IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CITIZENS FOR PEACE IN SPACE, an unincorporated association; WILLIAM SULZMAN; MARY LYNN SHEETZ; BARBARA HUBER; GERARD JACOBITZ; DONNA JOHNSON; and APRIL PERGL, Plaintiffs-Appellants, v. THE CITY OF COLORADO SPRINGS, a Colorado municipal corporation, Defendant-Appellee.	**Case No. 05-1391**

On Appeal from the United States District Court
for the District of Colorado

Civil Action No. 04-cv-464-RPM-OES, The Honorable Richard P. Matsch

APPELLANTS' OPENING BRIEF

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ORAL ARGUMENT IS REQUESTED

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I. STATEMENT OF RELATED CASES

There are no prior or related appeals.

II. JURISDICTIONAL STATEMENT

A. The jurisdiction of the district court was based upon 28 U.S.C. §1331. This is an action under 42 U.S.C. §1983 for deprivation of the Plaintiffs-Appellants' rights of political expression under the First Amendment.

B. This Court's jurisdiction is based upon 28 U.S.C. §1291. This is an appeal from a final decision of the United States District Court for the District of Colorado.

C. The final judgment of the district court was entered on July 25, 2005. The Notice of Appeal was filed in the district court on August 18, 2005.

D. This appeal is from a final judgment of the district court that disposes of all parties' claims.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The Broadmoor Hotel in Colorado Springs, Colorado, was the site of an international conference of the member nations of the North Atlantic Treaty Organization ("NATO"). As a security measure, the City of Colorado Springs (the "City") closed the public streets and sidewalks and excluded all public forms of political expression in a large "restricted" zone that extended for several blocks in all directions from the hotel. The City denied the Plaintiffs' request to conduct a

peaceful one-hour vigil, limited to six participants, on the sidewalk across the street from the hotel entrance. As a result, the Plaintiffs were forced to conduct their vigil several blocks away from their intended audience and the symbolic object of their protest. The district court noted that "[w]hat is at issue in this litigation is the legitimacy of a complete closure of a traditional public forum, the public streets within the security zone, to all persons other than accredited representatives of professional news organization." Aplt.App. 00225.

1. Did the district court err when it concluded that the City's restrictions on expression were narrowly tailored to advance the City's interest in assuring safety and security?

2. Did the district court err when it concluded that the City's restrictions left the Plaintiffs with ample alternative channels of communication?

IV. STATEMENT OF THE CASE

For a four-day period in October 2003, the Broadmoor Hotel was the site of an international conference of the member nations of NATO. As a security measure, the City closed the public streets and sidewalks and imposed a large "restricted" zone that extended for several blocks in all directions from the hotel. Citizens for Peace in Space ("CPIS") and six of its members (the Plaintiffs in this case) requested permission to conduct a brief vigil on the first day of the conference on the public sidewalk across the street from the hotel entrance, where

they could display a banner and express their views about military policy. In an effort to assuage the City's concerns about security, the Plaintiffs proposed that the vigil would be limited to one hour; would be conducted at a specific time and location; and would be limited to six pre-identified participants who would submit to the same security procedures as the representatives of the press who would be allowed into the security zone. The City simply denied CPIS's request because the location was inside the "restricted" zone.

The Plaintiffs sued the City under 42 U.S.C. §1983. They seek nominal damages for the violation of their First Amendment rights resulting from their exclusion from the traditional public fora surrounding the Broadmoor Hotel. After a two-and-one-half day trial to the court, the district court entered judgment for the City. The Plaintiffs appeal from that judgment.

V. STATEMENT OF FACTS

1. The several-block-radius security zone completely closed a traditional public forum to all persons wishing to engage in public expression.

From October 7 through October 10, 2003, the Secretary of Defense hosted a conference of the defense ministers of the nineteen member nations of NATO, plus nine invitee nations, at the Broadmoor Hotel in Colorado Springs. Aplt.App. 00218-19; 00231. The conference was attended by approximately 1,000 delegates, family, and staff. Aplt.App. 00218; 00480, ll.5-18. The entire Broadmoor facility

was leased for this purpose, Aplt.App. 00218; 00517, ll.4-6, including the International Center, across the street from the hotel, where several hundred representatives from the national and international press were based.

The security plan included closing public streets and sidewalks and imposing a large "limited access area" or "security zone." As depicted in the map introduced in evidence and attached to the district court's order, this security zone surrounded the Broadmoor and extended across public and private property for the equivalent of several city blocks in all directions. Aplt.App. 00219-20; 00229-30. The perimeter was roughly defined by the locations of five checkpoints on roadway intersections surrounding the hotel property. Aplt.App. 00229-30; 00469, ll.8-13.

As the district court noted, "[w]hat is at issue in this litigation is the legitimacy of a complete closure of a traditional public forum, the public streets within the security zone, to all persons other than accredited representatives of professional news organizations." Aplt.App. 00225.

2. The large size of the security zone was designed to protect the NATO delegates from the risk of vehicle-borne explosives.

A task force assembled to plan security for the conference began work 9-10 months earlier. Aplt.App. 00465, ll.12-25. Chaired by Air Force Colonel Ulysses Middleton, it eventually included representatives of the Colorado Springs Police Department ("CSPD"), the El Paso County Sheriff's office, the FBI, the

Department of Justice, the Department of Transportation, the Department of Homeland Security, FEMA, the U.S. Air Force, and the U.S. Army, as well as NATO representatives. Aplt.App. 00692, ll.3-19; see also 00219.

The breadth of the restricted zone was the result of task force concerns about the possibility of vehicle borne explosives, Aplt.App. 00219; 00476, ll.7-24; 0073, l.12 – 0074, l.5; 00661, l.7 – 00662, l.6; 00679, l.8 – 00680, l.1, with potential blast radiuses up to 300 feet. Aplt.App. 00219; 00629, ll.8-19; 00119, ll.5-7. The restricted zone was designed to ensure that any vehicle-borne explosives could not get close enough to endanger any of the conference participants.

During the conference, the restricted area and its perimeter were manned and patrolled by several hundred personnel from the military and various law enforcement agencies. Aplt.App. 00478, l.22 – 00479, l.4. Within the restricted area, there were concentric zones of tighter security surrounding the hotel facility where the delegates would be. Aplt.App. 00469, ll.1-7; 00471, ll.10-21. Access to the restricted area – by vehicle or on foot – was exclusively by way of the five checkpoints. Aplt.App. 00470, ll.19-25. Vehicles or persons seeking entry were directed to Checkpoint 1 (at Lake Avenue and Second Street). The security at the checkpoints included screenings by metal detectors and trained explosive-detecting dogs. Aplt.App. 00139, l.25 – 00144, l.25; 00220. Persons who did not arrive in individual vehicles, such as hotel employees who were bussed into the restricted

zone from an off-site staging area, "would go through metal detectors, their bags would go through screens, just like the airport." Aplt.App. 00677, l.21 – 00678, l.5.

The boundaries of the restricted zone and the locations of the checkpoints were established six months or more before the conference began. Aplt.App. 00676, ll.3-9. The City and the task force then established protocols to allow a myriad of persons and groups to enter and exit the security zone during the NATO conference.

While most of the delegates, their families, and staffs arrived and departed by motorcade, Aplt.App. 00480, l.13 – 00481, l.15, there were protocols for individual escorts as well. Aplt.App. 00481, l.16 – 00482, l.1. The majority of the ministers and chiefs of defense came with their own security teams, some of which were armed. Aplt.App. 00482, ll.2-13; 00127, l.8 – 00129, l.8; 00721, l.10 – 00722, l.13.

3. Protocols were established for representatives of the national and international media to enter and exit the restricted zone.

Several hundred representatives of the press, mostly from the national and international media, were cleared for entry into the restricted zone. Aplt.App. 00486, ll.9-22; 00126, l.2 – 00127, l.7. Protocols were established whereby media representatives would be screened and enter and depart the restricted area either in groups by bus from an off-site staging area or, if any had their own vehicles,

through Checkpoint 1. Aplt.App. 00221; 00486, l.23 – 00487, l.4; 00633, l.21 – 00634, l.24; 00109, l.8 – 00110, l.21. The media representatives were based inside the restricted area at the International Center, Aplt.App. 00220; 00229 (labeled "IC"), directly across Lake Circle from the hotel entrance. They were confined to that general location while inside the restricted area. Aplt.App. 00471, l.22 – 00472, l.10; 00485, l.19 – 00486, l.8. Any interviews with conference participants required escorting the interviewee to the International Center. Aplt.App. 00148, l.19 – 00148, l.2. The credentialed media gaining access to the restricted area likely included paparazzi, Aplt.App. 00171, ll.4-12, and international espionage agents. Aplt.App. 00534, ll.12-23.

4. Residents of the security zone and their guests, as well as hotel employees, delivery persons, maintenance persons, and others with "business" inside the security zone were allowed to come and go.

Approximately 1,000 hotel employees worked at the Broadmoor during the conference, all of whom were pre-screened and bussed into and out of the restricted area from a remote staging site each day. Aplt.App. 00221; 00166, l.4 – 00167, l.8.

Protocols were established whereby persons having business with the hotel, such as delivery or repair people, could enter and depart the restricted area by escort or through Checkpoint 1. Aplt.App. 00485, ll.7-18; 00631, l.5 – 00632, l.7; 00167, l.9 – 00169, l.13.

The restricted area included approximately 22 private homes. Aplt.App. 00220; 00644, ll.17-23. Protocols were established so that residents could pass through the checkpoints at any time of day or night. Aplt.App. 00488, ll.2-14; 00173, l.22 – 00174, l.16.

Protocols were established whereby persons making deliveries, carrying out maintenance or repair services, or otherwise having business with residents could enter and leave the restricted area. Aplt.App. 00488, ll.15-22; 00174, l.17 – 00178, l.4; 00681, ll.11-15.

Protocols allowed guests of residents to enter and leave the restricted area at any time. Aplt.App. 00488, l.23 – 00491, l.2; 00178, l.5 – 00181, l.8. A resident would have been permitted to have a backyard barbecue with 25 guests – all accorded protocols for entry and exit through the checkpoints. Aplt.App. 00178, l.18 – 00170, l.23.

5. The only categories of persons who were forbidden to enter the security zone were pure sightseers and persons who wished to exercise their First Amendment rights.

In effect, there were only two categories of people for whom no protocols whatsoever were established for entry into the restricted area – pure sightseers and persons wishing to exercise their First Amendment rights, collectively classified as "the general public." Aplt.App. 00491, ll.3-25; 00183, l.8 – 00186, l.12. The task force viewed such persons as having "no business with the NATO conference

inside the security zone." Aplt.App. 00685, l.18 – 00686, l.24. Even persons who were allowed in the restricted area, such as residents and their guests, were not permitted to step across the property line onto the public sidewalk to engage in public expression. Aplt.App. 00512, l.17 – 00514, l.6. As Commander (now Deputy Chief) Liebowitz testified, such persons would have been "detained." Aplt.App. 00514, ll.1- 6.

6. The Plaintiffs are longtime peace activists in Colorado Springs.

Bill Sulzman is an army veteran and a former Roman Catholic priest. For over three decades, he has lived in Colorado Springs, where he provides direct service to the poor and is active in the peace and justice movement, both activities stemming from commitments made during his theology training. Aplt.App. 00386, l.23 – 00388, l.6.

Mr. Sulzman does research, education, and outreach for CPIS. Aplt.App at 00388, ll.1-6. The other individual Plaintiffs are long-time members of CPIS. Aplt.App. 00391, ll.16-20. The organization's name reflects its mission and its concern that space, which CPIS regards as a global commons, is increasingly a key part of the way in which nations carry out warfare. Aplt.App. 00388, ll.9-17; 00392, ll.16-17. Founded in 1987, CPIS participates in a world-wide network of advocates working to demilitarize space and prevent war. CPIS has been active

locally because there are four major Space Command bases in Colorado, including one in Colorado Springs. Aplt.App. 00388, ll.18 – 37, l.11.

A Space Symposium is held every year at the International Center. During the Space Symposium, members of CPIS regularly stand on the public sidewalk outside the International Center, displaying a banner, distributing informational leaflets, and providing an opportunity for the delegates to dialog with CPIS members. Aplt.App. 00389, ll.11-39.

7. In mid-September 2003, when the Plaintiffs first learned that the NATO conference would be held at the Broadmoor Hotel, they decided that they wanted their voice to be heard.

In mid-September 2003, Mr. Sulzman learned from the local newspaper that the NATO conference would be held in Colorado Springs in early October. He regarded the conference as a major historical event that was symbolic of NATO's transition from what CPIS regarded as the organization's original purpose. Secretary of Defense Rumsfeld, whom Mr. Sulzman regarded as a critical architect of policies CPIS criticizes, was expected to play a major role. Aplt.App. 00392, l.3 – 00393, l.3. CPIS wanted to have its voice heard in conjunction with this historic event.

Mr. Sulzman also heard the public announcement of the unprecedented security zone that would surround the Broadmoor. Aplt.App. 00393, ll.13-17. It was apparent that the scope of the planned exclusion zone would force CPIS to

carry out any educational and protest activities too far away from the site of the conference and its participants. Aplt.App. 00397, l.22 – 00398, l.6. CPIS consulted with the ACLU, Aplt.App. 00398, ll.7-24, and authorized it to communicate with the City on CPIS's behalf to see if CPIS could conduct a peaceful vigil inside the security zone. Their preferred location was the public sidewalk outside the International Center, the same spot where for seventeen consecutive years they had held signs, passed out literature, and interacted with participants in the Space Symposium. That location would place them close to the symbolic object of their protest. It would also allow them to be seen by their intended audience, the conference participants and the national and international media based in the International Center. Aplt.App. 00396, ll.4-16.

8. The Plaintiffs proposed a one-hour vigil at a specific time and place, limited to pre-identified participants who would submit to the same security procedures as the media and others who were permitted to enter the security zone.

In a letter to City officials (which had been preceded by a telephone conversation which the City recorded, transcribed, and which was placed in evidence, Aplt.App. 00244-50), CPIS's attorney explained that six members of the organization wished to exercise their First Amendment right to hold signs and express their views about peace and military policy. They wanted to do so while standing on the public sidewalk where they would be visible and where their message could reach their intended audience. Aplt.App. 00239-41.

The letter proposed a peaceful vigil that would be limited in size and duration. Six individuals specifically identified in advance (the individual Plaintiffs in this case) would stand for an hour on the sidewalk outside the International Center. The CPIS members also offered to submit to the same security checks and security procedures as the members of the media that the City planned to allow into the security zone. As the letter explained, all six CPIS members proposing the vigil "are well known to the Colorado Springs Police Department as individuals who are dedicated to the principles of peace and non-violence."[1] Aplt.App. 00239-41.

9. The City refused the Plaintiffs' request and said that granting it would "imperil" all persons within the security zone.

Plaintiffs' request, and the possibility of allowing at least some protesters to enter the security zone, received little or no consideration. When the City was first contacted about Plaintiffs' proposal for a limited vigil, the decision had already been made that no protesters would be allowed into the restricted area. Aplt.App. 00244-50. Commander Liebowitz viewed the complete exclusion of persons wishing to exercise their First Amendment rights as a "legal" matter that had already been decided by the City Attorney and military JAG. Aplt.App. 00497, l.8 – 00498, l.12. Col. Middleton explained that the task force never seriously

[1] The CSPD's only negative history with CPIS members may have involved an occasional arrest for non-violent trespass, in conjunction with expressing their views. *Aplt.App. 00152, ll 13-24*.

considered any exception to the complete exclusion of demonstrators from the restricted area and that his own "mind was made up." Aplt.App. 00712, l.24 – 00713, l.16.

The City rejected CPIS's request. In a letter, the City's attorney reasoned that if six CPIS members were allowed inside the security zone in order to carry out their proposed vigil, then members of other groups would also have to be allowed. According to the City, to allow other groups inside the security zone "would seriously jeopardize the government's ability to maintain the security of the Broadmoor Hotel, thus imperiling all persons within the zone." Thus, the City concluded that "unless specifically authorized, no person, including members of CPIS, will be allowed inside the security zone." Aplt.App. 00242-43.

10. The Plaintiffs had to conduct their vigil several blocks from their requested location, and they did not have the opportunity to communicate effectively with their intended audience.

Commander Liebowitz suggested an alternative location outside the security zone, near the corner of Lake Avenue and Second Street. Aplt.App. 00528, l.12 – 00529, l.8; 00244-50. This location, outside Checkpoint 1, was the closest to the front entrance to the Broadmoor that any protesters were allowed to stand. Aplt.App. 00511, ll.16-25.

While there was some possibility that CPIS would be momentarily visible at that location to motorcades proceeding through Checkpoint 1, the delegate vehicles

did not pause or stop at the checkpoint, Aplt.App. 00508, l.25 – 00509, l.16, nor was CPIS provided the motorcade schedule. Aplt.App. 00538, ll.12-14.

Ultimately, the Plaintiffs did go Checkpoint 1 at the time and date they had proposed for their vigil. They requested and were denied entrance to the restricted area. Aplt.App. 00403, ll. 5-52. The Plaintiffs ended up holding their banner at an unpaved area (there was no sidewalk) by a ditch by the side of the road at the southeast corner of the intersection of Second and Lake. Aplt.App. 00403, l.5 – 00406, l.21. The City presented testimony that at various times during the NATO conference, there were a total of 20-30 protesters at this location, including the Plaintiffs.[2] Aplt.App. 00742, l.18 – 00743, l.1.

At this location, the Plaintiffs were several city blocks from the location they had requested. At this distance, the CPIS members and their banner could barely be seen from the hotel, if they could be seen at all. Aplt.App. 00395, l.5 – 00396, l.3; 00257; 00255; 00256; 00509, l.17 – 00511, l.25; 00290. There was no direct line of sight between the Plaintiffs and the front of the International Center. Aplt.App. 00404, ll.6-21; 00256; 00406, l.22 – p.55 l.13; 00255.

Mr. Sulzman asked Lt. (now Commander) Pete Carey of the CSPD if he would be willing to inform conference participants or the media representatives of

[2] This testimony, from the news director of a local television station, is the only evidence of the number of persons who protested or were interested in protesting in conjunction with the NATO conference.

CPIS's presence at Checkpoint 1, but he declined. Aplt.App at 00410, ll.7-17. Even if they had become aware of CPIS's presence, the media representatives at the International Center were not allowed to walk down Lake Street past Checkpoint 1 to interview the Plaintiffs. Aplt.App. 00147, l.9 – 00148, l.16. To interview the Plaintiffs, most members of the international media, who had not arrived in their own vehicles, would have had to leave the International Center by bus, return to the initial staging area, and then arrange their own transportation to Checkpoint 1. Aplt.App. 00148, l.3 – 00151, l.1. Although Mr. Sulzman spoke with three representatives of the local press, he already enjoyed a regular relationship with local reporters. Aplt.App. 00409, ll.22-25. He regarded the NATO conference as a "unique opportunity" to be available to communicate with the international press and persons from 18 countries. Aplt.App. 00410, l.18 – 00411, l.1. He testified that standing on the side of the road while traffic is moving made the Plaintiffs much less physically accessible to persons who might wish to communicate with them, compared with standing on the sidewalk that CPIS proposed for its vigil. Aplt.App. 00462, ll.7-9. As it turned out, CPIS did not interact at all with any conference participants or any of the media representatives who were confined to the International Center. Aplt.App. 00508, ll.15-21.

11. The earlier protest at Seventh and Lake.

The City presented evidence that on the day before the conference began, some protesters stood with signs at a roundabout near Seventh and Lake, five blocks further east of Checkpoint 1. Vehicles carrying delegates arriving to the conference passed by this location at a high rate of speed on their way to the Broadmoor. Aplt.App. 00734, l.13 – 00735, l.10; 00432, ll.1-17; 00327. The City introduced a videotape containing raw footage taken at that location by reporters for a local television station. Aplt.App. 00740, l.15; 00327. CPIS did not organize this protest, but Mr. Sulzman and some CPIS members displayed their banner for at least part of the time. Aplt.App. 00427, l.23 – 00428 l.11; 00461, ll.22-25. Mr. Sulzman spoke with some local newspaper reporters that day, but he did not speak to any television reporters. Aplt.App. 00428, ll.12-23.[3]

During the trial, the City suggested that the Plaintiffs could have protested near Checkpoint 3, near the Broadmoor West buildings where the delegates apparently met. Aplt.App. 00531, l.20 – 00532, l.17. The Broadmoor's security director acknowledged that there were no windows on the side of the building which would have permitted CPIS to be seen. Aplt.App. 00647, l.19 – 00648, l.6.

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[3] The City's attorney asked questions of Mr. Sulzman that were apparently intended to elicit testimony that the CPIS banner appeared on the local television news that night, but Mr. Sulzman had not seen the broadcast and could not provide the testimony the City sought. *Aplt.App. 00431, ll.1-17*.

12. The City presented testimony that allowing large numbers of protesters into the security zone would have required assigning additional police.

Lt. Carey put together the operational plan that identified the CSPD resources "to plug into what they needed inside that safety zone." Aplt.App. 00062, l.20 – 00064, l.10. He did not make the decision to exclude protesters, but he supported it. Aplt.App. 00089, ll.10-15. He testified that a large number of police officers would be required if a protest turned illegal, and he did not have enough officers "on the inside." Aplt.App. 00089, l.16 – 00090, l.21. He testified that he needs sufficient officers so that, if necessary, he could form a line to physically move protesters out of the area. Aplt.App. 00095, l.15 – 00095, l.2. Lt. Carey's memory of his operational plan was that there were 40-50 CSPD officers assigned to the NATO conference, Aplt.App. 00129, l.13 – 00130, l.13, in addition to 10 undercover CSPD officers, Aplt.App. 00134, ll.25-14, and a 15-person tactical team inside that was "staged and ready." Aplt.App. 00130, l.11 – 00131, l.22. Lt. Carey testified that generally allowing protesters inside the security zone would have required doubling the number of CSPD officers assigned. Aplt.App. 00097, l.15 – 00098, l.24.

Lt. Carey briefly alluded to the possibility of limiting the numbers of protesters who would be allowed in the security zone at any one time. He said he

did not know how police would decide "who belongs in and who belongs out." Aplt.App. 00098, l.2 – 00099, l.15.

13. The City acknowledged it could have accommodated small protests such as the Plaintiffs' proposed vigil as well as additional protests conducted under similar ground rules.

Commander Liebowitz testified that allowing demonstrators into the security zone would have required officers to escort and observe them. Aplt.App. 00524, ll.9-17. If they engaged in civil disobedience and had to be arrested, that could strain police resources. If a protester went limp, for example, four police officers might be required to carry the protester away. Aplt.App. 00523, l.7 – 00524, l.25. Additional resources might be necessary to complete paperwork and transport any arrestees. Aplt.App. 00525, ll.1-4. Lt. Col. Robert Haughey, who served as Colonel Middleton's assistant, Aplt.App. 00660, ll.7-18, stated that generally allowing protesters into the zone would have required some additional resources. Aplt.App. 00670, ll.4-23.

Nevertheless, there was never any question that the City could easily have accommodated the Plaintiffs' request for a brief one-hour vigil. Commander Liebowitz acknowledged that there were already sufficient law enforcement personnel available to handle any conceivable disruption that the six CPIS members could hypothetically have caused. Aplt.App. 00498, l.25 – 00502, l.17. The district court noted that "[t]here were adequate personnel available to assure

the peacefulness of a one-hour demonstration and the prevention of any disruption to the NATO conference." Aplt.App. 00226.

The City's concern was that allowing CPIS into the restricted area would lead to other groups making similar requests. Aplt.App. 00242-43; 00402, ll.7-14. Although no such requests were actually made, Aplt.App. 00537, ll.2-15; 00226-27, Commander Liebowitz testified that as a logistical matter, the City could have handled such similar requests, under protocols comparable to those suggested by CPIS, for groups limited to a particular size, such as ten participants. Aplt.App. 00502, l.18 – 00506, l.21.

VI. SUMMARY OF ARGUMENT

The City failed to carry its burden of proving that its decision to prohibit all pedestrian protesters within a three-block radius of the entrance to the Broadmoor Hotel was narrowly tailored to assure the safety of the conference participants. The size and boundaries of the security zone were determined by the blast radius of vehicle-borne explosives. The total exclusion of pedestrian protesters (who would have been screened for explosives) was not a direct and effective way to eliminate the risk of vehicle-borne explosives approaching too close to the hotel.

The City suggested that excluding all pedestrian protesters advanced its interest in security *indirectly*, by conserving law enforcement resources and avoiding the need to assign officers to monitor protests within the restricted zone.

The existing staffing plan, however, was based on the premise that no protesters would be permitted to enter the restricted zone. The City did not present evidence that it would have been unable to assign additional law enforcement officers or seek reinforcements from other agencies if the security plan had been modified to accommodate protesters. Moreover, the law enforcement staffing already assigned to the NATO conference was sufficient to handle the brief small-scale vigil the Plaintiffs proposed, as well as any additional protests conducted under similar ground rules.

The City's restrictions burdened substantially more speech than was necessary to satisfy the City's legitimate interests. The City banned all expression from the public streets and sidewalks inside the restricted zone, including expression that did not pose any risk of overtaxing law enforcement resources or otherwise jeopardizing the security or safety of the conference participants.

There were numerous and obvious alternatives that would have satisfied the City's interests while burdening substantially less speech. The City could have allowed brief small-scale protests within the restricted zone under ground rules similar to the ones the Plaintiffs proposed. The City could have allocated time slots for these protests pursuant to a content-neutral permit scheme. The City acknowledged that the law enforcement resources it had already assigned to the

NATO conference were sufficient to accommodate such alternatives without jeopardizing security.

The district court was alone in concluding that the City could not have feasibly accommodated limited-duration, limited-participation protests within the restricted zone. The court erred when it concluded that City officials would have been unable to issue permits for such small-scale demonstrations on a content-neutral basis. The court further erred when it declared that the City's decision to keep the Plaintiffs several blocks away from the hotel entrance was "reasonable," without further analyzing whether the restriction was narrowly tailored.

The City's restrictions failed to leave the Plaintiffs with adequate alternative channels of communication. They were deprived of an adequate opportunity to reach their intended audience, the conference participants and the national and international media representatives based inside the restricted zone at the International Center. The district court erred when it concluded that Plaintiffs' opportunity to talk with local newspaper reporters was an adequate substitute for the missed opportunity to communicate with international visitors from over two dozen foreign countries. The district court further erred by dismissing the significance of Plaintiffs' desire to conduct their vigil near the entrance to the conference hotel.

VII. ARGUMENT

A. Introduction

The parties and the district court agree that this case is governed by the standard of intermediate scrutiny that applies to restrictions upon the time, place, or manner of expression in a public forum. In order to survive judicial review, the government must demonstrate that such a regulation is content-neutral, is narrowly tailored to advance a significant governmental interest, and leaves open ample alternative channels for communication. Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

Plaintiffs agree that ensuring the safety and security of the convention participants is a significant governmental interest. Plaintiffs do not argue that the City of Colorado Springs discriminated against them on the basis of the content or viewpoint of their message. The critical issues are whether the City's restrictions on expression were narrowly tailored to advance the proffered interest in security and whether the restrictions left the Plaintiffs with adequate alternative channels of communication. The district court's consideration of both issues was fatally flawed. As Plaintiffs demonstrate below, the City failed to carry its burden of demonstrating that its restrictions were narrowly tailored. Nor did the City demonstrate that its restrictions left the Plaintiffs with ample alternative channels of communication.

B. Standard of Review

"In a First Amendment case, we have an obligation to make an independent examination of the whole record in order to make sure that the speech regulation does not constitute a forbidden intrusion on the field of free expression." Revo v. Disciplinary Bd. of the Supreme Court, 106 F.3d 929, 932 (10th Cir. 1997). "We review the district court's findings of constitutional fact and its ultimate conclusions of constitutional law de novo." Id.

This independent review of the record is conducted "without deference to the district court." Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 567 (1995). The appellate court's duty to conduct an independent review "rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection." Id. "Even where a speech case has originally been tried in a federal court, subject to the provision of Federal Rule of Civil Procedure 52(a) that 'findings of fact . . . shall not be set aside unless clearly erroneous,' we are obliged to make a fresh examination of crucial facts." Id., quoting New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964).

1. The City did not carry its burden of proving that prohibiting all pedestrian protestors within a three-block radius of the convention hotel was narrowly tailored to advance a significant governmental interest.

The district court's order quotes the appropriate legal standard from the Ward decision. Order at 7. After announcing the legal standard, however, the court failed to undertake *any* analysis of whether the challenged restrictions were narrowly tailored. The court did not analyze whether excluding the Plaintiffs from the three-block-radius exclusion zone directly advanced the proffered interest in safety and security. Nor did the court analyze whether the three-block-radius exclusion zone suppressed significantly more expression than necessary. Instead, the district court opined that if the Plaintiffs' request for a one-hour vigil had been granted, it was "reasonably probable" that "similar requests would have been made by others on the following day." Aplt.App. 00227. The district court did not analyze whether any such additional requests would have threatened the City's interest in safety and security. The court simply concluded that "the City's refusal to allow any demonstrators entry into the security zone was reasonable." Id.

The district court's failure to apply the narrow tailoring standard produced an erroneous and anomalous result that requires correction. Plaintiffs have been unable to find any decision of any other court that allowed the government to banish would-be dissenters to a location more than 1,000 feet away from their intended audience and the symbolic object of their protest. On the contrary, courts

applying the same legal standard that applies here have repeatedly rejected exclusion zones that were less drastic in size and scope than the one challenged here. See, e.g. Bay Area Peace Navy v. United States, 914 F.2d 1224, 1228 (9th Cir. 1990) (holding that 75-yard security zone burdened "substantially more speech than is necessary to further the government's legitimate interests"); United States v. Baugh, 187 F.3d 1037, 1044 (9th Cir. 1999) (holding that keeping demonstrators 150-175 yards away from their intended audience failed the test of narrow tailoring); SEIU, Local 660 v. City of Los Angeles, 114 F. Supp. 2d 966 (C.D. Cal. 2000) (invalidating "security zone" at Democratic National Convention that kept demonstrators 260 yards away from delegates entering and leaving the convention site); Galvin v. Hay, 374 F.3d 739, 755 (9th Cir. 2004) (providing additional reasons why the restrictions discussed (by a different panel) in Baugh "burdened the plaintiffs' speech to a substantially greater degree than necessary"); Weinberg v. City of Chicago, 310 F.3d 1029, 1040-42 (7th Cir. 2002) (holding that ordinance banning peddling within 1,000 feet of stadium burdens substantially more speech than necessary and unjustifiably prevents plaintiff from reaching his intended audience).

Had the district court actually applied the narrow tailoring standard and held the City to its burden of proof, it would have required the City to demonstrate that the challenged restrictions directly advanced the proffered interest in security and

that they did so without suppressing more speech than necessary. See ACORN v. Municipality of Golden, 744 F.2d 739, 746 (10th Cir. 1984) (When "a law infringes on the exercise of First Amendment rights, its proponent bears the burden of establishing its constitutionality.") As the Plaintiffs demonstrate below, the City did not carry its burden of proof and did not succeed in justifying the exclusion of the Plaintiffs from the public fora near the hotel.

2. The City failed to show that excluding all pedestrian demonstrators from a multiple-city-block security zone directly and materially advanced its interest in protecting the NATO delegates from vehicle-borne explosives or other potential threats to their safety.

"Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Ward at 799. In order to demonstrate that a challenged restriction is narrowly tailored, the government must demonstrate that its restrictions "serve a substantial state interest in 'a direct and effective way.'" Edenfield v. Fane, 507 U.S. 761, 773 (1993), quoting Ward at 772. In the absence of such proof, a regulation "may not be sustained if it provides only ineffective or remote support for the government's purpose." Edenfield at 770-71, quoting Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 564 (1980); Revo at 929, 933. A regulation is not narrowly tailored when it "does not sufficiently serve those public interests that are urged as its justification." United States v. Grace, 461 U.S. 171, 178

(1983). When a restriction is justified as a measure "to prevent anticipated harms," the government "must demonstrate that the recited harms are real . . . and that the regulation will in fact alleviate these harms in a direct and material way." Turner Broad. Sys. v. FCC, 512 U.S. 622, 662 (1994).[4]

The City justified its restrictions as necessary for the safety and security of the convention participants. As the First Circuit recently noted, however, characterizing the government interest in such broad terms is not useful to the narrow tailoring analysis:

> Security simpliciter is too broad a rubric to be useful in this analysis. Security is not a talisman that the government may invoke to justify any burden on speech (no matter how oppressive). Thus, the question of narrow tailoring must be decided against the backdrop of the harms that a particular set of security measures are designed to forfend.

Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 13 (1st Cir. 2004). Similarly, the City's decision to exclude the Plaintiffs must be analyzed by focusing on the

[4] The substance of Ward's "narrow tailoring" prong is the same as the "narrow tailoring" portion of the test for regulations of commercial speech. See United States v. Edge Broadcasting Co., 509 U.S. 418, 430 (1993). It is also identical to the "narrow tailoring" prong of the test formulated in United States v. O'Brien, 391 U.S. 367 (1968), to analyze regulations that incidentally burden speech. See Turner Broad. Sys. at 622, 661-62 (equating standard of Ward and O'Brien). Accordingly, the analysis of whether a time, place, or manner regulation is narrowly tailored often draws on commercial speech cases and decisions applying the O'Brien test.

specific harms the security zone was designed to fend off and the degree to which the Plaintiffs' protest would contribute to those harms.

The size of the three-block-radius "exclusion zone" was based upon the potential blast radius of vehicle-borne explosives. It had nothing to do with any harms or threatened harms that the City attributed to pedestrians. The City presented no evidence whatsoever to suggest that the Plaintiffs or any other pedestrian demonstrators who submitted to security screening would pose any direct threat to the Broadmoor or anyone associated with the NATO conference. The total exclusion of pedestrian protesters was certainly not a "direct and effective way," Edenfield at 773, to serve the City's legitimate interest in eliminating the risk that vehicle-borne explosives could approach within three blocks of the hotel.

Nor did the City argue that public expression, in and of itself, posed any danger. Although the City appeared at times to suggest that the *mere presence* of any person who approached within three blocks of the hotel entrance somehow posed a danger, any such position is undermined by the numerous exceptions to the rule of exclusion. Thus, the City determined that residents of the security zone did not pose a danger, nor did employees of the hotel, or the several hundred media representatives, or persons making deliveries to the hotel, or persons making service calls at any of the residences, or any number of social guests of the residents. Indeed, the only categories of persons who were absolutely forbidden to

approach within three blocks of the hotel entrance were sightseers and persons like the Plaintiffs who merely wished to exercise their First Amendment rights. Thus, 25 non-residents could enter the restricted area to attend a backyard barbeque, Aplt.App. 00178, l.18 – 00179, l.23, but the six Plaintiffs were forbidden to stand peacefully for an hour on a public sidewalk with their banner. The "principle" guiding the City's list of exceptions was that persons having "business" in the restricted zone were allowed to enter. This "principle" unjustifiably denigrates the legitimate role of public dissent and mistakenly consigns it to a status less important than backyard barbeques. Under the First Amendment, persons displaying a banner to communicate a message about a subject of public concern cannot be dismissed as having "no legitimate business" standing on a public sidewalk in a place where they hope to convey their message to world leaders and to the national and international media who cover those leaders.

In light of the absence of evidence that the Plaintiffs or other protesters posed a direct threat to safety, the City relies on an indirect and much more tenuous connection between its restrictions and its interest in protecting the conference participants. The City argued that excluding all protesters protected the safety of NATO delegates *indirectly*, by conserving law enforcement resources, and avoiding the need to monitor any protesters inside the security zone. According to Lt. Carey, law enforcement must have sufficient officers available to

form a line and move people on in case a legal protest gets out of hand. To allow a "large number" of protesters inside the security zone, while still maintaining the checkpoints at the perimeter, would have required doubling the number of CSPD officers assigned.[5]

The City's testimony about law enforcement's staffing requirements, however, is not sufficient to justify the substantial burden on expression in this case. First, the size of the security zone was decided early in the planning process, as was the decision to exclude all protesters from that zone. The staffing plan, which determined exactly how many officers from various agencies would be assigned to the NATO conference and what tasks they would perform, was determined later. Thus, the number of law enforcement personnel that CSPD assigned was based on the premise (among other premises) that no protesters would be permitted inside the security zone. The City did not present evidence that it would have been unable to assign more officers, or impose additional overtime, or arrange for reinforcements from another law enforcement agency, if the decision had been made to add protesters to the list of persons who would be permitted to enter the security zone after passing through security checks at the perimeter. See Collins v. Jordan, 110 F.3d 1363, 1372 (9th Cir. 1996) (explaining that courts have held that the proper response to the possibility of disruptive

[5] Lt. Carey recalled assigning a total of 65-75 officers to duties connected with the NATO conference. Aplt.App. 00129, l.9 – 00131, l.22; 00134, ll.25-14.

demonstrations "is for the government to ensure an adequate police presence . . . rather than to suppress legitimate First Amendment conduct as a prophylactic measure").

Second, even without assigning additional officers, the law enforcement staffing at the NATO conference was already sufficient to handle the Plaintiffs' proposed vigil. As the district court acknowledged, accommodating the Plaintiffs' request would not have posed a problem. "There were adequate personnel available to assure the peacefulness of a one-hour demonstration and the prevention of any disruption to the NATO conference." Matsch Order at 9. Moreover, as Commander Liebowitz acknowledged, the CSPD could have adequately accommodated similar protests by additional groups entering the security zone under the same conditions the Plaintiffs proposed. Aplt.App. 00502, l.18 – 00506, l.21.

When discussing the legal standard that applies in this case, Justice O'Connor emphasized that a restriction is not narrowly tailored where "a substantial portion of the burden on speech does not serve to advance [the State's content-neutral] goals." Turner Broad. Sys. at 622, 682 (O'Connor, J., concurring in part & dissenting in part) (brackets in original). She provided examples from a series of the court's prior holdings striking down overly-broad regulations of expression:

> If the government wants to avoid littering, it may ban littering, but it may not ban all leafleting. If the government wants to avoid fraudulent political fundraising, it may bar the fraud, but it may not in the process prohibit legitimate fundraising. If the government wants to protect householders from unwarranted solicitors, it may enforce "No Soliciting" signs that the householders put up, but it may not cut off access to homes whose residents are willing to hear what the solicitors have to say.

Id., at 682-83 (citations omitted).

The same reasoning applies here and illustrates the flaws in the City's decision to ban all expression within the expansive security zone. If the vehicles in which protesters arrive may pose a risk, then the City can regulate the vehicles, but it cannot exclude all pedestrians. If the City wants to protect against the risk that pedestrians may be carrying weapons or explosives, then the City can screen for explosives, but it cannot rely on the risk of explosives to bar entry to innocent protesters. If the possibility of an overwhelming quantity of pedestrian protesters threatens to overtax law enforcement resources, then the City can limit the number of demonstrators or limit the duration of demonstrations, but it cannot exclude all pedestrian protesters. If the City fears that pedestrian demonstrators might scatter and spread out to all areas of the restricted zone and thereby risk overtaxing security personnel, then the City can limit the locations for demonstrators or require that protesters remain in the same vicinity, but the City cannot banish them entirely. As Justice O'Connor explained, "[b]road prophylactic rules in the area of

free expression are suspect. Precision of regulation must be the touchstone." Id. at 683, quoting NAACP v. Button, 371 U.S. 415, 438 (1963). In this case, the exclusion of all protesters from the security zone was not narrowly tailored, because a substantial portion of the burden on speech did not serve to alleviate the threat of overextending law enforcement resources. See Ward at 799; see also Million Youth March, Inc. v. Safir, 18 F. Supp. 2d 334, 346-47 (S.D.N.Y. 1998) (holding that by denying a permit outright and shutting down an entire event when city's safety concerns could have been satisfied by allowing a more limited version to go forward, the city improperly "regulated expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals").

The "essence of narrow tailoring" is to "focus[] on the source of the evils . . . and eliminate[] them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." Ward at 799, n.7. To the extent that the "evil" is the potential to overextend law enforcement resources, the City's total ban on *all* protesters fails Ward's test. The exclusion of *all* protesters does not "focus on the source of the evils." Id. At the same time, it bans "a substantial quantity of speech that does not create the same evils," id., by suppressing the Plaintiffs' vigil (and the potential for others like it) that would impose no burden on law enforcement staffing.

3. The exclusion of pedestrian protesters was not narrowly tailored because it burdened substantially more speech than was necessary to further the government's legitimate interests.

Although narrow tailoring does not require that a restriction be "the least restrictive or least intrusive means" of achieving the governmental interest, the government must show that the regulation does not "burden substantially more speech than is necessary to further the government's legitimate interests." Ward at 798-99. In this case, it is clear that the City burdened "substantially more" speech than necessary. Indeed, it prohibited *all* public forms of expression on all the streets and sidewalks within the three-block-radius restricted zone. As the district court noted, this was "a complete closure of a traditional public forum." Order at 8. A complete ban on a form of expressive activity can be narrowly tailored, "but only if each activity within the proscription's scope is an appropriately targeted evil." Ward at 800, quoting Frisby v. Schultz, 487 U.S. 474, 485 (1988). In this case, the City failed to show that standing on the public sidewalk and displaying a banners was an "appropriately targeted evil." Nevertheless, it prohibited any pedestrians from carrying a sign, displaying a banner, or otherwise engaging in peaceful public expression, without showing that any of these activities posed any direct threat to security.

The unjustifiable overbreadth of the City's restrictions is illustrated by their application even to residents of the restricted area and their guests. These

individuals passed through the security checkpoints and were allowed to enter the restricted area. It is clear that the City did not regard these individuals as a direct threat to safety or security. Indeed, a group of 25 social guests could have attended a backyard barbeque. But if even one of those guests stepped from the back yard to the public sidewalk and displayed a banner, "they would have been detained." Aplt.App. 00514, ll.1-6. It is clear that this burden on expression was substantially broader than necessary to further the City's legitimate interest in ensuring the safety of the convention participants.

The rejection of the Plaintiffs' proposed vigil further demonstrates that the City suppressed more expression than necessary to assure safety and security. It was the hypothetical possibility of requests by *other* groups – not the Plaintiffs – that concerned the City. In turning down the Plaintiffs' request, the City justified its actions only by saying that if it granted the Plaintiffs' request for a six-person one-hour vigil, it would have to grant other requests. The City's evidence, however, did not support its contention that that requests for similar treatment, if granted, would have "imperil[ed] all persons within the zone." Id. The only testimony that arguably came close to addressing this point was Lt. Carey's, discussed above, that allowing "large numbers" of protestors would have required additional law enforcement staffing. As for large numbers, the record contains no evidence that any more than 20-30 persons, including the Plaintiffs, might arguably

have been interested in requesting entry into the restricted area. Aplt.App. 00742, l.18 – 00743, l.1. The City did not demonstrate that the potential burden of monitoring demonstrators required keeping them three blocks away from the hotel entrance.

Moreover, Commander Liebowitz acknowledged not only that the City could have accommodated Plaintiffs' proposed vigil, but also that the CSPD could have adequately accommodated similar protests under the same conditions the Plaintiffs proposed. Aplt.App. 00502, l.18 - 00506, l.21. In the previous section, Plaintiffs explained that banning all protesters was not a sufficiently focused means of addressing the City's concern about overextending law enforcement resources, because a substantial portion of the burden on speech did not serve to advance the government's goal. For the same reason, banning all protestors burdens substantially more speech than necessary, Ward at 799, to address the City's concern about overextending law enforcement. This is especially true because the City already had sufficient law enforcement staffing to accommodate the Plaintiffs and any other groups that wanted to demonstrate under ground rules similar to what the Plaintiffs proposed.

4. The lack of narrow tailoring is further demonstrated by the existence of numerous and obvious alternatives that would have satisfied the City's legitimate interest in security while imposing less of a burden on constitutionally-protected expression.

A regulation can survive intermediate scrutiny even when it is not the least restrictive means of achieving the government's purpose. Nevertheless, "[t]he availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny." U.S. West, Inc. v. FCC, 182 F.3d 1224, 1238 (10th Cir. 1999), quoting 44 Liquormart v. Rhode Island, 517 U.S. 484, 529 (1996) (O'Connor, J., concurring). "This is particularly true when such alternatives are obvious and restrict substantially less speech." Id. "[A]n obvious and substantially less restrictive means for advancing the desired government objective indicates a lack of narrow tailoring." Id. at 1238, n.11.

The court applied this principle in Lederman v. United States, 291 F.3d 36 (D.C. Cir. 2002), when it considered a ban on expressive activity in a 250-foot "no demonstration zone" on the East Front sidewalk at the foot of the steps to the Capitol Building. Id. at 39-40. The government justified the ban as a measure to promote safety and orderly flow of traffic. Id. at 45. The court explained that the virtually *per se* ban on expressive activity was not narrowly tailored, and it relied on the "ready availability" of numerous less restrictive alternatives that would be "equally effective" in promoting the government objectives. Id. In listing

examples, the court included the enforcement of existing ordinances prohibiting obstruction of the sidewalk, impeding passage, and disorderly conduct. It also included the following:

> Alternatively, the Board could require permits for demonstrations on the sidewalk, limit the duration of such demonstrations, restrict the number of individuals who may demonstrate simultaneously, require that demonstrators present bags and other personal possessions to police officers for screening, or prohibit activities likely to attract *large* crowds.

Id. at 45-46. The court concluded that "the Government could achieve its intended objectives while also permitting some demonstrations on the East Front sidewalk." Id. at 46.

These principles clearly apply here. There were obvious alternatives to the City's total ban on expression. Even if the City had shown that some restrictions on peaceful First Amendment activity in the security zone were necessary (and it did not), the City nevertheless could have easily accommodated at least *some* expressive activity, in a content-neutral manner, without overextending the security personnel in a manner that would jeopardize the safety of the convention participants. As both the City and the district court acknowledged, the Plaintiffs' proposal for a six-person one-hour vigil did not jeopardize security. There was no reason why the City could not have accommodated the Plaintiffs' request and concurrently provided the same accommodations, on similar content-neutral terms,

to any other groups that also wanted to express their views. Similarly, the City could easily have implemented the less-restrictive alternatives identified in Lederman.[6] It could have set up a content-neutral permit system to approve demonstrations at specified times and locations within the restricted zone, with the permits issued on a first-come first-served basis. It could have imposed reasonable limits on the duration of each demonstration and/or reasonable limits on the number of participants. It could have restricted the available time slots. All of these alternatives would have reduced the degree to which monitoring the protests arguably would have strained the resources of the law enforcement personnel or diverted them from other security-related duties. It is clear that some or all of these less restrictive alternatives could have been implemented without overextending the already-available law enforcement personnel assigned to the NATO convention.

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[6] See also Coalition to Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61 (D. Mass. 2004). Despite "extraordinarily stringent security measures," id. at 63, that limited protest near the 2004 Democratic Convention in Boston, law enforcement did not adopt the "all or nothing" approach challenged in this case. Instead, officials charged with ensuring security set up a graduated, layered system. A "hard security zone" under the jurisdiction of the Secret Service covered the immediate vicinity of the Fleet Center, where the convention took place. Persons unconnected to the convention were forbidden to enter the "hard" security zone. Id. at 65. Boston officials were responsible for a less restrictive "soft security zone," which began across the street from the Fleet Center. Although vehicles, tables, and chairs were excluded from the soft zone, leafleting and small demonstrations were permitted without a permit. Demonstrations of between 21 and 50 persons required a permit, which Boston officials pledged to process on an expedited basis. Id. at 65-66.

This Court has explained that "[n]arrow tailoring means that the government's speech restriction must signify 'a careful calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition.'" U.S. West at 1238, quoting Cincinnati v. Discovery Network, 507 U.S. 410, 417 (1993). No such "careful calculation" was undertaken here. These less restrictive alternatives were not considered, and the City's witnesses could provide no reasons for rejecting them. Colonel Middleton testified, for example, that the possibility of allowing some limited First Amendment activity in the security zone was never seriously considered, because from the inception of the planning process, he agreed with his counterparts from other NATO countries that demonstrators would be excluded entirely. Aplt.App. 00712, l.24 – 00713, l.16 ("my mind was made up" to exclude demonstrators). Similarly, Commander Liebowitz regarded the decision as already final: no protesters would be permitted into the restricted area. Aplt.App. 00244-50. In his view, the complete exclusion of protesters was a legal matter than had already been resolved by the City attorney and military JAG. Aplt.App. 00497, l.8 – 00498, l.12. Lt. Carey was unaware of any discussion about issuing permits for demonstrations of limited scope within the restricted area. Aplt.App. 00163, l.2 – 00164, l.3. None of the City's witnesses testified that there were insufficient law enforcement personnel to implement

alternatives[7] that would have permitted at least some expression within the restricted zone on a content-neutral basis.[8]

Indeed, the district court was alone in concluding that the City could not feasibly implement the less restrictive alternatives the Plaintiffs proposed. As Plaintiffs explain in the following section, the district court's reasoning on this point was erroneous.

5. The district court failed to analyze whether the City's restrictions were narrowly tailored, and its brief analysis of Plaintiffs' proposed less restrictive alternatives was factually and legally erroneous.

Although the district court cited the Ward decision and quoted the appropriate legal standard, it failed to actually analyze whether the City's restrictions were, in fact, narrowly tailored to advance a significant government interest. In addition, the district court improperly analyzed the less restrictive

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[7] Even if there had been testimony that the existing staffing plan could not accommodate the extra task of monitoring limited numbers of protesters within the security zone (and there was none), an "obvious and substantially less restrictive" alternative, U.S. West at 1238, would be to assign additional officers to the NATO convention. The City presented no evidence that it could not have assigned additional officers or obtained reinforcements from other law enforcement agencies.

[8] In testimony that did not discuss permits, Lt. Carey briefly alluded to the possibility of allowing protesters to enter the security zone in limited numbers. He said that he did not know how the CSPD could decide who could enter and who could not. The answer is that law enforcement would not make such decisions. If permits were issued on a content-neutral, first-come first-served basis, then the permit holder – not the police – selects the participants who present the organization's message. See Hurley at 557, 574-81.

alternatives the Plaintiffs proposed, and it rejected them on a factually and legally erroneous basis.

The district court identified the significant government interest as "[t]he safety of the people and property within the security zone." Aplt.App. at 00225. The court noted the City's evidence that explosives had been stolen from a mining company several months earlier. It also noted that the conference included participants from countries with a history of conflict and that some of the delegates were accompanied by armed security teams. The court did not discuss or analyze, however, whether excluding protesters (who would be screened for explosives) from the restricted area directly advanced the government interest in protecting against the threat of explosives or the possible threat posed by the mutual animosities of some conference participants.

The court further noted that the Plaintiffs' proposed vigil would not have posed a logistical problem because "there were adequate personnel available to assure the peacefulness of a one-hour demonstration and the prevention of any disruption to the NATO conference." Aplt.App. 00226. The court then noted the City's position that granting access to the Plaintiffs would have prompted additional requests. The court agreed, stating that "it was reasonably probable that if the plaintiffs obtained the public notice they sought, similar requests would have been made by others on the following day." Aplt.App. 00227.

The court did not analyze whether any such additional requests would have threatened the City's ability to ensure safety. Instead, the court turned to Plaintiffs' argument that the City could have adopted less restrictive alternatives, such as issuing permits within the restricted zone for protests of limited duration and limited size. The district court rejected these less restrictive alternatives on the basis of a factually and legally erroneous proposition:

> The plaintiffs suggest that the City could have required permits for those seeking to demonstrate within the security zone, and that such a process would have allowed more speech, while still promoting the safety within the security zone. Granting or denying requests for permits would have placed the police or other city representatives in the position of assessing the potential for danger or disruption of the requesting groups and their messages. That would destroy the neutrality that is required by the First Amendment.

Aplt.App. 00227. The district court's analysis is severely flawed. Contrary to the court's suggestion, it is common to regulate potentially-competing uses of public space by means of a permit scheme. See, e.g., Utah Animal Rights Coalition v. Salt Lake City Corp., 371 F.3d 1248, 1258 (10th Cir. 2004) ("Permitting schemes are necessary to ensure that scarce 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"); Thomas v. Chi. Park Dist., 534 U.S. 316, 323 (2002). Contrary to the district court's mistaken view, granting or denying requests for permits would *not* have required police to assess the messages

of the requesting groups. On the contrary, the long-settled legal standard *prohibits* any prior assessment of the content of the message. See, e.g., Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992) ("any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message"); Thomas at 323, n.3. Indeed, the criteria for granting or denying permits must be so clear-cut that there is no room for subtle discrimination based on content or viewpoint. Thomas at 323, n.3 ("narrowly drawn, reasonable and definite standards"); Forsyth at 131 ("narrow, objective and definite standards").

The district court noted correctly that approving or denying permits on the basis of the speaker's message would destroy the neutrality required by the First Amendment. The court was incorrect, however, in assuming that any permit scheme would necessarily have to be based on an assessment of whether the speaker's message carried a "potential for danger or disruption." Aplt.App. 00227. Contrary to the district court's erroneous view, a permit scheme could easily have implemented the well-settled rules requiring content-neutral criteria.

After erroneously rejecting Plaintiffs' suggestion that the City could have devised a permit scheme to allow small groups the opportunity to express their views inside the restricted zone, the district court simply declared that the City's restriction was "reasonable." Aplt.App. 00227. The court then said, as if by way of explanation, that "a clear rule avoids disputes about whether such a restriction is

content neutral." Order at 10, citing Hill v. Colorado, 530 U.S. 703, 729 (2000). The court then stated:

> Reviewing requests for permits to demonstrate within the security zone would have required the commitment of personnel and resources to screen them, to conduct background checks, to escort persons in and out of the area and to monitor their activities.

Aplt.App. 00227. The court conducted no further discussion or analysis of the question whether the City's restrictions were narrowly tailored.

The district court's reasoning was flawed on multiple levels. First, as the district court noted, a "clear rule"" that prohibits all expression in a public forum, like the rule that is challenged here, will indeed "avoid disputes" over whether certain speakers receive favored treatment.[9] Aplt.App. 00227. But such clarity requires sacrificing the First Amendment. As this Court has recognized, "[i]n public fora, 'the government may not prohibit all communicative activity.'" First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114, 1132 (10th Cir. 2002), quoting Perry Education Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983). Because suppressing all expression is not a constitutional option, the key to minimizing disputes about content-neutrality is to ensure that the criteria for granting or denying permits are sufficiently "narrow, objective and definite" to avoid the discretion that leaves room for censorship and to minimize

[9] As this lawsuit demonstrates, however, such a rule will not avoid disputes about whether the total suppression of expression is justified.

the risk of arbitrary application. See Forsyth at 130-31. Contrary to the district court's suggestion, the Constitution does not permit government officials to prohibit all expression in a public forum just so they can avoid disputes about how they administer a content-neutral permit scheme.

Second, the district court's reliance on Hill was misplaced. The reasons that prompted the Hill court to tout the benefits of a bright-line rule do not apply here. Contrary to the suggestion of the district court, allocating time slots for small groups to enter the security zone on a first-come first-served basis would not have required any complicated individualized on-the-spot assessments.[10] More

[10] In Hill, the court considered a Colorado statute enacted to protect patients who were often accosted at health clinic entrances by confrontational anti-abortion demonstrators using strong and abusive language in close-up face-to-face encounters. Id. at 709-10. The statute applies at the entrances to health care facilities and forbids "knowingly approach[ing]" within eight feet of another person, without that person's consent, for the purpose of engaging in certain expression. Id. at 707. The court upheld the statute as a valid content-neutral regulation of the manner of speech. In responding to the dissenters' argument that the statute was not narrowly tailored, the majority noted that "the statute takes a prophylactic approach; it forbids all unwelcome demonstrators to come closer than eight feet." Id. at 729. The majority conceded that the statute will sometimes apply to a demonstrator whose approach would have turned out to be harmless. Id. The court opined that the legislature's choice of a bright-line rule could well be superior to an attempt to address the problem by "legal rules that focus exclusively on the individual impact of each instance of behavior, demanding in each case an accurate characterization (as harassing or not harassing) of each individual movement within the 8-foot boundary." Id. Noting that difficulty of "such individualized characterization of each individual movement," the court concluded with the sentence quoted by the district court in this case: "A bright-line prophylactic rule may be the best way to provide protection and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself." Id.

importantly, however, the legal standard that governs permit schemes ensures the very same advantages as the bright-line rules praised by the district court: a permit scheme must be content-neutral and contain "narrow, objective and definite" criteria for decision. Such a standard, "by offering clear guidance and avoiding subjectivity," Hill at 729, ensures the protection of free expression.

Third, in promoting the virtues of a "clear rule," the court neglected to analyze whether that rule struck the proper balance between the City's interests and the First Amendment rights of the Plaintiffs and other potential dissenters. The rule of total exclusion that is challenged here would be just as "clear" if it had forced the Plaintiffs to hold their banner four blocks away from the entrance to the Broadmoor Hotel, or six blocks, or even a mile. By simply declaring in a conclusory fashion that the City's restrictions were "reasonable," the court erroneously failed to analyze whether the restrictions were narrowly tailored to advance the City's interest in ensuring the safety of the conference participants.

The district court added an additional sentence, noting that a permit scheme would require "personnel and resources" to screen, escort, and monitor the protesters. Aplt.App. 00227. The court said nothing about the amount of personnel or resources it believed these tasks would require, nor did the court conclude that screening, escorting, and monitoring small groups of protesters would have diverted so many resources as to threaten the City's ability to ensure

safety. Any such conclusion would be unsupported by the record. There was no testimony that any such expenditure of resources would have diverted the security staff in a manner that would have thwarted their ability to respond to true security threats. Commander Liebowitz testified that there were sufficient officers at hand to handle small-group protests like the one proposed by the Plaintiffs. The only evidence in the record of the possible numbers of protesters who would have made any request similar to the Plaintiffs was, at the most, 20-30 protesters, *including* the six Plaintiffs. Aplt.App. 00742, l.7 to 00743, l.1. Had the City accommodated the Plaintiffs' request for a brief vigil, the City clearly could have accommodated any additional requests on a similar basis.

In conclusion, the district court erroneously failed to undertake the analysis explained in Sections A and B, above, which demonstrates that the City's exclusion of all public expression from the restricted zone was not narrowly tailored. In addition, it erroneously rejected the less restrictive alternatives discussed in Lederman and those proposed by the Plaintiffs, including a content-neutral permit scheme for demonstrations of limited duration with limited numbers of participants. There was no evidence that such less restrictive alternatives were unworkable or would have posed a threat to the safety or security of the conference participants. Thus, as this Court has explained, there were "obvious and substantially less restrictive means for advancing the desired government

objective," U.S. West, Inc. at 1238, n.11, which "indicates a lack of narrow tailoring." Id.

Because the City failed to demonstrate that its restrictions on expression were narrowly tailored, no further analysis is necessary. The lack of narrow tailoring alone requires reversal. See American-Arab Anti-Discrimination Comm. v. City of Dearborn, 418 F.3d 600, 607 (6th Cir. 2005); Lederman at 44. Nevertheless, as discussed below, reversal is also required because the City failed to leave the Plaintiffs with adequate alternative channels of communication.

6. The challenged restrictions failed to leave open adequate alternative channels for communication.

To survive intermediate scrutiny, the government must demonstrate that regulations of the time, place, or manner of expression "leave open alternative channels for communication" that are both "ample" and "adequate." See Ward at 798 ("ample"); City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994) ("adequate"). In this case, the Plaintiffs did not have ample alternative channels of communication because they were deprived of the opportunity to reach their intended audience. "[A]n alternative is not ample if the speaker is not permitted to reach the intended audience." Weinberg at 1029, 1042, quoting Bay Area Peace Navy at 1224, 1229. The Plaintiffs were removed to a location several blocks away from the symbolic target of their protest, the entrance to the convention hotel, and from their intended

audience, the convention participants and the international and national media representatives who were housed in the International Center.

Numerous courts have held that the government violates the First Amendment when it forces speakers so far from their intended audience that they cannot be seen or heard or when the government otherwise thwarts or threatens the speaker's "ability to communicate effectively," Weinberg at 1042, quoting Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984), with the intended audience.

For example, in Bay Area Peace Navy, the Coast Guard imposed a 75-yard security zone that thwarted the plaintiffs' water-borne demonstration. Because of the distance, the intended audience could not read the protesters' banners nor hear their singing. Id. at 1226. The court ruled for the plaintiffs, because "[a]n alternative is not ample if the speaker is not permitted to reach the 'intended audience.'" Id. at 1229.

In Baugh, the demonstrators were ordered to a "First Amendment area" that was 150-175 yards away from the government officials to whom the demonstrators wished to address their message. Id. at 1044. The court held that "[s]uch distancing of the demonstrators from the intended audience does not provide a reasonable alternative means for communication." Id. at 1044.

In SEIU, the court rejected the government's plan to keep protesters at least 260 yards away from the entrance to the Democratic Convention. The court held that the "Official Demonstration" area was not an adequate alternative because the plaintiffs "cannot get close enough to the facility to be seen or heard." Id. at 972.[11]

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[11] Even when, unlike the situation here, security officials face the challenge of dealing with tens of thousands of demonstrators, some of whom are expected to be hostile, violent, or actively disruptive, law enforcement has been able to provide adequate security without forcing protesters as far away as the Plaintiffs were in this case.

For example, on the eve of the Iraq war in 2003, an antiwar organization sought a permit for a protest march, with 150,000 expected participants, past the United Nations headquarters. United for Peace & Justice v. City of New York, 243 F.Supp.2d 19 (S.D.N.Y.), aff'd 323 F.3d 175 (2d Cir. 2003). The New York City police department denied the permit, saying it could not provide adequate security for a moving parade that close to the U.N. Building. The police readily offered an alternative site for a stationary demonstration at Dag Hammarskjord Plaza, at the edge of the U.N. complex, which is "highly visible" from the U.N. building. Id. at 25. The court concluded that this alternative enabled the Plaintiff "to communicate its message at a desirable location in close proximity to its target audience, the United Nations." Id. at 30.

In the wake of violent riots in Seattle on the occasion of the 1999 World Trade Organization conference, which led to the emergency closure to the public of the portion of the downtown area encompassing the delegate hotels and meeting venues, protestors were still permitted to assemble "directly across the street" from the convention center where they "could reasonably expect their protest to be visible and audible to the delegates." Menotti v. City of Seattle, 409 F.3d 1113, 1138 (9th Cir. 2005).

Finally, the heavily-fortified site of the Democratic Convention in Boston in 2004, surrounded by a "hard security zone" and a "soft security zone," also included a designated "demonstration zone." Coalition to Protest the Democratic Nat'l Convention at 61, 65-67. Despite its drawbacks as a "grim, mean, and oppressive space," id. at 67, with the ambience of an "internment camp," id. at 74, the demonstration zone "provid[ed] a direct interface between demonstrators and the area where delegates will enter and leave the Fleet Center." Id. The Court of Appeals agreed that the demonstration zone "did provide an opportunity for

The Plaintiffs in this case were removed even farther from their intended audience than the protesters in the foregoing cases. The Broadmoor was barely visible from the location offered to the Plaintiffs at Checkpoint 1.[12] No convention participant could read the Plaintiffs' banner from the Broadmoor. None of the national or international media representatives could read the banner from the International Center. Because the Plaintiffs were deprived of the opportunity to communicate with their intended audience, they did not have an adequate alternative channel of communication.[13] See also New Alliance Party v. Dinkins, 743 F. Supp. 1055, 1066-67 (S.D.N.Y. 1990) (holding that alternative protest location was not adequate because it permitted "only a glimpse of the northern

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expression within sight and sound of the delegates, albeit an imperfect one." Bl(a)ck Tea Soc'y at 8, 14.

[12] During the trial, the City suggested that the Plaintiffs could have protested outside Checkpoint 3, near the Broadmoor West complex across the lake from the main hotel. The hotel's security director acknowledged, however, that there were no windows on the side of the building that would have permitted the Plaintiffs to be seen at that location by persons inside the complex.

[13] Although vehicles carrying at least a few members of the intended audience passed by Checkpoint 1, they did not actually stop – they were waved right through. Aplt.App. 00509, ll.4-16. It is possible that a sharp-eyed and alert member of the intended audience, who was sitting on the south side of the vehicle, whose view was not impaired by a darkened smoked-glass window, and who happened to peer out at just the right moment, might have caught a momentary glimpse of the Plaintiffs' banner while passing through Checkpoint 1. Such a remote possibility, however, is not sufficient to satisfy the First Amendment's requirement that Plaintiffs have an adequate opportunity to "communicate effectively," Weinberg at 1042, to their intended audience. See SEIU at 972 (explaining that an alternative channel is not adequate when "only those delegates with the sharpest eyesight and most acute hearing have any chance of getting the message").

corner of [Gracie] Mansion" where the intended audience was located); Students Against Apartheid Coalition v. O'Neil, 660 F. Supp. 333, 339-340 (W.D. Va. 1987) (holding that relegating students to alternative locations to construct symbolic protest "shanties" placed them beyond earshot and out of the sight of the intended audience, the Board of Visitors); Weinberg at 1042 (holding that ordinance banning peddling within 1,000 feet of stadium deprives plaintiff of ample alternative channels to distribute his book to his intended audience, Chicago Blackhawks fans).

In concluding erroneously that Plaintiffs were provided adequate alternative channels of communication, the district court incompletely summarized material facts in the record and also misapplied the law. First, the court stated that "[t]he media representatives were not permitted to conduct interviews with delegates of others [sic] attendees outside of the IC." Aplt.App. 00228. If the Plaintiffs had been able to conduct their vigil at their chosen location, however, they would have been easily visible to the media representatives from the front of the International Center itself. In addition, the media representatives were permitted to go outside the International Center onto the grassy area to the south, where they could easily have communicated directly with the Plaintiffs. Thus, contrary to the district court's suggestion, the national and international media would have been able to

photograph the Plaintiffs and communicate with them if they had been permitted to conduct their vigil on the sidewalk adjacent to the International Center.

Second, the district court misapplied the law when it concluded that the location near Checkpoint 1 "provided sufficient opportunity for the plaintiffs to communicate their message to the public directly and through the media." Aplt.App. 00227-28. The court relied on Plaintiffs' contact with local reporters,[14] and it erroneously regarded the local press as a substitute for the Plaintiffs' intended audience: the conference participants and the national and international media representatives. Contrary to the district court's faulty reasoning, an alternative is not adequate if it "forecloses a speaker's ability to reach one audience even if it allows the speaker to reach other groups." Weinberg at 1029, 1041, quoting Gresham v. Peterson, 225 F.3d 899, 907 (7th Cir. 2000). The difference in the audiences is particularly clear in this case, as the national and international visitors are unlikely to tune in to Colorado Springs television or pick up the local newspaper. Thus, the district court erred when it concluded that Plaintiffs'

[14] The court noted that local newspaper reporters spoke with the Plaintiffs when they displayed their banner at Checkpoint 1. Aplt.App. 00224. The court also stated that the Plaintiffs' banner "had been included in the T.V. news coverage" of a demonstration that took place a day earlier, before the conference began, at Seventh and Lake, several blocks east of Checkpoint 1. Aplt.App. 00224. In making the latter statement, the district court apparently misapprehended the record. Although the Plaintiffs' banner was visible for a brief moment in raw video footage taken by a local television station and introduced by the City, the testimony does not reflect that this footage was broadcast.

opportunity to talk with local newspaper reporters was an adequate substitute for the missed opportunity to communicate with international visitors from over two dozen foreign countries.

Finally, although the district court noted that the Plaintiffs considered the Broadmoor Hotel to be the symbolic target of their vigil, Aplt.App. 00228, it unjustifiably dismissed that point as insignificant. Without any further discussion or analysis, the court simply concluded: "They have not shown that the difference between the permitted location and the street in front of the IC was a significant impediment to their freedom of expression." Aplt.App. 00228.

Location is a critical component of a speaker's message, especially when, as in this case, "the place represents the object of protest, the seat of authority against which the protest is directed." Wolin v. Port of New York Auth., 392 F.2d 83, 90 (2d Cir. 1998); see also Women Strike for Peace v. Morton, 472 F.2d 1273, 1287 (D.C. Cir. 1972) (recognizing the "unmistakable symbolic significance" in demonstrating close to specific buildings). When considering the First Amendment rights of demonstrators at the Democratic Convention, the court recognized the importance of the street running by the convention center as the "symbolic doorstep" of the Democratic National Committee. Coalition to Protest the Democratic Nat'l Convention at 61, 72. Similarly, the entrance to the Broadmoor Hotel was the "symbolic doorstep" of the NATO decisionmakers. The

district court failed to accord appropriate weight to the symbolic significance of the Broadmoor. See Weinberg at 1041 ("Whether an alternative is ample should be considered from the speaker's point of view."). Similarly, the district court discounted the significance of Plaintiffs being forced to conduct their vigil several blocks away, where the visual connection to their target "was partially obstructed, remote, and oblique" and "the protestors' message of confronting the authority represented by the building was inhibited." Galvin at 739, 755.

Had the Plaintiffs been permitted to conduct their vigil in their chosen location, it would have provided an opportunity for the national and international media not only to see the Plaintiffs' banner, but also to photograph and videotape the Plaintiffs holding their banner with the symbolic doorstep of the NATO decisionmakers in the background. Such an image signifies something more than the specific content of the Plaintiffs' views; it also symbolizes the fact that peaceful and principled criticism of military policy is both possible and present, a significant message to convey to the international press and their audiences, who include potential constituents of the global movement in which the Plaintiffs participate.

Thus, the district court erred by concluding that the City's restrictions provided the Plaintiffs with ample alternative channels of communication. That represents a second independent ground for reversal.

VIII. CONCLUSION

For the foregoing reasons, the City failed to carry its burden of proving that the challenged restrictions met the test of Ward, and the district court therefore erred by awarding judgment to the City. Because this Court has an obligation to conduct a *de novo* review of the entire record and because the district court's order does not turn on any credibility determinations, this Court stands in the shoes of the district court. This Court should therefore reverse the judgment of the district court and remand with instructions to enter judgment in favor of Plaintiffs.

IX. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested due to the importance of the Constitutional issues at stake and to enable the parties to assist the Court with any questions it may have regarding the factual record.

Respectfully submitted this 30th day of January, 2006.

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

Under FRAP 32(a)(7), undersigned counsel certifies that this brief is set in the proportionate font Times New Roman, 14-point, and contains a word count of 13,680 words.

/s/ Mark Silverstein
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of January, 2006, a true and correct copy of the foregoing **APPELLANTS' OPENING BRIEF** was placed in the United States mail, postage prepaid, and the brief was also submitted by digital submission as a native PDF file (along with a scanned PDF format of the attachment to the brief), to the following addressees:

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