



June 11, 2013

Via Facsimile/U.S. Mail/Email

Douglas Sloan, City Attorney
Fresno City Hall
2600 Fresno Street
Second Floor
Fresno, CA
93721-3600
Fax: 559-488-1084

Re: Marriage Equality USA request to hold rally

Dear Mr. Sloan:

It has come to our attention that the City of Fresno has denied Marriage Equality USA's request to hold a rally in front of City Hall on the day the United States Supreme Court decides the challenge to California's ban on marriage for same-sex couples, on the grounds that Marriage Equality is unable to predict the precise date that opinion will issue.¹ Although we appreciate the City's interest in having advance notice of such events, the United States Court of Appeals for the Ninth Circuit has repeatedly held that this interest must yield to the First Amendment right of the people of this nation to respond to unexpected or unpredictable events by holding demonstrations in public areas without providing such notice. Thus, although Cities may generally require permits for large events on public open spaces, the First Amendment demands that they "must provide some alternative for expression concerning fast-breaking events." *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1038 (9th Cir. 2009). Because denying a permit to Marriage Equality would violate this rule, we ask that you grant the requested permit.

¹ The Supreme Court, of course, does not usually provide notice of when it will issue specific decisions; all that is possible to say is that the opinion will issue before the end of June, and most likely on a Monday or Thursday.

MICHELLE A. WELSH, CHAIRPERSON | DENNIS MCNALLY, AJAY KRISHNAN, FARAH BRELVI, ALLEN ASCH, VICE CHAIRPERSONS | KENNETH J. SUGARMAN, SECRETARY/TREASURER
ABDI SOLTANI, EXECUTIVE DIRECTOR | CHERI BRYANT, DEVELOPMENT DIRECTOR | SHAYNA GELENDER, ORGANIZING & COMMUNITY ENGAGEMENT DIRECTOR | REBECCA FARMER, COMMUNICATIONS DIRECTOR
ALAN SCHLOSSER, LEGAL DIRECTOR | MARGARET C. CROSBY, ELIZABETH GILL, LINDA LYE, JULIA HARUMI MASS, LINNEA NELSON, MICHAEL RISHER, JORY STEELE, STAFF ATTORNEYS
PHYLLIDA BURLINGAME, ALLEN HOPPER, NATASHA MINSKER, NICOLÉ A. OZER, POLICY DIRECTORS | STEPHEN V. BOMSE, GENERAL COUNSEL



Background

As we understand it, Marriage Equality USA has held several rallies in front of Fresno City hall in the past, supporting the freedom to marry for same-sex couples. In late March of this year, Mr. Jason Scott of Marriage Equality USA began the process of obtaining a permit for a rally to occur on the day that the Court issues its opinion in *Hollingsworth v. Perry*, the case involving California's Proposition 8. After communicating with a number of staff in multiple departments by email and telephone, Mr. Scott received a letter from Assistant City Manager Renena Smith on June 5, informing him that a permit "will not be granted" because Scott had failed to specify the precise date and time of the planned event, citing Fresno Municipal Code § 14-2406(5). The letter stated that if Mr. Scott wanted to submit another application to have the event he could submit a revised application that included the date "a minimum of 3 weeks in advance" of the event. A copy of this letter is attached.

Marriage Equality USA would like to hold the rally from 6:00 to 8:00 in the evening, after most if not all City offices are closed. Because the Court usually publishes its decisions at 7:00 a.m., Pacific time, this would provide the City with approximately 11 hours of lead time to make any necessary preparations. Marriage Equality USA expects between 150 and 300 people to attend the rally, a number that will fit in the area in front of City Hall without interfering with vehicular or pedestrian traffic. Marriage Equality USA also wishes to use amplification. The Fresno rally is to be but one of the many rallies to be held all over the state and the nation on the day the Court issues its decision.

The First Amendment Protections for Spontaneous Political Speech

For close to 30 years the Ninth Circuit has struck-down local laws that require people to notify the government far in advance that they want to hold a parade or other expressive event as violating the First Amendment. *See, e.g., N.A.A.C.P., Western Region v. City of Richmond*, 743 F.2d 1346 (1984) (striking down 20-day requirement). As the court explained, speaking of parades and other such events:

Timing is of the essence in politics. When an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all. A delay of even a day or two may be intolerable when applied to political speech in which the element of timeliness may be important. Parades are public events. Participatory enthusiasm is vital to their success. The size of a crowd and its enthusiasm for a cause may generate sufficient passion to sway the undecided. Thus, simple delay may permanently vitiate the expressive content of a demonstration. A spontaneous parade expressing a viewpoint on

a topical issue will almost inevitably attract more participants and more press attention, and generate more emotion, than the same parade 20 days later. The later parade can never be the same. Where spontaneity is part of the message, dissemination delayed is dissemination denied.

Id. at 1356.

Most recently, the court invalidated a Long Beach ordinance that required groups that wanted to respond to breaking news by holding a rally or other assembly to provide 24 hours' notice to the city, on the grounds that "by requiring advance notice, the government outlaws spontaneous expression. Immediate speech can no longer respond to immediate issues." *LBAPN*, 574 F.3d at 1036-38. The Ninth Circuit specifically noted as a reason for striking the law down was that it applied not just to parades that could disrupt traffic, but also to large² "assemblies that take place on the lawn in front of a city hall" and other parks and open spaces in the city. *Id.* at 1037.

These same principles mean that the City cannot prohibit Marriage Equality USA from holding a rally in front of City Hall simply because it cannot predict exactly when the Supreme Court will issue its decision regarding Proposition 8. As an initial matter, by holding a rally to respond to a U.S. Supreme Court decision on a highly visible and often controversial topic, Marriage Equality USA wants to engage in "core First Amendment speech, critical to the functioning of our democratic system," a "type of speech that "rests on the highest rung of the hierarchy of First Amendment values." *Id.* at 1021. And the area in front of City Hall is a public forum under both the state and federal constitutions, a location that is "uniquely suitable for public gatherings and the expression of political or social opinion." *Id.* at 1022; see *Kuba v. I-A Agricultural Ass'n*, 387 F.3d 850 (9th Cir. 2004); *Prigmore v. City of Redding*, 211 Cal.App.4th 1322, 1339-1340 (2012). In fact, holding a political demonstration in front of a city hall has a special value that the First Amendment protects, because it is "the seat of authority" in a city. See *Galvin v. Hay*, 374 F.3d 739, 752 (9th Cir. 2004); see *In re Berry*, 68 Cal.2d 137, 154 (1968) ("public buildings ... are the very places where communication of the content of the [demonstrators'] grievances would be most effective").

Because Marriage Equality USA wants to engage in core political speech in a public forum, the City's requirement that it obtain any sort of permit bears "a heavy presumption against its constitutional validity." *LBAPN*, 574 F.3d at 1023. And,

² The Court invalidated the law Long Beach law even though it allowed groups of less than 75 people to hold such events without any advanced notice or permit. See *LBAPN*, 574 F.3d at 1037-38.

under these circumstances, the City's legitimate interests in obtaining advance notice of such an event cannot overcome that presumption. Marriage Equality USA has complied with all of the City's requirements, aside from the impossible one of providing the unknowable date of the Supreme Court's decision. By holding the event in the evening it will provide some 11 hours of notice to the City and will not interfere with the operations of City Hall during the workday.³ It is not asking that streets be closed or traffic redirected or that the City provide substantial services for the event. The planned rally is not so large as to create the types of serious sanitation or other concerns that could truly require days of advance notice. And I am informed that the rally organizers are more than happy to work with the City to ensure that the event goes as smoothly as possible.

Under *LBAPN*, Marriage Equality USA would have a right to hold such a rally in response to the Proposition 8 decision even if they had made no attempt to provide prior notice to the City that they wanted to do so. Instead, they have in good faith provided as much notice as they can, and have otherwise complied with all the City's normal rules for holding such events. We therefore ask that you work with Marriage Equality USA to allow them to hold their planned event from 6:00 to 8:00 on the day that the Supreme Court issues a decision in *Hollingsworth v. Perry*, and that you inform them (and me) of your decision in this matter not later than 5:00 on Thursday, June 13. I am of course happy to discuss the matter with you before then in an attempt to resolve this issue. I can be contacted at 415-621-2493 and at mrisher@aclunc.org.

Yours,



Michael T. Risher
Staff Attorney

Encl.

cc: Renena Smith, Assistant City Manager (email and fax)
Rae Duke (email only)

³ In addition, at this point in its term the Court issues almost all of its decisions on Mondays or Thursdays, which may allow some degree of advance planning in the days before the rally.



RENENA SMITH
Assistant City Manager

June 5, 2013

Jason Scott
7690 E. Herndon
Clovis, Ca. 93619

RE: RESERVATION INQUIRY OF FRESNO CITY HALL FRONT PLAZA FOR MARRIAGE EQUALITY U.S.A.

Dear Mr. Scott,

Thank you for your recent inquiry regarding Marriage Equality U.S.A.'s interest in, reserving the front plaza of City Hall. We show you have had the following communications with City staff. 1.) 4-8-13, you contacted City staff via phone and were assisted by Ms. Helen Rodriguez. Ms. Rodriguez proceeded to email you supporting documents along with the contact information for Ms. Rae Duke, City of Fresno Permits Division, explaining that you would need to obtain a Special Events Permit (SEP). 2.) 4-15-13, Ms. Rodriguez left a message on your voicemail attempting to ensure that you received the email. We do not show that you returned her call. 3.) 5-16-13, an email was received by City Council Districts (1 & 3), stating that you were unhappy due to your feeling that you had not received adequate assistance from City Hall staff.

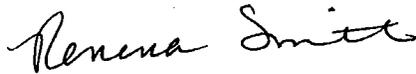
The City has reviewed your inquiry and determined that a SEP will not be granted per Section 14-2406, subsection (5) of the City of Fresno's SEP application. The regulations regarding the use of the Plaza at City Hall require that a date and estimated start and ending time for the event be provided at the time of initial inquiry and SEP application. This information is required as to ensure that adequate support from City Hall security, building facilities staff and the Fresno Police Department are provided for all events. Your current inquiry does not specify the date and duration times for your event, an SEP cannot be processed, nor can City Hall Plaza be reserved due to that reason.

If you are interested in submitting a revised SEP application with date and duration time for your event, please ensure that the completed application is submitted to Ms. Rae Duke a minimum of 3 weeks in advance for City staff review.

City Manager's Office • City of Fresno
2600 Fresno Street • Fresno, California 93721-3601
(559) 621-7774 • FAX (559) 621-7776 • Renena.Smith@fresno.gov

Should you need further assistance or have additional questions feel free to contact Ms. Rae Duke directly for assistance. She can be contacted at (559) 621-6875 or via email at Rae.Duke@Fresno.Gov.

Sincerely,

A handwritten signature in cursive script that reads "Renena Smith".

Renena Smith
Assistant City Manager

Attachment

c: Rae Duke, via email Rae.Duke@Fresno.Gov
Helen Rodriguez via email Helen.Rodriguez@Fresno.Gov
Jaymi Morgan via USPS 4545 E. Home, Fresno, Ca. 93703