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February 26, 2003

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**By Telecopy**  
(Original to follow)

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City & County of Denver  
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Re: Constitutionality of Denver Revised Municipal Code § 54-363

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Dear Mr. Howard & Ms Toornman,

This law firm represents The Dandelion Center, a Colorado non-profit corporation activist organization engaged in free speech activities on a range of topics of interest to the people of Denver and its environs. In this context, we are acting as cooperating attorneys in conjunction with the American Civil Liberties Union Foundation of Colorado.

We are writing to express our concerns relating to the provisions, and their application, in the Denver Revised Municipal Code relating to parade permits. In particular, we wish to address the requirements under that Code – as a condition for receipt of a parade permit – that applicants agree to indemnify the City for claims arising out of a parade and to provide cost-recovery for property damage to the City. These indemnification and cost-recovery provisions, and their application by the City, pose significant constitutional issues that should be addressed as soon as possible.

In that vein, this letter provides the following: (1) a summary of our investigation to date of the City's practices on this issue; (2) an analysis of the legal defects in such practices, and (3) a suggestion for the steps the City can pursue to remedy these issues. It is our hope that the parties can resolve the issues discussed here amicably and without resort to litigation. Toward that end, we would be happy to discuss this matter at your convenience. Please be advised, however, that in light of the expectations of our client, and its members, soon to seek permits to engage in more speech activities that would come within the scope of the indemnification and cost-recovery requirements, we need to move as quickly as possible on this matter.

I. Background of Denver's Parade Indemnification Provisions

As you know, Denver's ordinances pertaining to permits for parades and special events in the City require – as a condition upon the right to engage in First Amendment-protected activity – that an applicant agree to provide cost-recovery for the City and to indemnify the City for multiple potential claims that might be brought against the City arising from the particular parade or special event. These requirements appear to date back to the original drafting of this ordinance in 1987.

Our investigation of this matter has revealed that the City has, in actual practice, at least *three* different indemnification provisions that are relevant here. Each such variation is set forth below, with highlighting of the material differences in the text:

Denver Rev. Mun. Code § 54-363:

“I, \_\_\_\_\_, in applying for a parade or special event permit, agree to reimburse the City & County of Denver for any costs incurred by it in repairing damages to city property caused by persons sponsoring or participating in the event. In exchange for the parade or special event permit, I agree to defend the city against, and indemnify and hold the city harmless from any liability to any person or property which results from the actions of those sponsoring or participating in the event.”

Denver Special Events Permit Application form:

“I, \_\_\_\_\_, applying for a parade or special event permit, agree to reimburse the City and County of Denver for any costs incurred by it in repairing damages to city property caused by persons sponsoring or participating in the event. In exchange for the parade or special event permit, I agree to defend the city against, indemnify and hold the city harmless from any liability to any persons or property which results from *the use of Denver Police officers* or the actions of those sponsoring or participating in the event.”

Denver Parade Permit Application form:

[Applicant submits the following text on organization's letterhead stationery:]

“In consideration of your allowing us to use Denver Police Officers in connection with our \_\_\_\_\_, the \_\_\_\_\_ agrees to indemnify, hold harmless, and defend the City and Count of Denver from and against *any claim, liability, or damage arising from our use of Denver Police Officers in connection with the sponsorship of the event*, scheduled to take place on \_\_\_\_\_.

Our investigation has been unable to locate any statutory basis in the City's ordinances for the provisions in both application forms that require the applicant to indemnify the City for claims arising from conduct by police officers. We also have been unable to ascertain precisely when the City began including this additional requirement in permit applications.

Our investigation also leads us to believe that the City has never granted an exemption from these cost-recovery and indemnification requirements as a result of the indigency of the applicant. The City has no practice for ascertaining whether an applicant is credit-worthy for his or her undertaking of the indemnification obligations.

## II. Legal analysis of indemnification requirements

It is well-settled law under the First Amendment to the United States Constitution that government restrictions on core, political speech come with a substantial presumption of unconstitutionality, and they may be upheld only with a clear and convincing showing by the government of the legality of such measures. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579-80 (1995). Additionally, otherwise protected free-speech activity may not be burdened by the government merely because the speech is unpopular and might provoke counter-demonstrations. *See NAACP v. Claiborne Hardware*, 458 U.S. 886, 918 (1982).

In the context of government restrictions on parades and other core-speech activities, the United States Supreme Court has held that the government may not engage in viewpoint discrimination and may not burden speech on the basis of the content of the speaker's message. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Absent such prohibited view-point or content-based regulations, government restrictions on parades and other core-speech activities that are facially content-neutral still may not be permitted unless the government carries its burden of demonstrating the following: (1) the restrictions are, in application, actually content-neutral; (2) the restrictions are narrowly tailored to serve an important public interest, and (3) the restrictions allow adequate alternative avenues for the speaker to disseminate his or her message to the target audience in question. *See id.*

Under this analytical framework, various courts have found indemnification provisions for parade or assembly permits to be unconstitutional. *See Courtemanche v. General Servs. Admin.*, 172 F. Supp. 2d 251, 269 (D. Mass. 2001); *see also* Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 Geo. L.J. 257, 270-71 & n.74 (collecting cases). These courts have concluded that indemnification requirements are *not* content-neutral. *See Courtemanche*, 172 F. Supp. 2d at 269-71 (concluding that indemnification requirements result in content-based discrimination because permit applicants may seek private insurance and in so doing, insurance underwriters are likely to make content-based discriminations). Next, courts also have concluded that indemnification requirements are *not* narrowly tailored to serve legitimate government interests. *See Invisible Empire of Knights of the Ku Klux Klan v. City of West Haven*, 600 F. Supp. 1427, 1434 (D. Conn. 1985); *see also*

*Courtmanche*, 172 F. Supp. 2d. at 274 (finding that any assertion as to a per se government interest in shifting costs onto parade organizers is not a legitimate government interest). Finally, courts also have found that indemnification requirements do *not* leave open sufficient alternative avenues of speech activity. See *Nationalist Movement v. City of Boston*, 12 F. Supp. 2d 182, 192 (D. Mass. 1998) (noting that the location of a demonstration often can be “an essential part of the message sought to be conveyed” and “essential to communicating with the intended audience”).

In addition to the foregoing legal analysis, it is clear that the City’s indemnification requirements are particularly perverse in their imposition of liability on a parade organizer as a result of conduct by the police or by a parade participant. The recent events at an anti-war protest in Colorado Springs are illustrative of this point. At this peaceful protest rally, some individuals joined the rally unbeknownst to the rally organizers and then proceeded to engage in allegedly unlawful, disruptive activities that prompted police responses resulting in injuries and arrests. Under the City’s current indemnification requirements, because the third parties who joined the rally would constitute “participants,” rally organizers would be responsible for defending the government against claims of injuries arising as a result of the conduct of both these rally participants and the police. This outcome would occur even though the rally organizers might show that they had nothing to do with the activities of the other rally participants.

It is also apparent that regardless of how much the City may protest that there is no real cost to its indemnification requirements, these provisions do indeed impose real and substantial harms to the free-speech and free-assembly rights of persons in our community. For example, because a parade organizer is aware of the existence of these requirements, even if the person does not go forward with the expense of obtaining private insurance to cover the risk resulting from the indemnification requirements, those requirements nevertheless pose a constitutionally impermissible risk that persons will limit or alter their plans for a parade or speech in order to avoid conduct that may cause a greater risk of claims against the City. A very good example is the situation where an anti-war activist decides to avoid taking his or her parade route past the offices of a military recruiting station. Such a parade route, in these times, might cause a greater risk of potential conflict and potential claims against the City. However, such government-induced self-censorship is precisely what the First Amendment has been held to bar.

### III. Proposal for amendment of the City’s parade ordinance

In light of our analysis of the facts and law on this matter, we believe that the City must repeal Denver Rev. Mun. Code § 54-363, to the extent that the provisions of Section 363 are applied to parades and other First Amendment-protected activity. It is clearly established law that the City may not condition the exercise of First Amendment rights upon an agreement to indemnify the City for claims that would otherwise be protected under the First Amendment. See *Claiborne Hardware*, 458 U.S. at 918; *Forsyth County*, 505 U.S. at 130. Indeed, even apart from First Amendment restrictions, the City should not be requiring parade organizers to indemnify the City for claims resulting from conduct where the parade organizer did not

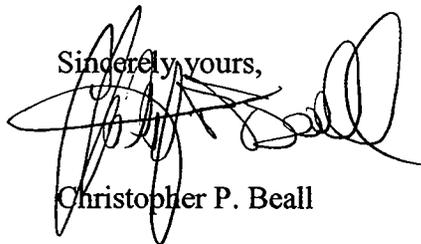
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authorize or ratify the conduct in question. *See Claiborne Hardware*, 458 U.S. at 918. The cost-recovery provisions of the ordinance also suffer from the same defects. *See Forsyth County*, 505 U.S. at 130.

We suggest that as an interim indication of good faith, the City should immediately announce a change in its policies with respect to parade permits, such that these permits will no longer carry a requirement for indemnification of the City as a result of claims based on the conduct of police officers. Because this particular requirement is so egregiously unconstitutional and because it has no statutory authorization in the parade ordinance itself, the City should take this step as a matter of administrative discretion.

In conclusion, we wish to reiterate our desire to resolve this matter amicably and to assist the City in ensuring that its parade ordinance is fully accommodating of free speech interests. We trust that you share this aim, we look forward to working with you on this matter, and we are available at your convenience to discuss these issues. We must advise you, however, that because of the current press of world events, we cannot delay action on this matter. We hope that a mutually agreeable resolution can be reached within the next few weeks.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Christopher P. Beall", written over the typed name below.

Christopher P. Beall

cc: Mark Sass  
The Dandelion Center  
Pavlos Stavropoulos  
The Dandelion Center  
Mark Silverstein, Esq.  
ACLU Foundation of Colorado