County Court, City and County of Denver, Colorado 1437 Bannock Street Denver, CO 80202	
People of the City of Denver vs. Defendants: David Baird; Paul Bame; Sharon Braun; Jordon Garcia; Ellen Klaver; Elizabieta Kosmicki; Hanne Leschly; Mackenzie Liman; Paul D. Lopez; Alicia Lucero; Judith Lujan; Ciam Mail; Anna Mansouri; Ruba Mansouri; Martinique Marron; Stephanie Martinez; Magalina Martinez; Jennifer Martinez-Moore; Morgan Matter; Kasey McQueen; Mary Kay Meintzer; Inocencio Mendoza; Brianna Mestas; Allison Miller; Ross Miller; Timothy Moen; Henrika Monnet; Zeke Moreland; Jennifer Murphy; Laura Naranjo; Christopher Nelson; Lindsay Nerad; Victoria Nevarez; Erin Odonnell; Dennis Ortega; Jay Ottenstein; Mae Pagett; Theresa Panian; Lauren Parks; Val Phillips; Sabin Portillo; Robert Prior; Stacey Proctor; Devin Razavi-Shearer; Junior Reinatoc; Chris Riederer; Ruby Sanchez; Yvonne Sandoval; Mark Sass; Mark Schneider; Andrew Scott; Eileen Shendo; Danielle Short; Kristina Sickles; Maxine Sigala; Scott Silber; Elizabeth Simmons; Sarah Slater; Ashley Spicer; Mathew Thompson; Peter Tierney; Adam Tinnel; Patricia Torres; Adrienne Tsikewa; Kevin Tucker; Trevor Uberuaga; Chris Ulrich; Aubrey Valencia; Carla Vialpondo; Deborah Watt; Rena Weber; Jessica Weirich; Karyn Wells; Benjamin Whitmer; Tanya Wollerman; Shirley Worthel; Amber Zamora	▲ COURT USE ONLY ▲

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MOTION TO DISMISS ALL CHARGES AND RECITATION OF AUTHORITY

HATE SPEECH

The above Defendants, by and through their attorneys, respectfully submit their Motion to Dismiss All Charges and Recitation of Authority, stating as follows:

1. All of the above Defendants were arrested on October 11, 2004, while attending and protesting against the Columbus Day Parade—a parade for which the City of Denver ("Denver" or "the City") had wrongfully and unconstitutionally issued a permit. No one was injured nor was any property damaged during Defendants' peaceful activity.

2. Defendants contend that they were engaged in entirely lawful conduct and that the charges pending against them should be dismissed as invalid and unconstitutional because the Columbus Day Parade was an act of hate speech and ethnic intimidation prohibited by the United States Constitution and Supreme Court precedent, Colorado statutes, and controlling international law.

SUMMARY OF THE ARGUMENT

3. Not all speech or expressive activity is protected by the First Amendment to the United States Constitution ("the First Amendment").

4. The Columbus Day Parade ("Parade") constituted hate speech and ethnic intimidation, perversely "celebrating" the genocide of native peoples. As such, it was unprotected by the First Amendment, and impermissible under the laws of the United States, of Colorado, and international law. As set out below, Defendants had an affirmative duty to peacefully take action to oppose such wrongful conduct, just as they would have been justified to do were the Paraders marching through the streets with the sanction of the government, burning crosses before black citizens in an attempt to incite violence and harm the community.

5. United States Supreme Court case law, the statutes of Colorado and international law make it clear that Defendants had not only the right to take the action that they did, but the duty to so act.

ARGUMENT

6. Defendants are ardent supporters of every person's First Amendment rights, including the rights of the Paraders, when such person's activity are permissible under the law. The Defendants agree that the First Amendment creates a marketplace of ideas that stimulates and strengthens democracy. Such agreement does not run counter to a formulation of the First Amendment under which hate speech is not protected; and rather is regulated. In fact, this progressive approach to the First Amendment is supported by Supreme Court jurisprudence and Colorado state laws.

7. The First Amendment, however, does not protect all speech or expressive activity. As Justice Scalia explained in *R.A.V. v. St. Paul*: "From 1791 to the present . . . our society . . . has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" 505 U.S. 377, 382-83 (1992). Among the categories of unprotected speech is intimidating "hate-speech." *See Virginia v. Black,* 538 U.S. 343 (2002).

8. In *Virginia v. Black*, the United States Supreme Court upheld a Virginia statute that criminalized cross burning carried out with the intent to intimidate. *Id.* In *Black*, three defendants were convicted separately of violating the cross-burning statute. Defendant Black had organized a Ku Klux Klan rally where a cross was burnt. *Id*. at 348. The cross burning was visible to people who were not attending the rally, including Rebecca Sechrist, who watched the rally and cross burning from a near-by property. *Id.* Ms. Sechrist heard the rally participants make racist and violent statements and testified that the language made her "very . . . scared." *Id.* at 348-49. Ms. Sechrist also witnessed the cross burning and stated it "made her feel 'awful' and 'terrible.'" *Id.* at 349.

9. The two other defendants in *Black* were Richard Elliot and Jonathan O'Mara who attempted to burn a cross on the yard of James Jubilee, apparently in retaliation for Mr. Jubilee's complaints about Mr. Elliot's shooting firearms in his backyard. *Id.* at 350. Jubilee stated that seeing the cross on his yard made him "very nervous . . . [I] didn't know what would be the next phase." *Id.*

10. The Supreme Court upheld the constitutionality of the Virginia statute and explained, "Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence."[1] *Id.* at 363. In upholding the statute, Justice O'Connor, writing for the Court, explained the history of cross burning and its connection to the Ku Klux Klan and violence. *See id.* at 352-57. Justice O'Connor explained: "Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan." *Id.* at 353. Further, "cross burnings have been used to communicate both threats of violence and messages of shared ideology . . . . The burning of a cross is a 'symbol of hate.'" *Id.* at 354, 357.

11. Intimidating hate speech is therefore unprotected and may be banned in order to "protect individuals from the fear of violence and from the disruption that fear

[1] Virginia, or any other state, could also ban all intimidating hate speech. The Court explained that Virginia decided that burning a cross is a "particularly virulent form of intimidation" and chose to only regulate this form of intimidating hate speech. *Virginia v. Black*, 538 U.S. at 363. This does not mean that cross burning is the only type of unprotected hate speech, it was simply the type that Virginia felt the need to address. In *R.A.V. v. St. Paul*, the Supreme Court explained: "When the basis for the content discrimination [banning intimidating cross burning, not all intimidating hate speech] consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." 505 U.S. at 388.

engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Id.* at 360 (internal quotation marks omitted) (citing *Watts v. United States,* 394 U.S. 705; *R.A.V.,* 505 U.S. at 388).

12. Though not directly addressed by the Supreme Court, legal scholars have suggested that hate speech may also be unprotected on the basis of interference with equality. *See* N. Douglas Wells, *Whose Community? Whose Rights? – Response to Professor Fiss*, 24 CAP. U.L. REV. 319, 327-28 (1995) [hereinafter Wells]. Wells explains: "The importance of equality seems intrinsic within the First Amendment." *Id.* at 327. The Supreme Court's decisions in both *Brown v. Bd. of Ed.* and *Austin v. Mich. Chamber of Commerce* stress the high value of equity in our society. *See Brown v. Bd. of Ed.,* 347 U.S. 483 (1954) (holding that "separate but equal" public education is unconstitutional and deprives African-American children of equal protection of the laws guaranteed by the Fourteenth Amendment); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) (upholding the Michigan Campaign Finance Act, which prohibits corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office).

13. In *Austin*, the Supreme Court noted that "the political advantage of corporations is unfair" and that "the compelling governmental interest in preventing corruption supports the restriction of the influence of political war chests funneled through the corporate form." *Austin*, 494 U.S. at 659 (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)). The Supreme Court therefore appears willing to sacrifice some First Amendment rights of corporations in order to ensure a more equal political process, free from corruption or the appearance of corruption.

14. Also, the Supreme Court's opinion in *Brown* stresses the importance of equality in public education. *Brown,* 347 U.S. at 493 (explaining that segregation of children solely on the basis of race deprives children in the minority group of equal educational opportunities). The opinion also relies on the effects of segregation on minority children. *See id.* at 493-94. Wells explains that this language may present a third rationale for regulating hate speech: the effect upon its victims. *See* Wells, *supra*, at 320 ("A noteworthy aspect of the Supreme Court's opinion in *Brown* was its acknowledgement of the tangible manifestations of the psychological effects of racism on its victims . . . Racist hate speech is in several respects nearly as injurious to racial minorities as the *de jure* segregation in education which the Supreme Court confronted in *Brown v. Board of Education*."). In fact, *Black* also notes the effects that the cross burning had on both victims and those who happened to observe the burning. *See Black,* 538 U.S. at 349-50.

15. Ethnic intimidation is further unprotected under Colorado law. C.R.S. §§ 31-21-106.5 and 18-9-121 (Lexis 2004). These Colorado statutes allow for criminal prosecution and civil damages for ethnic intimidation. C.R.S. § 18-9-121 explains: "it is the right of every person, regardless of race, color, ancestry, religion, or national origin, to be secure and protected from fear, intimidation, harassment, and physical harm caused by the activities of individuals and groups." C.R.S. 18-9-121(a).

16. Hate speech may therefore be regulated and is unprotected based on several different rationales. First, intimidating hate speech is expressly regulated by C.R.S. §§ 31-21-106.5 and 18-9-121. The Supreme Court's opinion in *Virginia v. Black* allows such speech to be banned. Second, hate speech may be unprotected because it conflicts with the high national value of equality as demonstrated in *Brown* and *Austin*. Finally, hate speech may be unprotected because of the effect that it has upon its victims.

Definition and History of Hate Speech

17. Hate speech has been defined as words that are persecutorial, hateful, and degrading, which promote a message of trait-based inferiority. *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L.REV. 2320, 2332 (1989). It targets an oppressed group with a conscious design to encourage hatred on the basis of race, religion, ethnicity, national origin, or gender, and is engaged in to retain power and control over that oppressed group. *See* Samuel Walker, Hate Speech: The History of An American Controversy 8 (1994) (explaining that Human Rights Watch has defined hate speech as "'any form of expression regarded as offensive to racial, ethnic and religious groups and other discrete minorities, and to women'"); Laura J. Lederer, *Pornography and Racist Speech as Hate Propaganda*, in The Price We Pay 131 (Laura J. Lederer & Richard Delgado eds., 1995) (hereinafter "Lederer").

18. Hate speech has been used to "exclude, subordinate, discriminate against, and create second-class citizenship for entire groups of people," which invariably perpetuates a system of inequality and exclusion. It is a crude mechanism not only to intimidate and humiliate, but also to silence opposition. *See Lederer* at 131.

19. More significantly, certain types of expression have been recognized as hate speech and regulated since World War II because of their potential for inciting violence, indeed genocidal actions, against oppressed minorities. *See* Friedrich Kumbler, *How Much Freedom for Racist Speech? Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335, 336 (1998) (hereinafter "Kumbler"). In 1946 the International Military Tribunal at Nuremberg, which was organized at the insistence of the United States and whose chief prosecutor was Supreme Court Justice Robert H. Jackson, convicted Julius Streicher, the publisher of an anti-Jewish newsletter and sentenced him to death for crimes against humanity because his publications "incited the German people to active persecution." *See* 22 Trial of the Major War Criminals Before the International Military Tribunal 547, 547 (1948). At that trial, Justice Jackson, in his role as Chief Prosecutor, assured the world that this was not simply "victor's justice" saying, , "If certain acts and violations of treaties are crimes, they are crimes whether the United States does them or whether Germany does them. We are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us." *Quoted in* Bertrand Russell, War Crimes in Vietnam 125 (1967); *see also* Robert H. Jackson, The Nurnberg Case (1947). *Even German judges were held liable for crimes against humanity, among other things, and given sentences up to life imprisonment in subsequent Nuremberg Tribunals for*

failing to uphold such basic principles of international law. Case No. 3, Nuremberg Docket (*The Justice Case*); *see* John Alan Appleman, Military Tribunals and International Crimes (1954, reprinted 1971), at 157-162.

20. After witnessing the horrendous brutality of Nazi Germany, which began with hate propaganda against targeted groups, the international community, represented by the United Nations, promoted the inherent worth of each person as the primary human right in need of protection. *See* U.N. Charter, Pmbl. (1945); Universal Declaration of Human Rights, art. 7 G.A. Res. 217(A), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948). *See also,* International Covenant on Civil and Political Rights, supra ¶ 5, art. 19 (stating that "freedom of expression" is restricted by the rights of others); *Id*. art. 20(2) (stating that "(a)ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law"). Such an approach to individual dignity warrants government protection, and it justifies limiting the "right" of others to vent harmful and degrading hate-based speech. *See* International Covenant on Civil and Political Rights, *See id* at art. 19 and 20(2) (stating that "(a)ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law"). In fact, hate speech is routinely criminalized in the nations of Europe. *See id. supra*, ¶ 5.

21. More specifically, prompted by the clear links between racist propaganda, the Holocaust, and other genocidal tragedies, various international covenants and individual countries have excluded hate speech from the scope of protected expression and recognized it as criminal conduct. Thus, while Article 19 of the International Covenant on Civil and Political Rights (ICCPR) protects freedom of expression, it also recognizes it as a restricted right, and one accompanied by concomitant responsibilities, and Article 20 explicitly states that "(a)ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." ICCPR, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, ratified by the U.S. 1992). The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), is even clearer, stating in Article 4:

> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour (*sic)* or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end . . .
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement of racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour *(sic)* or ethnic origin. . .

See also, International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, art. 20(2), 999 U.N.T.S. 171, S. Exec. Doc. E, 95-2 (1978) (entered into

force Mar. 23, 1976); U. N. Charter, Pmbl. (1945); Universal Declaration of Human Rights, art. 7 G.A. Res. 217(A), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948); International Convention on the Elimination of All Forms of Racial Discrimination, art. 4 opened for signature Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195; International Covenant on Civil and Political Rights, art. 20, G.A. Res. 2000(A) (XXI), U.N. GAOR, 21st Sess.,Supp. No. 16, at 52, U.W.; Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L., 1, 1 (1996); Scott Catlin, *A Proposal for Regulating Hate Speech in the United States: Balancing Rights under the International Covenant on Civil & Political Rights*, 69 NOTRE DAME L. REV. 771, 794-800 (1994).

22. In 1994 the United Nations established the International Criminal Tribunal for Rwanda (ICTR) to hold accountable those most responsible for the genocidal murders of an estimated 800,000 Rwandans. *See* Statute for the International Tribunal for Rwanda, 33 I.L.M. 1602, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1600. On December 3, 2003, the ICTR, in *Prosecutor v. Nahimana, Barayagwiza, and Ngeze (The Media Case)*, Case No. ICTR99-52-T, convicted three media executives whose newspaper and radio station promoted ethnic hatred. They were found guilty of genocide, direct and public incitement to genocide, conspiracy to commit genocide, and two crimes against humanity – persecution and extermination. *See Recent Cases: International Law – Genocide – U.N. Tribunal Finds That Mass Media Hate Speech Constitutes Genocide, Incitement to Genocide, and Crimes Against Humanity,* 117 Harv. L. Rev. 2769 (2004).

23. The United States has long recognized that it is bound by international law. Article VI of the Constitution of the United States provides that the Constitution, the laws made pursuant to it, and "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. Art. VI, cl. 2. The Supreme Court stated in 1900 in The Paquete Habana that "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." For this purpose, where there is no treaty, and no controlling executive or legislative 175 U.S. 677,700 (1900) (citing Hilton v. Guyot, 159 U.S. 113, 163, 164, 214, 215). According to the Restatement (Third) of the Foreign Relations Law of the United States, "International law is law like other law, promoting order, guiding, restraining, regulating behavior. . . . It is part of the law of the United States, respected by Presidents and Congresses, and by the States, and given effect by the courts." (pt. I, ch. 1 (1987)).

24. The United States was instrumental not only in the establishment and judgments of the Nuremberg Tribunal, but in the founding of the United Nations. It is bound by the UN Charter and the Universal Declaration of Human Rights, which is recognized as customary law, binding on all states. Furthermore, the United States played a key role in the drafting of the international treaties which commit governments to prohibit hate speech. It has signed and ratified both the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All

Forms of Racial Discrimination. *See* U. N. Charter, Pmbl. (1945); Universal Declaration of Human Rights, art. 7 G.A. Res. 217(A), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948); International Convention on the Elimination of All Forms of Racial Discrimination, art. 4 opened for signature Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195; International Covenant on Civil and Political Rights, art. 20, G.A. Res. 2000(A) (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.W.; [ADD ICERD] *see also* Jordan Paust, International Law as Law of the United States (2nd ed. 2003); Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L., 1, 1 (1996); Scott Catlin, *A Proposal for Regulating Hate Speech in the United States: Balancing Rights under the International Covenant on Civil & Political Rights*, 69 NOTRE DAME L. REV. 771, 794-800 (1994).

25. Reluctance to regulate hate speech in the United States may be partially attributed to a traditional characterization of the First Amendment as a prohibition against government interference, rather than as an imposition of a positive duty on government to guarantee the receipt and transmission of ideas among its citizens. Americans' general understanding of the First Amendment as protecting against government intrusion may stem from a strong preference for privileging the liberty of some over equality for all, as well as a commitment to individualism and a natural rights tradition derived from Locke which champions freedom from the state (negative freedom) over freedom through the state (positive freedom). *See* Isaiah Berlin, Four Essays on Liberty 118-72 (1969).

26. Regardless of the origins of an absolutist notion of free speech, speech has been consistently limited by the United States government, for the public good, throughout its history. For example, the Supreme Court has long recognized that the government may regulate certain categories of expression consistent with the Constitution. See, *e.g.*, *Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572, 86 L. Ed. 1031, 62 S. Ct. 766* (1942). For example, the *First Amendment* permits a State to ban "true threats," *e.g., Watts v. United States, 394 U.S. 705, 708, 22 L. Ed. 2d 664, 89 S. Ct. 1399 (per curiam),* which encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals, see, *e.g., id., at 708*. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur. *R. A. V., supra, 505 U.S. at 388*. *See Black,* 538 U.S. at 357. *See also, Beauharnais v. People of State of Ill.,* 343 U.S. 250, 72 S.Ct. 725, 735 (1952), where the Supreme Court applied the rule that libelous speech was not within the realm of protection under the First Amendment. In

Beauharnais the Court upheld the constitutionality of a statute criminalizing group defamation based on race or religion.[3]

27. Of course, for forty years Congress has prohibited intimating/hate speech relating to racist, as well as other types of intimidation. 42 U.S.C. 2001(e). *See, e.g., Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993) (Title VII's prohibition against discrimination with respect to "terms, conditions, or privileges of employment" *based on race*, color, religion, sex, or national origin is not limited to economic or tangible discrimination, but extends to entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in discriminatorily hostile or abusive environment. Civil Rights Act of 1964, §§ 701 et seq., 703(a)(1), as amended, 42 U.S.C. 2000(e)).

28. To refuse to extend such limitations to hate speech invariably sacrifices protection for oppressed groups. Empirical evidence suggests that expressed ideas about other members of the national community significantly influence peoples' perspectives on interpersonal relations and bigotry developed over an extended period of time has led to crimes against humanity.[4] Preconceived notions about oppressed groups influence how they are treated,[5] and for this reason has been recognized as unprotected speech under the First Amendment.

The Columbus Day Celebration is Hate Speech and Therefore Unprotected

29. The Columbus Day Celebration constitutes hate speech and ethnic intimidation and is unprotected because it is threatening, intimidating, it degrades equality, assaults the victim of the activity and has an intentionally and damaging negative effect on its victims.

30. Christopher Columbus came to the "new world" to find wealth and to capture this wealth for himself at any expense. *See* Samuel Eliot Morison, *Journals and Other Documents on the Life and Voyages of Christopher Columbus* (Heritage Publishers 1963). In 1493, Columbus installed himself as "viceroy and governor of [the Caribbean islands] and the mainland" of America. *See* Benjamin Keen, trans., *The Life of Ferdinand* at 105-6 (Rutgers Univ. Press 1959). Columbus's reign as governor was marked by policies of slavery and extermination of the indigenous population. *See, e.g.,* Troy Floyd, *The Columbus Dynasty in the Caribbean, 1492-1526* (Univ. of N.M. Press 1973). For example, *approximately five million native Taino people were killed during the first three years of Columbus's reign*. *See* Sherburn F. Cook and Woodrow Borah, *Essays in Population History,* V.1, Chap. VI (Univ. of Cal. Press 1971). Millions more indigenous people were killed by slavery, starvation and disease during Columbus's time as governor.

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[3] Although *Beauharnais* arguably may be inconsistent with more recent decisions by the Court, it has never been repudiated, and is instructive in this case.

[4] *See* David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 462 (1987).

[5] *See* Richard Delgado & Jean Stefancic, *Ten Arguments Against Hate-Speech Regulation: How Valid?*, 23 N. KY. L. REV. 475, 478 (1996).

31. Columbus's injury to the native populations of the Americas did not end with his regime, however. Those who followed Columbus to the "new world" continued to conquer and slaughter the indigenous people. *See, e.g.,* E. Wagner and Allen E. Stern, *The Effects of Smallpox on the Destiny of the Amerindian* at 44-45 (Bruce Humphries, Inc. 1945) (noting that British forces intentionally infected American Indians with smallpox by passing on blackest and handkerchiefs from a smallpox hospital); David Svaldi, *Sand Creek and the Rhetoric of Extermination: A Case Study in Indian-White Relations* (University Press of America 1989) (explaining how the American government and corporations sought the extermination of the American Indian). Such programs of extermination and "assimilation" are not all far removed from the present time. Policies of boarding schools and blind adoptions to non-Indians have been forced upon Native American children since the early 1900s. *See* Tille Blackbear, "American Indian Children: Foster Care and Adoptions," in Office of Educational research and Development, National Institute of Educational Research and Development, National Institute of Education, *Conference on Educational and Occupational Needs of American Indian Women* at 185-210. Further, as recently as the 1970s American Indian women were forced to undergo involuntary sterilization. *See* Brent Dillingham, "Indian Women and HIS Sterilization Practice," *American Indian Journal,* V.3, No. 1, at 27-8 (Jan. 1977).

32. The Columbus Day Celebration is, in effect, a celebration of the murder, sterilization and attempted extermination of indigenous peoples. It is a reveling in genocide, where the marchers gleefully throw candy and chant at the survivors of Columbus' racist and homocidal madness. As such, the celebration has a very harmful and damaging effect on the Defendant victims and society as a whole. Accordingly, it is unprotected speech.

33. Like the cross-burning observers in *Virginia v. Black*, observers of the celebration are threatened, subjected to the genocidal glee of the Paraders under the approval and sanction of the government. They are intentionally scared by the Paraders and consequently experience severe emotional damage. Evidence at the hearing of this motion will demonstrate that the Defendants, as in *Black,* felt "terrible" and "awful" and "very scared." *See Black,* 538 U.S. at 349-50. Just as "burning a cross is inextricably intertwined with the history of the Ku Klux Klan," celebration of Columbus is inextricably intertwined with the murder, sterilization and attempted extermination of Columbus and all who followed him. *See Black,* 538 U.S. at 353. Because of the horrific history of Columbus and his effect on indigenous people, the Columbus Day Celebration is a "symbol of hate." *See id.* at 357. Under the *Virginia v. Black* rationale and opinion, the Columbus Day Celebration is intimidating hate speech and is unprotected.

34. Further, the Columbus Day Celebration is in direct conflict with the principles expressed in Colorado Statutes. C.R.S. 18-9-121 explains: "it is the right of every person, regardless of race, color, ancestry, religion, or national origin, to be secure and protected from fear, intimidation, harassment, and physical harm caused by the activities of individuals and groups." However, the Columbus Day Celebration does not "protect" indigenous people from intimidation and harassment; but rather subjects

them to a celebration of a man that murdered, enslaved and starved millions of their ancestors.

35. Finally, the Columbus Day Celebration is also unprotected speech because it conflicts with the fundamental value of equality. The Columbus Day Celebration has the effect of maintaining "established systems of caste and subordination." *See* Wells, *supra*, at 320. The celebration of a man who brought murder and suffering to millions of indigenous people only strives to prevent the true history of Columbus from being known and understood in America. So long as Columbus is recognized as a "hero" and celebrated by Americans and the government, the idea that indigenous people can be treated as second-class citizens that are to be assimilated or extinguished will live on, but be supported and constitute the official policy of the government. This is in direct conflict with the high value of equality espoused in *Brown v. Bd of Ed.* and *Austin v. Mich. Chamber of Commerce*. *See* Wells, *supra*, at 323 ("[*Brown*] teaches a very important lesson: that the harm of racial subordination is achieved by the meaning of the message it conveys. In other words, segregation stamps a badge of inferiority on African-Americans, and this badge communicates a message to others that signals exclusion of African-Americans from the community of citizens.").

36. It is the government's responsibility to prevent speech which promotes or incites racial hatred or discrimination, particularly when the ideas or behavior promoted or incited are not simply "discriminatory" but genocidal in their implications. The Nuremberg Tribunals confirmed that this principle was established in customary international law well before World War II; since then it has been explicitly articulated in both the ICCPR and CERD, treaties ratified by and binding upon the United States. The fundamental lesson of Nuremberg, moreover, is that when the government fails to comply with international law, thereby engaging in violations of fundamental human rights, it is the responsibility of the citizenry to ensure compliance. As the judgment of the International Military Tribunal stated, "the very essence of the [Nuremberg] Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State." (Judgment of the International Military Tribunal for the Trial of German Major War Criminals, reproduced in Edgar M. Wise and Ellen S. Podgor, *International Criminal Law: Cases and Materials* (2000) at 516, 522.) The judgment went on to hold that "the fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility. . . . The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible." (*Id.*) In this case, a moral choice *was* possible and the Defendants exercised it as required by law.

37. This moral and legal requirement—that people oppose inciteful, and in this case, genocidal displays—was recognized by themayor of the City of Denver in 1995 when the Hon. Wellington Webb presented the City's human rights award to the American Indian Movement ("AIM") and Mssrs. Means and Morris (a Defendant herein) and acknowledged, in his own words, that in stopping the 1992 Columbus Day Parade AIM, Means and Morris were to be honored: "It was a victory in which I'm glad the city did not prevail because Russell, Glen and others were on the right side of the

issue." (Comments of Hon. Wellington Webb, 1995 Denver Civil Rights Award Presentation). As was the case in 1992 and thereafter, a non-violent display aimed at stopping a Parade that celebrates a genocidal murderer is a duty that every citizen should practice.[6]

CONCLUSION

38. Because the Columbus Day Parade constitutes hate speech having the effect of ethnic intimidation and incitement to genocide, it conflicts with Colorado statutes, U.S. constitutional jurisprudence, and the United States' obligations under international law. The City of Denver had no authority to issue the permit to the parade organizers and had no authority to order Defendants to cease their peaceful protest. Indeed, it had the affirmative obligation to prevent the hate speech at issue, and in light of its failure to do so, the Defendants had an obligation to engage in their protest. Because the police officers' orders to stop protesting were not lawful, Defendants' actions were entirely lawful.

39. There being no factual or legal basis to any of the charges leveled against Defendants, all charges should be dismissed.

Respectfully submitted this 2nd day of December, 2004.

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[6] Evidence will be presented at the hearing on this motion that marchers were gleefully extolling the "virtues" of Christopher Columbus while throwing things at the Defendants and spectators. Were the parade at issue simply a celebration of Italian heritage, of course the Defendants would not have been required to take a stand, and in fact might well have participated and joined in with the celebration of that part of Denver's diverse and important culture.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION TO DISMISS—HATE SPEECH**,** was sent via U.S. Mail, postage prepaid this 2nd day of December, 2004, addressed to the following:

Denver City Attorney's Office
1437 Bannock Street, Room 393
Denver, CO 80202

Date: December 2, 2004

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