



FIRE

Foundation for Individual
Rights and Expression

July 16, 2024

Sent Via FedEx Overnight Shipping and Email

Stephen Rosenthal, House Chief Sergeant-At-Arms
200 E. Colfax Avenue
Denver, Colorado 80203
house.sergeants@coleg.gov

Frank Lombardi, Senate Chief Sergeant-At-Arms
Benjamin Trujillo, Senate Sergeant-At-Arms
c/o Cindi Markwell, Secretary of the Senate
200 E. Colfax Avenue
Denver, Colorado 80203
cindi.markwell@coleg.gov

**Re: Ban on Apparel Expressing Political Statements in Colorado State
Capitol Public Galleries**

Dear Sergeants-At-Arms Lombardi, Rosenthal, and Trujillo:

The Foundation for Individual Rights and Expression¹ is writing to demand that the Colorado House and Senate Sergeants-At-Arms refrain from enforcing the ban on pins and apparel “expressing political statements” in the public galleries of their respective chambers. This rule violates the First Amendment rights of Coloradans, including our client Jeffrey Hunt, who wish to engage in silent, nondisruptive political expression through pins and apparel.

On March 21, 2023, Mr. Hunt visited the Colorado Capitol with colleagues from Colorado Christian University to oppose three bills that would regulate crisis pregnancy centers. Hunt wore a sweatshirt reading “Pro-Life U” (referring to the University) and silently sat in the Colorado Senate gallery to watch the floor

¹ FIRE is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the most essential qualities of liberty.

proceedings.² Sergeant-At-Arms Ben Trujillo approached Hunt and instructed him to exit the gallery. Hunt complied. After leaving the gallery, Trujillo told Hunt that “Pro-Life U” was a “political statement” prohibited by a rule banning “pins or apparel expressing political statements” (“Capitol Gallery Rule”).³

Hunt disputed the rule applies to his sweatshirt, so Trujillo requested Chief Sergeant-At-Arms Frank Lombardi evaluate Hunt’s apparel. Lombardi agreed “Pro-Life U” was a “political” message prohibited by the Capitol Gallery Rule. They gave Hunt a choice: Remove the sweatshirt or forfeit his ability to watch his state government from the gallery. Unwilling to sacrifice his First Amendment rights, Hunt chose the latter and waited outside the gallery alone while his colleagues remained inside.

The Capitol Gallery Rule’s ban on “political” pins and apparel violates the First Amendment. “[S]peech on public issues occupies the highest rung on the hierarchy of First Amendment values and is entitled to special protection.” *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (cleaned up). That is because “[s]peech concerning public affairs is more than self-expression; it is the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). When the government seeks to silence political expression, it bears a heavy burden to justify its censorship. The Capitol Gallery Rule cannot meet that high bar.

To start, regulations on speech must be capable of reasoned application. The Capitol Gallery Rule is not. In 2018, the Supreme Court of the United States struck down a ban on “political apparel” in polling places because the restriction did not provide sufficient guidance for government officials and the public to understand what constituted “political” apparel. *Minn. Voters All. v. Mansky*, 585 U.S. 1, 8, 21–22 (2018). So too here: The Capitol Gallery Rule does not explain what it means for apparel to express a “political” statement. As in *Mansky*, it is unclear whether “Support Our Troops” or “#MeToo” shirts would run afoul of the rule. *Id.* at 19. Sergeants-At-Arms wield unbridled discretion to decide whether someone’s apparel or pin is “political.” That boundless discretion violates the First

² Jeff Hunt (@jeffhunt), TWITTER (Mar. 21, 2023, 12:55 PM), <https://twitter.com/jeffhunt/status/1638222825969573890> [<https://perma.cc/USG8-A96Z>]; see also Evita Duffy-Alonso, *Colorado Man Thrown Out of State Senate Gallery for Wearing Pro-Life Sweatshirt*, THE FEDERALIST (Mar. 23, 2023), <https://thefederalist.com/2023/03/23/colorado-man-thrown-out-of-state-senate-gallery-for-wearing-pro-life-sweatshirt> [<https://perma.cc/MY3P-V392>].

³ *Visit and Learn*, COLO. GEN. ASSEMB., <https://leg.colorado.gov/node/1020196> [<https://perma.cc/HL72-5AA9>]. The gallery rule applies to both the House and Senate galleries.

Amendment and censors Coloradans, like Mr. Hunt, who wish to silently express themselves while watching their democracy in action.

The Capitol Gallery Rule is also an unlawful content-based restriction on speech: Whether a visitor may sit in the gallery depends on what their clothing says. Content-based restrictions are noxious to free expression because officials may “wield such [policies] to suppress disfavored speech.” *Reed v. Town of Gilbert*, 576 U.S. 155, 167 (2015). Content-based restrictions “are presumptively unconstitutional and may be justified only if . . . narrowly tailored to serve compelling state interests.” *Id.* at 163. Suppressing silent, nondisruptive political expression is not a permissible—let alone compelling—interest in a state capitol. And a rule prohibiting nondisruptive political expression in a public gallery is not reasonable in light of the purpose of the gallery—ensuring Colorado’s legislature is open and accessible to members of the public interested in pending legislation.

Moreover, House and Senate officials enforce the Capitol Gallery Rule in a viewpoint-discriminatory manner, which is “an egregious form of content discrimination.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).⁴ Just weeks before banning Hunt from the gallery because of his conservative “political” sweatshirt, Senate Sergeants-At-Arms permitted students wearing pro-gun control “Angels Against Gun Violence” shirts to sit in the gallery undisturbed.⁵ Enforcing a rule differently because of a speaker’s message is repugnant to the Constitution. *See Iancu v. Brunetti*, 588 U.S. 388, 399 (2019) (Alito, J., concurring) (“Viewpoint discrimination is poison to a free society.”).

After the Sergeants-At-Arms ejected Hunt from the Senate Gallery, Secretary of the Senate Cindi Markwell justified the Capitol Gallery Rule to the media by claiming the rule only “limit[s] expression of support or opposition on matters [the Senate] is debating.”⁶ Markwell’s post hoc explanation to reporters appears nowhere in the text of the rule, on the website, nor is it posted outside the galleries.

⁴ The First Amendment’s ban on viewpoint discrimination extends to the administrative functions of state legislatures. *See Kamplain v. Curry Cnty. Bd. of Comm’rs*, 159 F.3d 1248, 1251 (10th Cir. 1998).

⁵ Matt Bloom & John Daley, *Denver students walk out of East High Friday to rally against gun violence at Colorado Capitol*, DENVERITE (March 3, 2023, 9:19 AM), <https://denverite.com/2023/03/03/denver-students-walk-out-of-east-high-friday-to-rally-at-colorado-capitol/> [<https://perma.cc/PX7P-HX3K>].

⁶ Chris Perez, *Educator Weighing Legal Action After Being Booted From Senate Gallery for Pro-Life Sweatshirt*, WESTWORD (Mar. 31, 2023), <https://www.westword.com/news/pro-life-u-senate-gallery-sweatshirt-colorado-capitol-jeff-hunt-legal-lawsuit-16518295> [<https://perma.cc/Y5NW-WLYT>].

Markwell also told reporters “[t]he purpose of the policy is to avoid conflict between opposing sides on any particular issue.”⁷ But a separate rule already prohibits disturbances in the gallery,⁸ and Sergeants-At-Arms are, of course, free to prohibit actual disruption without policing silent protected expression. Critically, the First Amendment prohibits the government from censoring peaceful expression out of fear someone’s opinion will cause “conflict.” American democracy is built on peaceful, respectful disagreement. And at least since the 1896 presidential race between William McKinley and William Jennings Bryan, political regalia has been mass produced and omnipresent in American political communication.⁹ Indeed, if the government cannot limit the “silent, passive expression”¹⁰ of teenagers wearing anti-war armbands in a public high school, then it certainly has no power to prohibit adults from wearing politically expressive apparel in a state capitol.

The rule banning pins and apparel “expressing political statements” from the Colorado Senate and House Galleries is an ongoing violation of the First Amendment rights of our client and all Coloradans. Mr. Hunt wishes to return to the Senate and House galleries during the 2025 General Assembly wearing clothing expressing his viewpoints on important public issues. Unless and until the Sergeants-At-Arms cease enforcing this unconstitutional ban, he cannot.

Please provide written confirmation no later than the close of business on **Tuesday, July 30, 2024**, that the Colorado House and Senate Sergeants-At-Arms will refrain from enforcing the ban on “pins and apparel expressing political statements” and that signage in the Colorado State Capitol communicating this unconstitutional rule has been removed.

We are hopeful you will honor your obligation to respect and uphold the First Amendment rights of all Coloradans. Otherwise, FIRE will file a lawsuit and seek the full array of remedies including damages and attorney’s fees.

Thank you for your prompt attention to this matter. Please do not hesitate to contact us with any questions.

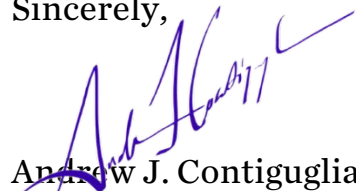
⁷ Perez, *supra* note 6.

⁸ *Visit and Learn*, *supra* note 3.

⁹ Kathleen Moenster, *Artifact of the Month: Political Campaign Buttons*, NAT’L PARKS SERV. (Feb. 8, 2019), <https://www.nps.gov/jeff/blogs/political-campaign-buttons.htm>.

¹⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

Sincerely,



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cc: Senator Steve Fenberg, President of the Senate
Representative Julie McCluskie, Speaker of the House