

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

NEW MEXICO TOP)	
ORGANICS – ULTRA HEALTH, Inc.,)	
Plaintiff,)	
)	Case No. _____
v.)	
)	COMPLAINT FOR
LARRY KENNEDY, DAN MOURNING, and)	INJUNCTIVE RELIEF,
RAINA BINGHAM, in their official capacities,)	DECLARATORY JUDGMENT,
Defendants.)	and DAMAGES

Plaintiff New Mexico Top Organics – Ultra Health, Inc. complains against the Defendants as follows:

Introduction

1. “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, (1943).
2. Outside the limited areas of obscenity, fighting words, and defamation, governments may not discriminate against or regulate speech based on its content or message. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382–83 (1992). Any attempt to so regulate or control speech is presumptively invalid. *Id.*
3. In this case, New Mexico Top Organics – Ultra Health, Inc. (“Ultra Health” herein) seeks the Court’s protection of its rights and freedom, under the First and Fourteenth Amendments to the United States Constitution, to speak free from unconstitutional governmental control and regulation.

4. As shown below, the Defendants have applied to Ultra Health regulations and restrictions on Ultra Health's speech that are unconstitutional on their face and as applied to Ultra Health.
5. The Defendants' policies and regulations impermissibly seek to restrict Ultra Health from engaging in constitutionally protected speech in a public forum.
6. The Defendants seek to restrict the speech of Ultra Health because of the viewpoint to be expressed and the message to be delivered.
7. Ultra Health seeks to protection of this Court and respectfully asks that the Court vindicate and defend its rights under the United States Constitution.

Jurisdiction and Venue

8. This action arises under the United States Constitution, particularly the First and Fourteenth Amendments, and the Civil Rights Act, 42 U.S.C. §§ 1983 and 1988.
9. This Court has original jurisdiction over these federal claims pursuant to 28 U.S.C. §§ 1331 and 1343.
10. This Court has authority to grant the requested declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57.
11. This Court has authority to issue the requested injunctive relief pursuant to 42 U.S.C. § 1983 and Federal Rule of Civil Procedure 65.
12. This Court has authority to award attorneys' fees and costs pursuant to 42 U.S.C. § 1988.
13. Venue is proper in the United States District Court for District of New Mexico pursuant to 28 U.S.C. § 1391(b) because the events giving rise to the instant claim occurred within this District and because Defendants reside in this District.

Plaintiff

14. New Mexico Top Organics – Ultra Health, Inc. (“Ultra Health” herein) is a New Mexico non-profit corporation licensed by the State of New Mexico’s Department of Health to grow, distribute, and sell medical cannabis products to patients enrolled in the Department’s Medical Cannabis Program.

Defendants

15. Defendant Larry Kennedy is, and was at all times relevant to this Complaint, the Chairman of the New Mexico State Fair Commission. He is responsible for New Mexico State Fair administration and policy-making, including the policies, procedures, and decisions made herein and applied to deprive Ultra Health of its constitutional rights. Defendant Kennedy acquiesced in, sanctioned, supported, and/or approved the actions of Defendant Bingham. Defendant Kennedy acted under color of state law at all times relevant to this matter.
16. The State Fair Commission is a public body whose members are appointed and whose existence is provided for in statute. See NMSA § 16-6-4.
17. The State Fair Commission is statutorily authorized to “hold annually on suitable grounds a state fair” and is charged to “shall prepare, adopt, publish and enforce all necessary rules for the management of the New Mexico state fair.” See NMSA § 16-6-4.
18. Dan Mourning is the General Manager of Expo New Mexico, which is and operates as an agency of the State of New Mexico. Mourning is responsible for operations of Expo New Mexico and administration and policy-making, including the policies, procedures, and decisions made herein and applied to deprive Ultra Health of its constitutional rights. Defendant Mourning acquiesced in, sanctioned, supported, and/or approved the actions of

Defendant Bingham. Defendant Mourning acted under color of state law at all times relevant to this matter.

19. Raina Bingham is the Director of the Concessions Department for Expo New Mexico, which is and operates as an agency of the State of New Mexico. Bingham is responsible for some operations of Expo New Mexico and administration and policy-making, including the policies, procedures, and decisions made herein and applied to deprive Ultra Health of its constitutional rights. Defendant Bingham acted under color of state law at all times relevant to this matter.

Statement of Facts

20. Ultra Health believes a part of its mission to serve patients and promote good health is to educate the public about medical cannabis and about the State's Medical Cannabis Program.
21. Ultra Health also believes the general public – as well as the ever-growing population of licensed patients – benefits from exposure to education information about medical cannabis and its benefits and uses.
22. Ultra Health believes public attitudes and beliefs about medical cannabis will change for the better with additional education and information delivered to the public.
23. Ultra Health believes there are individuals in New Mexico who could benefit from medical use of cannabis but do not have sufficient knowledge of the medical cannabis program to take advantage of it.
24. In order to provide information and education to a large number of New Mexico residents, Ultra Health sought permission from the New Mexico State Fair Commission (via its staff

and members) to operate an informational booth at the 2017 New Mexico State Fair in Albuquerque, New Mexico.

25. Ultra Health believed that operating an informational booth at the State Fair – alongside many other informational booths promoting various business and agricultural interests and ventures – would provide valuable information and education to the public.
26. Ultra Health believed that operating an informational booth at the State Fair would help generate good will among the public toward the Medical Cannabis Program as well as medical cannabis in general.
27. Ultra Health believed that operating an informational booth would result in medically-eligible individuals gaining knowledge about the Medical Cannabis Program and pursuing access to medicine which could alleviate symptoms of serious medical conditions.
28. Ultra Health believed it would receive a benefit from operating an informational booth at the State Fair in the form of increased awareness of its brand and its manner of performing its role as a Licensed Non-Profit Producer (“LNPP” herein).
29. Ultra Health did not plan to sell any merchandise at the State Fair or to transact any business at the State Fair.
30. Ultra Health planned to display at its informational booth images of a cultivation facility, diagrams and photos of cannabis plants in various stages of development, diagrams and photos of the process of turning cannabis plant material into “usable cannabis” as defined in administrative regulation, lists and information regarding the types of medical cannabis products available, and other information about the medical use of cannabis.

31. On April 11, 2017, Ultra Health applied to “Expo New Mexico,” the New Mexico state agency that operates the New Mexico State Fair, for permission to operate an informational booth at the 2017 State Fair.
32. Ultra Health paid a \$50 application fee and sent in the filled-in application form used by the State Fair.
33. Ultra Health also sent a rough drawing/schematic which depicted, among other things, a microscope and a scale. The drawing/schematic also indicated the booth space would include “educational materials on the medicinal and economic benefits of cannabis.”
34. On April 27, 2017, Ultra Health’s Director of Operations, Leigh Jenke, wrote to Raina Bingham and asked, “if you could just send me a list of what will not be allowed this year from Ultra Health at the State Fair. Our corporate office would like a list so we can be absolutely sure we don’t have any miscommunication.”
35. On May 2, 2017, Defendant Raina Bingham, Concessions Manager of Expo New Mexico, wrote to Ms. Leigh Jenke, Director of Operations of Ultra Health, in response to Ultra Health’s request for permission to operate an informational booth.
36. In the email of May 2, 2017, Defendant Bingham imposed restrictions of Ultra Health’s protected speech that violate Ultra Health’s rights under the United States Constitution’s First and Fourteenth amendments.
37. In the May 2, 2017 email, Defendant Bingham stated “You may not bring onto EXPO New Mexico campus any and all cannabis and cannabis derived products including CBD products.”
38. In the May 2, 2017 email, Defendant Bingham stated the Ultra Health could “...not bring any type of drug paraphernalia that could be used to plant, propagate, cultivate, grow,

harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body any type of cannabis or other controlled substance.”

39. Ms. Bingham also wrote in her May 2, 2017 email that Ultra Health was “...precluded from displaying any image of the above restricted items in any way to include banners, flyers, clothing or any other medium.”
40. By the plain language of Ms. Bingham’s statement, Ultra Health would be precluded from bringing a photograph of a cannabis plant.
41. By the plain language of Ms. Bingham’s statement, Ultra Health would be precluded from bringing a drawing of a cannabis plant.
42. By the plain language of Ms. Bingham’s statement, Ultra Health would be precluded from bringing a T-shirt of Bob Marley holding a cannabis product.
43. By the plain language of Ms. Bingham’s statement, Ultra Health may have been precluded from even displaying its own business logo, which includes an approximation of a leaf.
44. By the plain language of Ms. Bingham’s statement, Ultra Health would be precluded from bringing a shovel to its informational booth, and would also be precluded from bringing a picture of a shovel, since a shovel may be used to “cultivate” or “plant” a cannabis plant.
45. By the plain language of Ms. Bingham’s statement, Ultra Health would be precluded from bringing a microscope, a test tube, a petri dish, or a mass spectrometer to its informational booth, and would also be precluded from bringing a picture of any of those items, since those items are used to test medical cannabis.
46. By the plain language of Ms. Bingham’s statement, Ultra Health would be precluded from bringing cookies or vegetable oil to its informational booth, and would also be precluded

from bringing a picture of cookies or vegetable oil, since those items are used to ingest medical cannabis.

47. By the plain language of the statement, Ultra Health would be precluded from bringing a cardboard box to its informational booth, since cardboard boxes may be used to “store” medical cannabis.
48. On information and belief, Defendant Bingham sent this email with the permission/acquiescence of Defendants Mourning and Kennedy, and/or at the direction of Defendants Dan Mourning and Larry Kennedy.
49. On May 8, 2017, Ultra Health’s Director of Operations Leigh Jenke informed Defendant Bingham that Ultra Health had decided against participation in the 2017 State Fair because the “list of restrictions is too broad and I believe we would have trouble informing people about Ultra Health.”
50. New Mexico Administrative Code 4.3.10 describes “participant requirements” for “Concessions and commercial exhibits.”
51. That section defines an “exhibitor” as “one who displays for informational purposes and who has no intent to sell products or services.”
52. NMAC 4.3.10 states, “All concessions and exhibits must comply with terms as set forth in the concessions and exhibits guidelines and procedures manual.”
53. The State Fair website’s page for “Concessions and Commercial Exhibits” directs the reader to the 2017 “Vendor Manual.”
54. NMSA § 16-6-4 states the State Fair Commission “shall have the power to charge entrance fees and admissions and lease stalls, stand and restaurant sites, give prizes and premiums,

arrange entertainments and do all things which by the commission may be considered proper for the conduct of the state fair not otherwise prohibited by law.”

Precedent Regarding the First Amendment and Cannabis/Marijuana

55. Legal precedent has established that the government may not restrain depiction or discussion of cannabis.
56. In *Conant v. McCaffrey*, 172 F.R.D. 681, 694 (N.D.Calif. 1997), a court ruled that the federal government could not prohibit physicians from discussing or recommending medical cannabis use to patients. There, the Court commented, “Finding itself in disagreement with plaintiff physicians' views about the efficacy of medical marijuana, the government has announced a policy which significantly inhibits communication of those views,” but the Court went on, “the government attempts to justify its policy of sanctioning physicians on the unremarkable and undisputed proposition that the government can regulate distribution and possession of drugs. The government's statutory authority to regulate that conduct, however, does not allow the government to quash protected speech about it.”
57. “The government’s fear that frank dialogue between physicians and patients about medical marijuana might foster drug use... does not justify infringing First Amendment freedoms.”
Id.
58. *Gerlich v. Leath*, 847 F.3d 1005 (8th Cir. 2017) held that Iowa State University’s denial of a university trademark featuring a marijuana/cannabis leaf was unconstitutional.
59. As recounted in that case, Iowa State University grants student organizations permission to use its trademarks if certain conditions are met. The ISU student chapter of the National

Organization for the Reform of Marijuana Laws (NORML ISU) had several of its trademark licensing requests denied because its designs included a cannabis leaf.

60. The Eighth Circuit held the university's approval scheme for approval of trademark use created a "limited public forum" and that the University's "defendants' rejection of NORML ISU's designs discriminated against that group on the basis of the group's viewpoint." *Id.* at 1012.

61. These cases and others establish the government may not restrain depiction of cannabis plant parts or discussion of medical cannabis, including in limited public fora.

Cause of Action One: As-Applied Violation of Plaintiff's Right to Free Speech Under the First and Fourteenth Amendments (42 U.S.C. § 1983)

62. Plaintiff repeats and realleges each of the foregoing allegations in this Complaint.

63. The First Amendment to the United States Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

64. The First Amendment applies to states via the Fourteenth Amendment.

65. The First and Fourteenth Amendments extend to state fairgrounds. See, e.g. *International Society for Krishna Consciousness, Inc. v. Brown*, 456 F.Supp. 437 (S.D. Indiana 1978).

66. State fairgrounds are "public forums" for purposes of the First Amendment. *Id.*

67. Although Ultra Health did apply here for a permit/permission to host an informational booth at the New Mexico State Fair, "In the area of first amendment rights, one need not have applied for a permit in order to challenge a statute, rule, regulation or policy on constitutional grounds; standing is recognized because of the danger of tolerating, in the

area of first amendment freedoms, the existence of penal or restrictive statutes or rules susceptible of sweeping and improper application.” *Id* at 441.

68. Typically, when a public forum uses a permitting scheme, a government may only restrict permittees’ speech according to time-place-and-manner. See *ACLU v. Denver*, 569 F.Supp.2d 1142, 1161 (D.Colo. 2008).
69. For example, when governments grant parade permits to hold parades on city streets, they may regulate the time, place, and manner of the parade; however, they may not regulate the content of the parade’s speech or expression.
70. However, time-place-and-manner restrictions are only acceptable if “(i) they are justified without regard to the content of the speech; (ii) they are narrowly-tailored to serve a significant governmental interest; and (iii) there are ample alternative channels for communication of the desired message.” *Id*.
71. Here, the restrictions imposed by Defendants went considerably beyond time-place-and-manner, and they reach the content of the speech/expressive conduct are not narrowly tailored.
72. All actions of Defendants were conducted under color of statute, ordinance, regulation, custom, or usage.
73. The First Amendment extends to “expressive conduct,” including the “display” of “items” where the item has some meaning or association. See, e.g. *Bragg v. Swanson*, 371 F.Supp.2d 814 (W.D.W.V. 2005)
74. Here, the State Fair’s restraint of Ultra Health’s booth reached items which could be used to “plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce,

process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body any type of cannabis.”

75. In hosting its educational booth at the State Fair, Ultra Health may have used any number of these items to express its opinions regarding medical cannabis.
76. In hosting its educational booth at the State Fair, Ultra Health may have used any number of these items to aid in its speech to Fair visitors.
77. In hosting its educational booth at the State Fair, Ultra Health may have used any number of these items to enable discussion with prospective patients.
78. Thus, Ultra Health’s display of/possession of the listed items would constitute expressive conduct here.
79. The State Fair’s restraint of Ultra Health’s informational booth space thus reaches “expressive conduct.”
80. The State Fair’s restraint of Ultra Health’s informational booth precludes Ultra Health from using any demonstrative aids in its educational or informational interactions with Fair patrons.
81. Furthermore, the State Fair’s restraint of Ultra Health’s information booth reaches images of a wide variety of items.
82. The State Fair’s restrain of Ultra Health’s information booth reaches not only images of cannabis plant parts themselves, but also reaches images of items as innocuous as shovels, microscopes, and cookies.
83. The First Amendment reaches and is applicable to images and illustrations. See *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985).
84. Defendants bear the burden of justifying any regulation of expressive activity.

85. Defendant Bingham's email of May 2, 2017 placed restrictions on Ultra Health's exhibit space which went considerably beyond the time, place, or manner of the exhibit.
86. Defendant Bingham's email of May 2, 2017 would reach possession/display/use of items as innocuous as a shovel, a microscope, or a cardboard box.
87. Defendant Bingham's email of May 2, 2017 would reach images of items as innocuous as a shovel, a microscope, or a cardboard box.
88. Defendant Bingham's email of May 2, 2017 placed restrictions on Ultra Health's exhibit space which related to the content of the exhibit.
89. Defendant Bingham's email of May 2, 2017 thus restrained the content of Ultra Health's exhibit space.
90. Specifically, Defendant Bingham's email of May 2, 2017 restrained expression having to do with medical cannabis.
91. The restrictions expressed by Defendant Bingham's on May 2, 2017 constitutes First Amendment content discrimination.
92. It is well-settled that the government may not engage in content discrimination. See *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992).
93. Any speech restriction which discriminates against speakers based on the content of their speech/expressive conduct is subject to "highly exacting strict scrutiny review." *ACLU v. Denver*, 569 F.Supp.2d 1142 (D.Colo. 2008), and the government must show that its regulation is necessary to serve a compelling state interest and must be the least-restrictive means available to serve that purpose. *Id.*
94. Defendant Bingham did not identify any particular source of law which she claimed to support or authorize her decisions and restrictions.

95. However, Defendant Bingham acted under the authority of the Expo New Mexico state agency and thus acted under color of state statute, custom, and usage.
96. Defendant Bingham's email of May 2, 2017 is a plain and obvious example of prior restraint.
97. Furthermore, at all times relevant here, Defendant Bingham was aware Ultra Health is a non-profit licensed producer of usable medical cannabis products.
98. Ultra Health's application here indicated it would include "education materials on the medicinal and economic benefits of cannabis."
99. Thus, at all times relevant here, Defendants were aware that Ultra Health holds the viewpoint that medical cannabis use should be societally accepted.
100. At all times relevant here, Defendants were aware that Ultra Health holds the viewpoint that medical cannabis use by medically-eligible individuals should be encouraged.
101. At all times relevant here, Defendants were aware Ultra Health holds the viewpoint that medical cannabis is medically and economically beneficial.
102. The restrictions outlined in Defendant Bingham's May 2, 2017 decision indicate that Expo New Mexico State Agency does not accept or condone Ultra Health's viewpoint.
103. In fact, Defendant Bingham used the term "drug paraphernalia," as if Ultra Health is engaged in criminal activity, instead of medical activity regulated by the State.
104. Defendant Bingham's email of May 2, 2017 constitutes First Amendment viewpoint discrimination.
105. It is well-settled the government may not engage in viewpoint discrimination. *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992).

106. Defendants have explicitly and implicitly chilled Plaintiffs' free expression and have deprived Plaintiffs of their clearly established rights to freedom of speech and expression secured by the First and Fourteenth Amendments to the Constitution of the United States.
107. The denial of constitutional rights is irreparable injury per se, and Plaintiff is also entitled to declaratory and injunctive relief, including a declaration that Defendants violated their First Amendment rights.
108. Defendants Bingham's actions, as endorsed by Defendants Kennedy and Mourning, violated clearly established constitutional rights of which all reasonable administrators and staff should have known, rendering them liable to Plaintiff for damages under 42 U.S.C. § 1983.
109. As illustrated by the *Conant* and *Gerlich* cases cited above, the mere existence of criminal penalties for certain types of cannabis possession/distribution, and the mere fact that governments may regulate or penalize certain types of cannabis possession/distribution, does not justify restraint of speech, expressive conduct, or imagery regarding cannabis.
110. The fact that the government may regulate or penalize pure conduct associated with possession/distribution of cannabis does not justify restraint of speech, expressive conduct, or imagery regarding cannabis.
111. Plaintiff is entitled to damages based on the actions of Defendants in an amount to be determined by the evidence and this Court.
112. Plaintiff is entitled to reasonable attorney fees and costs pursuant to 42 U.S.C. § 1988.

Count Two: Declaratory Judgment and Injunction (28 U.S.C. § 2201, et seq.)

113. Plaintiff repeats and realleges each of the foregoing allegations in this Complaint.

114. An actual controversy has arisen and now exists between Plaintiffs and Defendants concerning Plaintiffs' rights under the United States Constitution. A judicial declaration is necessary and appropriate at this time as to Count I above.
115. Plaintiff desires a judicial determination of its rights against Defendants as they pertain to Plaintiff's right to educate and inform the public regarding the beneficial use of medical cannabis without being subjected to content and viewpoint discrimination or prior restraint.
116. To remedy the prior restraint of Plaintiff's constitutional rights by Defendants, it is appropriate and proper that a declaratory judgment issue, pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57, declaring Defendant's actions, statements, and restraints unconstitutional.
117. Furthermore, pursuant to 28 U.S.C. § 2202 and Fed. R. Civ. P. 65, it is appropriate and hereby requested that this Court issue a permanent injunction prohibiting the Defendants from enforcing their restrictions on Plaintiff's expressive activities to the extent they are unconstitutional. Plaintiff is suffering irreparable harm from enforcement of the Defendants' decisions, monetary damages are inadequate to remedy the harm, and the balance of equities and public interest both favor a grant of injunctive relief.

WHEREFORE, Plaintiff respectfully requests the Court grant the following relief: enter judgment in favor of Plaintiff and against Defendants; enter a declaratory judgment stating that the restrictions outlined in Defendant Bingham's May 2, 2017 email are unconstitutional; enter a declaratory judgment stating that Defendants have violated Plaintiff's First Amendment rights; enter a permanent injunction barring enforcement of the restrictions outlined in Defendant Bingham's May 2, 2017 email; award monetary damages in an amount to be proven; award

attorneys' fees, costs, and expenses pursuant to 42 U.S.C. § 1988; award any other relief to which Plaintiff may be entitled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 31st day of May, 2017, I caused a copy of the foregoing Complaint for Injunctive Relief, Declaratory Judgement, and Damages to be served on all parties entitled to notice by using the Court's online filing system.

/s/ Kristina Caffrey