

in Iraq. Specifically, it has prohibited the A.C.T. banner to hang because of its message, its ideas, its subject matter, or its content; and because the government of the Town of Taos finds the views therein unacceptable and denies its exposure precisely because the views expressed may be less favored or more controversial. This is precisely what the First Amendment to the US Constitution and New Mexico Constitution protects.

The Town of Taos Buildings and Grounds Banner Use and Regulations, *inter alia*, state as follows:

“Political banners will not be allowed for. ‘Political Banner’ means any sign or banner intended to advertise or contain information about or soliciting votes for a candidate, a current elected official, political party, proposal or issue or any sort or any manner relating to or at issue in a specific matter or any particular election or any issue concerned with the form, organization, and administration of State, Federal or Local public bodies regarding regulations laws, ordinances and policy of such public body or individuals or other comments related as so provided herein. The following banners advertising support to the community shall be placed if space permits. They are “Congratulations Seniors! Please...Don’t Drink and Drive.”, Trek for trash (town sponsored), Yuletide (town sponsored and patriotic banners. Political banners are prohibited except for any town sponsored patriotic banners.” (sic) Town of Taos Buildings and Grounds Banner Use and Regulations, 11, 12. *See* Exhibit B, Attached to the Emergency Application for Temporary Restraining Order and Incorporated Herein.

JURISDICTION

The jurisdiction of the court is invoked pursuant to the First Amendment to the Constitution of the United States and the N.M. Const. art. II, §17 and applicable federal and state law.

PARTIES

Plaintiff, Cliff Bain, is a resident of the Town of Arroyo Hondo, County of Taos, State of New Mexico, and has been an active member in the Action Coalition of Taos.

Plaintiff, Ana Easter, is a resident of the Town of El Prado, County of Taos, State of New Mexico, and has been an active member in the Action Coalition of Taos.

Plaintiff, The Action Coalition of Taos, is a not-for-profit community organization, based in Taos County, New Mexico, that formed in 2002 to oppose the war on Iraq. It has educated the community through its various speakers on fossil fuel dependence, the threats of the Patriot Act, and the humanitarian and environmental consequences of the war on Iraq.

Defendant, Mayor Bobby Duran is the current Mayor of the Town of Taos. He engaged in the conduct complained of in the course and scope of his employment, and pursuant thereto he made the unlawful decision to bar Plaintiffs' First Amendment activities, pursuant to a Town of Taos Regulation of wrongfully denying citizens their constitutional rights of freedom of speech, equal protection, and due process. He is being sued in his official and individual capacity.

Defendant, Park Superintendent, Dennis Martinez, is a Town of Taos employee. He engaged in the conduct complained of in the course and scope of his employment, and pursuant thereto he made the unlawful decision to bar Plaintiffs' First Amendment activities, pursuant to a Town of Taos Regulation of wrongfully denying citizens their constitutional rights of freedom of speech, equal protection, and due process. He is being sued in his official and individual capacity.

Defendant, Town of Taos, is a municipal corporation, duly incorporated under the laws of the State of New Mexico, and is the employer and principal of Defendants Mayor Bobby Duran and Park Superintendent Dennis Martinez. The Town of Taos is responsible for the laws and regulations it promulgates and the policies, practices and customs of the Taos Park District.

FACTS

1. The Action Coalition of Taos (A.C.T.) has had a history of protesting the actions of the US government to bomb and invade the sovereign country of Iraq, specifically targeting one of the architects of the war, Secretary of Defense, Donald Rumsfeld. At A.C.T.'s first demonstration, on October 26, 2002, a protest that garnered over 3000 people, former Mayor Fred Peralta condemned the use of violence to resolve disputes. Additionally, A.C.T. has sponsored many meaningful lectures and educational discussions including, but not limited to, former U.N. Weapons Inspector Scott Ritter, former New Mexico Supreme Court Justice Gene E. Franchini, former CIA Analyst Ray McGovern, Father John Dear, International Human Rights Activist Kathy Kelly and Community Activist and Author John Nichols.
2. All events sponsored by A.C.T. have been peaceful. The only violence that ever occurred was by Rumsfeld security personnel when he threw a rock at peaceful protesters. The man throwing the rock was not arrested. This was captured on video tape but the police refused to prosecute.
3. On numerous occasions, A.C.T. has announced its various events through advertisement on banners that hang across Highway 64 (parallel to the Kit Carson Park entrance), Town of Taos.
4. In October 2003 the Town of Taos permitted A.C.T. to hang the following banner:

ACT AGAINST EMPIRE
A.C.T. NOW FOR PEACE
Fire Rumsfeld! Peace Rally, El Prado, Sunday, Oct. 26

5. After the banner hung there was disagreement over its content expressed in the *Taos News*, in stores, and coffee shops. It was thereafter, that the Town of Taos amended its former Buildings and Grounds Banner Use and Regulations to include the above cited language.
6. The Town of Taos and other community organizations have often expressed its views and ideas through banners that have hung in the same venue. The “text on the banner [was not] for [an] event and sponsor only; [they were not] only banners advertising public entertainment or civic events.” Town of Taos Buildings and Grounds Banner Use and Regulations, 5. For example, in August, 2003, without an “event” or “sponsor” or “for public entertainment or [because of a] civic event” the Town of Taos displayed the following banner:

THE TOWN OF TAOS WELCOMES
VICE PRESIDENT DICK CHENEY AND
SECRETARY OF DEFENSE DONALD RUMSFELD

7. Currently, the Town of Taos has refused placement of the A.C.T. banner across Highway 64. The banner application for the week of March 7- March 14 has been “approved subject to modification of the banner. ... specifically the phrase ‘Fire Rumsfeld!’ [must be removed] for approval.” The Town of Taos cites Taos Banner Use and Regulation, item 5.; *See* Exhibit C & D, Attached to the Emergency Application for Temporary Restraining Order and Incorporated Herein.
8. “Fire Rumsfeld!” has always been a demand of the Action of Coalition of Taos and for good reason. Something here about waging aggressive war. Do

we want to say that he has failed to provide adequate safety protections for U.S. Military personnel. The latest accusations include that Donald H. Rumsfeld, the U.S. Secretary of Defense, whose policies, patterns, practices, derelictions of duty and command failures have caused horrific abuses and torture inflicted on detainees in U.S. custody in Iraq, Afghanistan and Guantanamo Bay, Cuba.¹ Such torture or other cruel, inhuman or degrading treatment or punishment of detainees in U.S. custody violates the United States Constitution, U.S.-ratified treaties including the Geneva Conventions, military rules and guidelines, the law of nations, and our fundamental moral values as a nation.²

STANDARD FOR TRO

To obtain a preliminary injunction, the movant must establish that:

¹ The prohibition against torture is a peremptory jus cogens norm from which no derogation is allowed. It is universally recognized and is binding on all persons under all circumstances. As U.S. courts have recognized, the torturer, “like the pirate and slave trader before him,” is “hostis humanis generis, an enemy of all mankind.” *Filartiga v. Pena-Irala*, 630 F. 2d 876, 890 (2d Cir. 1980). Torture or other cruel, inhuman or degrading treatment of detainees is universally prohibited by the laws of all civilized societies in clear and unambiguous terms. Article 17 of the Third Geneva Convention, included as part of U.S. Army Field Manual 27-10, The Law of Land Warfare, provides that “no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever.” Article 32 of the Fourth Geneva Convention, also incorporated in Field Manual 27-10, prohibits the torture of civilians. Article 3 Common to all Four Geneva Conventions expressly prohibits “violence to life and person, ... murder of all kinds, mutilation, cruel treatment and torture....” The U.N. Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85, which was ratified by the United States in 1994, confirms the nonderogable nature of this prohibition. The U.S. Supreme Court recently reaffirmed that torture is among the gravest violations of the law of nations. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2763 (2004); *id.* at 2783 (Breyer, J., concurring).

² The torture and abuses did not spring from the spontaneous acts of individual soldiers. As the report of former Defense Secretary James Schlesinger concluded, the abuses of detainees were “widespread,” and “were not just the failure of some individuals to follow known standards, and

the plaintiff will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the defendant; (3) issuance of the injunction will not be adverse to the public's interest; and (4) there is a substantial likelihood plaintiff will prevail on the merits. *LaBalbo v. Hymes*, 115 N.M. 314, 318, 850 P.2d 1017, 2021 (Ct. App. 1993). See also, *Worldwide St. Preachers' Fellowship v. Peterson*, 388 F.3d 555, (7th Cir. 2004) (The Plaintiffs have requested declaratory and temporary and injunctive relief. In order to prevail on a motion for a temporary injunction, plaintiffs must show: they are reasonably likely to prevail on the merits; they would suffer irreparable harm if the injunction is not granted; there is no corresponding hardship to Defendants; and an injunction will serve the public interest. See, e.g., *International Kennel Club v. Mighty Star, Inc.*, 846 F.2d 1079, 1084 (7th Cir. 1988); *National People's Action v. Village of Wilmette*, 914 F. 2d 1008, 1010-11 (7th Cir. 1990).

Plaintiffs meet all the above requirements. Plaintiffs have a better than negligible chance of succeeding in its case. Furthermore, without the restraining order in place, Plaintiffs will suffer irreparable harm. The political intimidation and first amendment activity – flying its banner and proceeding with a peace rally - is chilled, if not completely stultified. Conversely, Defendants will suffer no harm. Finally, the public interest will be served. Accordingly, the temporary restraining order must be granted.

LEGAL ARGUMENTS

A. Plaintiffs Are Likely To Prevail On The Merits.

To obtain a preliminary injunction, Plaintiffs must only show some likelihood of success on the merits - the threshold is low. It is enough that a plaintiff's chances are "better than negligible." *International Kennel Club*, 846 F.2d at 1084; *Jackson v. City of Markham*, Ill., 773

they are more than the failure of a few leaders to enforce proper discipline. There is both

F.Supp. 105, 107 (N.D.Ill. 1991). Plaintiff's chances of success in this lawsuit are far better than "negligible". Because Defendants have retaliated against Plaintiff for engaging in speech of a public concern, Plaintiff's chances of success are high.

Law enforcement activities designed to forbid persons or groups for criticizing government officials violate the First Amendment. In *Dellums v. Powell*, 566 F.2d 167, 195 (D.C. Cir. 1977), the court emphasized the significance of First Amendment rights in holding that a cause of action existed directly under the Constitution for damages for violations of these rights: "Basically, what is at stake here is loss of an opportunity to express [] one's dissatisfaction with the laws and policies of the United States. Staged demonstrations, capable of attracting national or regional attention in the press and broadcast media – are for better or worse a major vehicle by which those who wish to express dissent can create a forum in which their views may be brought to attention of a mass audience.... And often it is the staging and theatrics [] which express the passion and emotion with which a point of view is held. The demonstration, the picket line, and the myriad other forms of protest which abound in our society each offer peculiarly important opportunities in which speakers may at once persuade, accuse, and seek sympathy or political support, all in a manner likely to be noticed."

Plaintiffs speak on a matter of grave public concern – a cry for peace and against torture and abuse in a time of war. President Bush on June 22, 2004, declared that "the values of this country are such that torture is not a part of our soul and our being." Plaintiffs call for the firing of Rumsfeld because they submit Secretary of Defense Donald Rumsfeld is responsible for torture and abuse of detainees, the death of thousands of civilians and environmental devastation. The issues of environmental destruction (the use of weapons containing depleted uranium), death

institutional and personal responsibility at higher levels."

of innocent civilians and torture of detainees is of paramount public importance. A court must examine the content, form and context of a given statement as revealed by the whole record when determining whether the speech addresses a matter of public concern. *Gray v. Lacke*, 885 F.2d 399, 410 (7th Cir. 1989). *Williams v. Wallace*, 240 F. Supp. 100, 120 (M.D. Ala. 1965). (The law is clear that the right to petition one's government for the redress of grievances may be exercised in large groups.)

The government bears the burden of proving that speech is unprotected. *Waters v. Churchill*, 511 U.S. 661, 668 (1994) citing *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965). Defendants will be hard pressed to prove Plaintiff's speech is undeserving of protection.

A1. The Taos Banner and Use Regulation is Unconstitutional – It Violates the First Amendment to the U.S. Constitution, Equal Protection of the Laws, Due Process Protections and Article 2, §17 of the New Mexico Constitution.

The Town of Taos has failed to promulgate standards that guide both applicants and the decision makers. Applicants are entitled to know, what activities the government will allow for everyone or disallow for everyone so that they may plan accordingly, and so that they may challenge regulations they believe are unconstitutional restrictions on freedom of expression and assembly. Decision makers require clear standards to bind their discretion and eliminate prejudice (whether conscious or unconscious) in the granting of banner placement. As the Court in *Shuttlesworth* noted, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" must contain "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth v. Birmingham*, 394 U.S. 147,150-151 (1969). The Supreme Court stated more than a half-century ago the dangers and unconstitutionality of the failure to promulgate or enforce standards in relation to access to public space:

[T]his Court [has] condemned statutes and ordinances which required that permits be obtained from local officials as a prerequisite to the use of public places, on the grounds that

a license requirement constituted a prior restraint on freedom of speech, press and religion, and, in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid. [citation omitted] ... No standards appear anywhere; no narrowly drawn limitations; nor circumscribing of this absolute power; no substantial interest of the community to be served. It is clear that all that has been said about the invalidity of such limitless discretion must be equally applicable here." *Niemotko v. Maryland*, 340 U.S. 268, 271-72 (1951).

[T]he absence of express standards makes it difficult to distinguish, 'as applied,' between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these *guideposts*, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression In sum, without standards to fetter the licensor's discretion, the difficulties of proof and the case-by-case nature of 'as applied' challenges render the licensor's action in large measure effectively unreviewable. *Lakewood v. Plain Dealer Publishing Co.* 486 U.S. 750, 758-59 (1988).

“Precision of regulation must be the touchstone in an area [of free expression] so closely touching our most precious freedoms.” *NAACP v. Button*, 371 U.S. 415(1963).

The Town of Taos’ Banner and Use Regulations provides no procedural safeguards with regard to the granting of permits or denial thereof. In addition to the failure to promulgate narrowly tailored rules for the granting or denial of permits, the Town has placed final decision making concerning these banners in the hands of a biased Mayor. (“All banners concerning peace rallies must be approved by the Mayor.” J. Fresquez, Banner Application Receipt Personnel, March 3, 2005) "Our cases addressing prior restraints have identified ... evils that will not be tolerated in such schemes. [A] scheme that places 'unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.' *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 225 -27 (1990) [citations omitted]

“Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content; the

people are guaranteed the right to express any thought, free from government censorship.”

Police Department of the City of Chicago v. Moseley, 408 U.S. 92, 95 (1972). *Emphasis supplied*. Therefore, “[n]ecessarily, then under the equal protection clause, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views, and it may not select which issues are worth discussing or debating in public facilities; government must afford all points of view an equal opportunity to be heard.” *Moseley*, 408 U.S. at 96.

“[A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.... [W]e have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker. Therefore, even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not condition that speech on obtaining a license or permit from a government official in that official's boundless discretion.” *Lakewood v. Plain Dealer Publishing Co.* 486 U.S. 750, at 763-64 (1988)

“[A]ppropriate, limited, discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials, provided that such limited discretion is 'exercised with ...uniformity of method of treatment upon the facts of each application, free from improper or

inappropriate considerations and from unfair discrimination.” *Cox v. Louisiana*, 379 U.S. 536, (1965).

Hostility to this rally cannot justify its denial. “[M]ere public intolerance or animosity cannot be the basis for abridgement of ... constitutional freedoms.” *Coates v. City of Cincinnati*, 402 U.S. 611, 615(1971), *Collin v. Smith*, 578 F.2d 1197, 1205 (7th Cir. 1978). See also: *Watson v. City of Memphis* 373 U.S. 526 (1963), *Cox v. Louisiana*, *supra*.. Not even can the threat of violence constitute an excuse for its denial. *Cooper v. Aaron* (1958), 358 U.S. 1 (1958)

The Town of Taos Banner Use and Regulation violates the New Mexico Constitution on its face. “Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.” N.M. Const. art. II, § 17.

B. Without A Restraining Order, Plaintiffs Will Suffer Irreparable Harm.

Plaintiffs will suffer irreparable harm without the order. If the Court does not Order the Town of Taos to hang the banner immediately the advertisement for the peace rally on March 19 will be moot. When First Amendment rights are at stake, any chilling of those rights is a violation of the First Amendment. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" justifying injunctive relief. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) the Seventh Circuit concluded that “money damages are therefore inadequate.” *Joelner v. Village of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004). Here, Plaintiffs will be denied access to their First Amendment activities, to-wit, a forum to discuss and denounce the policies of war and torture and abuse by the highest level of government, because the Town of Taos has forbidden the forum producers from public

advertisement of the forum. Further, because Plaintiff's First Amendment rights have been violated and will continue to be violated without the granting of an injunction, Plaintiff has no adequate remedy at law. *Id.* at 109. Additionally, Plaintiffs, Cliff Bain and the Action Coalition of Taos, have invested substantial time and expense in organizing for these rallies.

C. The Threatened Injury to The Plaintiffs Outweighs Any Damage the Injunction Might Cause the Defendants.

Defendants will suffer no damage or hardship if the Order is entered. Defendants will surely not be harmed if Plaintiffs are permitted to hang its banner advertising its First Amendment protected activity. In *Temple Baptist Church v. City of Albuquerque*, 98 NM 138, 646 P.2d 565 (1982) the court held that the city could have a valid sign ordinance if it was **content neutral**, reasonable in terms of time, place and manner, served some significant governmental interest and allowed for ample alternative channels of communications. *Emphasis supplied.*

The Town of Taos cannot argue that it suffered or will suffer irreparable harm if this banner is allowed to fly. As shown below, the public will benefit. In a democracy, the government benefits when the public benefits.

D. The Public Interest Is Served By Granting An Injunction.

An injunction will serve the public interest. Plaintiffs submit valid complaints regarding the unconstitutionality of the Town's Banner and Use Regulations. The public has a genuine interest in ensuring that allegations against its elected and appointed officials is protected by the First Amendment to the U.S. Constitution and the New Mexico Constitution, as it is political speech and in the public interest. The conduct by the Town authorities, in the instant case, and through its discretionary permitting practice for protected activities in general,

creates a chill on, and obstructs, organizing efforts by all persons who wish to engage in freedom of expression and who are not favored by defendants. The Supreme Court recognizes the significance and value of robust demonstrations.

"[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949); *Collin v. Smith*, 578 F.2d 1197, 1205 (7th Cir. 1978).

As the Seventh Circuit stated recently: "There can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute because it is always in the public interest to protect First Amendment liberties. We believe that the public interest is better served by . . . protecting core First Amendment rights." *Joelner*, 378 F.3d at 620 (citations omitted)

Everyone gains when everyone's rights are upheld. Upholding everyone's rights is the function of the courts and upholding everyone's rights requires upholding Plaintiffs' rights. We should in these times be mindful that to the extent we secure legitimate and orderly access to means of communication for *all* views, we create conditions in which there is no incentive to resort to more disruptive conduct. Plaintiffs seek protection through the channels of his government of rights accorded them by the Constitution and we, as the agency of that government charged with securing those rights, ought ensure that *no unneeded delay* encumber the exercise of such critical freedoms. *Wolin v. Port of New York Authority*, 392 F.2d 83, 90 (2nd Cir. 1968) Emphasis supplied.

E. Conclusion

Plaintiffs have met all the requirements for the entry of a Temporary Restraining Order. Wherefore, for all the above stated reasons, Plaintiffs respectfully request this court grant their motion for a Temporary Restraining Order to Enjoin Defendants From Prohibiting A.C.T.'s Banner Placement Across Highway 64, to declare the Town of Taos Banner and Use Regulation as written and applied as Unconstitutional, for attorneys' fees and costs, and for any and all relief that law and justice require.

Dated: March 7, 2005

Respectfully submitted,

MARIEL NANASI
JEFFREY H. HAAS

Mariel Nanasi
Jeffery H. Haas
HCR 74 PO Box 243764
El Prado, NM 87529
(505) 776-1932
nanasi@starband.net