



Cathryn L. Hazouri, Executive Director • Mark Silverstein, Legal Director

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Terry Adams, Executive Director
Cherry Creek Arts Festival
2 Steele Street, Suite B-100
Denver, CO 80206
By email to terryadams@cherryarts.org and United States mail

Dear Ms. Adams:

I write to inquire about the current policy of the Cherry Creek Arts Festival with regard to the right of members of the public to engage, at your festival, in activities such as distributing flyers with political messages, holding signs with such messages, and soliciting signatures on petitions to place proposed measures on the ballot.

Almost every year, the American Civil Liberties Union (ACLU) receives inquiries from persons who have wanted to engage in such activities at various street fairs and festivals, including the Cherry Creek Arts Festival. According to the complaints, authorities at the street fairs have claimed the right to prohibit such activities or to exclude members of the public who engage in such activities in the geographic area covered by the street fair's permit.

The persons who have complained to the ACLU are understandably confused by their exclusion from the ordinarily-public streets, sidewalks, and parks.

When I first researched this issue many years ago, I found the 1994 Colorado Court of Appeals case of *Brandon v. Springspree*, 888 P.2d 357 (Colo. Ct. App. 1994). This decision appears to support the right of street fair organizers to exclude members of the public who wish to engage in certain free-speech activities in the area covered by the street fair's permit.

In more recent years, however, a number of federal courts have come to the opposite conclusion as the court in *Brandon*. In *Parks v. City of Columbus*, 395 F.3d 643 (6th Cir. 2005), the Sixth Circuit concluded that when a festival attendee does not interfere with or distort the message of a festival held in a public place, the festival cannot eject him. The Court held that the Columbus Arts Festival violated the First Amendment when it excluded an individual for wearing a sign and distributing religious literature.

The Ninth Circuit recently reached a similar conclusion. A street preacher challenged a city policy that gave permit holders the right to eject whomever they desired from their events. *Gathright v. City of Portland*, 439 F.3d 573, 575 (9th Cir. 2006). The court held that the policy was overbroad, because those who "seek[] only to be heard, not to have

his speech included or possibly confused with another's," have the right to spread their message during permitted events in public spaces.

The Eighth Circuit has also weighed in on this question. In *Wickersham v. City of Columbia*, 481 F.3d 591 (8th Cir. 2007), it considered restrictions on speech at a privately sponsored, open-to-the-public air show at a municipal airport. The court held that the organization promoting the event did not have the right to prohibit members of the public from passing out leaflets, carrying signs, or wearing clothing that expressed a message. The court explained that there was little risk that the views the attendees expressed would be mistakenly identified as the views of the event organizer, nor had the sponsor demonstrated that attendees' expressive activity undermined or interfered with the sponsor's message.

These courts conclude that a private party that obtains a permit to use public property for an event to which the general public is invited does *not* have an automatic right to exclude any and all free-speech activity. Members of the public who attend a privately-sponsored street fair on ordinarily-public property do not give up their First Amendment rights at the entrance. The exception, of course, is activities that undermine the message that the private permit-holder seeks to convey, in those cases where the permit-holder is in fact communicating a message.

The holdings of these federal courts apply with particular force in Colorado, where provisions of state law are even more protective of free-speech activities than the First Amendment. For example, in *Bock v. Westminster Mall*, 819 P.2d 55 (Colo. 1991), the Colorado Supreme Court relied on the state constitution's guarantee of free expression, Article II, Section 10, to hold that the owner of a privately-owned shopping mall did not have an automatic right to bar members of the public from entering the mall to distribute leaflets about an issue of public concern. If the private owners of commercial property in Colorado do not have an automatic right to exclude persons who wish to hand out leaflets, then surely a street fair, too, does not have an automatic right to exclude persons who wish to engage in the same activity on the streets, sidewalks, or park areas that are ordinarily open to the public.

Another provision of Colorado law may well provide even more legal protection for one particular form of free-speech activity: soliciting and collecting signatures for citizen-initiated ballot measures. The Colorado Constitution reserves to the people the right and power of initiative, and this right holds a favored place in the state constitutional scheme. The Colorado Supreme Court has described the power of initiative, like the right to vote, as "a fundamental right at the very core of our republican form of government." *McKee v. City of Louisville*, 200 Colo. 525, 530, 616 P.2d 969, 972 (1980). "[B]oth the right to vote and right of initiative have in common the guarantee of participation in the political process." *Loonan v. Woodley*, 882 P.2d 1380, 1383 (Colo. 1998). The Court has "has always liberally construed this fundamental right," and it has "viewed with the closest scrutiny" any alleged infringements on its free exercise. *McKee*, 200 Colo. at 530, 616 P.2d at 972. The act of soliciting signatures is an integral part of Colorado's fundamental state constitutional right of initiative. It also represents "core political speech" where the

constitutional protection of free expression is “at its zenith.” *Meyer v. Grant*, 484 U.S. 414, 424-25 (1988). Accordingly, in light of *Bock v. Westminster Mall* and the state constitution’s special protection of the initiative process, a blanket prohibition on signature-gathering in ordinarily-public spaces such as public parks, streets, and sidewalks would be analyzed “with the closest scrutiny.” *McKee*, 200 Colo. at 530, 616 P.2d at 972. In situations where the signature-gathering does not obstruct pedestrian traffic and does not interfere with the message of the permit holder, a street fair’s total ban on soliciting signatures may well be struck down.

We are getting close to another season of street fairs, a season in which there are a number of proposed ballot measures for which citizens will be circulating petitions and gathering signatures. I assume that the ACLU will once again receive complaints and inquiries from members of the public who are informed that they cannot hand out leaflets, hold signs, or solicit signatures at the street fairs.

I write to inquire about your current policies regarding these free-speech activities. If it is your policy to prohibit members of the public from handing out pamphlets, holding message-bearing signs, or soliciting signatures, I would ask you to review those policies in light of the legal authorities mentioned in this letter.

I look forward to your response and the opportunity for dialog about these issues.

Sincerely,

A handwritten signature in cursive script that reads "Mark Silverstein".

Mark Silverstein
Legal Director, ACLU of Colorado