding quotes underscore the problem that Plaintiff faces in bringing this suit. Mayor Langford was not acting pursuant to legislation or statute with respect to the actions complained of here. The determination whether to sign a proclamation and commission city workers to hang banners are purely discretionary acts on behalf of the Mayor. There is no right to have a proclamation signed, as Plaintiff candidly concedes. There is no right to have city workers hang your banners, either. In order to apply the rational basis review, the governmental entity must be acting in accordance with some form of statute or legislation. No such legislation or statute exists in this situation, and therefore Plaintiff's equal protection claim must fail.

The Mayor was simply exercising his discretion as to which proclamations to sign and when to commission city workers to hang banners. Thus, there was no government action or classification in the first instance. Moreover, Plaintiff has not alleged that Mayor Langford has signed every proclamation presented to him, or that he has commissioned City workers to hang banners for all events.[8] For each of these requests, Mayor Langford may use his discretion on

[8] Even though Plaintiff alleges in its complaint that all other events have banners hung by City officials, they cannot be certain of this fact. Just as one cannot tell how many lives have been saved because of the presence of a lighthouse, so it is also true that Plaintiff cannot know how many similar requests have been denied by the mayor since there would have been no outward consequences of that decision.

which ones to grant and which ones to deny. That discretion is part of the underlying nature of the Mayor's responsibilities and privilege. As for any decision to decline assistance to Plaintiff in hanging their banners, whatever may have been the Mayor's *actual* motivations, there are myriad legitimate reasons for such a decision, such as the desire to conserve limited City resources, the fact that Plaintiff made its request in an untimely manner, that other entities had made prior requests for the same time period, etc., etc. In short, rational basis review is easily satisfied here, and the Equal Protection claim must fail.

CONCLUSION

Plaintiff has failed to establish the most rudimentary element for proceeding in litigation. Plaintiff has failed to state a claim for which relief could be granted. Mayor Langford has qualified immunity, and therefore is not exposed to liability in either his official or individual capacity. Not only has Plaintiff come up short on the procedural tactics of the suit, but its claims are also without merit. For the foregoing reasons, Mayor Langford asks that this Court grant his Motion to Dismiss For Failure to State a Claim, and for such other and further relief to which he may be entitled.

Dated this 28th day of January, 2009.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2009, I have caused a copy of the foregoing Memorandum of Law in Support of Defendant's Motion to Dismiss to be electronically served on the following counsel of record:

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