DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Denver City & County Building 1437 Bannock Street Denver, Colorado 80202	▲COURT USE ONLY▲
Plaintiff: American Civil Liberties Union of Colorado, Inc., v. **Defendant:** Jeffrey Wells, in his official capacity as Executive Director of the Colorado Department of Personnel and Administration	Case No. 04-CV-4161 Courtroom 6
Mark Silverstein, No. 26979 Jennifer J. Lee, No. 36518 AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO 400 Corona Street Denver, Colorado 80218 (303) 777-5482 A. Bruce Jones, No. 11370 HOLLAND & HART, LLP 555 Seventeenth Street, Suite 3200 P.O. Box 8749 Denver, Colorado 80201-8749 (303) 295-8000	

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff, the American Civil Liberties Union of Colorado, Inc. (ACLU of Colorado) submits this Brief in conjunction with its Motion for Summary Judgment against Defendant Jeffrey Wells, in his official capacity as the Executive Director of the Colorado Department of Personnel and Administration (DPA).

INTRODUCTION

This action challenges the validity of the recently-adopted DPA regulations governing the standards for issuing, denying, canceling and revoking permits for demonstrations and special events in the public areas adjacent to the State Capitol. These regulations, which became effective in April 2004, outline the procedure for obtaining a permit from DPA for the purpose of using the State Capitol area for rallies, demonstrations, or other expressive activity.

The State Capitol area is a popular location for expressing political views, and DPA issues hundreds of permits each year for such events. When DPA revised its regulations, however, it adopted a number of regulations that threaten the free speech rights of those who engage in expressive activities in the State Capitol area. These regulations, which are the subject of this challenge, fail to comply with well-established law governing permitting schemes for public forums. As a result, the challenged regulations impermissibly infringe on free speech rights.

There are no disputes of material fact, and, pursuant to C.R.C.P. 56, the ACLU of Colorado is entitled to judgment as a matter of law against Jeffrey Wells, in his official capacity as Executive Director of DPA.

FACTUAL BACKGROUND

In 2004, DPA promulgated and adopted regulations entitled "State Capitol Complex Buildings and Grounds Regulations." *See* DPA regulations annexed hereto as Exhibit A. The stated purpose of these regulations is "to establish standards for acceptance, processing, review and disposition of permit applications for demonstrations and special events." *Id.* at 1. The largest area covered by these regulations is called the "State Capitol Complex Building and Grounds," which is "the area encompassing state-owned buildings and grounds within the area bounded by 16th Avenue, Broadway, 11th Avenue and Grant Street in the City and County of Denver." *Id.* at 2 (reg. 1.9). Within that area there are two smaller areas known as the "State Capitol Grounds," one is "the area bounded by Grant Street, 13th Avenue, Lincoln Avenue, and Colfax Avenue." The other is "Lincoln Park," which is "the area bounded by Lincoln Avenue, Broadway, Colfax Avenue, and 14th Avenue." *Id.* (Regs. 1.7 & 1.10).

The State Capitol area is frequently used for rallies, demonstrations and other expressive activity. *See* Affidavit of Cathryn Hazouri (Aff. Hazouri) at ¶ 5 annexed hereto as Exhibit B. DPA issued about 226 permits for the State Capitol area in 2004. Def.'s Answer ¶ 8. The ACLU of Colorado has had a longstanding interest in promoting free speech rights and has a long track record in having participated in litigation, advocacy and public education in defending these rights. Aff. Hazouri at ¶¶ 2-3 (Ex. B). In 2004, when DPA first proposed its regulations concerning the permitting process for the State Capitol Grounds, the ACLU of Colorado participated in the administrative rulemaking process urging modification of the proposed regulations by submitting written comments and providing oral testimony at a public hearing. *Id.* at ¶ 4. Both the ACLU of Colorado and its members frequently sponsor rallies, demonstrations

and other expressive activity at the State Capitol grounds and have sponsored several such gatherings before and after the DPA regulations went into effect. *Id.* at ¶¶ 5-7. Despite being threatened by the DPA regulations, the ACLU of Colorado intends to sponsor and participate in rallies in the future. *Id.* at ¶ 8.

The DPA permitting scheme requires individuals to obtain a permit before using this public forum for free speech activities. This scheme also provides standards for cancellation and revocation of a permit after it has been issued. As described below, the ACLU of Colorado challenges the most problematic regulations within DPA's permitting scheme.

Regulation 9.0

DPA regulation 9.0 allows DPA to cancel an event when the "level of security" is heightened:

> 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.

Ex. A at 6 (reg. 9.0). Since the U.S. Department of Homeland Security created its color-coded advisory system in 2002, the level of security has remained heightened by the U.S. Department of Homeland Security. Def.'s Answer at ¶ 16; Deposition of William Taylor[1] (Dep. Taylor) at 28 annexed hereto as Exhibit C; *see* U.S. Department of Homeland Security, *Threats and Protection: Advisory System* (visited Sept. 28, 2005) http://www.dhs.gov/dhspublic/display?theme=29. DPA has no internal written guidance or procedures on how its officials would make the determination to cancel a permit on the basis of heightened security.

[1] In response to Plaintiff's C.R.C.P. 30(b)(6) Deposition Notice to DPA, DPA produced William Taylor, Associate Director of the Division of Central Services of DPA on August 26, 2005.

Defendant's Responses to Plaintiff's First Request for Admissions ("Def.'s Resp. Pl.'s Req. Admis.") at ¶ 3 annexed hereto as Exhibit D.

Regulations 1.8, 3.2 & 5.0

Plaintiff challenges DPA regulations 1.8, 3.2 and 5.0, which restrict solicitation. Solicitation is defined by reg. 1.8 as "any request or demand for monetary contributions or the sale of expressive materials, such as bumper stickers or buttons." Ex. A at 2 (reg. 1.8). Solicitation activities are generally not allowed on "State Capitol Grounds," though some exceptions exist. One exception states:

> Events and solicitation authorized by a permit holder may be conducted on the State Capitol Grounds only within a 100-foot external radius of the site defined by the permit. No other solicitation is allowed on the State Capitol Grounds, except on perimeter sidewalks.

Id. at 3 (reg. 3.2). The "site" defined by the permit is a general area, such as "West Steps," or "East Steps," of the Capitol. *See, e.g.,* Sample Permit Application annexed hereto at Exhibit E. Another exception allows for solicitation in Lincoln Park. *See* Ex. A at 4 (reg. 4.2). Finally, certain kinds of solicitation are permissible if:

> [I]n conjunction with Department of Human Services business enterprise activities pursuant to §§ 26-8.5-101, *et seq.*, C.R.S. or in the useable space of an agency occupying a building as an approved tenant when the head of the agency approves the activity in writing and takes full responsibility for the activity.

Id. (reg. 5.0).

These current DPA restrictions on solicitation represent a historical change from its previous restrictions on solicitation. Emergency regulation 1.436, effective December 26, 2003, allowed solicitation as part of a permitted event without any further restrictions. *See* Emergency Rule 1.436 effective 12/26/03 (ER 1.436 12/26/03) annexed hereto as Exhibit F. Prior to that,

emergency regulation 1.436, effective on September 25, 2003, had no restrictions whatsoever of any kind on solicitation. *See* Emergency Rule 1.436 effective 9/25/03 (ER 1.436 9/25/03) annexed hereto as Exhibit G.

Regulation 7.4

The DPA permitting scheme provides multiple grounds for denying a permit. One problematic ground is in regulation 7.4, which allows denial if:

> It reasonably appears that the proposed event is likely to incite or produce imminent lawless action. No permit shall be denied based upon the content of the views to be expressed at the event.

Ex. A at 5 (reg. 7.4). The submitted permit application, on which basis DPA determines that an event is "likely to incite or produce imminent lawless action," requires very little information about the permit holder and the event. *See* Ex. E. DPA does not possess any additional written guidelines or procedures on how officials would evaluate a permit pursuant to reg. 7.4. Def.'s Resp. Pl.'s Req. Admis. at ¶ 2 (Ex. D).

Regulations 8.1 & 8.2

DPA regulations 8.1 and 8.2 allow for permit revocation during the course of an event. These regulations provide:

> 8.1 A permit issued for an event at State Capitol Complex Buildings and Grounds is revocable if the permit holder or participants violate these regulations or laws of the United States or State of Colorado in the course of an event.
>
> 8.2 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.

Ex. A at 6 (Regs. 8.1 & 8.2). DPA has no specific written guidelines or procedures for revoking permits pursuant to either reg. 8.1 or reg. 8.2. Def.'s Resp. Pl.'s Req. Admis. at ¶ 3 (Ex. D). Nor

are there any written procedures or training materials on revocation in the possession of law enforcement. Defendant's Responses to Plaintiff's First Requests for Production of Documents ("Def.'s Resp. Pl.'s Req. Docs.") at ¶ 2 annexed hereto as Exhibit H.

Regulation 6.2

DPA regulation 6.2 requires that applications for permits be filed at least 30 days in advance, a requirement that "may" be waived in some cases:

> Applications will not be accepted more than 180 days nor less than 30 days before a proposed event is scheduled to occur. . . The Executive Director may grant a waiver if it appears that, under the circumstances, it will be possible to adequately protect the public safety, health, and welfare.

Ex. A at 4-5 (reg. 6.2). DPA has streamlined procedures for processing a permit. *See* Procedures for Processing a Permit annexed hereto as Exhibit I; Defendant's Responses to Plaintiff's Second Set of Interrogatories (Def.'s Resp. Pl.'s Interrogs.) at ¶¶ 1-4 annexed hereto at Exhibit J. DPA does not have any additional written guidance on how to administer the waiver of the 30-day time-limit. Def.'s Resp. Pl.'s Req. Admis. at ¶ 1 (Ex. D).

ARGUMENT

The ACLU of Colorado is entitled to summary judgment when the "pleadings, affidavits, depositions, or admissions show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Civil Service Com. v. Pinder*, 812 P.2d 645, 649 (Colo. 1991). The moving party has the initial burden of production to show that there is no genuine issue of material fact, but once the moving party has met its initial burden, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. *Greenwood Trust Co. v. Conley*, 938 P.2d 1141, 1149 (Colo. 1997).

Furthermore, "[i]n a case where a party moves for summary judgment on an issue on which he would not bear the burden of persuasion at trial, his initial burden of production may be satisfied by showing the court that there is an absence of evidence in the record to support the nonmoving party's case." *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). Since DPA's regulations infringe on the exercise of First Amendment rights, DPA has the burden of establishing their constitutionality. *See, e.g., Tattered Cover, Inc. v. Tooley*, 696 P.2d 780, 785-86 (Colo. 1985) (where a law affects free speech rights, the state has the burden of establishing constitutionality of its law); *United States v. Playboy Entm't Group, Inc*., 529 U.S. 803, 816 (2000) (when the government restricts speech, it bears the burden of proving the constitutionality of its actions).

As the ACLU of Colorado will demonstrate, there are no disputed issues of material fact. Moreover, DPA will be unable to meet its burden of justifying the challenged regulations. The ACLU of Colorado is therefore entitled to judgment as a matter of law.[2]

I. AS A MATTER OF LAW, THE CHALLENGED REGULATIONS ARE INVALID UNDER THE COLORADO ADMINISTRATIVE PROCEDURE ACT BECAUSE THEY ARE UNCONSTITUTIONAL.

[2] The ACLU of Colorado has standing to bring this pre-enforcement challenge to the DPA regulations since its activities fall within the ambit of the regulations. *See, e.g., CF&I Steel Corp. v. Colo. Air Pollution Control Comm'n*, 610 P.2d 85, 91-92 (Colo. 1980); *Marco Lounge, Inc. v. City of Federal Heights*, 625 P.2d 982, 985-86 (Colo. 1981). The ACLU of Colorado sponsors and attends gatherings on the State Capitol grounds and has done so several times since the DPA regulations came into effect. Aff. Hazouri ¶¶ 5-6 (Ex. B). It intends to sponsor and participate in rallies in the future. *Id.* at ¶ 8.

Furthermore, the ACLU of Colorado has standing in a representative capacity on behalf of its members. It has members who have standing on their own to challenge the DPA regulations because they sponsor gatherings on State Capitol grounds. *Id.* at ¶¶ 2, 7. The subject matter of this lawsuit is germane to the ACLU's purpose, which is to protect and defend the free speech rights of Colorado residents. *Id.* at ¶¶ 3-4. Finally, neither the claim asserted nor the relief requested in this case requires that the organization's members participate personally in the lawsuit. *See Colorado Manufactured Hous. Ass'n v. Pueblo County*, 857 P.2d 507, 519 (Colo. Ct. App. 1993); *Villa Sierra Condominium Ass'n v. Field Corp*., 787 P.2d 661, 667 (Colo. Ct. App. 1990).

The ACLU of Colorado will demonstrate that the challenged regulations violate the Colorado Administrative Procedure Act ("CAPA"). Regulations adopted pursuant to a statutory rulemaking procedure violate CAPA if they are:

> arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes, or limitations, not in accord with the procedures or procedural limitations of this article or as otherwise required by law, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, unsupported by substantial evidence when the record is considered as a whole, or otherwise contrary to law.

Colo. Rev. Stat. § 24-4-106(7) (2005). This Court must examine whether the challenged regulations violate CAPA because they are "contrary to constitutional right, power, privilege or immunity." *Id.*; *cf. Jeffrey v. Colorado State Dep't of Social Services,* 599 P.2d 874, 881 (Colo. 1979) (CAPA allows for declaratory and injunctive relief for an unconstitutional agency action). Because the regulations infringe on the right of expression, DPA has the burden of establishing their validity. *See, e.g.*, *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780, 785-86 (Colo. 1985); *United States v. Playboy Entm't Group, Inc*., 529 U.S. 803, 816 (2000). DPA cannot meet its burden of demonstrating that its regulations comply with the requirements of the Colorado and United States Constitutions.

A. Constitutional Standards that Apply to the Challenged Regulations

Since DPA's regulations infringe on the right of free expression, DPA must show that its regulations meet established constitutional standards for regulations affecting free speech rights. This section outlines the legal standards that apply to the challenged regulations.[3]

[3] The free speech and due process clauses, sections 10 and 35 of article II of the Colorado Constitution, provide all the protections of their federal counterparts. *See, e.g., Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 553 P.2d 811, 816 (Colo. 1976); *Bock v. Westminister Mall Co.*, 819 P.2d 55, 59 (Colo. 1991). The Colorado Constitution

The first subsection reviews the law on prior restraints and the rule that a permitting scheme cannot delegate overly broad licensing discretion to government officials. The second subsection reviews the law prohibiting regulations based on the content of the applicant's message. The third subsection discusses the legal standard governing content-neutral regulations that are subject to an intermediate scrutiny standard of review. Finally, the last subsection briefly discusses the prohibition against vague regulations affecting freedom of expression.

1. Prior Restraints

A scheme that requires the application for a permit prior to being able to engage in free speech activities in a traditional public forum is a prototypical prior restraint on speech. A prior restraint describes governmental action "forbidding certain communications when issued in advance of the time that such communications are to occur." *People v. Bryant*, 94 P.3d 624, 628 (Colo. 2004) (quoting *Alexander v. United States*, 509 U.S. 544, 550 (1993)). Prior restraints on speech are "the most serious and the least tolerable infringement on First Amendment rights" and therefore presumptively invalid. *Id.* at 628 (quotation omitted); *City of Colorado Springs v. 2354 Inc.*, 896 P.2d 272, 279 (Colo. 1995); *see also Bantam Books Inc., v. Sullivan*, 372 U.S. 58, 70 (1963). Prior restraints have "an immediate and irreversible sanction." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

Although a permitting scheme imposed on free speech activities is a prior restraint on speech, such a scheme can be permissible "to regulate competing uses of public forums" if it meets certain constitutional requirements. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). First, a permit scheme cannot "delegate overly broad licensing discretion to a

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provides even broader protection to expression than the First Amendment to the United States Constitution. *People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 356 (Colo. 1985).

government official." *Id.* Second, the criteria for granting or denying a permit cannot be based on the "content" of the applicant's message. *Id.* Finally, if these conditions are met, the government must also demonstrate that the permit scheme is "narrowly tailored to serve a significant government interest, and must leave open ample alternatives for expression."[4] *Id.*

A permitting scheme must also include clear guidelines for the official who decides whether a permit can be issued, suspended and revoked. As the Supreme Court has explained, a government regulation that provides too much discretion for arbitrary application is invalid because "such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth County*, 505 U.S. at 130 (1992) (quoting *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)). To curtail this risk, "'a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority.'" *Id.* at 131 (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969)); *see also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988). The test of whether a permitting scheme provides an impermissible amount of discretion is: "[i]f the permit scheme involves [an] appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgement of our precious First Amendment freedoms is too great to be permitted." *Forsyth,* 505 U.S. at 131 (internal quotations and citations omitted). The success of a challenge to a permitting regulation as delegating overly broad discretion should not rest "on whether the administrator has exercised his discretion in a

[4] The second and third test are discussed more fully respectfully in section I.A.2 and I.A.3.

content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Forsyth*, 505 U.S. at 133 n.10.

The Colorado Supreme Court has similarly held that "[i]n view of the danger of censorship and arbitrary suppression inherent in the application of imprecise standards, regulations granting government officials excessive discretion to regulate constitutionally protected modes of expression are unconstitutional on their face." *City of Colorado Springs*, 896 P.2d at 297; *see also Marco Lounge Inc. v. City of Federal Heights*, 625 P.2d 982, 988 (Colo. 1981); *Trujillo v. City of Walsenburg*, 118 P.2d 1081, 1083 (Colo. 1941).

While the government is not powerless to prohibit intentional advocacy of force of violence, it may not do so unless such speech is actually "*directed* to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (finding unconstitutional a statute that criminalizes merely the advocacy of unlawful actions) (emphasis added). Any permitting regulation intended to allow an official to deny a permit to such proscribable speech must not only meet this *Brandenburg* standard, but must also fully comply with *Forsyth*'s requirement of "'narrow, objective, and definite standards to guide the licensing authority.'" *Forsyth*, 505 U.S. at 131. Such regulations are invalid if they allow an official discretion to prohibit speech based on his "mere opinion" that lawless action will occur. *Hague v. CIO*, 307 U.S. 496, 516 (1939); *see also Cox v. Louisiana*, 379 U.S. 536, 557 (1965) (statute providing unbridled discretion to the local officials to permit only peaceful parades or demonstrations would be impermissible).

Moreover, imposing a prior restraint based on a mere prediction of future unlawful activity presumptively violates the First Amendment. *Carroll v. President of Princess Anne*, 393

U.S. 175, 180-81 (1968); *Kunz v. New York*, 340 U.S. 290, 294 (1951). The Supreme Court has stated that:

> the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment.

Carroll, 393 U.S. at 180-81. Such punishment or curtailment of First Amendment rights must be based on a present abuse of rights since "it is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions v. Conrad*, 420 U.S. 546, 558-59 (1975). The constitutionally preferred sanction, therefore, is "to punish the few who abuse rights of speech *after* they break the law [rather] than to throttle them and all others beforehand." *Id.* at 559 (emphasis in original).

2. Content-Based Regulations

Restrictions on speech in a public forum that are considered content-based are presumptively invalid and must be able to survive strict scrutiny. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Carey v. Brown*, 447 U.S. 455, 463 (1980); *see also Denver Publ'g Co. v. City of Aurora*, 896 P.2d 306, 312 n.10 (Colo. 1995). A content-based restriction is one that prohibits a particular type of expression or references the content of the regulated speech.[5] *R.A.V.*, 505 U.S. at 385-86. The rationale of the general presumption against validity, "is that content discrimination 'raises the

[5] There is often confusion between content-based and viewpoint-based restrictions. Viewpoint-based restrictions are best understood as a particularly "egregious form of content discrimination" where the "specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Vistors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" *Id.* at 387 (quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., Inc.*, 502 U.S. 105, 116 (1991)).

The Supreme Court has held that a content-based restriction on speech in a public forum must be subjected to the most exacting scrutiny. *See, e.g., Boos v. Barry*, 485 U.S. 312, 321 (1988). The government has the burden of showing that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." ***Id.*** (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). Without satisfying this strict scrutiny standard, the government, therefore, "may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Vistors of the Univ. of Va.*, 515 U.S. 819, 828 (1995).

3. Content-Neutral Time, Place, or Manner Regulations

Regulations of the time, place, or manner of expressive activity are subject to intermediate scrutiny if their application or enforcement does not depend on the content of the expression. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).[6] The government must demonstrate that such content-neutral regulations are "narrowly tailored to serve a significant governmental interest," and "leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *see also Lewis v. Colo. Rockies Baseball Club*, 941 P.2d 266, 275 (Colo. 1997).

[6] This intermediate level of scrutiny applied to content-neutral time, place and manner restrictions is the same standard used by courts to evaluate commercial speech. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994).

The government must actually prove that for each challenged regulation "the harms it recites are real." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993); *Lewis*, 941 P.2d at 277. Even if the regulations are supported by significant, rather than conjectural, governmental interests, the government still has the burden of showing that its regulations are narrowly tailored. *See Denver Publ'g Co.*, 896 P.2d at 314-15. A court may not simply assume that a regulation "will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (quoting *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1996)). The government must actually demonstrate that the regulation "will in fact alleviate [the recited harms] to a material degree," because a regulation "'may not be sustained if it provides only ineffective or remote support for the government's purpose.'" *Edenfield*, 507 U.S. at 770-71 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980); *see also Lewis*, 941 P.2d at 276-77. A regulation is not narrowly tailored when it "does not sufficiently serve those public interests that are urged as its justification." *Grace*, 461 U.S. at 181.

Furthermore, narrow tailoring requires that the "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. A restriction on speech is not narrowly tailored when it "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Id.* In *Turner Broadcasting*, Justice O'Connor illustrated the difference between overly burdensome and narrowly tailored regulations:

> If the government wants to avoid littering, it may ban littering, but it may not ban all leafleting. If the government wants to avoid fraudulent political fundraising, it may bar the fraud, but it may not in the process prohibit legitimate fundraising. If the government wants to protect

> householders from unwarranted solicitors, it may enforce "No Soliciting" signs that the householders put up, but it may not cut off access to homes whose residents are willing to hear what the solicitors have to say.

512 U.S. at 682-83 (O'Connor, J., concurring in part & dissenting in part) (citations omitted). A content-neutral regulation, therefore, "curtails no more speech than is necessary to accomplish its purpose" if it targets and eliminates no more than the exact source of "evil" it seeks to remedy. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-810 (1984); *see also Frisby v. Schultz*, 487 U.S. 474, 485 (1988) ("A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil").

While the intermediate scrutiny standard does not require the government to choose the least restrictive or least intrusive means of achieving its end, the existence of many less restrictive options that advance the governmental interest reveals a lack of narrow tailoring. "[I]f there are numerous and obvious less burdensome alternatives to the restriction on . . . speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418 n.13 (1993); *see also Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 638 (9th Cir. 1991) ("[R]estrictions which disregard far less restrictive and more precise means are not narrowly tailored").

4. Vagueness Doctrine

The void for vagueness doctrine forbids the enforcement of a law that contains "terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). "A statute is unconstitutionally vague if persons of common intelligence must guess at its meaning." *People v. Moyer*, 670 P.2d 785,

789 (1983); *Sellon v. City of Manitou Springs*, 745 P.2d 229, 233 (Colo. 1987). A statute that "vests virtually complete discretion in the hands of the police" fails to provide the minimal guidelines required for due process. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

Where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.'" *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). The government, therefore, is held to an even more exacting standard under the void for vagueness doctrine when the law interferes with the right of free speech and the speaker is subject to criminal sanctions. *Parrish v. Lamm*, 758 P.2d 1356, 1366 (Colo. 1988); *Vill. of Hoffman Estates v. the Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 498-99 (1982).

B. Regulation 9.0 Is Unlawful Because it Provides Nearly Complete Discretion to Cancel Permits at Any Time and Minimally Promotes Security Interests while Placing a Substantial Burden on Speech.

Under regulation 9.0, DPA has the authority to cancel permits when the "level of security is heightened, as declared by the . . . U.S. Department of Homeland Security." Ex. A at 6 (reg. 9.0). DPA has admitted that since the U.S. Department of Homeland Security has established its terrorism advisory system in September 2002, the level of security has remained elevated or heightened. Def.'s Answer at ¶ 16; Dep. Taylor at 28 (Ex. C); *see* U.S. Department of Homeland Security, *Threats and Protection: Advisory System* (visited Sept. 28, 2005) http://www.dhs.gov/dhspublic/display?theme=29. Since this regulation became effective, therefore, DPA has been and continues to be afforded unlimited discretion to cancel an already scheduled-event at any time. It is well established that a licensing scheme that vests such unfettered discretion in licensing officials violates the First Amendment. *See, e.g.*, *Forsyth*

County v. Nationalist Movement, 505 U.S. 123, 131 (1992); *City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272, 297 (1999).

The discretion in reg. 9.0 is akin to the licensing schemes found to be unconstitutional because they provide absolutely no limits to the licensing official's discretion. In *City of Lakewood*, for example, the Court invalidated an ordinance requiring a permit to place newsracks on public property because:

> It is apparent that the face of the ordinance itself contains no explicit limits on the mayor's discretion. Indeed, nothing in the law as written requires the mayor to do more than make the statement "it is not in the public interest" when denying a permit application.

486 U.S. at 769; *see also Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) ("[M]unicipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community."). Here, DPA's latitude under reg. 9.0 is even broader than that in *City of Lakewood* and *Shuttlesworth* in that DPA need not provide any justification whatsoever to cancel a permit. Other than whether the level of security is "heightened," reg. 9.0 does not require DPA to consider any other criteria when canceling a permit. *See* Ex. A at 6 (reg. 9.0). Moreover, DPA has no internal written guidance or procedures on how its officials would make the determination to cancel a permit on the basis of heightened security. Def.'s Resp. Pl.'s Req. Admis. at ¶ 3 (Ex. D). Since the level of security may remain elevated potentially indefinitely given the omnipresence of terrorism, reg. 9.0 impermissibly provides DPA with carte blanche discretion to cancel any permit at any time.

DPA will certainly assert that it has never cancelled a permit, nor does it have any intention of doing so on unreasonable grounds. The success of this challenge to reg. 9.0 on the grounds of overly broad discretion, however, "rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Forsyth*, 505 U.S. at 133 n.10. "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Id.* (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)). So in the absence of "narrow, objective and definite" criteria within reg. 9.0, DPA retains this "*power* to enforce the [regulation] in a manner that favors some viewpoints over others," *ACORN v. City of Tulsa*, 835 F.2d 735, 741 (10th Cir. 1987) (quotations omitted) (emphasis in the original), and it is the existence of that discretion that violates the First Amendment.

Furthermore, reg. 9.0 utterly fails the narrow tailoring test required of content-neutral time, place and manner regulations. DPA claims that reg. 9.0 serves the significant governmental interest of protecting the security interests of those requesting the permit and those working in the State Capitol. Dep. Taylor at 27 (Ex. C). While no one will dispute that the interest in protecting individuals against terrorism is significant, DPA cannot actually prove that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

The heightened level of security that allows DPA to cancel an event is, at best, a remote indicator that the State Capitol itself is threatened by "real harms." Since the DPA regulations became effective on April 30, 2004, the level of security has remained heightened by the U.S.

Department of Homeland Security. Dep. Taylor at 28 (Ex. C). In *Bourgeois v. Peters*, the Eleventh Circuit invalidated a city's policy, partially justified by the fact that the threat assessment level was "elevated" by the Department of Homeland Security, of requiring protesters to be searched prior to participation in a protest. 387 F.3d 1303, 1307 (11th Cir. 2004). The court reasoned that:

> [g]iven that we have been on 'yellow alert' for over two and a half years now, we cannot consider this a particularly exceptional condition that warrants curtailment of constitutional rights. We cannot simply suspend or restrict civil liberties until the War on Terror is over, because the War on Terror is unlikely ever to be over.

Id. at 1312. Here too, the same elevated security level by the U.S. Department of Homeland Security cannot be considered "a particularly exceptional condition that warrants curtailment of constitutional rights." To the extent that reg. 9.0 allows for cancellation based on such speculative harms to the Capitol, it will necessarily fail to "alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71.[7]

Furthermore, restrictions on expression that are justified on the basis of such speculative security threats "burden substantially more speech than necessary." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). In *Bay Area Peace Navy v. United States*, the Ninth Circuit considered a 75-yard security zone around the pier for "Fleet Week" that the Coast Guard alleged was "needed to safeguard prominent public officials from subversive acts or accidents, or

[7] Moreover, to the extent that Colorado law already addresses specific threats to the security of the Capitol, reg. 9.0 imposes additional burdens on expression without further advancing the asserted interests in protecting persons at the State Capitol. Pursuant to Colo. Rev. Stat. § 24-32-2104(1), the governor has the authority to suspend the operation of any statute, order, rule or regulation necessary to cope with an emergency when "a disaster has occurred or that this occurrence or the threat thereof is imminent." Colo. Rev. Stat. § 24-32-2104(4), (7)(a) (2005). Thus, the existing statute not only provides an example of an "obvious less burdensome alternative[] to the restriction on . . .speech," *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418 n.13 (1993), but also shows that reg. 9.0 "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799.

incidents of a similar nature." 914 F.2d 1224, 1226 (9th Cir. 1990). Persons desiring to demonstrate in boats off the pier were relegated to a far distance. *Id.* Without any evidence of specific threats to security, the Ninth Circuit held that the 75-yard security zone infringed on more free speech rights than necessary:

> Although the government legitimately asserts that it need not show "an actual terrorist attack or serious accident" to meet its burden, it is not free to foreclose expressive activity in public areas on mere speculation about danger. . . Otherwise, the government's restriction of first amendment expression in public areas would become essentially unreviewable.

Id. at 1228 (citations omitted). Even though the protestors in *Bay Area Peace Navy* were still permitted to protest, albeit at a considerable distance, the court nonetheless concluded that the security zone was an unjustified burden on free speech rights. *Id.*; *see also Serv. Employees Int'l Union*, 114 F. Supp. 2d 966, 971-72 (C.D. Cal. 2000) (secured zone from which protesters are excluded is impermissible because it is based on mere speculation that violence may occur); *cf. Kellam v. Burnley*, 673 F. Supp. 71, 75 (D.R.I. 1987) (security zone that infringed on free speech rights was suspiciously unrelated to any alleged security threat). Here, reg. 9.0 provides DPA with authority to impose even greater burdens on free speech rights, because the cancellation of a permit would prevent all expression at the site. Reg. 9.0, therefore, burdens more speech than necessary, because it provides DPA with the authority to cancel permits whenever Washington declares a generalized nation-wide "heightened" level of security, even when there is no specific evidence of security threats against the Capitol. In fact, DPA has acknowledged that the cancellation of an event does not make much sense based on the nation's heightened security level alone, because the safety of individuals at the Capitol depends "on what the immediate threat is for Colorado and the Colorado State Capitol there would be consideration of the security

of everyone involved and how we would determine what to do with that event." Dep. Taylor at 25 (Ex. C). DPA thus admits that reg. 9.0 burdens substantially more speech than necessary because it authorizes the cancellation of a permit in the absence of any specific security threats against the Capitol. Regulation 9.0, therefore, is not narrowly tailored, as there is virtually no nexus between DPA's authority to cancel permitted events and the governmental interest in protecting against security threats targeted at the State Capitol.

C. The Challenged Regulations Concerning Solicitation Are an Impermissible Burden on Free Speech.

DPA's regulations ban solicitation within the large geographical area of the State Capitol Complex Buildings and Grounds, with limited exceptions. Ex. A at 3-4 (regs. 3.2, 4.2 & 5.0). Solicitation is defined by DPA as "any request or demand for monetary contributions or the sale of expressive materials, such as bumper stickers or buttons." *Id.* at 2 (reg. 1.8). Except for Lincoln Park and for some other special events exempted by reg. 5.0, solicitation in the State Capitol area is prohibited except for "solicitation authorized by a permit holder may be conducted on the State Capitol Grounds only within a 100-foot external radius of the site defined by a permit." *Id.* at 3 (reg. 3.2). Immediately prior to the enactment of these solicitation restrictions, DPA had issued less restrictive regulations concerning solicitation, s*ee* ER 1.436 12/26/03 (Ex. F); ER 1.436 9/25/03 (Ex. G), including a three-month period with no restriction on solicitation whatsoever.

These solicitation restrictions are incredibly broad and not limited to aggressive face-to-face demands for money or to repeated and harassing demands made by a large group of individuals. Instead, these restrictions forbid a friend from asking another friend for a quarter to go feed the parking meter. They also apply to an individual who silently holds up a sign making

a request for a monetary contribution. For having violated the solicitation restrictions, any of these individual would be subject to criminal penalties under Colo. Rev. Stat. § 18-9-117(1) (2005), which could include a penalty of up to six months imprisonment. Colo. Rev. Stat. § 18-1.3-501(1) (2005).

It is well established that solicitation, including requests for donations, is protected speech because "charitable solicitations involve a variety of speech interests that are within protection of the First Amendment." *Riley v. Nat'l Fed'n of the Blind,* 487 U.S. 781, 788 (1988); *Sec'y of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 959-60 (1984); *Schaumburg v. Citizens For A Better Env't,* 444 U.S. 620, 632 (1980); *Int'l Soc'y for Krishna Consciousness v. Lee,* 505 U.S. 672, 677 (1992); *United States v. Kokinda,* 497 U.S. 720, 725 (1990) *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640, 647 (1981) .

A content-based restriction is one that prohibits a particular type of expression by referencing the content of the regulated speech. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385-86 (1992). On their very face, the regulations that restrict solicitation from most parts of the Capitol Complex Buildings and Grounds reference the actual content of speech by prohibiting "any request or demand for monetary contributions or the sale of expressive materials, such as bumper stickers or buttons." Ex. A at 2 (Reg. 1.8). Outside of the 100-foot radius set forth in reg. 3.2, for example, an individual is permitted to hold a sign stating "support my group," while an individual is prohibited from holding a sign stating "support my group with a small donation." The only distinction between the prohibited sign and the permitted sign is the content or substance of the message. Where a person who requests money from bystanders is regulated but

one who seeks only a receptive listener is not, the distinction is based on the content of speech. *See, e.g., Carreras v. City of Anaheim*, 768 F.2d 1039, 1048 (9th Cir. 1985).

Indeed, many courts have held that ordinances restricting only solicitation, and not other categories of speech, are impermissibly content-based. *See, e.g., Loper v. New York City Police Dep't*, 999 F.2d 699, 705 (2d Cir. 1993) (restriction on "begging" was impermissibly content-based); *Hobbs v. County of Westchester*, 2002 U.S. Dist. LEXIS 24569, at *24-25 (S.D.N.Y. Dec. 23, 2002) (ban on solicitation was content-based); *Carreras*, 768 F.2d at 1048 (ordinance regulating solicitation but not other speech was impermissibly content-based); *Blair v. Shanahan*, 775 F. Supp. 1315, 1325 (N.D. Cal. 1991) ("Here, only begging . . . is proscribed. One may approach and speak at will to solicit directions or the time of day, request signatures for a petition, or any number of other common occurrences without running afoul of this statute"), *modified on other grounds*, 38 F.3d 1514 (9th Cir. 1994).

Content-based ordinances are subject to strict scrutiny and are presumptively invalid under the First Amendment. *R.A.V.*, 505 U.S. at 382. The government has the burden of showing that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Boos v. Barry*, 485 U.S. 312, 321 (1988) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). Since DPA's solicitation restrictions clearly regulate speech on the basis of content, they are presumptively invalid unless DPA can prove that they survive strict scrutiny. As discussed below, these restrictions cannot survive strict scrutiny because they cannot even meet the requirements for the more lenient standard of narrow tailoring.

Even if the solicitation regulations were content-neutral, which they are not, DPA will be unable to prove that they are "narrowly tailored to serve a significant government interest." *Denver Publ'g Co.v. City of Aurora*, 896 P.2d 306, 312 (1995) (quotations omitted). DPA stated that the interest being protected by this restriction on solicitation was to prevent "disrupt[ion of] the day-to-day business of the state capitol." Dep. Taylor at 43-44, 49. In particular, DPA regarded unregulated solicitation activities as potentially problematic if they "would impede people's ability to get in and out of the capitol and do business and participate in those events there." *Id.* at 45.

DPA, however, will be unable to show that solicitation itself poses a real problem and that its restrictions on solicitation actually advance its interest in protecting against congestion and the blocking of entrances and walkways to buildings. DPA must actually demonstrate that the purported "harms it recites are real." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). Here, DPA admitted that in the areas where demonstrations are permitted, there are no potential problems with impeding day-to-day business by blocking entrances to buildings. Dep. Taylor at 47 (Ex. C). When asked to describe such impediments, DPA stated that it was "not sure what that would look like." *Id.* at 45. Nor could DPA provide evidence of any actual harms that prompted its change from its previous, less restrictive, versions of rules concerning solicitation to its new limitation within a 100-foot radius. *See id.*; ER 1.436 12/26/03 (Ex. F); ER 1.436 9/25/03 (Ex. G). In the fall of 2003, DPA lifted its earlier ban on solicitation. ER 1.436 9/25/03 at 2-3 (Ex. G). For three months there was no prohibition on solicitation whatsoever. *Id.* DPA has not and cannot provide any evidence that the entrances and walkways to buildings were blocked during that time. Nor has it otherwise presented any evidence of why the current more

restrictive regulations of solicitation are necessary. DPA, therefore, has failed to prove that solicitation poses any real "harms." *Edenfield,* 507 U.S. at 771.

Furthermore, to the extent that DPA contends that the restrictions target the harm of blocking entrances and walkways to buildings, it must actually prove that they "alleviate the recited harm in a direct and material way." *Edenfield,* 507 U.S. at 770-71. Even assuming that the purported harms that DPA "recites are real," DPA admits that the solicitation restrictions target only a small portion of the purported harm. Dep. Taylor at 45-46 (Ex. C). A regulation may not be sustained if it "provides only ineffective or remote support for the government's purpose," *see Edenfield,* 507 U.S. at 770, or "does not sufficiently serve those public interests that are urged as its justification." *United States v. Grace*, 461 U.S. 171, 181 (1983). Despite DPA's admission that it was not "solicitation alone that causes the problem," its regulations specifically target only those individuals engaged in solicitation. Dep. Taylor at 45-47 (Ex. C). When regulations only target one portion of the purported harm, they necessarily "provide[] only the most limited incremental support for the interest asserted," indicating a lack of "fit" between its goals and its chosen means. *City of Cincinnati. v. Discovery Network, Inc.*, 507 U.S. 410, 427-28 (1993) (citation omitted) (ordinance banning newsracks for commercial publications, justified as reducing visual clutter, invalid because it did not ban newsracks for newspapers); *see also Vill. of Schaumberg v. Citizens for a Better Env't,* 444 U.S. 620, 637 (1980) (ban on door-to-door solicitations, enacted to decrease disruption in residential areas, invalid because it prohibited door-to-door solicitation by only some charitable organizations but not by others); *Lewis v. Colo. Rockies Baseball Club*, 941 P.2d 266, 277 (Colo. 1997) (ban on vending in one area, justified as reducing congestion, invalid when there was no similar ban in more congested

areas). Here too, DPA will be unable to justify differentiating between solicitation activities and other activities of individuals on the State Capitol grounds and will be unable to prove that its current restrictions have anything more than an incremental effect, if any, on protecting against blocking entrances and walkways to buildings. Without this evidence that the regulations actually further the interests asserted, it cannot therefore be, by definition, a reasonable time, place, or manner restriction.[8] *Edenfield*, 507 U.S. at 773.

Furthermore, the solicitation restrictions are not narrowly tailored because they "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799. The regulation prohibits many solicitation activities that pose no possibility of blocking entrances or walkways to buildings, such as one person requesting monetary contributions outside of the 100-foot radius, or an individual asking a friend for a quarter to feed a parking meter. To the extent that the ban on solicitation outside of the 100-foot radius prohibits all solicitation activities, it cannot be narrowly tailored since "each activity within the proscription's scope" is not "an appropriately targeted evil." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988); *see also Lederman v. United States*, 291 F.3d 36, 45 (D.C. Cir. 2001) ("the ban's absolute nature might be less troubling if . . . all listed demonstration activities could reasonably be expected to interfere with the stated objectives of traffic control and safety.").

Finally, under the void for vagueness doctrine, reg. 3.2 violates due process because it fails to provide a person of "ordinary intelligence a reasonable opportunity to know what conduct

[8] Moreover, an example of a "less burdensome alternative," *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418 n.13 (1993), is the Colorado law that protects against congestion at the State Capitol by allowing for the "free movement of business." *See* Dep. Taylor at 47 (Ex. C). To the extent that this law already exists, these solicitation restrictions also substantially burden speech without further advancing the asserted interests in protecting against congestion at the State Capitol. A content-neutral regulation is narrowly tailored only if it "curtails no more speech than is necessary to accomplish its purpose" and eliminates no more than the exact source of "evil" it seeks to remedy. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-810 (1984).

is prohibited." *People v. Moyer*, 670 P.2d 785, 789 (Colo. 1983). Any person who violates the DPA's solicitation regulations is also subject to criminal penalties pursuant to Colo. Rev. Stat. § 18-9-117(1) (2005). The void for vagueness doctrine is even more strictly applied where, as here, the law implicates the right of expression and involves criminal sanctions. *Parrish v. Lamm*, 758 P.2d 1356, 1366 (Colo. 1988).

Specifically, reg. 3.2 allows limited solicitation that is "authorized by a permit holder," but no definition of the term "authorized" is provided in the DPA regulations. Ex. A at 3 (reg. 3.2). It is unclear what sort of authorization is required, whether it can be written or oral, and whether such authorization needs to be obtained beforehand or can be after the fact. Furthermore, since the site indicated in an approved permit simply specifies a general location, such as "West Steps" for the location of the event, s*ee, e.g.*, Ex. E at 1, it is unclear what territory is defined by the 100-foot radius for permissible solicitation activities. Because this provision fails to explain the term "authorized" or how to measure the "100-foot radius" in which solicitation activities are permissible, it fails to provide adequate notice of exactly what behavior is proscribed. An unsuspecting individual, for example, who makes requests for monetary contributions in a particular location because she measured the 100-foot radius from the edge, rather than the center of her event, might unwittingly find herself violating the solicitation restrictions and subject to criminal penalties. Since DPA did not provide any clarity to these provisions, interpretation is left to law enforcement. Vesting such discretion in the police fails to provide the "minimal guidelines required for due process." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

DPA's restrictions of solicitation activities in regulation 1.8, 3.2 and 5.0, therefore, must be invalidated because they cannot survive constitutional scrutiny.

D. Regulation 7.4 Impermissibly Authorizes DPA to Deny a Permit Based on a Mere Prediction of Future Lawless Action.

Regulation 7.4 provides DPA with the power to deny a permit long before the date of a proposed event and prevent its occurrence if "[i]t reasonably appears that the proposed event is likely to incite or produce imminent lawless action." Ex. A at 5 (reg. 7.4).

Reg. 7.4 does not constitutionally "regulate competing uses of public forums," because it authorizes denying permits on the basis of criteria that are not sufficiently "'narrow, objective and definite.'" *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992) (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969)). Regulation 7.4 provides too much discretion to suppress expression, because it authorizes DPA to deny a permit based on an "appraisal of facts, the exercise of judgment, and the formation of an opinion," *Forsyth*, 505 U.S. at 131, about whether future unlawful action is sufficiently probable.[9] *See, e.g., Hague v. CIO*, 307 U.S. 496, 516 (1939) (invalidating ordinance that provided government official with impermissible discretion to deny a permit based on his opinion that denial would prevent "riots, disturbances, or disorderly assemblages"); *Beckerman v. City of Tupelo*, 664 F.2d 502, 510 (5th Cir. 1981) (ordinance impermissibly permits official "to deny a permit merely because, in his

[9] The regulation is not saved by the provision stating that DPA may not deny a permit "based upon the content of the views to be expressed at the event." *See* Ex. A at 5 (reg. 7.4). This provision does not prevent DPA from denying a permit based on an impermissible rationale that does not rely directly on the speaker's views. For example, DPA may argue that, without considering the content of the views to be expressed at a proposed event, it can deny a permit because the applicant's past event resulted in violent or otherwise illegal actions. Such a basis for denial is not only impermissible, *see, e.g., Collins v. Jordan*, 110 F.3d 1363, 1372 (1996) ("First Amendment activity may not be banned simply because prior similar activity led to or involved instances of violence"), but it also represents the exercise of impermissible discretion because it involves an "appraisal of facts, the exercise of judgment and the formation of an opinion by the licensing authority" about the prediction of future unlawful activity. *Forsyth*, 505 U.S. at 131.

opinion, unlawful conduct on the part of others will result from the parade"); *Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers*, 735 F. Supp. 745, 749 (M.D. Tenn. 1990) (invalidating regulation that authorizes denial of a permit based on the prediction that the future event will create a "clear and present danger of imminent lawless activity"). DPA has admitted that it has no written guidance or fixed objective criteria for defining "reasonably appears" and "likely to incite or produce imminent lawless action." Def.'s Resp. Pl.'s Req. Admis. at ¶ 2. The lack of such "written interpretations" or "instructions" is additional evidence that the regulation provides impermissibly broad discretion. *ACORN v. Mun. of Golden*, 744 F.2d 739, 748 (10th Cir. 1984 (the fact that there are also no "written interpretations" or "written instructions, orders, memoranda, or directions" regarding the enforcement of regulations further lends support to the finding that such regulations provide impermissibly broad discretion).

DPA has also provided no evidence of how it would be able to determine, in advance, the supposed likelihood of lawless action other than merely *suspecting* that it might occur. Danger of unlawful activity usually depends upon the immediate circumstances surrounding the expression. The submitted permit application contains very little information about the permit holder and the event, so that DPA could only know about potential lawless action if DPA were informed directly by the applicants that they intended to break laws at the event. *See* Ex. E at 2-3; Dep. Taylor at 18-19 (Ex. C). In *Martin Luther King Jr.*, the court invalidated a permitting scheme that authorized denial of a permit based on an anticipation of future violence because "there can be no clear and present danger at the time of application [forty-five days in advance] sufficiently clear to justify denial of a parade permit." 735 F. Supp. at 749. The same applies here. There is no advance information that could make the likelihood of unlawful activity

"sufficiently clear" without DPA exercising unlawful discretion by an "appraisal of facts, the exercise of judgment, and the formation of an opinion," *Forsyth*, 505 U.S. at 131. Furthermore, since reg. 7.4 also encompasses all "lawless action," it grants an official additional discretion to deny a permit based on her prediction that minor laws will be violated, even when those violations pose no threat to people or property. This regulation, therefore, impermissibly provides DPA with too much discretion to deny a permit in advance, and without an adequate basis to conclude that the event will actually result in illegal activity that substantially threatens persons or property.

The standard set forth in reg. 7.4 also does not meet the test set forth by the Supreme Court for prohibiting advocacy of violence or illegal activity in a public forum. "The law is also clear that the government may not prohibit angry or inflammatory speech in a public forum unless it is (1) 'directed to inciting or producing imminent lawless action' *and* (2) 'likely to incite or produce such action.'" *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996) (emphasis in the original) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). Here, reg. 7.4 has a lower threshold for prohibiting free speech because it merely requires the "reasonable appearance" that the event is likely to produce "imminent lawless action" and does not require that the event actually be "directed to inciting" such lawless action. Ex. A at 5 (reg. 7.4). By authorizing suppression of expression under a standard less demanding than *Brandenburg*, reg. 7.4 impermissibly covers speech that stirs passions, resentment or anger which is fully protected by the First Amendment. *Terminello v. Chicago*, 337 U.S. 1, 4 (1949).

Furthermore, since Reg. 7.4 grants DPA the power to deny applicants the use of the Capitol Grounds in advance of actual expression, it imposes a prior restraint based on a mere

prediction of future unlawful activity, which is presumptively a First Amendment violation. *Carroll v. President of Princess Anne*, 393 U.S. 175, 180-81 (1968). Instead of imposing a prior restraint, the constitutionally preferred sanction is "to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." *Southeastern Promotions v. Conrad*, 420 U.S. 546, 558-59 (1975); *Kunz v. New York*, 340 U.S. 290, 294 (1951). The state is not powerless to prevent imminent violence or lawlessness since the police under those circumstances should be able to "disperse and control the crowd, and if that becomes impossible, the marchers may be arrested." *Beckerman*, 664 F.2d at 510. Such punishment or curtailment of First Amendment rights, however, "must be based on a present abuse of rights, not a pre-nascent fear of future misconduct." *Id.* Here, DPA has suggested that law enforcement would be on hand to address potentially lawless action. *See, e.g.*, Dep. Taylor at 21, 30, 34-35 (Ex. C). In fact, DPA adjusts the number of law enforcement officers present based on the size of the event and based on the possibility of counter-demonstrators. *Id.* at 14. Because DPA has the power to "disperse and control the crowd" through the presence of law enforcement at the permitted event, DPA cannot justify a regulation authorizing resort to a prior restraint based on a mere prediction of unlawful activity in the future.

Regulation 7.4 should be invalidated as it authorizes the harsh penalty of a prior restraint based on the mere prediction that unlawful activity may occur in the future.

E. Regulation 8.2 Impermissibly Authorizes Law Enforcement to Revoke a Permit Based on a Mere Prediction of Future Lawless Action.

Regulation 8.2 similarly grants officials the authority to revoke a permit "if it reasonably appears that continuation of the event is likely to incite or produce imminent lawless action."

Ex. A at 6 (reg. 8.2). Such revocation authority allows law enforcement to shut down an entire event based on a mere prediction that unlawful activity will occur.

Reg. 8.2 provides law enforcement with impermissibly broad discretion in deciding when such a revocation can occur. "'[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority.'" *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969)); *see also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988). As discussed above, courts have invalidated permitting regulations that provide officials with discretion to prevent an event from occurring based on an official's "mere opinion" that future lawless action will occur. *See, e.g.*, *Hague v. CIO*, 307 U.S. 496, 516 (1939); *Beckerman v. City of Tupelo*, 664 F.2d 502, 510 (5th Cir. 1981); *Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers*, 735 F. Supp. 745, 749 (M.D. Tenn. 1990). Here, reg. 8.2 similarly provides insufficient objective criteria for revocation because it merely requires the "reasonable appearance" that the event is likely to produce such imminent lawless action. Ex. A at 6 (reg. 8.2). The regulation itself has no definitions or standards to guide the judgment of what "reasonable appearance" means. Nor does DPA have any written guidelines or procedures that explain when a permit may be revoked pursuant to reg. 8.2, nor any training materials or written instructions for law enforcement on when revocation is permissible according to the regulations. Def.'s Resp. Pl.'s Req. Admis. at ¶ 3; Def.'s Resp. Pl.'s Req. Doc. at ¶ 2 (Ex. H). Given that DPA has provided no further guidance on the meaning of reg. 8.2, therefore, law enforcement is impermissibly provided wide latitude to exercise its own judgment with an "appraisal of facts, the exercise of judgment, and the

formation of an opinion" on when to revoke a permit based on a mere "appearance" that unlawful activity may take place in the future. *Forsyth*, 505 U.S. at 131.

Reg. 8.2 also authorizes law enforcement to revoke a permit and suppress expression under a standard less demanding than the constitutional minimum set forth in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (government may not forbid advocacy of violence or illegal activity unless the advocacy is "directed to inciting or producing imminent lawless action" and is "likely to incite or produce such action"). *Brandenburg* does not permit the government to proscribe speech unless it occurs in a context where it is *likely* to produce imminent lawless action, but reg 8.2 authorizes the government to shut down expression without sufficient evidence and certainty, based on the mere "reasonable appearance" that the Brandenburg threshold might be met. Reg. 8.2 also falls short of the Brandenburg standard because it authorizes law enforcement to revoke a permit in the absence of evidence that the speaker actually intends to incite or provoke lawless action or that the event is actually "directed to inciting" such lawless action. Ex. A at 6 (reg. 8.2). Reg. 8.2 provides an impermissibly broader basis, therefore, for prohibiting inflammatory speech than is allowed by the Supreme Court.

Furthermore, like Reg. 7.4, Reg. 8.2 authorizes law enforcement to shut down an entire event based on a prediction of future lawless action. It therefore authorizes a prior restraint that presumptively violates the First Amendment. *See, e.g., Carroll v. President of Princess Anne*, 393 U.S. 175, 180-81 (1968). "[C]urtailment of First Amendment rights must be based on a present abuse of rights, not a pre-nascent fear of future misconduct." *Beckerman*, 664 F.2d at 510. As explained above, the preferred constitutional method for addressing unlawful conduct that may be "intertwined with First Amendment activity" is to punish it after it occurs, rather

than prevent free speech activities that from occurring. *Collins v. Jordan*, 110 F.3d 1363, 1371-72 (9th Cir. 1996); *Carroll*, 393 U.S. at 180-81; *Southeastern Promotions*, 420 U.S. 546, 560 (1975). Since the State of Colorado has the ability to punish such conduct after it occurs, *see, e.g.*, Dep. Taylor at 21, 30, 34-35 (Ex. C), it should do so rather than revoking a permit based on the belief that lawless action will occur in the future.

Moreover, Reg. 8.2 does not survive intermediate scrutiny because it is not narrowly tailored to address DPA's purported interests. DPA has asserted that the governmental interests served by this regulation is protection of: (1) the individuals issued the permit; (2) property of the Capitol; and (3) individuals doing business and working at the Capitol. *Id.* at 32. In particular, DPA stated that the real purpose of the revocation regulations is to address a mass violence situation, rather than the violations of law by a few, during the course of a permitted event:

> I would imagine if it's one person, they're going to remove that one person and it's not a problem at all. This really gets towards there are 800 people at the capitol and everybody is beating on each other and waving knives and that kind of thing. I mean this isn't one person is angry from a crowd or doing lawless things as an individual because my understanding is state patrol wouldn't [sic] know how to handle one person and be able to move that away without impacting the ability of the entire crowd.

Id. at 34.

A narrowly-tailored statute should not ban more speech than needed to address the government's stated goals. *See, e.g., United States v. Grace*, 461 U.S. 171, 182 (1983). Reg. 8.2, however, "burden[s] substantially more speech than is necessary," *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), by authorizing revocation of a permit for the entire event, thereby infringing all participants' free speech rights, based on multiple scenarios that do not address DPA's stated purpose of protecting against mass violence. First, reg. 8.2 allows

revocation for violations of law that have nothing to do with mass violence or even harming people or property, such as a protestors soliciting outside of the 100-foot radius, in violation of reg. 3.2 and Colo. Rev. Stat. § 18-9-117(1) (2005). Second, revocation is allowed based on the lawless actions of a few isolated individuals that have nothing to do with mass violence and who are entirely controllable by law enforcement. Finally, in circumstances where there may only be a "reasonable appearance" of imminent lawless action, reg. 8.2 impermissibly allows for revocation, without any sort of real certainty that mass violence or even minor or isolated lawless action will occur. *See, e.g., Beckerman v. Tupelo*, 664 F.2d at 510 (regulation allowing for denial of permit based on pre-nascent fears of misconduct is not narrowly tailored). In all of these scenarios, therefore, silencing the permit holder and all participants constitutes an overly drastic response to DPA's goal of protecting against mass violence. Reg. 8.2, therefore, is not narrowly tailored because it places a more substantial burden on the permit holder and participants than is necessary to protect DPA's interests. *Ward*, 491 U.S. at 799.

F. The State of Colorado's Authority to Revoke Permits Pursuant to Regulation 8.1 Is Neither Subject to Narrow and Objective Criteria Nor Narrowly Tailored to Serve its Purported Interest in Protecting Against Substantial Harm.

Regulation 8.1 similarly allows law enforcement to revoke a permit "if the permit holder or participants violate these regulations or the laws of the United States or State of Colorado." Ex. A at 6 (reg. 8.1).

It is well established that a permitting scheme which involves an "appraisal of facts, the exercise of judgment and the formation of an opinion by the licensing authority" vests too much discretion in the permitting official and therefore will be found unconstitutional. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992). In *City of Colorado Springs v. 2354, Inc.*,

the Supreme Court of Colorado invalidated an ordinance that allowed for revocation or suspension of a sexually oriented business license "if the licensee or an agent or employee thereof violates" "any law of the United States, of the State of Colorado or the City of Colorado Springs when such violation occurred on the licensed premises, or relates to conduct or activity of any business required to be licensed by this Chapter."[10] 896 P.2d 272, 296-97 (Colo. 1995). Since the provision had no *mens rea* requirement nor any other criteria for finding a violation of law, the court invalidated the provision because it reasoned that: "[i]n view of the danger of censorship and arbitrary suppression inherent in the application of imprecise standards, regulations granting government officials excessive discretion to regulate constitutionally protected modes of expression are unconstitutional on their face."[11] *Id.* at 297.

Here, as in *City of Colorado Springs*, reg. 8.1 does not have a *mens rea* requirement nor any other definite criteria for finding a violation of law or regulation, leaving law enforcement the wide discretion to determine what violations of law would result in permit revocation. DPA admits that it has no specific written guidelines or procedures for revoking permits pursuant to this regulation, nor does law enforcement possess any written procedures or training materials on revocation. Def.'s Resp. Pl.'s Req. Admis. at ¶ 3 (Ex. D); Def.'s Resp. Pl.'s First Req. Doc. at ¶ 2 (Ex. H). In violation of the standard articulated in Forsyth, reg. 8.1 vests discretion in law enforcement to appraise facts, exercise judgment and form an opinion of whether a violation of law or regulation should trigger revocation.

[10] The Supreme Court of Colorado reviewed this portion of the ordinance under the intermediate scrutiny standard of review. *City of Colorado Springs*, 896 P.2d at 296.

[11] Without any *mens rea* requirement, the *City of Colorado Springs* court also found that this provision establishes a strict liability standard that is constitutionally suspect for purposes of First Amendment analysis. 896 P.2d at 296.

Furthermore, reg. 8.1 is not narrowly tailored to achieve a significant governmental purpose, as required of content-neutral statutes regulating the time, place and manner of speech. Similar to reg. 8.2, DPA has asserted that this regulation serves to protect individuals and property from substantial harm. DPA has provided examples, such as the continued use of a high decibel sound system resulting in broken windows at the Capitol or "all 75 people are out there, you know, breaking some kind of law at the same time." Dep. Taylor at 38, 40 (Ex. C).

Reg. 8.1, however, authorizes law enforcement to revoke a permit based on *any* violation of the DPA regulations or the laws of Colorado or the United States by a permit holder or participant during the course of the event, even when those violations are unrelated to the permitted event. The "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). In *City of Colorado Springs*, the Supreme Court of Colorado found that a licensing scheme that allowed for suspension or revocation of the license based on any violation of law, without any consideration of the particular circumstances, was "not narrowly drawn to insure maximum opportunity for constitutionally protected modes of expression." *Id.* at 297. Here too there are many violations of law or regulation that could occur during the course of a permitted event that would be wholly unrelated to DPA's interest in preventing substantial harm to property or individuals at the Capitol. For example, reg. 8.1 authorizes law enforcement to revoke a permit if an individual holds a sign requesting monetary contributions outside of the 100-foot radius, or if an individual asks a friend for a quarter to feed a parking meter, both violations of reg. 3.2. By authorizing law enforcement to revoke a permit for a *de minimus* violation of DPA regulations, reg. 8.1 impermissibly places a substantial

burden on speech without serving or advancing the DPA's stated goals of protecting people and property from substantial harm.

In addition, reg. 8.1 authorizes law enforcement to shut down an entire event and revoke the permit holder's right to speak because of violations of law or regulation committed by participants over whom the permit holder has no control. Ex. A at 6 (reg. 8.1). When white business owners sought damages for unlawful activity that occurred during a boycott organized by the NAACP, the Supreme Court held that the First Amendment protected the civil rights organization from liability for the unlawful actions of individual participants in the boycott, unless the organization directed, authorized or ratified the unlawful activities. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932 (1982). Similarly, the First Amendment rights of a permit holder cannot be suspended or infringed because persons unconnected to the permit holder engage in unlawful activity that the permit holder does not direct, authorize or ratify. *See Healy v. James*, 408 U.S. 169, 186 (1972) (guilt by association alone, without establishing that an individual's association poses the threat feared by the Government, is an impermissible basis upon which to deny First Amendment rights). The revocation of a permit under reg. 8.1 is impermissible because it results in punishing an innocent permit holder and participants because of the unlawful actions of unconnected individuals. Under these circumstances, therefore, revoking the free speech rights of the permit holder and participants suppresses far more speech than is necessary to address DPA's interest in protecting against substantial harm.

Moreover, there are less restrictive alternatives that address the DPA's concerns, which are certainly "a relevant consideration in determining whether the 'fit' between the ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418 n.13

(1993). Here, DPA admitted that law enforcement can address violations of law that occur during the course of an event by "deal[ing] with them individually" rather than using the drastic remedy of revoking the permit and shutting down the entire event. *See* Dep. Taylor at 40 (Ex. C). In fact, DPA stated that, rather than revoke a permit, if one or two people were breaking the law, law enforcement "would have the ability to deal with them individually." *Id.* DPA's own admission that law enforcement can adequately address many violations of law or regulation without shutting down an entire event demonstrates that reg. 8.1 is not narrowly tailored.

Regulation 8.1, therefore, must be invalidated since it provides unfettered discretion for revocation based on *de minimus* violations of law and is substantially broader than necessary to achieve DPA's interest in protecting against substantial harm to people and property in the State Capitol area.

G. DPA's 30-Day Advance Notice Requirement in Regulation 6.2 Is Not Narrowly Tailored.

Regulation 6.2 requires that all applications be filed at least 30 days in advance of the date of the demonstration. Ex. A at 4-5 (6.2). "Advance notice or registration requirements drastically burden free speech" since they "stifle spontaneous expression" and "prevent speech that is intended to deal with immediate issues." *Rosen v. Port of Portland*, 641 F.2d 1243, 1249 (9th Cir. 1981). Courts, therefore, have recognized that an advance-notice requirement is a substantial inhibition on speech and have therefore invalidated such requirements. *See, e.g.*, *American-Arab Anti-Discrmination Committee v. City of Dearborn*, 418 F.3d 600, 607-8 (6th Cir. 2005) (30-day notice sweeps too broadly and is invalid on its face); *Douglas v. Brownell*, 88 F.3d 1511, 1523-24 (8th Cir. 1996) (five-day notice requirement is not narrowly tailored); *NAACP v. City of Richmond*, 743 F.2d 1346, 1357 (9th Cir. 1984) ("all available precedent

suggests that a 20-day advance notice requirement is overbroad."); *see also Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir. 1994) (advance notice and permitting requirement for activities in a public park invalidated); *Rosen*, 641 F.2d at 1249 (advance notice and permitting requirement for free speech activities at the Portland Airport invalidated).

The only government interest DPA has articulated in support of reg. 6.2 is the need for the State Patrol to determine whether it must assign more than the normal number of officers to police a particular event. Dep. Taylor at 13 (Ex. C). As Plaintiff will demonstrate, reg. 6.2 is not narrowly tailored to advance this interest.

In *City of Dearborn*, the Sixth Circuit stated that "[a]ny notice period is a substantial inhibition on speech," because "'[t]he simple knowledge that one must inform the government of his desire to speak and must fill out appropriate forms and comply with applicable regulations discourages citizens from speaking freely.'" 418 F.3d at 605 (quoting *NAACP*, 743 F.2d at 1355). Recounting evidence that the City could usually prepare within two days and sometimes within a day, the Sixth Circuit found that a 30-day notice provision burdened more speech than necessary. 418 F.3d at 606. Given the substantial burden on speech, the 30-day notice provision was therefore invalidated. *Id.* at 607-8.

The reasoning of *City of Dearborn* applies here. The 30-day notice requirement clearly burdens spontaneous speech, because the various requirements of notifying DPA and filling out the appropriate forms result in discouraging citizens from speaking freely.[12] *See, e.g.*, *NAACP*, 743 F.2d at 1355. At the same time, DPA has admitted that the procedures prior to approval of a

[12] The mere existence of a waiver procedure does not lessen the substantial burden on speech, particularly where the waiver procedure suffers from a lack of narrow, objective and definite criteria. *See, e.g.*, *NAACP*, 743 F.2d at 1357-58; *City of Dearborn*, 418 F.3d at 607. As discussed below, DPA's waiver procedure fails to provide sufficiently definite criteria.

permit only take "a day or two." Even when a permit applicant is required to meet with DPA to tour the site, that takes only "five minutes to . . . a half hour." Dep. Taylor 11, 18 (Ex. C); *see also* Ex. I; Def.'s Resp. Pl.'s Interrogs. at ¶¶ 1-4 (Ex. J). Since DPA needs only 1-2 days to process the application, requiring 30 days advance notice clearly burdens more speech than necessary.

In an extraordinary case in which a proposed event may be expected to attract very large numbers of people, DPA may need additional time because of the "state patrol's ability to bring in additional staffing if they need that." Dep. Taylor at 13, 15 (Ex. C). In those extraordinary cases, however, DPA states that it actually needs *more* than thirty days to plan. *Id.* at 14. In those situations, therefore, the 30-day advance notice requirement wholly fails to advance the government's stated interest. A regulation is not narrowly tailored when it cannot "advance the asserted state interests sufficiently to justify its abridgement of expressive activity." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).

When it invalidated a 30-day advance notice requirement for a parade, the court in *City of Dearborn* found it persuasive that other municipalities have required much less time to prepare for a march. *See, e.g.*, *City of Dearborn*, 418 F.3d at 606 n.2 ("A study conducted in 1970 of twenty-two municipalities showed that Denver, Oakland, and Dallas had no advance notice requirements for a march, and only three of the twenty-two municipalities studied had an advance notice requirement of more than six days. According to the study, the average advance notice requirement was New York City's thirty-six hour requirement."). The same evidence is even more persuasive in this case. DPA does not have to address the multiple concerns involved in planning for a proposed parade, such as traffic diversions and street closings, since DPA's

regulations only authorize permits for stationary rallies and events. The ability of so many municipalities to plan for proposed marches and parades in less than 30 days is further evidence that DPA's 30-day advance notice requirement is not narrowly tailored.

Finally, DPA regularly waives the requirement of 30 days advance notice, further demonstrating that it is not needed to satisfy DPA's concerns. Indeed, DPA rarely, if ever, denies requests that the 30-day requirement be waived. Dep. Taylor at 16 (Ex. C). In *City of Dearborn*, the Sixth Circuit found that the City regularly waived its requirement of 30 days advance notice, which, the court explained, "provides more support for our conclusion that the Ordinance's thirty-day notice provision is not narrowly tailored to serve a significant government interest." 418 F.3d at 607 n.4. The same is true here.

DPA's waiver procedure does not save the advance-notice requirement from its lack of narrow tailoring. Like any standard for granting or denying a permit, the standards of reg 6.2 must constrain the discretion of the decisionmaker with criteria that are "narrow, objective, and definite." *Forsyth County v. Nationalist Movement*, 505 U.S. 125, 131 (1992) (quotations omitted). While the requirement of submitting an application 30 days in advance is sufficiently definite, the procedure for waiver is not. Regulation 6.2 states that the "Executive Director may grant a waiver if it appears that, under the circumstances, it will be possible to adequately protect the public safety, health and welfare." Ex. A at 5 (reg. 6.2). A licensing scheme is invalid when it permits an official to restrain speech based on her "own opinions regarding the potential effect of the activity" upon such indeterminate concepts as "the public welfare, peace, safety, health, decency, good order, morals or convenience" of the community. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 154 (1969); *see also Indo-American Cultural Society, Inc. v.*

Township of Edison, 930 F. Supp. 1062, 1064-66 (D.N.J. 1996) (invalidated ordinance granting Town Council uncontrolled discretion to grant or deny a permit "upon such terms and conditions as it deems necessary and proper to ensure the public health, safety and welfare"). A waiver of an advance-notice requirement that provides the granting official with too much discretion and no objective standards is unconstitutional. *See, e.g.*, *NAACP*, 743 F.2d at 1357 (invalidating waiver scheme which allows city official discretion to grant "if it finds unusual circumstances"); *City of Dearborn,* 418 F.3d at 607 (waiver policy which was opaque and lacking sufficient notice and standards to guide city officials could not save the burdensome 30-day advance-notice requirement). DPA's waiver procedure in regulation 6.2 does not provide sufficient standards to guide DPA officials.[13] The very language of reg. 6.2 – the "Executive Director *may* grant a waiver" – provides DPA with the complete discretion to deny a waiver even if there were seemingly no objective reasons for denying it. Ex. A at 5 (reg. 6.2) (emphasis added). The regulation does not describe any standards for how DPA assesses whether it could "protect the public safety, health and welfare," nor does DPA possess any internal written guidance on how to make this determination. Def.'s Resp. Pl.'s Req. Admis. at ¶ 1 (Ex. D). DPA officials, therefore, are left to appraising facts, exercising judgment and forming an opinion, *see Forsyth*, 505 U.S. at 131, about whether "public safety, health and welfare" will be adequately protected "under the circumstances." Given the impermissibly wide latitude provided to DPA officials in denying waivers, the waiver scheme in reg. 6.2 should be invalidated.

[13] Furthermore, the waiver provision burdens substantially more speech than necessary. DPA states that its only criteria for granting or denying a waiver is "the size of the event" and whether state patrol "can handle the size of the event." Dep. Taylor at 16 (Ex. C). Yet the text of reg. 6.2 provides much broader discretion to DPA to deny a waiver based on the indeterminate criteria of whether "it will be possible to adequately protect the public safety, health and welfare."

For the reasons set forth above, the 30-day advance notice requirement and waiver scheme within reg. 6.2 should be invalidated.

II. AS A MATTER OF LAW, THE CHALLENGED REGULATIONS CANNOT SURVIVE CONSTITUTIONAL SCRUTINY.

To the extent that the challenged regulations violate the Colorado Administrative Procedure Act because they are "contrary to constitutional right, power, privilege or immunity," they must also fail to survive constitutional scrutiny under sections 10 and 35 of article II of the Colorado Constitution. *See supra* Section I.

CONCLUSION

For the reasons set forth above, the ACLU of Colorado respectfully requests that the Court grant its Motion for Summary Judgment and find that the aforementioned regulations, as a matter of law, violate the Colorado Administrative Procedure Act and Colorado Constitution.

Respectfully submitted on this 7th day of November 2005.

_/s/Jennifer J. Lee_____
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