U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
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CLERK, U.S. DISTRICT COURT
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In the United States District Court
For the Northern District of Texas
Lubbock Division

Jason W. Roberts, Plaintiff,	§	
v.	§	Civ. No. 5-03-CV-0140-C
Donald R. Haragan, et al. Defendants.	§	

Memorandum of Law in Support of
Plaintiff's Motion for Preliminary Injunction

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STATEMENT OF THE NATURE AND STAGE OF PROCEEDING

The plaintiff, Jason Roberts, has filed a Verified Complaint for injunctive and declaratory relief. Mr. Roberts now seeks an order granting him a preliminary injunction restraining defendants from enforcing the challenged unconstitutional policies of Texas Tech University (TTU) because they impermissibly restrict free speech. For the reasons set forth below, the policies are unconstitutional on their face and as applied to the plaintiff.

STATEMENT OF THE ISSUES TO BE RULED UPON BY THE COURT AND STANDARD OF REVIEW

The issue is whether the plaintiff is entitled to the issuance of a preliminary injunction restraining defendants from enforcing the challenged TTU policies that require permission to speak on campus unless the speech takes place in a small gazebo. Plaintiff is also seeking to enjoin the TTU policy that prohibits student speech that may be considered "intimidating" or "humiliating."

The standard for a preliminary injunction is well established. The plaintiff must demonstrate:

> (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest.

Shamloo v. Mississippi State Bd. of Trustees, 620 F2d 516, 523-524 (5th Cir. 1980), quoting Canal Authority of Florida v. Callaway, 489 F.2d 567 (5th Cir. 1974).

SUMMARY OF THE ARGUMENT[1]

TTU requires students to obtain prior written permission whenever they desire to engage in student speech or other expressive activities anywhere on the TTU campus other than a small Gazebo designated as a "Free Speech Area." Student Affairs Handbook 2002-2003 ("Handbook") at 14-15, ¶¶ A-E ("Students or registered student organizations desiring to use campus grounds must register for grounds use") (Ex. C).[2] This Gazebo holds about 40 people and is clearly much too small to serve a campus population of 28,000 students.

The permit process requires students to submit an application at least six business days prior to any speech event, describing the nature and content of his or her proposed expression and the location on campus where it will occur. TTU students are not permitted to engage in free speech without prior permission unless they are in the Gazebo. Permission to speak outside the Gazebo will not be granted unless TTU officials determine that it will "serve or benefit the entire University community." Handbook at 14, ¶A (Ex. C).

TTU policies also grant university officials unfettered discretion to restrict proposed student expression that they believe may "intimidate" or "humiliate" another person anywhere on campus. This permit requirement and restrictions on speech content are hereinafter referred to as the "Speech Code." Handbook at 19 ¶ 5(d) (Ex. C).

On May 29, 2003, TTU officials denied Mr. Roberts' May 22, 2003 application to engage in religious and political speech on a large, outdoor, open area outside the campus bookstore. Mr. Roberts sought permission to express his religious and political view that "homosexuality is a sinful, immoral, and unhealthy lifestyle," and to pass out a leaflet citing the Scriptural basis for his view. In a written response, the TTU Assistant Director of the Center for Campus Life explained that it was the view of TTU that the plaintiff's speech regarding his negative opinions of the homosexual lifestyle would not "serve or benefit the entire University community."

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[1] The material facts are set forth in the Verified Complaint (see ¶¶ 26-80) and Exhibits attached thereto.

[2] All exhibits referred to herein are attached to the Verified Complaint.

Plaintiff's appeal of the decision was also denied for the location he requested. However, he was given permission to speak in a less desirable location where students are not as likely to hear his message.

The First Amendment protects student expression on the university campus – which is considered a marketplace of ideas. These protections reach their zenith when the content of the speech at issue is controversial or annoying, and therefore most in need of protection.

The TTU Speech Code is an unconstitutionally overbroad prior restraint because it prohibits student speech in all common areas except the Gazebo without prior permission. The Speech Code also is unconstitutionally content-based because it allows TTU officials to grant or deny a permit based on the potentially offensive content of the speech and the anticipated negative reaction it may invoke. The defendants may not restrict speech simply because they believe it may potentially intimidate or humiliate a person or fail to "serve or benefit the entire University community." Even speech that actually disrupts may not be restricted under the First Amendment unless the disruption is "material and substantial."

The Speech Code is also unconstitutionally vague since it lacks narrow, objective and definite standards to guide the decision-makers. It vests TTU officials with unfettered discretion to prohibit any student speech that they might find intimidating or humiliating on the basis of their own subjective reaction or the anticipated subjective reaction of others. It lends itself to arbitrary and discriminatory enforcement because different officials can attach different meanings to the vague criteria used. The failure to include time limits on the decision-maker in an appeal also constitutes a form of "unbridled discretion."

The loss of First Amendment freedoms, even for a moment, results in irreparable injury. The injury to Mr. Roberts' First Amendment freedoms far outweighs any inconvenience to the defendants. The public interest will be served, not injured, by the elimination of unconstitutional conduct by the defendants.

ARGUMENT

I. LIKELIHOOD OF SUCCESS ON THE MERITS

A. The Plaintiff's Expression is Protected by the First Amendment.

Freedom of expression – an essential ingredient of liberty – must be jealously guarded, particularly when the controversial nature of the speaker's message has stirred emotions and triggered an attempt to suppress that message. Gregory v. City of Chicago, 394 U.S. 111 (1969); Texas v. Johnson, 491 U.S. 397 (1989). Popular speech and pleasant words have little need for constitutional protection. City of Houston v. Hill, 482 U.S. 451, 462 n.11 (1987). The true test of the right to free speech is the protection afforded to humiliating, intimidating, unpopular, or even despised speech. Cf. Madsen v. Women's Health Center, 512 U.S. 753, 773-74 (1994) (anti-abortion expression); United States v. Eichman, 496 U.S. 310 (1990) (flag burning); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (cross-burning); Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (scurrilous attacks on public figure).

> Free speech ....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. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest . . . . There is not room under our Constitution for a more restrictive view.

Terminiello v. Chicago, 337 U.S. 1, 3-4 (1949).[3] The divisiveness of an issue like homosexuality – including debates over the contours of its morality, associated health risks, and the legality of homosexual practices – provokes expressive activities that irritate, provoke, disturb, and test the patience of many. But "if absolute assurance of tranquility is required, we may as well forget about free speech." City of Houston, 482 U.S. at 462 n.11 (editing marks and citation omitted).

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[3] Cf. M. Nimmer, Freedom of Speech §§ 1.04 (1984) (gathering cases and materials on the "safety valve" function of freedom of expression).

There is no doubt that the expressive activities sought to be engaged in by the plaintiff in the instant case are constitutionally protected. Of course, oral communications rest at the very heart of the right to free speech. City of Houston; Gregory; Edwards v. South Carolina, 372 U.S. 339 (1963); Schenck v. United States, 519 U.S. 357, 377 (1997). "It is offensive--not only to the values protected by the First Amendment, but to the very notion of a free society--that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so." Watchtower Bible and Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 165-166 (2002).

Further, engaging in "leafleting [is an] expressive activity involving 'speech' protected by the First Amendment." United States v. Grace, 461 U.S. 171, 176 (1983). See also Schenck, 519 U.S. at 377 (noting that leafleting is a "classic form of speech that lie[s] at the heart of the First Amendment"). Pamphleteering is a particularly inoffensive means of communication: "one need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand," United States v. Kokinda, 497 U.S. 720, 734 (1990) (plurality).[4] In Watchtower Bible, Justice Stevens noted, "[f]or over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering." Id., 122 U.S. at 160, citing Hynes v. Mayor and Council of Oradell, 425 U.S. 610 (1976); Martin v. City of Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State (Town of Irvington), 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938).

B. First Amendment Protections Apply With Special Force to Student Expression on University Campuses

It is well settled that student expression is entitled to First Amendment protection on the university campus. Healy v. James, 408 U.S. 169 (1972). "[W]hile a university certainly has the

[4] The Supreme Court's consistent jurisprudence has recognized free distribution of literature as expression protected by the Constitution. See, e.g., Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Lovell v. Griffin, 303 U.S.444, 452 (1938); Heffron v. ISKCON, 452 U.S. 640 (1981).

right to 'prescribe and control conduct' on its campus, the 'vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Gay Student Services v. Texas A & M University, 737 F.2d 1317, 1326 (5th Cir. 1984) (quoting Healy at 180, citing Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 507 (1969)). "Colleges and Universities are not immune from the requirements of the First Amendment." Shamloo v. Mississippi State Board of Trustees, 620 F. 2d 516, 521 (5th Cir. 1980). Indeed, the Supreme Court regards a public university as a marketplace of ideas.

> This Court has recognized that the campus of a public university, at least for its students, possess many of the characteristics of a public forum.... "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'" Healy v. James, 408 U.S. 169, 180 (1972). Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." Id., at 181-182. We therefore have held that students enjoy First Amendment rights of speech and association on the campus, and that the "denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint. Id., at 181, 184.

Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981). See also Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

In Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992), the court held that Southwest Texas State University's anti-solicitation policy, prohibiting students from handing out free newspapers with commercal advertisements, violated the plaintiffs' First Amendment right to free speech. The court noted:

> Roughly 5,000 students live and work on the campus, making the campus, in the words of the University's own promotional booklet, a "town" of which the resident student will be a "contributing citizen" and "voting member." The campus's function as the site of a community of full-time residents makes it "a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment," Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 651 (1981), and suggests an intended role more akin to a public street or park than a non-public forum. See Hague v. CIO, 307 U.S. 496 (1939).

TTU has recognized these rules of law and similarly designated its campus as a place where students enjoy freedom of speech.

> Students need to be encouraged and free to explore ideas, test values and assumptions in experience, face dilemmas of doubt and perplexity, question their society, criticize and be criticized. ***Hence the doctrines of academic freedom and of free speech that are central to the classroom must extend to other areas of campus life.*** Colleges and universities must protect and encourage ideological exploration and avoid policies or practices that bind the inquiring minds and spirits of students, faculty, and staff.

Handbook at 2 (Ex. C) (emphasis added).

Public universities are required to avoid regulation of student speech in ways that turn on the "content of the ...[speech] rather than the time, place, or manner" in which it is delivered. Papish v. Board of Curators of Univ. of Missouri, 410 U.S. 667, 670 (1973). Furthermore, regulation of student expression on the basis of the "motivating ideology or the opinion or perspective of the speaker" constitutes viewpoint-based discrimination – "an egregious form of content discrimination" – that is never allowed. Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 829. Cf. Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993), R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

1. **The Speech Code is Unconstitutionally Overbroad.**

Pursuant to the overbreadth doctrine, restrictions on speech cannot "sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307 (1964); and see Schneider v. New Jersey, 308 U.S. 147, 160 (1939). "In the First Amendment area government may regulate only with narrow specificity." NAACP v. Button, 371 U.S. 415, 433 (1963). A regulation is void if it "does not aim specifically at evils within the allowable area of [government] control but . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise" of protected rights. Thornhill v. Alabama, 310

U.S. 88, 97 (1940). *And* see City of Houston, 482 U.S. at 458-59; Gooding v. Wilson, 405 U.S. 518 (1972).

As discussed below, while TTU has a legitimate governmental interest in maintaining order on its campus, its challenged Speech Code goes well beyond this interest and trespass on protected student expression.

2. The Speech Code Restricts More Student Speech Than Permitted Under the Applicable Standards of *Tinker* and *Burnside*.

The controlling cases on student expression in the case at bar are Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), and Burnside v. Byers, 363 F. 2d 744, 749 (5th Cir. 1966). In Burnside the Fifth Circuit enunciated its standard under the First Amendment for determining the reach of constitutional protections afforded student expression. 363 F. 2d at 749. The test was later adopted by the Supreme Court in Tinker, 393 U.S. at 513. *See discussion* Shamloo, 620 F. 2d at 521. The Tinker/Burnside test was again enunciated by the Fifth Circuit in Shamloo. A student may engage in expressive activities[5] . . .

> **if he does so without "materially and substantially (interfering) with the requirements of appropriate discipline in the operation of the school"** and without colliding with the rights of others. Burnside v. Byars, *supra*, 363 F.2d at 749. But conduct by the student, in class or out of it, which for any reason whether it stems from time, place, or type of behavior **materially disrupts** class work or involves **substantial disorder** or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Shamloo, 620 F.2d at 516 (quoting Tinker, 393 U.S. at 513) (emphasis added.) As the Supreme Court elaborated in Tinker:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to . . . students. It can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate . . . . In our system, state-operated schools may not be

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[5] Although Tinker and Burnside involved student speech on secondary school campuses the standards enunciated in those cases are applied by the Fifth Circuit to colleges and university campuses as well. Jenkins v. Louisiana State Board of Education, 506 F. 2d 992, 1002 (5th Cir. 1975), Shamloo, 620 F2d at 521;

> enclaves of totalitarianism. School officials do not possess absolute authority over students. They are possessed of fundamental rights which the State must respect . . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom to expression of their views . . . . [S]chool officials cannot suppress 'expressions of feelings with which they do not wish to contend.'. . . . 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American school.'. . . When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects **. . . if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others.**

Tinker, 393 U.S. at 506, 511, 512-513 (emphasis added.)

The TTU Speech Code completely prohibits student expression deemed to be potentially "intimidating,"or "humiliating," and limits speech not "beneficial" to the whole university to a small Gazebo. The determinations are entirely subjective, and are not even expressly based upon a regard for any level of disruption that the speech may cause. Thus, by its own terms the Speech Code falls short of the *material* and *substantial* disruption standard established in Tinker and Burnside. Indeed the Fifth Circuit has held that even actual student "disruption" that fails to rise to the level of a *material* and *substantial* disruption fails to meet the standard established in Tinker and Burnside. As the Court stated in Shamloo, the

> . . . district court concluded that "the demonstration had a disruptive effect with respect to other student's rights. **But this is not enough to conclude that the demonstration was not protected by the First Amendment.** The court must also conclude (1) that the disruption was a material disruption of class work or (2) that it involved substantial disorder or invasion of the rights of others. It must constitute a material and substantial interference with discipline.

Shamloo, 620 F.2d at 522 (emphasis added). The Jackson State University policy struck down in Shamloo was a time and place restriction that limited student speech activities only to "activities of a wholesome nature." Id. at 523. The ambiguous and unconstitutional "wholesome

nature" criteria is strikingly similar to that imposed by TTU in its approval of only those activities which it deems to "serve or benefit the entire University community."

As in the present case, the restriction in Shamloo reached protected speech beyond that permitted by Tinker and Burnside. Id. Similarly see Burnside, 363 F. 2d at 748; Canady v. Bossier Parish School Board, 240 F. 3d 437, 442 (5th Cir. 2001) ("The [Tinker] Court concluded that when officials attempt to restrict students from expressing particular political views, they must demonstrate that the expression would 'substantially interfere with the work of the school or impinge upon the rights of other students.'")

The Supreme Court's decision in Healy v. James, 408 U.S. 169, another college student speech case, is also instructive. In Healy, the Court struck down a college's attempt to restrict the expressive activities of a student group that the college deemed "would be a 'disruptive influence at CCSC.'" Id. at 188. The college asserted that the group's "'prospective campus activities were likely to cause a disruptive influence at CCSC.'" Id. The Court rejected this reasoning reiterating that "'undifferentiated fear or apprehension of disturbance . . . is not enough to overcome the right to freedom of expression'" on a college campus. Id. at 191 (quoting Tinker at 508). Applied to the instant case, while some, including TTU, may "find the views expressed by" the plaintiff "to be abhorrent" and even possibly disruptive, this is not a permissible basis for restricting his speech rights. Healy at 187-188. And see Gay Students Services, 737 F. 2d at 1327 ("unsubstantiated fear or apprehension" that a student or student group's speech will cause disruption is insufficient to restrict student expression).[6] In the present

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[6] As the Court stated in Tinker:

> Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on campus, that deviates from the views of another person, may start an argument, or cause a disturbance. But our Constitution says we must take this risk, Terminello v. Chicago, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively, often disputatious, society.

393 U.S. at 508.

case, there is no evidence of *any* actual disruption, or even "potential" disruption, let alone a "substantial and material" disruption.

a. The Policy is an Unconstitutional Prior Restraint.

The Speech Code requires students to obtain permission to speak in any area of TTU campus except the Gazebo. This amounts to an unconstitutional prior restraint on speech. The Supreme Court has held that "the regulations we have found invalid as prior restraints have had this in common: they gave public officials the power to deny use of a forum in advance of actual expression." Ward v. Rock Against Racism, 491 U.S. at 795 n.5 (internal quotation marks and citation omitted). "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

Under Defendant's Speech Code, a student needs permission to stand on a campus sidewalk and deliver a speech to classmates on the way to class - unless the speech is given in the Gazebo. This is exactly the type of restriction the Supreme Court has stricken on numerous occasions.

For instance, in Schneider v. State, 308 U.S. 147 (1939), the court held unconstitutional a local ordinance requiring a permit to canvass and distribute literature. First, the court recognized that the government can only regulate speech in a public forum as long as it "does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature... ." Id. at 160. The court then determined:

> [W]e hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house.

Id. at 164. In the present case, not only must students obtain a permit to distribute literature to their classmates from door to door, Handbook at 17, ¶ E(4)(d) (Ex. C), they must also get a permit if they want to speak on the streets and sidewalks of campus - outside of a small designated area. Id. at 15, ¶¶ E & F. This clearly violates the prohibition on prior restraints as set forth in Schneider as well as other Supreme Court precedents. See, e.g., Lovell v. City of Griffin, 303 U.S. 444 (1938) (striking down an ordinance that required permission to distribute literature on streets and sidewalks); and Hague v. C.I.O., 307 U.S. 496 (1939) (voiding an ordinance prohibiting free speech and assembly in public places without a permit).

TTU's prior restraint on speech in common areas of campus is further exacerbated by the fact that permission to speak outside the Gazebo is based upon the content of the speech. Use of campus space, including common areas is limited to speech which will "serve or benefit the entire university community." Student Affairs Handbook at 14, ¶A (Ex. C); Denial of request by Assistant Director of the Center for Campus Life (Ex. F).

"When the restriction upon student expression takes the form of an attempt to predict in advance the content and consequences of that expression, it is tantamount to a prior restraint and carries a heavy presumption against its constitutionality." Gay Student Services, 737 F. 2d at 1325, quoting University of Southern Mississippi Chapter of the Mississippi Civil Liberties Union v. University of Southern Mississippi, 452 F. 2d 564, 566 (5th Cir. 1971) (*quoting* Tinker, 393 U.S. at 509). In this case, TTU officials must attempt to determine whether, in their opinion, the speech outside the Gazebo will benefit the entire university community. Whether speech will benefit the entire university community can only be determined by considering the content of the speech. No guidelines are provided to university officials to help them make this determination. This attempt to predict the benefit of the speech before it occurs carries a heavy presumption against constitutionality.

For instance, a restriction on expression which turns on the *anticipated* potential for *disturbance* is plainly impermissible. As the Supreme Court of Texas has stated:

> The potential danger feared by the city officials was the public disorder created by the hostile audience. Such fears are not a constitutionally permissible factor to be considered in regulating demonstrations. Gregory v. City of Chicago, *supra*, 394 U.S. 111; Cox v. Louisiana, supra, 379 U.S. at 551; Hague v. C.I.O., *supra*, 307 U.S. at 516. [footnote omitted]. As one writer aptly observed: "It is unthinkable that such a 'heckler's veto' should rise to the dignity of a constitutional principle," justifying a prior restraint on free speech. Blasi, Prior Restraints on Demonstrations, 68 Mich. L. Rev. 1481, at 1510 (1970). Justice Cadena's dissent in the court of civil appeals correctly observes that the City's "evidence" consisted only of speculation about possible reprisals against the fifty hostages. It is clear, however, that "undifferentiated fear of disturbance cannot be the basis of a prior restraint." Tinker v. Des Moines School District, 393 U.S. 503 (1969). Nor does the "clear and present danger" test, first announced by Justice Holmes in Schenck v. United States, 249 U.S. 47 (1919), apply to this case. This doctrine has never been used to justify prior restraints on free speech. Nebraska Press Ass'n v. Stuart, *supra*. Rather, it has been employed by the courts only in the context of advocacy and incitement as a test of permissible punishment. Brandenburg v. Ohio, 395 U.S. 444 (1969).

Iranian Muslim Organization v. City of San Antonio, 615 S.W. 2d 202, 206-207 (Tex. 1981).

In the instant case, TTU's decisions are based upon even less acceptable and subjective criteria. TTU is not just concerned about whether a hostile audience may react in a disorderly way to student speech. It attempts to make the infinitely more difficult decision of whether it will benefit the entire university community. As with any other classic prior restraint, under the TTU Speech Code, speech can proceed only if permission is granted in advance based on the proposed content and value of the speech.

Finally, the Speech Code fails to provide a time limit on the decision maker in an appeal when an application to engage in student expression is denied. Student Affairs Handbook at 15, ¶ G (Ex. C). This alone is a fatal constitutional defect in the policy. Freedman v. Maryland, 380 U.S. 51, 58-59 (1965); FW/PBS v. City of Dallas, 493 U.S 215, 226 (1990) ("a prior restraint that fails to place limits on the time within which the decision maker must issue the license is impermissible.").

b. The Speech Code is a Content-Based Restriction on Expression

Content-based restrictions are presumptively unconstitutional.

> 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. . . . Necessarily, then, . . . 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 . . . . Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Police Dep't of Chicago v. Mosley, 408 U.S. at 95-96; *accord* Carey v. Brown, 447 U.S. 455, 462-63 (1980). Even time, place, and manner restrictions on expression are unconstitutional when they are not "content- neutral." United States v. Grace, 461 U.S. at 177; Ward v. Rock Against Racism, 491 U.S. 781 (1989);and *see* Frisby v. Schultz, 487 U.S. 474, 481 (1988). "'Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.'" Forsythe County, Ga. v. Nationalist Movement, 505 U. S. 123, 114 (1992) (citations omitted). The Court in Forsythe County observed that:

> Although there is a 'heavy presumption' against the validity of a prior restraint [citation omitted], the Court has recognized that **government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally** [citation omitted] . . . . Such a scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official . . . . [citation omitted] **Further, any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message . . .**

505 U.S. at 131 (emphasis added).

The TTU policy is unconstitutional because it is a content-based restriction on expression. A permit for student expression is granted or denied on the basis of the content of the proposed speech, and in particular, whether the proposed speech has the potential to "intimidate," "humiliate," or "serve or benefit" the entire university community. The Supreme Court has made it abundantly clear that a restriction on speech is content-based, and therefore unconstitutional, when it is based on the potential reaction to the speech of the audience. Forsyth County, Ga., 505 U.S. at 135. In Forsythe County the Court considered a permit requirement

that was based on the anticipated hostile reaction to the proposed expressive activity. The Court held that a governmental restriction that examines the content of the message to be communicated constitutes an unconstitutional content-based regulation. Id. at 133-134. "*Listeners reaction to speech is not a content-neutral basis for regulation.*" Id. at 134. (emphasis added). Similarly in Texas v. Johnson, 491 U.S. at 412, the Court held that regulations which consider anticipated "unrest" or "violent reaction" to expression are content-based and therefore unconstitutional. As the Court reiterated in United States v. Eichman, 496 U.S. 310 (1990), a regulation that restricts expression "out of concern for its likely communicative impact . . . cannot be 'justified without reference to the content of the regulated speech.'" Id. at 317-18. Similarly see Boos v. Barry, 485 U.S. 312, 321 (1988).

In fact, it is uniformly recognized that speech cannot be restricted because of the emotive impact of a communication on its audience. For example, in Gooding v. Wilson, 405 U.S. 518, 527 (1972), a Georgia statute was held unconstitutionally overbroad because it made it "a breach of the peace merely to speak words *offensive* to some who hear them, and so swept too broadly" (emphasis added). In Coates v. Cincinnati, 402 U.S. 611, 614 (1971), the Court struck down an ordinance making it a crime for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner *annoying* to persons passing by . . . ." (emphasis added). "In almost every instance it is not acceptable for the state to prevent a speaker from exercising his constitutional rights because of the reaction to him by others." Beckerman v. City of Tupelo, Miss., 664 F.2d 502, 509 (5th Cir. 1981). See also, Bachellar v. Maryland, 397 U.S. 564 (1970) (disorderly conduct conviction voided because charge permitted conviction for "saying that which offends, disturbs" based on evidence that some onlookers were angry or resentful); O'Conner v. Donaldson, 422 U.S. 563, 575 (1975) ("mere public intolerance or animosity cannot constitutionally justify deprivation of a person's physical liberty"); Hastings v. Bonner, 578 F.2d 136, 141 (5th Cir. 1978) ("The right of free association may not be abridged merely because its exercise may be annoying to some people"); Collin v. Smith, 578 F.2d 1197, 1207 (7th Cir. 1978) ("ordinance is fatally vague . . . because it turns in part on subjective

reactions to prohibited conduct"); Intern. Cacus. of Labor Comm. v. Dade County, Fla., 724 F.Supp. 917, 931 (S.D. Fla. 1989) (ordinance may not be constitutionally enacted and enforced if a violation "may entirely turn upon whether or not a policeman is annoyed").

In the present case, speech that is less favored or not politically correct is screened away from the main campus under the guise of being intimidating, humiliating, or not benefitting the entire university community. The Supreme Court, however, has held that the government may not "impose special prohibitions on those speakers who express views on disfavored subjects" or on the basis of "hostility – or favoritism – towards the underlying message." R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992). See also, Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) ("The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others'"); Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984). The Supreme Court has been quite clear that, if speech is offensive and emotionally unsettling, "that consequence is a reason for according it constitutional protection." Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 501 U.S. 105 (1991). See also, Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988).

Any argument that the TTU Speech Code is content-neutral because it excludes *all* intimidating or humiliating speech from campus common, is constitutionally bankrupt. Indeed this argument has been categorically rejected by the Supreme Court. "[W]e have held that a regulation that 'does not favor either side of a political controversy' is nonetheless impermissible because the 'First Amendment's hostility to content-based regulation extends...to prohibition of public discussion of an entire topic'." Boos v. Barry, 485 U.S. at 319-20 (cannot justify restriction by arguing that all sides of debate are equally restricted). The Supreme Court repeatedly has rejected the argument that viewpoint-neutrality equals content-neutrality. See, e.g., Burson v. Freeman, 504 U.S. 191, 213 (1992); Arkansas Writers Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987); Consolidated Edison Co., 447 U.S. at 537-538; Carey v. Brown, 447

U.S. at 462, n6. As the Fifth Circuit has stated, a regulation "must still be constitutionally gauged under the strict scrutiny standard even though it is viewpoint-neutral." Shirmer v. Edwards, 2 F.3d 117, 120 (5th Cir. 1993)("'the First Amendment's hostility to content-based restrictions extends not only to restrictions on particular viewpoints, but also to prohibitions of public discussion on an entire topic.").

3. The Speech Code Is Unconstitutionally Vague.

The TTU Speech Code is unconstitutional because, *inter alia*, it employs terms that are so "vague that men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). The policy does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). While all regulations must be reasonably clear, laws which restrict free speech, such as the TTU Speech Code, must satisfy "a more stringent vagueness test," Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982) (footnote omitted). Any regulation governing a speaker's access to a forum must contain "narrow, objective, and definite standards" to guide a governmental authority, so that such regulations do not operate as a prior restraint that may result in censorship." Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969).

In the present case a student can never know, with any degree of confidence, whether some one will find his or her expression intimidating, or humiliating, or whether it may be perceived as "serving or benefitting" the entire university, and as a result, whether his or her speech might be deemed unacceptable under the Speech Code. This clearly results in the kind of self-censorship the Supreme Court has warned against. *See, e.g.*, City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 758 (1988) (vague regulations cause self-censorship). In fact, Mr. Roberts has testified that he has been censoring his own speech for fear of violating the Speech Code. Verified Complaint at ¶¶ 76-78.

There is no objective standard in the Speech Code to guide the decision-makers. The Speech Code does not define "intimidating," "humiliating," or what may "serve or benefit the entire university community." The determination of what is or is not acceptable speech is made on the basis of the subjective reaction of the government officials. The TTU policy is similar to the ordinance held unconstitutional by the Fifth Circuit in Beckerman. There is an ordinance permitted the police chief to restrict expressive activities on the public streets when he thought "criminal conduct likely to follow." As in the instant case, there was nothing to prevent the official from "arbitrary and discriminatory . . . enforcement." 664 F.2d at 511. "Unlimited discretion" was vested in the official to restrict protected expression . Id. For this reason the regulation was held void for vagueness. Id. Also see Forsythe County, 505 U.S. at 134-136 (permit requirement of expressive activities held unconstitutional because it vested official with unfettered discretion to restrict speech based on its content for arousing hostile mob); City of Lakewood, 486 U.S. at 757 (where official has unfettered discretion in restricting expression regulation is unconstitutional); Shuttlesworth, 394 U.S. at 149-151 (Court found that a Birmingham ordinance conferred unbridled discretion when it required the city commission to issue a parade permit unless in "its judgement the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused."); Gooding v. Wison, 405 U.S. 518, 525-528 (1972) (Court held disorderly conduct statute unconstitutionally vague as it related to speech because it was "easily susceptible to improper application.")

In Shamloo, the Fifth Circuit held a university permit requirement unconstitutional for vagueness when it allowed the university official to restrict student expression that was not "wholesome." 620 F. 2d at 523. Like TTU's standard of "serving or benefitting" the university, that school's regulation was unconstitutional because "different officials could attach different meaning to the words in an arbitrary and discriminatory manner." Id. at 524. Similarly see, City of Lakewood, 486 U.S. at 758. In Coates v. City of Cincinnati, 402 U.S. at 612-615, the Court invalidated an ordinance that prohibited persons from engaging in conduct "annoying to persons

passing by." The Court held the regulation unconstitutionally vague because, like the TTU criteria, the language was subject to varying interpretations and could therefore be abused. Id.

Finally, as noted above, the Speech Code fails to place "definite limitations on the time within which" the decision-maker in an appeal must issue a decision and grant or deny the permit. FW/PBS, 493 U.S. at 226. The failure to include such time restraints in the policy is absolutely fatal because it constitutes a form of "unbridled discretion." Id. at 226-228; Vance v. Universal Amusement Co., 445 U.S. 308, 316 (1980).

4. Alternative Locations Offered by Defendants Do Not Redeem the Violation of Plaintiff's First Amendments Expressive Rights.

Finally, the defendants cannot salvage the unconstitutional Speech Code on a plea that they have offered other locations on campus for plaintiff's expression, like the Gazebo. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975) (quoting Schneider v. New Jersey, 308 U.S. 147, 163 (1939)). First of all, intimidating and humiliating speech is prohibited everywhere on campus, including the Gazebo. Secondly, as an "alternative" location, the Gazebo is not sufficient because of its limited size and exposure to foot-traffic.

II. THE PLAINTIFF IS SUFFERING IRREPARABLE INJURY

"It is undisputed that the loss of First Amendment freedoms for even minimal periods of time unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). "[T]he denial of first Amendment rights inflicts irreparable injury." Iranian Muslim Organization v. City of San Antonio, 615 S.W. 2d at 208; also Shamloo v. Mississippi State Board of Trustees, 620 F. 2d at 525 (involving students demonstrating on campus). Thus, the irreparable harm part of the preliminary injunction test is satisfied. See also Memphis

Community School Dist. v. Stachura, 477 U.S. 299 (1986) (holding monetary recovery cannot compensate for injury to intangible rights guaranteed by the Constitution).

III. THE INJURY TO PLAINTIFF OUTWEIGHS THE THREATENED HARM THE INJUNCTION MAY DO TO DEFENDANTS

Granting plaintiff's requested injunctive relief – which essentially commands defendants to comport with the requirements of the First and Fourteenth Amendments – will cause no harm to defendants. Defendants can assert no compelling governmental interest that can outweigh the free speech rights at stake in this case. See Tinker; Burnside. *The defendants' anticipation that plaintiff's speech may intimidate or humiliate a passerby, or simply fail to "serve or benefit the entire University community," does not outweigh the plaintiff's fundamental rights to free expression.*

As the Court in Beckerman observed, even if any sort of actual material and substantial interference with the university occurs, the answer is to "disperse and control the crowd" (if any), and in the extreme case, arrest any lawbreakers. 664 F.2d at 510. But "[s]uch punishment or curtailment of First Amendment rights must be based on a present abuse of rights, not a pre-nascent fear of future misconduct." Id. Defendants will suffer no legally cognizable harm by being enjoined from continuing their unconstitutional deprivation. Furthermore, absent a preliminary injunction, Mr. Roberts and other students will suffer continued irreparable injury to constitutionally guaranteed freedom of speech.

IV. GRANTING A PRELIMINARY INJUNCTION WILL NOT DISSERVE THE PUBLIC INTEREST

Obviously, the public interest would be well served by the elimination, rather than the continuation, of overt discrimination against constitutionally protected expression at a forum open and available for use by other students. See Lamb's Chapel, 508 U.S. at 394; Cornelius v.

NAACP Legal Defense & Educ. Fund, 473 U.S. at 806. No public interest is served by judicial countenance of an unconstitutional prohibition on speech.

CONCLUSION

For the foregoing reasons, plaintiff satisfies the test for a preliminary injunction. The Speech Code should be declared unconstitutional on its face and as applied, and the Court should issue a preliminary injunction against the defendants restraining enforcement of the challenged policy.

Respectfully submitted this 24th day of June, 2003.

Certificate of Conference: By signature below, it is hereby certified pursuant to LR 7.1 that J. Michael Johnson, attorney for the Plaintiff, conferred with Victor Mellinger, attorney for the Defendants, on June 19, 2003, and again on July 23, 2003and determined that Defendants would oppose this motion because they could not voluntarily grant the relief requested.

Attorneys for Plaintiff,

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*Motion for Admission *Pro Hac Vice* to be submitted

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon, via first class mail, on Victor Mellinger this the 24th day of June, 2003.

Ronnie L. Agnew