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' REPLY BRIEF

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I. THE CITY'S "STATEMENT OF FACTS" MUST BE READ WITH SKEPTICISM

In its brief,[1] the City of Colorado Springs ("the City") includes multiple pages of bullet-pointed assertions that it presents as facts supported by the record. The City's presentation warrants caution, as many of the factual assertions are not supported by the corresponding citations to the record. In other instances, the City's one-sided selection of record citations presents a distorted picture. The following are a few examples:

- The City states that security planners for the NATO conference were "concerned about possible terrorist threats and/or violent demonstrations." AB at 5 (1st bullet). Although the City cites to testimony that mentions the fear of vehicle-borne explosives, none of the five record citations support the City's assertion about "violent demonstrations."
- The City also states that "such attacks or violent demonstrations have taken place at other NATO events." AB at 5 (2nd bullet). Neither of the record citations mentions demonstrations, nor do they mention any terrorist attacks at past NATO events.

[1] The brief of the City of Colorado Springs, the Appellee in this case, is abbreviated as "AB." Plaintiffs' Opening Brief is abbreviated as "AOB."

- The City states that the security measures "were implemented pursuant to NATO protocol as used worldwide" and that the security "was planned pursuant to an international memorandum of agreement." AB at 5 (6th bullet). The cited portions of the record, however, do not support any suggestion that either "NATO protocol" or a "memorandum of agreement" somehow required the restriction on expression that is challenged in this case. Nor does the City's brief challenge the district court's conclusion that "only the City had the authority to close its public streets." Aplt. App. 226.
- The City states that "complicated international diplomacy was involved with the defense ministers and their staff from 19 different nations throughout the planning and conference process." AB at 6 (2nd bullet). The only "complicated international diplomacy" discussed in the cited portion of the record, however, is the familiar principle that protocol requires that one country's delegate must be treated the same as another country's. Aplt. App. 61, ll. 3-11.
- The City states that the location where Plaintiffs wanted to conduct its vigil "was not visible from the front door of the Broadmoor, or from Broadmoor West, where the meetings and delegate functions took place." AB at 8 (2nd bullet). The cited portions of the record say

nothing about Broadmoor West nor about the location of the meetings or the delegate functions. As for the view of the front door of the Broadmoor, the City relies on Mr. Sulzman's testimony about Exhibit G1, a photograph. In the page before the testimony that the City relies on, Mr. Sulzman testifies that the photograph does not accurately depict the view from the location where Plaintiffs wanted to conduct its vigil. Aplt. App. 454, ll. 7-24. Mr. Sulzman acknowledges that, from the location where Exhibit G1 was shot, trees block the view of the front door of the Broadmoor Hotel. Mr. Sulzman further testifies that "that's probably why we wouldn't have stood there." Aplt. App. 455, ll. 4-7.

- The City distorts the record by describing, out of chronological order, selected portions of the communications about Plaintiffs' proposed vigil that took place before the NATO conference. AB at 8-9. As the exhibits make clear, Plaintiffs' attorney spoke first with Commander Liebowitz on Friday, September 26, 2003. Pursuant to the suggestion of Commander Liebowitz, Plaintiffs' attorney then spoke with Lori Miskel of the City Attorney's office on Monday, September 29, 2003. Aplt. App. 240 (Plaintiffs' Exhibit 2). Following that conversation, Plaintiffs' attorney wrote to City officials in a letter dated October 1,

2003. Aplt. App. 239 (Plaintiffs' Exhibit 2). In that letter, Plaintiffs' attorney outlined the details of the brief vigil Plaintiffs proposed on the sidewalk outside the International Center. The letter also offered to discuss possible alternatives "as long as those alternatives did not require CPIS members to be excluded entirely from the territory of the announced 'security zone.'" Aplt. App. 241. Ms. Miskel responded in a letter dated October 3, 2003. Aplt. App. 242 (Plaintiffs' Exhibit 3). Her letter invited Plaintiffs to discuss "the most suitable demonstration site outside of the security zone." Aplt. App. 243 (emphasis added).

- The City states that "all meetings were conducted at the Broadmoor West facility," AB at 10 (1st bullet), but the citation to the record does not support that assertion.
- The City states that the day before Plaintiffs' proposed vigil, a "sizeable" demonstration took place on Lake Street, several blocks east of Second Street. AB at 10 (2nd bullet). The cited portion of the record says nothing about the size of the demonstration.
- The City asserts that the "international media were aware of protestors at Second and Lake." AB at 13 (2nd bullet). The City cites to the testimony of a member of the local media who testified, without

foundation, that "everybody at the International Center" saw them. AB at 13, citing Aplt. App. 743, ll. 6-13. The cited testimony prompted an objection, which was sustained. Aplt. App. 743, ll. 14-17.

- Citing the testimony of Commander Liebowitz, the City states that allowing demonstrators into the restricted zone would require committing additional security personnel. AB at 14 (2nd bullet). The City fails to mention Liebowitz's admission that the number of security personnel present at the NATO conference was sufficient to handle Plaintiffs' proposed vigil. Aplt. App. 498, l. 25 – 502, l. 17. Nor does the City mention the additional testimony that with the already-assigned personnel, the City could have handled similar protests by groups limited to a particular size, such as ten persons. Aplt. App. 502, l. 18 – 506, l. 21.
- In an effort to suggest that Mr. Sulzman might have engaged in criminal acts if he had been permitted to enter the restricted zone, the City distorts Mr. Sulzman's testimony. AB at 14 (3rd bullet), citing Aplt. App. 453, ll. 2-5. The City does not mention Mr. Sulzman's testimony that he would not have even considered engaging in any

civil disobedience at the NATO conference because "we signed off on another course." Aplt. App. 448, ll. 21-23.

II. THE CITY FAILS TO DEMONSTRATE THAT THE CHALLENGED RESTRICTION IS NARROWLY TAILORED

In the section of its brief devoted to the issue of narrow tailoring, the City argues at length about issues that are not contested. At the same time, the City fails to discuss, and therefore essentially concedes, critical points raised in Plaintiffs' Opening Brief. As a result, the City has failed to demonstrate that the exclusion of Plaintiffs from the restricted zone satisfies the test of narrow tailoring.

The City devotes several pages to an undisputed legal proposition – that the narrow tailoring standard does not require the government to adopt the least restrictive means of achieving its stated goals. Plaintiffs have never argued otherwise. The standard of Ward v. Rock Against Racism, 491 U.S. 781 (1989), is one of intermediate scrutiny, not strict scrutiny. In this case, the City has failed to carry its burden[2] of demonstrating that the restrictions on Plaintiffs' speech meet the standard of intermediate scrutiny articulated in Ward.

In its "Summary of the Argument," the City acknowledges that the narrow tailoring standard is not satisfied simply because a regulation advances a significant government interest to some degree. As the City notes, a regulation

[2] The City does not dispute that it bears the burden of proving that its restrictions on expression are justified.

flunks the test of narrow tailoring if it is "substantially broader than necessary to achieve that interest." AB at 16. In the "Argument" section of its brief, however, the City fails to rebut or even discuss Plaintiffs' argument that the challenged restrictions on pedestrian protesters were substantially broader than necessary.

A. The City Imposed a Total Ban on All Pedestrian Protesters in a Public Forum.

The City does not dispute the district court's statement that "[w]hat is at issue in this litigation is the legitimacy of a complete closure of a traditional public forum." Aplt. App. 225. The City objects, however, when Plaintiffs discuss the legal standard that applies when the government bans completely a particular form of expressive activity in a public forum. Such a complete ban can be narrowly tailored "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).

The City responds by stating that it did not impose a complete ban on expressive activity outside the security zone. AB at 26. The City misses the mark. As the D.C. Circuit recently explained, "[t]he Supreme Court has stressed the importance of providing access '*within* the forum in question.'" Initiative and Referendum Institute v. United States Postal Service, 417 F.3d 1299, 1310 (D.C. Cir. 2005), quoting Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 655 (1981) (emphasis added). In this case, as the district court noted, the

issue is the complete closure of the traditional forum area comprised of the streets and sidewalks near the Broadmoor.

In attempting to argue that the complete ban on pedestrian protesters is narrowly tailored, the City relies on Frisby, which upheld an ordinance banning residential picketing that targets a particular home. In that case, the Court concluded that the ordinance was narrowly tailored to protect the privacy of individuals within their own home from aggressive and unwanted communications directed to their residence in particular. Frisby at 484-88.[3] Frisby's reasoning in explaining why a complete ban was permissible, however, demonstrates that that the complete ban on pedestrian protesters in *this* case was *not* narrowly tailored. In Frisby, the Court stated as follows:

> A statute is narrowly tailored if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy. City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 808-10 (1984). A complete ban can be narrowly tailored, *but only if each activity within the proscription's scope is an appropriately targeted evil*.

Frisby at 485 (emphasis added). The Court then explained that in Taxpayers for Vincent, it considered an ordinance that imposed a complete ban on the posting of signs on public property. The Court upheld the complete ban "because the interest

[3] Contrary to the City's statement, Frisby did not hold that the ban on residential picketing "furthered the city's interest in maintaining safety and quiet in residential neighborhoods." AB at 26, citing Frisby at 486. No such governmental interest is discussed in the portion of the decision cited by the City, nor in any other portion of the Court's opinion.

supporting the regulation, an esthetic interest in avoiding visual clutter and blight, rendered each sign an evil." Id. at 485-86. Further explaining the result in Taxpayers for Vincent, the Frisby court explained that complete prohibition of signs on public property was legitimate because "the substantive evil – visual blight – [was] not merely a possible byproduct of the activity, but [was] created by the medium of expression itself." Frisby at 486, quoting Taxpayers for Vincent at 810.

Similarly, in Frisby, the court explained that picketing that focuses on and targets a particular household in a residential neighborhood intrudes offensively on the privacy of the home. It concluded that the "evil" of targeted residential picketing "is created by the medium of expression itself." Id. at 487, quoting Taxpayers for Vincent at 810. Accordingly, each activity that fell within the complete ban was an appropriately-targeted evil.

This case is different. As Plaintiffs explained in their Opening Brief, the City's interest in ensuring the safety of the NATO delegates does not make each pedestrian protester an "evil." The potential danger to NATO delegates is not created by the mere presence in the restricted zone of pedestrians who have been pre-screened for explosives. On the contrary, the possible danger posed by pedestrian protesters is the potential strain on law enforcement resources. See AOB at 29-30, 33. This danger is a "byproduct," Frisby at 486, that arises only

when the presence of *too many* pedestrian protesters diverts law enforcement officers from other necessary security-preserving duties.[4] For that reason, the narrow tailoring analysis does not regard pedestrians protesters as an "appropriately-targeted evil" that justifies a complete ban. This is especially clear in light of two obvious alternatives to a complete ban on pedestrian protesters that would satisfy the City's interest in security – providing additional law enforcement resources and/or limiting the number and scope of pedestrian protests.[5]

B. The City's Reliance on United States v. Griefen is Misplaced.

In arguing that its restrictions on pedestrian protesters were narrowly tailored, the City mistakenly relies on United States v. Griefen, 200 F.3d 1256 (9th Cir. 2000). In Griefen, a contractor was scheduled to extend a road to facilitate logging in the Nez Perce National Forest. Before construction began, protesters occupied the area, dug trenches across the existing roadway, and erected barriers

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[4] Similarly, a small pedestrian protest, such as the 6-person one-hour vigil Plaintiffs proposed, did not pose any of the potential harms the City relies on in attempting to justify the challenged restriction. As Commander Liebowitz acknowledged, and as the district court concluded, the number of law enforcement resources already assigned to the NATO conference was sufficient to monitor Plaintiffs' vigil and handle any possible problem it might have caused. Aplt. App. 498, l. 25 – 502, l. 17 (Liebowitz); Aplt. App. 226 (district court). As for the potential harms posed by the prospect that other groups would seek the same accommodation Plaintiffs requested, Commander Liebowitz acknowledged that the City could have accommodated them too under protocols comparable to those Plaintiffs suggested, for groups limited to a particular size, such as ten persons. Aplt. App. 502, l. 18 – 506, l. 21.

[5] These alternatives are discussed in Section II.C.

intended to impede construction. When construction was set to begin, the Forest Service issued a temporary closure order that barred the protesters and other members of the public from approaching or remaining within 150 feet of the construction zone. The closure order was served on the protesters, and five of them, the defendants in the case, refused to leave. The Forest Service had to resort to extraordinary measures to remove the defendants from raised structures they had erected across the roadway. One had to be removed with a hydraulic cherry picker. Another had secured himself in a raised structure that was "defended by nails" and was "brought to earth" only when the structure's legs were dismantled. Id. at 1259.

The court concluded that the closure order was narrowly tailored to advance the government's interest in assuring that the road construction proceeded without danger to persons or property. The construction project "required the use of potentially dangerous heavy construction equipment." Id. at 1260. Moreover, as the court explained, "the protesters had already shown by their destructive conduct that they presented a clear and present danger to the safe completion of the construction project, both to other persons as well as to themselves." Id.; see also id. at 1261 (concluding that the protesters posed a "clear and present threat to health and safety and property").

The government's decision to keep protesters a mere 150 feet away in Griefen does not compare to the City's decision in this case to keep protesters more than 1,000 feet away.[6] Moreover, unlike the situation in Griefen, the pedestrian protesters in this case, all of whom would have been screened for weapons and explosives, did not pose any direct threat to health, safety, or property. The court's decision to uphold the limited closure order in Griefen is not persuasive when applied to the much larger exclusion zone and very different facts of this case.

C. The City Fails to Discuss Obvious Alternatives that Would Satisfy the City's Interests While Suppressing Substantially Less Speech.

The City acknowledges this Court's decision in U.S. West, Inc. v. FCC, 182 F.3d 1224 (10th Cir. 1999), which explained that "an obvious and substantially less restrictive means for advancing the desired government objective indicates a lack of narrow tailoring." Id. at 1238, n.11; see AB at 27. Nevertheless, the City fails to discuss obvious alternatives that Plaintiffs outlined in their Opening Brief. One such alternative is providing additional law enforcement staffing. Another is providing for short-duration demonstrations inside the restricted zone with limited numbers of participants. Either of these obvious alternatives would have satisfied

[6] In their Opening Brief, Plaintiffs explained that they had been unable to find a single case that allowed the government to banish protesters to a location more than 1,000 feet away from their intended audience. AOB at 24-25, citing five cases invalidating exclusion zones less drastic in scope than the one challenged in this case. Although distance alone is not always a dispositive factor, the City has failed to cite a single case in which a court approved a no-protest zone as expansive as the one surrounding the NATO conference.

the City's legitimate interests in safety and security while suppressing substantially less expression.

D. The City Failed to Demonstrate That It was Unable to Provide Sufficient Law Enforcement Officers to Accommodate Pedestrian Protesters Within the Restricted Zone.

As Plaintiffs pointed out in their Opening Brief, courts have held that the proper response to the possibility of disruptive demonstrations "is for the government to ensure an adequate police presence . . . rather than to suppress legitimate First Amendment conduct as a prophylactic measure." Collins v. Jordan, 110 F.3d 1363, 1372 (9th Cir. 1996), citing Cox v. Louisiana, 379 U.S. 536, 551 (1965) and Kunz v. New York, 340 U.S. 290, 294-95 (1951). Thus, to the extent that the presence of pedestrian protesters posed a risk of diverting law enforcement resources from other security-related duties, an obvious solution was to provide an adequate number of additional law enforcement officers to handle whatever potential problems the protesters might pose.[7] Such a solution would satisfy the City's concerns without banishing pedestrian protesters from the restricted zone.

The City offers no real response. The City cites testimony that additional police resources would have been necessary if unlimited numbers of protesters had

[7] The only evidence the City produced about the number of protesters who might arguably have been interested in protesting at the NATO conference was 20-30, including Plaintiffs. Aplt. App. 742, l.18 – 743 l. 1.

been allowed into the security zone and if they engaged in criminal conduct. In its Statement of Facts, the City states that "CSPD did not have the resources available." AB at 15. The testimony about the "resources available" on which the City relies, however, refers to the resources available under a staffing plan that assumed that all pedestrian protesters would be forbidden to enter the restricted zone. As Plaintiffs explained in their Opening Brief, the City did not demonstrate that it was unable to provide additional staffing,[8] nor was there any testimony indicating that the City was unable to seek reinforcements from other law enforcement agencies. In the absence of such testimony, the City has failed to carry its burden of proving that its exclusion of pedestrian protesters was narrowly tailored.

E. The City Failed to Show That It Could Not Have Accommodated Limited-Duration Protests with Limited Numbers of Participants.

In their Opening Brief, Plaintiffs discussed another obvious alternative that would have satisfied the City's safety and security concerns while suppressing substantially less expression – providing an opportunity within the restricted zone for limited-duration protests with limited numbers of participants. AOB at 37-48. Plaintiffs relied on Lederman v. United States, 291 F.3d 36 (D.C. Cir. 2002),

[8] The "facts" section of the City's brief also states that the CSPD's resources were "strained to the limit." AB at 15. This characterization does not appear in the cited portion of the record. Rather, it is the City's argument to this Court.

which relied on a similar alternative to hold that a "no demonstration zone" near the Capitol building was not narrowly tailored.

The City provides no response. The City does not challenge the district court's conclusion that the City could have accommodated the small one-hour vigil Plaintiffs proposed without taxing the already-assigned law enforcement personnel. Nor does the City dispute the testimony of Commander Liebowitz, who acknowledged that the City could have accommodated similar requests, under protocols comparable to those suggested by Plaintiffs, for groups limited to a particular size, such as ten participants. Aplt. App. 502, l.18 – 506, l.21. Similarly, the City does not challenge Plaintiffs' argument that the City could have allocated time slots for these small-scale protests pursuant to a content-neutral permit scheme.[9] Finally, the City declines to discuss or challenge Plaintiffs' reliance on Lederman. Thus, the City leaves unanswered the argument at pages 37-48 of Plaintiffs' Opening Brief.

Because of the existence of these obvious alternatives that would have satisfied the City's security concerns while restricting substantially less expression, the City's restrictions cannot be deemed to be narrowly tailored. See U.S. West, Inc. at 1238, n.11. The absence of narrow tailoring, by itself, requires reversal. In

[9] Thus, the City makes no attempt to defend the district court's erroneous conclusion that it was impossible to issue permits for such small-scale protests on a content-neutral basis. The City in essence concedes the argument at pages 43 - 48 of Plaintiffs' Opening Brief.

addition, as explained below, reversal is also required because the City's restrictions failed to leave adequate alternative channels of communication.

III. THE CITY FAILED TO DEMONSTRATE THAT THE CHALLENGED RESTRICTION LEFT PLAINTIFFS WITH ADEQUATE ALTERNATIVE CHANNELS OF COMMUNICATION

The City has failed to demonstrate that excluding Plaintiffs from the restricted zone left them with adequate alternative channels of communication.

The City suggests that Plaintiffs could have conducted their protest at the World Arena,[10] where members of the national and international press boarded buses to take them to the International Center. The City also suggests that Plaintiffs could have conducted their protest at public areas outside the Pro Rodeo Hall of Fame, or Peterson Air Force Base, or Shriver Air Force Base, locations that the NATO delegates visited at some points during the several-day conference. The City presents no legal authority for its suggestion that the First Amendment requires Plaintiffs to investigate all possible times and locations throughout the entire metropolitan area where members of their intended audience might show up over a several-day period. Plaintiffs selected a spot on a public sidewalk in a traditional public forum where there is a presumption that the First Amendment guarantees the right of expression. As the Supreme Court has explained, "one is not to have the exercise of his liberty of expression in appropriate places abridged

[10] The World Arena is a ten-minute drive from the Broadmoor Hotel. Aplt. App. 188, ll. 4-10.

on the plea that it may be exercised in some other place." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975), quoting Schneider v. State, 308 U.S. 145, 163 (1939). This Court must reject the City's argument that Plaintiffs should have been content to take their protest somewhere across town.

Moreover, the City presented no evidence that Plaintiffs could have obtained detailed advance information about the delegates' schedule or their whereabouts at specific times. Mr. Sulzman testified that he did not have access to the schedules of either the media or the delegates, nor did he know in which specific areas of the Broadmoor buildings they would be located at specific times. Aplt. App. 460, l. 18 – 461, l. 14. Indeed, the City's witnesses testified that the schedules of the delegates were not released to the public for security reasons. Aplt. App. 687, l. 24 – 688, l. 5 (testimony of Michael Zirkle); Aplt. App. 538, ll. 12-14 (testimony of Commander Liebowitz).

Contrary to the City's argument, holding signs by the side of the road, which might be seen momentarily by the few persons who happened to pass by in moving vehicles, is not an adequate alternative to the sidewalk vigil that Plaintiffs proposed outside the International Center. Plaintiffs selected a location that was close to and visible and accessible from what Mr. Sulzman characterized as "action central" for the NATO conference. Aplt. App. 445, l. 20 – 446, l. 1. Plaintiffs' information was that press briefings would routinely occur in the International Center. As Mr.

Sulzman explained, those press briefings would involve not just the media, but press attaches, who were part of the delegates' staff. Aplt. App. 441, ll. 12-16. The City acknowledges that conference delegates themselves, not just the media, could be found in the International Center. AB at 7 (1st bullet). To arrive at the International Center from the Broadmoor Hotel, the delegates would have to walk past the spot where Plaintiffs wanted to conduct their sidewalk vigil.

At their chosen location, Plaintiffs would have been plainly visible to all the national and international media representatives who were present at the International Center, not just the few who happened to be in a vehicle passing through Checkpoint 1. The sidewalk outside the International Center provided an easy opportunity for interaction with any journalists who might be interested. As Lt. Carey explained, these journalists, including camera crews, were permitted to go outside the International Center onto the grassy area to the south, where they

could easily have photographed, videotaped, and communicated directly with Plaintiffs. Aplt. App. 146, l. 8 – 147, l. 4.[11]

Although the media representatives could easily have communicated with Plaintiffs outside the International Center, the situation was much different at Checkpoint 1. Members of the international and national press, most of whom did not have their own vehicles, could not leave the International Center to walk down to Second and Lake. Instead, they would have had to wait for a bus that would take them to the staging area. From there, they would then have had to arrange their own transportation to Plaintiffs' location outside the restricted zone. Thus, the City's restrictions made it all but certain that no member of the national or international press – especially those who did not have their own vehicles – would talk with Plaintiffs. As Commander Liebowitz acknowledged, the City's restrictions effectively prevented any opportunity for conversation between

[11] In the statement of facts and the summary of argument sections of the City's brief, the City asserts, erroneously, that the media would not have been allowed to come out of the International Center near the location of Plaintiffs' proposed vigil. AB at 4 (1st bullet); id. at 18. The City apparently relies on the testimony of Commander Liebowitz, cited at page four of the City's brief, who stated in general terms that the media "had authorization to go into the area of the International Center only. They had no access to go anywhere outside the International Center." Aplt. App. 471, l.22 – 472, l. 7. The testimony of Lt. Carey, however, demonstrates that the "area of the International Center" included the area outside the building. He personally observed media camera crews outside the south side of the International Center. He called the command center and received confirmation that the media's presence at that location was not a problem. Aplt. App. 146, l. 8 – 147, l. 4.

Plaintiffs and their intended audience – the conference delegates and the journalists based at the International Center. Aplt. App. 508, ll. 15-21.

"Whether an alternative is ample should be considered from the speaker's point of view." Weinberg v. City of Chicago, 310 F.3d 1029, 1041 (7th Cir. 2002). Overlooking this guidance, the City contends that Plaintiffs' preferred location is inferior to Checkpoint 1 because "it had no line of sight to the front entrance to the Broadmoor." AB at 18. The City appears to misunderstand the testimony of Mr. Sulzman, who indicated that Plaintiffs did not intend to stand on the portion of the sidewalk where the view toward the Broadmoor was partially blocked by trees. Aplt. App. 454, l. 7 – 455, l. 7. The photographs taken from the front entrance of the Broadmoor and from the balcony above the front entrance clearly show a direct line of sight to the sidewalk outside the International Center where Plaintiffs wished to conduct their vigil. Aplt. App. 290-92 (Exhibits G5, G6, and G7).

The City argues, erroneously, that because Plaintiffs had the chance to talk to some members of the media, the legal standard has been satisfied. Contrary to the City's argument, however, the opportunity to talk to some members of the local media is no substitute for what Plaintiffs were forced to forego – a unique opportunity to reach not only the delegates, but also the journalists from the national and international media who were based at the International Center. Plaintiffs were clearly deprived of the opportunity to "communicate effectively"

with those members of their intended audience. Weinberg at 1042, quoting Taxpayers for Vincent at 789, 812. The City's restrictions did not provide adequate alternative channels of communication.

IV. CONCLUSION

For the foregoing reasons, the City failed to carry its burden of demonstrating that the challenged restrictions were narrowly tailored to advance the City's interest in assuring the safety of the NATO conference delegates. Similarly, the City failed to demonstrate that its restrictions left Plaintiffs with adequate alternative channels of communication. Accordingly, this Court should reverse the judgment of the district court and remand with instructions to enter judgment in favor of Plaintiffs.

Respectfully submitted this 5th day of May, 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 4,877 words.

/s/ Mark Silverstein
Mark Silverstein (digital)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of May, 2006, a true and correct copy of the foregoing **APPELLANTS' REPLY BRIEF** was placed in the United States mail, postage prepaid, and the brief was also submitted by digital submission as a native PDF file, to the following addressees:

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