

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE VILLEGAS; BOB POELKER;
MARCELO ORTA; DON DEROSIERS,
Plaintiffs-Appellants,

v.

GILROY GARLIC FESTIVAL
ASSOCIATION; D. BERGMAN, Officer;
CITY OF GILROY,
Defendants-Appellees.

No. 05-15725

D.C. No.
CV-01-20720-JW

OPINION

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted
December 11, 2007—Pasadena, California

Filed September 3, 2008

Before: Alex Kozinski, Chief Judge,
Diarmuid F. O'Scannlain, Pamela Ann Rymer,
Sidney R. Thomas, M. Margaret McKeown,
Kim McLane Wardlaw, Raymond C. Fisher,
Ronald M. Gould, Richard A. Paez, Consuelo M. Callahan,
and N. Randy Smith, Circuit Judges.

Opinion by Judge O'Scannlain;
Dissent by Judge Thomas;
Dissent by Judge Gould

COUNSEL

Randolph M. Hammock, Law Offices of Richard M. Lester, Canoga Park, California, argued the cause for the plaintiffs-appellants; Allen Lichtenstein, General Counsel and Lee Rowland, Staff Attorney, ACLU, Las Vegas, Nevada, were on the briefs.

Bronwen Lacy, Strombotne Law Firm, San Jose, California, and Gregory C. Simonian, Clapp Moroney Bellagamba and Vucinich, Daly City, California, argued the cause for the defendants-appellees; Mark Strombotne, Strombotne Law Firm, San Jose, California, G. Martin Velez, Clapp Moroney Bellagamba and Vucinich, Daly City, California, and Valerie S. Higgins, Clapp Moroney Bellagamba and Vucinich, San Bruno, California, were on the briefs.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether guests at the Gilroy Garlic Festival can hold the City of Gilroy in California and the Gilroy Garlic Festival Association liable in a civil rights action when they are escorted from the event by a City police officer for violating the Festival's dress code.

I

George Villegas and remaining plaintiffs (hereinafter "Top

Hatters”), all of whom are members of the Top Hatters Motorcycle Club, brought suit against the City of Gilroy and the Gilroy Garlic Festival Association (“GGFA”) under 42 U.S.C. § 1983 for alleged violations of their civil rights arising out of events occurring at the Gilroy Garlic Festival on July 30, 2000. On that occasion they were wearing vests that included an image of a skull with wings and a top hat with the words “Top Hatters” above the top hat and the word “Hollister” written below.¹ Pursuant to an unwritten policy of the GGFA that prohibited guests from wearing “gang colors or other demonstrative insignia, including motorcycle club insignia,” the Festival’s chair of security, an off-duty police officer, requested an on-duty police officer to remove the Top Hatters and this litigation ensued.

The district court granted summary judgment in favor of both the City of Gilroy and the GGFA, ruling that wearing such vests was neither expressive conduct nor expressive association within the protection of the First Amendment and that in any event the GGFA was not a state actor within the meaning of section 1983. *Villegas v. City of Gilroy*, 363 F. Supp. 2d 1207, 1208-09, 1211, 1217-19 (N.D. Cal. 2005).

On the Top Hatters’ appeal, a three-judge panel affirmed, holding that the motorcycle club insignia was subject to expressive conduct analysis but that there was no First Amendment violation; it failed to reach the state action issue. *See Villegas v. City of Gilroy*, 484 F.3d 1136, 1140 (9th Cir.), *withdrawn*, 503 F.3d 974 (9th Cir. 2007).

Thereafter, a majority of the circuit judges in active service ordered that this case be heard en banc pursuant to Rule 35(a)

¹The Top Hatters attended the Gilroy Garlic Festival to celebrate member Bob Poelker’s birthday sporting their Top Hatters Motorcycle Club vests. These vests are made of either blue denim or black leather, and are adorned with various patches and pins that indicate membership in the Top Hatters.

of the Federal Rules of Appellate Procedure. *Villegas*, 503 F.3d at 974.

II

Before dealing with the Top Hatters' contentions, a more detailed recital of the uncontroverted facts offered in support of summary judgment is appropriate.

Once a year, for a few days in the summer, GGFA, a private non-profit corporation, sponsors and runs the Gilroy Garlic Festival. The Festival offers food, contests, music, and family recreation activities—with an emphasis on garlic—in a family-friendly environment. Such attractions include the Great Garlic Cook-Off cooking contest and Gourmet Alley, where garlic-laced calarmari and scampi, garlic chicken stir fry, garlic sausage sandwiches, and garlic bread are served. Magicians, dance troupes, puppets and jugglers offer entertainment geared toward children in a special area.

The Festival at issue was held in Christmas Hill Park, a public park in the City of Gilroy, from July 28 to July 30, 2000. In order to secure this venue, GGFA entered into a facility reservation contract with the City. Under the terms of this agreement, GGFA was required to “understand and agree that security and traffic control may be required by the Gilroy Police Department.”

GGFA itself has a chair of security and an assistant chair of security, who are unpaid volunteers, one of whom is usually a law enforcement officer with the City of Gilroy Police Department or another local law enforcement agency. At the conclusion of the Festival, the City of Gilroy Police Department typically submits a bill to GGFA for expenses incurred in providing its law enforcement officers to staff the Festival.

GGFA had an informal dress code in place; however, as the Top Hatters point out, at the time of the incident, there was

no written policy in existence, nor was there one posted. According to the alleged dress code, persons wearing clothing with gang colors or insignia were allowed to remain at the Festival only if they removed such clothing. Individuals refusing to remove clothing with gang colors or insignia were not permitted to remain at the Festival. Such policy was adopted as a response to an increase in gang-related violence at the Festival in prior years which had negatively impacted attendance. The dress code was not applied to the area outside the Festival.

As the Top Hatters entered the Festival sporting their vests, off-duty Gilroy Police Sergeant Donald Kludt, GGFA's chair of security, dressed in plain clothes, spotted them, contacted Gilroy Police Officer Brenda Bergman, and requested that she escort the Top Hatters back to the gate. Officer Bergman was armed and uniformed and assigned to Festival security. In his deposition, Sergeant Kludt explained why he contacted Officer Bergman for assistance:

Q: Was it the fact that she [Officer Bergman] was an armed uniformed officer, was that part of your thought process in wanting her to be with you?

A: Yeah.

Q: Because you were not armed; correct?

A: Correct.

Q: And you were not uniformed; correct?

A: Correct.

Q: And you wanted Officer Bergman to assist you because she would give some air of authority as a police officer; correct?

[Objection]

Q: Would that be a fair statement?

A: Yes.

Officer Bergman duly approached the Top Hatters and requested that they follow her to the gate and they complied. Once they arrived there, Sergeant Kludt explained GGFA's dress code policy to them: "I told them that if they refused to remove their [gang] colors and enjoy the festival that we will ask them to leave and then we will refund their money, their entry fee into the festival." The Top Hatters, however,

felt that this was not right, that they had their rights to wear their vests where they wanted to and this was not right. And I [Sergeant Kludt] told them: Well, I have a policy and I'm enforcing this policy and I'm asking you to leave if you're choosing not to, you know, come into the festival without your colors.

So they left. And then I walked around with them, went to the ticket booth and ordered those people to refund these people their money.

Q: Where was Officer Bergman at the time?

A: Standing next to me.

The Top Hatters challenge on appeal the district court's grant of summary judgment, asserting that there were genuine issues of material fact as to whether GGFA was a state actor and whether the Top Hatters were engaged in protected expressive conduct or expressive association. The Top Hatters also assert that the City was liable for enforcing an unconstitutional dress code which it had impliedly adopted.

III

[1] Under familiar principles, even a private entity can, in certain circumstances, be subject to liability under section 1983. See *Sutton v. Providence St. Joseph Medical Ctr.*, 192 F.3d 826, 835-36 (9th Cir. 1999). In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the Supreme Court created a two step analysis for determining whether or not there was state action by a private actor sufficient to establish liability for a constitutional tort. The first inquiry was “whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority.” *Id.* at 939. The second was “whether, under the facts of this case, . . . [the] private parties, may be appropriately characterized as ‘state actors.’ ” *Id.* In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), the Court introduced a multi-factored test. *Id.* at 295-300. The inquiry is a general one: “[S]tate action may be found if, though only if, there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’ ” *Id.* at 295 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). Some of the factors to consider in determining whether there is a “close nexus” are: (1) the organization is mostly comprised of state institutions; (2) state officials dominate decision making of the organization; (3) the organization’s funds are largely generated by the state institutions; and (4) the organization is acting in lieu of a traditional state actor. See *id.* at 295-99.

The Top Hatters argue that there is a sufficiently “close nexus” between the GGFA and the City of Gilroy and point to the following facts in support of its contention:

1. The festival is held in a public park, owned by the City of Gilroy;
2. The City of Gilroy issued a written permit to the GGFA which is signed by all of the city council

members, and which *requires*, in part, that the City of Gilroy provide some of its police officers as security for the festival;

3. The City of Gilroy submits a bill to the GGFA for the use of its police officers;

4. The “chair of security” for the GGFA is typically a police officer with the City of Gilroy Police Department;

5. At the time of the incident, this “chair of security” for the GGFA was Sergeant Kludt, an active member of the City of Gilroy Police Department; and

6. Sergeant Kludt utilized the command post of the Gilroy Police Department at the festival grounds.

We are not persuaded. The Fourth Circuit’s opinion in *United Auto Workers v. Gaston Festivals, Inc.*, 43 F.3d 902 (4th Cir. 1995), is instructive. In *Gaston*, the UAW was denied a booth at a festival run by Gaston Festivals, Inc., “a private, non-profit corporation that organizes and promotes the Fish Camp Jam, an annual festival held in downtown Gastonia, North Carolina.” *Id.* at 904. The festival was “held on public streets and sidewalks and on private property in Gastonia’s downtown area.” *Id.* Just like GGFA, Gaston had to “obtain a permit in order to use the public property during the festival In addition to approving the permit, the City provide[d] police protection, traffic department assistance, and sanitation services during the . . . event.” *Id.* In addition, the City actually donated \$10,000 to the Fish Camp Jam. *Id.* at 904-05.

The court in *Gaston* determined that “[t]he organization, management, and promotion of events such as the [festival] do not fall within the domain of functions exercised tradition-

ally and exclusively by the government.” *Id.* at 907-08. Additionally, the court noted that “[t]he Supreme Court has expressed doubts that, as a general matter, ‘the operation of a park for recreational purposes is an exclusively public function,’ particularly in light of ‘the experience of several American entrepreneurs who amassed great fortunes by operating parks for recreational purposes.’”² *Id.* at 908 (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 n.8 (1978) and citing *NCAA v. Tarkanian*, 488 U.S. 179, 197-98 n.18 (1988) (holding that the coordination of amateur sports is “by no means . . . a traditional, let alone an exclusive, state function”)).

The UAW also made the argument that Gaston Festivals was a state actor because the City had given control of its town center to the festival, which the court rejected because it determined that to find state action, “[a] private actor must assume plenary control and complete governmental power over the property in question.” *Id.* at 909 (citing *Marsh v. Alabama*, 326 U.S. 501, 506 (1946); *Hudgens v. NLRB*, 424 U.S. 507, 519 (1976)). The court noted that while the City required a permit and provided essential services such as security to support the festival, the City did not thereby relinquish control of the public areas. *Id.*

[2] Applying similar principles here, we conclude that GGFA is not a state actor. First, running festivals is not a traditional municipal function. Second, just as in *Gaston*, the City of Gilroy required a permit, showing that the City retained control of the park and provided security services. Unlike in *Gaston*, where the City actually contributed money to the festival, the City of Gilroy billed the GGFA for its security services. There is even less connection between Gilroy and GGFA than between the city and the festival in *Gaston*.

²Additionally, we have required that for a private actor to be considered a state actor under a “public function test, the function at issue must be both traditionally and *exclusively* governmental.” *Lee v. Katz*, 276 F.3d 550 (9th Cir. 2002) (emphasis added).

[3] Nevertheless, the Top Hatters rely upon *United States v. Davis*, 482 F.2d 893, 901-04 (9th Cir. 1973), *overruled on other grounds by United States v. Aukai*, 497 F.3d 955, 960-61 (9th Cir. 2007) (en banc). There, we held that when private security guards implemented an airport security program ordered by the President of the United States, they were engaging in a predominately government function and that the federal government was the dominant actor. *Davis*, 482 F.2d at 901-04. Unlike *Davis*, there is no showing here that security activity is a dominant or even a major purpose of the GGFA. Furthermore, there is no indication in the record that the City of Gilroy plays a dominant role in controlling the actions of the organization or the content of the festival.³

³*Collins v. Womancare*, 878 F.2d 1145 (9th Cir. 1989), on which the dissent relies, does not counsel otherwise. Dissent at 12075-76, 12080-81. First, there is no evidence that the City or the police department played any part in drafting the dress code or any other aspect of the Festival. Police were required to be present to provide security, a legitimate state interest when such a large crowd is gathered. See *Berger v. Hanlon*, 129 F.3d 505, 514 (9th Cir. 1997), *rev'd on other grounds*, 526 U.S. 808 (1999) (per curiam), *opinion reinstated*, 188 F.3d 1155 (9th Cir. 1999). Here, unlike in *Berger* where there was “a written contractual commitment between the government and the media to engage jointly in an enterprise that only the government could lawfully institute—the execution of a search warrant,” maintaining security is not something only the government could lawfully institute. *Id.*

Second, although the dissent focuses on the “neutrality” of the officers in *Womancare*, here, unlike in *Womancare* where police “neutrality” was of greater importance due to the general right of anyone to protest on a sidewalk, a person does not have a general right to wear attire of their choosing to a privately run festival. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995) (recognizing right of parade organizers to exclude unwanted participants despite its “use of the streets”).

Third, the additional factors that the dissent lists to suggest “joint action,” including the percentage of the citizens of Gilroy working at the festival, the increased income generated, and “the assistance and involvement of the City’s Engineering Division, Building & Safety Division, Fire Department, Chemical Control Division, and Police Department,” could

Following the reasoning of *Gaston*, we are satisfied that GGFA was not a state actor for purposes of section 1983 liability.⁴

IV

[4] The Top Hatters also contend that the City of Gilroy is liable under *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978), for violating their First Amendment rights by enforcing the GGFA dress code. But it is generally not a constitutional violation for a police officer to enforce a private entity's rights. As the district judge noted in this case, and we agree, if the ability "to exclude others from public property during the course of a limited, permitted use" were found to be a constitutional violation, "[e]very picnic, wedding, company outing, meeting, rally, and fair held on public grounds would be subject to constitutional scrutiny." *Villegas*, 363 F. Supp. 2d at 1216. Because there is no constitutional violation, there can be no municipal liability.

apply equally to the building of a new fertilizer plant, but that would not make the construction of such plant state action. Dissent at 12076. Moreover, the large increase in visitors from afar highlights that the main concern of the City in maintaining a police presence was public safety, not a share in the financial success of the Festival.

⁴The dissent finds fault with our conclusion of state action, stating that we "consider[] only the 'governmental function' test." Dissent at 12074. But, it is clear from our analysis that we consider not only whether a festival is a traditional state function but also factors such as the level of control the City has over the festival, the level of financial contribution of the City to the festival, etc. See *Brentwood Academy*, 531 U.S. at 295-99 (emphasizing that federal courts should apply a flexible multi-factor analysis when determining whether the action of a private actor is really state action for purposes of the Fourteenth Amendment). Moreover, the dissent's approach seems to be internally inconsistent, noting that there is "no specific formula for defining state action" but then stating that we must apply "four distinct—but not mutually exclusive—tests." Dissent at 12074; see also *Brentwood Academy*, 531 U.S. at 295-99 (describing the "four distinct . . . tests" referred to by the dissent in this case as simply factors that may be considered in a flexible approach to state action).

[5] But even if there were a constitutional violation, the Top Hatters cannot establish municipal liability under the *Monell* standard. In *Monell*, the Supreme Court held that a local government may indeed be liable for violation of constitutional rights resulting from “a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body’s officers” or “pursuant to governmental ‘custom’ even though such a custom has not received formal approval through the body’s official decisionmaking channels.” 436 U.S. at 690-91.

[6] Generally, a municipality is liable under *Monell* only if a municipal policy or custom was the “moving force” behind the constitutional violation. *See Galen v. County of Los Angeles*, 477 F.3d 652, 667 (9th Cir. 2007). In other words, there must be “a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.” *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). Furthermore, it is not enough to “merely [to] alleg[e] that the existing . . . program . . . represents a policy for which the city is responsible.” *Id.* at 389.

[7] Here, the Top Hatters point to the fact that the permit requires that the City’s police provide a portion of the Festival’s security, that the City is reimbursed for providing such security, and that Officer Bergman complied with the request of the GGFA’s chair of security to remove individuals who did not comply with GGFA’s dress code.⁵ None of these facts gives rise to the conclusion that the City had a policy or custom of enforcing GGFA’s dress code. Furthermore, there is no evidence in the record of a custom or official policy of the

⁵Although the GGFA chair of security was a police officer, there is no showing that he was acting other than in his private capacity as the GGFA chair of security. Furthermore, there is no evidence presented by the Top Hatters that Officer Kludt was required to be the chair of security by City policy or custom, or that the GGFA was required by the City to name a police officer as its chair of security.

City to enforce the GGFA's dress code, nor is there evidence that Gilroy officials participated in forming the dress code.

V

In light of the foregoing we do not reach the question of whether wearing the Top Hatters clothing and insignia constituted expressive conduct.

AFFIRMED.

THOMAS, Circuit Judge, with whom Circuit Judges WARDLAW, FISHER, and PAEZ join, dissenting, and with whom Circuit Judge GOULD joins in part:

Gilroy holds itself out as the “Garlic Capital of the World,” and no one seriously disputes the claim. In celebration of its status, and recognizing that eating garlic is inevitably a shared experience, Gilroy hosts an annual Garlic Festival in late July. It is not a small affair. Approximately 120,000 visitors participate annually, and more than three million revelers have attended the festival since its inception. Disregarding the Bard’s admonition,¹ the festival features “food laced with over two tons of garlic.” It is, according to the promotional materials, a “fun and fragrant” experience, with participants “going bananas over garlic.” The festival is sponsored and managed by the non-profit Gilroy Garlic Festival Association (“Festival Association”).

Members of the Top Hatters Motorcycle Club, Inc., a non-profit charitable corporation, were expelled from the 2000 Festival for wearing vests bearing their corporate insignia—

¹“And, most dear actors, eat no onions nor garlic, for we are to utter sweet breath.” William Shakespeare, *A Midsummer Night’s Dream*, act 4, sc. 2.

