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

**REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT**

## INTRODUCTION

The Department of Personnel and Administration (DPA) has not carried its burden of proving that its regulations comply with the well-established law governing permitting schemes

for public forums. In many respects, DPA has apparently conceded that the challenged regulations are problematic by failing to address Plaintiff's arguments.

In particular, DPA has failed to apply the intermediate scrutiny test required for content-neutral time, place and manner regulations. In order to survive constitutional scrutiny, such regulations must be narrowly tailored to advance a significant government interest, and leave open alternative channels for communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). While it remains undisputed that DPA's proffered governmental interests are significant, DPA fails, and in several instances does not even attempt, to demonstrate that the challenged regulations are actually narrowly tailored to advance the proffered governmental interests, and that they do so without suppressing more speech than necessary. *Id.* at 798-99.

Instead, DPA spends the bulk of its energy focusing on Plaintiff's argument that DPA's regulations provide impermissible amounts of discretion to the permitting official. A government regulation that provides too much discretion is invalid because "such discretion has the potential for becoming a means of suppressing a particular point of view" so that a regulation, to curtail such risks, must contain "'narrow, objective, and definite standards to guide the licensing authority.'" *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992) (citations omitted). DPA mistakenly rests its refutation of this argument on the grounds that officials have not and will not misuse their discretion to suppress a particular point of view. The ultimate question of whether a permitting scheme impermissibly provides for overly broad discretion, however, does not require an examination into whether the agency has misused discretion in the past or promises, in good faith, to not misuse its discretion in the future. Rather

*Forsyth* requires that the regulations themselves have "narrow, objective, and definite standards" that place explicit limits on the discretion of the permitting official. *Id.* at 131.

This Court should grant Plaintiff's Motion for Summary Judgment as a matter of law because the challenged DPA regulations are unconstitutional, and thus invalid under the Colorado Administrative Procedure Act.[1]

## ARGUMENT

### I. DPA MISCONSTRUES AND FAILS TO APPLY THE PROPER LEGAL STANDARDS APPLICABLE TO ITS REGULATIONS.

DPA does not dispute that the government must bear the burden of proof in establishing the constitutionality of its regulations.[2] Pl.'s Br. at 7 (citing *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780, 785-86 (Colo. 1985)).

#### A. DPA Largely Fails to Apply the Narrow Tailoring Test to its Regulations.

The parties agree that the appropriate test to be applied to DPA's regulations that are considered content-neutral time, place and manner regulations is whether such regulations are

[1] Both parties agree that Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment apply to both Plaintiff's constitutional claims and claims under the Colorado Administrative Procedure Act. *See, e.g.*, Def.'s Resp. at 2-3.

[2] DPA indirectly attempts to shift the burden by arguing that Plaintiff must provide evidence of a "chilling effect" in order to sustain a facial challenge to its regulations. Def.'s Resp. at 7. Not only is its shifting of the burden impermissible, but DPA is completely wrong on the legal standard governing facial challenges. *Forsyth*, 505 U.S. at 129 (a facial attack should be permitted when the regulation in question has "the *potential* to chill the expressive activity of others not before the court"). DPA's further pronouncement that "a law's chilling effect on protected speech must be substantial" is completely unsupported by its pinpoint citation to *Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003) (holding that a facial attack of a law regulating both conduct and speech requires "a law's application to protected speech be substantial"). Nor does DPA's parenthetical following *FW/PBS, Inc. v. City of Dallas*, accurately reflect the court's statement on facial challenges since DPA omits the remainder of a sentence. 493 U.S. 215, 223 (1990) ("Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker."), *overruled on other grounds by, City of Littleton v. Z. J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004).

"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); Def.'s Resp. at 8-10; Pl.'s Br. at 13-15 . DPA spends much of its time attempting to justify its regulations by touting the significance of public safety, preservation of property, terrorism and ensuring normal day-to-day business at the Capitol – all of which are undisputedly substantial concerns. *See, e.g.*, Def.'s Resp. at 10, 18, 22, 25. The importance of governmental interests, however, is never sufficient, in and of itself, for a regulation to be deemed constitutional.

Intermediate scrutiny requires that the regulation be narrowly tailored to serve that interest. *Ward*, 491 U.S. at 796. While both parties agree that this standard does not require the government to choose the least restrictive means of achieving its end, *see* Pl.'s Br. at 15; Def.'s Resp. at 10, 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) (quotations omitted). Furthermore, narrow tailoring requires that DPA's regulations do not "burden substantially more speech than is necessary." *Ward*, 491 U.S. at 799.

DPA has not even attempted to demonstrate that each of its regulations is narrowly tailored to serve the stated governmental interests. Except for the occasional conclusory statement that its regulations serve its interests, *see, e.g.*, Def.'s Resp. at 7, 10, or that its regulations are "narrow" or "narrowly tailored," *see id.* Def.'s Resp. at 17, 23, 26, DPA has failed to apply the narrow tailoring test throughout its response. DPA cannot, and does not, show that its regulations actually "will in fact alleviate [the recited harms] to a material degree."

*Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). Nor does DPA even address Plaintiff's arguments that "a substantial portion of the burden on speech does not serve to advance [DPA's] goals." *Ward*, 491 U.S. at 799.

**B. DPA Fundamentally Misunderstands the *Forsyth* Test.**

No one disputes that a constitutional permitting scheme is permissible in order to regulate competing uses of a public forum. *Forsyth County*, 505 U.S. at 130; Def.'s Resp. 7-8; Pl.'s Br. at 9. What DPA fundamentally misunderstands is the basic standard applied in determining whether such a permitting scheme meets constitutional requirements. The United States Supreme Court has held that a permitting scheme cannot "delegate overly broad licensing discretion to a government official." *Forsyth*, 505 U.S. at 130. DPA, however, attempts to mischaracterize Plaintiff's argument by stating that Plaintiff seeks a permitting scheme that would delineate all possible scenarios, *see, e.g.*, Def.'s Resp. at 13, and, at the same time, that Plaintiff seeks to abolish DPA's permitting scheme so that no such standards exist, *see, e.g.*, Def.'s Resp. at 28. Neither is a true characterization of Plaintiff's position nor of the case law elucidating constitutional standards for permitting schemes. *See* Pl.'s Br. at 9-11.

A permitting scheme must include clear guidelines for the decisionmaker and must contain "narrow, objective, and definite standards to guide the licensing authority." *Forsyth*, 505 U.S. 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).[3] It is not the mere existence of any amount of discretion vested with a permitting official that is fatal, *see* Def.'s

[3] DPA's attempt to distinguish *Forsyth* on the grounds that the case concerns fees for permits is entirely inapt. Def.'s Resp. at 12. Plaintiff has never argued that the specific factual holding in *Forsyth* dictates a result with respect to any of the challenged DPA regulations. Rather, Plaintiff applies the legal standard set forth in *Forsyth* because it represents a recent comprehensive statement by the U.S. Supreme Court on evaluating the constitutionality of permitting schemes. *See* Pl.'s Br. at 9-11.

Resp. at 5, 11, 14, but rather the absence of adequate "standards governing the exercise of discretion."[4] *City of Lakewood*, 486 U.S. at 763.

In order to determine whether a permitting scheme delegates "overly broad licensing discretion to a government official," a court will examine whether the face of the law itself contains explicit limits on discretion.[5] *See id.* at 769-70. Contrary to DPA's assertions, Def.'s Resp. at 15, Plaintiff does not otherwise have to provide evidence that DPA has acted as a censor:

> Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas . . . 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.* at 757 (quotations omitted). Moreover, the existence of overly broad discretion cannot be saved because the agency vows to operate in good faith. Such a presumption that an official "will act in good faith and adhere to standards absent from the ordinance's face" is "the very presumption that the doctrine forbidding unbridled discretion disallows." *Id*. at 770.

[4] DPA's reliance on *Tool Box v. Ogden City Corporation*, 355 F.3d 1236 (10th Cir. 2004), is misplaced. Def.'s Resp. at 14. While the Tenth Circuit did state that "the Court [in *City of Lakewood*] was concerned only with those licensing schemes most likely to be in fact an instrument of censorship," it was referring to whether a licensing scheme had "a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." *Tool Box*, 355 F.3d at 1242 (citations omitted). In *Tool Box*, the court held that the building permit sought by the nude-dancing establishment did not have the requisite nexus to expression, unlike licensing laws "governing charity solicitation, parade permits, film censorship, and regulation of handbills, leaflets, or sound trucks." *Id.* DPA's permitting scheme clearly satisfies this "nexus to expression" and thus is "most likely to be in fact an instrument of censorship."

[5] Contrary to DPA's assertions, reg. 7.4 does not provide explicit limits to the operation of DPA's entire permitting scheme. Def.'s Resp. at 12. The language in reg. 7.4 prohibits "content-based denials" and solely applies to the process of denying permits. *See infra* footnote 19.

## II. DPA HAS FAILED TO CARRY ITS BURDEN OF ESTABLISHING THAT THE CHALLENGED REGULATIONS SURVIVE CONSTITUTIONAL SCRUTINY.

### A. DPA Has Not Proved that Regulation 9.0 Is Narrowly Tailored and Has Narrow, Objective and Definite Standards for Canceling Permits.

In a desperate attempt to save reg. 9.0 from its fatal flaws, DPA asserts that its "authoritative" construction of the regulation must be considered when evaluating its constitutionality.[6] DPA would have this Court believe that "the Executive Director's actions demonstrate his authoritative construction," Def.'s Resp. at 16-17, even though his actions have been one of *inaction* since reg. 9.0 became effective. According to DPA, the Executive Director's inaction has "made it clear" that "a yellow or 'elevated' alert does not constitute 'heightened security,'" Def.'s Resp. at 16, despite DPA's separate admissions that the level of security has remain "heightened" since its regulations became effective.[7] Def.'s Answer at ¶ 16; Dep. Taylor at 28 (Ex. C). Instead of relying on internal written guidance or procedures – which DPA admits do not exist, Def.'s Resp. Pl.'s Req. Admis. at ¶ 3 (Ex. D) – DPA would have this Court read the mind of the Executive Director for his interpretation and implementation of reg. 9.0. DPA's unsupported assertions simply cannot be accepted as providing what it touts as an "authoritative" construction of reg. 9.0.[8]

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[6] Regulation 9.0 states:

> 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.

[7] Nor does the Executive Director's inaction demonstrate, as DPA erroneously maintains, that reg. 9.0 "provides that the Executive Director must consult" with the relevant state and federal security agencies. Def.'s Resp. at 18.

[8] DPA's statement that the Executive Director utilizes "additional tools provided by Homeland Security" is a new factual assertion without evidentiary support. Def.'s Resp. at 18.

Furthermore, no one disputes that terrorism is a serious security concern and that acts of terrorism have previously occurred in the United States. Def.'s Resp. at 18. The important governmental interests at stake with reg. 9.0, however, are not sufficient to show that the regulation is "narrowly tailored to serve a significant governmental interest." *Clark*, 468 U.S. at 293. DPA utterly fails to show that the regulation itself is narrowly tailored. *Compare* Pl.'s Br. at 18-21 *with* Def.'s Br. at 18-19. DPA ignores Plaintiff's arguments because it cannot prove that reg. 9.0 addresses "real" threats against the State Capitol without burdening "substantially more speech than necessary" to achieve its goal of protecting against terrorism. *Edenfield*, 507 U.S. at 770-71; *Ward*, 491 U.S. at 799.

Moreover, as long as a heightened level of security remains in effect, reg. 9.0 grants "unbridled discretion," since it provides no limits whatsoever to the permitting official's discretion. *See* Pl.'s Br. at 16-18. DPA apparently cannot, and does not, argue against the fact that the "face of the ordinance itself contains no explicit limits." *City of Lakewood*, 486 U.S. at 769; *see also* Def.'s Rep. at 16-18.

Instead, DPA asserts that its Executive Director has never cancelled an event based on his authority under reg. 9.0. *See* Def.'s Resp. at 16-17. The Supreme Court in *City of Lakewood*, however, dictates that a court cannot presume that licensing officials will act in "good faith and adhere to standards absent from the ordinance's face." 486 U.S. at 770. The determination of whether the regulation vests unfettered discretion, therefore, rests on "whether there is anything in the ordinance [that] prevent[s]" the Executive Director from improperly exercising his discretion. *Forsyth*, 505 U.S. at 133 n.10. Despite the fact that the DPA has not yet exercised its power to cancel a permitted event, the very "*power* to enforce the [regulation] in a manner that

favors some viewpoints over others" violates the First Amendment. *See ACORN v. City of Tulsa*, 835 F.2d 735, 741 (10th Cir. 1987) (quotations omitted).

Regulation 9.0 must be invalidated, therefore, because the regulation contains no explicit limits and is not narrowly tailored to DPA's interests in ensuring safety at the State Capitol.

### B. DPA's Desperate Attempt to Reinvent its Solicitation Regulations, 1.8, 3.2 and 5.0, Does Not Save them from Being Unconstitutional.

Instead of directly addressing Plaintiff's arguments about the solicitation regulations, DPA attempts some creative maneuvering to reinterpret its solicitation regulations.[9] DPA's attempt to reinvent its already vague restrictions on solicitation, however, creates even more confusion than before. "Although a 'statute must be construed, if fairly possible, so as to avoid . . . the conclusion that it is unconstitutional, . . . avoidance of a difficulty will not be pressed to the point of disingenuous evasion.'" *Initiative & Referendum Institute v. U.S Postal Service*, 417 F.3d 1299, 1317 (D.C. Cir. 2005) (quoting *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373 379 (1933)). Moreover, given that DPA's new spin does not appear in any written guidelines or official agency interpretations, *see* Def.'s Resp. Pl.'s Req. Doc. at ¶ 3 (Ex. H), it is also a

[9]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." Regulation 3.2 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.

Regulation 5.0 states:

> Solicitation and commercial enterprise within state buildings and on grounds other than the State Capitol Grounds and Lincoln Park are not allowed except on the perimeter sidewalks, when in 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.

complete mystery how permit holders, participants and law enforcement officers are supposed to know what is allowed and what is prohibited.

DPA points to the conflict between its regulations 3.2 and 5.0. Def.'s Resp. at 22-23. Regulation 3.2 states "[n]o other solicitation is allowed on the State Capitol Grounds" while reg. 5.0 states "[s]olicitation . . . within state buildings and on grounds other than the State Capitol Grounds and Lincoln Park are not allowed." Despite the plain language of these regulations, DPA suddenly declares that the general prohibition on solicitation in reg. 3.2 is supposedly only applicable during a permitted event, while reg. 5.0, which does not otherwise forbid solicitation on State Capitol Grounds, is supposedly applicable at all other times. *Id.*

DPA's new reinvention of these regulations, however, does not stop there. In a desperate attempt to show that its new reading of these regulations is reasonable, DPA proceeds to provide examples that would completely perplex any individual reading these solicitation regulations. DPA, for example, states that reg. 3.2 would allow counter-demonstrators to solicit *outside* of the 100-foot radius during a permitted event, *id.* at 24, even though such an example would directly contradict the text of reg. 3.2 That text states that, other than solicitation within the 100-foot radius that is authorized by the permit holder, "[n]o other solicitation is allowed on the State Capitol Grounds." DPA also states that "asking for change near the capitol" would be "irrelevant under the regulations at issue." *Id.* at 23. The text of reg. 3.2, however, clearly prohibits asking for change during a permitted event, if such solicitation occurred outside of the 100-foot radius and/or was not authorized by the permit holder. Thus, DPA's supposed limiting "interpretation" of regulation 3.2 and 5.0 is not only disingenuously unfaithful to the text of the regulations, but also fundamentally in violation of the rules of statutory construction because it

fails to give a "sensible effect to all its parts" and renders portions of the regulations "superfluous." *Leaffer v. Zarlengo*, 44 P.3d 1072, 1078 (Colo. 2002).

Furthermore, DPA now supposedly limits the solicitation restrictions to a ban only on "in-person" solicitation, which DPA says does not prohibit "passing out leaflets or flyers that instruct individuals on where they can send donations." Def.'s Resp. at 21 (Ex. C). No such narrowing construction was offered at DPA's deposition. *See, e.g.*, Dep. Taylor at 45. In addition, DPA's new interpretation contradicts the explicit definition in reg. 1.8, which states that solicitation encompasses "any request or demand for monetary contributions or the sale of expressive materials." Other than its sudden new announcement of a limitation to "in-person" solicitation in its brief, DPA has offered nothing to inform its own officials, law enforcement or the public of this newly minted limitation, nor has DPA explained to anyone exactly what "in-person" solicitation means. It is unclear, for example, whether holding a sign that says "support my cause with a donation" would constitute in-person solicitation under DPA's supposed new limitation on its already existing definition of "solicitation." And although DPA is offended at the suggestion that its solicitation restriction prohibits an individual from asking a companion for a quarter to feed the parking meter, Def.'s Resp. at 19-20, DPA leaves unclear whether or not this innocuous inquiry of asking a companion for a quarter would qualify as "in-person" solicitation.

Such total confusion reveals the utter vagueness of DPA's self-styled reinvention of its solicitation regulations. A regulation is unconstitutionally vague if it "fails to reasonably forewarn persons of ordinary intelligence of what is prohibited . . . and lends itself to arbitrary and discriminatory enforcement because it fails to provide explicit standards for those who apply

it." *City of Englewood v. Hammes*, 671 P.2d 947, 951 (Colo. 1983) (quotations omitted). Here, no one, including law enforcement responsible for enforcing the solicitation restriction, has been provided with notification and sufficient information of "what conduct is prohibited." As a consequence, DPA's new spin on its solicitation regulations results in the chilling of First Amendment rights, particularly where as here, a violation of these regulations is punishable by criminal sanctions.[10] DPA wholly ignored Plaintiff's earlier arguments about the vagueness of the solicitation restriction. *Compare* Pl.'s Br. at 26-27 *with* Def.'s Resp. at 19-24. By suddenly announcing a new "interpretation" (in a brief to this Court and no where else), DPA has only strengthened Plainitff's unrebutted arguments.

Plaintiff cited cases that have regarded various restrictions of solicitation as content-based and therefore subject to strict scrutiny. Pl.'s Br. at 22-23. In rebuttal, DPA contends that "restrictions on solicitation are not necessarily content-based." The key to the analysis, of course, is the text of the challenged prohibition. DPA relies primarily on *ISKCON v. Kennedy*, 61 F.3d 949 (D.C. Cir. 1995), and in doing so, it misrepresents that case and overlooks its reasoning.

According to DPA, the court in *ISKCON* considered "a definition of solicitation in the Federal regulations identical to Regulation 1.8." Def's Resp. at 21. On the contrary, there was *no* definition of solicitation in the regulation the court considered. The court therefore turned to

[10] Criminal penalties in the free speech context make the void for vagueness standard even more exacting. *Parrish v. Lamm*, 758 P.2d 1356, 1366 (Colo. 1988). DPA does not deny that an individual in violation of its solicitation regulations would be subject to criminal penalties under C.R.S. § 18-9-117(1) (2005). Instead, DPA argues that the criminal penalties provision is not applicable because it does not have the authority to enforce criminal sanctions. Def.'s Resp. at 19-20. DPA's argument misses the mark. Plaintiff has never suggested that DPA has the authority to make arrests under this provision. *See* Pl.'s Br. at 27. Indeed, the fact that DPA promulgates these regulations, while a different agency (the State Patrol) is responsible for enforcement and arrests, highlights the need for text that clearly delineates what is prohibited.

the Park Service's official construction of the regulation, which the court believed it must do unless that construction was "plainly erroneous" or inconsistent with the text of the regulation. 61 F.3d at 954-55. In this case, regulation 1.8 does contain a definition: solicitation is "*any* request . . . for monetary contributions." Reg. 1.8 (emphasis added). The DPA's new gloss on its regulation – that it applies only to "in-person" solicitation – is clearly inconsistent with that text. An agency's assertion in a brief cannot constitute an authoritative agency interpretation in the face of the regulation's inconsistent text.[11]

DPA also fails to directly respond to arguments that its restriction on solicitation is not narrowly tailored to serve its purported interest in protecting day-to-day business and preventing congestion at the Capitol. *See* Pl.'s Br. at 24-26. Instead, DPA, for the first time, announces new purported government interests that supposedly prompted the solicitation regulations – e.g., "[i]ndividuals who wish to avoid solicitors alter their paths, slowing themselves and those around them . . . [i]ndividuals with young children or physical disabilities [who] are most vulnerable to solicitors since they cannot easily avoid the solicitor. . .[and preventing] an unwelcome

[11] In addition, the reasoning of *ISKCON* demonstrates that the DPA's restriction of solicitation, even as it is described in its newly-minted form in DPA's brief, is an unconstitutional content-based regulation of expression. DPA's new supposed "interpretation" differs in a critical way from the Park Service interpretation regarded as content-neutral in *ISKCON*. According to the Park Service's official interpretation, the regulation prohibited only an "in-person request for immediate payment." *ISKCON*, 61 F.3d at 954. In concluding that such a regulation was content-neutral, the court relied on Justice Kennedy's concurring opinion in *ISKCON v. Lee*, 505 U.S. 672, 693 (1992) (Kennedy, J., concurring). In Justice Kennedy's view, a regulation is content-neutral when it regulates requests for immediate payment. The physical exchange of money is the critical element that distinguishes the regulation from a regulation of pure speech. *Id.* at 704-5. In the same opinion, Justice Kennedy said that a regulation that prohibits all speech requesting contributions is clearly based on content. *See id. at* 704 ("If the Port Authority's solicitation regulation prohibited all speech that requested the contribution of funds, I would conclude that it was a direct, content-based restriction of speech in clear violation of the First Amendment.")

Thus, the critical distinction is whether the prohibited communication includes a request for immediate payment. If DPA intends to claim that its solicitation regulation applies only to requests for immediate payment, it did not say so in its brief. The newly-rewritten ban on solicitation, as described in the agency's brief, says nothing about demands for immediate payment; it applies to *all* requests for contributions that are made "in-person," a term the DPA has not defined. Thus, Justice Kennedy's opinion in *Lee*, the same authority that regards the Park Service regulation as content neutral, condemns the DPA's latest version of its regulation as an unconstitutional regulation of content.

atmosphere surrounding state buildings and grounds" – none of which had been previously mentioned as specific concerns in its deposition. *Compare* Def.'s Resp. at 22 (citations omitted) *with* Dep. Taylor at 43-46 (Ex. C). DPA does not produce evidence that solicitation has produced such adverse effects at the State Capitol. Instead, DPA copies a list of adverse effects from a court case examining problems that arose from solicitation at the terminals of New York City airports over ten years ago.[12] *See Int'l Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 684 (1992). Even with the addition of these new governmental interests, DPA still cannot, and does not, show that its 100-foot radius limitation on solicitation in reg. 3.2 provides anything more than "ineffective or remote support for the government's purpose." *Edenfield*, 507 U.S. at 770. Given that DPA now says it reinterprets reg. 5.0 as freely allowing for solicitation throughout the State Capitol Grounds at almost all times, the limited operation of the 100-foot radius restriction during permitted events cannot "alleviate [the recited harms] to a material degree." *Id*. at 770-71. Furthermore, since solicitation that involves non-monetary requests – such as an immediate request for a signature on a petition – is not included in DPA's definition of solicitation in reg. 1.8, any prohibition of solicitation would necessarily provide "only ineffective or remote support for the government's purpose." *Id.* at 770. DPA, therefore, did not meet its burden of showing that its specific solicitation restriction in reg. 3.2 is narrowly tailored towards limiting the "adverse effects of solicitation." Def.'s Resp. at 22.

Even if DPA's new reinvention of its regulations were considered authoritative, DPA has not demonstrated that the regulations, as such, can survive constitutional scrutiny.

[12] DPA has not, for example, produced evidence that solicitation produced any harms or adverse effects at the State Capitol when DPA had lifted its earlier ban on solicitation in the fall of 2003. *See* E.R 1.436 9/25/03 at 2-3 (Ex. G).

### C. DPA Has Failed to Address Plaintiff's Arguments About the Invalidity of the 30-Day Advance Notice Requirement in Regulation 6.2.

DPA has failed to refute Plaintiff's arguments related to the 30-day advance notice requirement and its lack of narrow tailoring.[13] *Compare* Pl.'s Br. at 39-43 *with* Def.'s Resp. at 27-28. It is noteworthy that DPA cites no case law to counter the plethora of cases that have held that advance-notice requirements are a substantial inhibition on speech and have thereby invalidated such requirements as burdening more speech than necessary. *See, e.g., American-Arab Anti-Discrmination Committee v. City of Dearborn*, 418 F.3d 600, 607-8 (6th Cir. 2005). Despite DPA's one-sentence contention that the 30-day notice requirement is dictated by State Patrol's planning requirements, Def.'s Resp. at 28, DPA has already confessed that the vast majority of applications do not require State Patrol planning, and that the largest events require *more* than 30 days to plan additional staffing by State Patrol, rendering the 30-day notice requirement unnecessary. Dep. Taylor at 11, 14-16 (Ex. C). The 30-day requirement, therefore, is not narrowly tailored since it does not actually "advance the asserted state interests," *Turner Broad. Sys.*, 512 U.S. at 664, in preparing for an event. *See* Pl.'s Br. at 40-42.

DPA does not directly address Plaintiff's argument that the waiver procedure cannot save the advance-notice requirement from its lack of narrow tailoring, nor does it address Plaintiff's argument that the procedure lacks "narrow, objective, and definite" criteria for granting the waiver. *See* Pl.'s Br. at 42-43; *Forsyth*, 505 U.S. at 131. Regulation 6.2, like so many advance-notice requirements for other permitting schemes, should be invalidated.

[13] Regulation 6.2 states:

> 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.

### D. DPA Cannot Show that Regulation 8.1 Is Narrowly Tailored Nor that it Contains Narrow, Objective and Definite Criteria.

DPA has simply failed to address Plaintiff's arguments with respect to the lack of narrow tailoring of reg. 8.1.[14] *See* Pl.'s Br. at 37-39. Because it authorizes revoking a permit for any *de minimus* violation of law or regulation, reg. 8.1 "burden[s] substantially more speech than necessary" to address DPA's interest in protecting public safety. *Ward*, 491 U.S. at 799. Nor has DPA addressed Plaintiff's argument that reg. 8.1 impermissibly authorizes revocation of the permit based on the actions of participants over whom the permit holder has no control. *See* Pl.'s Br. at 38.

Moreover, the DPA fails to refute Plaintiff's argument that reg. 8.1 grants law enforcement total and unguided discretion to determine what violations of law or regulation will result in permit revocation. Plaintiff relied on *City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272, 296-97 (Colo. 1995), where the Colorado Supreme Court considered a licensing provision which required revocation of a license based on any violation of "any law of the United States, of the State of Colorado, or the City of Colorado Springs." The court held that the provision's imprecise standards granted government officials excessive discretion and it, therefore, violated the First Amendment.[15] DPA attempts to distinguish *City of Colorado Springs* on the basis that the licensing scheme there required revocation after a violation of law, while reg. 8.1 provides

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[14] Regulation 8.1 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 an event.

[15] Contrary to DPA's argument, the invalidation of this licensing provision did not solely rest on the strict liability nature of this provision. *Compare* Def.'s Resp. at 26. The court also found that "[s]uch a sweeping regulation, however appropriate in other contexts, is not narrowly drawn to insure maximum opportunity for constitutionally protected modes of expression." *City of Colorado Springs*, 896 P.2d at 297.

law enforcement with the discretion to decide whether or not to revoke a permit after a violation of law. Def.'s Resp. at 26. DPA's argument fails. If anything, the additional discretion provided by reg. 8.1 is even more problematic "[i]n view of the danger of censorship and arbitrary suppression inherent in the application of imprecise standards." *City of Colorado Springs*, 896 P.2d at 297. It is the "pervasive threat inherent in [the] very existence [of discretion] that constitutes the danger." *Forsyth*, 505 U.S. at 133 n.10.

Instead, DPA states that its Executive Director has never once revoked a permit based on reg. 8.1, and asserts that such restraint evidences "its own implementation and interpretation" of reg. 8.1. Def.'s Resp. at 26. The underlying fallacy of this argument is that DPA is not the entity responsible for revoking a permit pursuant to reg. 8.1. Given that DPA has previously stated that "[l]aw enforcement's the only agency that can revoke the permit" during the course of an event, Dep. Taylor at 36-37 (Ex. C); *see also* Defendant's Responses to Plaintiff's First Set of Interrogatories at ¶ 5 annexed hereto at Exhibit K, it is perplexing that DPA argues that its Executive Director's inaction is even relevant. Def.'s Resp. at 26.

This Court may not presume that law enforcement will act in "good faith and adhere to standards absent from the ordinance's face." *City of Lakewood*, 486 U.S. at 770. DPA does not dispute that there are no specific written guidelines or procedures for revoking permits pursuant to this reg., 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 Req. Docs. at ¶ 2 (Ex. H). While DPA need not delineate every specific violation of federal or state law that could prompt revocation, reg. 8.1 is certainly not the kind of regulation that has sufficient "narrow, objective, and definite standards to guide the licensing authority." *Forsyth*, 505 U.S. at 131.

### E. DPA Has Failed to Prove that Regulation 7.4 Can Constitutionally Authorize Denial of a Permit Based on a Prediction of Future Lawless Action.

Regulation 7.4 authorizes denial of a permit at the time of application, long before the permitted event.[16] Nevertheless, seemingly confused by the text of its own regulations, DPA claims that it will only deny a permit "once words are spoken and the situation has escalated to the point in which imminent lawless action is likely." Def.'s Resp. at 25. The decision whether to deny a permit, under 7.4, however, will never temporally coincide with the permitted event.[17] When evaluating whether to deny an application on the grounds that "the proposed event is likely to produce imminent lawless action," DPA will have before it, at most, the permit application, and possibly some information from the permit applicant. *See* Sample Permit App. 2-3 (Ex. E); Dep. Taylor at 18-20 (Ex. C). Contrary to DPA's assertions, therefore, Reg. 7.4 does not allow it to "take into account" facts that would inform whether the permitted event will "escalate[] to the point in which imminent lawless action is likely." Def.'s Resp. at 24-25.

Not surprisingly, DPA ignores all of Plaintiff's arguments that reg. 7.4 impermissibly allows denial of a permit based on a future prediction of violence.[18] *See* Pl.'s Br. at 28-30. Since a denial of a permit under reg. 7.4 is a prior restraint, *id.* at 30-31, such a restraint is presumptively invalid under the First Amendment, unless it is fashioned to prevent "imminent violence or lawlessness." *Beckerman v. City of Tupelo*, 664 F.2d 502, 510 (5th Cir. 1981);

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[16] Regulation 7.4 authorizes a 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.

[17] Regulation 6.2 requires that applications are submitted at least 30 days prior to an event. Regulation 6.4, in turn, requires that the Executive Director approve or deny an application within 20 days or receipt of the application.

[18] Nor has DPA addressed why the constitutionally preferred sanction of punishing "the few who abuse rights of speech *after* they break the law," *Southeastern Promotions v. Conrad*, 420 U.S. 546, 559 (1975) (emphasis in the original), cannot "ensure the safety of Colorado Citizens." *Compare* Def.'s Resp. at 25.

*Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996); *cf. Hess v. Indiana*, 414 U.S. 105, 109 (1973) (speaker cannot be punished without evidence that his speech "is likely to produce[] *imminent* disorder") (emphasis in the original). At the time when DPA is reviewing the permit application, usually weeks in advance of the event, there can be no ascertainable knowledge of whether "imminent violence or lawlessness" will occur. For precisely this reason, courts have invalidated permitting schemes that authorize the permitting official to deny a permit based on a prediction of future lawless action. *See, e.g., Hague v. CIO*, 307 U.S. 496, 516 (1939); *Beckerman*, 664 F.2d at 510-11; *Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers*, 735 F. Supp. 745, 749 (M.D. Tenn. 1990). DPA, therefore, has failed to carry its burden in showing why reg. 7.4 should not similarly be invalidated.[19]

**F. Regulation 8.2 Is Invalid on Multiple Grounds.**

DPA fails to address Plaintiff's argument that reg. 8.2 is not narrowly tailored to serve its asserted purpose.[20] *Compare* Pl.'s Br. at 34-35 *with* Def.'s Br. at 20, 24-26. The asserted purpose of reg. 8.2 is to ensure the safety of people and property and protect against situations of mass violence. Def.'s Br. at 25; Dep. Taylor at 34 (Ex. C). Regulation 8.2, however, authorizes revocation of a permit in response to *any* "lawless action," including isolated, minor, and nonviolent violations of law that pose no significant threat to property or

[19] As explained previously, s*ee* Pl.'s Br. at 28 n.9, this Court must reject DPA's assertion that the prohibition in reg. 7.4 of "content-based denials" saves it from invalidation.

[20] Regulation 8.2 states:

> 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.

public safety.[21] Shutting down an entire event under such circumstances, therefore, would result in "burden[ing] substantially more speech than necessary," and necessarily fail to advance DPA's stated goals of protecting the public and property from substantial harm and situations of mass violence. *Ward*, 491 U.S. at 799.

Regulation 8.2 also provides law enforcement with impermissibly broad discretion to decide whether to revoke since DPA has no additional written standards or guidance pertaining to reg. 8.2. *See* Pl.'s Br. at 32-33; Def.'s Resp. Pl.'s Req. Admis. at ¶ 3 (Ex. D); Def.'s Resp. Pl.'s Req. Docs. at ¶ 2 (Ex. H). DPA counters by arguing that law enforcement will exercise its police power in a manner consistent with the "public health, safety and welfare of Colorado citizens." Def.'s Br. at 20. The existence of overly broad discretion, however, cannot be saved based on the good reputation of law enforcement. A presumption that an official "will act in good faith and adhere to standards absent from the ordinance's face" is "the very presumption that the doctrine forbidding unbridled discretion disallows." *City of Lakewood*, 486 U.S. at 770.

DPA also contends that reg. 8.2 does not broaden the powers of law enforcement officers. On the contrary, reg. 8.2 authorizes law enforcement to shut down an entire event "if it reasonably appears that continuation of the event is likely to incite or produce imminent lawless action." This phrasing impermissibly authorizes law enforcement to revoke a permit without sufficient certainty that the event has actually reached the critical threshhold stage where such drastic law enforcement action is justified. An event "cannot be dispersed . . . unless [protestors] 'are violent or . . . pose a clear and present danger of imminent violence.'" *Collins*,

[21] DPA attempts to justify reg. 8.2 by invoking the prospect that "the safety and the lives of Colorado citizens are placed in jeopardy." Def's Resp. at 25. The grant of authority in the regulation, however, is not limited to such serious situations. Contrary to DPA's assertions, reg. 8.2 does not "articulate . . . [that] events will be cancelled if public safety and lives are threatened." *Id.* at 25.

110 F.3d at 1371 (citations omitted); *Beckerman*, 664 F.2d at 510. By qualifying the *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969), standard with the phrase "reasonably appears," DPA authorizes revoking permits in situations where a breach of the peace is not actually imminent, but only "reasonably appears" to be so. In those close cases, DPA has drawn the line in a manner that protects the mistaken judgment of law enforcement and thereby sacrifices First Amendment rights.[22]

No one doubts the underlying importance of public safety at a permitted event, Def.'s Resp. at 25, however, such safety cannot be achieved at the price of potentially curtailing First Amendment rights. *See* Pl.'s Br. at 33-34. In the interest of public safety, DPA should "punish the few who abuse rights of speech *after* they break the law [rather] than to throttle them and all others beforehand." *Southeastern Promotions v. Conrad*, 420 U.S. 546, 559 (1975).

DPA has, therefore, not met its burden of showing that reg. 8.2 is constitutional.

## CONCLUSION

For the reasons set forth above, the ACLU of Colorado respectfully requests that the Court grant its Motion for Summary Judgment and deny Defendant's Cross-Motion for Summary Judgment.

[22] DPA also incorrectly argues that reg. 8.2 cannot be a prior restraint because revocation under this regulation is envisioned to occur "[d]uring the conduct of an event." Def.'s Resp. at 25-26. A revocation of a permit under this regulation, however, would necessarily occur prior to the conclusion of an event, "forbidding certain communications . . . in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (defining prior restraint).

Respectfully submitted on this 20th day of January 2006.

_/s/Jennifer J. Lee_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 20th day of January, 2006, served a true and complete copy of the foregoing document upon all parties herein electronically by LexisNexis File & Serve or by depositing true and accurate copies of the same in a prepaid package with the United States Postal Service to the following addresses:

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