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COURT OF APPEALS, STATE OF COLORADO Court Address: 2 E. 14th Avenue, Denver, Colorado 80203	
Lower Court Information: Denver County District Court Denver City & County Building 1477 Bannock Street Denver, CO 80202 Honorable, H. Jeffrey Bayless, District Court Judge Case No. 04 CV 4161, Courtroom 6 **Agency Information:** Colorado Department of Personnel & Administration 633 17th Street, Suite 1600 Denver, CO 80202	**▲COURT USE ONLY▲**
Plaintiff/Appellant: AMERICAN CIVIL LIBERTIES UNION OF COLORADO, INC. v. **Defendant/Appellee:** RICHARD L. GONZALES, in his official capacity as Executive Director of the Colorado Department of Personnel and Administration **Attorneys for Plaintiffs/Appellants:** Kevin C. Paul #20941 Cynthia A. Coleman, #34217 PARSONS, HEIZER, PAUL LLP 2401 15th Street, Suite 300 Denver, Colorado 80202 (303) 595-4747 Mark Silverstein, #26979 AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO 400 Corona Street Denver, Colorado 80218 (303) 777-5482	**Case Number:** 2006CA001610
OPENING BRIEF	

Plaintiff-Appellant, the American Civil Liberties Union of Colorado, Inc. ("ACLU"), by and through its counsel, Parsons, Heizer, Paul LLP and Mark Silverstein, and pursuant to C.A.R. 28, 31, and 32, submits its Opening Brief as follows:

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III. STATEMENT OF THE ISSUES

A. Whether the District Court erred in concluding that Regulation 9.0, which authorizes the DPA to cancel permits whenever "the level of security is heightened, as declared by the U.S. Department of Homeland Security," is constitutional?

B. Whether the District Court erred in concluding that Regulations 1.8, 3.2, and 5.0, which prohibit "solicitation" on the State Capitol grounds except in a limited area and under limited circumstances, are constitutional?

C. Whether the District Court erred in concluding that Regulation 8.1, which authorizes the DPA to revoke a permit based upon any violation of state or federal law, or the Challenged Regulations, by the permit holder or any participant, is constitutional?

D. Whether the District Court erred in dismissing the ACLU's claim pursuant to 42 U.S.C. § 1983?

IV. STATEMENT OF THE CASE

The ACLU is challenging the constitutionality of new administrative regulations limiting expressive conduct on the State Capitol Grounds. The Colorado Department of Personnel and Administration ("DPA") and Defendant Richard L. Gonzales, as Executive Director of the DPA ("Executive Director"), control the State Capitol Complex Buildings and Grounds (the "Capitol Grounds") and enforce the regulations.[1] *See* District Court Record ("Dist. Rec.") at 78, ¶ 5.

On September 18, 2003, the Dandelion Center, Inc. filed a complaint in the United States District Court for the District of Colorado challenging the validity of a 1992 state regulation that prohibited all solicitation on the State Capitol Grounds. Dist. Rec. at 184 (Statement of Troy Eid (September 25, 2003)). In response, then Executive Director of the DPA, Troy Eid, issued an emergency rule repealing the ban on non-commercial solicitation on the Capitol Grounds. Dist. Rec. at 184; Administrative Record ("Admin. Rec.") at 3 (statement of basis and purpose for second amendment of solicitation regulation).

[1] Prior to this litigation, Troy Eid was the Executive Director of the DPA. At the initiation of this litigation, Jeffrey Wells had replaced Mr. Eid as Executive Director of the DPA. Subsequently, in January 2007, Richard L. Gonzales was appointed Mr. Wells' successor and is presently the DPA's Executive Director.

Subsequent to Mr. Eid's departure from the DPA, the Executive Director issued a second emergency rule regarding solicitation on the Capitol Grounds. This emergency rule provided that "[s]olicitations or commercial enterprise is not allowed on the State Capitol Buildings Group Grounds, except as part of a permitted demonstration or special event." Admin. Rec. at 4 (Emergency Rule 1.436 (effective December 26, 2003)).

Thereafter, the DPA published a Notice of Hearing regarding possible changes to the State Capitol Grounds permit regulations. *See* Admin. Rec. at 33-40. The ACLU, among others, provided testimony and written comments at the public hearing held March 1, 2004. Admin. Rec. at 85-92, 44-45, 56-74. On or about March 17, 2004, the DPA adopted comprehensive new regulations entitled "State Capitol Complex Buildings and Grounds Regulations" (the "Regulations"), which became effective on April 30, 2004. Dist. Rec. at 79, ¶ 13.

On May 28, 2004, the ACLU filed a complaint in Denver District Court against the Executive Director, seeking judicial review of the Regulations pursuant to the Colorado Administrative Procedures Act, C.R.S. § 24-4-101 *et seq*. (the "APA"). Dist. Rec. at 1-14. In its Complaint, the ACLU sought declaratory and injunctive relief pursuant to the Uniform Declaratory Judgments Law, C.R.S. § 13-51-101 *et seq*., along with C.R.C.P. 57, C.R.C.P. 65, the APA, and 42 U.S.C. §

1983 ("Section 1983"). *Id*. The Complaint alleged that the Regulations threaten the right of free expression and are invalid under Section 24-4-106(7) of the APA, violate Article II, Sections 10 and 25 of the Colorado Constitution, and violate the First Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution in contravention of Section 1983. Dist. Rec. at 6-7.

On August 13, 2004, the Executive Director filed a motion to dismiss all claims, which was later amended. Dist. Rec. at 15-31. On March 2, 2005, the District Court, Honorable H. Jeffery Bayless, presiding, dismissed the ACLU's Section 1983 claim for failure to state a claim, but otherwise denied the motion to dismiss. Dist. Rec. at 75-76; Appellant's Appendix ("Appellant's App.") at 43-44. The Executive Director then filed his Answer to the Complaint on April 1, 2005. Dist. Rec. at 77-84.

On November 7, 2005, the ACLU moved for summary judgment seeking an order declaring several of the Regulations contrary to the Colorado Constitution and therefore, invalid under the APA. Dist. Rec. at 86-221. In its motion, the ACLU limited its challenge to Regulations 9.0 (the "Cancellation Regulation"); 1.8, 3.2 and 5.0 (the "Solicitation Regulations"); 7.4 (the "Imminent Lawless Action Regulation"); 8.1 and 8.2 (the "Revocation Regulations"); and 6.2 (the "Application Deadline Regulation"). *Id.*

On December 19, 2005, the Executive Director filed his response and a cross-motion for summary judgment. Dist. Rec. at 222-251. The Executive Director also limited his motion to the regulations addressed in the ACLU's motion. *Id.*

On June 23, 2006, the District Court declared Regulation 7.4 "unconstitutional or lacking adequate guidelines to be used in denying permit applications," and the remaining Regulations challenged in the ACLU's motion constitutional. Dist. Rec. at 300-309; Appellant's App. at 45-53. Since the ACLU sought a declaration that the Regulations contravened the APA solely because they are unconstitutional, the District Court's order on summary judgment resolved all claims that survived the Executive Director's motion to dismiss.

The ACLU filed its Notice of Intent to Seek Appellate Review pursuant to C.R.S. § 24-4-106(9), and its Notice of Appeal on August 8, 2006. Dist. Rec. at 310-352. The Executive Director filed his Notice of Cross-Appeal on August 21, 2006. Dist. Rec. at 353-358.

V. STATEMENT OF FACTS

The ACLU has a long history of working to protect free speech rights in Colorado through advocacy, education, and litigation. Dist. Rec. at 146 (Hazouri Affidavit ("Hazouri Aff.") at 2, ¶ 2). Like many other organizations, the ACLU

has frequently participated in picketing, speechmaking, marching, holding vigils, and hosting rallies and demonstrations at the State Capitol intended to publicly communicate its views on issues related to civil rights and civil liberties. Dist. Rec. at 146 (Hazouri Aff. at 2, ¶ 5). In addition, individual members of the ACLU – who number more than 10,000 in Colorado – have also sponsored and participated in events held on the grounds of the State Capitol, where such events, large and small, have taken place for many years. Dist. Rec. at 147 (Hazouri Aff. at 3, ¶ 8); Dist Rec. at 149-162 (Taylor Deposition ("Taylor Dep."), generally). Both the organization and its members intend to continue sponsoring and participating in events at the State Capitol in the future. Dist. Rec. at 146 (Hazouri Aff. at 3, ¶ 8).

In 2004, the DPA adopted new Regulations governing events on the Capitol Grounds. Dist. Rec. at 79, ¶13. These new Regulations require anyone who wishes to hold an "event" on the Capitol Grounds to apply for and obtain a permit. Dist. Rec. at 9 (Regulations 1.3 ("event"); 1.8 ("solicitation"); 6.1 (permit mandate)). The Executive Director may not issue a permit for more than "one event on the State Capitol Grounds at a time." Dist. Rec. at 11 (Regulation 3.1). In addition, the new Regulations afford the DPA's Executive Director discretion to cancel permits based upon general pronouncements of "heightened" national

security, *see* Dist. Rec. at 14 (Regulation 9.0). They also ban solicitation outside of permitted events, *see* Dist. Rec. at 11 (Regulation 3.2); ban solicitation that is not acceptable to a permit holder, *see* Dist. Rec. at 11 (Regulation 3.2); and allow the Executive Director broad discretion to revoke permits based upon any infraction of law, *see* Dist. Rec. at 14 (Regulation 8.1). Violating these new Regulations can give rise to criminal penalties. *See* C.R.S. § 18-9-117 (1) (prohibition against conduct on public property that violates rule limiting such conduct). Apart from the new Regulations, the DPA has not adopted standards or guidelines to assist the Executive Director in exercising the broad discretion the Regulations afford him. Dist. Rec. at 193-95 (Responses to ACLU's Requests for Admission: answers number 1–3)).

The DPA's new Regulations are significantly more restrictive than were the prior regulations governing events at the Capitol. Dist. Rec. at 146 (Hazouri Aff. at 2, ¶ 4); Dist. Rec. at 204-05 (Emergency Rule 1.436, effective Dec. 26, 2003 (allowing solicitation during permitted demonstration or special event)); Dist. Rec. at 206-09 (Emergency Rule 1.436, Effective Sept. 25, 2003 (allowing all solicitation)). In particular, the prior regulations allowed more than one event at a time on the grounds, did not authorize cancellation of permits based upon

"heightened" concerns for national security, and did not bar solicitation that was unacceptable to the permit holder for a particular event.

A complete copy of the Regulations is included in Appellant's Appendix. On cross-motions for summary judgment, the District Court declared all of the Regulations challenged by the ACLU, with the exception of Regulation 7.4, to be constitutional and enforceable. Regulation 7.4, which the District Court declared unconstitutional, allowed the Executive Director to deny a permit where it "appear[ed] that the proposed event is likely to incite or produce imminent lawless activity." Dist. Rec. at 13 (Regulation 7.4); Dist. Rec. at 307-09 (June 23, 2006 Order).

Grouped by category, the Regulations that are the focus of the ACLU's argument on appeal (the "Challenged Regulations") are:[2]

Cancellation:

> 9.0 Cancellations
> The permit holder must notify the Executive Director 24 hours in advance of any cancellation of any event. 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.

[2] Regulation 7.4 has been omitted from the Challenged Regulations based upon the District Court's declaration that it is unconstitutional. Additionally, Regulations 6.2 (application deadlines) and 8.2 (revocation of permit where continuation of event already underway is likely to incite or produce imminent lawless action) are not included in this appeal.

Solicitation:

1.8 "Solicitation" means any request or demand for monetary contributions or the sale of expressive materials, such as bumper stickers or buttons.

3.2 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 a permit. No other solicitation is allowed on the State Capitol Grounds, except on the perimeter sidewalks.

5.0 Other State Buildings and Grounds
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.

Revocation:

8.0 Permit Revocation

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

Dist. Rec. at 9-14; Appellant's App. at 54-59.

In order to protect its own and its members' rights to engage in expressive conduct on the grounds of the State Capitol, the ACLU mounted this challenge, in which it asserts that the Challenged Regulations violate the First Amendment to the United States Constitution and, therefore, are a deprivation of federal constitutional rights under color of state law as prohibited by Section 1983. Further, the ACLU asserts the Challenged Regulations contravene Article II of the Colorado Constitution and, thus, constitute agency rulemaking in violation of the APA.

V. ARGUMENT

A. Summary of the Argument.

The District Court erred by failing to recognize that the Challenged Regulations are unconstitutional restrictions on expressive conduct in a public forum.

The Cancellation Regulation, which permits the DPA to prohibit all events whenever the national threat advisory is "heightened," is not narrowly tailored to serve a significant government interest. In particular, the Cancellation Regulation permits the government to impose a prior restraint on speech in a public forum based upon a general measure of national security that need have nothing at all to do with Colorado or the State Capitol grounds.

The Solicitation Regulations are clearly content-based. They restrict only solicitation and they do so by affording a permit holder a discretionary veto over solicitation within the area defined for an event, which the permit holder may exercise based upon the content of a solicitor's message. As a consequence, the Solicitation Regulations are subject to strict scrutiny. Because they are neither necessary nor narrowly tailored to a compelling state interest, the Regulations fail that standard.

Even if the Solicitation Regulations are deemed content-neutral, they must still withstand intermediate scrutiny, which requires narrow tailoring to serve a significant state interest. The DPA identified no harms that the Regulations, which effectively ban all solicitation outside permitted events, would materially alleviate, and offered no explanation for rejecting obvious, less burdensome alternatives. The DPA therefore failed to demonstrate that the Solicitation Regulations are narrowly tailored.

The Revocation Regulation fails the narrow tailoring test as well. It grants sweeping discretion to the DPA, while providing no guidance regarding the proper exercise of that discretion. It also allows the DPA discretion to revoke a permit based upon the innocuous conduct of a single individual who has no role in a permitted event.

Because the ACLU alleged that the DPA adopted the Challenged Regulations in violation of the First Amendment, the District Court erred in dismissing the ACLU's claim under Section 1983 for failure to state a claim.

The District Court's Order holding the Cancellation Regulation, the Solicitation Regulations, and the Revocation Regulation constitutional should therefore be reversed. Likewise, the District Court's Order dismissing the ACLU's Section 1983 claim should be reversed and that claim reinstated.

B. Standard of Review.

The ACLU has asserted that the Challenged Regulations constitute invalid agency rulemaking because they violate Article II, Sections 10 and 25 of the Colorado Constitution and the First and Fourteenth Amendments to the United States Constitution. *See* Dist. Rec. at 1-7.

1. APA standard of review.

Sections 24-4-106(4), (7), and (11) of the APA provide that a court shall overturn an agency action if it is arbitrary or capricious, legally impermissible, or an abuse of discretion. *Colo. Real Estate Comm'n v. Hanegan*, 947 P.2d 933, 935 (Colo. 1997). In making these determinations, the Court shall review the record as cited by any party, determine all questions of law, interpret the statutory or

constitutional provisions involved, and apply those interpretations to the facts duly found or established. C.R.S. § 24-4-106(7).

Rules promulgated pursuant to statutory rulemaking proceedings are presumed valid and the standard of review is reasonableness of the agency rulemaking action. *Brown v. Colo. Ltd. Gaming Control Comm'n*, 1 P.3d 175, 176 (Colo. App. 1999). The ACLU, as the challenging party, bears the burden of establishing that the Challenged Regulations are invalid because they violate the state and federal constitutions and are, therefore, legally impermissible. *Id*.

2. 42 U.S.C. § 1983 standard of review.

The ACLU alleges, pursuant to 42 U.S. § 1983 ("Section 1983"), that the Challenged Regulations violate the First Amendment to the United States Constitution. State courts have concurrent jurisdiction with federal courts over Section 1983 claims. *Brown v. Davidson*, No. 04CA2455, 2006 Colo. App. LEXIS 1015 at *7, (June 29, 2006). "To state a claim for relief under 42 U.S.C. § 1983, all that a plaintiff need allege is (1) that he was deprived of a federal right and (2) that such deprivation was effected by one acting under color of state law." *Id*. at *10-11; *see also Ward v. Utah*, 321 F.3d 1263 (10th Cir. 2003) (approving First Amendment claim pursuant to Section 1983 where declaratory relief was sought

and constitutional deprivation was based upon chilling effect of threatened enforcement).

3. Constitutional standard of review.

The ACLU has asserted that the Challenged Regulations violate the state and federal constitutions, and therefore the APA. Dist. Rec. at 1-7. Because the ACLU demonstrated that the Challenged Regulations burden protected speech, the DPA must establish that they meet applicable constitutional standards. *See Denver Publ'g Co. v. City of Aurora*, 896 P.2d 306, 319 (Colo. 1995); *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780, 785-86 (Colo. 1985) (where law affects speech, state must establish its constitutionality).

Sections 10 and 25 of Article II of the Colorado Constitution provide at least the same protections as the First and Fourteenth Amendments to the United States Constitution. *See, e.g. Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 191 Colo. 455, 461, 553 P.2d 811, 816 (1976); *People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 356 (Colo. 1985). Indeed, Section 10 provides *greater* protection for free speech than the First Amendment to the United States Constitution. *See Seven Thirty-Five East Colfax, Inc.*, 697 P.2d at 356. Where a state regulation burdens speech in a public forum, the same tests are used for

evaluating that regulation under both the United States and Colorado Constitutions. *See Denver Publ'g Co.*, 896 P.2d at 311.

Evaluating the constitutionality of state restrictions on speech begins with determining the nature of the property affected. *See Id.* at 309. State capitol grounds, in general, are recognized as public fora. *See, e.g., Simpson v. Municipal Court*, 14 Cal. App. 3d 591, 597 (Cal. Ct. App. 1971) (acknowledging the unique role a capitol plays in public discourse); *Lederman v. United States*, 291 F.3d 36, 41 (D.C. Cir. 2002) (courts have long recognized Capitol grounds as traditional public forum); *see also Women Strike for Peace v. Morton*, 472 F.2d 1273, 1287 (D.C. Cir. 1972) (recognizing courts are particularly sympathetic to right to demonstrate as close as possible to state capitol as public forum and seat of government).

A permit requirement applicable to a public forum is a prior restraint on speech. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). "The term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'" *Alexander v. United* States, 509 U.S. 544, 550 (1993) (quoting M. Nimmer, Nimmer on Freedom of Speech § 4.03, p. 4-14 (1984) (emphasis added in *Alexander*)). Prior restraints are heavily disfavored and a

permit requirement that applies to speech in a public forum is acceptable only so long as it does not delegate overly broad discretion to a government official, is not based on content, and is narrowly tailored. *Forsyth*, 505 U.S. at 130. (citing *U.S. v. Grace*, 461 U.S. 171, 177 (1983)).

A permit requirement "that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" *Forsyth*, 505 U.S. at 130-31 (citing *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)). "To curtail that 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 (citing *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969); *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)).

For purposes of constitutional analysis, restrictions on speech – including permit requirements – fall generally into two categories: (1) content-based restrictions and (2) content-neutral time, place, or manner restrictions.

"As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based.

Id. at 643 (citing *Burson v. Freeman*, 504 U.S. 191 (1992); *Boos v. Berry*, 485 U.S. 312, 318-19 (1988)).

Content-based restrictions must satisfy strict scrutiny. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). To meet this exacting standard, a regulation must be necessary to serve a compelling state interest and be narrowly tailored to achieve that end. *Id*.

"In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Such restrictions must be: (1) narrowly tailored, (2) to serve a significant state interest, and (3) leave open ample alternative channels for communication. *Id*; *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). They also must not afford government officials overly broad discretion to limit or prohibit expressive conduct. *Forsyth*, 505 U.S. at 130.

C. The District Court erred in concluding the Cancellation Regulation is constitutional.

The District Court failed to recognize that Regulation 9.0 (the "Cancellation Regulation") authorizes an unconstitutional prior restraint on speech in a public

forum. The Cancellation Regulation affords the Executive Director discretionary authority to cancel an event permit, and thereby, curtail speech, any time the U.S. Department of Homeland Security declares the national threat advisory[3] "heightened." Given that the national threat advisory can be "heightened" owing to events outside the United States, and need not have anything to do with Colorado in general, or the State Capitol in particular, *see* Dist. Rec. at 155 (Taylor Dep. at 26, ll. 5-7) (national threat advisory heightened due to London bombing), the Cancellation Regulation is not narrowly tailored to advance the DPA's interest in promoting the safety of those using the Capitol Grounds.

The United States Court of Appeals for the Eleventh Circuit addressed a similar effort to regulate constitutionally protected conduct based upon the national threat advisory level in *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004). In *Bourgeois*, the plaintiff, a political advocacy group, sued the City of Columbus, Georgia for violating its members' First and Fourth Amendment rights. *Id*. at 1306-07. The group filed suit after Columbus instituted a metal-detector search policy for participants in demonstrations near Fort Benning. *Id.* The City asserted its mass searches were necessary because of the elevated Department of Homeland Security national threat advisory level. *Id*. at 1307.

[3] The Department of Homeland Security national threat advisory level is the federal government's color-coded threat "thermometer" that appears on the Department's web site, www.dhs.gov. *See* Dist. Rec. 155 (Taylor Dep. at p. 25, ll. 9-15).

The Eleventh Circuit expressly rejected this assertion, stating that "we have been on 'yellow alert' for over two and a half years now," and that "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 truly over." *Id*. at 1312. Based upon this reasoning, the Court concluded that a system that hands government officials authority to set the range of permissible searches by simply raising or lowering the nation's threat level risks completely obliterating established constitutional protections. *Id*. Because the Columbus search policy provided the City precisely such discretion, the Eleventh Circuit held it to be a violation of the Fourth Amendment, as well as an impermissible prior restraint on speech and assembly that contravened the First Amendment. *Id*. at 1325.

Like the City of Columbus, the DPA has authorized a restriction on First Amendment protected conduct in reliance upon a general threat advisory that has no necessary relationship to the State Capitol Grounds or to any event scheduled to take place there. In particular, the Cancellation Regulation affords the Executive Director unlimited discretion to cancel the permit for a scheduled event if "the level of security" declared by the President, the Governor, the federal Department of Homeland Security, or the state Office of Preparedness, Security, and Fire

Safety is "heightened." Dist. Rec. at 14 (Regulation 9.0); Appellant's App. at 59. The Regulation does not explain what the level of security must be "heightened" over, or require any link to public safety at or near the State Capitol. Rather, a "heightened level of security" in some form is all that is necessary.[4] As the Eleventh Circuit recognized, such a generalized threat assessment cannot support the curtailment of protected constitutional rights and liberties. *See Bourgeois* at 1312.

In light of *Bourgeois*, the District Court erred in concluding the Cancellation Regulation was permissible. Rather than being narrowly tailored to advance public safety at and near the State Capitol, the Regulation permits the discretionary curtailment of events on the Capitol Grounds in response to a broad and non-specific statement regarding the nation's security. Irrespective of the DPA's exercise of this discretion in the past, *see* Dist. Rec. at 154 (Taylor Dep. at 23, ll. 3-20), nothing in the language of the regulation requires the Executive Director to consider whether a "heightened" security level relates in any way to public safety at the Capitol. *See* Dist Rec. 194 (Responses to Requests for Admission at 2, answer to request number 3 (admitting no guidelines regarding cancellation)). Instead, the Executive Director is clearly authorized to cancel a permit for no other

[4] The DPA acknowledged that the national threat advisory has been "heightened" by the U.S. Department of Homeland Security throughout the time that the Challenged Regulations have been in effect. Dist. Rec. at 80 (Answer at ¶ 16); Dist. Rec. at 155 (Taylor Dep. at 28, ll. 14-19).

reason than a "heightened" level of national security announced by the federal Department of Homeland Security. The Regulation, thus, permits the imposition of a prior restraint on expressive conduct in a quintessential public forum that is far from narrowly tailored to advance a significant government interest. The District Court erred in concluding otherwise and its summary judgment order regarding the Cancellation Regulation should therefore be reversed.

D. The District Court erred in concluding the Solicitation Regulations are constitutional.

Challenged Regulations 1.8, 3.2, and 5.0 (the "Solicitation Regulations"), as a content-based restriction on protected speech, must survive strict scrutiny. *See Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (acknowledging solicitation is typically intertwined with informative, persuasive speech seeking support for particular causes or views and, thus, is entitled to First Amendment protection greater than that for purely commercial speech). The Solicitation Regulations fail this most rigorous test because they are neither necessary nor narrowly tailored to serve a compelling state interest.

1. The Solicitation Regulations are content-based.

"Deciding whether a particular regulation is content-based or content-neutral is not always a simple task." *Turner Broad. Sys.,* 512 U.S. at 642. "In determining whether a regulation is content based or content neutral, [courts] look to the

purpose behind the regulation." *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (declaring wiretapping statutes content-neutral because not justified by reference to content of communications). In order to demonstrate that a regulation of speech is content-based, it is not necessary in all cases to prove that the government intended to adopt a content-based restriction. Likewise, the government's mere assertion of a content-neutral purpose will not "'be enough to save a law which, on its face, discriminates based on content.'" *Id*. (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (holding must-carry television regulation content-neutral because it distinguishes between speakers based only upon *manner* in which message is communicated, and not upon *message* communicated)).

The Solicitation Regulations expressly apply to a "request or demand for monetary contributions." Dist. Rec. at 10 (Regulation 1.8); Appellant's App. at 55. They do not apply to any other statements, requests, or demands. For instance, the Regulations would not apply to a request for a non-monetary contribution of used items or of volunteer time. Likewise, they do not bar statements of support or opposition for a particular cause. Rather, the Solicitation Regulations specifically target requests for money. On their face, then, the Solicitation Regulations distinguish between communications based upon their content and are, therefore, content-based.

Equally important, the Solicitation Regulations do not apply "evenhandedly." Regulation 3.2 expressly provides that "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." Dist. Rec. at 11 (emphasis added). The Regulation then goes on to unequivocally state that "*[n]o other solicitation is allowed* on the State Capitol Grounds, except on the perimeter sidewalks."[5] Thus, on their face, the Regulations completely prohibit solicitation on the Capitol Grounds outside the area specifically defined for an event, and then grant the permit holder unbridled discretion to allow certain solicitors, while prohibiting others, within that area.

In *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981), the U. S. Supreme Court addressed a rule on solicitation put in place for the Minnesota State Fair. *Id*. at 643. That rule required that anyone or any group desiring "'to sell, exhibit or distribute materials during the annual State Fair must do so only from fixed locations on the fairgrounds.'" *Id*. (quoting official interpretation of Minnesota State Fair Rule 6.05). Space for solicitation was "rented to all comers in a nondiscriminatory fashion on a first-come, first-served basis…." *Id*. at 644.

[5] The sidewalks around the perimeter of the Capitol Grounds mark the end of the DPA's jurisdiction and the beginning of the City of Denver's. Thus, the DPA could not extend its Solicitation Regulations to the perimeter sidewalks. *See* Dist. Rec. at 159 (Taylor Dep. at 44-45).

Rejecting the plaintiffs' assertion that the State Fair rule was content-based, the Court stressed that "the Rule applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds." *Id*. at 649. The Court further explained that

> Rule 6.5 [does not] suffer from the more covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority. The method of allocating space is a straightforward first-come, first-served system. The Rule is not open to the kind of arbitrary application that this Court has condemned as inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.

Id. at 649 (citations omitted). Finally, the Court noted, "the Rule does not exclude [plaintiffs] from the fairgrounds, nor does it deny [them] the right to conduct any desired activity at some point within the forum. *Id*. at 655.

In sharp contrast to the Minnesota rule, the Solicitation Regulations do not apply evenhandedly to all who wish to distribute materials or solicit contributions. By affording a permit holder complete control over solicitation in the event area, the Regulations create precisely the arbitrary discretion over speech that the Court expressly disapproved in *Heffron*. Moreover, the permit holder's exercise of its veto results in the prohibited solicitor's exclusion from the Capitol Grounds. *See* Dist. Rec. at 11 (Regulation 3.2 (no other solicitation allowed)). Thus, unlike the Minnesota rule, the Solicitation Regulations are content-based and subject to strict

scrutiny. *See Gathright v. City of Portland*, 439 F.3d 573, 577 n.3 (9th Cir. 2006) (suggesting policy allowing private citizens to exclude others from soliciting during public forum events is content-based regulation subject to strict scrutiny).

2. The Solicitation Regulations fail under strict scrutiny.

To survive strict scrutiny, the Solicitation Regulations must be necessary to serve a compelling state interest, and narrowly drawn to achieve that end. *Perry Educ. Ass'n*, 460 U.S. at 45. A content-based regulation is not narrowly tailored if a less restrictive alternative is available. *See Boos v. Barry*, 485 U.S. 312, 329 (1988).

The DPA asserted that the Solicitation Regulations were created because "we want permit holders to be able to solicit within their event or their demonstration without impacting the day-to-day operations of the state capitol." Dist. Rec. at 159 (Taylor Dep. at 44, ll. 1-4). Assuming, for the sake of argument, that this interest is indeed compelling, the Solicitation Regulations are neither necessary nor narrowly drawn to achieve it.

Nothing in the record on appeal suggests that the DPA could not have adequately protected activities taking place inside the Capitol by implementing a less drastic restriction on expressive conduct than the Solicitation Regulations, which limit solicitation to a single location when a permit has been granted, and

prohibit all solicitation when no permitted event is scheduled. Moreover, there seems no link at all – much less a narrowly tailored fit – between affording permit holders an absolute veto over solicitation on the Capitol Grounds and facilitating orderly operation of the Capitol. Where an evenhanded regulation requiring solicitors to remain in certain fixed locations, available on a non-discriminatory, first-come, first-served basis, might have escaped strict scrutiny, the content-based Solicitation Regulations do not. *See Heffron*, 452 U.S. at 649; *see also Village of Schaumburg*, 444 U.S. at 637 (prohibition on charitable solicitation fails strict scrutiny, in part, because less restrictive means available); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940) (conditioning right to solicit contributions on discretionary licensing procedure violates liberty protected by constitution); *Largent v. Texas*, 318 U.S. 418, 422 (1943) (discretionary permit regarding speech amounts to censorship prohibited by constitution). Because the Solicitation Regulations are neither necessary nor narrowly tailored to achieve the DPA's stated purpose, they fail under strict scrutiny and should therefore be declared unenforceable.

3. The Solicitation Regulations cannot satisfy intermediate scrutiny.

Even if the Solicitation Regulations are deemed content-neutral time, place, or manner restrictions, they fail the intermediate level of scrutiny applicable to

such restrictions. *See Ward*, 491 U.S. at 791. Intermediate scrutiny requires that a content-neutral regulation be narrowly tailored to serve a significant state interest, while leaving open ample alternative channels for communication. *Id*. A restriction on speech is not narrowly tailored when obvious, less burdensome alternatives to advance the state's interest exist. *See U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1238 (10th Cir. 1999) (noting government's obligation to consider obvious less restrictive means).

In *Edenfield v. Fane*, 507 U.S. 761 (1993), the U.S. Supreme Court provided guidance regarding the "narrow tailoring" requirement. There, the Court explained that a regulation on solicitation – even for purely commercial purposes – must directly advance the state's alleged interest and must provide something more than "ineffective or remote support for the government's purpose." *Id*. at 770. *Edenfield* involved a challenge to a complete ban on solicitation by certified public accountants. *Id.* at 771. Concluding that such a ban violated the First Amendment, the Court reasoned that the state failed to demonstrate that the harms it claimed to be addressing were real and that its restriction on speech would "in fact alleviate them to a material degree." *Id*. (citations omitted). The Court took particular note of the fact that the record before it offered no support for the state's assertion that

CPA advertising created a real danger of fraud, overreaching, or compromised professional independence. *Id*.

Here, the DPA was unable to articulate any real harm that the Solicitation Regulations were likely to alleviate in a material way. Although the DPA identified its purpose in adopting the Regulations to be assuring that day-to-day operations at the Capitol proceeded without impediment, it could not explain how permitting solicitation would undermine that purpose. Dist. Rec. at 160 (Taylor Dep. at 45, ll. 4-13). Moreover, the DPA provided no explanation for why solicitation was singled out for regulation. *Id*. (Taylor Dep. at 45-46).

Similarly, the DPA did not identify the harms that caused it to replace its prior, less-restrictive rule with the Solicitation Regulations, and did not explain why it rejected that obvious and less burdensome alternative. *See* Admin. Rec. at 3-4. Likewise, the DPA could not explain what harm would be prevented by limiting solicitation to the 100-foot area defined by the Regulations when, depending on the size of the crowd, demonstrations and other non-solicitation would be permitted to spill beyond that 100-foot area. *See Id*. (Taylor Dep. at 47). In a nutshell, the DPA provided nothing to indicate that its highly restrictive Regulations would materially alleviate a real harm being caused specifically by solicitation anywhere on the Capitol Grounds. It also provided nothing to

demonstrate why it had rejected the obvious and less burdensome alternative of simply adhering to its prior rules. The Solicitation Regulations therefore fail the narrow tailoring test and should be held unenforceable.

E. The District Court erred in concluding the Revocation Regulation is constitutional.

Regulation 8.1 (the "Revocation Regulation") delegates broad discretion to the Executive Director without providing narrow, objective, and definite standards to guide the exercise of that discretion. The District Court therefore erred in holding it constitutional.

The Revocation Regulation states that an event permit "is *revocable* if the permit holder or participants violate [the Regulations] or the laws of the United States or State of Colorado in the course of the event." Dist. Rec. at 14; Appellant's App. at 59. The Colorado Supreme Court previously rejected a similar regulation that directed city officials to suspend or revoke a sexually oriented business license in response to a violation of any federal or state law, or municipal ordinance. *City of Colo. Springs v. 2354 Inc.*, 896 P.2d 272, 296-97 (Colo. 1995). The Court concluded that this provision was unconstitutional on its face because it authorized either license revocation or suspension, without providing any criteria for determining when one or the other was appropriate. *Id*. at 297.

The Revocation Regulation likewise delegates revocation decisions to the Executive Director without also providing definite and objective criteria to guide those decisions. Specifically, the Regulation affords the Executive Director unfettered authority to determine whether any violation of federal or state law, or of the Regulations, no matter how trivial or unrelated to the permitted event itself, will result in the revocation of a permit and the prohibition of protected speech.

For example, the Executive Director is afforded discretion to revoke a permit issued to a political advocacy group because one uninvited "participant," who happened to attend a demonstration, violated state law by possessing a small quantity of marijuana. Revoking the group's permit obviously adds nothing to existing enforcement procedures, which already require compliance and which impose criminal sanctions for failing to do so. Thus, the Revocation Regulation clearly places a substantial new burden on speech that is unlikely to materially alleviate a real harm. *See Edenfield*, 507 U.S. at 770-71; *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982) (right to engage in protected First Amendment activity does not lose all constitutional protection because some members of group engage in unprotected conduct); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1052 (9th Cir. 2006) (impermissible to sanction permit holder for actions of unrelated third party).

F. The District Court erred in dismissing the ACLU's Section 1983 claim.

The District Court erred in its March 2, 2005 Order dismissing, for failure to state a claim, the ACLU's claim for declaratory and injunctive relief pursuant to Section 1983 based upon the Challenged Regulations' violation of the United States Constitution. Dist. Rec. at 76; Appellant's App. at 44.

1. Standard of review for motions to dismiss.

Motions to dismiss are disfavored under the law. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996). In evaluating a motion to dismiss for failure to state a claim upon which relief can be granted, all averments of material fact must be accepted as true, and all allegations in the complaint must be viewed in the light most favorable to the plaintiff. *Id*; *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1290-91 (Colo. 1992). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff cannot prove any set of facts under which it would be entitled to relief. *Id*.

2. The ACLU stated a claim for relief under Section 1983.

"To state a claim for relief under 42 U.S.C. § 1983, all that a plaintiff need allege is (1) that he was deprived of a federal right and (2) that such deprivation was effected by one acting under color of state law." *Davidson*, 2006 Colo. App. LEXIS 1015 at **10-11; s*ee also Ward v. Utah*, 321 F.3d 1263 (10th Cir. 2003)

(approving First Amendment claim pursuant to Section 1983 where declaratory relief was sought and constitutional deprivation was based upon chilling effect of threatened enforcement).

The ACLU alleged in its Complaint that the Challenged Regulations contain provisions that "impermissibly infringe upon and threaten the right of the ACLU of Colorado and its members to engage in expression and association that is protected by the Colorado and United States Constitutions." Dist. Rec. at 3, ¶ 14. As a result, the ACLU is alleging a deprivation of First Amendment rights and has satisfied the first required element for a Section 1983 claim.

The Complaint also satisfies the second element for such a claim by alleging that a state agency promulgated the Challenged Regulations and that the Executive Director of that state agency, acting in his official capacity and, therefore, under color of state law, is responsible for enforcing the Challenged Regulations. Dist. Rec. at 2, ¶ 5. As a result, accepting all averments of material fact as true, and viewing all allegations in the light most favorable to the ACLU, the ACLU has clearly stated a claim for relief pursuant to Section 1983 that is sufficient to withstand a motion to dismiss for failure to state a claim.

3. The District Court's orders are inconsistent.

The District Court's March 2, 2005 Order dismissing the ACLU's Section 1983 claim is internally inconsistent. The order recognizes the impact of the DPA's regulations on a federal right, as required by Section 1983, but then concludes that the ACLU failed to state a claim under Section 1983. The March 2, 2005 Order states, in relevant part:

> Given the standards applicable to determination of Rule 12 motions, and given the fact that the plaintiff is an organization which sponsors gatherings on the state capitol grounds, and given the potential implications of the First Amendment right the court concludes that the motion to dismiss must largely, but not totally, be denied.
>
> The court concludes that the third claim for relief under 42 U.S.C. § 1983 must be dismissed for no claim is stated. However, the first and second claims have been adequately stated and the motion to dismiss as to those claims is denied.

Dist. Rec. at 76; Appellant's App. at 44.

The District Court thus acknowledged that the Challenged Regulations impacted First Amendment rights at gatherings on the State Capitol Grounds. *Id*. Subsequently, in its June 23, 2006 Order, the Court declared one of the Challenged Regulations unconstitutional and enjoined its enforcement. Dist. Rec. at 307-09; Appellant's App. at 51-53.

Because the District Court acknowledged the Challenged Regulations' First Amendment implications, permitted the ACLU's First Amendment claims to proceed under the APA, and actually held one of the Challenged Regulations unconstitutional, it could not also have determined that the ACLU failed to state a claim for violation of the First Amendment under Section 1983. Dist. Rec. at 76; Appellant's App. at 44. The District Court's order partially granting the State's Motion to Dismiss should therefore be reversed and the ACLU's Section 1983 claim reinstated.

VI. CONCLUSION

The District Court erred by concluding that the Cancellation Regulation, Solicitation Regulations, and Revocation Regulation are constitutional. The District Court further erred by dismissing the ACLU's claim for relief pursuant to 42 U.S.C. § 1983.

WHEREFORE, the ACLU respectfully requests that this Court:

1. Reverse the District Court's Order granting the State summary judgment and concluding that the Cancellation Regulation, the Solicitation Regulations, and the Revocation Regulation are constitutional;

2. Declare the Cancellation Regulation, the Solicitation Regulations, and the Revocation Regulation in violation of the First Amendment to the U.S.

Constitution, as well as Article II, Sections 10 and 25, of the Colorado Constitution and, therefore, unenforceable.

3. Reverse the District Court's Order dismissing the ACLU's Section 1983 claim.

4. Award the ACLU such other and further relief as the Court deems just and proper, including reasonable attorneys' fees and court costs.

DATED this 20th day of February, 2007.

Respectfully submitted,

Kevin C. Paul
Cynthia A. Coleman
PARSONS, HEIZER, PAUL LLP
2401 15th Street, Suite 300
Denver, CO 80202
Telephone: (303) 595-4747
Fax: (303) 595-4750

Mark Silverstein, #26979
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF COLORADO
400 Corona Street
Denver, Colorado 80218
Phone Number: (303) 777-5482

ATTORNEYS FOR THE
PLAINTIFF- APPELLANT
ACLU OF COLORADO, INC.