IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **08-cv-00910-MSK-KMT**

AMERICAN CIVIL LIBERTIES UNION OF COLORADO,
AMERICAN FRIENDS SERVICE COMMITTEE,
AMERICAN INDIAN MOVEMENT OF COLORADO,
AMERICANS FOR SAFE ACCESS,
CODEPINK,
ESCUELA TLATELOLCO CENTRO DE ESTUDIOS,
LARRY HALES,
GLENN MORRIS,
RECREATE 68,
ROCKY MOUNTAIN PEACE & JUSTICE CENTER,
DAMIAN SEDNEY,
TENT STATE UNIVERSITY,
TROOPS OUT NOW COALITION, and
UNITED FOR PEACE & JUSTICE,
Plaintiffs,

v.

THE CITY AND COUNTY OF DENVER, COLORADO,
MICHAEL BATTISTA,
THE UNITED STATES SECRET SERVICE, and,
MARK SULLIVAN,
Defendants.

PLAINTIFFS' TRIAL BRIEF

Pursuant to this Court's Order entered July 14, 2008, the Plaintiffs, by and through their undersigned counsel, respectfully submit this Trial Brief in advance of the bench trial, set for July 29, 2008.

INTRODUCTION

As the Court has previously recognized, this case calls upon the judicial system to balance competing interests:

> The right of citizens to speak their minds, to assemble in protest, and to do so in public, where they can be seen and heard, is one of the most cherished and

> important rights secured by our Constitution. And it goes without saying that in these times, concerns for physical security of all people attending the convention, -- delegates, press, and protestors alike – are also of critical importance. And there is no doubt that to some extent **the interests of free speech and security may be in conflict and that that conflict is what the Court may be required to resolve** before the Convention begins.

Tr. of June 9, 2008 (Doc. #36) at 46:15–25. This Trial Brief sets forth the legal framework that governs that task of judicial balancing. The Court must apply the appropriate and constitutionally-mandated test to determine whether the Defendants' announced plans "constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (citations omitted).

Plaintiffs will not belabor the point that the upcoming Democratic National Convention presents a quintessential and historical opportunity for the People, travelling to Denver from across this nation, to express themselves to governmental leaders and policy makers (present and future) on a whole host of topics of public interest and concern. Yet, the evidence to be adduced at trial will demonstrate, ironically, that as a result of the Defendants' plans challenged herein – including the closure of public streets and sidewalks for expressive use to everyone *other than guests selected by the DNCC, who are free to use those public forum places to engage in expressive activities*, and the Defendants' refusal to allow *any* political marches on city streets to any location *other than* the Pepsi Center or Invesco Field – **there will be markedly *less* freedom of free speech and assembly in the City of Denver during the DNC than there is the other 361 days of the year.** While Defendants chant the mantra of "security" as the basis to justify their restrictions, both case law and common sense dictate that bald, conclusory and

speculative pronouncements of potential future threats are insufficient grounds to curtail fundamental liberties that lay at the heart of our democratic system of government.[1]

The paradigmatic metaphor for "the Freedom of Speech" enshrined in the First Amendment is the "soap box in the town square." It represents the most basic mechanism, available to anyone, by which to raise one's voice above the crowd and espouse one's views to those who choose to listen – it is literally the stage upon which anyone may stand and communicate one's views on any subjects he chooses. Here, the Defendants' restrictions -–both in isolation and in combination – effectively place that soapbox inside a caged pen and relocate it to the outskirts of town. Under the applicable constitutional tests, as described below, the Defendants' present plans:

- to prohibit any parade or march that will be visible from the Pepsi Center;
- to require people wishing to exercise free speech rights to enter a government-manned gauntlet;
- to force demonstrators to stand inside a caged confinement pen (which *also* is not within view of the Pepsi Center);
- to require any person in that cage to attempt to convey his or her message, above a cacophony of competing voices and noises, to Convention Delegates in the one minute it takes them to walk towards or from the Pepsi Center; and
- to bar the distribution of leaflets or pamphlets to Delegates;

[1] "Security is not a talisman that the government may invoke to justify ***any*** burden on speech (no matter how oppressive)." *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 13 (1st Cir. 2004). Even if this Court were to grant deference to the U.S. Secret Service's assessment of risk and the appropriate means to address that risk, deference "does not mean unquestioning acceptance of every claim [of harm]." *Northrop v. McDonnell Douglas Corp.*, 751 F.2d 395, 402 (D.C. Cir. 1984). As demonstrated below, judicial deference is *not* appropriate when the question before the Court, as here, is one of "constitutional fact."

cannot be justified as being either "necessary to further a compelling governmental interest" nor "narrowly tailored to further a substantial government interest while leaving open ample alternative channels" for the Plaintiffs' speech to communicate effectively with the delegates, other convention attendees and the press. Accordingly, as will be demonstrated at trial, the Defendants cannot meet *their* burden of proof, to demonstrate that their planned restrictions do not "constitute a forbidden intrusion on the field of free expression."

DISCUSSION

I. PLAINTIFFS' BURDEN FOR ISSUANCE OF INJUNCTIVE RELIEF

A party requesting a permanent injunction bears the burden of showing: "(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007) (citations omitted); s*ee also Kansans for Life, Inc.* v. *Gaede*, 38 F. Supp. 2d 928, 937-38 (D. Kan.1999).

Despite the similar nature of the requirements for permanent and preliminary injunctions, permanent injunctions may be issued without speculation into a party's potential success on the merits, and are therefore "examined under less demanding standards than are preliminary injunctions." *Roberts v. Madigan*, 702 F. Supp. 1505, 1514 (D. Colo. 1989) (citing *Henson v. Hoth*, 258 F. Supp. 33 (D. Colo. 1966)); *Durango Herald, Inc. v. Riddle*, 719 F. Supp. 941, 946 (D. Colo. 1988).

Although Plaintiffs bear the burden to establish all four elements of their entitlement to injunctive relief, there can be no serious contention that if they demonstrate "success on the

merits" – that Defendants' planned restrictions will violate their rights secured by the First Amendment – that the other three prongs will be easily satisfied. *See e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[L]oss of First Amendment freedoms . . . unquestionably constitutes irreparable injury."); *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1055 (10th Cir. 2007) ("Deprivations of speech rights presumptively constitute irreparable harm"), *reh'g and reh'g en banc denied*, 499 F.3d 1170 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (2008); *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005) ("Vindicating First Amendment freedoms is clearly in the public interest."); *Elam Constr., Inc. v. Reg'l Trans. Dist.*, 129 F.3d 1343, 1347 (10th Cir. 1997) ("The public interest also favors plaintiffs' assertion of their First Amendment rights.").

Thus, in essence, the Plaintiffs' burden to establish their entitlement to the injunctive relief they seek collapses the four prongs into just one: success on the merits. *See, e.g., Kansans for Life, Inc.*, 38 F. Supp. 2d at 937-38 ("Here, plaintiff has sufficiently proven a chilling effect upon its First Amendment rights. This constitutes irreparable harm. The public interest favors the assertion of First Amendment rights and we believe this outweighs the interests served by regulating the kind of speech at issue in this case. . . . Consequently, the court shall enter a permanent injunction in this case.") (citations omitted).

II. SUCCESS ON THE MERITS

A. The Defendants Bear the Burden of Persuasion

At trial, the Plaintiffs will demonstrate that they intend to engage in free speech and assembly – in the form of parades,[2] leafleting, pamphleteering, political demonstrations and rallies – during the Democratic National Convention, and that the Defendants have announced plans that they will restrict or prevent the Plaintiffs from doing so. Once the Plaintiffs establish those basic (and largely undisputed) facts, the burden then shifts exclusively to the governmental defendants to attempt to meet the applicable constitutional test to justify their restrictions on free speech rights. *See Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1220, 1221 (10th Cir. 2007) ("[T]he ***burden falls on the City*** to show that its 'recited harms are real . . . and that the regulation will in fact alleviate these harms in a direct and material way.'") (emphasis added) (citation omitted).

B. Constitutional Requirements:

1. The First Amendment to the Constitution of the United States

"In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). In "quintessential public forums," such as streets, parks and sidewalks, "which 'have immemorially been held in trust for

[2] *See Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 611 (6th Cir. 2005) ("Parades and processions are a unique and cherished form of political expression, serving as a symbol of our democratic tradition. There is scarcely a more powerful form of expression than the political march.").

the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,'" the government cannot prohibit all communicative activity. *Id.* (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

The public fora at issue in this case have particular significance. Both with respect to the Plaintiffs' desire to hold marches on city streets within visual sight of the Pepsi Center (even when no Delegates are present) and their desire to stand in the traditional public fora within sight and sound of Delegates ***and*** the convention hall, "it is well established that the location of a demonstration may be 'an essential part of the message sought to be conveyed,' as well as 'essential to communicating with the intended audience.'" *Coal. to Protest the Democratic Nat'l Convention v. City of Boston*, 327 F. Supp. 2d 61, 72 (D. Mass. 2004) (citation omitted), *aff'd, Bl(a)ck Tea Soc'y v. City of Boston*, 370 F.3d 8, 13 (1st Cir. 2004).

a. Because the Defendants' Restrictions on Free Speech Discriminate Based on the Identity of the Speaker, They Are Subject to Strict Scrutiny

At trial, Plaintiffs will establish that the Defendants intend to erect a "hard security perimeter" around the Pepsi Center and its environs in which only individuals credentialed by the Democratic National Convention Committee ("DNCC") will be permitted to enter, and to congregate on what are ordinarily public thoroughfares – sidewalks and streets – and therein will be permitted to engage in expressive conduct. In contrast, the Plaintiffs, and others who have not been "invited" by the DNCC and thereby authorized to pass the security checkpoints into the

"hard security perimeter," will ***not*** be permitted to engage in expressive conduct in those same traditional public fora.[3]

Such discrimination among speakers in granting access to public fora that have historically been devoted to expressive activity by the People, subjects such restrictions to the most stringent form of judicial review, applicable to governmental restrictions that favor one viewpoint over another. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another.").

In making the often difficult determination of a governmental restriction's neutrality, courts have asked whether the governmental regulation of expressive activity "is justified without reference to the content of regulated speech." *Hill v. Colo.*, 530 U.S. 703, 720 (2000). Of course, government restrictions that vary in their application ***based on the identity of the speaker*** do not reference ***any*** speech, rendering this test somewhat inapposite. The Tenth Circuit, as well as other courts, has treated government restrictions that discriminate based upon the identity of the speaker as distinct from content- and viewpoint- based restrictions, but nonetheless, subject to strict scrutiny if employed within public fora. *See Summum v. Duchesne City*, 482 F.3d 1263, 1273 (10th Cir. 2007) ("In addition to exclusions based on viewpoint or subject matter, **exclusions based on the speaker's identity trigger strict scrutiny when the**

[3] The Government concedes that while Plaintiffs and others will be prohibited from engaging in free speech and expression on certain public sidewalks and city streets, others will not be similarly deprived of those rights.

forum at issue is public.") (emphasis added);[4] *see also Black v. Arthur*, 18 F. Supp. 2d 1127, 1135 (D. Or. 1998) ("[A] regulation that restricts the First Amendment freedoms of a specific group is subject to the more demanding standard of 'strict scrutiny' if the government has targeted the group because of its message ***or the identity of the speakers***") (emphasis added), *aff'd on other grounds*, 201 F.3d 1120 (9th Cir. 2000);[5] *cf. XXL of Ohio, Inc v. City of Broadview Heights*, 341 F. Supp. 2d 765, 780 (N.D. Ohio 2004) ("Also, a regulation which imposes restrictions based upon the identity of the speaker imposes content-based restrictions."). Notably, in *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212 (2007), the Tenth Circuit concluded that intermediate scrutiny applied to the restrictions at issue there expressly because they did ***not*** discriminate between speakers based on their identity: "[t]here is no evidence that the City's security plan drew any distinction based on the content of speech. Instead, it implemented *a total ban on public expression* within the security zone, ***regardless of the identity of the speaker*** or the subject of the message." *Id.* at 1220 (citation omitted) (emphasis added).

---

[4] In *Summum v. Duchesne City*, 482 F.3d 1263 (10th Cir. 2007), Chief Judge Tacha relied upon Supreme Court precedents subjecting restrictions on access to public fora, based on speaker identity, to strict scrutiny: "*See Cornelius,* 473 U.S. at 808 (noting that exclusion of speech from a public forum requires 'a finding of strict incompatibility between the nature of the speech or the identity of the speaker' and the forum's function); *see also Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 96 (1972) ("[W]e have frequently condemned . . . discrimination among different users of the same medium for expression.")." *Id.* at 1273.

[5] The reason such restrictions are subject to particularly searching judicial scrutiny is the concern that by permitting certain speakers to exercise free speech while excluding others, the Government is engaging in the forbidden role of attempting to influence the outcome of public debate: "[A]n exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people." *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994), quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978).

In determining whether a particular regulation of speech runs afoul of the "neutrality" principle, "the government's purpose is the controlling consideration." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).[6] Here, the purpose of the Defendants' restrictions is to ensure that those people who have been approved and "credentialed" by the DNCC are granted access to the Convention sites, including public fora spaces adjacent to the convention halls, and are permitted to engage in a whole host of communicative activities there, and that those who have not been so invited are excluded. (Clearly, there can be no "security-related" justification for the disparate treatment among speakers, as all who are permitted to enter the "hard security perimeter" must go through a magnetometer and be subject to search). As a predictable, indeed ***intended*** consequence of the differential treatment among potential speakers who seek to access the public fora within the "hard security perimeter," those who intend to speak in ***favor*** of the Democratic Party's policies and positions are free to do so, while anyone wishing to express views contrary to those of the DNCC (*e.g.* "McCain in 2008" or "Nader in 2008") is prohibited, by government-imposed exclusion, from expressing such views. *See Rosenberger*, 515 U.S. at 828-29 ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . The government

[6] Actually, since *Ward*, the Supreme Court has "receded from this formulation, returning its focus to the law's own terms, rather than its justification." *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1259 n.8 (11th Cir. 2005). In *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, the Supreme Court expressly rejected the argument that laws are treated as suspect and content-based only when the legislature "intends to suppress certain ideas": "[O]ur cases have consistently held that '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment . . . [E]ven regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.'" 502 U.S. 105, 117 (1991) (citations omitted).

must abstain from regulating speech when the specific motivating ideology of the opinion or perspective of the speaker is the rationale for the restriction.") (citations omitted).

Indeed, it was this very disparate treatment, based exclusively upon the identity of the speaker, that led the United States District Court for the Central District of California to state, in *dicta*, that it "ha[d] its doubts" that the hard security perimeter surrounding a Democratic National Convention in downtown Los Angeles was "content-neutral." *See Serv. Employee Int'l Union v. City of Los Angeles*, 114 F. Supp. 2d 966, 970 (C.D. Cal. 2000) (distinguishing the "secured zone" from complete "no access zones" at other high profile events, stating that "[f]ree expression is permitted within the zone to those who have access; however, the only people with access are those chosen by the Democratic National Convention Committee") (hereinafter "*SEIU*"). The *SEIU* court rejected the Defendant's assertion that the zone was not a content-based restriction because, the Defendants argued, some Democrats will be denied access to the zone; instead, the Court correctly noted that "such argument ignores the fact that ***all*** non-democrats will be denied access." *See id.*

Unlike the parties in *SEIU*, here the Plaintiffs have expressly pleaded that the Defendants' proposed restrictions on speech are ***not*** "content-neutral." *See* Suppl. & Am. Compl. For Inj. Rel. (Doc. #51) ("Suppl. Compl.") ¶ 102. Under *Summum,* once the Court determines, as it must, that the Defendants' announced restrictions will provide unequal treatment[7] to engage in free speech and assembly based exclusively upon the identity of the

[7] *See Mosley*, 408 U.S. at 96 ("There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to the assembly or speaking by ***some*** groups, government may not prohibit ***others*** from assembling or speaking on the basis of what they intend to say.") (footnote omitted) (emphasis added).

speaker, those restrictions are subject to "strict scrutiny": the Government must demonstrate that the means its has chosen are "necessary to a compelling state interest" ***and*** that no "less restrictive means" exits that can adequately protect that compelling state interest**.** *See, e.g., Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n*, 492 U.S. 115, 126 (1989); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Golan v. Gonzales*, 501 F.3d 1179, 1196-97 (10th Cir. 2007) (same). At trial, Defendants will not be able to meet their burden of demonstrating that their restrictions on parades and their provision of a "Public Demonstration Zone," as presently configured, are the "least restrictive means" to accomplish to the admittedly compelling governmental interest of maintaining security at the DNC.

b. Alternatively, If the Court Determines That Defendants' Restrictions Are "Content-Neutral," the Government Bears the Burden of Proving That Those Restrictions Satisfy the "Intermediate Scrutiny" Standard

If the Court concludes – despite the differential access provided to public fora based upon the identity of the speaker – that the Defendants' restrictions on speech are "content-neutral," then the Defendants must meet their burden of demonstrating that those restrictions "are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *See Perry*, 460 U.S. at 45; *Ward*, 491 U.S. at 791.

i. The Defendants' restrictions are not narrowly tailored to serve a significant governmental interest

"Narrow tailoring means that the government's speech restriction must signify a careful calculation of the costs and benefits associated with the burden on speech imposed by its prohibition." *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1238 (10th Cir. 1999) (internal quotation

marks and citation omitted). In determining the reasonableness of the "fit" between the Defendants' restrictions and the burdened speech, the "[g]overnment 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*, 491 U.S. at 799. The "essence of narrow tailoring" is that the government restriction must "focus[] on the source of the evils the [government] seeks to eliminate . . . and eliminate[] them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." *Id*. at 800 n.7.

Furthermore, "narrow tailoring" requires the government to demonstrate more than the importance of its asserted interests in the abstract; it must be shown that the proposed restrictions will in fact advance those interests. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (U.S. 1994) ("When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' ***It must demonstrate that the recited harms are real, not merely conjectural,*** and that the regulation will in fact alleviate these harms in a direct and material way") (citation omitted) (emphasis added); *Pacific Frontier*, 414 F.3d at 1235 (holding that the "fit" between a government regulation and the government's asserted interest is not sufficiently "direct" when "[t]he city has provided no evidence other than conjecture to support its argument").

(a) Consideration of obvious and readily available alternative means (as employed at prior and other national conventions) is relevant and appropriate

While the intermediate scrutiny test does not require Defendants to demonstrate the absence of "less restrictive alternatives" to their proposed restrictions, *see Citizens for Peace in Space*, 477 F.3d at 1221, it remains true that the existence of obvious less-burdensome

alternatives to the restriction on speech are directly relevant to the Court's determination here whether the Defendants' restrictions are "narrowly tailored." *See U.S. West, Inc.*, 182 F.3d at 1238 & n. 11 ("[T]he existence of an obvious and substantially less restrictive means for advancing the desired government objective ***indicates a lack of narrow tailoring***.") (emphasis added); *see also City of Cincinnati v. Discovery Network, Inc*., 507 U.S. 410, 418 (1993) (explaining how the "narrowly tailored" standard of review is neither "strict scrutiny" nor merely "rational basis"). Thus, at trial, the Plaintiffs will demonstrate, through fact witnesses and expert testimony, that security planners in other locations – where there are no ***material*** differences – have been able to provide parade route and demonstration zone access in much closer proximity to the convention halls than is being proposed here.[8] The fact that these "obvious and substantially less restrictive" alternatives exist (and it is the Government's burden to explain ***why*** they cannot be employed here), strongly suggests ("indicates") that the means chosen by the government are ***not*** "narrowly tailored," as the Constitution commands. *U.S. West, Inc.*, 182 F.ed at 1238 n. 11.

[8] Resort to isolated events arising at ***past*** demonstrations, however, is not an appropriate justification for curtailing fundamental rights ***prospectively***. *See SEIU*, 114 F. Supp. 2d at 972 (C.D. Cal. 2000) ("First Amendment jurisprudence teaches that banning speech is an unacceptable means of planning for potential misconduct.") (*citing Collins v. Jordan*, 110 F.3d 1363, 1373 (9th Cir. 1997)); *Collins*, 110 F.3d at 1372 ("The law is clear that First Amendment activity may not be banned simply because prior similar activity led to or involved instances of violence. . . . the proper response to potential and actual violence is for the government to ensure adequate police presence, and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.")(citations omitted).

(b) The Court Should not Grant Deference to the Executive Branch or the City Government on Issues of "Constitutional Fact"

Plaintiffs anticipate that the Defendants will again urge this Court to defer to the "expert" assessments of the United States Secret Service and the City's law enforcement personnel in determining what is the appropriate means to address what, in their considered judgment, constitute viable or potential safety threats at the DNC. *See* Secret Service's Resp. in Opp'n to Pltfs.' First Mot. for Inj. Relief (Doc. #26) at 40 -41 (stating that "[t]he Court should avoid inserting itself into a security planning process that is so clearly within an Executive branch agency's responsibility and competence."). The Court should not blindly defer to such assessments,[9] particularly where the asserted "facts" are contested, as they will be at trial, and where they constitute "constitutional facts." *See Students Against Genocide v. Dep't of State*, 257 F.3d 828, 837 (D.C. Cir. 2001) (a reviewing court should give "substantial weight to agency statements," but only "so long as they are plausible and not called into question by contrary evidence."); *see also Northrop v. McDonnell Douglas Corp.*, 751 F.2d 395, 402 (D.C. Cir. 1984) (deference "does not mean unquestioning acceptance of every claim [of harm]"); *Jordan v. Pugh*, 504 F. Supp.2d 1109,1120-23 (D. Colo. 2007) (although granting due deference to Bureau of Prisons' assessment of security risks in federal prisons, finding a failure of any evidence presented of *actual* security risks); *Id.* at 1121 (discounting the "conclusory testimony" of two BOP employees).

[9] Admittedly, in *Citizens for Peace in Space*, the Tenth Circuit stated that it "will give deference to a reasonable judgment by the City as to the best means of providing security at the NATO conference." 477 F.3d at 1221 (citations omitted).

In *Quaker Action Group v. Hickel,* 421 F.2d 1111, 1117-18 (D.C. Cir. 1969), the United States District Court preliminarily enjoined enforcement of a Department of Interior regulation that prohibited certain demonstrations in front of the White House, thereby permitting the demonstrations to go forward; on appeal of that injunction, the United States Secret Service asserted that the federal courts should review its determination of the appropriate security perimeter only to determine if it was "wholly irrational." *Id.* at 1117-18. The D.C. Circuit refused to apply a deferential standard, using language that is particularly apt to the present case:

> ***The expertise of those entrusted with the protection of the President does not qualify them to resolve First Amendment issues, the traditional province of the judiciary.*** A balancing of First Amendment freedoms against the requirements of Presidential safety may be left to other agencies in the first instance. But . . . the final judgment must rest with the courts.

Id. at 1118 (emphasis added); *see also id.* (holding "that the Government must in fact show such a danger rather than simply advance its conclusion as a determination binding upon the courts. . . . There has been no effort here to justify the Government's argument beyond the flat words of the Secret Service Director. First Amendment rights are too precious for sacrifice upon such an unsupported altar."); *see also Quaker Action v. Morton*, 516 F.2d 717, 723 (D.C. Cir. 1975) ("When the executive or the administrative process abridges constitutional rights, it is subject to closer scrutiny than otherwise, and ultimately it is the court rather than the agency that must balance the competing interests.").

Other courts have similarly held that administrative agency determinations are not subject to deference when those positions involve "constitutional facts," which federal courts are required to review *de novo*. *See, e.g.*, *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393,

410 (5th Cir. 1999) (holding that "we do not give [an administrative agency's] actions the usual deference when reviewing a potential violation of a constitutional right."); *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979) ("Independent judicial judgment is especially appropriate in the First Amendment area. Judicial deference to agency fact-finding and decision-making is generally premised on the existence of agency expertise in a particular specialized or technical area. But in general, courts, not agencies, are expert on the First Amendment."); *Local 32B-32J, Serv. Employees Int'l. Union v. Port Auth.*, 3 F. Supp. 2d 413, 421 (S.D.N.Y. 1998) ("Absent extraordinary circumstances, however, courts may not defer to administrative judgments that implicate First Amendment rights.") (citation omitted).

Indeed, there is now a well-developed body of case law in which federal courts have disagreed with the "expert" assessments of executive branch agencies in determining what is the appropriate scope of a "secure perimeter" needed to maintain safety without trammeling the rights of demonstrators. *See Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1228 (9th Cir. 1990) (holding that a 75-yard security zone burdened "substantially more speech than is necessary to further the government's legitimate interests"); *SEIU*, 114 F. Supp. 2d at 972 (invalidating "security zone" at the Democratic National Convention that kept demonstrators 260 yards away from delegates entering and leaving the convention site); *United States v. Baugh*, 187 F.3d 1037, 1044 (9th Cir. 1999) (holding that a perimeter keeping demonstrators 150-175 yards away from their intended audience failed the test of narrow tailoring); *Lederman v. United States*, 291 F.3d 36 (D.C. Cir. 2002) (rejecting government's claim that 250-foot "no demonstration zone" near the Capitol Building was narrowly tailored to the government's interest in promoting safety and orderly flow of traffic); *Weinberg v. City of Chicago*, 310 F.3d

1029 1040-42 (7th Cir. 2002) (striking down an ordinance banning peddling within 1,000 feet of a sports arena because it burdened substantially more speech than necessary).

Thus, at the conclusion of the trial, the Court will be called upon to make its own, independent assessment – based upon the conflicting evidence – whether the security perimeters (including the complete closure of ten lanes of traffic on Speer Boulevard and Auraria Parkway, for three full days of the DNC, thereby "precluding" any parade routes that will bring marchers "within sight and sound" of the Pepsi Center), burdens substantially more speech than is necessary in order to accomplish the Government's legitimate interests.

(i) The Defendants' restrictions fail to leave open ample alternative channels for communication to the Delegates and other attendees at the Convention, and deprive Plaintiffs of their opportunity to convey the symbolic message (though the news media) that they are protesting *at* the Democratic National Convention.

For an alternative channel of communication to pass constitutional muster, it must provide for effective communication of the intended ***message*** to the intended ***audience***. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984). Preventing a speaker from reaching his or her target audience fails to leave open ample alternatives. *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981); *see, e.g.*, *Bay Area Peace Navy*, 914 F.2d 1224 (allowing protestors to hand out pamphlets on land or to demonstrate at the entrance to the pier were not viable alternatives because the invited visitors, who were the plaintiffs' intended audience, were not accessible from those positions); *Students Against Apartheid Coalition v. O'Neil*, 660 F. Supp. 333, 339 (W.D. Va. 1987) (requiring student groups

to conduct demonstration at alternative location, which was not frequented by the group's target audience, is not an ample alternative channel).

Here, the determinative criterion to evaluate the adequacy of the alternatives cited by the Defendants is the ***location*** of the spaces where demonstrators will be permitted to assemble to communicate their message. "The requirement that potential alternatives be 'ample' requires a nuanced analysis that may take account of (1) the audience to which the speaker seeks to communicate and (2) ***the contribution of the desired location*** to the meaning of the speech." *Million Youth March, Inc. v. Safir*, 18 F. Supp. 2d 334, 347 (S.D.N.Y. 1998) (recognizing that the location of an event can "infuse substantial and unique additional meaning to the message," which "undermines the adequacy of the City's alternative locations.") (emphasis added); *Women Strike for Peace v. Morton*, 472 F.2d 1273, 1287 (D.C. Cir. 1972) (surveying various situations where the location of expressive activity is an essential component to the particular message being conveyed). Courts have repeatedly recognized that "there is symbolic value in ***marching before a site*** even if no one is home." *Coal. to March on the RNC and Stop the War v. City of St. Paul*, __ F. Supp. 2d __, 2008 WL 2791612 at * 14 (D. Minn. July 18, 2008) (citing *Coal. To Protest the Democratic Nat'l Convention*, 327 F. Supp. 2d at 72). Any "alternative channel" of communication that fails to allow the speakers to communicate their intended message ***at all*** cannot be deemed "ample and adequate." Thus, any "Designated Parade Route," such as the one proposed here by Defendants, which does not permit the demonstrators to present to the public and the assembled news media an image depicting the demonstrators' march in the foreground and the site of the DNC (the Pepsi Center) in the background – in the same photograph – cannot, under any reasonable interpretation of the phrase, be deemed an "ample alternative channel" of

communicating ***that message***. The fact that the Public Demonstration Zone, as proposed by the Defendants, similarly cannot be photographed in a way that captures its geographic connection to the site of the Convention, cannot possibly be an "adequate alternative channel" to a public street or sidewalk that ***is*** within sight and sound of the convention hall (*i.e.*, the sidewalks and streets that abut the Pepsi Center).

2. Fourth Amendment to the Constitution of the United States

In the Supplemental Complaint, the Plaintiffs pleaded, on information and belief, that the Municipal Defendants were planning to conduct searches of individuals in the Public Demonstration Zone that would deprive the Plaintiffs of rights secured by the Fourth Amendment. Earlier this day, July 24, 2008, the Municipal Defendants stipulated that, "barring any unforeseen and changed circumstances, persons inside the Public Demonstration Zone(s)/Public Viewing Area(s) will be governed by the same laws ***and constitutional principles*** that apply to public use of public sidewalks." (emphasis added). In light of this commitment by the Municipal Defendants, now on file with this Court, to treat the Public Demonstration Zone no differently that any other traditional and historic public forum, the Plaintiffs' claim under the Fourth Amendment has now been rendered moot.

3. Article II, Section 10 of the Colorado Constitution

Article II, section 10 of the Colorado Constitution provides:

> No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty . . . .

Colo. Const. art.II, § 10. Colorado's Supreme Court has recognized that this provision of the State Constitution provides broader protection for free speech than the Federal Constitution, and that plaintiffs may obtain injunctive relief directly under that constitutional provision, to prevent further, continued, or future violations of those rights. *See Bock v. Westminster Mall Co.*, 819 P.2d 55, 59 (Colo. 1991) (ordering entry of summary judgment for plaintiffs seeking injunctive relief in a case where relief was sought, but denied, under 42 U.S.C. §1983).[10]

At trial, Plaintiffs will demonstrate that they intend to engage in expressive activity, including the distribution of pamphlets, and that the Defendants' regulations will impinge on Plaintiffs' ability to engage in expression and expressive conduct that constitutes a violation of the Colorado Constitution, even if it does not violate the United States Constitution.[11]

a. *Privately owned* areas that are the functional equivalents to public fora are treated as such fora under Article II, Section 10 of the Colorado Constitution.

In *Bock*, *supra*, the Colorado Supreme Court held that Article II, section 10 of the Colorado Constitution provides a right of public access, for expressive purposes, to a privately owned areas so long as they bears a sufficiently close "relationship with governmental entities or public monies" or is operated "in a manner such that it performs a virtual public function." *Bock*, 819 P.2d at 60.

---

[10] *See also Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1054 (Colo. 2002); *Lewis v. Colo. Rockies Baseball Club, Ltd.*, 941 P.2d 266, 271 (Colo. 1997).

[11] The Defendants have announced that they will not permit, in any manner, the distribution or transmission of leaflets and other printed materials from the Plaintiffs and other persons within the Public Demonstration Zone to any person within the "hard-security zone," including Delegates and other attendees at the Convention. *See* Suppl. Compl., Ex. AA.

In addition to the closure of public fora (streets and sidewalks) in the vicinity of the two convention halls, the Defendants intend to impose restrictions on access to the privately owned parking lots adjacent to those two sports arenas. Although the City Defendants have committed to this Court that they will treat the "Public Demonstration Zone" in Parking Lot A of the Pepsi Center Parking as the functional equivalent of a public sidewalk, they have not yet so committed with respect to the parking lots surrounding Invesco Field at Mile High. Thus, the Plaintiffs continue to invoke their rights, under Article II, section 10, as a basis for their right to conduct expressive conduct in that privately-owned space.

b. Certain non-disruptive expressive activities may not be wholly excluded from public forums or comparable privately owned areas.

In addition to its forum analysis, the *Bock* decision held that Article II, section 10 prevents the suppression of non-disruptive activities, such as leafleting and collecting pledge signeatures, within public fora or equivalent private areas. *See Bock*, 819 P.2d at 62-63 (finding that "[p]etitioners' chosen mode of speech . . . [was] well within the mainstream," and that they could not be excluded from the common areas of the shopping mall for engaging in such speech). Although reasonable time, place, or manner restrictions may be imposed on such expressive activity, the expression may not be completely banned from the particular forum nor may it be overly burdened. *See id.*; *Robertson v. Westminster Mall Co.*, 43 P.3d 622, 628 (Colo. Ct. App. 2001) (holding that shopping mall regulation which allowed mall management 48 hours to review application for permission to engage in expressive activities violated the state constitution). Thus, under Article II, section 10, a reasonable "time, place or manner" restriction on leafleting requires that some space be provided ***within the particular public forum***, for such activity. *Bock*, 819 P.2d at 63. In other words, it is not sufficient, under the state constitution, to

prohibit all leafleting within a forum and to say that the Plaintiffs have an "ample alternative channel" because they are able to leaflet elsewhere, ***outside*** that forum. The state constitutional right at issue here may not be eviscerated by reference to speech opportunities in different locations.

C. The Court Has the Power and Authority to Enforce Its Own Orders

On June 9, 2008, the Parties entered a stipulation which the Court then converted into an Order, expressly declaring that it could be enforced through the power of contempt. *See* Tr., June 9, 2008 (Doc. #36) at 12:5-13:12 (entering Stipulation of Parties as an Order of the Court, subject to enforcement through contempt). That Stipulation, now an Order of this Court, requires the Defendants to provide a Public Demonstration Zone on the grounds of the Pepsi Center that is within "sight and sound" of Delegates at the Pepsi Center.

At trial, Plaintiffs will demonstrate that the Defendants' announced plans do not abide by that commitment; therefore, unless the Defendants voluntarily alter their plans, they will be violating an Order of this Court, and will therefore be subject to contempt (or lesser sanctions as the Court may deem appropriate). *See Law v. NCAA*, 134 F.3d 1438, 1442 (10th Cir. 1998); *Elkin v. Fauver*, 969 F.2d 48, 52 (3d Cir. 1992) (where the purpose of a contempt sanction is to coerce compliance with a prior Court Order, the "framing of sanctions for civil contempt is committed to the sound discretion of the trial court.") (citation omitted). In fashioning a "coercive" sanction, this Court must consider "the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." *O'Connor v. Midwest Pipe Fabrications, Inc.*, 972 F.2d 1204, 1211 (10th Cir. 1992) (internal quotation marks omitted); *McComb v. Jacksonville Paper Co.*,

336 U.S. 187, 193-194 (1949) ("The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief . . . [which] may entail the doing of a variety of acts").

Accordingly, at the conclusion of the trial, if the Court determines that the Defendants have not committed to abide in full to all their commitments as set forth in the Court's Order of June 9, 2008, the Court is empowered to and should enter particularized sanctions designed to ensure Defendants' compliance with its Order.

Other Issues That May Arise at Trial:

A. Judicial Estoppel on Municipal Defendants

At a hearing on the Plaintiffs' Motion to Compel Responses to Interrogatories on July 22, 2008, counsel for the Municipal Defendants stated in open court, in opposition to that motion, that the Municipal Defendants will not assert at the trial herein that they are unwilling to provide permits for any "alternative parade" routes during the Democratic National Convention on the grounds that they lack a specific number of police officers available to provide security services at such parades. (The exact wording of counsel's representation must await the preparation of the July 22 hearing transcript, which will be available on or before July 28, 2008.) As a result of that representation, and apparently in reliance thereon, the Magistrate Judge denied the Plaintiffs' motion to compel responses to the Plaintiffs' interrogatories, which asked the Municipal Defendants to state the number of police officers that would be needed to provide security for alternative parade routes. Accordingly, the Municipal Defendants are estopped from asserting at the trial that "lack of personnel resources" is a grounds upon which they are refusing, or are

unable, to accommodate any alternative parade routes, to any location, during the Convention. *See Bradford v. Wiggins*, 516 F.3d 1189, 1194 (10th Cir. 2008) (setting forth the elements of judicial estoppel); *Eastman v. Union Pac. R. Co.*, 493 F.3d 1151, 1156 (10th Cir. 2007) (same).

B. Plaintiffs Oppose Any Attempt to Close the Courtroom

At various times in the preparation of this case for trial, the Defendants have suggested, without stating so directly, that they ***may***, at some point in these proceedings, seek to close the courtroom to the public and/or to present certain purportedly "sensitive" information *in camera*. Should that situation arise, the Plaintiffs will, and hereby do, object to any such effort to deny the public its right to attend judicial proceedings occurring before an Article III jurist. *See also* D.C.COLO.L.CivR 7.2 E. & F. (precluding the entry of an order to close any court proceedings "before the date set in the public notice for filing objections" to such a motion, which shall be "not less than three business days after the public notice is posted;" notably, this rule contains an exception "in emergency circumstances" which are not present here).

Respectfully submitted this 24th day of July, 2008

By: /s *Steven D. Zansberg*

Steven D. Zansberg
Christopher P. Beall
LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.
1888 Sherman Street, Suite 370
Denver, Colorado 80203
(303) 376-2400
In cooperation with the American Civil Liberties Union Foundation of Colorado

M. Elizabeth Morton
DORSEY & WHITNEY LLP
370 17th Street, Suite 4700
Denver, Colorado 80202-5647
(303) 629-3400
In cooperation with the American Civil Liberties Union Foundation of Colorado

Diego G. Hunt
HOLLAND & HARD LLP
555 Seventeenth Street, Suite 3200
Denver, Colorado 80201-8749
(303) 295-8087
In cooperation with the American Civil Liberties Union Foundation of Colorado

Mark Silverstein
Taylor Pendergrass
ACLU FOUNDATION OF COLORADO
400 Corona Street
Denver, Colorado 80218
(303) 777-5482

Attorneys for Plaintiffs
American Civil Liberties Union of Colorado, **American Friends Service Committee**, **American Indian Movement of Colorado** and **Glenn Morris**, **Americans for Safe Access**, **Citizens for Obama** and **Damian Sedney**, **CODEPINK**, **Escuela Tlatelolco Centro De Estudios**, **Recreate 68**, **Rocky Mountain Peace & Justice Center**, **Tent State University**, **Troops Out Now Coalition** and **Larry Hales**, and **United For Peace & Justice**

CERTIFICATE OF SERVICE

Undersigned certifies that on this 24th day or July, 2008, **PLAINTIFFS' TRIAL BRIEF** was filed with the Court and served on the counsel of record listed below through the Court's ECF-CM electronic filing system:

Counsel for Municipal Defendants:

David R. Fine
City Attorney
City and County of Denver
1437 Bannock, Room 353
Denver, Colorado 80202
dlefiling.litigation@denvergov.org, dolores.martinez2@denvergov.org,
luis.corchado@denvergov.org, xavier.duran@denvergov.org

James M. Lyons
Michael D. Plachy
Alex C. Myers
ROTHGERBER JOHNSON & LYONS LLP
One Tabor Center, Suite 3000
1200 17th Street
Denver, Colorado 80202-5855
jlyons@rothgerber.com, djmather@rothgerber.com, mplachy@rothgerber.com,
ccollins@rothgerber.com, amyers@rothgerber.com, cealey@rothgerber.com

Jean E. Dubofsky
The Dubofsky Law Firm
1000 Rose Hill Drive
Boulder, Colorado, 80302
jeandubofsky@comcast.net

Counsel for Federal Defendants:
Lisa A. Christian
Kevin Traskos
Amanda A. Rocque
Assistant United States Attorneys
UNITED STATES ATTORNEY'S OFFICE
FOR THE DISTRICT OF COLORADO
1225 17th Street, 7th Floor
Denver, CO 80202
Lisa.Christian@usdoj.gov, Kevin.traskos@usdoj.gov,
amanda.rocque@usdoj.gov, jamie.mulholland@usdoj.gov,
USACO.ECFCIVIL@usdoj.gov

/s *Christopher P. Beall*