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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:** 2006 CA 001610
ANSWER-REPLY 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 Answer-Reply Brief as follows:

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III. ARGUMENT

A. Summary of the Argument

The ACLU has challenged certain regulations adopted by the Department of Personnel and Administration (the "Department") relating to use of the State Capitol Grounds because those regulations violate the First and Fourteenth Amendments to the United States Constitution, as well as Article II, Sections 10 and 25, of the Colorado Constitution.

In support of its position that all of the challenged regulations are constitutional, the Department relies upon its own "authoritative construction" of each regulation. None of these purported limiting constructions, however, has

been published by the Department apart from the papers filed in this litigation. Moreover, each purported limiting construction is directly at odds with the plain language of the challenged regulations and amounts to nothing more than the Department's declaration that it will not enforce the regulations in certain circumstances. Therefore, the Department's assertion that it has cured the constitutional infirmities of each challenged regulation through an "authoritative construction" is without merit.

With respect to the regulations that prohibit solicitation on the State Capitol Grounds, the Department failed to demonstrate that those regulations are narrowly tailored to the Department's interest in facilitating day-to-day operations at the State Capitol. Rather, the solicitation regulations prohibit all solicitation, except that which is approved by the single individual or organization that holds an event permit at any given time. Such an unfettered and unguided veto over expressive conduct directly contravenes the First Amendment and, therefore, cannot be deemed enforceable.

The Department has also failed to draw any link between the Cancellation Regulation, which permits the Executive Director to cancel a permit solely because the national threat advisory is heightened, and the Department's interest in protecting those who visit the State Capitol Grounds. The record provides no

evidence that the Department of Homeland Security's post-9/11 "threat thermometer" is related to or affected by activity at the State Capitol. The Cancellation Regulation is not narrowly tailored to the Department's interest in protecting public safety on the Capitol Grounds and affords the Executive Director unfettered discretion that could be exercised to impose content-based restrictions on expressive conduct. Therefore, the Cancellation Regulation contravenes both the United States and Colorado Constitutions.

As the District Court correctly concluded, the Department's regulation authorizing the Executive Director to deny a permit based upon the discretionary determination that a proposed event is likely to incite or produce imminent lawless conduct is not narrowly tailored to the Department's interest in preventing injuries to people and damage to property during permitted events. In particular, the permit denial regulation authorizes the Department to deny a permit based upon speculation regarding the likelihood of violence weeks or months in advance of the proposed event. That regulation therefore vests the Department with impermissible discretion and imposes an unconstitutional prior restraint on First Amendment activity. Moreover, the Department clearly has other, less restrictive means available for the purpose of preventing violence during events at the State Capitol.

Finally, the Department argues, without authority, that the ACLU failed to demand relief available under Section 1983, the federal civil rights statute, and, even if the ACLU did make a claim pursuant to Section 1983, that claim was subsumed by the ACLU's claim under the Colorado Constitution. The ACLU, however, clearly satisfied the requirements of a prima facie claim under Section 1983 by asserting in its Complaint, and consistently throughout this litigation, that the Executive Director, acting in his official capacity and on behalf of the Department, adopted regulations that contravene rights expressly protected by the First and Fourteenth Amendments to the United States Constitution. The Department's contentions to the contrary are, therefore, entirely without merit, and the District Court's Order dismissing the ACLU's Section 1983 claim should be reversed.

For all of the foregoing reasons, each of the challenged regulations is unconstitutional and should be declared unenforceable. In addition, the District Court's Order declaring the permit denial regulation unconstitutional should be affirmed.

B. The Department erroneously argues that the Executive Director "authoritatively construed" the Challenged Regulations, so as to overcome their constitutional infirmities.

Before the District Court and in its Opening Brief, the ACLU objected to Regulation 9.0 (the "Cancellation Regulation"), Regulations 1.8, 3.2, and 5.0, (the "Solicitation Regulations"), and Regulation 8.1 (the "Revocation Regulation") (together the "Challenged Regulations") on the ground that each violated both the First Amendment to the U.S. Constitution and Article II of the Colorado Constitution. The Department of Personnel and Administration (the "Department") answered by contending that the Executive Director "authoritatively construed" each regulation so as to substantially narrow its scope and cure its constitutional infirmities. *See* Answer Brief and Opening Brief for Cross-Appeal ("Opening-Answer") at 16, 18 (Solicitation Regulations); 21 (Cancellation Regulation); 26 (Revocation Regulations). The record on appeal, however, provides no support for the Department's argument. In particular, the Department has not identified an official, published statement of any kind that "authoritatively construes" the scope of any of the Challenged Regulations.

In *Initiative & Referendum Inst. v. United States Postal Serv.*, 417 F.3d 1299 (D.C. Cir. 2005), the United States Court of Appeals for the District of Columbia Circuit addressed an argument much like the Department's. For years, the United

States Postal Service permitted individuals and organizations to collect ballot initiative petition signatures on the sidewalks and other exterior areas surrounding post office buildings. *Id.* at 1303. In 1998, however, the Postal Service issued a regulation expressly prohibiting that activity on all Post Office property. *Id*. (quoting 39 C.F.R. § 232.1(h)(1)). The plaintiffs challenged this regulation as a violation of the First Amendment.

During a hearing on motions for summary judgment, "the Postal Service 'announced … in open court that it had changed its articulated position from the one it took early in [the] litigation to one more favorable to plaintiffs on whether certain alternative channels of communication on exterior properties would violate [the new regulation].'" *Id.* at 1304. In a nutshell, the Postal Service declared that it would not apply its new regulation to public sidewalks surrounding post offices and would not interpret it to prohibit asking people to sign petitions at an off-premises location. *Id*. At the district court's request, the Postal Service submitted a proposed "reminder to postmasters" bulletin, explaining this interpretation of its new regulation. *Id*. The district court then relied on this internal bulletin to conclude that, as interpreted and implemented by the Postal Service, the new regulation did not create an unconstitutional burden on First Amendment activities.

See Initiative & Referendum Inst. v. United States Postal Serv., 297 F. Supp. 2d 143, 153-154 (D.D.C. 2003).

On appeal, the D.C. Circuit disagreed. Noting that "[a] limiting construction that is 'fairly' possible can save a regulation from facial invalidation," the Court determined that the Postal Service's interpretation of its new regulation bordered on "disingenuous evasion." 417 F.3d at 1316, 1317. Given that the regulation expressly prohibited signature gathering on *all* Postal Service controlled property, "[n]either a postal patron nor a postal employee charged with enforcement could reasonably read the regulation's language and conclude as the Bulletin declares – that the regulation '*does not apply* to …public perimeter sidewalks, even if the Postal Service's property line extends onto such a sidewalk.'" *Id*. (emphasis added by Court). In essence, the Court explained, "this provision of the Bulletin is not really an 'interpretation' of the regulation at all." Rather, "it is 'no more than an agency decision not to enforce the Postal Service's regulations on [the described] property.'" *Id*.

Focusing on the Postal Service bulletin, the Court reasoned that "[t]he problem with the change at issue here is its format. It is 'published' solely in the form of an internal bulletin: it is not published in the Federal Register, is not contained in the Code of Federal Regulations, and is not posted for public

examination in post offices." *Id.* at 1317-18. Citizens who wanted to circulate petitions for signature would have no way of knowing about the Postal Service's limiting construction. Moreover, even if a citizen became aware of the internal bulletin, she or he could not rely on it, as opposed to the regulation itself. *Id.* at 1318. Therefore, the Court concluded, the Postal Service's interpretation and implementation of its regulation was not sufficient to "temper the regulation's chill of First Amendment rights, particularly given the criminal sanctions that attached to a violation. *Id*. Irrespective of the Postal Service's claim to the contrary, the regulation was unconstitutional on its face. *Id*.

The Department's position here is almost identical to that of the Postal Service. In response to the ACLU, the Department contends that the Executive Director has "authoritatively construed" each of the Challenged Regulations so as to significantly limit their applicability. Yet, neither the record nor the Department's Opening-Answer brief identifies any publication that a citizen could consult in order to learn of these "authoritative constructions." In particular, none of the Executive Director's "authoritative constructions" appears in the Code of Colorado Regulations or in the Colorado Register. *See* C.R.S. § 24-4-103(11)(a) (Code of Colorado Regulations and Colorado Register shall be sole official publications for rules and regulations, notices of rulemaking, proposed rules, and

attorney general's opinions). Moreover, as in the Postal Service case, a citizen who learned of the Department's purportedly "authoritative construction" would have no ground for relying upon it. *See* C.R.S. § 24-4-103(10) (no rule shall be relied upon unless published); *see also Colo. State Dep't of Health v. Geriatrics, Inc.*, 699 P.2d 952, 958 (Colo. 1985) (regulation rendered statutorily incompetent by department's failure to properly publish); *People v. Bobian*, 626 P.2d 1132, 1135 (Colo. 1981) (Section 24-4-103 (10) intended to afford due process by making regulations available to public).

Rather, the Department has set forth its "authoritative constructions" solely in papers filed in this litigation. Moreover, the Department's "constructions" amount to little more than statements of its decision not to enforce the Challenged Regulations in certain circumstances. *See* Opening-Answer at 17-18 (prohibition on all solicitation will not be enforced in certain circumstances); 21-23 (Cancellation Regulation will not be enforced where heightened level of security does not relate to Capitol); 26 (revocation Regulation will not be enforced where violation is *de minimus*). Thus, the Department's argument that it has cured the constitutional infirmities of the Challenged Regulations through reasonable limiting constructions is without merit and those Regulations should be declared unconstitutional.

C. The Department fails to demonstrate that the Solicitation Regulations are a content neutral regulation narrowly tailored to serve a significant government interest.

Based largely upon the "authoritative construction" argument refuted in Section III. B., above, the Department contends that the Solicitation Regulations do not permit content-based restrictions on expressive conduct. Opening-Answer at 16. The plain language of the Solicitation Regulations, however, directly conflicts with this argument.

For purposes of the Challenged Regulations, "Solicitation" means "any request or demand for monetary contributions or the sale of expressive materials, such as bumper stickers or buttons." 1 C.C.R. 107-1 § 1.8 ("Solicitation Regulation 1.8"). The language of this provision is in no way limited or equivocal – it includes *any* request or demand for monetary contributions, as well as *any* sale of "expressive material," which is not defined. *See id*. Nothing in the words of Solicitation Regulation 1.8 reasonably suggests that, as the Department contends, it includes only particular kinds of requests or demands for money, or particular sales of expressive materials.

The general permitting regulations applicable to the State Capitol Grounds provide that all "Events" on the Capitol Grounds require a permit. 1 C.C.R. 107-1 §§ 2.1, 3.2, 6.1. An "Event" includes "picketing, speechmaking, marching,

holding vigils or religious services, historical reenactments, celebrations, entertainments, exhibitions, parades, fairs, festivals, pageants, sporting events, *and all other similar activities which involve the communication or expression of views or ideas, engaged in by one or more persons*, the conduct of which has the effect, intent, or propensity to draw a crowd or onlookers, but does not include casual use by visitors or tourists." 1 C.C.R. 107-1 § 1.3 (emphasis added). The Department is authorized to approve and issue a permit for *only one* Event at a time anywhere on the State Capitol Grounds. 1 C.C.R. 107-1 § 3.1.

In accordance with Solicitation Regulation 3.2, "Events *and solicitation authorized by a permit holder* may be conducted on the State Capitol Grounds *only within a 100-foot radius of the site defined by a permit. No other solicitation is allowed on the State Capitol Grounds*, except on the perimeter sidewalks.[1] *See* 1 C.C.R. 107-1 § 3.2 (emphasis added).

In summary, all Events at the State Capitol require a permit, and the Department will permit only one Event at a time. Both Event activities and solicitation that is authorized by a permit holder must occur within 100 feet of the approved Event site. No other solicitation is allowed on the State Capitol Grounds. Thus, no solicitation can occur on the State Capitol Grounds except during a

[1] As addressed in the ACLU's Opening Brief, the perimeter sidewalks surrounding the State Capitol are outside the Department's rulemaking authority.

permitted Event, within 100 feet of the permitted site, and with the approval of the permit holder.

The Department's assertion that "[c]ounter-demonstrators would be allowed to seek solicitations beyond the 100-foot radius of the permitted event" is completely undermined by the plain language of the regulations, read together and taken as a whole. Opening-Answer at 18. A counter-demonstration would surely involve the communication or expression of views or ideas by one or more persons whose intent was to attract onlookers. Thus, a counter-demonstration would constitute an Event and could not take place on the State Capitol Grounds without a permit. Since the Department is prohibited from issuing more than one permit at a time, a counter-demonstration – irrespective of whether it involved solicitation -- could not lawfully occur under the Department's existing regulations.

Moreover, Solicitation Regulation 3.2 is unequivocal in prohibiting *all* solicitation on the State Capitol Grounds that is not approved in the sole and unfettered discretion of the one individual or organization that holds an Event permit at any given time. *See* 1 C.C.R. 107-1 § 3.2. The Department has offered no support for its assertion that such a sweeping prohibition on expressive conduct is narrowly tailored to its stated interest in facilitating "the day-to-day operations of the state capitol." District Court Record ("Dist. Rec.") at 159 (Taylor

Deposition Transcript ("Taylor Dep.") at 44, ll. 1-4). The record offers no evidence of any harm the Solicitation Regulations were implemented to prevent and provides no reason that the Department had to replace its prior, less restrictive solicitation rules with regulations that clearly permit content-based restrictions on First Amendment activity in a traditional public forum. Therefore, this Court should reject the Department's effort to evade the plain meaning of the Solicitation Regulations and declare those Regulations unenforceable.

D. The Department fails to demonstrate that the Cancellation Regulation is narrowly tailored to serve a significant government interest.

The District Court erred in concluding State Capitol Complex Building and Grounds Regulation 9.0 (the "Cancellation Regulation") is a reasonable time, place, and manner restriction, narrowly tailored to serve a significant government interest. The Department's argument to the contrary is without merit and should therefore be rejected.

The Cancellation Regulation authorizes the Executive Director to cancel an event permit "if the level of security is heightened, as declared by… the U.S. Department of Homeland Security." 1 C.C.R. 107-1 § 9.0. It is undisputed that this provision refers to the United States Department of Homeland Security's national threat advisory level – the color-coded threat "thermometer" created by the federal government in the wake of the terrorist attacks of September 11, 2001.

See Dist. Rec. at 155 (Taylor Dep. at 25-26). The Department contends that, "[a]t the risk of sounding trite, the harms or threats presented by a post 9/11 world are real and the regulations are narrowly tailored to alleviate those harms to a material degree." Opening-Answer at 23 (citing *Edenfield v. Fane*, 507 U.S. 761 (1993) (predating September 11, 2001 terrorist attack by approximately eight years)).

In *Allah v. Brown*, 351 F. Supp. 2d 278 (D.N.J. 2004), the plaintiffs challenged a New Jersey Department of Corrections ("DOC") policy "that directed prison officials to open inmates' legal mail outside their presence." *Id.* at 279. Before the September 11, 2001 terrorist attacks, the DOC required that an inmate's legal mail be opened and inspected for contraband only in the inmate's presence. However, following 9/11, the governor altered this policy so that inmates' legal mail was to be opened and inspected for anthrax contamination and contraband without the inmate present. *Id*. The DOC contended that this new policy was reasonably related to its interest in maintaining prison safety and security, and was adopted to address "a 'very real' threat of anthrax contamination" following on the terrorist attacks of September 11, 2001. *Id.* at 281.

Concluding that the new DOC regulation violated the First Amendment guarantees of free speech and free association, the district court found that "there is no reasonable connection between the Legal Mail Policy and the Defendants'

asserted interest. Defendants have offered no evidence that there is an elevated risk of anthrax contamination in prisons resulting from the events of September 11, 2001, which prompted [the new regulation]." *Id*. The court further reasoned that a more narrowly tailored policy – such as one limiting immediate inspections to suspicious letters or providing for inspection of all mail in an enclosed area – might both serve the state's interests and satisfy constitutional scrutiny. *Id*. at 282. The DOC's new regulation, however, was not such a narrowly tailored policy and, thus, could not be enforced. *Id.* at 283.

Like the DOC, the Department here contends that its Cancellation Regulation is intended to address "the harms or threats presented by a post 9/11 world." Opening-Answer at 23. Yet the record on appeal provides no evidence of any link whatsoever between public safety on the grounds of the Colorado State Capitol and the federal Department of Homeland Security's post-9/11 threat thermometer. Nothing in the record suggests that the national threat advisory has ever been increased or decreased based upon any threatened or actual activity at the State Capitol. Rather, the Department conceded that the threat advisory has been "heightened" throughout the time that the Cancellation Regulation has been in place, based upon events far removed from the State Capitol Grounds. *See* Dist. Rec. at 80 (Department's Answer at ¶ 16); 154-56 (Taylor Dep. at 22-29). Thus, as

with the DOC regulation at issue in *Allah*, there is no reasonable connection between granting the Executive Director unfettered discretion to cancel permits whenever the national threat advisory is heightened – as it is today – and the Department's interest in protecting public safety at the Capitol. The District Court erroneously concluded otherwise and its order permitting enforcement of the Cancellation Regulation should be reversed.

Furthermore, the Department's contention that this Court should overlook the constitutional infirmities of the Cancellation Regulation because the Executive Director has not yet employed that Regulation to cancel a permit lacks merit. As the United States Supreme Court pointed out in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), "facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision." 505 U.S. at 133, n. 10 (citing *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 (1988)).

> "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." Accordingly, the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so.

Id. (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)).

The Cancellation Regulation unequivocally provides the Executive Director authority to cancel a permit solely because "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." 1 CCR 1-170 § 9.0. Nothing in the language of the Regulation requires the Executive Director to employ this broad, discretionary authority only when security at the Colorado State Capitol is threatened. *See id*. Likewise, nothing in the Cancellation Regulation prevents some future Executive Director from employing the Regulation as a content-based restriction on First Amendment activity. Thus, the fact that the Executive Director has not yet cancelled a permit owing to the heightened national threat advisory can not be relied upon to declare the Cancellation Regulation constitutional. This Court should, therefore, reverse the District Court's order regarding the Cancellation Regulation and declare that Regulation unenforceable.

E. The District Court correctly concluded that the Permit Denial Regulation is unconstitutional and unenforceable.

The District Court properly determined that the Department's State Capitol Complex Buildings and Grounds Regulations, Section 7.4 (the "Denial Regulation") delegated unfettered discretion to the Department and imposed an

unconstitutional prior restraint on expressive conduct. This Court should therefore affirm the District Court's order declaring the Denial Regulation unenforceable.

The Denial Regulation states that "[a] permit may be denied in writing by the Executive Director upon the following grounds: [i]t 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." 1 C.C.R. 107-1 § 7.4. Applications for event permits "will not be accepted … less than 30 days before a proposed event is scheduled to occur." 1 C.C.R. 107-1 § 6.2. The Executive Director has the discretion to waive this deadline "if it appears, under the circumstances, it will be possible to adequately protect the public safety, health, and welfare." *Id*.

Relying upon *Forsyth County, supra*, the District Court reasoned that the Denial Regulation "allows denial of a permit based on a permit application filed possibly weeks or months in advance. Even though the regulation is specifically targeted at action that is *likely* to produce *imminent* lawlessness, the permitting official must make this determination based on information contained in an application and well in advance of the actual event." Dist. Rec. at 307-309; Appendix to ACLU's Opening Brief at 51-53 (emphasis in original). As a consequence, the District Court concluded, the Denial Revocation "delegates an

impermissible level of discretion to the permitting official" and imposes "an unconstitutional prior restraint on speech." *Id*.

The District Court's conclusion is supported by *Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers*, 735 F. Supp. 745 (M.D. Tenn. 1990). In *Ku Klux Klan*, the City of Pulaski, Tennessee, adopted a parade permitting ordinance that included, among other provisions, a requirement that permit applications be filed not more than 180 days, and not later than 45 days, prior to a proposed event. *Id.* at 748 (citing City of Pulaski Ordinance No. 14, 1989) ("Ordinance 14"). "Paragraph (k) of Pulaski Ordinance 14 provide[d] that 'the City of Pulaski shall deny a parade permit to any individual or group based on anticipation of violence being instigated or riots incited by such individual or group under circumstances when, at the time of the application for the permit, there is a clear and present danger of imminent lawless action.'" *Id*. at 749.

The district court acknowledged that, in *Hague v. CIO*, 307 U.S. 496 (1939), the United States Supreme Court struck down a similar ordinance that authorized government officials to deny a public meeting permit if doing so would prevent "'riots, disturbances, or disorderly assemblages.'" 735 F. Supp. at 749. (quoting *Hague*, 307 U.S. at 516). The court then explained that

> [p]aragraph (k) of Ordinance 14 is similarly unconstitutional because it allows too much latitude for discriminatory denial of a First

> Amendment right to free speech. Furthermore, the constitutionality of paragraph (k) is not preserved by limiting the power to deny permits to situations where, "at the time of the application for the permit, there is clear and present danger of imminent lawless activity." Such language is without effect in the midst of a statute requiring permits to be applied for 45 days before the parade date. The imminence of danger or of unlawful activity depends upon the *immediate* circumstances surrounding the expression, including the content of expression, size and makeup of the speakers and audience, and the sufficiency of the police presence. It is impossible for these factors to be known 45 days before the parade, and accordingly there can be no clear and present danger at the time of application sufficiently clear to justify denial of a parade permit.

Id. (emphasis in original) (citations omitted).

The District Court's analysis here is almost identical to that in *Ku Klux Klan*. The Denial Regulation permits the Department to deny a permit on the ground that a proposed event is likely to incite or produce *imminent* lawless action. Yet, Regulation 6.2 states that permit "[a]pplications will not be accepted more than 180 days nor less than 30 days before a proposed event is scheduled to occur." 1 CCR 170-1 § 6.2. Just as with Pulaski Ordinance 14, it is virtually impossible for the Executive Director to determine that a particular event will likely result in lawless conduct a month or more before that event is scheduled to occur. Thus, like Ordinance 14, the Denial Revocation imposes an unconstitutional prior restraint on First Amendment activity and the District Court was correct in declaring it unenforceable.

This Court may also wish to consider the United States Court of Appeals for the Fifth Circuit's decision in *Beckerman v. City of Tupelo*, 664 F.2d 502 (5th Cir. 1981). In *Beckerman*, the plaintiff challenged a Tupelo ordinance that permitted the police chief to deny a parade permit if he found that "'the conduct of the parade will probably cause injury to persons or property or provoke disorderly conduct or create a disturbance.'" *Id.* at 507 (quoting Tupelo, Mississippi, Ordinance Regulating Parades, Processions, and Public Demonstrations, Section 1 (c) (1)). Declaring this ordinance an unconstitutional prior restraint on protected speech, the Fifth Circuit acknowledged that "[i]n almost every instance it is not acceptable for the state to prevent a speaker from exercising his constitutional rights because of the reaction to him by others." *Id*. at 509. The court also explained that

> [t]he state is not powerless to prevent imminent violence or lawlessness resulting from a clash between the marchers and onlookers. If this situation arises, the police must try first to disperse and control the crowd, and if that becomes impossible, the marchers may be arrested. Likewise, if the marchers exceed the bounds of persuasion and argument and enter the realm of incitement to imminent lawless action, they can be punished. Such punishment or curtailment of First Amendment rights must be based on a present abuse of rights, not a pre-nascent fear of future misconduct.

Id. at 510 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Feiner v. New York*, 340 U.S. 315, 321 (1951)).

As the Fifth Circuit reasoned in *Beckerman*, the fact that the Denial Regulation imposes an unconstitutional prior restraint on expressive conduct and is, therefore, unenforceable does not deprive the Department of the ability to protect public safety during events occurring on the State Capitol Grounds. Law enforcement officers are clearly free to intervene during an event to control and disperse the participants and, if necessary, to make arrests. In addition, Regulation 8.2, which is not being challenged by the ACLU, authorizes the ranking law enforcement official in charge to immediately revoke an event permit "if it reasonably appears that continuation of the event is likely to incite or produce imminent lawless action." 1 C.C.R. 107-1 § 8.2. Therefore, the Department's contention that the Denial Regulation "simply provides a mechanism to provide for the immediate safety of Colorado citizens as well as the preservation of the State's property" is without merit and the District Court's order declaring that Regulation unenforceable should be affirmed.

The Department's reliance on *Brandenburg v. Ohio*, 395 U.S. 444 (1969), in support of its argument is misplaced. In *Brandenburg*, a criminal defendant challenged his conviction under Ohio's Criminal Syndicalism Act, which prohibited advocating the use of "crime, sabotage, violence, or unlawful methods

of terrorism" to accomplish political reform, for advocating violence during a Ku Klux Klan rally. *Id*. at 444.

Striking the Act down on First Amendment grounds, the United States Supreme Court explained that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. Further, "'the mere abstract teaching … of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.' A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments." *Id*. at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)).

Brandenburg directly addressed whether an individual may be criminally sanctioned for advocating, rather than inciting, violence. *Id*. at 435. To the extent that it provides any guidance as to what a government might rely on in deciding whether to grant or deny a public event permit, *Brandenburg* clearly indicates that only expressive conduct that is both directed at inciting imminent lawless conduct and likely to do so can be prohibited. There is no support in the record for the

contention that the Executive Director could make these determinations in reviewing a permit application weeks, if not months, before a proposed event was scheduled to occur. Thus, *Brandenburg* only serves to support the District Court's conclusion that the Denial Regulation constitutes an impermissible prior restraint on expressive conduct protected by the First Amendment.

F. The District Court erroneously dismissed the ACLU's claim under 42 U.S.C. § 1983.

The Department contends, without authority, that the ACLU's claim for relief in accordance with Article II of the Colorado Constitution "subsumed the ACLU's claim for relief under 42 U.S.C. § 1983 due to the broader free speech protections afforded by the Colorado Constitution." Opening-Answer at 30. This argument is completely without merit.

No published authority from any Colorado court suggests that a plaintiff is barred from seeking relief from a violation of the First Amendment via Section 1983 and from a violation of Article II, Section 10 of the Colorado Constitution in a single action. To the contrary, both the Colorado Supreme Court and the Colorado Court of Appeals have often addressed such claims asserted together.

For example, in *Lewis v. Colo. Rockies Baseball Club*, 941 P.2d 266 (Colo. 1997), the plaintiffs contended that the Colorado Rockies' policy that barred plaintiffs from selling alternative baseball game programs near the team's stadium

violated both the First Amendment and Article II of the Colorado Constitution. On appeal, the plaintiffs argued that the Colorado Supreme Court should focus its analysis on the state constitution, as did the trial court, because Article II's protection of speech is broader than that afforded by the First Amendment. *Id*. at 271. The state supreme court, however, rejected that request, stating that because the area surrounding the stadium was "public forum property under the federal analysis, we find it unnecessary to address the more expansive protection of the Colorado Constitution." *Id*. Accordingly, the court analyzed the plaintiffs' claims under federal law and enjoined the Rockies' policy as a violation of the First Amendment. *Id*. at 271-72, 278; *accord Holliday v. Reg'l Transp. Dist.*, 43 P.3d 676, 681 (Colo. App. 2001) (unnecessary to reach state constitutional analysis where federal jurisprudence regarding restriction of speech in public forum applies).

Like the plaintiffs in *Lewis*, the ACLU has stated claims for relief under both the First Amendment and Article II of the Colorado Constitution. In particular, before the District Court and in this appeal, the ACLU has argued that the Challenged Regulations impermissibly restrict expressive conduct in a public forum, violate the First Amendment, and give rise to a claim under Section 1983. Nothing in *Lewis*, or any other authority cited by the Department, however,

suggests that, because the Challenged Regulations could be held to contravene both the First Amendment and Article II, the ACLU is barred from seeking relief under federal law. The Department's argument to the contrary is baseless and should therefore be rejected.

The Department also argues that "[t]he ACLU does not assert a claim for relief or attorney's fees pursuant to 42 U.S.C. § 1988 and thus, any award under 42 U.S.C. § 1988 would be improper." Opening-Answer at 30. Once again, the Department's argument is erroneous.

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of [Title 42], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. "For purposes of section 1988, federal courts have defined a 'prevailing party' as a party who has succeeded "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Int'l Soc'y for Krishna Consciousness, Inc. v. Colo. State Fair & Indus. Exposition Comm'n*, 673 P.2d 368, 372 (Colo. 1983)(quoting *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The district court declared that regulation 7.4 violates the First Amendment, and, accordingly, the ACLU is already a prevailing party that has achieved some of the benefit it sought in bringing suit.

Although the ACLU's Complaint did not reference Section 1988 or formally request attorney's fees, no such explicit reference is necessary. The ACLU stated a valid claim under Section 1983, and Section 1988 provides for an award of attorney's fees for a prevailing plaintiff. Indeed, as the Colorado Supreme Court has explained, even an explicit reference to Section 1983 is not necessary for a prevailing plaintiff to be entitled to an award of fees. "For purposes of recouping attorney's fees under section 1988, express reference to conduct as violative of section 1983 is not required; section 1988 is applicable *to any action for which section 1983 provides a remedy.*" *Id*. at 374 (emphasis added) (awarding Section 1988 attorney fees where plaintiffs' complaint expressly mentioned neither Section 1983 nor Section 1988).

Because the ACLU properly stated a claim for relief under Section 1983 in its Complaint, this Court should reverse the district court's erroneous dismissal of the ACLU's claim under 42 U.S.C. § 1983.

VI. CONCLUSION

The District Court erred by concluding that the Cancellation Regulation, Solicitation Regulations, and Revocation Regulation are constitutional. However, the District Court correctly concluded that the Denial Regulation is

unconstitutional and unenforceable. The District Court also erred by dismissing the ACLU's claim for relief pursuant to 42 U.S.C. § 1983.

WHEREFORE, based upon all of the foregoing, the ACLU respectfully requests that this Court:

1. Reverse the District Court's Order granting the Department 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. Affirm the District Court's Order granting the ACLU summary judgment and concluding that the Permit Denial Regulation is unconstitutional and unenforceable.

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

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

DATED this 7th day of August, 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.

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of August, 2007, a true and correct copy of the foregoing **ANSWER-REPLY BRIEF** was placed in the U.S. Mail, first class postage prepaid addressed to the following parties:

Mark McMullen, # 35263
Assistant Attorney General
State of Colorado Department of Law
1525 Sherman Street - Fifth Floor
Denver, Colorado 80203

Mark Silverstein,
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF COLORADO
400 Corona Street
Denver, Colorado 80218

Pleading was hand delivered to:

COURT OF APPEALS, STATE OF COLORADO
Clerk's Office
2 E. 14th Avenue
Denver, Colorado

_____

Cynthia A. Coleman
PARSONS, HEIZER, PAUL LLP
2401 15th Street, Suite 300
Denver, CO 80202
Telephone: (303) 595-4747
Fax: (303) 595-4750
E-mail: ccoleman@phplawyers.com