

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

RICHARD DORMAN and ADI NEUMAN,

Plaintiffs,

vs.

Case No. 02-1150-CZ

Hon. Melinda Morris

MARY SUE COLEMAN, PRESIDENT,
THE UNIVERSITY OF MICHIGAN, AND
DAVID A. BRANDON, LAURENCE B.
DEITCH, DANIEL D. HORNING, OLIVIA P.
MAYNARD, REBECCA MCGOWAN,
ANDREA FISCHER NEWMAN, S. MARTIN
TAYLOR, and KATHERINE E. WHITE,
THE REGENTS OF THE UNIVERSITY OF
MICHIGAN,

Defendants.

**AMICUS BRIEF OF THE
AMERICAN CIVIL LIBERTIES UNION
AND THE NATIONAL LAWYERS GUILD**

RICHARD A. SOBLE (P20766)
Cooperating Attorney,
A.C.L.U. Fund of Michigan
and National Lawyers American
221 N. Main #220
Ann Arbor, MI

KARY L. MOSS (P49759)
MICHAEL J. STEINBERG (P43085)
A.C.L.U. Fund of Michigan
60 West Hancock
Detroit, MI 48201
(313) 578-6813

RALPH J. SIRLIN (P24635)
Cooperating Attorney,
National Lawyers Guild
925 Ford Bldg.
Detroit, MI 48226
(313) 962-2770

Statement of Amici

The American Civil Liberties Fund of Michigan is a not-for-profit organization dedicated to preservation and protection of the Bill of Rights. The ACLU Fund is the litigation and education arm of the ACLU of Michigan, a subsidiary of a Washington, D.C., non-profit corporation and nationwide non-partisan organization of more than 275,000 members dedicated to the protection of civil liberties. The ACLU Fund regularly and frequently participates in litigation in state and federal courts seeking to protect the rights of United States and Michigan citizens. See, e.g., State ex rel O'Hair v Bennis, 447 Mich 719; 527 NW2d 483 (1994), aff'd, 116 SCt 994; 134 LEd2d 68 (1996); Booth Newspapers v University of Michigan Regents, 444 Mich 211; 507 NW2d 422 (1993); Rood v General Dynamics, 444 Mich 107; 507 NW2d 501 (1993); Sitz v Department of State Police, 443 Mich 744; 506 NW2d 209 (1993); Dudewicz v Norris Schmid, Inc, 443 Mich 68; 503 NW2d 645 (1993); People v DeJonge, 442 Mich 266; 501 NW2d 127 (1993); Sanchez v Lagoudakis, 440 Mich 496; 486 NW2d 657 (1992); People v Bullock, 440 Mich 15; 485 NW2d 866 (1992); Armstead v Detroit Edison, 439 Mich 868; 481 NW2d 342 (1991); Doe v Director of DSS, 439 Mich 650; 487 NW2d 166 (1992); People v Jamieson, 436 Mich 61; 461 NW2d 884 (1990); Mead v Batchlor, 435 Mich 480; 460 NW2d 493 (1990); Saldana v Kelsey-Hayes, 435 Mich 857 (1990); Storey v Meijer, 431 Mich 368; 429 NW2d 169 (1988); Smith v Department of Public Health, 428 Mich 540; 410 NW2d 749 (1987), aff'd, 491 US 58; 109 SCt 2304; 105 LEd2d 45; Woodland v Michigan Citizens Lobby, 423 Mich 188; 378 NW2d 337(1985); Department of Civil Rights v Beznos, 421 Mich 110; 365 NW2d 82 (1984); Female

Health Care Centers v Mills, 419 Mich 948; 357 NW2d 642 (1984); Socialist Workers Party v Secretary of State 412 Mich 571; 317 NW2d 1 (1982); People v Howell, 396 Mich 16; 238 NW2d 148 (1976); People v Winegar, 380 Mich 719; 158 NW2d 395 (1968), cert denied, 395 US 971; 89 S Ct; 2107; 23 L Ed 2d 759 (1969).

The National Lawyers Guild is an association dedicated to the need for basic change in the structure of our political and economic system. We seek to unite the lawyers, law students, legal workers and jailhouse lawyers of America in an organization that shall function as an effective political and social force in the service of the people, to the end that human rights shall be regarded as more sacred than property interests.

Our aim is to bring together all those who recognize the importance of safeguarding and extending the rights of workers, women, farmers and minority groups, upon whom the welfare of the entire nation depends; who seek actively to eliminate racism; who work to maintain and protect our civil rights and liberties in the face of persistent attacks upon them; and who look upon the law as an instrument for the protection of the people, rather than for their repression.

Introduction

On October 8, 2002, two students attending the University of Michigan filed a complaint in this court against the University of Michigan, including its President and the Board of Regents (hereinafter Defendants), seeking a permanent injunction ordering defendants to cancel a conference that has been organized by the National Student Conference on the Palestine Solidarity Movement, scheduled to take place on campus from October 12-14. Plaintiffs also seek attorneys fees and costs.¹ Upon information and belief, attendance at the conference is completely within the discretion of students and the public.

Plaintiffs allege that “conference speakers announced by Conference organizers include a “Who’s Who’ of supporters of terrorism and violence against the United States of America, Americans and Jews.” Plaintiffs Complaint at Para.12. Before any person has spoken at all, indeed, before the conference has even begun, plaintiffs ask this Court to grant their request for injunctive relief because some of the conference speakers, at various points in the past, have “demonstrated a record of inciteful speech and engaged in threats.” Citing examples of speech made elsewhere in the country at different times by some of the conference participants, plaintiffs would have this court find that the letting the conference go forward would violate the Michigan Penal Code’s proscription against ethnic intimidation, MCL 750.147b, and the Elliott-Larsen Civil Rights Act, M.C.L. 37.201, et seq. *Id.* at Para. 29 and 33.

Even assuming the facts to be true as Plaintiffs’ allege, it would be a gross

¹ It is Amici’s understanding that Plaintiffs’ intend to file a motion for temporary restraining order on

violation of the First Amendment to grant injunctive relief stopping this entire conference, both because such an injunction would be improperly content-based, overbroad, and constitute a prior restraint on expression.

I. Legal Argument

A. Legal Standard

To succeed in obtaining a temporary restraining order or injunctive relief, the Plaintiffs must show that (1) they have a reasonable likelihood of success on the merits of the underlying claim; (2) they have no adequate remedy at law; (3) they will suffer irreparable harm if the preliminary injunction is denied; (4) the irreparable harm they will suffer without injunctive relief is greater than the harm the defendant will suffer if the preliminary injunction is granted; and (5) the preliminary injunction will not harm the public interest. *Michigan Council 25, American Federation of State, County & Municipal Employees v Detroit*, 124 Mich App 791, 794 (1983) (preliminary injunction).

Amici will focus primarily on the first requirement: that is, that the plaintiffs do not have any likelihood of success on their claims. The governing standard is articulated in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the seminal Supreme Court case which reversed the conviction of a Klu Klux Klan member under a criminal syndicalism statute that prohibited advocating the use of crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing political reform. The Court held that the constitutional guarantees of free speech and press do not allow a State to forbid speech, even speech that advocates of the use of force or of law except where such

advocacy is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action. 395 U.S. at 447. See also *Hess v. Indiana*, 414 U.S. 105 (1973) (overturning disorderly conduct conviction); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) (overturning verdict for white merchants following boycott organized by the NAACP that included intimidation and threats).

Not surprisingly, “[i]t is rare that a regulation restricting speech because of its content will ever be permissible.” *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000) (holding Telecommunication Act requirement that cable operators scramble sexually explicit channels violated First Amendment). Content-based restrictions must be subject to the strictest scrutiny. *Id.* The regulation must be “necessary to serve a compelling state interest” and “narrowly drawn to achieve that end.” *Boos v. Barry*, 485 U.S. 312, 321 (1988) (finding state law prohibiting display of signs within 500 feet of an embassy as content-based restriction not narrowly tailored); *Playboy Entertainment*, 529 U.S. at 813. Moreover, the government must “demonstrate” that the harms it relies on are “real and that its restriction will in fact alleviate them to a material degree.” *Playboy Entertainment*, 529 U.S. at 817. The regulation must also advance the means of advancing government’s interest that is the least restrictive of speech. *Id.* at 813 (citing *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997)); See also *Yates v. United States*, 354 U.S. 298 (1957) (advocacy of forcible overthrow of the government as an abstract principle is immune from prosecution); *Herndon v. Lowry*, 301 U.S. 242 (1966) (overturning conviction for exercising First Amendment rights to incite insurrection because of lack of evidence of incitement).

B. Plaintiffs cannot assert an interest that alleged “fighting words” in this case would satisfy the strict scrutiny requirement.

The “fighting words” doctrine was first articulated by the Supreme Court in *Chaplinsky v. New Hampshire*, 315 U.S. 516 (1942), holding that words that “inflict injury or tend to incite an immediate breach of the peace” are unprotected by the First Amendment. Since then the Court has further defined this exception by limiting its application. See *Gooding v. Wilson*, 405 U.S. 518, 524-5 (1972) (holding a Georgia statute prohibiting abusive language to be vague and overbroad); *Terminello v. City of Chicago*, 337 U.S. 1, 4-5 (1949) (reversing conviction of petitioner whose speech allegedly stirred people to anger and invited public dispute.) As Justice Marshall wrote, “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.” *Police Department v. Mosely*, 408 U.S. 92, 95 (1972).

In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), for example, the Court invalidated a Bias-Motivated Crime Ordinance after a group of teenagers allegedly constructed a cross and set it ablaze inside the fenced yard of a black family. The Court held that the “ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.” 505 U.S. at 380-1. Writing for the majority, Justice Scalia observed that “fighting words” are undeserving of protection in all respects. Instead, he argued that the ability to proscribe certain speech is based on its non-content, not its content element. *Id.* at 386. He said:

In other words, the exclusion of ‘fighting words’ from the scope of the First

Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a 'nonspeech' element of communication.

Id.

Examples of speech which has been considered to have First Amendment protection includes :

*a Klu Klux Klansman's statement in *Brandenburg* that, "[the Ku Klux Klan is] not a revengent (sic) organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revenge taken";

* a protestor's protected chant in *United States v. Hess*, that "we'll take the fucking street again";

*a NAACP speaker's threat, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), to boycott violators that "if we catch any of you going in any of them racist stores, we're gonna break your damn neck;" or

*a draft protestor's crude, but protected statement that "if they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," *Watts v. United States*, 394 U.S. 705 (1969).

As Judge Cohn recognized in *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989), under certain circumstances racial and ethnic epithets, slurs and insults might fall within the "fighting words" exception to the First Amendment, and that credible threats of violence or property damage made with specific intent to harass or intimidate the victim because of his race, sex, religion or national origin is punishable both criminally and civilly under state law. *Id.* at 862. However, a university may not prohibit

certain speech because it disagrees with ideas or messages sought to be conveyed. *Id.* at 863; See *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Cohen v. California*, 403 U.S. 15 ((1971)) (“fuck the draft”).

Regardless, Plaintiffs allegations that comments made by speakers invited to attend this conference in the past would “incite violence” is pure conjecture, even assuming that different speakers may offend and upset some people.

D. Plaintiffs’ request seeks an absolute ban on this conference and so is not narrowly tailored.

Educational institutions hold a unique place in our society where freedom of thought and opinion is cherished as almost nowhere else. They provide a forum where strong opinions can, and should be, voiced. In this case, the injunction that plaintiffs’ seek would have this court prohibit all speech related to the Middle East and the pros and cons of university divestment, subjects that even plaintiffs’ must concede are entitled to First Amendment protection. As the court recognized in *Doe*, 721 F. Supp. at 864, “a law regulating speech will be deemed overbroad if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate.” (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

This is no different than a case in which the Supreme Court struck down an ordinance that made it unlawful for citizens to molest, abuse or interrupt any policeman in the execution of duty because it would also forbid citizens from criticizing or insulting officers. See *Houston v. Hill*, 482 U.S. 451, 460-65. Nor is it any different from a case in which the Court struck a statute that made it unlawful for any person to use “opprobrious words or abusive language, tending to cause a breach of the peace,”

because it punished speech which did not rise to the level of fighting words. *Gooding v. Wilson*, 405 U.S. 518 (1972).

E. Issuance of an Injunction would constitute an unconstitutional prior restraint on speech.

Injunctive relief that would prohibit a conference from taking place would clearly constitute prior restraint on speech without any of the procedural safeguards mandated by the Supreme Court in *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977) and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).² Prior restraints are a “most extraordinary remedy.” *CBS v. Davis*, 510 U.S. 1315, 1317 (1994). See also *Crue v. Aiken*, 137 F. Supp.2d 1076 (C.D. Illinois 2001) (striking University policy that was an unconstitutional prior restraint on speech).

In *CBS v. Davis*, *supra*, for example, the Court approved the stay of a preliminary injunction that would have prohibited the news agency from broadcasting footage taken at a meat packing company. The Court recognized that to prevent the broadcasting of this footage, based on speculation of facts “known and unknowable,” would cause irreparable harm to the news media. And, in the famous “Skokie case,” *Collin v. Smith*, 578 F.2d 1197 (1978), the Seventh Circuit ruled that a city could not deny a parade permit to a Nazi organization because of *anticipated* violations of an ordinance which prohibited the dissemination of materials that promoted hatred towards persons based on their heritage. As that Court recognized:

² In *Skokie* the Supreme Court recognized that procedural safeguards would include immediate appellate review or, absent such review, allowance of a stay. Given that Plaintiffs have delayed filing their complaint until two days before the onset of the conference, and have not filed any motions or requests for a hearing as of the date that this amicus brief was filed, and the day when the conference is scheduled to begin, means that defendants would have no opportunity to seek appellate review should this Court grant Plaintiffs’ motion.

Retaining meaning in civil rights...seldom seems to be accomplished by the easy cases, however, and it was not so here....[I]f these civil rights are to remain vital for all, they must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises.

Id. at 1210.

CONCLUSION

For all of the forgoing reasons, the Court should deny Plaintiffs' motion for a permanent injunction and temporary restraining order.

Respectfully submitted,

Attorney for Amici

Kary L. Moss, Esq. (P49759)
Michael Steinberg, Esq. (P43085)
ACLU Fund of Michigan.
60 West Hancock
Detroit, MI 48201
(313) 578-6813

Richard Soble, Esq.,
Cooperating Attorney (P20766)
ACLU Fund of Michigan
National Lawyers Guild, Detroit Chapter
Soble & Rowe
221 N. Main Street, Ste. 200
Ann Arbor, MI 48104
(734) 996-5600

Ralph Sirlin, Esq., (P24635)
Cooperating Attorney
Reosti, James & Sirlin
National Lawyers Guild, Detroit Chapter
615 Griswold Street
Detroit MI 48226
(313)962-2770

