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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

	)	CASE NO.: CV 03-6288 ABC (JTLx)
TELEMUNDO OF LOS ANGELES, et	)	
al.,	)	FINDINGS OF FACT AND CONCLUSIONS
	)	OF LAW IN SUPPORT OF PRELIMINARY
Plaintiffs,	)	INJUNCTION GRANTED TO PLAINTIFFS
	)	
vs.	)	PRELIMINARY INJUNCTION
	)	
THE CITY OF LOS ANGELES, et	)	
al.,	)	
	)	
Defendants.	)	
	)	

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Plaintiffs' Application for a Preliminary Injunction (the "Application") came on regularly for hearing before this Court on September 10, 2003. After reviewing the materials submitted by the parties, argument of counsel, and the case file, the Court hereby makes the following findings of fact and conclusions of law:

**I. FINDINGS OF FACT**

1. On September 15, 2003, the City of Los Angeles is scheduled to hold an official ceremony and celebration at City Hall Plaza to commemorate the 193rd anniversary of the beginning of the Mexican War of Independence against colonial Spain, known as the

1 tradition of "El Grito" (The Cry). See Declaration of Monica Gil  
2 ("Gil Decl.") ¶ 2; Ex Parte Application, Exh. B.

3 2. The El Grito ceremony commemorates a Mexican tradition that dates  
4 back to 1810, when Father Miguel Hidalgo y Costilla gave the cry  
5 that initiated the events that culminated in the war for  
6 independence from Spain. Id.

7 3. Univision Television Group, Inc., d.b.a. KMEX-TV ("KMEX")  
8 originated the concept of the celebration and has produced and  
9 broadcast the celebration exclusively for the past 22 years. See  
10 Declaration of Christina Sanchez Camino ("Camino Decl.") ¶ 7.

11 4. In planning each year's celebration, KMEX has worked with the  
12 Comite Mexicano Civico Patriotico ("Comite"), a private civic  
13 organization, the Mexican Consulate, the City of Los Angeles, and  
14 interested members of the Los Angeles City Council. See KMEX  
15 Opp'n at 1:18-21; Camino Decl., Exh. E.; Gil Decl, Exh. B.

16 5. The El Grito celebration is scheduled to begin with a live  
17 concert given by Latin performers, and will culminate with an  
18 official ceremony on the steps of City Hall, featuring a  
19 reenactment of the historic cry by the Los Angeles Mexican Consul  
20 General and involving appearances by the Mayor, the City  
21 Attorney, Councilmember Alex Padilla and other City officials.  
22 See Gil Decl. ¶ 2.

23 6. The celebration and ceremony will last one hour and will be  
24 broadcast nationwide on KMEX's affiliated network, Univision.  
25 See Camino Decl. ¶ 12.

26 7. The broadcast can be divided into two portions: the first 45  
27 minutes will be purely entertainment and the last 15 minutes will  
28 comprise the actual reenactment of El Grito De Delores. Id. ¶

1 13.

2 8. Because of scheduling conflicts, KMEX will delay its broadcast by  
3 one hour. Id.

4 9. KMEX intends to provide news outlets access to the same video  
5 feed of the reenactment that it is sending to its affiliated  
6 networks. That feed will be distributed by Telco line and will  
7 be clean of any logos, network or station branding, or other  
8 advertising. Id. ¶ 16.

9 10. KMEX has placed certain common restrictions on use of the pool  
10 feed. Specifically, because KMEX's affiliated networks must  
11 broadcast the celebration on one-hour tape delay, no news  
12 organization may "scoop" KMEX's affiliated networks.  
13 Simultaneous broadcasting is permitted. Id.

14 11. For the past four months, Plaintiffs Telemundo of Los Angeles,  
15 Inc. and Estrella Communications, Inc. (collectively,  
16 "Telemundo") have attempted to secure from the City equal access  
17 to the El Grito ceremony for its journalists and news  
18 technicians. See Gil Decl. ¶ 5.

19 12. Telemundo's Director of Public Affairs, Monica Gil, called City  
20 Council President Padilla's office in May 2003, seeking equal  
21 access to El Grito. His staff was unwilling to talk about El  
22 Grito and directed Ms. Gil to other staff members who did not  
23 return her calls. In June, one of Council President Padilla's  
24 staff members told Ms. Gil that she would have to wait until the  
25 new council members were seated in July 2003 to discuss  
26 Telemundo's participation in El Grito. Id.

27 13. Ms. Gil called Council President Padilla's office on July 1, 2003  
28 to follow up. Id.

- 1 14. On July 10, 2003, Ms. Gil heard back from Council President  
2 Padilla's staff via electronic mail, but the response did not  
3 address her request to participate in the El Grito production  
4 meetings. Id. ¶ 6.
- 5 15. On July 21, 2003, Mr. Abud and Ms. Madison of Telemundo sent a  
6 letter to Council President Padilla stating that Telemundo wanted  
7 to participate in the El Grito ceremony on equal footing with  
8 Univision. Id. ¶ 7, Exh. A.
- 9 16. On August 1, 2003, Council President Padilla responded by letter  
10 stating that such participation would not be possible because the  
11 City had "partnered" with Univision, and Univision had a  
12 financial interest in participating in the event with "exclusive  
13 rights to broadcast from the stage." Id., Exh. B.
- 14 17. On August 6, 2003, Paula Madision, Manuel Abud, James Lichtman  
15 and Ms. Gil met with Council President Padilla, Los Angeles City  
16 Attorney Rocky Delgadillo, and members of their staffs to discuss  
17 the El Grito celebration. Id.
- 18 18. Throughout July and August 2003, Ms. Gil continued to call  
19 Council President Padilla's office approximately three times each  
20 week to discuss access, but his staff members did not return her  
21 calls. Id.
- 22 19. A July 8, 2003 letter from Mayor Hahn states that the El Grito  
23 event is part of the City's Latino Heritage Month 2003, and is  
24 being "organized by Council President Alex Padilla." See Plfs'  
25 Reply, Exh. A.
- 26 20. For at least the last three years, the City Council has declared  
27 the El Grito celebration a Special Event sponsored by the City  
28 and has requested that all City Departments waive all fees,

1 costs, and requirements, including insurance. See Pls' Reply,  
2 Exh. C.

3 21. On September 2, 2003, the City Council authorized that "\$75,000  
4 be transferred from the General City Purposes Fund . . . to  
5 support the El Grito celebration," and that a total of \$20,000 be  
6 designated for cultural events from the Cultural Affairs  
7 Department to support the event. Id.

8 22. On August 19, 2003, Council President Padilla wrote to Telemundo,  
9 explaining that the City was "only a co-sponsor of the El Grito  
10 celebration" and Univision controlled "all production aspects."  
11 Ex Parte Application, Exh. D.

12 23. On September 3, 2003, Telemundo filed a Complaint and an Ex Parte  
13 Application for a Temporary Restraining Order and an Order to  
14 Show Cause why a preliminary injunction should not issue. The  
15 Complaint named the City of Los Angeles and Council President  
16 Alex Padilla as Defendants.

17 24. Telemundo seeks to broadcast the last 15 minutes of the El Grito  
18 event, the actual reenactment of El Grito De Delores.

19 25. The Court received Defendants' Opposition to the Application on  
20 September 5, 2003.

21 26. On September 5, 2003, the Court granted a Temporary Restraining  
22 Order.

23 27. Thereafter, KMEX filed an Ex Parte Application to Intervene and  
24 an Opposition to Plaintiffs' Application on September 5, 2003.

25 28. On September 8, 2003, the Court received: (1) Telemundo's  
26 Opposition to the Application to Intervene, (2) Defendants'  
27 Response to the Order to Show Cause, and (3) KMEX's Supplemental  
28 Brief.

1 29. The Court granted the Application to Intervene on September 8,  
2 2003.

3 30. The Court received Telemundo's Reply on September 9, 2003.

4 31. Any conclusion of law deemed to be a finding of fact is hereby  
5 incorporated into the findings of fact.

## 6 II. CONCLUSIONS OF LAW

7 1. To obtain a preliminary injunction, a plaintiff must show  
8 "either: (1) a likelihood of success on the merits and the  
9 possibility of irreparable injury; or (2) that serious questions  
10 going to the merits were raised and the balance of hardships tips  
11 sharply in its favor." Walczak v. EPL Prolong, Inc., 198 F.3d  
12 725, 731 (9th Cir. 1999). "These two alternatives represent  
13 extremes of a single continuum, rather than two separate tests."  
14 Id. (internal quotations omitted). "Thus, the greater the  
15 relative hardship to [a plaintiff], the less probability of  
16 success must be shown." Id.

17 2. Telemundo's Complaint asserts causes of action against the City  
18 of Los Angeles and Alex Padilla in his official capacity as  
19 member and President of the Los Angeles City Council. Telemundo  
20 alleges violations of its (1) right to free speech and free press  
21 under the First Amendment, made applicable to the states under  
22 the Fourteenth Amendment of the United States Constitution; (2)  
23 right to equal protection and due process under the Fifth and  
24 Fourteenth Amendments; and (3) right to free speech and press  
25 under Article I of the California Constitution.

26 3. The Court finds that Telemundo has established a likelihood of  
27 success on its free speech claim under the First Amendment.

28 4. Freedom of the press and of speech as guaranteed by the First

1 Amendment is within the "liberty safeguarded by the due process  
2 clause of the Fourteenth Amendment from invasion by state  
3 action." Near v. Minnesota, 283 U.S. 697, 707 (1931).

4 5. As an initial matter, the Court concludes that there is  
5 undoubtedly state action involved in the El Grito ceremony. A  
6 city may be held liable under 42 U.S.C. § 1983 for violation of  
7 the First Amendment if the acts in question were undertaken  
8 pursuant to official policy or custom. Hopper v. City of Pasco,  
9 241 F.3d 1067, 1082 (9th Cir. 2001) (citing Monell v. Dep't of  
10 Social Services, 436 U.S. 658, 690-91 (1978)).

11 6. There are three ways to meet the policy or custom requirement:  
12 (1) the plaintiff may prove that a city employee committed the  
13 alleged constitutional violation pursuant to a formal government  
14 policy or a longstanding practice or custom which constitutes the  
15 standard operating procedure of the local government entity; (2)  
16 the plaintiff may establish that the individual who committed the  
17 constitutional tort was an official with "final policy-making  
18 authority" and that the challenged action itself thus constituted  
19 an act of official government policy; and (3) the plaintiff may  
20 prove that an official with final policy-making authority  
21 ratified a subordinate's unconstitutional decision or action and  
22 the basis for it. Id. at 1083 (citations omitted).

23 7. The record is replete with evidence to support all three avenues  
24 for establishing that the City's alleged denial of equal access  
25 to the El Grito ceremony was committed as part of a formal policy  
26 or custom.

27 8. First, Telemundo has presented evidence to show that the City has  
28 a longstanding practice of sponsoring the El Grito ceremony and

1 partnering exclusively with Univision to broadcast the event. As  
2 Council President Padilla acknowledged, the City is a co-sponsor  
3 of the El Grito ceremony and has "partnered" with Univision and  
4 others for the production of the ceremony. The event is  
5 occurring at City Hall and will include appearances by Mayor  
6 Hahn, Council President Padilla, and other high-ranking City  
7 officials. Minutes from City Council sessions from the last  
8 three years also indicate that the El Grito celebration is an  
9 event sponsored by the City.

10 9. Second, Telemundo may likely show that Council President Padilla  
11 committed the constitutional tort and that he is an official with  
12 "final policy-making authority."

13 10. Third, if Padilla were not deemed a final policymaker, Telemundo  
14 has presented evidence to support a finding that final  
15 policymakers ratified Padilla's decision to deny Telemundo equal  
16 access to the El Grito ceremony. A July 8, 2003 letter from  
17 Mayor Hahn states that the El Grito event is part of the City's  
18 Latino Heritage Month, and is being "organized by Council  
19 President Alex Padilla."

20 11. Despite substantial evidence to the contrary, KMEX contends that  
21 there is no state action in this case. For support, KMEX cites  
22 Crowder v. Conlan, 740 F.2d 447 (6th Cir. 1984) and Jackson v.  
23 Statler Found., 496 F.2d 623 (2d Cir. 1974). Neither of these  
24 cases is relevant to the facts before the Court. These cases  
25 deal with the circumstances in which private entities may be  
26 deemed state actors for purposes of imposing liability under §  
27 1983. By contrast, the Court is concerned with the circumstances  
28 in which a state actor may be held liable under § 1983. As



1 discussed above, a proper inquiry focuses on whether the alleged  
2 constitutional violation was undertaken pursuant to the City's  
3 official policy or custom. KMEX's argument is therefore  
4 baseless.

5 12. Because state action is present, the Court turns to whether the  
6 City has likely abridged Plaintiffs' rights under the First  
7 Amendment.

8 13. In Richmond Newspapers, Inc. v. Virginia, the Supreme Court broke  
9 new ground by recognizing that the First Amendment gave the press  
10 and public an affirmative right of access to newsworthy matters,  
11 particularly criminal court proceedings. 448 U.S. 555, 578-82  
12 (1980) ("Until today the Court has accorded virtually absolute  
13 protection to the dissemination of information or ideas, but  
14 never before has it squarely held that the acquisition of  
15 newsworthy matter is entitled to any constitutional protection  
16 whatsoever . . . Today, however, for the first time, the Court  
17 unequivocally holds that an arbitrary interference with access to  
18 important information is an abridgement of the freedoms of speech  
19 and of the press protected by the First Amendment.") (Stevens,  
20 J., concurring); see Eugene Cerruti, "Dancing in the Courthouse:  
21 The First Amendment Right of Access Opens a New Round," 29 U.  
22 RICH. L. REV. 237 (1995).

23 14. However, the presence of state action and Telemundo's invocation  
24 of the First Amendment is not dispositive of the issue. The  
25 rights granted to the press and embodied in the First Amendment  
26 are not absolute. Richmond, 448 U.S. at 581 n.18 ("[O]ur holding  
27 today does not mean that the First Amendment rights of the public  
28 and representatives of the press are absolute."); Zemel v. Rusk,

1 381 U.S. 1, 17 (1965) ("The right to speak and publish does not  
2 carry with it the unrestrained right to gather information.").

3 15. The Court must consider the character of the location where the  
4 expressive activity will occur. Whether the location is a public  
5 or nonpublic forum determines the extent to which First Amendment  
6 rights may be exercised and the amount of consideration courts  
7 must give governmental interests engendering restrictions on  
8 those rights. Perry Educators Ass'n v. Perry Local Educators'  
9 Ass'n, 460 U.S. 37, 44 (1983).

10 16. In Perry, the Supreme Court outlined three types of forums: (1)  
11 public forums are those places which traditionally have been held  
12 in the trust for the use of the public, such as streets,  
13 sidewalks and parks; (2) designated public forums are  
14 nontraditional forums that the government has opened for  
15 expressive activity by part or all of the public; and (3)  
16 nonpublic forums include property which is not by tradition or  
17 designation a forum for public communication. 460 U.S. at 45-46.

18 17. If government property has by law or tradition been given status  
19 as a public forum, a state's right to limit protected expressive  
20 activity is sharply circumscribed. Capitol Square Review &  
21 Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995). The  
22 government may impose reasonable restrictions on the time, place,  
23 or manner of protected speech, provided the restrictions are  
24 content-neutral, that they are narrowly tailored to serve a  
25 significant governmental interest, and that they leave open ample  
26 alternative channels for communication of the information. See  
27 id.; Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)  
28 (quotation marks and citations omitted).

- 1 18. The Court finds that the El Grito ceremony is a public forum.  
2 For at least three years, the entertainment and official ceremony  
3 have taken place on government property, transforming publicly  
4 owned property into a public forum for expressive activity.  
5 Cinevision Corp. v. City of Burbank, 745 F.2d 560, 570 (9th Cir.  
6 1984) (“[B]y granting Cinevision access to the Bowl for the  
7 presentation of music by a variety of performers, the City  
8 transformed publicly owned property into a public forum, even if  
9 the expressive activity is promoted by a single entity.”).
- 10 19. Where the government is acting in its proprietary capacity  
11 (rather than governmental) with respect to public property, the  
12 government may restrict access to performances produced by  
13 private entities as long as the restrictions are not arbitrary  
14 and the event is purely commercial. D’Amario v. Providence Civic  
15 Ctr. Auth., 639 F. Supp. 1538, 1544 (D. R.I. 1986) (state may  
16 enforce “no camera” rule at rock concert); Post Newsweek  
17 Stations-Connecticut, Inc. v. Travelers Ins. Co., 510 F. Supp.  
18 81, 85-86 (D. Conn. 1981) (state may restrict television  
19 station’s access to figure-skating championships at civic  
20 center).
- 21 20. The Court finds that the City is not acting in its proprietary  
22 capacity with respect to the official ceremony portion (the last  
23 15 minutes) of the El Grito event. This portion will feature  
24 Mayor Hahn, Council President Padilla and other City officials.  
25 In addition, the City is acting in its governmental capacity  
26 because for at least the last three years, the City Council has  
27 declared the El Grito celebration a Special Event sponsored by  
28 the City.

- 1 21. Next, the Court considers whether the City's restrictions on  
2 Telemundo's broadcast of the El Grito official ceremony are  
3 reasonable.
- 4 22. Several courts have determined that discriminatory access to  
5 public forums or information is generally violative of the First  
6 Amendment. Anderson v. Cryovac, Inc., 805 F.2d 1, 9 (1st Cir.  
7 1986) (district court could not grant one media entity access to  
8 discovery materials while excluding another); American  
9 Broadcasting Companies v. Cuomo, 570 F.2d 1080, 1083 (2d Cir.  
10 1977) (ABC could not be excluded from post-election activities at  
11 campaign headquarters where other members of the press were  
12 granted access); Sherrill v. Knight, 569 F.2d 124, 129 (D.C. Cir.  
13 1977) (where White House press facilities had been made publicly  
14 available as a source of information for reporters, the White  
15 House could not exclude a reporter arbitrarily or for less than  
16 compelling reasons); United Teachers of Dade v. Stierheim, 213 F.  
17 Supp. 2d 1368, 1373-74 (S.D. Fl. 2002) (teachers' union and  
18 editor of union newspaper could not be excluded from the press  
19 room reserved for members of the "general-circulation" media and  
20 relegated to a "separate but equal" media room); Westinghouse  
21 Broadcasting Co, Inc. v. Dukakis, 409 F. Supp. 895, 896 (D. Mass.  
22 1976) (public officials may not selectively exclude one news  
23 organization from public meetings and press conferences absent a  
24 compelling government interest); Borreca v. Fasi, 369 F. Supp.  
25 906, 909-10 (D. Haw. 1974) (enjoining mayor from excluding a  
26 certain reporter from general news conferences).
- 27 23. Defendants have not presented one reason, compelling or  
28 otherwise, why they initially decided that KMEX's cameras should

1 be granted access to the official ceremony while Telemundo should  
2 be required to use a pool feed. However, now that the City has  
3 made the decision, it argues that the restrictions on Telemundo  
4 are required for public safety reasons pursuant to Los Angeles  
5 Fire Department Standard Policies and Procedures for outdoor  
6 concert events.

7 24. In reviewing the declaration of L.A. Fire Department Inspector  
8 Benjamin Flores, the Court did not find that he concluded that  
9 occupancy restrictions preclude Telemundo's cameras or trucks.  
10 Instead, Inspector Flores stated that he would approve cameras in  
11 front of the stage and would not approve "hand held roaming or  
12 stationary cameras in the audience area." Defs' Opp'n, Benjamin  
13 Flores Declaration ("Flores Decl.") ¶ 13. Flores did not offer  
14 an opinion as to cameras on stage. However, he will allow the  
15 broadcast media to park their production trucks in the southwest  
16 corner of "Lot 11" between Spring and Broadway. Id. ¶ 14.

17 25. Because the City's public safety considerations are not supported  
18 by the evidence, the Court finds that the City's restrictions on  
19 Telemundo's access to the official ceremony are unreasonable.

20 26. Telemundo has established a substantial likelihood of success on  
21 its First Amendment claim.

22 27. Because Plaintiffs have demonstrated such a substantial  
23 likelihood of success on the merits of their claims, they need  
24 only show a reasonable possibility of irreparable injury at this  
25 second step of the preliminary injunction test.

26 28. As Plaintiffs correctly note, the "Supreme Court has made clear  
27 that '[t]he loss of First Amendment freedoms, for even minimal  
28 periods of time, unquestionably constitutes irreparable injury'

1 for purposes of the issuance of a preliminary injunction.”

2 Sammartano v. First Judicial District Court, 303 F.3d 959, 973  
3 (9th Cir. 2002) (quoting Elrod v. Burns, 427 U.S. 347, 373  
4 (1976)).

5 29. Defendants argue that Telemundo will not be irreparably harmed  
6 because it will be provided a pool feed of KMEX’s broadcast.

7 30. The Court rejects Defendants’ argument because embodied in  
8 Telemundo’s First Amendment rights is its right to decide what to  
9 film, what to emphasize, and what images to relay to viewers.  
10 Moreover, Defendants have not persuasively argued that pooling is  
11 necessary.

12 31. The Court finds that Plaintiffs have made a sufficient showing of  
13 irreparable injury.

14 32. The Court also finds that equitable considerations do not weigh  
15 in favor of denying the preliminary injunction.

16 33. KMEX cites WPIX, Inc. v. League of Women Voters, 595 F. Supp.  
17 1484 (S.D.N.Y. 1984), in arguing that Telemundo’s last-minute  
18 demand for access will unjustly burden KMEX with the task and  
19 expense of revising the stage and its production. KMEX also  
20 argues that, unlike Telemundo, it has invested money and  
21 resources in planning the El Grito ceremony.

22 34. The Court finds Telemundo’s actions distinguishable from the WPIX  
23 plaintiff, which never informed the state actor that it demanded  
24 physical access to the event prior to commencing litigation for  
25 injunctive relief. Here, the record is clear that Telemundo  
26 sought access as early as May 21, 2003, almost four months before  
27 the event, when it raised the issue with Council President  
28 Padilla.

1 35. Furthermore, KMEX's commercial interest in the production of the  
2 El Grito ceremony does not outweigh Telemundo's First Amendment  
3 rights and the public interest in diversity of coverage of  
4 newsworthy events.

5 36. For these reasons, Telemundo is not compelled to delay  
6 broadcasting the ceremony for one hour. The public has an  
7 interest in viewing live coverage of the event.

8 37. The Court now turns to the question of the appropriate interim  
9 remedy.

10 38. The Plaintiffs do not seek any remedy with respect to the  
11 entertainment portion of the event. As to the official ceremony,  
12 Plaintiffs seek (1) equal camera positioning; (2) equal number of  
13 cameras; (3) equal production truck positioning; (4) equal access  
14 to stage audio; (5) equal signage opportunity, or no signage at  
15 all; (6) equal emcee opportunity, co-emcee opportunity or no  
16 emcees; (7) equal "access" credentials; (8) equal access to  
17 production meetings; and (9) equal access to rehearsal meetings.  
18 See Amended [Proposed] Order Granting Preliminary Injunction.

19 39. Based on the foregoing, the Court GRANTS Plaintiffs' request for  
20 a preliminary injunction granting equal camera positioning, equal  
21 number of cameras, equal truck positioning, equal access to stage  
22 audio, equal "access" credentials, equal access to production  
23 meetings, and equal access to rehearsal meetings. The Court  
24 DENIES Plaintiffs' request for an equal emcee opportunity, co-  
25 emcee opportunity or no emcees.

26 40. Any finding of fact deemed to be a conclusion of law is hereby  
27 incorporated into the conclusions of law.  
28

