



COUNCIL MINUTES

April 2, 2012

The City Council of the City of Mesa met in a Regular Council Meeting in the Council Chambers, 57 East 1st Street, on April 2, 2012 at 5:51 p.m.

COUNCIL PRESENT

Scott Smith
Alex Finter
Christopher Glover
Dina Higgins
Dennis Kavanaugh
Dave Richins
Scott Somers*

COUNCIL ABSENT

None

OFFICERS PRESENT

Christopher Brady
Debbie Spinner
Linda Crocker

(Vice Mayor Somers participated in the meeting through the use of telephonic equipment.)

Invocation by Pastor George Barnes, Hi-Way Baptist Church.

Pledge of Allegiance was led by Ben Meek, Scout Troop # 459.

Mayor's Welcome.

Mayor Smith welcomed everyone to the meeting. A videotaped presentation was aired that outlined meeting procedures and provided attendees with instructions relative to addressing the Council.

Awards, Recognitions and Announcements.

Mayor Smith stated that April 15 to 21, 2012 is National Volunteer Week. He noted that the City of Mesa was fortunate to have hundreds, if not thousands, of hardworking volunteers who give their time and talent in many areas of the community. Mayor Smith commented that he and his fellow Councilmembers have the pleasure of interacting with the volunteers at various recognition ceremonies and added that Mesa is "a special place" with so many citizens willing to serve the community.

Mayor Smith introduced Senior Human Resources Analyst Sheila Byrne, who was prepared to recognize the volunteers and their activities.

Ms. Byrne acknowledged the presence in the audience of numerous volunteers who serve in a variety of City departments. She explained that this year, instead of recognizing the volunteers on an individual basis, each of the Councilmembers will briefly highlight examples of the duties and accomplishments

that the volunteers perform in specific City departments. Ms. Byrne added that following the individual presentations, the volunteers, volunteer coordinators and Departments Directors will be asked to come forward and be presented a certificate by the Mayor and a Councilmember.

Mayor Smith and several Councilmembers recognized the volunteers who serve in various roles including, but not limited to, the following:

- Advisory Boards and Committees
- iMesa Steering Committee
- Redistricting Commission
- MACFest
- Mesa Arts Center
- Arizona Museum of Natural History
- Arizona Museum for Youth
- City Prosecutor's Office
- City Attorney's Office
- Historic Preservation
- Falcon Field Airport
- Mesa Fire Department
- Information Technology Department
- Mesa Express Library
- Neighborhood Outreach
- Southwest Ambulance's Arizona Celebration of Freedom
- Parks and Recreation
- Mesa Police Department
- Transportation Department

Ms. Byrne remarked that in 2011, volunteers donated 236,045 hours of service, which is worth more than \$5 million to the City and the equivalent of 113 Full-Time Employees (FTEs). She stated that although the City has hundreds of volunteers, it can always use more. Ms. Byrne briefly described a new online system that will enable volunteers to sign up for specific opportunities based on their area of interest and length of time commitment.

Mayor Smith expressed appreciation to Mesa's volunteers for their spirit, energy and enthusiasm, all of which helps to "Build a Better Mesa."

1. Take action on all Consent Agenda items.

All items listed with an asterisk (*) will be considered as a group by the City Council and will be enacted with one motion. There will be no separate discussion of these items unless a Councilmember or citizen requests, in which event the item will be removed from the Consent Agenda and considered as a separate item. If a citizen wants an item removed from the Consent Agenda, a blue card must be completed and given to the City Clerk prior to the Council's vote on the Consent Agenda.

Mayor Smith stated that item 6a, which includes an emergency clause, requires at least 6 out of 7 votes, and will be left on the Consent Agenda. He also clarified that item 8a has now been added back onto the Consent Agenda. Mayor Smith explained that a "yes" vote on the Consent

Agenda allows for the introduction of the revised site plan with increased parking at the apartment complex.

In response to a question from Vice Mayor Somers, Planning Director John Wesley clarified that with respect to item 8a, the developer has submitted a revised site plan, which eliminated the lower level of one of the apartment buildings and replaced it with parking spaces. He noted that this resulted in the reduction of seven apartment units and the addition of 22 parking spaces, which brings the parking ratio up to 1.5 for the entire development.

It was moved by Councilmember Kavanaugh, seconded by Councilmember Richins, that the Consent Agenda items, as amended, be approved.

Carried unanimously.

*2. Approval of minutes of previous meetings as written.

(Note: This item was deleted. A draft of March 19, 2011 Regular Council meeting minutes is available for review on the City's website and will be approved at the April 23, 2012 Regular Council meeting.)

3. Take action on the following liquor license application:

*3-a. Alston House 1st Anniversary Celebration

This is a one-day charitable event to be held on Saturday, April 14, 2012, from 4:00 p.m. to 8:00 p.m., at 453 North Pima Street. **(District 4)**

4. Take action on the following contracts:

*4-a. Term Contract for Helicopter Airframe Parts and Repairs for the Police Department. **(Citywide)**

The Purchasing Division recommends awarding the contract to the lowest, responsive and responsible bidder, Seaside Helicopters, at \$188,000, based on estimated quantities.

*4-b. Purchase of 23 Replacement Vehicles (2 Pick-ups, 4 Tahoes and 17 Autos) for the Police Department. **(Fully Funded by FY 11/12 Vehicle Replacement Fund) (Citywide)**

The Purchasing Division recommends authorizing purchase from State of Arizona contracts with Courtesy Chevrolet at \$48,919.82; Midway Chevrolet at \$457,293.86; and San Tan Ford at \$99,539.24, including applicable sales taxes. The combined total award is \$605,752.92.

*4-c. Purchase of Replacement Water Treatment Pumps, Analyzers and Related Equipment for the Water Resources Department. **(Citywide)**

The Purchasing Division recommends awarding the contract to the lowest, responsive and responsible bidder for a specific group of line items to Ryan Herco Flow Solutions at \$20,680.63; Phoenix Pumps, Inc. at \$65,496.99; Vantage, LLC at \$937.83; Hach Company at \$17,810.30; and Phoenix Instrumentation, Inc. at \$8,842.37, including applicable taxes. The combined total contract award is \$113,768.12.

*4-d. Dobson Ranch Residential Street Overlays – Phase II. **(District 3)**

City Project 09-901-001. The roadway segments included in this project have deteriorated to a point that a mill and overlay of the existing pavement is necessary. This project includes approximately 217,500 square yards of milling and 440,000 square yards of rubberized asphalt overlay.

Recommend award to the lowest bidder, M.R. Tanner Construction, in the amount of \$4,589,000, plus an additional \$458,900 (10% allowance for change orders), for a total award of \$5,047,900. Funding for this project is available from the Transportation Sales Tax.

5. Take action on the following resolutions:

- *5-a. Approving and authorizing the City Manager to adopt the issuance and post-issuance compliance procedures relating to Tax-Exempt Bonds, other Tax-Exempt Financing and Build America Bonds – Resolution No. 10002.
- *5-b. Ordering the sale of \$27,290,000 principal amount of City of Mesa General Obligation Bonds, Series 2012; and authorizing the reimbursement of bond proceeds of certain advances on construction projects – Resolution No. 10003.
- *5-c. Ordering the sale of \$67,300,000 principal amount of City of Mesa Utility Systems Revenue Bonds, Series 2012; and authorizing the reimbursement of bond proceeds of certain advances on construction projects – Resolution No. 10004.

6. Consider a petition and take action on the following resolution:

- *6-a. Consider a Petition received for the formation of the Eastmark Community Facilities District No. 1 and approving a Resolution forming such District and entering into a Development, Financing Participation, Waiver and Intergovernmental Agreement with such District and Developer and declaring an emergency – Resolution No. 10005. **(An emergency clause requires a three-fourths (3/4) affirmative vote of its members; at least 6 out of 7 votes.)**

7. Introduction of the following ordinance and setting April 23, 2012, as the date of the public hearing on this ordinance:

- *7-a. **Z12-12 (District 3)** 2254 West Main Street. Located west of Dobson Road on the north side of Main Street (3± acres). Rezone from GC CUP and RM-4 CUP to GC CUP BIZ and RM-4 CUP BIZ and Site Plan Review. This request will allow the development of a mixed-use apartment complex with first floor commercial space. A New Leaf, owner; Doug McCord, applicant.

P&Z Recommendation: Approval with conditions. (Vote: 5-0, Boardmembers Roberts and DiBella absent.)

8. Introduction of the following ordinance and setting April 23, 2012, as the date of the public hearing on this ordinance:

- *8-a. **Z12-11 (District 5)** 2217 North Power Road. Located north of McKellips Road on the east side of Power Road (5.24± acres). Rezone from RS-35 to RM-4 BIZ and Site Plan Review. This request will allow the development of a 160-unit apartment complex. Dennis Barney, owner; Dan Kauffman, applicant.

P&Z Recommendation: Denied. (Vote: 4-0, Boardmembers Roberts and DiBella absent. Boardmember Arnett abstained.) A “yes” vote will be for denial of the introduction of the Ordinance, as recommended by the Planning and Zoning Board.

(Note: At the April 2, 2012 Study Session, the Council placed this item back on the Consent Agenda. A “yes” vote is for the introduction of the Ordinance for a rezone and a revised site plan decreasing the number of units at a proposed apartment complex.)

Items not on the Consent Agenda

There were no items off the Consent Agenda.

9. Items from citizens present.

Mayor Smith noted that in accordance with State law, the Council is not permitted to respond to any comments made by citizens under this agenda item.

Richard Smith, spokesperson for the Phoenix chapter of Veterans for Peace, provided the Council a copy of a February 28, 2012 letter from Dianne Post, an attorney for End the War Coalition. **(See Attachment 1)** He expressed a series of concerns regarding the conduct of the Mesa Police Department (MPD) on February 22, 2012 with respect to the End the War Coalition protest at the Republican Presidential Debate.

Mr. Smith noted, in particular, that the MPD violated the First Amendment rights of several members of the Coalition, including himself, by providing incorrect information regarding the City's prohibition of the use of a megaphone during the protest and threatening the individuals with arrest when they attempted to use the device. He added that the End the War Coalition would like a letter of apology from the City and an acknowledgement that the MPD will not deter any other protest groups from exercising their First Amendment rights.

William Clark, a Mesa resident and Vietnam veteran, concurred with the statements of the previous speaker. He also encouraged the City to issue a letter of apology to the End the War Coalition to ensure that future protesters in Mesa who wish to exercise their freedom of speech, and abide by the law, are allowed to do so without being harassed or threatened by the MPD.

Patricia Anger, a winter resident in Mesa, commented that she just learned yesterday that the City is now charging her and all of the other residents in her RV Park for water, sewer and trash pickup for the months when they are out-of-state and not using those services. She stated that in her opinion, the charges were unfair and added that many of her neighbors are seniors and on limited budgets.

10. Adjournment.

Without objection, the meeting adjourned at 6:43 p.m.

SCOTT SMITH, MAYOR

ATTEST:

LINDA CROCKER, CITY CLERK

I hereby certify that the foregoing minutes are a true and correct copy of the minutes of the Regular Council Meeting of the City Council of Mesa, Arizona, held on the 2nd day of April 2012. I further certify that the meeting was duly called and held and that a quorum was present.

LINDA CROCKER, CITY CLERK

pag
(attachment – 1)

28 February 2012

Scott Smith
Mayor of Mesa
PO Box 1466
Mesa, AZ 85211

RE: Police actions on 22 February 2012 at Republican Presidential Debates

Dear Mayor Smith,

Prior to the Republican debates, Mitch Rubin contacted the City of Mesa to ask about a permit for the End the War Coalition protest at the Republican Presidential Debates. The city insisted on "free speech zones" and prohibited the use of any amplified device including a hand held megaphone. While we dispute the concept of "free speech zones" at all, the U.S. is a free speech zone because of our First Amendment Rights, that discussion will await another day.

The actions of the city represent unconstitutional content discrimination.

In the response to End the War, the city gave incorrect information i.e. that the "city of Mesa noise ordinance (Section 6-12-2) does not permit the use of amplification systems,...." That is untrue. Section 6-12-6 (B) relates to hawkers, peddlers and amplification for advertising. This was a political protest not advertising. Section 6-12-6(E) relates to amplification systems in vehicles. There was no vehicle in question. There is no blanket prohibition against amplification in the ordinance.

Further, the response from the city says that ... "amplification systems of any kind will not be permitted in the Free Speech Demonstration Zones." Several groups on the south west corner of Center and Main had megaphones for use in their demonstrations: The Dream Act group, the End the War Coalition and the Syrian support group. All three of those groups support political issues in opposition to the official line of the Republican party. Two were repeatedly targeted by police and told they could not use the megaphones. The Syrian group stopped using it when first told.

Such action by the police is in violation of the Constitutional rights of the protesters. A government cannot make distinctions between types of groups or the content of their speech and prohibit political groups from their fundamental rights. The response of the City was clearly not content neutral as it was aimed at political protests only. That behavior is unconstitutional.

Expressive or symbolic conduct can be regulated but if such regulation is content based, the court must analyze it under strict scrutiny. *Texas v. Johnson*, 491 U.S. 397, 402-04, 109 S.Ct. 2533, 2538-39, 105 L.Ed.2d 342 (1989). *Texas v. Johnson* was the flag burning case, which, like the actions here, was overtly political. The Supreme Court said they must look not only at the defendant's actions but also at the government interest involved. Here, the government interest is *de minimus* since the area had been designated as a "free speech zone", it was heavily policed, many other groups were in the area and no violations of health, safety or

public order had occurred. It is clear that the arbitrary rule was not content neutral but specifically because the request and the action was in connection with the protest.

The wrongful insistence on “free speech zones” meant that no alternative was available to the group. Two officers stated that the protesters could voice their positions without a megaphone. However, even if the police disagree that using a megaphone is the most effective way for the protesters to make their point, the police are not at liberty to punish them for expressing their First Amendment rights in this fashion. It is well settled that minor matters of public inconvenience or annoyance cannot be transformed into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *New Times, infra*

The police threatened at least two group members with arrest if they did not stop using the megaphone. Free speech is not balanced with relative social costs and benefits. The First Amendment already made the balance – in favor of free speech. The burden is on the government to show that the expression can be limited or prohibited. *U.S. v. Stevens*, 130 S. Ct. 1577, 176 L. Ed 2d 435 (2010) They have not and cannot do so.

To restrict the usage of a public place, the government must have a legitimate purpose and the protesters must have means of achieving the message another equally effective way. *Veterans and Reservists for Peace in Vietnam v. Regional Commissioner of Customs, Region II* 459 F. 2d 676, (Third Cir. 1972) At the noisy corner, there was no other equally effective way than to use a megaphone. A regulation is permissible only if it advances a significant government interest, is justified without reference to the content and leaves open ample alternatives. *Dimas v. City of Warren*, 939 F. Supp 554 (1996) No unbridled discretion on the part of the officers is allowed. *Burk v. Augusta-Richmond Co.* 365 F. 3d 1247, (2004); *Bourgeois v. Peters*, 387 F.3d 1303, (2004) In the instant situation, the government cannot meet this test.

The government bears an extraordinary heavy burden when it attempts to regulate speech in a public forum because a public forum has a special protected status in our law. *NAACP v. City of Richmond*, 743 F.2d 1346 (Ninth Circuit, 1984) As the court outlined in *NAACP*, public fora cannot be put off limits to First Amendment activity because of expense or because the speakers can go somewhere else. The court must error in the direction of allowing speech because there is no remedy for lost speech. Indeed, timing is of the essence in politics. Here, the group is seeking to prevent the continuation of the occupation and killing in Afghanistan and the beginning of such an action with Iran. Any delay in speaking about an issue can mean delay forever. *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 182, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968)

The harm to the group outweighs any harm to the city. By refusing use of the megaphone, the group lost its constitutional right, a right that can never be recovered. The city can show no harm from the speech of the group and thus will have lost nothing. Given the heavy burden the city bears to restrict protected activity, they cannot prevail.

Other officers suggested the group could have gotten a permit and hired a band such as the one performing at ear splitting level a few feet away. An ordinance that purports to be

content neutral but that discriminates between the rich and poor who don't have the resources to disburse their message is not content neutral. *New Jersey Environmental Federation v. Wayne Tps.* 310 F. Supp. 2d 681 (2004). Instead, when an ordinance burdens fundamental rights, it must be narrowly tailored to serve those compelling interests. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 2226, 124 L.Ed.2d 472 (U.S.1993); *New Times, Inc. v. Arizona Bd. of Regents*, 110 Ariz. 367, 371, 519 P.2d 169, 173 (1974). By targeting groups who communicate their message in the best way they can, though a way the police don't like, the actions of the police are not content neutral. Thus the police actions are subject to strict scrutiny and cannot survive.

Requiring individuals to obtain permits prior to engaging in protected speech also violates the First Amendment if no standards and procedures exist to determine the award of those permits. *McFadden v. City of Bridgeport* 422 F.Supp.2d 659 (N.D. W. VA 2006) Thus the permit process is explicitly viewpoint discrimination against those groups, like End the War Coalition, who do not feel that the city has the right to grant or deny their freedom of speech.

The city engaged in unconstitutional arbitrary distinctions.

The city made an arbitrary distinction in saying that though access to power is available on public property, they would supply no power to groups in the "Free Speech Demonstration Zones". During the event, two police officers said to the protesters "the city has decided for this day" that no amplification will be allowed.

The entire several block area at Center and main was very busy and noisy. A band was playing on a stage in the middle of the street just a few feet away from the "free speech zones". It was so loud that it was difficult to talk to a person standing near let alone hear. A restaurant with outdoor tables across the street on the northwest corner had its music turned up very loud as well. A loud contingent of Ron Paul supporters came crashing through the crowd, running into people and converged on the Dream Act students in a harassing way. No police action was taken to stop them.

When one of the End the War Coalition persons, an attorney and member of Veterans for Peace, began to speak with the megaphone, the corner was so loud that he could not be heard even with the megaphone unless one was within a few feet. Yet the police approached him and claimed that he was violating the ordinance with his disturbance and loud noise. The Ron Paul group was allowed to drown out all alternative speech. It is absurd to suggest that in that venue the End the War Coalition speaker could have been disturbing anyone. The decision to not allow amplified sound "for this day" is the kind of arbitrary decision the city cannot make when it affects fundamental constitutional rights.

Even when the city and the police can regulate, they do not have unfettered discretion, but any such regulation must pass intermediate scrutiny, *White v. City of Sparks*, 341 F. Supp. 2d 1129 (2004), which the city cannot do. The activities of the groups here are directly related to the protected activities. Further, the court also held in *Morton* that a regulation was unconstitutionally vague because it left the Superintendent with an unfettered discretion to allow nocturnal activities by favored groups, while prohibiting other activities by the less popular

simply by biased construction of the undefined term 'camping.' That is precisely what the police have done here – allowed the actions of the favored group and prohibited the actions of the disfavored group.

The actions of the protesters do not violate the ordinance.

In order to violate the existing ordinance the noise has to be excessive or offensive (6-12-2) as defined in 6-12-3 and enumerated in 6-12-5 or 6-12-6. Section 6-12-4 requires that the sound level shall be measured. Main and Center is specifically designated as an arterial street. "Excessive noise" is a sound exceeding the levels. I observed no measurement of noise levels by the police. If there were, it is certain that the levels of the End the War Coalition would have been dwarfed by the Ron Paul group. Yet the Ron Paul group was not warned. A police officer said the Ron Paul group would not be stopped because they had free speech. Apparently is it the policy of Mesa that only the loudest have free speech while the others are denied the ability to speak. This is favoring one group while disfavoring another – precisely what the city cannot do.

The definition of "offensive noise" in the ordinance requires the noise to go across a property line or 50 feet from its source. The megaphones could hardly be heard in a close circle, let alone 50 feet. Under the ordinance, the volume and duration of the noise has to be such that it would cause discomfort or annoyance to a reasonable person of normal sensitivity. That would be impossible in the situation. Given the live band, the music from the restaurant and the noise from all the different groups, it would be impossible that this particular group was responsible for any "offensive noise" under the ordinance definition. I hereby request a print out of the readings of the actual decibel measurements made by the police as required by the ordinance.

Section 6-12-5 enumerates offensive or excessive noises: land use noises in excess of decibel limits, vehicle noise, construction, schools etc., animals, machinery and loading. None of these situations applied to the protest. Section 6-12-6 enumerates prohibited noises: radios and other equipment from 10 pm to 7 am; hawkers using amplification for advertising; squealing tires, and vehicles. None of these prohibited noises occurred during the protest. No violation of any kind took place under the ordinance.

The activities of the Mesa police had a chilling effect on First Amendment rights.

The behavior of the Mesa Police chills First Amendment rights. Clearly the action of the police is direct reprisal for protected speech that offends the First Amendment because it chills speech. *Hartman v. Moore*, 547 U.S. 250, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006) Chilling behavior includes such actions as prohibiting the wearing of partisan shirts (*Doninger v. Niehoff*, 514 F. Supp.2d 199, (2007); ticketing cars for minor offenses including leaving them unattended (*Richter v. Maryland*, 590 F. Supp.2d 730 (2008); threatened use of coercive power (*Zieper v. Metzinger*, 392 F. Supp.2d 516 (2005). The Mesa Police have engaged in threatened use of coercive powers in violation of the Constitution and in an attempt to chill speech and need to cease and desist.

The action of the group was clearly political speech. Political speech is the core of the protection offered by the First Amendment, has the highest value and any interference must be

analyzed under strict scrutiny. The right of assembly is intrinsically linked to the right of speech and equally fundamental. *Richmond Newspapers Inc., v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) Not only does the group have a right to speak, it has a right to assemble and join together to petition the government and educate the public who have a right to listen, *Coalition to Protest the Democratic Nat'l Convention v. City of Boston*, 327 F. Supp.2d 61 (2004).

Especially in today's technological society, because speech is frequently expensive and seldom free, the government must realize that access to the most powerful media – radio, television, and the press – is blocked to those who lack the financial resources and often blocked to those whose message is one the corporately owned media does not want to distribute. Criticism of government or a call for change may not be suppressed because it comes from those with little or no means. *International Caucus of Labor Committees v. Montgomery*, 856 F. Supp. 1551 (1994) An expression of anguish about domestic and foreign affairs is protected and cannot be criminally punished except in the most compelling circumstances. *Cline v. Rockingham County Superior Court*, 502 F.2d 789 (1974) Citizens are not only permitted to criticize government policy decisions but have a duty to do so. *Kiiskila v. Nichols*, 433 F.2d 745 (1970)

Behavior, such as using a megaphone which is a time honored protest mechanism, cannot be banned indiscriminately but must be measured against constitutional rights. Intent must be considered, and if a constitutionally protected right is involved, it cannot be made criminal. The facts and environment must be considered and if the activity was communicating a message, then it comes within the protection of the First Amendment. *Balas v. Taylor*, 567 F. Supp.2d 654 (2008) The instant issue was clearly a political message. *Committee for Responsible Regulation of Lake Tahoe v. Lake Tahoe Regional Planning Agency*, 311 F. Supp.2d 972 (2004)

The streets are a traditional public forum protected by the First Amendment. *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public."). A lawn, a public square, an open public thoroughfare, a space between public buildings makes it the quintessential public forum regardless of whether it has been used so in the past. *Coe v. Town of Blooming Grove*, 567 F. Supp.2d 543 (S.D.N.Y. 2008) Regulation of free speech in a public forum can be done only when there is a threat to public health or safety. *New Jersey Environmental Federation v. Wayne Tps.* 310 F. Supp. 2d 681 (2004). The city and the police can make no such showing here, especially since they arbitrarily denied the use of the megaphone as a prior restraint.

International law finds three actions *jus cogens* and justifies universal jurisdiction: war crimes, genocide, torture and inhumane and degrading treatment. Slavery and piracy are arguably added to that list. The Nuremberg defense, named after the trials of the Nazi leadership after World War II, holds that a person is justified in breaking domestic law because the actions they are protesting violate international law. The protest of the group was against an criminal and disastrous war that is leading to the deaths and injuries of Americans and Afghans every day and to prevent the beginning of another war that will be equally illegal and more harmful. The group believes that this conduct will have a direct causal relationship to averting or lessening the

harm and that they had no legal alternatives to protesting. *U.S. v. Schoon*, 955 F.2d 1239 (9th Cir. 1991) The conduct of the group was socially acceptable and desirable under the circumstances, *Akron v. Detwiler* (July 5, 1990), Summit App. No. 14385, unreported, at 5, 1990 WL 95683. The harm the group seeks to avoid is far greater than any potential alleged harm committed. *Cleveland v. Sabo* (May 14, 1981), Cuyahoga App. Nos. 41999-42004, unreported, 1981 WL 4949.

While the city may not like the message of the group, the Supreme Court has recognized that even facially neutral laws can discriminate against disfavored viewpoints and speakers. See *Martin v. Struthers*, 319 U.S. 141, 146, 63 S.Ct. 862, 864, 87 L.Ed. 1313 (1943). No matter how neutral a law may appear, there is a vast difference in prohibiting both the rich and poor from sleeping under bridges.

Conclusion

The End the War Coalition was engaged in political expression that has the highest level of protection under the First Amendment. The symbolic and expressive conduct is fully protected and necessary. The activities of the Mesa Police overstepped any reasonable time, place and manner restrictions. Any regulation of such activities, including symbolic or expressive conduct, especially in a public forum, must be analyzed with strict scrutiny. Even time, place and manner restrictions must be analyzed with intermediate scrutiny and must be content neutral, have a significant government interest, leave open equally effective alternative methods of speech, and not give government officials unfettered discretion. The activities of the Mesa Police have an unlawful chilling effect on the exercise of protected activities and must be stopped.

The End the War Coalition would like a letter of apology from the city and an acknowledgement that they recognize their error and will not in the future deter them or any other protest groups from exercising their First Amendment rights.

Sincerely,

Dianne Post
Attorney for End the War Coalition
Jose Penalosa
Attorney for Dream Act

Cc:
City council
Chief of Police
City Prosecutor
Arizona Republic
Mesa Tribune