AMERICAN CIVIL LIBERTIES UNION of COLORADO
ACLU FOUNDATION

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December 21, 2007

David Fine
Office of the City Attorney
1437 Bannock, St., Room 353
Denver, CO 80202
SENT VIA EMAIL

Re: ACLU Comments on Denver's Proposed Permit Ordinance

Dear David:

On behalf of the ACLU Foundation of Colorado and the coalition of ACLU cooperating attorneys at Dorsey & Whitney L.L.P., Holland & Hart L.L.P., Levine Sullivan Koch & Schulz, L.L.P., Otten Johnson Robinson Neff & Ragonetti, P.C., Recht and Kornfeld, P.C., and the University of Denver Sturm College of Law, I write to respond to the City's proposed changes to the parade and permit ordinances.

The ACLU Foundation of Colorado ("ACLU") greatly appreciates the opportunity to review and comment on the proposed changes. As we have discussed with you and other representatives from the Mayor's office, the City Attorney's office, and the Denver Police Department, we believe that the 2008 Democratic National Convention presents Denver with a unique opportunity to become a national model and success story for its respect for free speech.

We are hopeful that this review will assist your office in identifying and remedying deficiencies in the proposed scheme before finalizing the ordinance to be sent to City Council. While we note constitutional concerns with the proposed ordinance on a section-by-section basis in Section III below, of particular and serious concern are 1) the City's proposed system of preferential treatment to the government whenever there are conflicting requests for traditional public forums, creating a *de facto* government monopoly of all such forums at events like the DNC; 2) requiring park permits for a single person and small groups, 3) unreasonably long advance notice requirements for permit applicants; 4) charging fees and requiring indemnification agreements for free speech parade activity; and 5) granting discretionless and unbounded authority for city officials to revoke and deny permit requests.

Our comments on specific provisions of the proposed ordinances are made in the context of the constitutional principles and the scope of our review as discussed below.

I. CONSTITUTIONAL PRINCIPLES

A. Article II Section 10 of the Colorado Constitution and The First Amendment of the U.S. Constitution Prohibit the Government from Restricting or Regulating Speech with Few Exceptions

Freedom of speech has always had a preferred position in our state and federal constitutional system:

> This [Supreme Court] has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.[1]

Consequently, the government is prohibited from censoring, regulating or placing prior restraints on free speech under the First Amendment, with a few extremely narrow exceptions. Furthermore, some restrictions allowed under the First Amendment are impermissible under Article II Section 10, which "provides greater protection of free speech than does the First Amendment."[2] The government's burden to justify restrictions is heaviest when it seeks to regulate core political speech in areas like public parks, streets and sidewalks that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicated thoughts between citizens, and discussing public questions."[3]

B. Political Parades, Protests and Demonstrations Receive the Highest Constitutional Protection

The United States Supreme Court has repeatedly recognized that political expression regarding governmental affairs and public issues "has always rested on the highest rung in the hierarchy of First Amendment values."[4] As that court stated, "speech concerning public affairs is more than self-expression; it is the

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[1] *Schneider v. State*, 308 U.S. 147, 161 (1939).

[2] *Lewis v. Colorado Rockies Baseball Club*, 941 P.2d 266, 271 (Colo. 1997) (suggesting greater scrutiny for time, place and manner restrictions under Art. II Sec. 10); *Z.J. Gifts D-2, L.L.C. v. City of Aurora,* 93 P.3d 633 (Colo. App. 2004) (holding that Art. II Sec. 10 provides broader protection for freedom of speech in the context of political speech than the First Amendment); *Bock v. Westminister Mall*, 819 P.3d 55 (1991) ("The object of article II, section 10 is to guard the press against the trammels of political power, and secure to the whole people a full and free discussion of public affairs. Thus, the second clause of Art. II, Sec. 10 of the Colorado Constitution necessarily enhances the already preferred position of speech under the First Amendment of the United States Constitution) (citations and quotations omitted); *see also Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002); *Holliday v. RTD*, 43 P.3d 676 (Colo. App. 2001).

[3] *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939).

[4] *E.g. NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 913 (1982).

essence of self-government."[5] Parades, protest marches, and demonstrations are the most basic vehicle for this constitutionally protected expression.[6] Indeed, the Supreme Court has characterized political parades, marches and demonstrations as "reflect[ing] an *exercise of these basic constitutional rights in their most pristine and classic form."*[7]

C. The City Holds Parks, Sidewalks and Streets in Trust for the Public, Limiting Their Authority to Restrict Political Activity in Those Areas

The United States Supreme Court made clear nearly seventy years ago that the government's technical "ownership" of traditional public forums does not grant it a right to exclude the public from that property.[8] Even when a city holds "title" to areas such as parks, sidewalks and streets, it holds that title "in trust for the use of the public ... for purposes of assembly, communicating thoughts between citizens and discussing public questions."[9] Parks, streets and sidewalks belong to the people as "privileges, immunities, rights and liberties."[10] The city is not "bestow[ing]" the "enjoyment of a privilege or benefit" that it owns when the people use such forums.[11] Rather, the people's right to engage in political protest activity in parks and on streets and sidewalks is a "privilege [that] exists apart from state authority. It is guaranteed the people by the Federal Constitution."[12]

Consequently, the government's already limited authority to restrict expressive and associational rights is further constrained when it comes to parks, streets and sidewalks, which the Supreme Court has recognized as "traditional public forums."[13] The First Amendment requires the government reserve these areas in "trust *for the public*" precisely for the purpose of assembly, expression and communication about matters of public concern.[14] "Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities,

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[5] *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (emphasis added).
[6] *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 568 (1995); *see also, National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977).
[7] *Hurley*, 515 U.S. at 568-69, quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (emphasis added).
[8] *See Hague*, 307 U.S. at 514-16, rejecting argument based on *Davis v. Massachusetts*, 167 U.S. 43 (1897), which implicitly gave government proprietorship over public square.
[9] *Id*. at 515-16.
[10] *Id*. at 515.
[11] *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943).
[12] *Id*.; *see also Lewis*, 941 P.2d at 271.
[13] "Traditional public forums" are the most protected type of government property. The Supreme Court described the three types of public forums in *Perry Education Ass'n v. Perry Local Educators' Association*, 460 U.S. 37 (1983). "Traditional" public forums include "places which by long tradition or government fiat have been devoted to assembly and debate." *Id*. at 45-46. Typically, these are parks, streets and sidewalks.
[14] *Hague*, 307 U.S. at 515-16 ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the *use of the public* and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions") (emphasis added).

rights, and liberties of citizens."[15] In these public areas, "which occupy a special position in terms of First Amendment protection, *the government's ability to restrict expressive activity is very limited*."[16]

D. Article II Section 10 and the First Amendment Command the Highest Degree of Free Speech Protection at the 2008 Democratic National Convention

The 2008 Democratic National Convention in Denver represents a convergence of all the most fundamental and highly protected free speech rights discussed above. At the DNC, those wishing to exercise their free speech rights wish to 1) assemble in parades and demonstrations in 2) traditional public forums, for 3) the purpose not just of core political expression, but for the purpose of core political expression related to the election of the highest government officer in the nation.

At an event such as the DNC, the right to engage in free speech activities is at its zenith, and the government's ability to regulate such speech at its nadir. As stated by the court examining a challenge to the "protest pen" at the 2004 Democratic National Convention in Boston:

> Protesters, demonstrators, and dissidents outside a national political convention are not meddling interlopers who are an irritant to the smooth functioning of politics. They are participants in our democratic life. The Constitution commands the government to treat their peaceful expressions of dissent with the greatest respect -- *respect equal to that of the invited delegates*.[17]

E. Constitutional Scrutiny of Time, Place and Manner Restrictions

Although permit systems regulating the use of public forums are considered a type of prior restraint on free expression, the Supreme Court has recognized that the government has an interest in "regulat[ing] competing uses of public forums" and may, accordingly, utilize a permit scheme to impose reasonable time, place and manner restrictions.[18] In order to be constitutionally permissible, however, permit systems must satisfy strict constitutional requirements.

The Supreme Court has identified four criteria for evaluating permit systems. First, the permit system "may not delegate overly broad licensing discretion to a government official."[19] Second, "any permit scheme controlling the time, place

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[15] *Id*.
[16] *Boos v. Barry*, 485 U.S. 312, 318 (1988) (internal quotations omitted; emphasis added).
[17] *Coalition to Protest the Democratic Nat'l Convention v. City of Boston*, 327 F. Supp. 2d 61, 77 (D. Mass. 2004) (emphasis added).
[18] *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).
[19] *Id*.

and manner of speech must not be based on the content of the message…"[20] Third, the scheme "must be narrowly tailored to serve a significant governmental interest…"[21] Fourth, it "must leave open ample alternatives for communication."[22]

The test for what constitutes a permissible time, place and manner restriction is arguably even more stringent under the broader protection for free speech guaranteed by Article II Section 10.[23] Under either constitution, however, if the permit scheme is based on the content of the message, it will be subject to strict scrutiny, and will only pass constitutional muster if it is necessary to serve a compelling state interest and narrowly drawn to achieve that end.[24]

II. SCOPE OF ACLU REVIEW

In reviewing the draft ordinances, we discuss below several factors that inform, and in some cases limit, the scope of our comments.

A. Denver's Ordinance Revisions Have Not Been Restricted to DNC-Specific Changes

On October 17, 2007, the City announced in a press release that it was suspending the *parks* permit process "during the period from 12:01 am on August 15th, 2008 to 12:00 pm on August 31, 2008." The City explained that it was

> …working to develop an alternative process for permitting these locations during the designated time period and will provide information on that process as it is developed…All permit applications for use of parks and other parks facilities that are not specifically identified above and all applications for any park or facility for a date outside the designated time period of August 15, 2008 to August 31, 2008 will follow existing procedures.[25]

The October 17, 2007 press release appeared to suggest that 1) the "alternative process" contemplated was limited to permits for the certain parks listed in that press release, and 2) that the "alternative process" to be proposed would be restricted to use during the specified time period around the DNC.

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[20] *Id*. Restraints based on the content of the message, discussed below in this letter, are subject to strict scrutiny, and will only be upheld if the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *See See Perry Educ.* Ass'n, 460 U.S. at 45 (citing cases).
[21] *Id*.
[22] *Id*.
[23] *Lewis*, 941 P.3d at 271.
[24] *Perry Educ. Ass'n*, 460 U.S. 37.
[25] *See* http://www.denvergov.org/Portals/469/documents/Permit_press%20release10_07%20.doc

In fact, Denver has undertaken a far more comprehensive review and revision of the ordinances. The revisions include not just the park permitting process discussed in the October 17, 2007 press release, but also changes to the parade permitting ordinances. Moreover, these changes are not limited to the August 15th to August 31st, 2008 timeframe. Rather, they will affect free speech activity in Denver from the time they are adopted, up through the DNC, and beyond.

The "alternative process" discussed in the press release appears to have been realized by the creation of a new system whereby the Mayor may declare something an "Extraordinary Event." The ability to make such a declaration, and the alternate provisions that become operative when such a declaration is made, is also not restricted to the DNC, but will affect other future free speech activity. Furthermore, we note that when an "Extraordinary Event" is declared, there is not a comprehensive "alternative process" that wholly supplants or replaces the normal permitting procedures. Rather, such a declaration alters only particular elements of the ordinances, while large portions of the scheme remain intact and applicable.

In sum, Denver appears to have undertaken a wholesale review of both the parade and park permitting ordinances, and suggested changes that will impact free speech rights in Denver before, during and after the DNC. Our comments are directed accordingly.

B. Denver Has Not Provided Draft Application Forms nor Amended Parks and Recreation Rules and Regulations

The City has not made clear how or if existing permit application forms and requirements may be altered in response to the proposed changes. With regard to the DNC and other "Extraordinary Events," the City describes an "Extraordinary Event 8/15-8/31 Request Form,"[26] but has not provided a copy or any description of that form. Likewise, the City has not made clear how or if Parks and Recreation Rules and Regulations may be added, altered or omitted in response to the proposed changes.

There is no doubt that rules, regulations, application processes and application requirements may, just like ordinances, unduly burden, chill or otherwise unconstitutionally interfere with free speech rights. Because the City has not provided any information on what form these will take, however, we are unable to evaluate whether or how the city will meet its constitutional burden in this regard.

C. Denver Has Not Adequately Explained Who Has Final Authority Regarding Permitting and Other Decisions During the DNC

In the proposed ordinances and draft declaration, the City does not discuss or even acknowledge the role that the federal government will play at the DNC. For

[26] *See* Permitting/Coordination Process Extraordinary Event worksheet.

example, to date the City has not disclosed any information about the "secured perimeter" or "hard security zone" that will reportedly be established by the federal government. In the draft declaration the City provides no information regarding how the City's permitting decisions may be affected by security zone boundaries, whether the City will honor approved permit applications regardless of where that boundary is established, whether the federal government will have any role in reviewing and approving permit applications or any veto power in that process, or any formal or informal agreements the City has negotiated with the federal government with regard to any of the above. The answers to these questions may dramatically impact the operation and constitutionality of the proposed scheme, and should be addressed by the City immediately.

D. Other Limitations on the ACLU's Review

As early as September of this year, the City indicated in meetings attended by the ACLU that city attorneys were reviewing the relevant permitting ordinances with an eye toward possible revisions. On or before October 17, 2007, the city had made a formal decision to begin redrafting portions of that ordinance. When the City provided the drafts to the ACLU on December 12, 2007, it had somewhere in the neighborhood of sixty days or more to make and review those changes.

The city originally intended to give the ACLU four business days to review and return comments on the proposed ordinances. While the City graciously extended that deadline to nine business days, such a short time frame simply does not allow for an exhaustive legal review scrutinizing every potential constitutional and statutory issue. Thus, we do not represent that these comments encompass every critique or concern we may have with the proposed changes.

Finally, partial revisions to this scheme may create unanticipated problems with other ordinance provisions that, in the current structure, do not appear to raise constitutional questions. In addition, this review does not, and obviously cannot, anticipate every situation where the City may unconstitutionally apply otherwise facially valid ordinance provisions.

III. COMMENTS ON PROPOSED ORDINANCES

Below are comments from the ACLU regarding the proposed ordinances. Specific ordinance provisions are referenced by the new section number contained in the draft.

A. Proposed Parade Ordinance

D.M.C. § 54-357: Definitions

Denver Municipal Code ("D.M.C.") § 54-357(1) establishes a "central business district" that cannot be reconciled with the "affected location" contained in the draft declaration. The ACLU's concerns with the interplay between the "central business district" and the "affected location" is set forth in further detail in addressing D.M.C. § 54-365(1).

The broad definition of "Extraordinary Event" is also troubling. It appears that when an "Extraordinary Event" is declared, three changes occur: 1) permit applicants maybe subject to different application requirements under D.M.C. § 54-361(a); 2) the time period for submitting those applications may be altered by the Mayor under D.M.C. § 54-361(c), and; 3) a different system for allotting permits may be put in place under D.M.C. § 54-362(b). Because of the implications of such a declaration, we believe that both the public and the City would benefit from a more specific articulation of the conditions under which such declarations may be made.

For example, while the 2008 DNC may clearly be a "large-scale special event of national or international significance…for which a large number of parade permits are anticipated," there are no objective criteria in the definition that allow us to determine what other future events may be considered to be "large-scale" or of "national or international significance," or what a "large number of parade permits" would be, or who would make that determination.

More importantly, there is nothing in the ordinance as constituted that requires the Mayor to designate an Extraordinary Event some minimum amount of time before the date of the event. As currently drafted, the Mayor is free to declare something an Extraordinary Event, and thus alter key aspects of the permit scheme by executive decree, mere weeks or even days before an event. Likewise, there is nothing in the ordinance that details how such a declaration will be made (it appears it will come in the form of a memo from the Mayor's office) or publicized. A more detailed definition of "Extraordinary Event" with objective criteria, and clear guidelines for the timeframe and method for such a declaration, may address these concerns.

D.M.C. § 54-358: Waiver of article provisions for security measures for visiting dignitaries

D.M.C. § 54-358 vests total and limitless discretion with the Manager of Safety to waive any provision of the ordinance when "security measures are necessary to protect visiting dignitaries." We recognize that the City may have a legitimate interest in temporarily altering these provisions under certain conditions, however, the Manager of Safety's ability here to restrict or deny free speech activity with unbridled discretion is prohibited by the First Amendment. The unbridled discretion in this provision seems nearly identical to that struck down in *Forsyth*:

> There are no articulated standards…The administrator is not required to rely on objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others…The First Amendment prohibits the vesting of such unbridled discretion in a government official.[27]

Under the proposed ordinance, the Manager of Safety already has the ability to deny permits under D.M.C. § 54-365(4)(a)-(f), which includes grounds related to proper police protection, and the ability to revoke permits based upon, among other things, "security issues," in D.M.C. § 54-367.

We suggest that any legitimate interests of the City are already amply covered by those provisions, in which case this troubling provision may be deleted. If not, the City should be very clear about the distinct purpose to be served by this provision, and must articulate the objective, content-neutral criteria to be considered by the Manager of Safety when summarily waiving ordinance provisions, and a requirement that his reasons for taking such action be recorded in writing to permit effective judicial review.

D.M.C. § 54-361: Application

Pursuant to D.M.C. § 54-361(c), the City requires filing for permit applications forty-five days in advance. Advance notice requirements are unquestionably a burden on free speech, and will only be upheld where narrowly tailored to advance the government's significant interest.[28] This requirement cannot pass constitutional muster. Courts have routinely found unconstitutional similar unreasonable advance filing requirements.[29]

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[27] *Forsyth*, 505 U.S. at 133.

[28] *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163. (1969) (Harlan, J. concurring); *Carroll v. Princess Anne*, 393 U.S. 175 (1968) (delay of a even a day or two could be of crucial importance with respect to political speech).

[29] *Church of the American Knights of the Ku Klux Klan v. City of Gary*, 334 F.3d 676 (7th Cir. 2003) (forty-five-day-advance-notice requirement unconstitutional because "a very long period of advance notice with no exception for spontaneous demonstrations unreasonably limits free speech"); *Douglas v. Brownell*, 88 F.3d 1511 (8th Cir. 1996) (five-day-advance-notice requirement unconstitutional because it restricted a substantial amount of speech that did not interfere with the city's substantial interest in protecting public safety and convenience); *Grossman v. City of Portland*, 33 F.3d 1200 (9th Cir. 1994) (seven-day-advance-notice requirement unconstitutional because the delay may discourage potential speakers); *NAACP v. City of Richmond*, 743 F.2d 1346 (9th Cir. 1984) (twenty-day-advance-notice requirement unconstitutional because it was not the least restrictive means to achieve the government's substantial interest); *Rosen v. Port of Portland*, 641 F.2d 1243 (9th Cir. 1981) (twenty-four-hour-advance-notice requirement unconstitutional with respect to small groups and individuals); *Robinson v. Coopwood*, 292 F.Supp. 926 (N.D. Miss. 1968), aff'd, 415 F.2d 1377 (5th Cir. 1969) (one-hour-advance notice requirement unconstitutional because "there is no reason to require previous notice of an intention to conduct a peaceful assembly when there is no public danger, actual or impending, reasonably anticipated to result therefrom").

The Ninth Circuit found that a provision allowing a city seven calendar days to process an application violated the First Amendment because it precluded persons from using public parks, the "quintessential public forums," for "spontaneous First Amendment activity."[30] The Eighth Circuit struck down a five-day advance notice requirement with respect to demonstrations using a city's streets and sidewalks.[31] The Ninth Circuit has suggested that even a 24-hour waiting period may violate the First Amendment as applied to a smaller group.[32] Similarly, the Sixth Circuit has explained:

> Any notice period is a substantial inhibition on speech. 'The simple knowledge that one must inform the government of his desire to speak and must fill out appropriate forms and comply with applicable regulations discourages citizens from speaking freely.'[33]

The advance notice provision has the effect of prohibiting spontaneous speech which may, as a practical matter, deny a person or group any meaningful opportunity to comment on an important issue. "Timing is of the essence in politics…[W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all."[34]

The unreasonable advance-notice requirement in the proposed ordinance is not narrowly tailored to achieve the government's legitimate interest in allocating scarce resources because the determination as to whether another applicant has applied to use the same parade route at the same time should not take more than a few minutes. Nor is it narrowly tailored to advance the government's interest in public safety. As the cases set forth above and in the footnotes make clear, the city should need much less than forty-five days to address these concerns.

The ordinance does allow for permits to be accepted less than forty-five days before the parade, provided that the Manager of Safety finds that the parade "is for the purpose of spontaneous communication of topical ideas that could not have been foreseen in advance of required application period or that circumstances beyond the control of the applicant prevented timely filing of the application."[35] This vague and subjective exception hardly saves the otherwise unconstitutional advance notice requirement.

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[30] *Grossman*, 33 F.3d at 1204.
[31] *Douglas*, 88 F.3d at 1524.
[32] *Rosen*, 641 F.2d at 1248 n. 8.
[33] *American-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005) (*quoting N.A.A.C.P. v. City of Richmond*, 743 F.2d at 1355).
[34] *Brownell*, 88 F.3d at 1523 (*quoting Shuttlesworth*, 394 U.S. at163 (internal quotations omitted).
[35] It is also unclear whether the phrase that an "application will be accepted up to twenty-four hours" is intended to convey that an application will simply be *reviewed* (and either granted or denied) if the Manager finds that the parade is for "spontaneous communication of topical ideas", or if it will actually be "accepted" (e.g. a permit issued) if the City determines that the parade is for "the purpose of spontaneous communication of topical ideas."

In a case decided this month, the First Circuit reaffirmed this position when considering an ordinance that required a thirty-day advance notice requirement, but allowed for applications less than thirty days before the event for "good cause shown."[36] In finding that requirement unconstitutional, the court stated:

> We think the [good cause] exception does not save the unduly lengthy application period. If the "good cause" exception were attached to a reasonably short application period, we might rule otherwise. But as a device to cure a standard requirement of some thirty days, it is inadequate, requiring, as it does, that all persons desiring to seek a parade permit within some entitled shorter period shoulder the burden of convincing the City Manager of the existence of "good cause." Such a requirement curtails an applicant's free speech rights, both because of the additional effort the applicant need make in order to claim those rights and the risk that the City Manager may not realize from the phrase "good cause" that many applicants will be entitled, routinely, to a shortening of the period.[37]

Likewise, Denver's imposition of a forty-five day advance requirement cannot be saved by a vaguely worded exception requiring the applicant to satisfy the Manager of Safety's subjective judgment that the exception applies. Accordingly, we urge the city to waive the advance notice requirement for free speech parades, or reduce the requirement to a maximum of twenty-four hours.

Finally, with regard to the Extraordinary Event declaration referred to in D.M.C. § 54-361(c), the City grants the Mayor authority to specify different time periods for the application process if a specific event is declared an "Extraordinary Event." Nowhere does the ordinance constrain the time period the Mayor may designate for the acceptance of applications, which is of special relevance with regard to the advance notice requirement as discussed above. We suggest the City make clear that while the Mayor may extend the *earliest* time applications will be accepted by the City, he cannot impose any advance filing requirement greater than twenty-four hours.

D.M.C. § 54-362: Conflicting Applications

D.M.C. § 54-362(a)(1)-(3) sets out the City's proposed scheme for resolving conflicting applications for parade permits. Priority is given first to government-sponsored parades or events, second to applicants who have historically used a parade route or park on the requested date regardless of whether the parade is for the exercise of political or commercial speech, and finally to the expressive activities of everyone else. Granting government speech a *de facto* right to

[36] *Sullivan v. Augusta*, No. 06-1177, First Circuit Court of Appeals (December 14, 2007) (available at http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=06-1177.01A).
[37] *Id*. (no page cite currently available).

monopolize Denver's traditional public forums is impermissible under the First Amendment and Article II Section 10, and contrary to the City's stated commitment to respecting free speech rights.

As a threshold matter, it is not clear that the government has free speech rights that permit it any consideration at all in a parade permit application process.[38] Even if the government does have some free speech rights in this context, however, the City's grant of preferential treatment to itself and all other governmental entities when there are conflicting permits cannot pass constitutional muster either as a content-based preference or as a content-neutral time, place and manner restriction.

In *dicta*, The Tenth Circuit has characterized this approach to conflict priority evaluation as content-neutral[39]. We disagree. By its very nature, this scheme discriminates against the political expression of private groups and grants automatic preference to government speech. Government speech is fundamentally and inarguably different in content than speech of private citizens. For example, the City of Denver can hardly be expected to sponsor an "Impeach the Mayor" rally or a demonstration with a purely religious message. That is precisely the type of expression, however, long exercised in traditional *public* forums by the *public*. As recognized by the Supreme Court forty years ago:

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the state attempts to impose its will by force of law; the state's power to encourage actions deemed to be in the public interest is necessarily far broader.[40]

The proposed conflict priority evaluation scheme is a direct interference with the right of access to traditional public forums for political expressive activity. Granting automatic priority to government speech evinces a clear bias in favor of the content of the government's expressive activity. As such, the regulations are content-based and thus must be necessary to serve a compelling state interest and be narrowly drawn to achieve that end.[41] The conflict priority evaluation

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[38] Many circuits hold that a government has no First Amendment rights. *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 61 (1st Cir. 1999); see also *Creek v. Vill. of Westhaven*, 80 F.3d 186, 192-93 (7th Cir. 1996) (citing numerous decisions holding government entities have no First Amendment rights, and one contrary case, but not deciding the issue). Even if the government has First Amendment rights, they are subject to countervailing First Amendment rights of citizens wishing to utilize traditional public forums for the purpose of free speech.

[39] *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1252 (10th Cir. 2004)(Evaluating a conflict priority evaluation scheme nearly identical to that proposed by the City of Denver, "… [T]his section is entirely content-neutral. Although it gives priority to government-sponsored and historic-usage events, these categories are not based on the content of the intended speech…").

[40] *Maher v. Roe*, 432 U.S. 464, 475-476 (1977).

[41] *Perry Educ. Ass'n*, 460 U.S. 37.

scheme is neither necessary to serve a compelling state interest nor narrowly drawn.

Even assuming *arguendo* that such a scheme is not content based, such preferences clearly do not serve a "legitimate government interest" nor are they "narrowly tailored." Unlike the Tenth Circuit, which did not consider the constitutionality of the conflict priority scheme in *Utah Animal Rights Coalition*, courts analyzing permit schemes giving preferential treatment to the government have found them unconstitutional. In *Camp Legal Defense Fund, Inc. v. City of Atlanta*, the Eleventh Circuit evaluated an Atlanta ordinance that exempted "city-sponsored events" from a festival permitting process.[42] Like the priority system in the City's proposed ordinance, the exemption in that case had the potential to selectively "benefit private speakers" whose events were co-sponsored by the City.[43] The Eleventh Circuit struck down the scheme under *Forsyth*, holding that:

> The provision does not provide objective criteria that limit the ability of city officials to discriminate based on the viewpoint of the speaker or the content of the speech because Atlanta could arbitrarily decide to initiate, finance and execute in major part the event of a private organization.
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> . . .
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> [T]he exemption leaves unbridled discretion in the hands of the city to determine which speech and speakers…to endorse or suppress. Without objective standards, the exemption for city-sponsored events fails to guarantee that the exemption will not be applied in a discriminatory manner.[44]

Likewise, in *Congregation Lubavitch v. City of Cincinnati*, the court considered a permit scheme for displays at a traditional public forum that exempted from permit requirements "agencies, political subdivisions and instrumentalities of the governments of the United States, the state of Ohio, the county of Hamilton, the city of Cincinnati, and the board of education of the City of Cincinnati."[45] The court held such preferential treatment for government-sponsored speech to be unconstitutional:

> [T]he City has employed a convoluted device to exempt [certain private groups] through co-sponsorship with some form of government from the obligations imposed on other organizations. But even though a governmental purpose be legitimate and substantial, that purpose cannot

[42] 451 F.3d 1257, 1279 (11th Cir. 2006).
[43] *Id*. at 1279-1280.
[44] *Id*.
[45] *Congregation Lubavitch v. City of Cincinnati*, 807 F.Supp 1353, 1354 (S.D. Ohio 1992).

> be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.[46]

A similar result was reached in *Beckerman v. Tupelo*, where the Fifth Circuit found a permit scheme that exempted "governmental agencies" unconstitutional because the city failed to show any "legitimate and compelling interest to justify the differential treatment" between the government and private citizens. [47]

Finally, the D.C. Circuit flatly rejected as unconstitutional an attempt by the government to gain priority in the use of traditional public forums by issuing a permit to itself:

> There is no authority for the proposition that the government may by fiat take a public forum out of the protection of the First Amendment by behaving as if it were a private actor. Indeed, such authority as exists is directly to the contrary… Neither will we permit the government to destroy the public forum character of the sidewalks…by the *ipse dixit* act of declaring itself a permittee.[48]

The Tenth Circuit's decision in *Utah Animal Rights Coalition* merits additional discussion. In that case, Salt Lake City created a conflict priority scheme for the 2002 Winter Olympics that has been replicated, almost in its entirety, in the proposed ordinance here. The Tenth Circuit made clear that there were only two issues under consideration in that case: "1) a facial challenge to the then-operative ordinance, on account of its *lack of written deadlines* for processing permit applications, and 2) an as-applied challenged contending that the *time elapsed in processing [the] permit application…was unconstitutionally long*."[49] The court stated explicitly that "UARC does not allege that the [ordinance] was content-based."[50]

Thus, although the Tenth Circuit stated in dicta that the priority system appeared content neutral, neither the issue of content neutrality, nor whether a priority for the government in the application process was constitutionally permissible as a time, place and manner restriction, was briefed or decided in that case. The facts are substantially distinct as well: a sporting event such as the Olympics is not close in nature or scope to the fundamental "core political speech" of a national political convention. Nor was Colorado's Article II Section 10, which is more protective of political expression than the First Amendment and arguably requires a higher threshold for time, place and manner restrictions, at issue in that case. We believe that any reliance by the City on *Utah Animal Rights*

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[46] *Id*. at 1357 (internal citations and quotations omitted).
[47] 664 F.2d 502, 514 (5th Cir. 1982).
[48] *Mahoney v. Babbitt*, 105 F.3d 1452, 1458 (D.C. Cir. 1997).
[49] *Utah Animal Rights Coalition*, 371 F.3d at 1250 (emphasis added).
[50] *Id.* at 1257.

Coalition as a constitutional sanction for the scheme proposed here is seriously misplaced.

The City must amend the "conflict priority evaluation" scheme. A discriminatory permit system that grants a preference to the government is an invalid content-based restriction in violation of the First Amendment and Article II Section 10. Furthermore, similar attempts by government to give themselves priority rights over traditional public forums have been clearly rejected as impermissible time, place and manner restrictions in cases like *Lubavitch, Beckerman* and *Mahoney*. The system suffers from precisely the same infirmities identified in *Camp Legal Defense Fund* because Denver or any other government entity could "arbitrarily decide to initiate, finance and execute in major part the event of a private organization" granting that event priority and unilaterally preempting the free speech rights of all other groups.[51]

We urge the City to take the opportunity to change course here, and affirm its commitment to free speech by giving citizens the highest priority for traditional public forums in the event of conflicting applications. Denver has access to any number of ballrooms, convention halls, hotels and other venues that do not implicate any of the First Amendment and Article II Section 10 protections for traditional public forums, which have always been held in "trust *for the public*" precisely for the purpose of assembly, expression and communication about matters of *public* concern.[52] At a bare minimum, the City must eliminate the priority for government events and treat citizen and government applicants on a non-discriminatory and equal basis with regard to the opportunity to use traditional public forums.

Finally, we are troubled by the fact that D.M.C. § 54-362(a)(2) gives precedence to applicants who have used a traditional public forum for more than five years regardless of whether the parade is for the purpose free speech or commercial activities. This system is especially problematic for events like the DNC, where a great number of persons may wish to use traditional public forums such as streets and sidewalks for the purpose of engaging in free speech. At an event like the DNC, we believe that free speech in traditional public forums protected by the First Amendment and Article II Section 10 should not be denied simply because a commercial vendor has occupied that space for more than five years. In those instances, we believe it reasonable and constitutional to require historical commercial users to accommodate free speech activity in traditional public forums. The City should allow the Mayor to suspend the "historic usage" priority as applied to commercial users, and to grant preference to political free speech activities, for an "Extraordinary Event" like the DNC.[53]

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[51] 451 F.3d at 1279-1280.

[52] *Hague*, 307 U.S. at 515-16 (emphasis added).

[53] Granting preference to free speech activities is clearly allowable and favored under the First Amendment. *E.g. Thomas v. Chicago Park District*, 534 U.S. 316 (2002). (holding that the

D.M.C. § 54-363: Fee

D.M.C. § 54-363 requires a non-refundable application fee of $50 for parades of fifteen blocks or less, and a non-refundable application fee of $150 and prepayment of all additional police costs if the parade exceeds fifteen blocks. The ordinance provides no waiver for persons or groups unable to pay the fee. The City bears the burden of proving the fee constitutional. There is, of course, no question that the government may not profit from imposing licensing or permit fees on the exercise of free speech rights.[54] Only fees that cover the administrative expenses of the permit or license are permissible.[55] We believe the fee is not narrowly tailored to pass First Amendment muster.

Given only the plain language of the ordinance, we are unable to determine precisely what costs these particular fees are intended to defray. If they are meant to defray policing expenses, then the City's refusal to refund fees for denied parade applications would amount to an unconstitutional profit, as there are simply no police expenses in that instance. In addition, there would be no justification for increasing the fee from $50 to $150 for policing expenses when the City simultaneously requires the applicant to pay the policing costs for parades longer than fifteen blocks. [56]

With regard to the 2008 DNC in particular, we note that the City is expected to receive $50 million for security purposes. To the extent those funds are granted to the City to defray policing costs related to free speech activities like parades and demonstrations, it would raise additional questions about the constitutionality of the fees charged during the DNC.

The City, laudably and appropriately, has not collected and does not now attempt to collect any fees for "assembly" permits for free speech events in City parks.[57] We believe that the City should follow the same line of reasoning here, and waive any fee requirements for free speech parade activity.

D.M.C. § 54-364: Indemnification Agreement

D.M.C. § 54-364 requires a permit applicant to sign an indemnification agreement promising to repay the costs for repairing any damage to city property, and to indemnify the city against liability for any damage to persons or

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granting of waivers for fees, insurance, and indemnification for free speech activities, but not commercial activities, permitted under the First Amendment).

[54] *Murdock*, 319 at 113-14.

[55] *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941) (approving a fee "limited to the purpose stated" of meeting "the expense incident to the administration of the Act and to the maintenance of the public order in the matter licensed").

[56] In addition, charging for additional police protection may also be content based. *See Ku Klux Klan v. City of Gary*, 34 F.3d at 681.

[57] *See* discussion of parks and recreation proposed ordinance *infra.*

property. Because signing such an agreement will require most applicants to obtain insurance from the private market in order to cover that obligation, it unconstitutionally burdens free speech. Even where the applicant forgoes insurance, every court that has considered indemnification agreements as applied to free speech activity has found them not to be narrowly tailored. [58] We strongly urge Denver to exempt free speech parade activity from the indemnification requirement.

Although technically not an insurance requirement, courts have recognized that indemnification requirements will require most applicants to obtain insurance and, even if not, still involve a number similar of content-based considerations:

> …[I]t is not unreasonable to expect that one faced with unlimited liability as a consequence of [an indemnification agreement] would choose to purchase liability insurance to cover that risk…Whether a rational person would choose to purchase private insurance or to self-insure probably depends mainly on three factors: (1) the ability of the organizer and her organization to obtain the insurance (i.e., that it is offered to the group, and that they can afford it); (2) the organizer's ability to bear the maximum loss personally; and (3) the organizer's immunity from any judgment. Key factors that would enter into any rational evaluation of this decision -- how controversial the event and its sponsors will be; whether it will elicit a counterdemonstration, and if so, how large and how belligerent -- are nearly identical to the factors an insurer would use in setting a premium.[59]

In evaluating insurance requirements, many courts have held that insurance is inherently content-based, and cannot satisfy strict scrutiny.[60] Other courts have held insurance requirements unconstitutional because the plaintiff was a

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[58] In *MacDonald v. Chicago Park District*, 132 F.3d 355, 363 (7th Cir. 1997), the Seventh Circuit upheld insurance and indemnification requirements *only* when First Amendment activity was clearly exempted from those requirements ("The only exception to the published schedule recognized by the Code relates to the opportunity for a waiver of the user fee, security deposit and insurance requirements 'if the activity [proposed by the applicant] is protected by the First Amendment of the United States Constitution and the requirement would be so financially burdensome that it would preclude the applicant from using Park District property for the proposed activity...."). The Supreme Court later held in the same case that the waiver provision did not grant undue discretion and that it "furthers, rather than constricts, free speech." *See Thomas*, 534 U.S. at 324-25.

[59] *Van Arnam v. GSA*, 332 F. Supp. 2d 376, 393-394 (D. Mass. 2004) (holding unconstitutional indemnification clause).

[60] *Courtemanche v. General Service Administration*, 172 F.Supp.2d 251, 269 (D.Mass. 2001) ("The lower courts have generally found mandatory insurance provisions to be unconstitutional prior restraints on speech under various prongs of the Forsyth County test.") (citations omitted). *See also Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F.Supp.2d 1018 (C.D. Cal. 2002) (insurance requirement stricken because officials given too much discretion under *Forsyth*); *Pritchard v. Mackie*, 811 F.Supp. 665 (S.D. Fla. 1993) (striking insurance for many reasons).

politically controversial group that simply could not secure insurance.[61] The Second Circuit's decision in *Eastern Connecticut Citizens Action Group v. Connecticut* typifies the analysis.[62] The court in that case held that insurance companies routinely consider factors that are prohibited by the First Amendment:

> In denying an application for an insurance policy, brokers or underwriters often consider political beliefs of those who have applied for insurance coverage, the likelihood of adverse publicity to the insurance company, the lack of business experience of the group, and other invidious or irrelevant factors. Consideration of such factors play a part in the decisions of an underwriter to reject insurance coverage applications.[63]

Similarly, a California state court considering the issue reasoned that delegating insurance charges to the free market "appears inescapably to create a system of charges subject to impact and adjustment based on 'content,' including the element of hostile anticipation," which is "presumptively intolerable" under *Forsyth*.[64]

Likewise, courts that have considered indemnification and hold-harmless agreements as applied to free speech activity have found them unconstitutional.[65] In *Courtemanche v. General Service Administration*, the court held that municipalities generally do not impose responsibility for using public spaces on particular users, and that the burden on constitutional rights of doing so was intolerable.[66] The court noted that municipalities could utilize existing

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[61] *Collin v. Smith*, 578 F.2d 1197, 1208 (7th Cir. 1978) (insurance typically unavailable to those very controversial groups as to which the municipality's interest in having insurance would presumably be the greatest, like the Nazis); *Collin v. O'Malley*, 452 F.Supp. 577, 579 (N.D. Ill. 1978) ("Plaintiff and those like him, persons, groups or organizations espousing controversial political or social views and ideas, cannot obtain this coverage in the insurance marketplace").

[62] 723 F.2d 1050 (2nd Cir. 1983).

[63] *Id*. at 1056 n.2.

[64] *Long Beach Lesbian and Gay Pride, Inc. v. City of Long Beach*, 14 Cal. App. 4th 312, 340 (Cal. App. 1993).

[65] Indemnification provisions have been upheld with safeguards not applicable to the City's ordinance as drafted. As noted above, in *MacDonald* such a provision was found constitutional where waivers were provided for First Amendment activity. In *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1057 (9th Cir. 2006), the court also upheld an indemnification agreement with very little analysis as applied to "political demonstration" where the organizers could "avoid both the hold harmless provision and the insurance provision if they cooperate with the City Manager." In *Urlaub v. Inc. Vill. of Bellport*, 498 F. Supp. 2d 614, 622 (D.N.Y. 2007), the court found an indemnification provision in the context of a preliminary injunction constitutional "providing that an applicant's proven indigency is a consideration in the provision's application."

[66] *Courtemanche*, 172 F.Supp.2d at 274 ("To the degree that the indemnification/hold harmless provision is meant to impose additional responsibility beyond what the traditional principles of tort law provide, it is tailored to take public responsibility out of the public forum. But cities do not condition use of public ways on the execution of indemnification/hold harmless provisions. The traditional principles of tort liability, including vestiges of sovereign immunity and other specific limitations on governmental liability, are the accepted accommodation between the traditional availability of public amenities and concern the sovereign not be unduly burdened for providing

civil and criminal sanctions against those who damaged property.[67] Similarly, in *Eastern Connecticut Citizens Action Group*, the Second Circuit held an indemnification requirement was not narrowly tailored because the concern over damages claims could be "addressed through existing civil and criminal sanctions for trespassing, vandalism, and so on," and "[a]bsent a showing that those carefully-crafted remedies are unavailing in this instance, the state may not insist upon broader restrictions which substantially infringe constitutional rights."[68]

The same line of reasoning applies here. Every applicant who signs the indemnification agreement would have to obtain insurance in the private market to cover their obligation, requiring an additional financial cost that would be calculated based upon the content of the speech. The City may avail itself of a myriad of municipal and state ordinances and statutes that are more than sufficient to protect the City's interests should any damage to property or persons occur. Furthermore, the City is already shielded from potential state tort liability by the Colorado Governmental Immunity Act.[69] Finally, the City already carries insurance to cover liability claims.[70] We note that once again the City has already taken an appropriate and commendable approach in the parks permit ordinance by not requiring insurance or indemnification for free speech assemblies. Because the City's interests are already adequately met by methods that are not content based and do not burden or chill free speech, the indemnification requirement is not narrowly tailored and the City should exempt free speech parade activity from the indemnification requirement.

D.M.C. § 54-365[71]: Issuance of Permit

Section 54-365(1) restricts the timing of parades within the "central business district" of Denver between the times of 6:00 am and 9:00 am or 4:00 pm and 7:00 pm. It is unclear how the definition of the "Central Business District" is reconciled with (or affected by) the definition of the "Affected Location," as set forth in the City's Draft Declaration for purposes of determining when and where the City will limit parades and protests during the 2008 DNC. The "Affected Location" constitutes a much larger geographic area than the "central business

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them. The government cannot properly reallocate its due burden by conditioning use of public facilities on the assumption of that burden by others without narrowly tailoring the reallocation to minimize the chilling effect on constitutional rights").

[67] *Id*. at 273.

[68] 723 F.2d at 1057. *See also Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont,* 700 F.Supp. 281, 286 (D. Md. 1988) ("Town could more narrowly serve its interest in safety by criminalizing conduct which causes injury to person or property and by arresting violators of its criminal laws").

[69] *E.g. Deanzona v. City & County of Denver*, 222 F.3d 1229 (10th Cir. 2000) (holding Denver immune from tort liability under the CGIA).

[70] D.M.C. § 20-1 (referencing "self-insurance program for settling liability claims and paying judgments against [Denver]").

[71] In the City's draft, this section reads "54-3645".

district" and it is not clear whether the City intends to restrict any parade or protest during the rush-hour times within the "Affected Location" area.

While the City may enact reasonable time, place and manner regulations for parades and protests which are narrowly tailored to serve the legitimate interests of traffic control and public order, the ACLU believes that a complete rush-hour restriction for the "Affected Location" would be overbroad as it encompasses such a large area that there would be no alternative places to exercise those rights.[72] This is especially true for the area surrounding the Pepsi Center – the focal point of the Democratic National Convention and where free speech rights are of the utmost concern.

We ask that the City clarify whether the revisions to the parade ordinance are intended to restrict parades within the "Affected Location" or within the "central business district" during rush-hour times. To the extent that the rush-hour restriction is extended to the "Affected Location" and not just the "Central Business District," we urge the City to rescind any blanket prohibition.

In addition, D.M.C. § 54-365(4)(a) permits the Manager of Safety to deny a permit when the proposed parade will "substantially or unnecessarily" interfere with traffic in the area of the parade and there are not sufficient resources to mitigate the disruption. The ACLU has two concerns with this subsection: (1) the Manager of Safety has apparently unlimited discretion to determine what constitutes a "substantial" or "unnecessary" interference with traffic, and (2) due to the large-scale security measures that will be employed during the DNC, the Manager of Safety may argue there are not "sufficient resources to mitigate" *any and all* disruptions and, as a result, applications could be inappropriately denied on this basis. The City must define within the ordinance what constitutes a "substantial" or "unnecessary" interference with traffic.

In D.M.C. § 54-365(4)(d) & (e), the City permits the Manager of Safety to deny a permit based on prior "material misrepresentations" or violations of the "material terms of a prior permit" within the last three years. As noted in the discussion of the indemnification requirement above, banning persons from free speech parade activity for three years is almost certainly not the most narrowly tailored way to realize the City's legitimate interests when the City already has ample avenues in the criminal and civil law for pursuing violators.

If D.M.C. § 54-365(4)(d) & (e) are to remain in the ordinance, they must be amended to make very clear that the Manger of Safety cannot punish the applicant for the unauthorized misconduct and criminal acts of others.[73] The City

[72] *See Sixteenth of September Planning Committee, Inc. v. City and County of Denver,* 474 F.Supp. 1333 (D. Colo. 1979).

[73] *NAACP v. Claiborne Hardware*, 458 U.S. at 930-31 (holding that sponsoring organization can only be punished for the actions of individuals where the government can show the individual was

would also need to give substantial additional guidance regarding what constitutes a "material misrepresentation." As just one example, D.M.C. § 54-361(b)(7) requires the applicant to estimate the "number of persons who will participate." If the applicant estimates that 1,000 people will participate, and 100 or 10,000 show up, this may indeed constitute a "material misrepresentation." Unless the government can clearly show that the estimate was made in bad faith, however, the Manager of Safety should not be permitted to deny an applicant the right to hold a future parade.

Finally, D.M.C. § 54-365(4)(f) permits the Manager of Safety to deny an application if it "does not contain sufficient information about the…crowd estimate to enable the Manager to evaluate the proposed event…" We strongly urge the City to delete this vague language or exempt free speech parades from this ground for denial. It is often impossible to determine the number of people who will attend an event, whether it be a political demonstration or a rally celebrating the Rockies' NLCS championship. At most, a lack of "sufficient information" in this regard may permit the Manager to seek additional information. The City cannot, however, legitimately prohibit free speech on these grounds.

D.M.C. § 54-366: Review of denial or revocation

D.M.C. § 54-366(2)(a) details the appeals process when a permit is denied by the Manager of Safety. In the case of an Extraordinary Event, we note that *applications* are to be made to the "mayor or his designee," under D.M.C. § 54-361(a). It is not clear to whom, however, an *appeal* should be made during an Extraordinary Event declaration. This should be clarified.

In D.M.C. § 54-366(2)(a)(1), although "the denial of a permit application" arguably also includes a revocation of a previously granted permit, we suggest the City make explicit that the process for appealing a revocation of a permit is also governed by this section.

It is also unclear from this draft how the timeframes for the appeals will operate in practice. D.M.C. § 54-366(2)(b)(1) requires that the applicant file an appeal within five days of the notice of denial or revocation. After the appeal is received, it appears that the Manager may require the Department of Safety to "respond" to the appeal within fifteen days under D.M.C. § 54-366(4). When read in conjunction with D.M.C. § 54-366(6),[74] it appears that the Department of Safety's response is sent to the Manager of Safety, not the applicant. The Manager of Safety then has an unspecified time to review the Department of Safety's response, and then must issue a written decision within twenty-four hours after that review. This scheme leaves critical questions unanswered:

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an "agent" operating "within scope of their actual or apparent authority" or the conduct occurred with the organization's "knowledge" and it was "specifically ratified").

[74] We note that there is no subsection (5) in the ordinance as drafted.

- When the Manager of Safety *does not* direct the Department of Safety to respond to an appeal, in what timeframe must the Manager of Safety respond to the appeal? We suggest Denver follow its prior practice (deleted Subsection 1) of providing such a written response within two business days.

- When the Manager of Safety does direct the Department of Safety to respond to an appeal, how soon must the Manager's review occur? We believe that both the Manager's review and response to the applicant must occur with twenty-four hours of the receipt of the response from the Department of Safety (this may indeed what the drafters of this provision intended).

Aside from the ambiguities above, the extended timelines for the City's response to an appeal are also unjustifiable. The applicant must file an appeal within five business days yet, inexplicably, the department is given fifteen business days (which will often be three full weeks) to respond when there is Department review. The Department's time to respond when so requested by the Manager of Safety should also be shortened to five business days.

The City has appropriately provided for an expedited appeals process in D.M.C. § 54-366(6)(a). That provision, however, requires that notice of the need for an expedited process be given by the applicant to a "hearing officer." It is not clear who the "hearing officer" is or whether Denver contemplates an actual hearing in the appeals process. This should be clarified.

D.M.C. § 54-367[sic]: Review of Manager's decision

The Colorado Supreme Court has recognized that Colo. R. Civ. P. 106(a)(4), which governs review of decisions of government officials or bodies acting in a quasi-judicial manner, cannot circumscribe rights of individuals to file lawsuits under 42 U.S.C. § 1983.[75] To the extent that the appeal provisions are designed to circumvent this right, they are unenforceable.[76] The appeal procedures impose a very short timeframe on an applicant to file an appeal with the Manager asserting that denial of an application constitutes an unlawful time, manner, place restriction upon, or otherwise impermissibly burdens, constitutionally protected rights. Such challenges are properly the subject of a lawsuit under 42 U.S.C. § 1983.

D.M.C. § 54-367: Revocation of Permit

D.M.C. § 54-367 allows the Manager of Safety to "summarily revoke" any permit when a "disaster, public calamity, security issues, or other emergency" will make the parade an "imminent hazard to the safety of persons." In the context of this

[75] *Bd. of Cty. Comm'rs v. Sundheim*, 926 P.2d 545, 548-549 (Colo. 1996).
[76] *Id.*

provision, we read the term "security issues" to refer to unanticipated, "emergency" security issues unknown to the Manager of Safety at the time that the permit was granted. Although perhaps implicit in the ordinance, we urge the City to clarify that such a revocation is only permissible where the Manager of Safety has also determined that "there are not sufficient city resources to mitigate" the hazard and allow the parade to continue.[77]

The City should be clear that such a revocation is subject to appeal under D.M.C. § 54-366, or subject to immediate judicial review. Furthermore, in the interest of promoting free speech activity, we also strongly urge the City to direct the Manager of Safety to provide for an alternative parade route or time in the event of such a revocation whenever possible, as the City has appropriately done in D.M.C. § 54-366 ("Manager shall authorize the conduct of a parade on an alternate date, time, location or route").

B. Proposed Parks and Recreation Ordinance

As an initial matter, we support the proposed revisions to D.M.C. § 39-77 which delete the provisions that previously required an applicant for an assembly permit to provide insurance and pay certain fees, and that regulated the signs that could be displayed at an assembly. If the revisions are adopted, however, the regulations of the Denver Parks & Recreation Department (the "Parks Department") governing festivals and events (the "Festival Regulations") will need corresponding amendments. Although we have been informed that the City does not currently charge fees or require insurance for assemblies, the schedule of fees set forth in the Festival Regulations does not distinguish between assemblies and other types of events and Festival Regulation No. 5, as well as General Parks and Recreation Regulation No. 2, require insurance for all events. These regulations should be amended to expressly exempt assemblies.

Despite the fact that the proposed revisions represent an improvement over the existing code, we continue to have a number of concerns with respect to the proposed regulations and their chilling effect on activities protected by the First Amendment. The most serious concerns relate to the absence of any exemption from the permitting requirement for small assemblies in D.M.C. § 39-75, the advance notice requirements for assemblies under D.M.C. § 39-78, the procedures for revocation set forth in D.M.C. § 39-80, the appeal procedure set forth in D.M.C. § 39-81, and the impermissible preference given to certain speakers under D.M.C. § 39-87.

D.M.C. § 39-2: Adoption of Rules

D.M.C. § 39-2(g) provides that the Manager may adopt emergency rules "if such action is necessary to comply with state, local or federal law or if it is deemed necessary by the adopting authority to protect immediately the public heath,

[77] *See* D.M.C. § 54-365(4)(a).

safety, or welfare." We recognize the need for the City to be able to respond quickly and effectively to public emergencies as stated in the second half of the provision. We urge the City, however, to include a post-adoption hearing process when emergency rules are unilaterally imposed.

D.M.C. § 39-3: Curfew and closures

D.M.C. § 39-3 allows for park use after normal curfew and closure when an appropriate permit has been issued by the Manager. The ordinance is completely silent, however, as to the content-neutral and objective criteria the Manager should consider in deciding whether to grant or deny a request to use the park after curfew. This is precisely the type of unbridled discretion prohibited by *Forsyth* and its progeny. The City should provide objective, content-neutral criteria guiding this determination to cure this constitutional infirmity.

D.M.C. § 39-7: Camping and erection of tents and buildings prohibited

D.M.C. § 39-7 allows for camping and the erection of tents and other structures when properly permitted by the Manager. This section suffers from the same basic constitutional infirmity noted above with D.M.C. § 39-3, in that it fails to constrain, in any way, the Manager's determination of whether and under what conditions such a request may be granted or denied. Again, the City should provide objective, content-neutral criteria guiding this determination.

D.M.C. § 39-12: Disturbance of the peace

D.M.C. § 39-12 prohibits "disturbance of the peace" based upon, among other things, "offensive or obstreperous conduct," "loud or unusual noises," or "unseemly profane, vulgar, obscene, or offensive language or conduct." The Supreme Court has long recognized that speech which is merely "offensive", let alone "loud and unusual," cannot be proscribed or punished by the government under First Amendment.[78] The Colorado Supreme Court has more recently described the *Chaplinsky* test as follows:

> The question is whether repeated insults, taunts and challenges of another "in a manner likely to provoke a violent or disorderly response" is the equivalent of the "fighting words" formulation of *Chaplinsky* -- "those which by their very utterance inflict injury or tend to excite an immediate breach of the peace. The test is what men of common intelligence would understand to be words likely to cause an average addressee to fight. [79]

The same year, the Colorado Supreme Court struck down as facially overbroad a statute which provided that, "[a] person commits disorderly conduct if he

[78] *Chaplinsky v. N.H.*, 315 U.S. 568 (1942).
[79] *People ex rel. Van Meveren v. County Court of County of Larimer*, 551 P.2d 716, 718 (Colo. 1976).

intentionally, knowingly or recklessly…makes a course and obviously offensive utterance, gesture or display in a public place."[80] The court held that:

> The only exception which could permit the legislature to enact the statute challenged here is the "fighting words" exception. "Fighting words" are those which by their very utterance tend to incite others to unlawful conduct or provoke retaliatory actions amounting to a breach of the peace.
>
> . . .
>
> The challenged subsection makes no attempt to limit its application to "fighting words." It applies to the proscribed communications without regard to their probable effect on others. It is abundantly clear that the subsection on its face sweeps within its coverage protected as well as unprotected speech. Thus, it is facially overbroad.[81]

D.M.C. § 39-12 unquestionably criminalizes a broad range of constitutionally protected speech, and should be stricken or amended to bring it in line with *Chaplinsky.*

D.M.C. § 39-76 Definition [sic]

D.M.C. § 39-75 requires a permit before any assembly may be held in any park, and D.M.C. § 39-76 defines "assembly" to:

> mean and include demonstrating, picketing, speech making, marching, holding of vigils, and all other like forms of conduct which include the communication or expression of ideas, views or grievances, engaged in by one (1) or more persons, the conduct of which has the effect, purpose or propensity to draw a crowd of onlookers.

The definition is broad enough to include one person walking through or sitting in a park with a sign that states "Repent Now! The End is Near" or "Impeach the Mayor." Indeed, it is so broad as to include a person walking through or sitting in a park wearing a T-shirt containing such a message.

By requiring a permit before any assembly is held, the City has imposed a system of prior restraint that is presumed to be unconstitutional.[82] Although reasonable time, manner and place regulations may be imposed upon assemblies in public places, such regulations are permissible only "so long as

[80] In *People v. Hayden*, 548 P.2d 1278, 1280 (Colo. 1976).
[81] *Id*. at 1281.
[82] *Forsyth*, 505 U.S. at 130 (heavy presumption against constitutional validity of prior restraint).

they are content-neutral, narrowly tailored to serve a substantial governmental interest and leave open ample alternative channels for communication."[83]

There is no legitimate governmental interest, let alone a substantial one, in requiring one person carrying a sign to first obtain a permit before entering a park when others are free to enter and remain in the park without a permit. The same is true of two, three, ten or even twenty people. Even with respect to the use of public streets, where the government's interest in safety is more pronounced than in parks, courts have stricken as unconstitutional permit schemes and advance notice requirements that potentially apply to small groups. As the Sixth Circuit explained:

> Permit schemes and advance notice requirements that potentially apply to small groups are nearly always overly broad and lack narrow tailoring. The Ordinance is overly broad because under the Ordinance as written, any procession of people with a common purpose or goal, whether it be a small group of protestors or a group of senior citizens walking together to religious services, are conceivably required to obtain a permit from the city of Dearborn. . . . . Because the Ordinance would include almost any imaginable procession on Dearborn's streets or sidewalks, the Ordinance, as written, is hopelessly overbroad.
>
> For the same reason, the Ordinance lacks narrow tailoring. The city of Dearborn's significant interest in crowd and traffic control, property maintenance, and protection of the public welfare is not advanced by the application of the Ordinance to small groups.[84]

The Tenth Circuit has described the legitimate government interests in park permitting schemes as being "to ensure that scare space is allocated among conflicting applicants, to protect public access to thoroughfares and public facilities, and to enable police, fire, and other public safety officials to function."[85] These interests are addressed by the application requirements set forth in D.M.C. § 39-77, which require an applicant for an assembly permit to provide for portable sanitation facilities, monitors to provide for spectator or participant

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[83] *Utah Animal Rights Coalition*, 371 F.3d at 1258 (*citing Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).
[84] *American-Arab Anti-Discrimination Committee*, 418 F.3d at 608; *see also Burke v. Augusta-Richmond Cty.,* 365 F.3d 1247, 1225 n.13 (11th Cir. 2004) (listing cases invalidating content-neutral permit regulations as not narrowly tailored due to their application to small groups).
[85] *Utah Animal Rights Coalition*, 371 F.3d at 1258.

control and emergency medical facilities. The fact that there is no government interest in imposing these requirements upon a small assembly is demonstrated by the fact that there is no regulation imposing the same requirements upon a small group entering a park to play an impromptu game of Frisbee. These legitimate government interests are only implicated after a group reaches a certain size. The Chicago park permitting scheme upheld by the United States Supreme Court in 2002 applied only to events of fifty or more people.[86] Therefore, we urge the City to amend the permit requirement to apply only to assemblies greater than fifty persons.[87]

D.M.C. § 39-78: Assembly Permit

D.M.C. § 39-78 provides that the Manager will have three working days to determine whether an application for an assembly permit is complete and seven working days to issue or deny a permit. Because in many circumstances seven working days will include two weekends, this amounts to an advance notice requirement of eleven days. Such an advance notice requirement is constitutionally impermissible for all the same reasons discussed above with regard to D.M.C. § 54-361. Accordingly, we urge the city to waive the advance notice requirement for assemblies, or reduce the requirement to a maximum of twenty-four hours.

D.M.C. § 39-79: Permit revocation for fraud

Our concern with this section, which allows the Manager to revoke a permit if the information submitted was "materially incorrect or fraudulently provided," are the same as those articulated in discussion of D.M.C. § 54-365(4)(d) & (e) above.

D.M.C. § 39-80: Unlawful to violate terms of permit, revocation for cause, notice to cure

We believe that D.M.C. § 39-80 is both constitutionally infirm as well as a bad policy. Subsection (a) provides that the Manager or any sworn law enforcement officer who determines that the conditions of any permit are being violated shall notify the applicant, sponsor or designated representative. Subsection (b) makes it unlawful for the applicant, sponsor or representative to fail to take reasonable steps to cure the violation and makes it further unlawful for any participant or spectator to fail to comply with lawful directions issued by a law enforcement officer or by the applicant, sponsor or representative.

As a policy matter, given that the spectators violating the conditions often may be people opposed to the message of the applicant or sponsor, it is unwise to place

[86] *Thomas*, 534 U.S. 316 at 318.

[87] We note that even with the proposed exemption for groups under fifty, there may be circumstances in which the application of the permitting scheme to a larger group would still violate the federal and state constitutions.

the applicant, sponsor or representative (who will not be easily identifiable to the spectators) in the position of issuing legal directives to such spectators. It is both unwise and unconstitutional, however, to allow the free speech rights of the applicant or sponsor to be curtailed due to the failure of spectators to follow legal directives from a law enforcement officer.

Subsection (c) allows a law enforcement officer, after consultation with the chief of police or the chief's designee, to revoke the permit if the officer determines that "any failure to cure a violation of this article creates the clear and present danger of immediate significant harm to life, public safety or property which cannot be reasonably mitigated by increased public safety enforcement and which, on balance, outweighs the constitutionally protected rights of the organizers or participants in the scheduled event." This standard violates the First Amendment and Article II Section 10 because the law enforcement officer is given unbridled discretion to approve or deny the right to continue engaging in protected free speech activity based upon his determination as to whether the risk of danger to public safety outweighs constitutionally protected rights.[88]

Admittedly the Denver ordinance is more circumscribed than the ordinance stricken by the Supreme Court in *Shuttlesworth* because it only comes into play after some actual or threatened confrontation has created a clear and present danger. Once it does come into play, however, it does not in any manner constrain the discretion of the officer making the determination. Under what circumstances does a risk to public safety outweigh constitutionally protected rights? May an assembly permit be revoked because counter-demonstrators clearly and presently engage in minor property damage? The proposed ordinance offers no standards by which to make such a determination.

During the Civil Rights Era, police often justified denying or curtailing the First Amendment rights of civil rights protestors on the grounds that the police could not protect them from an angry crowd. Courts have roundly rejected this so-called "heckler's veto" as a legitimate grounds for restricting First Amendment activity.[89] The City's proposed ordinance suggests that a law enforcement officer would be justified in terminating a lawful assembly because the behavior of angry counter-demonstrators had created a risk to public safety. Thugs and bullies should not be allowed to terminate legitimate political protest of those with whom they disagree. The proper and narrowly tailored constitutional response is for officers to use existing criminal laws to arrest those breaking them, not to

[88] *Shuttlesworth*, 394 U.S. at 150 (striking ordinance which allowed city to deny a permit if it determined that public welfare, peace, safety, health, decency, good order, morals or convenience so required).

[89] *E.g. Gregory v. Chicago*, 394 U.S. 111, 117 (1969) (disorderly conduct conviction cannot stand when defendant acted in an orderly manner but surrounding crowd became hostile); *see also Street v. New York*, 394 U.S. 576, 592 (1969); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Stromberg v. California*, 283 U.S. 359 (1931).

foreclose free speech rights to all. [90] The actual or threatened criminal behavior of those opposing a speaker can never justify official action silencing the speaker. It is also well settled that the discretion of the officer making the decision to revoke must be carefully constrained.[91] The proposed ordinance does not do so.

D.M.C. § 39-81: Appeals, assembly permits

This provision is nearly identical to D.M.C. § 54-366, and the same constitutional concerns articulated above also apply here.

D.M.C. § 39-82: Review of the Manager's decision.

The same comments made above regarding D.M.C. § 54-367[sic]: "Review of Manager's decision" apply to this provision as well.

D.M.C. § 39-83: Designated park areas

D.M.C. § 39-83(3) allows the Manager to consider whether an assembly "would unduly disturb the quiet and peace of an adjacent residential neighborhood" in considering whether or not to grant an assembly permit application. This ground for denial is extremely vague and discretionless, and could clearly invite consideration of the content of the assembly in determining whether or not it would "unduly disturb the quiet and peace" of a nearby neighborhood. We suggest the City delete this provision or provide clear and objective content-neutral criteria constraining the discretion of the Manager.

D.M.C. § 39-84: Numerical Limitations

D.M.C. § 39-84 allows the Manager to "limit the number of individuals who shall be permitted to participate in any assembly." Once again, the City does not restrict the discretion of the Manager in any form in this provision. In addition, how such a requirement would be practically enforced raises serious concerns, especially because the City has made the failure to comply with a permit provision grounds for revocation of the permit, and a criminal offense. Does the "number of individuals" include uninvited participants? Spectators? Counter-demonstrators? How will the number of individuals "at any one time" be accurately counted? The applicant obviously cannot be punished criminally, or have his or her permit revoked, because more people attend than estimated, regardless of whether those persons are there to support, observe, or protest against the event. The City can encourage estimates that allow proper planning, but we believe this provision is unconstitutional and unworkable. We urge the City to delete this provision.

[90] We note that in D.M.C. § 39-5, the City has already criminalized the "failure to observe or comply with written permits."
[91] *Shuttlesworth*, 394 U.S. at 150.

D.M.C. § 39-86: Definition

The same comments made with regard to a lack of specificity regarding under what conditions and how an "Extraordinary Event" may be declared, detailed in response to D.M.C. § 54-357 above, also apply here.

D.M.C. § 39-87 Conflicting applications for Extraordinary Events

The priority system for Extraordinary Events is identical to the system contained in D.M.C. § 54-362 and suffers from the same serious constitutional flaws as discussed above with respect to the proposed parade ordinance.

In addition, unlike the parade permitting scheme, this conflict resolution system appears to be in effect only for "Extraordinary Events." We cannot determine from the ordinance how conflicting applications will be evaluated in the normal course, i.e., when there is not a declaration of an Extraordinary Event.

IV. REQUEST FOR REVISED VERSION OF ORDINANCES

The ALCU of Colorado and the ACLU cooperating attorneys appreciate the opportunity to provide comments on the proposed permit scheme. As discussed above, our review has been necessarily limited by a number of different factors. We hope, however, that the constitutional infirmities that we were able to identify above will be adequately remedied by the City prior to the submission of the new permit ordinances to City Council.

If you have any questions about the comments above, please do not hesitate to contact me. We welcome any opportunity to meet with you or other city officials to further explain or discuss these comments.

Finally, we would appreciate a copy of the ordinances and the declaration as soon as they are in the form to be sent to City Council.

Very truly yours,

Taylor Pendergrass
Staff Attorney, ACLU

cc. Katherine Archuleta, Office of the Mayor (via email)
Daniel Slattery, Office of the City Attorney (via email)