

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO  Denver City & County Building 1437 Bannock Street Denver, Colorado 80202	▲COURT USE ONLY▲
<b>Plaintiff:</b> American Civil Liberties Union of Colorado, Inc.,  v.  <b>Defendant:</b> Jeffrey Wells, in his official capacity as Executive Director of the Colorado Department of Personnel and Administration	Case No.  Courtroom
Mark Silverstein AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO 400 Corona Street Denver, Colorado 80218 Telephone: (303) 777-5482 Reg. No. 26979  Attorney for Plaintiff	
<p style="text-align: center;"><b>COMPLAINT</b></p>	

### **INTRODUCTION**

1. This lawsuit challenges the validity of recently-adopted administrative regulations that pose a threat to the exercise of First Amendment rights at rallies and demonstrations on the steps of the State Capitol Building and other nearby areas under the jurisdiction of the Colorado Department of Personnel and Administration.

2. The Colorado Department of Personnel and Administration adopted the challenged regulations, which are titled State Capitol Complex Buildings and Grounds Regulations, in March, 2004. They became effective on April 30, 2004.

3. The Plaintiff seeks judicial review of the challenged regulations pursuant to the Colorado Administrative Procedure Act, the Colorado Constitution, and 42 U.S.C. § 1983.

## **PARTIES**

4. The American Civil Liberties Union of Colorado, Inc. (ACLU of Colorado) is the Colorado affiliate of the American Civil Liberties Union. The ACLU of Colorado is a not-for-profit corporation dedicated to promoting and defending the civil liberties and constitutional rights of Colorado residents. The ACLU of Colorado has a longstanding interest in promoting and defending the right of association, the right of free expression, and the right to petition the government for redress of grievances. The ACLU of Colorado files this lawsuit on its own behalf and also sues in a representative capacity on behalf of its members. The interests the ACLU of Colorado asserts in this lawsuit are germane to the purposes of the organization. Members of the ACLU of Colorado would have standing to pursue this lawsuit in their own right, and the participation of individual members is not necessary for the claims asserted and the relief requested.

5. Defendant Jeffrey Wells is the Executive Director of the Colorado Department of Personnel and Administration, an administrative agency of the State of Colorado. Pursuant to Colorado statute, he and his agency are in charge of the buildings and grounds in the State Capitol Buildings Group Grounds, which is also called the State Capitol Complex Buildings and Grounds. This area includes all state-owned buildings and grounds in the area bounded on the north by Sixteenth Avenue, on the west by Broadway, on the south by Eleventh Avenue, and on the east by Grant Street, in the City and County of Denver. This area includes, but is not limited to, the State Capitol Grounds. Defendant Wells oversees and administers the issuance of permits for individuals and organizations who wish to reserve spots within the State Capitol Buildings Group Grounds, including the State Capitol Grounds, for expressive activity such as rallies and demonstrations. The Department of Personnel and Administration promulgated the regulations that are challenged in this case, and Defendant Wells is responsible for their enforcement. Defendant Wells acted and is threatening to act under color of state law. He is sued in his official capacity for declaratory and injunctive relief.

## **JURISDICTION**

6. This action for declaratory and injunctive relief is brought under the Uniform Declaratory Judgments Law, Colo. Rev. Stat. § 13-51-101 et seq., Rules 57 and 65 of the Colorado Rules of Civil Procedure; the Colorado Administrative Procedure Act, C.R.S. § 24-4-101 et seq., and 42 U.S.C. § 1983.

## **VENUE**

7. Venue is proper in the City and County of Denver under Rule 98 of the Colorado Rules of Civil Procedure.

## **FACTUAL ALLEGATIONS**

8. One of the most frequently-used locations for expression of political views, rallies, demonstrations and other forms of political speech in Denver is the State Capitol Building. Every year, the Department of Personnel and Administration (DPA) issues hundreds of permits authorizing use of the West steps of the Capitol or other portions of the Capitol grounds for expressive activity.

9. Members of the ACLU of Colorado participate in numerous ways in the exchange of information and viewpoints at the State Capitol Building and other nearby areas. They have sponsored events, obtained permits, attended events, carried signs, listened to speakers, handed out flyers, received flyers, given speeches, solicited contributions, made contributions, asked for signatures, signed petitions, and have otherwise engaged in numerous activities connected with the expression, communication, and exchange of information and views. Members of the ACLU intend to continue those activities in the future. The challenged regulations threaten the right of ACLU members to engage in these constitutionally-protected activities.

10. The ACLU of Colorado has expressed its views on issues of public concern by participating in the organizing and sponsoring of events held on the steps of the State Capitol Building and by providing staff members to speak at events sponsored by other organizations. The ACLU of Colorado intends to continue these activities in the future. The challenged regulations threaten the right of the ACLU to engage in these constitutionally-protected activities.

11. In December, 2003, the DPA published a Notice of Hearing stating its intent to consider adopting changes to the State Capitol Buildings Group Grounds Permit Regulations. The public hearing was scheduled for March 1, 2004 at 8:30 am.

12. The ACLU of Colorado provided oral testimony and written comments at that public hearing.

13. On or about March 17, 2004, the DPA adopted new regulations, now titled the State Capitol Complex Buildings and Grounds Regulations. The regulations became effective on April 30, 2004. A copy of the final text of the adopted regulations, as it currently appears on the DPA's web site at [http://www.colorado.gov/dpa/dcs/capcom/documents/RequestforUse-CapitolComplexFacilities\\_000.pdf](http://www.colorado.gov/dpa/dcs/capcom/documents/RequestforUse-CapitolComplexFacilities_000.pdf), is attached to this Complaint as Exhibit A.

14. The newly-adopted regulations include provisions that adversely affect the ACLU of Colorado and its members. These provisions impermissibly infringe on and threaten the right of the ACLU of Colorado and its members to engage in expression and association that is protected by the Colorado and United States Constitutions. The invalid provisions include, but are not limited to, the examples described in the following paragraphs.

**Power to cancel any permits when the "level of security" is "heightened"**

15. The final text of section 9.0 of the regulations includes the following:

The Executive Director may cancel a scheduled event if the level of security is heightened, as declared by the President, the Governor, the U.S. Department of Homeland Security, or the Colorado Office of Preparedness, Security, and Fire Safety.

16. The Department of Homeland Security has implemented a color-coded advisory system to denote when the threat of terrorism warrants a heightened level of security. According to that advisory system, yellow indicates "elevated condition," and orange indicates an even higher level of alert. The level has been set at either yellow or orange ever since the color-

coding scheme was devised. Thus, under the proposed new rule, the DPA would have had discretion to cancel any permit for any demonstration since September, 2002.

17. Section 9.0 provides the Executive Director with virtually unlimited and unguided discretion to cancel permits, in violation of the Colorado and United States Constitutions. It provides discretion to cancel permits on grounds forbidden by the Colorado and United States Constitutions.

### **Prohibition of constitutionally-protected speech**

18. The new regulations prohibit persons from engaging in certain constitutionally-protected expression in a broad area of the State Capitol Buildings Group Grounds.

19. Paragraph 1.8 of the new regulations defines the term “solicitation” It states that the term “means any request or demand for monetary contributions or the sale of expressive materials, such as bumper stickers or buttons.”

20. As defined in the regulations, “solicitation” refers to expression that is protected by the First Amendment and Article II, Section 10 of the Colorado Constitution.

21. With certain exceptions, the new regulations prohibit persons from engaging in constitutionally-protected solicitation throughout the area of the State Capitol Complex Buildings and Grounds.

22. Any person who violates the ban on solicitation is subject to criminal penalties pursuant to Colorado Revised Statute 18-9-117(1).

23. The new regulations prohibit persons from engaging in constitutionally-protected solicitation during a permitted event at the State Capitol Building, unless the permit holder “authorizes” the solicitation. All other constitutionally-protected solicitation on the State Capitol Grounds is prohibited.

24. The new regulations forbidding solicitation are not narrowly tailored to achieve a compelling government interest. They forbid a person from asking a friend for a quarter to feed a parking meter. They prohibit file clerks in numerous state offices from asking a co-worker for change for the coffee machine. The regulations appear to forbid workers in the Colorado Department of Revenue from mailing out state tax forms, which solicit voluntary contributions for the Colorado Domestic Abuse Fund, the Special Olympics Colorado Fund, and eight additional funds.

### **Authority to revoke permits for actions of persons that permit holders cannot control**

25. Section 8.1 of new regulations states:

A permit issued for an event at the State Capitol Complex Buildings and Grounds is revocable if the permit holder or participants violate these regulations or the laws of the United States or State of Colorado in the course of the event.

26. Section 8.1 of the new regulations provides that government officials may revoke a permit because of the actions of persons over whom the permit holders have no authority or control. It authorizes government officials to revoke permits if participants at a rally commit even a minor violation of the regulations, such as violating the ban on solicitation by asking a companion for bus fare or money for a parking meter. It provides government officials with unguided discretion to revoke permits, in violation of the Colorado and United States Constitutions. It authorizes government officials to revoke permits on grounds that are forbidden by the Colorado and United States Constitutions.

#### **Power to deny permits on insufficient grounds**

27. The final text of section 7.4 of the new regulations provides that the Executive Director may deny a request for a permit when:

It reasonably appears that the proposed event is likely to incite or produce imminent lawless action.

28. Section 7.4 authorizes the Executive Director to deny requests for permits on grounds that are prohibited by the Colorado and United States Constitutions.

#### **Power to revoke permits on insufficient grounds**

29. Similarly, section 8.2 of the new regulations provides that a permit may be revoked when:

During the conduct of an event, the ranking law enforcement official in charge may revoke a permit if it reasonably appears that continuation of the event is likely to incite or produce imminent lawless action.

30. Section 8.2 authorizes law enforcement to revoke a permit on grounds that are prohibited by the Colorado and United States Constitutions.

#### **DECLARATORY RELIEF**

31. An actual and immediate controversy exists between Plaintiff and the Defendant.

32. Defendant takes the position that the challenged regulations are valid and constitutional. Plaintiff believes that the regulations violate the Administrative Procedure Act, the Colorado Constitution, and the United States Constitution.

33. In requesting this declaratory relief, Plaintiff requests an interpretation of the rights, legal status and relationships of the parties under the law and facts.

#### **INJUNCTIVE RELIEF**

34. The Defendant has acted and is threatening to continue acting under color of state law to deprive Plaintiff and its members of their constitutional rights. Plaintiff and its members

face a real and immediate threat of irreparable injury as a result of the actions and threatened actions of the Defendant and the existence, operation, and threat of enforcement of the challenged regulations.

35. Plaintiff has no plain, adequate or speedy remedy at law.

### **FIRST CLAIM FOR RELIEF**

**(Colorado Administrative Procedure Act, C.R.S. § 24-4-106)**

36. The allegations of paragraphs 1-35 are incorporated by reference as though fully set forth herein.

37. The ACLU of Colorado and its members are adversely affected or aggrieved by the challenged regulations.

38. This action is timely filed within 30 days of the effective date of the challenged regulations.

39. Plaintiff seeks judicial review and a finding that the agency action is arbitrary or capricious, contrary to constitutional rights, and invalid on the grounds listed in C.R.S. § 24-4-106(7).

40. Wherefore, Plaintiff requests a declaratory judgment, an injunction, the relief specified in C.R.S. 24-4-106(5), and any other relief to which Plaintiff is entitled by law.

### **SECOND CLAIM FOR RELIEF**

**(Colorado Constitution, Article II, Sections 10 and 25)**

41. The allegations of paragraphs 1-40 are incorporated by reference as though fully set forth herein.

42. The challenged regulations violate Article II, Sections 10 and 25 of the Colorado Constitution.

43. Wherefore, Plaintiff requests a declaratory judgment, an injunction, and all other relief to which Plaintiff is entitled by law.

### **THIRD CLAIM FOR RELIEF**

**(42 U.S.C. § 1983, First and Fourteenth Amendments)**

44. The allegations of paragraphs 1-43 are incorporated by reference as though fully set forth herein.

45. The challenged regulations violate the First Amendment and the Due Process Clause of the Fourteenth Amendment.

46. Wherefore, Plaintiff requests a declaratory judgment, an injunction, and all other relief to which Plaintiff is entitled by law.

Dated May 28, 2004

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Mark Silverstein,  
ATTORNEY FOR PLAINTIFF