IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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.

SUPPLEMENTAL BRIEF RE: "PHASE I" ISSUES

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Pursuant to the Court's Order of June 10, 2008 (Doc. No. 35), the Plaintiffs, by and through their undersigned counsel, respectfully submit this Supplemental Brief concerning remaining "Phase I" issues.

INTRODUCTION

Following the non-evidentiary hearing on June 9, 2008, the Court's Order directed the parties to file supplemental briefs, simultaneously, addressing four issues: (1) whether, in addition to the nine specific items of information previously requested by the Plaintiffs, there is further information the Plaintiffs seek to compel; (2) whether there is any potential constitutional injury that is sufficiently ripe so as to permit the Court to compel disclosure of the height of the fence surrounding the Public Demonstration Zone, the distance between that zone and the delegates, and any other disclosures sought by the Plaintiffs, as indicated above; (3) what legal authority defines the Court's power to compel such disclosures; and, (4) assuming the power to compel disclosure exists and is appropriately invoked in this case, what specific items are to be disclosed, to whom and when.

As demonstrated below, the Plaintiffs' claims—both when they were originally filed, and presently—are "ripe" for judicial review. Moreover, the outstanding relief[1] sought in the Plaintiffs' first motion for preliminary injunction (to compel disclosure of *all* of the restrictions the Defendants intend to impose on free speech and assembly in connection with the "Public

[1] Plaintiffs originally also sought relief, which could only have been granted in the form of an injunction, ordering the Federal Defendants to provide the Municipal Defendants all the information the Municipal Defendants needed to make the requested disclosures; and compelling the Municipal Defendants to begin processing the Plaintiffs' pending requests for parade permits. That portion of the relief was essentially "mooted" when the Federal Defendants conceded, for the first time, after this litigation was filed, that the Municipal Defendants had all the information and/or authority they needed, and the City committed to begin processing the pending requests for parade permits by dates certain.

Demonstration Zone") is also "ripe" under existing case law. Defendants have already announced that they will completely close various "traditional public fora" (including Denver city streets, Chopper Circle and 9th Street) to the Plaintiffs and the public during the Democratic National Convention and will thereby prohibit any First Amendment activity that would normally be allowed in those areas; at the same time, the Defendants have announced their intention (and have committed to this Court) to make available a "Public Demonstration Zone" within sight and sound of the Pepsi Center and of the delegates attending the Convention, as an "*alternative* channel of communication" during the Convention. Given that the City has already announced its intention to entirely close down traditional public fora and establish a Public Demonstration Zone in their stead, the issue is clearly ripe for judicial review, and the question then becomes whether Defendants can meet their burden of showing that the Public Demonstration Zone satisfies the First Amendment standard. Thus, in order for the Plaintiffs to have an adequate opportunity for judicial review and for the Court to perform its constitutional duty to assess **the present announced plans** of the Defendants to close traditional public fora, both the Court and the parties need to know, now, the parameters of the "Public Demonstration Zone." The Court must consider the totality of the circumstances of that zone in applying the three-part test that determines whether "time, place, or manner" restrictions pass constitutional muster. The Court has set a full-day evidentiary hearing on that issue for July 29, 2008. In order to develop an evidentiary record and to prepare briefing (due July 7) in advance of that hearing date, both the Plaintiffs and the Court have a present need for disclosure. Thus, both their claims and the relief sought in the preliminary injunction motion are "ripe."

Under well-settled case law, the Court has ample authority, stemming from three related but independent sources, to compel disclosure of the information sought in the Plaintiffs' first motion for preliminary injunctive relief. First, the Court is authorized by federal statute, 28 U.S.C. § 1331, to exercise jurisdiction "in equity," and thus to issue injunctions, in cases arising under the Constitution or laws of the United States. *See* Jurisdiction and Removal Act of 1875, ch. 137 § 1, 18 Stat. 470. Second, similar authority is conveyed by another federal statute, 28 U.S.C. § 1651, which authorizes orders in aid of this Court's jurisdiction. Third, Rule 26(d) of the Federal Rules of Civil Procedure also permits the Court to require discovery in advance of the Rule 26(f) conference, and the Court has the authority to treat the disclosure sought in the First Motion for Preliminary Injunction as a request for expedited discovery (a motion seeking such expedited discovery is also being filed this day, as an alternative means to accomplish the same end). Under these three separate sources of authority, the Court is empowered to compel the Defendants to disclose the information sought in "Phase I" in order to preserve an opportunity to meaningfully adjudicate the merits of Plaintiffs' claims at a full evidentiary hearing ("Phase II"), now set for July 29, 2008.

Finally, despite Defendants' assertions to the contrary, the relief sought by the Plaintiffs in their First Motion for Preliminary Injunction does not seek compelled disclosure of any sensitive "security arrangements" or "security plans"" as the Motion clearly states. The Plaintiffs ask the Court only to order the Defendants to disclose *all* of the restrictions they intend to impose upon the Plaintiffs and others who want to exercise their First Amendment rights in the vicinity of the Pepsi Center, so that the parties can brief and the Court can assess whether such restrictions pass constitutional muster. Those are the "specific items" the Defendants should be compelled to

disclose, to the Plaintiffs, and they should be compelled to do so well before the Plaintiffs' opening brief on "Phase II issues" is due on July 7. Moreover, because the Plaintiffs are *not* seeking disclosure of plans of any sensitive security arrangements, the Defendants cannot meet their evidentiary burden of establishing "good cause" for a protective order. To the extent that the Defendants attempt to meet their evidentiary burden to justify a protective order, the Plaintiffs intend to subject any such testimony to cross-examination and will present evidence in rebuttal. At a minimum, the Plaintiffs maintain that the Defendants cannot meet the even higher burden of showing a need for an "attorneys' eyes only" protective order.

ANALYSIS

I. THE INFORMATION SOUGHT IN THE PLAINTIFFS' FIRST MOTION FOR PRELIMINARY INJUNCTION REMAINS THE SAME: DEFENDANTS MUST DISCLOSE ALL OF THE RESTRICTIONS THEY INTEND TO IMPOSE ON PEOPLE ENTERING OR STANDING IN THE "PUBLIC DEMONSTRATION ZONE" THAT MAY HAVE AN IMPACT ON THEIR EXERCISE OF FIRST AMENDMENT RIGHTS

From the inception of this litigation and up to the present, Defendants have taken the position that Plaintiffs enjoy "no entitlement" whatsoever to a "Designated Parade Route" or a "Public Demonstration Zone" at the Pepsi Center. Accordingly, Defendants argue, the Plaintiffs have no standing to complain about any of the particulars of those "channels of communication" and they are certainly not "entitled" to learn the specific contours of those channels until the Defendants choose to disclose them.[2] Defendants' view demonstrates a profound and fundamental misunderstanding of constitutional law.

[2] On June 12, 2008, the City announced that the "terminus" of the Designated Parade Route would be at Spear Blvd. and Larimer Street. As Plaintiffs will explain at the June 30 hearing, this location is not consistent with the City's prior commitment to provide a "designated parade route . . . with the route terminating within sight and sound of the

Continued on following page . . . .

The reality is as follows: The Defendants have already declared that they will erect a "hard security perimeter" in the immediate vicinity of the Pepsi Center during the Democratic National Convention, which will prohibit members of the public (including the Plaintiffs) from exercising their First Amendment rights within that perimeter. *See* Decl. of Dep. Chief Battista attached to City Defs.' Resp. ¶ 17 (declaring that members of the public will not be allowed to enter the "hard security perimeter.") Thus, **the Defendants have *already announced* that they *will* prohibit the Plaintiffs from exercising rights guaranteed by the First Amendment on public property that the City has acknowledged is a traditional public forum**. *See* Decl. of Guiermo Vidal attached to City Defs.' Resp. ¶ 6 (indicating that Chopper Circle and Ninth Street in Denver are "dedicated city street rights-of-way" to which the public ordinarily has a right of access). The City has announced the complete closure of a traditional public forum. Assuming, *arguendo*, that this restriction on First Amendment activity is content neutral,[3] this closure is constitutional only if narrowly tailored and the City provides ample and adequate alternative channels of communication. The "alternative channel" that the City must prove is sufficient to justify expansive closures of public forum space is its announced plan (now encompassed in an

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convention site." *See* Mayor Hickenlooper's February 28, 2008 "Declaration of Extraordinary Event," Ex. E to City's Resp. Br. at 4; Decl. of Katherine Archuletta (City's Ex. A) at 5 ¶ 6(e) (same); *see also* City's Press Release (Feb. 29, 2008) (declaring that the parade route "will end within view and earshot of the convention site"). The intersection of Speer and Larimer quite plainly is *not* "within sight and sound" nor "earshot" of the Pepsi Center.

[3] *But see SEIU v. City of Los Angeles*, 114 F. Supp. 2d at 970 ("While neither side argues that the 'secured zone' is a content-based restriction, the Court has its doubts regarding the zone's neutrality. The 'secured zone' is not a 'no speech' zone, nor is it a 'no access' zone. Free 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 . . . Defendants assert that the zone is not a content-based restriction because some Democrats will be denied access to the zone. While this may be true, such argument ignores the fact that all non-democrats will be denied access.").

Order of this Court) to construct a "Public Demonstration Zone" within sight and sound of the Pepsi Center and of the delegates attending the Democratic National Convention. *See, e.g., Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 853-54 (9th Cir. 2004) (holding that the government's establishment of three "designated free expression zones" outside of a public arena effectively closes off all other traditional public fora surrounding that arena and thereby subjects the parameters of the "free expression zones" to analysis to determine whether the closure of other channels of communication are constitutional time, place, or manner restrictions; and, considering the totality of the circumstances, holding that the "free expression zones" established by the government did not pass constitutional muster); *Serv. Employee Int'l Union, Local 660 v. City of Los Angeles*, 114 F. Supp. 2d 966, 972 (C.D. Cal. 2004) (analyzing the defendants' "Official Demonstration" area as an insufficient "alternative channel of communication to accommodate First Amendment interests" in connection with a "secured zone" surrounding the convention hall that closed off traditional public fora to the public) (hereinafter "*SEIU v. City of Los Angeles*").

Thus, in order for the Court to determine, in the "Phase II" merits portion of this case, whether the Defendants' restrictions on First Amendment rights of the Plaintiffs in the vicinity of the Pepsi Center satisfy the three-part test applicable to "time, place, or manner" restrictions,[4] the Defendants must be compelled to disclose not only the size of the Public Demonstration Zone (50,000 square feet) but also all other restrictions and parameters of the zone including, but not limited to, its precise location relative to the Pepsi Center and the delegates, its line of sight to the

[4] *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) "[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" (*quoting Clark v. Comty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

delegates; its capacity; whether any amplified sound systems and/or stages will be permitted to be brought into the zone; whether the access points into and out of the zone will create undue restrictions on pedestrian traffic flow so as to discourage people from entering the zone; whether there will be restrictions on signs, banners, or other displays within the zone; what provision will made for transmission of pamphlets, leaflets and other written materials from demonstrators to delegates; whether the fencing and/or netting that will surround the zone will interfere or impede the transmission of sound from the zone to the delegates, whether visibility will be impeded, to any degree, by such netting, etc. *See infra* n. 5 (illustrative listing of additional hypothetical restrictions on Plaintiffs' exercise of their First Amendment rights that Defendants may be intending to impose).

Moreover, because the burden to justify any and all such restrictions is solely on the government and because only the Defendants have knowledge of what restrictions they plan to impose,[5] it is only proper that the burden be placed on the Defendants to disclose ***all* of the restrictions they intend to impose on activity within the Public Demonstration Zone which may have a "chilling effect" on the Plaintiffs' exercise of their constitutional rights**, so that the Plaintiffs can attempt to negotiate changes to any unjustified restrictions and decide whether to challenge such restrictions in Phase II of this lawsuit, if necessary (in which case the Defendants must attempt to meet their burden of justifying those restrictions). As one court, reviewing such restrictions imposed in connection with a previous national political convention, stated succinctly, "*Any scheme* that precludes plaintiffs from *effectively* communicating with [the] delegates will not

[5] *See, e.g., Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1220-21 (10th Cir. 2007); *Serv. Employee Int'l Union, Local 660 v. City of Los Angeles*, 114 F. Supp. 2d 966, 970 (C.D. Cal. 2004).

withstand constitutional scrutiny." *SEIU v. City of Los Angeles*, 114 F. Supp. 2d at 973 (emphasis added).

II. THE PLAINTIFFS' CLAIMS ASSERTED IN THE COMPLAINT, AS WELL AS THE RELIEF SOUGHT IN THE PHASE I PRELIMINARY INJUNCTION MOTION, ARE "RIPE"

As demonstrated above, because the **Defendants have *already declared* that they *will* be closing traditional public fora to the public throughout the week of the DNC**, the facts surrounding the "alternative channels of communication" being made available to the Plaintiffs (and the public) are central to any assessment of the constitutionality of the Defendant's "time, place, or manner" restrictions. The facts and circumstances surrounding the Defendants' presently-planned restrictions to be imposed upon persons wanting to exercise their First Amendment rights in and around the Democratic National Convention are relevant and necessary for the Court to determine the constitutionality of the restrictions on fundamental rights that the defendants have ***already announced*** they will be imposing at the time of the Democratic National Convention. *See, e.g.*, *SEIU*, 114 F. Supp. 2d at 972-73 (the court takes into consideration the totality of the circumstances surrounding an "Official Demonstration Area" to determine whether it is a constitutionally adequate "alternative channel of communication"). Thus, presently, there is a "ripe" case or controversy concerning the announced and concrete plans of the Defendants to place completely off-limits to the Plaintiffs and the public, during the entirety of the Democratic National Convention, certain traditional public fora that are otherwise dedicated to use by the public for expressive activity. In order for the Court to determine, under the applicable constitutional standard, whether the alternative channel of communication provided by the City—the "Public Demonstration Zone"—is constitutionally sufficient, the parties and the Court need,

presently, to learn from the Defendants what are the exact parameters of that alternative channel of communication.

To make this point abundantly clear: were the City to decide *not* to provide any "Public Demonstration Zone" within sight and sound of the delegates and the Pepsi Center, or were the City to situate that Public Demonstration Zone a quarter of a mile away from the Pepsi Center, or to restrict its hours of use unreasonably (e.g., to make it available, as it is doing with the Designated Parade Route, only at times when no delegates will be present at the Pepsi Center), or to provide a woefully inadequate space to accommodate the anticipated number of demonstrators, etc., such facts would undoubtedly render the complete closure of other traditional public fora to First Amendment activity unconstitutional. *See SEIU v. City of Los Angeles*, 114 F. Supp. 2d at 972-73 (finding that because size and configuration of designated public demonstration outside Democratic National Convention was inadequate to allow protestors to communicate with delegates, the closure of traditional public forums to the public was unconstitutional).

Thus far, Defendants have disclosed only the *size* of the Public Demonstration Zone to be situated somewhere in the 350,000 square foot Parking Lot A. The details of *how that zone is configured* obviously dramatically impact the ability of the protestors to communicate effectively with the target audience, the delegates and the news media. There is a marked difference between a zone that is 250 feet wide by 200 feet deep, one that is 100 feet wide and 500 feet deep, one that is 10 feet wide and 5,000 feet deep, and one that is 5,000 feet wide and 10 feet deep. Thus, the Defendants' plans concerning how they will configure the Public Demonstration Zone, and where, are presently "ripe" for judicial determination.

In sum, presently, there is a live case or controversy concerning the constitutionality of the Defendants' already-announced plans to prohibit First Amendment activity within sight and sound of the convention hall and the delegates attending the Convention which requires the Court to consider all of the parameters of the alternative channel of communication the City is relying upon as a basis to justify the closure of the public square to First Amendment activity. As demonstrated further below, each of the parameters of the announced "Public Demonstration Zone" (meaning, all restrictions on activity within the Zone, both individually and collectively, that may impact the Plaintiff's exercise of First Amendment rights) must be considered by the Court in applying the "intermediate scrutiny" test to determine whether the Defendants' can meet their burden of demonstrating that their current plans to restrict fundamental rights pass constitutional muster.

III. THE COURT HAS AMPLE CONSTITUTIONAL AND STATUTORY AUTHORITY TO COMPEL THE DEFENDANTS TO DISCLOSE THEIR PLANNED RESTRICTIONS OF FIRST AMENDMENT ACTIVITIES, AS REQUESTED IN THE PHASE I PRELIMINARY INJUNCTION MOTION

In its Order entered June 10, 2008, the Court directed the parties to provide further briefing on the source of the Court's authority to order the City defendants to announce, by a date certain, the restrictions they intend to impose upon the Plaintiffs' constitutional rights in connection with the Democratic National Convention. Contrary to the arguments set forth in the City's previous pleading, and during the hearing on June 9th, the Plaintiffs have never premised their request for compelled disclosure of information upon a First Amendment "right to know." Thus, the City's citation to *Houtchins v. KQED, Inc.*, 438 U.S. 1 (1978) and *Shero v. City of Grove, Okla.*, 510 F.3d 1196 (10th Cir. 2007) are completely inapposite.

This Court is empowered by Article III of the Constitution of the United States to exercise jurisdiction over all cases and controversies over which federal statutes vest this Court with

jurisdiction. One such federal statute, 28 U.S.C. § 1331, vests this Court with jurisdiction to decide cases "arising under" federal law, including the Constitution and such statutes as 42 U.S.C. § 1983. The present case is expressly premised upon allegations that the defendants' already-announced plans to restrict free speech and assembly activities during the Democratic National Convention violate the Plaintiffs' rights under the First Amendment. Such claims "arise under" the Constitution and are also redressable against state actors under Section 1983. Thus, it is incontestable that this Court has jurisdiction over these claims under 28 U.S.C. § 1331. The Tenth Circuit has made clear that a court exercising jurisdiction under that statute has inherent authority to issue all appropriate injunctive relief. *See Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1231-33 (10th Cir. 2005) ("Equity thus provides the basis for relief . . . in appropriate cases within the court's jurisdiction," and recognizing that 28 U.S.C. § 1331 "**provides jurisdiction for the exercise of the traditional powers of equity in actions arising under federal law**")(emphasis added); *id*. at 1232 (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946) (recognizing the "jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution").

In addition to this Court's statutory and inherent equitable authority, a second source for the preliminary injunctive relief sought herein is found in the All Writs Act, 28 U.S.C. § 1651. That statute expressly vests all federal courts with the authority to issue orders "in aid of" their jurisdiction. Case law previously cited by Plaintiffs establishes that, pursuant to that statute, federal courts may properly require parties before the court to provide information, otherwise considered in the nature of "discovery," that will facilitate and enable the courts to adjudicate potentially meritorious claims. *See, e.g., Moore v. Gibson*, 195 F.3d 1152, 1165 (10th Cir. 1999); *see also Harris v. Nelson*, 394 U.S. 286, 299-300 (1969) ("It has been recognized that the courts

may rely upon [the All Writs Act] in issuing orders appropriate to assist them in conducting factual inquiries.") (citations omitted). Thus, this Court has additional statutory authority, pursuant to 28 U.S.C. § 1651, to enter the "Phase I" order sought herein, directing the Defendants to disclose the facts that will permit the parties and the Court to adjudicate potentially meritorious claims.

In addition, disclosure is mandated by plain logic and reason. During the hearing on June 9, 2008, counsel for the City repeatedly stated that Plaintiffs could or should seek the requested information through discovery requests propounded upon the Defendants, and even suggested that that would be the appropriate means to resolve the questions of "Phase I disclosures." Of course, absent a judicial order authorizing such discovery (or an agreement of the parties), no discovery may be tendered, pursuant to Fed. R. Civ. P. 26(d), prior to the conference required by Fed. R. Civ. P. 26(f).[6] Presently, the complete set of restrictions the Defendants *will* impose within the Public Demonstration Zone (which could have an impact on the Plaintiffs' exercise of their rights to free speech and assembly) are unquestionably "discoverable" as relevant and unprivileged information necessary to adjudicate claims challenging the constitutionality of those restrictions.[7] Thus, the City's argument—suggesting that the ordinary mechanisms of discovery should be employed in this case—actually argues strongly in favor of a judicial order compelling those disclosures immediately. *See Ellsworth Assoc., Inc., v. United States*, 917 F.

[6] As noted above, at the time the Motion for Preliminary Injunction was filed, the Municipal Defendants had made numerous public statements asserting that they lacked the necessary information from the Federal Defendants to permit disclosure of the requested information, a claim that Defendants abandoned after the filing of this litigation. Prior to that concession, however, injunctive relief requiring the Federal Defendants to disclose information to the Municipal Defendants was the proper, and indeed *only*, vehicle for Plaintiffs to seek that necessary relief as prerequisite to disclosure of the information by the Municipal Defendants to the Plaintiffs.

[7] Accordingly, the Plaintiffs have this day filed a Motion for Leave to Conduct Expedited Discovery, to which all Defendants object.

Supp. 841, 844 (D.D.C. 1996) (in an action challenging the constitutionality of a government set-aside program, granting plaintiff's request for expedited discovery, "[b]ecause the Court finds that granting the plaintiffs' request would expedite resolution of their claims for injunctive relief and that the government defendants have failed to establish good cause for a protective order . . ."); *Edudata Corp. v. Scientific Computers, Inc.*, 599 F. Supp. 1084, 1088 (D. Minn. 1984) (granting request for expedited discovery where "[f]urther development of the record before the preliminary injunction hearing will better enable the court to judge the parties' interests and respective chances for success on the merits."), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 429 (8th Cir. 1984); *see also Qwest Communications Int'l., Inc. v. Worldquest Networks, Inc.*, 213 F.R.D. 418, 419 (D. Colo. 2003) (stating that the "good cause standard [for expedited discovery] may be satisfied where a party seeks a preliminary injunction.") (citation omitted); *see generally* FED. R. CIV. P. 26(d), Advisory Committee Notes (explaining that the 1993 amendment to Rule 26(d) authorizes expedited discovery by local rule, order, or stipulation in "appropriate . . . cases, such as those involving requests for a preliminary injunction").

Here, by consent of the Plaintiffs, the Defendants' Answer to the Complaint is not due until July 1, 2008. Given the briefing schedule that the Court has now imposed, with the Plaintiffs' initial brief challenging the constitutionality of any restrictions the Defendants will impose (*if* Plaintiffs choose to raise such challenges) due to be filed on or before July 7, 2008, the Defendants should not be permitted to withhold information currently in their possession, and which they intend to disclose to the public in any event prior to the Convention, any longer.

In sum, as indicated above, the Court has three independent sources of authority to compel the Defendants to disclose information currently that is necessary for the Plaintiffs to litigate, and

for this Court to adjudicate, their challenges to the Defendants' restrictions on their fundamental rights. The burden thus shifts to the Defendants to justify any further delay in providing that information to the Court and the parties.

IV. THE DEFENDANTS SHOULD BE COMPELLED TO DISCLOSE TO THE PLAINTIFFS ALL OF THE RESTRICTIONS THEY WILL IMPOSE IN CONNECTION WITH THE PUBLIC DEMONSTRATION ZONE ON THE GROUNDS OF THE PEPSI CENTER, AND TO DO SO WELL IN ADVANCE OF THE DATE (JULY 7) WHEN THE PLAINTIFFS ARE REQUIRED TO FILE A BRIEF CHALLENGING THOSE RESTRICTIONS

In its Order of June 10, 2008, the Court directed the Parties to identify "what specific items [of information] should be required to be disclosed, to whom, and when." As has been shown above, the Plaintiffs are entitled to know in advance *all* of the restrictions that Defendants will be imposing upon the exercise of those fundamental rights. The disclosure should be made sufficiently in advance for Plaintiffs to have time to evaluate whether any of the restrictions raise constitutional questions and, if so, time to negotiate a resolution with Defendants and, if those negotiations are unsuccessful in whole or in part, time to develop a full evidentiary record and brief the issues. As was requested in the Plaintiffs' First Motion for Preliminary Injunction, the City Defendants should be compelled to disclose "immediately . . . *all restrictions* that [they] will impose on the 'demonstration zone' within sight and sound of the Pepsi Center and the Delegates attending the Convention," and specifically "*any* additional regulations or restrictions that will apply to persons wishing to exercise their free speech rights in the zone."

Of course, Plaintiffs cannot possibly anticipate or predict each and every such restriction that Defendants may seek to impose on persons within the Public Demonstration Zone[8]; that information is in the sole custody and control of the Defendants, and they, rightfully, bear the burden of justifying not only their closure of traditional public fora but the additional restrictions they intend to impose in connection with any purported "alternative channel of communication." *See* supra n. 4. Thus, it is the Plaintiffs' position that in light of legal authority and practical necessity, Defendants must identify *all* of the specific restrictions they intend to place on persons wishing to engage in First Amendment activity, and disclose those to the Plaintiffs and the Court, and, if thereafter challenged by Plaintiffs, to attempt to meet their evidentiary burden to justify those restrictions. Likewise, Plaintiffs must have an opportunity, if necessary, to develop an evidentiary record rebutting any showing by Defendants as to the constitutionality of those restrictions in the full-day hearing now set for July 29, 2008. In order for the Plaintiffs and their counsel to confer about those restrictions, and to prepare their opening brief on "Phase II" (merits) issues, this information must be disclosed *to the Plaintiffs* on or before June 30, 2008.

[8] Plaintiffs can speculate about myriad restrictions that other courts have struck down as unconstitutional: (1) subjecting people who enter a demonstration zone or rally to search or seizure of personal belongings, without individualized probable cause, *see Stauber v. New York*, No. 03 Civ 9162, 9163 & 9164 (RWS), 2004 U.S. Dist. LEXIS 13350, at *82-90 (S.D.N.Y July 16, 2004); *Bourgeois v. Peters*, 387 F.3d 1303, 1316-25 (11th Cir. 2004) (holding that City's requirement that protestors be subject to magnetometer search violates not only their Fourth Amendment rights, but their First Amendment rights as well); (2) herding people into closed-in "pens" without exits or right to re-enter; *Stauber*, 2004 U.S. Dist. LEXIS 13350 at * 76-81; (3) restricting the use of banners, signs, or other large displays to communicate their message, *Tucker v. City of Fairfield*, 398 F.3d 457, 464 (6th Cir. 2005); (4) failing to provide adequate information to protestors about adjacent street closures and means of ingress and egress to the zone, *Stauber*, 2004 U.S. Dist. LEXIS 13350 at *71-76; (5) situating media tents or other obstructions of line-of-sight between the zone and the delegates, *SEIU*, 114 F. Supp. 2d at 972, etc. However, ultimately, it is improper to place upon the Plaintiffs the burden of having to *predict* or itemize all of the myriad ways in which Defendants *might* impose additional restrictions on their exercise of fundamental rights—it is Defendants' burden to identify and then justify those restrictions.

V. ABESENT A SHOWING OF ACTUAL NEED OF *ANY* PROTECTIVE ORDER, NONE OF THE DEFENDANTS' DISCLOSURES SHOULD BE SUBJECT TO A PROTECTIVE ORDER, MUCH LESS ONE LIMITED TO "ATTORNEYS' EYES ONLY"

"In the absence of a showing of good cause for confidentiality [and a protective order entered thereon], the parties are free to disseminate discovery materials to the public." *Exum v. U.S. Olympic Com.*, 209 F.R.D. 201, 206 (D. Colo. 2002); The Sedona Guidelines: Best Practices Addressing Protective Order, Confidentiality & Public Access in Civil Cases, p. 7 (March 2007) ("Absent an agreement between the parties or an order to the contrary, a party is free to share the fruits of discovery obtained during litigation with others who are not parties to the lawsuit.") (citing *Phillips v. Gen. Motors Corp*., 307 F.3d 1206, 1210 (9th Cir. 2002); *Harris v. Amoco Prod. Co*., 768 F.2d 669, 683-84 (5th Cir. 1985)). To justify the imposition of such a protective order, the party seeking such a judicial order must make a *showing* of "good cause." FED. R. CIV. P. 26(c); *see also Exum*, 209 F.R.D. at 206 ("a party must demonstrate "good cause" for entry of a protective order. Conclusory or stereotypical assertions are insufficient to show good cause.") (citations omitted). Moreover, a "party seeking a protective order must show that disclosure *will* result in a clearly defined and serious injury to the party seeking protection." *Id.* (emphasis added) (citations omitted). Some courts have indicated that an *evidentiary* showing is necessary to demonstrate "good cause." *See Apco Oil Corp. v. Certified Transp. Inc.*, 46 F.R.D. 428, 430-432 (W.D. Mo. 1969) (setting an evidentiary hearing to determine whether good cause for protective order exists, as that determination "must be based upon appropriate testimony and other factual data, not the unsupported contentions and conclusions of counsel."); *Exum*, 209 F.R.D. at 207 (finding that United States Olympic Committee ("USOC") had "produced nothing to refute" the Declaration tendered by party opposing entry of order, and thus, concluding that "USOC has

failed to demonstrate good cause as required by Rule 26(c)."); *see also THK Am., Inc. v. NSK Co.*, 157 F.R.D. 637, 646 (N.D. Ill. 1993) (stating that a "protective order should not issue based only upon counsel's arguments in its briefs . . ."); *Pfeiffer v. Eagle Mfg. Co.*, 137 F.R.D. 352, 353 (D. Kan.1991) (holding that "'good cause,' within the meaning of Rule 26(c), contemplates a 'particular and specific *demonstration of fact,* as distinguished from stereotyped and conclusory statements.'"). Thus, before the Court can determine whether "good cause" has been demonstrated by the Defendants to support the entry of any protective order herein, there must be a full evidentiary hearing (now set for June 29) to resolve that factual dispute. *See* Tr. of Hr'g of June 9, 2008 herein, at 40: 21-23 (Doc. No. 36) (the Court stating: "If there are factual issues in dispute, they're not going to be resolved by declarations.").[9]

Of course, there is an even higher burden of proof and persuasion upon a party who seeks the entry of a protective order that precludes attorneys from sharing information with their clients—the parties whose substantive rights are being adjudicated by the Court based upon that undisclosed information. "District courts must be . . . chary of issuing protective orders that restrict the ability of counsel and client to consult with one another during trial or during the preparation therefor. Such orders arguably trench upon constitutional interests at least as important as those infringed by restrictions on public dissemination of information." *Doe v. District of Columbia*, 697 F.2d 1115, 1119 (D.C. Cir. 1983). In *Doe*, the court held that an "attorney's-eyes-only" protective order is permissible only if the trial court is "confident that the potential injury is substantial and cannot be prevented through the use of any device less

[9] *But see Taylor v. Solvay Pharms., Inc.*, 223 F.R.D. 544, 547 (D. Colo. 2004) (stating that "[g]ood cause for entry of a Rule 26(c) order need not be established at an evidentiary hearing," and considering the Declarations filed by the parties to determine whether good cause existed).

restrictive of a party's access to his lawyer." 697 F.2d at 1120. This standard is necessary because the use of an attorney's-eyes-only protective order "may strain the attorney-client relationship and create public distrust in the government's ability to keep confidential government documents confidential." *Pack v. Beyer*, 157 F.R.D. 226, 233 (D.N.J. 1994). Accordingly, a party seeking an attorney's-eyes-only protective order must establish a non-conclusory basis for predicting that a standard protective order would not be sufficient to protect the party's interests. *See, e.g.*, *Westbrook v. Charlie Sciara & Son Produce Co.*, No. 07-2657 Ma/P, 2008 WL 839745, at *5 (W.D. Tenn. Mar. 27, 2008) (denying request for attorney's-eyes-only protective order because "the defendants have not argued (much less presented any evidence) that [plaintiff] has demonstrated a propensity to release confidential information to third parties").

Although the resolution of the Defendants' purported "need" for a protective order, of any kind, must await the presentation of all evidence by the Parties at the hearing on June 30, the Plaintiffs are frankly at a loss to see how, possibly, Defendants can meet their burden with respect to the claimed need to keep secret (until August 24, at the latest) the distance between the closest edge of the Public Demonstration Zone and the Delegates or the Pepsi Center itself, in light of the following irrefutable facts:

- the Defendants have already disclosed (and have committed, in an Order of this Court) that they will provide a Public Demonstration Zone that will be "within sight and *sound* of the Delegates" while they are on the grounds of the Pepsi Center[10], and that the Defendants will not be providing any amplified sound system for use in the Public Demonstration

[10] *See* Order entered June 9, 2008 at 6 ¶ 9.a. ("The City will provide a 'Public Demonstration Zone' on the Pepsi Center Ground that will be within sight and sound of the delegates on the Pepsi Center Grounds.").

Zone. Thus, at the evidentiary hearing on June 30, expert testimony in the related fields of acoustics and audiology (sound and hearing science) could demonstrate that there is an identifiable distance (a range, in feet) in which an unamplified human voice can be heard and *understood*,[11] above ordinary background city noise levels, by persons of ordinary hearing capability.[12] Thus, the Defendants have already effectively disclosed the *maximum* distance between the closest edge of the Public Demonstration Zone and the delegates.[13] Furthermore, because the City has also disclosed that the Public Demonstration will be situated within Lot A on the Pepsi Center grounds, it has also disclosed the *maximum* distance between the farthest edge of that zone and the Pepsi Center.

- The distance between the edge of the public demonstration zone in St. Paul, Minnesota and the Excel Center, which will house this year's Republican National Convention, has already been publicly disclosed.
- At past political conventions, including those in New York and Boston in 2004, and others in previous years, the contours and precise locations of the public demonstration zones were disclosed publicly months in advance of those conventions.
- The precise location of the Public Demonstration Zone in Lot A of the Pepsi Center will be publicly disclosed, at the absolute latest, on August 24, 2008. However, the Democratic

[11] *See SEIU v. City of Los Angeles*, 114 F. Supp. 2d at 972 (holding unconstitutional a 260 yard distance between the demonstration zone and delegates attending national political convention because "the distance assures that only those delegates with the sharpest eyesight and the most acute hearing have any chance of getting the message.").
[12] *See* William J. Strong & George R. Plitnik, Music, Speech and Audio, 164, 182 (3d ed. 2007).
[13] This calculation presumes the accuracy of the Defendants' commitment to provide fencing material that is completely sound-neutral (i.e., that does not materially impede the transmission of a sound signal through the barrier).

> National Convention commences on August 25 and continues until August 28, a full five days after that latest possible disclosure date. (Such time would certainly give any hypothetical "evil-doer" sufficient opportunity to adjust his or her plans in light of the newly disclosed information if, in fact, a hypothetical "evil-doer" would wait until the disclosure of the exact distance before formulating such plans).

Moreover, any protective order that would preclude public disclosure, now, of information concerning the Defendants' intended restrictions on free speech and assembly rights at the DNC would face significant hurdles to continue such secrecy once the matters are brought to this Court's attention for adjudication on the merits in "Phase II," first in the Plaintiff's opening brief to be filed in Court no later than July 7, and then in the full evidentiary hearing challenging those restrictions, on July 29. *See* D.C.COLO.LCivR 7.2A (requiring a *showing* that a "clearly defined and serious injury . . . would result" if documents filed with the Court were not sealed, and also "why a less restrictive alternative to the relief sought is not available"); *see also Ricotta v. Ocwen Loan Servicing, LLC,* No. 06-cv-01502-MSK-KLM, 2008 WL 516674, at *10 (D. Colo. Feb. 22, 2008) ("Judges have a responsibility to avoid secrecy in court proceedings because 'secret court proceedings are anathema to a free society.' . . . [I]t is critical that the public be able to review the factual basis of this Court's decisions and evaluate the Court's rationale so that it may be confident that the Court is functioning as a neutral arbiter. . . . Documents filed with the Court are presumptively public, and *absent a showing of compelling reasons*, the Court will not seal them.") (emphasis added) (internal citations omitted). Thus, because it is *certain* that the restrictions the Defendants will impose on the Plaintiffs' constitutional rights at the DNC will be disclosed to the public as early as July 7, and at the latest, on August 24, 2008 (four full days before the final day

of the Convention), there can be no rational argument, much less an evidentiary showing, by the Defendants to justify the imposition of a protective order, of *any kind*, barring disclosure in open court of those intended restrictions now.

CONCLUSION

For the reasons set forth above, the Court has the legal authority to order, and should order, the City Defendants to disclose to the Plaintiffs, not subject to any protective order, all of the restrictions they intend to impose on the Plaintiffs' exercise of First Amendment rights in connection with the Public Demonstration Zone, on or before June 30, 2008.

Respectfully submitted this 18th day of June, 2008

By: /s Steven D. Zansberg

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CERTIFICATE OF SERVICE

Undersigned certifies that on this 18th day of June, 2008, this **PLAINTIFFS' SUPPLEMENTAL BRIEF ON PHASE I ISSUES** was filed with the Court and served on the counsel of record listed below through the Court's ECF-CM electronic filing system:

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