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

Three Expo Events, L.L.C., *Plaintiff*, v. City of Dallas, et al., *Defendants*.	§ § § § § § § § § §	CIVIL ACTION NO. 3:16-CV-00513-D

BRIEF OF THE STATE OF TEXAS AND THE DALLAS CITIZENS COUNCIL AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTEREST OF *AMICI CURIAE*

Attorney General Ken Paxton, on behalf of the State of Texas, is committed to promoting economic development throughout the State. Essential to that goal is ensuring that governmental entities can manage their commercial enterprises without onerous and unnecessary restrictions.

The Dallas Citizens Council is a nonprofit organization comprising business and civic leaders in the Dallas region.[1] Its purpose is to provide leadership on public policy issues to improve the lives of Dallas citizens. The Citizens Council is committed to the long-term vitality and prosperity of the City of Dallas and wants to ensure that the City is able to appropriately manage important economic assets like the Kay Bailey Hutchison Convention Center.

Because the Convention Center is a commercial enterprise that is intended to promote economic development in Dallas, it is a nonpublic forum that the City is free to reasonably manage under applicable law. *Amici* hope to aid the Court in understanding how free speech doctrine accommodates the City's significant interests as proprietor of the Convention Center.

[1] Neither *amici* nor counsel received any monetary contributions intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part.

INTRODUCTION

This Court previously declined to treat the Kay Bailey Hutchison Convention Center (the "Convention Center") as a designated public forum because Plaintiff "d[id] not offer any evidence that, in creating or operating the Convention Center, the City has intentionally opened up a nontraditional forum for public discourse." *Three Expo Events, L.L.C. v. City of Dallas*, 182 F. Supp. 3d 614, 627 (N.D. Tex. 2016) (Fitzwater, J.). Nothing has changed since that determination. The evidence confirms that the Convention Center is not a designated public forum, and Plaintiff's alleged evidence to the contrary is irrelevant to the City's intent. As a result, this Court should grant Defendant's motion for summary judgment and deny Plaintiff's motion for summary judgment.

ARGUMENT

After extensive discovery, the relevant evidence confirms that the City created the Convention Center "with the primary objective of promoting and facilitating events and activities which generate economic benefits to the city of Dallas." Pl.'s App. 598. Because the City's "use of [the Convention Center] as a commercial enterprise [is] inconsistent with an intent to designate [it] as a public forum," *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 804 (1985), this Court should continue to treat the Convention Center as a limited or nonpublic forum.[2]

[2] Because the Convention Center is not a designated public forum, the constitutionality of the City's refusal to contract with Plaintiff depends on reasonableness and viewpoint neutrality. Plaintiff has not challenged this Court's earlier conclusion that the City had reasonable and viewpoint-neutral reasons for refusing to host Plaintiff's event. *Three Expo Events*, 182 F. Supp. 3d at 628–32; *see also* Br. *Amici Curiae* 8–9.

I. The Evidence Confirms that the Convention Center Is a Commercial Enterprise to Which the City Offers Selective Access, Not a Designated Public Forum

The City operates the Convention Center as a commercial enterprise, and commercial purposes are inconsistent with the intent required to create a designated public forum. Br. *Amici Curiae* 3–5. Now, with the benefit of discovery, *amici* have identified two additional types of evidence confirming that the Convention Center is a commercial enterprise. First, direct evidence of the City's intent shows that the City wanted the Convention Center to serve as a commercial enterprise. Second, other undisputed evidence demonstrates that the City allows only selective, not general, access to the Convention Center.

A. Direct Evidence of the City's Intent Shows that the Convention Center Is Not a Designated Public Forum

"[T]he City's policy and practice has been to use the Convention Center as an economic engine to promote economic growth and vibrancy in Dallas." Pl.'s App. 284 (interrogatory response). The City's official Scheduling Policy explains that the Convention Center's twin purposes are commercial in nature:

> The facility was developed with the primary objective of promoting and facilitating events and activities *which generate economic benefits* to the city of Dallas. In addition, the Dallas Convention Center has a secondary objective of providing services and facilities to respond to the needs of local organizations *which promote business* and generally enhance the quality of life for the community it services.

Pl.'s App. 598 (emphases added). Both of these purposes—promoting activities that "generate economic benefits" and providing services that "respond to the needs of local

organizations" that "promote business"—boil down to improving the economic vitality of the City.

This direct evidence of the City's commercial intent bolsters both the City budget's description of the Convention Center as an "economic engine" and the City Council's focus on the Convention Center's economic impact. *Three Expo Events*, 182 F. Supp. 3d at 625 n.12; Br. *Amici Curiae* 4–5.

Indeed, Plaintiff's own evidence demonstrates that the Convention Center's core purpose is commercial. Through its member/director Jeffrey Handy, Plaintiff declared that the Convention Center's sales coordinator initially expressed interest in hosting Plaintiff's event because it represented "an untapped market for [the Convention Center]" that "potentially could *lead to good revenue*." Pl.'s App. 13, 15 (quoting Pl.'s App. 46) (emphasis added). Similarly, Plaintiff notes that Mayor Rawlings opposed hosting Plaintiff's event in his capacity "as the City's 'chief brand officer.'" Pl.'s Br. 8–9 (explaining that the mayor "did not believe Three Expo's event was good for the City's brand"). That City officials evaluated Plaintiff's event in business terms underscores that the Convention Center is a commercial asset.

B. The City Allows Only Selective Access to the Convention Center

As this Court recognized, when the government allows only "selective access" rather than "general access" to a property, it "indicates that the property is a nonpublic forum." *Three Expo Events*, 182 F. Supp. 3d at 627 n.14. The Supreme Court has explained the difference between general access and selective access:

> On one hand, the government creates a designated public forum when it makes its property generally available to a certain class of speakers, as the university made its facilities generally available to student groups in *Widmar*. On the other hand, the government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, "obtain permission," to use it.

Ark. Educ. Tel. Comm'n v. Forbes, 523 U.S. 666, 679 (1998) (citation omitted).

In this case, the City limits access to the Convention Center through an application process by which would-be users of the Convention Center "obtain permission" from the City. *See Three Expo Events*, 182 F. Supp. 3d at 628 (noting the lack of evidence "that members of the public who wish to use Convention Center space can do so without first obtaining the City's permission"). Even Plaintiff acknowledges that there are procedures "for requesting access to and obtaining permission to use and occupy space in the Convention Center." Pl.'s App. 282 (interrogatories asking for descriptions of those procedures).

Through that application process, the City denies use of the Convention Center for certain events altogether. Pl.'s App. 280–81. Moreover, the City refuses to host other events at certain times —despite the capacity to do so—because "the Convention Center perceives [them] as being *inconsistent with* [another booked event] or as being *in competition with* [another booked event]." Pl.'s App. 281 (emphases added). Decisions about incompatibility and competition—which depend on an event's content—are inconsistent with a wide-open "forum for public discourse." *Cornelius*, 473 U.S. at 802.

But those decisions exemplify the kind of discretionary, non-ministerial exercise of selective access that is characteristic of commercial enterprise.[3]

II. Plaintiff Has Not Identified Any Relevant Evidence Suggesting that the Convention Center Is a Designated Public Forum

In denying Plaintiff's motion for a preliminary injunction, this Court concluded that Plaintiff had "not offer[ed] any evidence that, in creating or operating the Convention Center, the City has intentionally opened up a nontraditional forum for public discourse." *Three Expo Events*, 182 F. Supp. 3d at 627. That remains true.

A. Erroneous Legal Conclusions from Lay Witnesses Are Not Evidence

Plaintiff relies on evidence that some City officials occasionally reached mistaken legal conclusions about how the First Amendment applies to the Convention Center. *See, e.g.*, Pl.'s Br. 3–4, 19. Those conclusions do not affect this Court's inquiry for two reasons. First, legal conclusions are not evidence that can support (or defeat) summary judgment. Second, even if the Court were inclined to consider these conclusions, they would be unreliable because they contradict both established precedent and each other.

The Fifth Circuit and this Court are clear that mere legal conclusions are not admissible in evidence. *See Snap-Drape, Inc. v. C.I.R.*, 98 F.3d 194, 198 (5th Cir. 1996) (affirming the exclusion of expert reports "consisting of nothing more than legal arguments"); *Texas Peace Officers Ass'n v. City of Dallas*, 58 F.3d 635, 1995 WL 370733,

[3] This record of selective access is much stronger than the record on which *Cornelius* ruled that the plaintiffs had not presented sufficient evidence of intent to create a designated public forum. *Cornelius*, 473 U.S. at 804 ("Although the record does not show how many organizations have been denied permission throughout the 24-year history of the CFC, there is no evidence suggesting that the granting of the requisite permission is merely ministerial.").

at *1 (5th Cir. May 31, 1995) (per curiam) (affirming the exclusion of testimony about whether First Amendment rights were violated); *Alldread v. City of Grenada*, 988 F.2d 1425, 1436 (5th Cir. 1993) (affirming the exclusion of testimony that would have constituted "inadmissible *legal* conclusions"); *AHF Cmty. Dev., LLC v. City of Dallas*, 633 F. Supp. 2d 287, 304 (N.D. Tex. 2009) (Fitzwater, J.) (granting summary judgment for defendants because "the unadorned legal conclusion of an expert that a party has established a prima facie case of disparate impact discrimination is not admissible"); *Gibson v. Liberty Mut. Grp.*, No. 3:02-cv-2306-D, 2004 WL 942280, at *3 (N.D. Tex. Apr. 30, 2004) (Fitzwater, J.) (striking part of the plaintiff's affidavit and granting summary judgment to the defendant because the "assertion that Harris lacked legal capacity is an inadmissible legal conclusion from a lay witness").

The legal conclusions that Plaintiff cites are particularly unreliable. For example, Plaintiff highlights one email suggesting the Convention Center is a "*traditional* public forum"—a proposition this Court has rejected, consistent with the overwhelming weight of authority on that point. *Contrast* App. 620 (attaching a document entitled "The Convention Center is a Traditional Public Forum[1].docx"), *with Three Expo Events*, 182 F. Supp. 3d at 626 ("It is indisputable that the Convention Center is *not* a traditional public forum.").

Similarly, Plaintiff cites an email asserting that content discrimination is prohibited in a limited public forum—but again, the law is to the contrary. *Contrast* Pl.'s App. 628 (email from a Convention Center employee claiming that "[t]he City of Dallas cannot deny the use of a limited public forum strictly based on the content of the user's expression"),

with Three Expo Events, 182 F. Supp. 3d at 631 ("[W]here the forum is limited or nonpublic, a *content*-based restriction on speech is permitted as long as it is designed to confine the forum to the limited and legitimate purposes for which it was created.").[4]

Both of those emails imply that denying access to the Convention Center would constitute an unconstitutional prior restraint. Pl.'s App. 622, 628. But as this Court has explained, "[p]rior restraints in a nonpublic forum . . . have been upheld as long as they were reasonable and viewpoint neutral." *Three Expo Events*, 182 F. Supp. 3d at 632 n.23. Moreover, Plaintiff's sources contradict each other. While one views the Convention Center as a traditional public forum, Pl.'s App. 620, the other treats it as a limited public forum. Pl.'s App. 628. Interestingly, neither adopts Plaintiff's position that the Convention Center is a *designated* public forum.

B. That the Convention Center Has Hosted Diverse Events Does Not Undermine Its Commercial Interests

Contrary to Plaintiff's argument, Pl.'s Br. 23–29, that the Convention Center hosts a diverse array of events is insufficient to transform the Convention Center into a designated public forum. Rather, only when the diversity of past events *contradicts* the government's asserted purpose in creating a forum does that diversity affect the

[4] Plaintiff also points to Ronald King's statement that the Convention Center "can't discriminate based on content." Pl.'s Br. 19 (citing Pl.'s App. 382, 577). Such statements evidence an erroneous understanding of the law and legal terminology; they are not factual descriptions of City policy. After all, no one disputes that the Convention Center necessarily considers the content of proposed events when it refuses to "cross-book events which the Convention Center perceives as being inconsistent with one another or as being in competition with one another." Pl.'s App. 281. Moreover, Mr. King does not have the authority to create official policy for the City. *See infra* Part II.C.

determination of forum status. Here, Plaintiff does not even argue that past events were inconsistent with the City's commercial purpose.

The City's intent is the touchstone of this public forum analysis. *See Cornelius*, 473 U.S. at 802; Br. *Amici Curiae* 3. The City's official statements reveal a commercial intent for the Convention Center, not the intent to create a designated public forum. *See supra* Part I.A. Such governmental statements are often dispositive of governmental intent, but "on occasion," courts will disbelieve a government's "bare statement of intent" if that statement is "overcome" by "consistent practice" to the contrary. *Stewart v. D.C. Armory Bd.*, 863 F.2d 1013, 1017 (D.C. Cir. 1988) ("A number of forum cases emphasize the importance of these objective indicia of intent and the fact that consistent practice can on occasion overcome a bare statement of intent to the contrary."); *see also Paulsen v. Cty. of Nassau*, 925 F.2d 65, 70 (2d Cir. 1991) ("Objective indicia of intent to create a public forum, combined with a history of consistent practice, can overcome a bare statement of contrary purpose.").

The cases that Plaintiff cites do not establish that diversity of events *ipso facto* creates a designated public forum. Pl.'s Br. 23. For example, *Concerned Women for America, Inc. v. Lafayette County* merely affirmed the district court's finding that a public library, which claimed to restrict access based on its educational and artistic mission, created a designated public forum "by opening up in the past to groups 'hav[ing] little to do with the Library's educational and artistic mission.'" 883 F.2d 32, 34 (5th Cir. 1989).[5]

[5] *See also Concerned Women for Am. Educ. & Legal Def. Found., Inc. (CWA) v. Lafayette Cty. & Oxford Pub. Library*, 699 F. Supp. 95, 97–98 (N.D. Miss. 1988) (recognizing that "[t]he

Similarly, *Gregoire v. Centennial School District* simply recognized that "the breadth of access granted by" a school district "undercuts [its] contention that it has granted access only to those groups compatible with the school's educational mission." 907 F.2d 1366, 1374 (3d Cir. 1990). "[I]n reality, [the school district had] opened its doors to those groups substantially outside what is commonly thought of as the educational mission of the school." *Id.* at 1375

In this case, Plaintiff has no evidence that previous Convention Center events were inconsistent with the City's commercial interests. Indeed, it does not even assert that there was any inconsistency. In the absence of such a conflict, past events provide no reason to treat the Convention Center as a designated public forum.

C. Evidence of Non-Policymakers' Intent Is Not Evidence of the City's Intent

"*Government intent* with regard to the forum is the critical starting point for" public forum analysis. *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 346 (5th Cir. 2001) (emphasis added). For that inquiry, Courts "look[] to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius*, 473 U.S. at 802. In this case, whether the Convention Center is a designated public forum centers on the City's intent, and therefore the City's "policy and practice." *See Three Expo Events*, 182 F. Supp. 3d at 627.

Library could restrict access to the auditorium by reasonably classifying those groups who used it or by limiting the discussion in the auditorium to correspond with the library's mission" but holding that it had not), *aff'd*, 883 F.2d 32 (5th Cir. 1989).

As a result, evidence of the City's policy and practice must pertain to actions taken by officials empowered to establish the City's official policy. *See Paulsen*, 925 F.2d at 70.

Municipal liability under Section 1983 similarly requires identification of a municipality's "policy or practice." *Burge v. St. Tammany Parish*, 336 F.3d 363, 369–70 (5th Cir. 2003); *see also Lawson v. Dallas Cty.*, 286 F.3d 257, 263 (5th Cir. 2002) (requiring "an official policy, practice, or custom"). In that context, courts require that an "official policy" must be "promulgated by the municipality's policymaker"—that is, an official empowered by state law to make policy. *James v. Harris Cty.*, 577 F.3d 612, 617 (5th Cir. 2009). However, only certain high-ranking officials qualify as policymakers:

> [P]olicymaking authority is more than discretion, and it is far more than the final say-so, as a matter of practice, on what water main will be replaced today and whether a building meets city construction standards. City policymakers not only govern conduct; they decide the goals for a particular city function and devise the means of achieving those goals. *Policymakers act in the place of the governing body in the area of their responsibility*; they are not supervised except as to the totality of their performance.

Bennett v. City of Slidell, 728 F.2d 762, 769 (5th Cir. 1984) (emphasis added). Thus, a policymaker must be "subject only to the power of the governing body to control finances and to discharge or curtail the authority of the agent or board." *Id.*

That same principle applies with equal force here. In the context of municipal liability, the only relevant policies are those of the municipality, and only policymakers have the power under state law to establish such policies. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). In the context of forum analysis, the only relevant policies are those of the municipality, and—for the same state-law reasons—only policymakers can establish such policies. Thus, this Court should similarly limit its analysis to policies that

are promulgated by policymakers. *See Paulsen*, 925 F.2d at 70 ("It is not Facility Management's gloss on municipal aims, however, that guides our inquiry. It is the intent of the controlling government body which aids our determination.").[6]

Ignoring these background principles, Plaintiff relies on deposition testimony from non-policymaking employees within the Convention and Events Services Department. Pl.'s Br. 3–8, 14, 18–20, 22–23, 27–35 (citing deposition testimony of John Johnson and Ronald King). But this testimony does not establish the intent of *the City*. At most, it establishes only the intent of those employees, who do not qualify as policymakers.

The City's organization chart confirms this point: The Convention and Event Services Department reports to an Assistant City Manager, who reports to the City Manager, who reports to the City Council.[7] The record further reflects that Convention Center employees—consistent with that chain of command—recognize that the City Council is ultimately in charge of City policy. Pl.'s App. 591 (Johnson Declaration) ("The Convention Center never received permission to issue a proposed contract to Mr. Handy for an event to be held in 2016.").

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[6] Indeed, this case is not just analogous to a municipal liability case under Section 1983; it is such a case. *See Three Expo Events*, 182 F. Supp. 3d at 620. Although *amici* do not dispute that the challenged City Council resolution is an official City policy, Plaintiff's theory of the City's liability relies not only on a City policy excluding it from the Convention Center (*i.e.*, the resolution), but also on a purported City policy designating the Convention Center as a public forum. Pl.'s Br. 14–36. For this additional reason, the Court should limit its public forum analysis to the intent of policymakers.

[7] City of Dallas, Comprehensive Annual Financial Report for the Fiscal Year Ended September 30, 2015, xviii, *available at* http://financialtransparency.dallascityhall.com/content/cafr_fy2015.pdf.

Indeed, the very ordinance at issue announces that "the *City Council directs* the City Manager to not enter into a contract with Three Expo Events, LLC, for the lease of the Dallas Convention Center." Pl.'s App. 1 (emphasis added). On its face, the ordinance confirms two important propositions. First, the City Council is empowered to give "direct[ion]" on questions concerning the Convention Center. Second, the City Manager can—and sometimes does—control contracting for the Convention Center, even if the Convention and Event Services Department often handles those matters day-to-day. Because employees within the Convention and Event Services Department are subordinate to the City Council and the City Manager in determining both overall goals and individual contracts, Plaintiff cannot show that those employees are "subject only to the power of the governing body to control finances and to discharge or curtail the authority of the agent or board." *Bennett*, 728 F.2d at 769. Consequently, they are not policymakers.[8]

Any rules established by non-policymakers do not represent City policy. The intent of non-policymakers does not establish the City's intent. Plaintiff's purported evidence is thus irrelevant.

D. The Physical Capacity of the Convention Center Remains Irrelevant

Like Plaintiff's motion for a preliminary injunction, Plaintiff's motion for summary judgment emphasizes the physical size and capacity of the Convention Center. *See* Pl.'s

[8] That Convention Center officials do not have policymaking authority is not surprising. Even higher-ranking City officials often do not qualify as policymakers. *See Bolton v. City of Dallas*, 541 F.3d 545, 551 (5th Cir. 2008) (holding that the Dallas City Manager was not "the final policymaker with respect to his decision to terminate [the plaintiff] and municipal liability cannot attach to that decision"); *Cox v. City of Dallas*, No. 3:98-cv-1763, 2004 WL 2108253, at *8 (N.D. Tex. Sept. 22, 2004) (ruling that the City Manager and the City Attorney are not policymakers for zoning enforcement), *aff'd*, 430 F.3d 734 (5th Cir. 2005).

Br. 18, 34–35. This Court has rejected the relevance of such evidence. "The capacity of the Convention Center to host an event such as Exxxotica, however, does not establish, or even necessarily support, the premise that the City has designated the Convention Center to be the functional equivalent of a quintessential public forum." *Three Expo Events*, 182 F. Supp. 3d at 627. Plaintiff makes no argument for revisiting that conclusion, and *amici* continue to support this Court's reasoning. Br. *Amici Curiae* 6.

CONCLUSION

All of the relevant record evidence confirms this Court's initial ruling: The Convention Center is not a designated public forum. For that reason, this Court should rule that the First Amendment does not require the City to host Plaintiff's proposed event.

Dated: March 3, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2017, the foregoing document was served via electronic filing on all counsel of record in this case.

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