IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

ERIC VERLO;
JANET MATZEN; and
FULLY INFORMED JURY ASSOCIATION

Plaintiffs,

v.

THE CITY AND COUNTY OF DENVER, COLORADO, a municipality; and
ROBERT C. WHITE, in his official capacity as chief of police for Denver;

Defendants.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs by and through attorney David Lane, hereby files this MOTION FOR PRELIMINARY INJUNCTION. The grounds for this motion are set forth fully herein:

This is a civil rights action for declaratory and injunctive relief as well as fees and costs arising under 42 U.S.C. §§ 1983, 1988 and 28 U.S.C. § 2201 *et seq*. due to defendants' current and imminent violations of plaintiffs' rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. Plaintiff brings this action for the constitutional injuries he is sustaining from the unconstitutional customs, practices and policies of Defendants in arresting peaceful protestors who are engaged in passing out literature in front of the Lindsey-Flannigan Denver County Courthouse informing passers by about the concept of jury nullification.[1] Plaintiffs wish to hand out

[1] "The right of a jury to render a verdict on the basis of the law as well as the

such literature but are chilled in their willingness and ability to do so based upon the arrests of two individuals for doing precisely that within the last two weeks, both charged with seven felony counts of jury tampering. (*See* attached exhibits).

I. INTRODUCTION AND BACKGROUND

All statements of fact set forth in the simultaneously filed Complaint are hereby incorporated into this Brief as though set forth fully herein.

II. PARTIES

All statements of fact regarding the parties set forth in the simultaneously filed Complaint are hereby incorporated into this Brief as though set forth fully herein.

III. LEGAL ARGUMENT

A. Plaintiffs Have a Particularly Strong Basis For Meeting The Preliminary Injunction Standard in a First Amendment Case

A plaintiff in a First Amendment case must meet four conditions to obtain a preliminary injunction: A Plaintiff must show that (1) they will suffer irreparable harm unless the injunction issues; (2) there is a substantial likelihood the Plaintiff ultimately will prevail on the merits; (3) the threatened injury to the Plaintiff outweighs any harm the proposed injunction may cause the opposing party; and (4) the injunction would not be contrary to the public interest.

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facts has been discussed by courts at least since *Bushell's Case*, [1670] 124 Eng. Rep. 1006 (C.P.) (granting habeas corpus relief to Edward Bushell, one of the members of the jury that acquitted William Penn and William Mead of preaching to a Quaker meeting, and who was then charged with contempt of court for failing to return a guilty verdict); *see also Jones v. United States*,526 U.S. 227, 244-48 (1999); *Sparf v. United States*, 156 U.S. 51, 64-106 (1895); *United States v. Polouizzi*, 564 F.3d 142, 161-63 (2d Cir. 2009); *United States v. Carr*, 424 F.3d 213, 219-21 (2d Cir. 2005); *United States v. Pabon-Cruz*, 391 F.3d 86, 89-91 (2d Cir. 2004); *United States. v. Thomas*, 116 F.3d 606, 612-19 (2d Cir. 1997); *United States v. Dougherty*, 473 F.2d 1113, 1130-37, 154 U.S. App. D.C. 76 (D.C. Cir. 1972); James Alexander, *A Brief Narration of the Case and Trial of John Peter Zenger* (1963)." *United States v. Heicklen*, 858 F. Supp. 2d 256, 260 n.1 (S.D.N.Y. 2012).

American Civil Liberties Union v. Johnson, 194 F.3d 1149, 1155 (10th Cir. 1999).

In a First Amendment case, the second condition--likelihood of success on the merits--plays a decisive role. Once plaintiffs have shown that their freedom of speech is burdened, the other conditions of an injunction will typically be met.

1. Irreparable Harm

When First Amendment rights are burdened, there is a presumption of irreparable harm. *See Cmty. Communications v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981); *Johnson*, 194 F.3d at 1163. The reason for the presumption is self-evident. As the Supreme Court stated, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976); *see also Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001)(court assumes irreparable injury where deprivation of speech rights). The denial of a public forum for is manifestly a prior restraint, and the injury is irreparable

2. Balance of Harms

The balance of harms test will most often be met once a First Amendment plaintiff demonstrates a likelihood of success on the merits. A threatened injury to plaintiffs' constitutionally protected speech will usually outweigh the harm, if any, the defendants may incur from being unable to enforce what is in all likelihood an unconstitutional statute or directive. *See Johnson*, 194 F.3d at 1163.

3. Public Interest

Plaintiffs can satisfy the "public interest test" because the denial of the public forum for passing out literature burdens their free speech rights. Injunctions blocking state action that would otherwise interfere with First Amendment rights are consistent with the public interest. *Elam Constr. v. Reg. Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir.1997)("The public interest...favors plaintiffs' assertion of their First Amendment rights."); *Utah Licensed Beverage*

Ass'n, 256 F.3d at 1076; *Johnson*, 194 F.3d at 1163; *Local Org. Comm., Denver Chap., Million Man March v. Cook*, 922 F. Supp. 1494, 1501 (D. Colo. 1996)

4. Success on the Merits

Plaintiffs have a strong likelihood of success on the merits because defendants' ban on passing out protected literature in the public forum infringes on plaintiffs' core First Amendment rights

In *Healy v. James*, 408 U.S. 169, 180-181 (1972) the Court made a powerful statement that people must be allowed to express disagreement about important issues. That such speech cannot be suppressed has become a well-worn touchstone of our nation's First Amendment jurisprudence.

Similarly, the Court has not wavered in its view that the government cannot abridge the expressive activities of peaceful assembly and association:

> Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition. See, *e. g.*, *Baird* v. *State Bar of Arizona*, 401 U.S. 1, 6 (1971); *NAACP* v. *Button*, 371 U.S. 415, 430 (1963); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293, 296 (1961); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (Harlan, J., for a unanimous Court).

Id. at 181. It is plain that Plaintiffs have a fundamental First Amendment right to express and explain their views in a public forum, and that citizens and passersby have a constitutionally protected right to peaceably assemble to hear those views, and to express their views in agreement or dissent.

As the Supreme Court observed in *Southeastern Promotions, Ltd. V. Conrad*, 420 U.S. 546, 552-53 (1975), Defendants' "action here is indistinguishable in its censoring effect from the official actions consistently identified as prior restraints in a long line of this Court's decisions. *See Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 150-151 (1969); *Staub* v. *City of Baxley*, 355 U.S. 313, 322 (1958); *Kunz* v. *New York*, 340 U.S. 290, 293-294 (1951); *Schneider* v. *State*, 308 U.S. 147, 161-162 (1939); *Lovell* v. *Griffin*, 303 U.S. 444, 451-452 (1938). Just as in the case presently before this Court, in these cases, plaintiffs asked the courts to provide relief where public officials

had forbidden the use of public places for protected speech. The restraints took a variety of forms, with officials exercising control over different kinds of public places under the authority of particular statutes. All, however, had this in common: they gave public officials the power to deny use of a forum in advance of actual expression." *Conrad, supra* at 552-3 (granting injunction to petitioners who alleged their First Amendment rights were violated by City that denied use of public forum to present theatrical production of "Hair"). The Court has consistently disallowed government prohibition of speech that was not the product of clearly established and content-neutral procedures for determining the propriety of the speech. "Invariably, the Court has felt obliged to condemn systems in which the exercise of such authority was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law." *Id.* at 553.

The fact that the conduct here at issue constitutes a restraint on speech *prior* to its occurrence carries substantial constitutional significance. The Supreme Court has analyzed it this way:

> The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. *See Speiser* v. *Randall*, 357 U.S. 513 (1958)."

The *de facto* prior restraint in this case is therefore constitutionally infirm, and must be enjoined to allow the speech to go forward.

1. The Defendants' Banning The Distribution Of Literature In The Public Forum Is An Unconstitutional Content-Based Discrimination Against Unpopular Speech.

The Supreme Court applies "the most exacting scrutiny" to restrictions that impose different burdens upon speech based on the viewpoint of the speaker. *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 642 (1994); *Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 105, 118 (1991). The Court analyzed this principle eloquently in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943): "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642. The Court reasoned:

> [a]s governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

Id. at 641. The Court in *Barnette* wisely observed that the protection of dissenting viewpoints, of views that stray far from the popular orthodoxy, is compelled by our Constitution, even where it hurts the most:

> we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the

> price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

Barnette, supra at 641-2. It is beyond debate that Defendants have banned Plaintiffs from the public square while expressing their viewpoints as those viewpoints are not aligned with the Defendants' accepted orthodoxy. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 413 n.9 (1989)("one's attitude toward the flag and its referents is a viewpoint"); *Barnette* 319 U.S. at 642 (constitution guarantees "right to differ as to things that touch the heart of existing order").

The First Amendment requires that the Defendants must allow the public forum to be used by Plaintiffs, notwithstanding the likelihood that Denver officials will disagree with the message being stated, notwithstanding the possibility that some who hear his speech may be made uncomfortable by it, and even assuming that some listeners may respond inappropriately or disruptively. The First Amendment tolerates no lesser result.

II. The Defendants Use Of The Jury Tampering Statute To Suppress Free Speech Cannot Be Countenanced By This Court.

Simply put, the Defendants are using the Jury Tampering statute as an excuse for squelching free speech. The Defendants are fearful that the message of jury nullification may take root in the minds of sitting jurors who would then ignore the instructions of a court and acquit criminal defendants despite their having been proven guilty at trial beyond a reasonable doubt. This misguided fear, however, is precisely why we have the First Amendment.

> Although "political speech by its nature will sometimes have unpalatable consequences, . . . in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). The First Amendment reflects "a profound national commitment to the principle that debate on

> public issues should be uninhibited, robust, and wide-open." *Snyder v. Phelps*, 131 S.Ct. 1207, 1215 (2011) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). "Indeed, the Amendment exists so that this debate can occur, robust, forceful, and contested. It is the theory of the Free Speech Clause that 'falsehood and fallacies' are exposed through 'discussion,' 'education,' and 'more speech.'" *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806, 2835 (2011) (Kagan, J., dissenting) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)). That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Snyder*,131 S.Ct. at 1215 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)).

United States v. Heicklen, 858 F. Supp. 2d 256, 271-72 (S.D.N.Y. 2012).

Because "[f]reedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person." *United States v. Alvarez*, __ U.S. __, 132 S.Ct. 2537, 2550 (2012), and because "[T]he purpose behind the Bill of rights, and of the First Amendment in particular [is] to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society" *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) this Court cannot permit this First Amendment violation to continue. As the Court observed in *Texas v. Johnson*, 491 U.S. 397, 414 (1989), "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Speech that is not controversial is unlikely to be suppressed and, therefore, in less need of protection. This is true even when society fears its effects. "Urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed." *McIntyre*, 514 U.S. at 347.

> "[T]he law is settled that as a general matter the First Amendment

prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (citations omitted). The test for determining whether a state official is engaging in a retaliatory action in response to free speech is simply whether he or she knew or should have known that such action would likely "deter a reasonable person from exercising his . . . First Amendment rights." *Couch v. Bd. of Trs. of the Mem. Hosp.*, 587 F.3d 1223, 1238 (10th Cir. 2009) (internal quotation marks omitted).

The Tenth Circuit's analysis applies the same test as most circuits:

> "Any form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom." *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000). Recently, we adopted the following test to assess a claim of retaliation for exercising one's freedom of speech "against a defendant who is neither an employer nor a party to a contract with the plaintiff," as is the case here. *See id.* at 1213. Such a plaintiff must prove: (1) he was engaged in constitutionally protected activity; (2) the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct. *See id.* at 1212.

Smith v. Plati, 258 F.3d 1167, 1176 (10th Cir. 2001); (*See also Van Deelen v. Johnson*, 497 F.3d 1151, 1155-56 (10th Cir. 2007); *Buck v. City of Albuquerque*, 291 F. App'x 122, 126 (10th Cir. 2008); *Smith v. Russom*, 2014 U.S. Dist. LEXIS 166188, *4 (D. Colo. Dec. 1, 2014)(Jackson, J.)).

It is hard to conceive of a bigger deterrent to free speech then the threat of immediate arrest, prosecution and incarceration. That is so because "fear of retaliation is the leading reason why people stay silent…" *Univ. of Tex. Sw. Med. Ctr. v.*

Nassar, 133 S.Ct. 2517, 2534-35 (2013). Clearly, "a person of ordinary firmness would be chilled from future exercise of his First Amendment rights if he were booked and taken to jail in retaliation for his speech." *Ford v. City of Yakima*, 706 F.3d 1188, 1194 (9th Cir. 2013).

The chilling effect standard is consistent with other federal court decisions in First Amendment retaliation cases brought under 42 U.S.C. § 1983. According to the Second Circuit, the test is whether the alleged adverse action "would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights." *Dillon v. Morano*, 497 F.3d 247, 254 (2d Cir. 2007) (internal quotation marks omitted). The Seventh Circuit held in 1994 that "even minor forms of retaliation can support a First Amendment claim, for they may have just as much of a chilling effect on speech as more drastic measures." *Smith v. Fruin*, 28 F.3d 646, 649 n.3 (7th Cir. 1994). Other circuits have done the same. *See, e.g., Passer v. American Chemical Society*, 935 F.2d 322, 331 (D.C. Cir. 1991) (finding actions that "humiliated [the employee] before the assemblage of his professional associates and peers from across the nation, and made it more difficult for him to procure future employment" to be adverse).

Surprisingly, there is but one case directly on point with the issue currently before this Court and unsurprisingly, it favors the right of free speech over specious jury tampering charges.

In *United States v. Heicklen*, 858 F. Supp. 2d 256 (S.D.N.Y. 2012) the defendant was indicted for jury tampering for passing out precisely the same sort of literature Plaintiffs in this case wish to distribute. On several occasions he stood in front of the

courthouse and distributed literature prepared by the Fully Informed Jury Association which is one of the Plaintiffs in this case.

Just as in the case presently before this Court, the New York federal Court found that the pamphlets essentially stated that a juror has not just the responsibility to determine the facts of a case before her on the basis of the evidence presented, but also the power to determine the law according to her conscience. *Id.* at 260. The court then had to determine whether the federal statute exempted the distribution of jury nullification literature from being considered jury tampering. This Court must do the same in analyzing the Colorado statute which reads in relevant part:

> (1) A person commits jury-tampering if, with intent to influence a juror's vote, opinion, decision, or other action in a case, he attempts directly or indirectly to communicate with a juror other than as a part of the proceedings in the trial of the case.

C.R.S. §18-8-609.

Applying both common sense and the law to the federal statute the New York federal Court concluded that the federal jury tampering statute could only be applied to:

> …a defendant[who is] trying to influence a juror upon any case or point in dispute before that juror by means of a written communication in relation to that case or that point in dispute. It also prohibits a defendant from trying to influence a juror's actions or decisions pertaining to that juror's duties, but only *if* the defendant made that communication in relation to a case or point in dispute before that juror. The statute therefore squarely criminalizes efforts to influence the outcome of a case, but exempts the broad categories of journalistic, academic, political, and other writings that discuss the roles and responsibilities of jurors in general, as well as innocent notes from friends and spouses encouraging jurors to arrive on time or to rush home, to listen closely or to deliberate carefully, but with no relation to the outcome of a particular case.

Heicklen, 858 F. Supp. 2d at 266. In other words, in order to be guilty of jury tampering, "…the statute [must] require that a defendant must have sought to influence a juror through a written communication in relation either to a specific case before that juror or to a substantive point in dispute between two or more parties before that juror. *Id.*

The Court, anticipating the case presently before this Court cautioned that "a broad reading of 18 U.S.C. § 1504 could raise First Amendment problems because of its potential to chill speech about judicial proceedings." *Id.*

Without question, Plaintiffs wish to engage in protected speech but are chilled from doing so because of the imminent and serious threat of immediate arrest. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const., amend. I. The Supreme Court has emphasized that "the First Amendment does not speak equivocally. . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Richmond Newspapers, Inc. v. Virginia*. 448 U.S. 555, 576 (1980) (internal quotations omitted).

The *Heicklen* court held that in order to suppress speech, there must be a "clear and present danger" to the administration of justice. It must be both "imminent" and likely to materialize. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Turney v. Pugh*, 400 F. 3d 1197, 1202 (9th Cir. 2005); *see also Locurto v. Giuliani*, 447 F.3d 159, 179 (2d Cir. 2006) (reiterating the salience of the "clear and present danger test" in a different First Amendment context)." *Id.* at 273. The court resoundingly rejected the government's position and held that "[t]he relevant cases establish that the First Amendment squarely protects speech

concerning judicial proceedings and public debate regarding the functioning of the judicial system, so long as that speech does not interfere with the fair and impartial administration of justice." *Id.* at 274.

The Defendants presently before this Court are attempting to do what oppressive governments have sought to do from time immemorial; suppress ideas they find unpalatable. As the *Heicklin* court so eloquently stated:

> The essence of the First Amendment is that falsehood and fallacies are exposed more effectively through discussion than through suppression, and that public debate affords adequate protection against the dissemination of "noxious doctrine." *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J. concurring); *see also Abrams v. United States*, 250 U.S. 616, 630-631 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .").

Heicklin at 275 n.23 .

IV. CONCLUSION

As Justice Hugo Black succinctly observed: "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Communist Party* v. *SACB*, 367 U.S. 1, 137 (1961). For the reasons stated, Plaintiffs respectfully request that this Court grant their Motion for a Preliminary Injunction and prohibit Defendants from arresting Plaintiffs and all others similarly situated when they engage in the protected activity of handing out jury nullification informational pamphlets in the plaza of the Lindsey-Flannigan courthouse in Denver, Colorado.

Dated this 17th day of August 2015.

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