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.

REPLY IN SUPPORT OF PLAINTIFFS' FIRST MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs American Civil Liberties Union of Colorado, *et al.*, by and through their attorneys, submit this consolidated Reply, pursuant to the Courts "Order Directing Reply And Setting Non-Evidentiary Hearing, (Doc. #29, May 28, 2008), in support of their previously filed Motion For Preliminary Injunction ("Motion") (Doc. #2, May 1, 2008), and state as follows:

INTRODUCTION

More than a month has elapsed since the filing of this case, and although the scope of the initial, interim preliminary injunction requested by the Plaintiffs has been narrowed by the parties' Stipulation (Doc. #24, May 22, 2008), the urgent need for a judicial order directing the City[1] to disclose the restrictions it presently intends to impose on the Plaintiffs' exercise of their fundamental rights remains as great, if not greater, as when the lawsuit was first filed. Without such interim relief, the Plaintiffs will be substantially foreclosed from important planning for their demonstration activities at the Democratic National Convention ("Convention") at the Pepsi Center in August, and even more importantly, they will be denied their constitutionally protected right to have meaningful judicial review of "time, place, and manner" restrictions that effectively operate as a prior restraint on their speech and assembly.

In their separate but coordinated response briefs, the Defendants have stated clearly their contention that, even though their plans for a "public demonstration zone" are in truth firm (with the caveat that all plans are subject to change based upon future contingencies), they steadfastly

[1] As used herein, the municipal defendants Michael Battista and the City and County of Denver are referred to collectively as "the City." The federal defendants Mark Sullivan and the United States Secret Service are referred to collectively as "the Secret Service."

refuse to divulge information as to those plans to the Court or the public ***until the Convention actually gets underway*** – based upon the wholly unsubstantiated assertion that disclosing the location (and other particulars) of that zone will necessarily and unavoidably undermine national security and the personal safety of delegates and attendees at the Convention. Moreover, the Secret Service urges this Court to accept its position that the Court has ***no role*** in this matter in any event: Only the Secret Service allegedly possesses the specialized expertise needed to determine both (a) ***when*** information may safely be disclosed about the public demonstration zone, and (b) what is the appropriate balance between security and First Amendment rights at the Convention.

The Defendants' position is factually untenable and unsupported by case law. Accepting their argument on its face would require the Court to conclude that the Defendants' restrictions on the free speech and assembly rights of the Plaintiffs (at a national political convention) are ***unreviewable*** by any Article III judge. The body of case law in which other federal judges have reviewed such restrictions in the past – and have disagreed with law enforcement's assessment of the proper balance between free speech rights and security concerns – demonstrates that the Defendants' position cannot be sustained. Moreover, the fact that the restrictions on free speech rights at past events of this kind were disclosed to the public well in advance of the events, without undermining national security or personal safety, ***and*** that such disclosure has already occurred in St. Paul, Minnesota, with respect to this year's Republican National Convention, (which will occur a week ***later*** than Denver's Convention), again demonstrates that there is no basis for the Court to accept at face value the Defendants' conclusory assertions, with no

substantiation, that public disclosure in advance of the Convention of the location and parameters of the public demonstration zone (and parade terminus) will cause grievous harm.

Plaintiffs do not believe that an evidentiary hearing is necessary to establish that the Defendants' position makes no sense, is contrary to historical and present experience, and would result in evading any meaningful judicial review of the restrictions on the Plaintiffs' fundamental liberty interests that the Defendants presently intend to impose on the Plaintiffs and the public. (Plaintiffs also note that because the burden of proof for these matters lies upon the Defendants, not the Plaintiffs, as is discussed more fully below, the question of whether an evidentiary hearing is necessary is one more properly for the Defendants.) Nevertheless, if the Court were to give any credence to the facially absurd argument that the public cannot be allowed to know of these restrictions until they are all set in place and the Convention is underway, then Plaintiffs request an evidentiary hearing. At that hearing, Plaintiffs will subject to cross-examination Defendants' conclusory assertions of both the necessity for secrecy and the alleged harm of disclosure (and their claims of not yet having sufficiently firm plans in place to warrant judicial review), and Plaintiffs will present affirmative testimony rebutting those assertions.

Regardless of whether the Defendants have met their burden with respect to disclosure ***to the public*** in advance of the Convention of the City's planned restrictions on free speech and assembly, which they have not, the Defendants certainly have made no showing, or even an attempt, to explain why disclosure of these restrictions cannot be made ***to the Court*** and to counsel of record, under an "attorneys eyes only" protective order, that will permit an adversarial testing of ***the merits*** (i.e., the constitutionality) of those restrictions that Plaintiffs believe will impose an unconstitutional burden on their rights. Such a protected disclosure now – rather than

on or after the start of the Convention – is the only mechanism that will allow the Court, and if necessary, the Tenth Circuit, sufficient time and opportunity to analyze any challenged restrictions with sufficient time to implement whatever judicial relief may be required under the Constitution.

This case began with a Complaint that evoked the sad experience of the last Democratic National Convention in Boston, in which federal judges decried the security measures adopted there as "an offense to the spirit of the First Amendment . . . a brutish and potentially unsafe place for citizens who wish to exercise their First Amendment rights." *Coal. to Protest the Democratic Nat'l Convention v. City of Boston*, 327 F. Supp. 2d 61, 76 (D. Mass.), *aff'd sub nom., Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004). Nevertheless, given the last-minute nature of those judicial proceedings, the four federal jurists who heard that case each agreed that they lacked the time or means to effectuate any meaningful alternative. This lawsuit, and the interim preliminary injunction sought herein, is guided by Judge Lipez's admonition that future political convention planners should avoid a repeat performance of events in Boston by bringing to the federal judiciary any disagreements about the proper balance of security and freedom of speech and assembly "months or at least weeks" in advance of the event, so that ***meaningful*** judicial review may occur.

Indeed, to effect meaningful judicial review of the Defendants' planned restrictions of speech and assembly at the Convention, a tremendously expedited schedule of disclosure, briefing, and hearing will be required. Plaintiffs anticipate that a schedule such as that presented here will be necessary:

- June 9, 2008 (76 days before Convention) – Current date for non-evidentiary hearing on request for interim relief.

- June 23, 2008 (62 days before Convention) – If necessary, evidentiary hearing on request for interim relief.

- June 25, 2008 (60 days before Convention) – Disclosure by Defendants of location and arrangements for demonstration zone and terminus of parade route, and any other public forum closures.

- July 7, 2008 (48 days before Convention) – Plaintiffs' brief on constitutionality of planned restrictions.

- July 14, 2008 (41 days before Convention) – Defendants' response to constitutional challenge by Plaintiffs.

- July 21, 2008 (35 days before Convention) – Plaintiffs' reply on their constitutional challenges.

- July 28, 2008 (27 days before Convention) – Hearing, with site visit by Court to Pepsi Center grounds, on constitutionality of planned restrictions.

- Aug. 4, 2008 (20 days before Convention) – Decision by Court on constitutionality of planned restrictions.

- Aug. 14, 2008 (10 days before Convention) – Expedited briefing to Tenth Circuit on any challenge of the Court's ruling

- Aug. 21, 2008 (3 days before Convention) – Expedited hearing by Tenth Circuit on the expedited appeal.

- Three days for Defendants to alter planned restrictions in compliance with order from Tenth Circuit, if necessary.

- Aug. 24, 2008 – Start of protest activity at the Democratic National Convention.

As this timetable demonstrates, without the interim preliminary injunction requested here, and a subsequent period to litigate any unconstitutional restrictions on free speech and assembly that are made evident through the requested disclosures, the Plaintiffs will be deprived of their fundamental right to independent judicial review. That denial, itself, constitutes irreparable harm that outweighs the government's claimed, but untested and unsubstantiated, assertions that security threats arising from purportedly "early" disclosure will somehow undermine security.

As demonstrated below, the Plaintiffs have standing to challenge already-announced restrictions that close off traditional public forums to free speech and assembly. They undoubtedly have standing to challenge the additional restrictions that the City has not yet disclosed. They have standing, and therefore, they have a right to judicial review. For that judicial review to be constitutionally adequate, Plaintiffs must have an opportunity to develop and present evidence that so that ***this Court***, as opposed to the Defendants themselves, can determine for itself whether Defendants have struck the proper balance between security precaution and fundamental rights. To do so, however, the Plaintiffs need, urgently, for the Court to order the disclosures requested in the Motion, and to set a briefing and hearing schedule to address the merits of the Plaintiff's claims. Without such interim relief, there simply will not be enough time for the parties and the Court to do what the Constitution requires, which is to assure that government restrictions on First Amendment rights are subjected to meaningful judicial review.

ADDITIONAL FACTUAL BACKGROUND

The factual background for the Motion was laid out in the initial Complaint for Injunctive Relief ("Complaint") (Doc. #1, May 1, 2008), with its accompanying exhibits, and the twelve (12) separate declarations from representatives of the Plaintiffs that were attached to the Memorandum (Doc. #3, May 1, 2008) in support of the Motion.[2] In addition to that factual material, Plaintiffs

[2] Those accompanying declarations are as follows:

(1) Declaration of Betty Ball, on behalf of Rocky Mountain Peace & Justice Center;
(2) Declaration of Leslie Cagan, on behalf of United for Peace & Justice;
(3) Declaration of Donald Duncan, on behalf of Americans for Safe Access;
(4) Declaration of Gabriela Flora, on behalf of American Friends Service Committee;
(5) Declaration of Nita Gonzales, on behalf of Escuela Tlatelolco Centro de Estudios ("Escuela Tlatelolco");

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here submit four additional declarations[3] to rebut the Defendants' contentions in their response briefs (and conclusory averments in the accompanying declarations) that secrecy is imperative with respect to the location and arrangement of the demonstration zone and the parade terminus.

These additional declarations – three of them from participants in the negotiations and litigation related to the last national political conventions in 2004 and the upcoming Republican National Convention in St. Paul, Minnesota – demonstrate conclusively the fallacy of the Defendants' unwarranted infatuation with secrecy. In New York, the location and arrangement of the demonstration zone were publicly announced by the New York Police Department on June 26, 2004, more than **two full months** before the start of the Republican National Convention there. (*See* Dunn Decl, ¶¶ 6-7.) At no time during the negotiations between protest organizations and police authorities in New York, which were ongoing throughout the summer of 2004, did anyone ever express a need to maintain the location or arrangements of the demonstration zone as secret for security purposes. (*Id.*, ¶ 9.)

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(6) Declaration of Larry Hales, on behalf of Troops Out Now Coalition;
(7) Declaration of Cathrynn Hazouri, on behalf of American Civil Liberties Union of Colorado ("ACLU")
(8) Declaration of Adam Jung, on behalf of Tent State University;
(9) Declaration of Glenn Morris, on behalf of American Indian Movement of Colorado;
(10) Declaration of Damian Sedney, on behalf of Citizens for Obama;
(11) Declaration of Glenn Spagnuolo, on behalf of Recreate 68; and,
(12) Declaration of Zoe Williams, on behalf of CODEPINK.

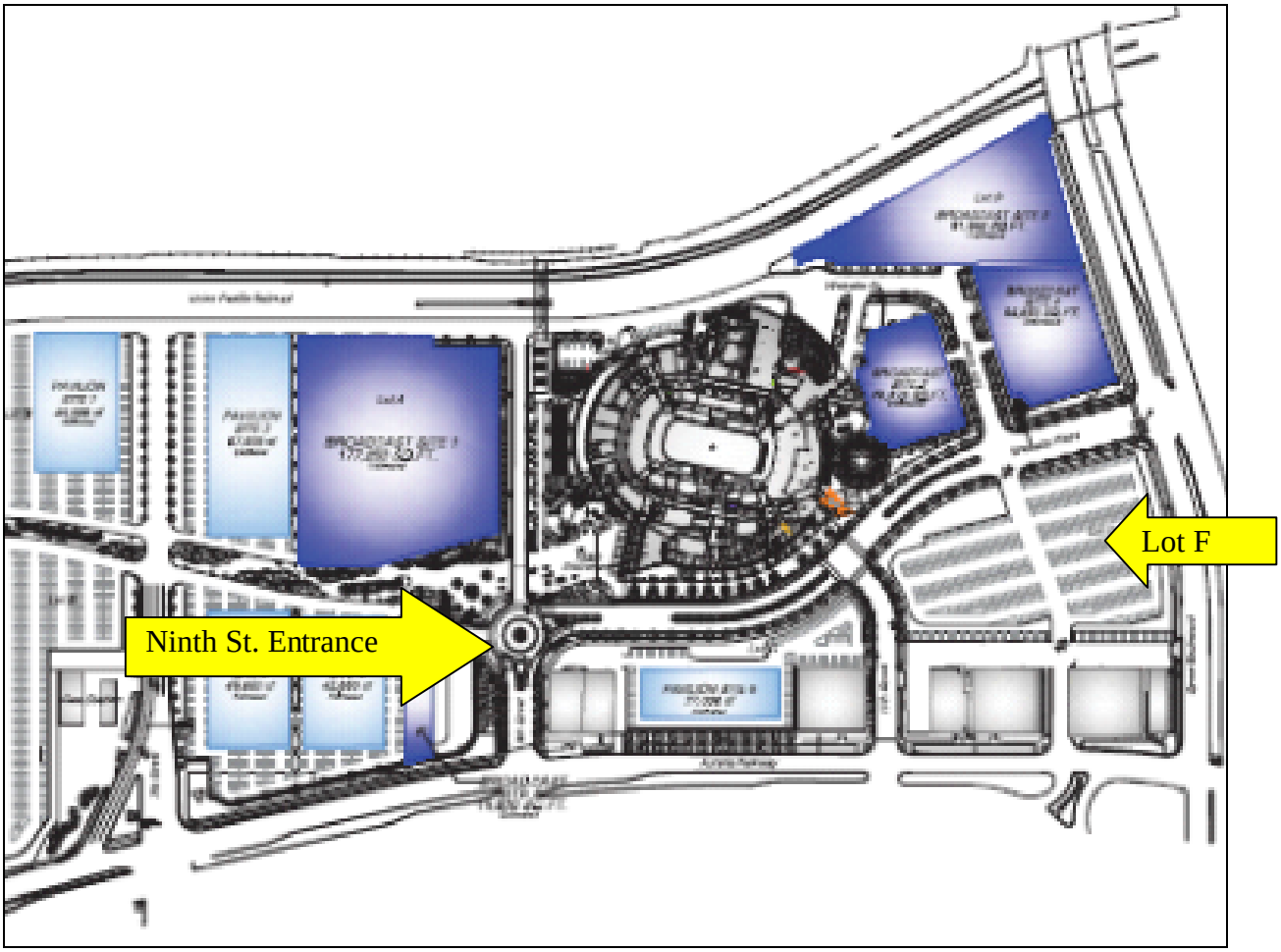
[3] These additional declarations are:
(13) Declaration of Christopher Dunn, of New York Civil Liberties Union;
(14) Declaration of John Reinstein, of American Civil Liberties Union of Massachusetts;
(15) Declaration of Teresa Nelson, of American Civil Liberties Union of Minnesota, and
(16) Declaration of Tony Bouza, retired police commander with expertise on security planning.

Even more pointedly, in Boston, police officials unveiled a mock up of the initial proposed demonstration zone ***nine months*** before the actual convention. (*See* Reinstein Decl., ¶ 5.) Then, again fully three months before the convention, police officials agreed to change the location of the demonstration zone to a site ***proposed by protest organizations*** that was closer to the convention building and able to assure that demonstrators within the zone would be within sight and sound of the delegates at the convention. (*See id.*, ¶ 9.) The lack of any concern for secrecy around the location and arrangements for the demonstration zone in Boston is further buttressed by the fact that an actual diagram of the "hard-security" and "soft-security" perimeters, as well as the proposed location of the demonstration zone was actually ***published*** in the *Boston Globe* more than three months before the convention. (*See id.*, Ex. B.)

And in St. Paul, ***on April 15, 2008***, during a personal walk-through of arrangements for a parade route and demonstration area at the Xcel Energy Center where the Republican National Convention will be held in September this year, St. Paul Police Department Assistant Police Chief Matt Bostrom explicitly pointed out to representatives of the various protest organizations accompanying him where the location of the "designated public assembly area" would be. (*See* Nelson Decl., ¶ 15 and Ex. B.) As the St. Paul Police Department would later describe it in its staff report to the St. Paul City Council, this demonstration zone is "as close as approximately 100 feet from one of the two main points of entry for credentialed attendees of the 2008 RNC," within the shadow of "the glassed front" of the convention site. (Nelson Decl., Ex. D at 3.) The St. Paul Police Department contends that this proximity by marchers and demonstrators close in to the convention site is "unprecedented," allegedly with no prior convention ever allowing demonstrators to get as close to delegates as is planned in St. Paul. (*Id.*) Of course, there is no

evidence whatsoever that this disclosure fully four and a half months before the start of St. Paul convention has created any risk to the security of the convention or the safety of the delegates. (Nelson Decl., ¶ 9.) Indeed, St. Paul's officials had indicated as early as February this year that they fully intended to make an early announcement of the location of the planned demonstration zone. (*Id.*, ¶ 5 and Ex. A.)

In addition to this specific information concerning other conventions, the Defendants' protestations concerning the need for secrecy are also belied by their own current actions. As noted in Plaintiffs' prior brief in support of the Motion, the Democratic National Convention Committee published – now more than six months ago – a detailed diagram of the Convention site, showing the layout of various media facilities, as well as provided other information on the security perimeter. *See* Memo., at 6-7 and attached Exs. A & B. Those prior disclosures demonstrate that the Defendants' plans for the location and arrangements of the demonstration zone and the parade terminus must necessarily be complete. The diagram of the Pepsi Center grounds published by convention organizers leaves only two locations that are within "sight and sound" of the delegates on the Pepsi Center grounds, as the Defendants have stipulated will be the case. Those two areas are either the entrance promenade on Ninth Street leading to the main doors of the Pepsi Center or the "Lot F" parking area in the southeast corner of the site:



Memo., Ex. A. In light of the fact that these two locations are easily deduced from already public information, there simply is no factual support for the Defendants' contention that the location of the demonstration zone – or the parade terminus, which is to be "within walking distance" of the demonstration zone – must remain officially secret.[4] Indeed, assuming the City is not intending to

[4] Plaintiffs also anticipate that, if necessary, when properly confronted through cross-examination and collateral adverse testimony to be elicited by Plaintiffs from witnesses called from the ranks of the Defendants' own personnel, as well as with testimony from Plaintiffs' own witnesses, the assertions of the Defendants' declarants will be revealed as not only implausible but simply not true. Indeed, a close reading of Defendants' papers shows that Defendants have falsely implied that the Motion requires disclosure of the entire "security plan." (*See* Battista Decl.,

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situate its "Public Demonstration Zone" at the entrance circle where Chopper Circle and Ninth Street intersect (an area that would plainly be too small to accommodate the size of groups expected to congregate at the Convention, and would thus be an unreasonable time, place and manner restriction), by process of elimination, the location of the Public Demonstration Zone appears already to be set by the City – although not yet disclosed – as Lot F on the grounds of the Pepsi Center.

Finally, former Minneapolis Police Chief Tony Bouza, himself a veteran of security planning for various major events including a Presidential visit, attests that there is simply no credible basis for the Defendants' assertion that security concerns necessitate the secrecy of the location and arrangement of the Public Demonstration Zone and the terminus of the Designated Parade Route. (Bouza Decl., ¶¶ 10 and 18.) Such secrecy, according to Chief Bouza's expert experience, simply has no legitimate basis in any rational security plan; no "individual intent on causing harm" would likely be deterred or even hindered by the secrecy of such information. (*Id.* ¶ 15.) As Chief Bouza points out, the City already has made many disclosures that would be "helpful" to a person planning to engage in unlawful conduct at the Convention, but those disclosures do not realistically present a true security risk. (*Id.* ¶ 11.) Nor would the requested disclosures here: The Defendants' predictions of risk are "speculative, far-fetched and fantastical,

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¶¶ 23-24; Machalko, ¶ 24.) This contention is at odds with the actual relief sought in the Motion, which is narrowly limited. *See* Motion at 2-3. The Defendants also have implicitly asserted that disclosure of the limited information Plaintiffs do seek will thereafter preclude "flexibility" or last-minute changes to security details. (Machalko Decl., ¶ 22.) Plaintiffs' actual request, of course, does no such thing. Moreover, there is no plausible basis for the Defendants' additional bizarre contention that Plaintiffs have effectively requested that the Defendants "finalize" the security plans. *See* Secret Service Resp. at 22 and 26. Nowhere does the Motion, or any of the Plaintiffs' filings, even so much as hint at such a demand.

and the purported need to keep secret the location and parameters of the public demonstration zone (and the terminues of the designated parade route) does not represent a realistic assessment of known or predictable risks against which appropriate security measures can be planned and executed." (*Id.* ¶ 18.)

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO ASSERT THEIR CLAIMS HEREIN

As is well-established in the caselaw, standing is an issue that is determined as of the time a plaintiff files her complaint. *See, e.g.*, *Aid for Women v. Foulston*, 441 F.3d 1101, 1109 (10th Cir. 2006) ; *Jordan v. Pugh*, 504 F. Supp. 2d 1109, 1115 (D. Colo. 2007). The determination is based on the claims actually pleaded in the plaintiff's complaint, requiring a plaintiff to show both the constitutional and prudential aspects of standing: "(1) a concrete and particularized, actual or imminent injury to a legally protected interest of the plaintiff; (2) a causal relationship between the injury and the challenged conduct or action; and (3) a likelihood that the injury will be redressed by a favorable decision," and "(1) a plaintiff must assert his own rights, not those of third parties; (2) the plaintiff's claim cannot be a general grievance shared equally and generally by all or a large class of citizens; and (3) the plaintiff's injury must be within the zone of interests the statute or common law claim intends to protect." *Jordan*, 504 F. Supp. 2d at 1115.

In its response, the Secret Service raises two theories to support its contention that Plaintiffs lack standing: first, that the Plaintiffs' claims are not "redressable," and second, that the Plaintiffs' claims are not "ripe." With respect to the first of these theories, the Secret Service has

misconstrued the nature of the claims that Plaintiffs make in this case, and with respect to the latter theory, the facts debunk the Secret Service's contentions.

A. Plaintiffs' Claims Are "Redressable."

The Secret Service's contentions concerning redressability misconstrue the essential nature of the Plaintiffs' claims. Plaintiffs' Complaint does not assert a claim under the First Amendment for access to information. Rather, Plaintiffs' contention is that the Defendants' current actions will necessarily and unerringly deny them their constitutional right to assemble peaceably and speak freely on public forum spaces at the Democratic National Convention. *See* Complaint, ¶¶ 85-88.

Indeed, neither set of Defendants has offered any evidence to rebut the essential proposition, underlying all of the Plaintiffs' claims, that come August 25, 2008, neither Larry Hales nor Glenn Morris nor Damian Sedney, nor any of the members of the various Plaintiff organizations, (nor any other member of the public), will be permitted to stand on the conceded public forum of the sidewalk of Chopper Circle outside the front doors of the Pepsi Center and engage in the hallowed right of a soap-box speech, or the distribution of leaflets, to any willing listener who is attending the Convention. Plaintiffs, their members, and any member of the public can certainly do so today, and tomorrow, and the next day, and every other day, except the days during the Convention. The fact that all involved in this litigation fully understand and appreciate that Plaintiffs and any other member of the public will be prevented from exercising their historic and fundamental right to assemble peaceably and speak freely on the sidewalk of Chopper Circle outside the Pepsi Center during the Convention means that Plaintiffs have a

redressable claim of violation of their First Amendment rights and a right to seek judicial review of those restrictions.

The cases underscore that a constitutional claim is "redressable" when a claim of injury is brought against a party with the power to correct or amend the challenged conduct. *See, e.g.*, *Bronson v. Swensen*, 500 F.3d 1099, 1111 (10th Cir. 2007); *Summum v. Duchesne City*, 482 F.3d 1263, 1268 (10th Cir. 2007). Because the Defendants can be ordered to rescind or revise their current plan to exclude the exercise of speech and assembly on the sidewalk of Chopper Circle, or to make available – as they have indicated they will – some alternative forum for the exercise of constitutional rights, the Plaintiffs' claims here are redressable, and as a result, there can be no doubt that Plaintiffs have standing.

Moreover, even accepting as true the Secret Service's mischaracterization of Plaintiff's argument as one which posits the redressability issue as an analysis of whether the Court can order disclosure, as opposed to ordering a revision of the planned restrictions on speech and assembly rights, there is still no merit to Defendants' redressability argument. In its Response, the Secret Service has conceded that it has ***already disclosed*** to the City ***all information*** that the Secret Service has in its possession that would be required to develop plans for the demonstration zone and the parade terminus. (*See* Michalko Decl., ¶ 26.) This concession means that the Secret Service has already confessed the portion of the "interim relief" that was sought from the Secret Service, *i.e.*, disclosures to the City sufficient to enable the City to announce plans for the location and arrangement of the demonstration zone and the parade terminus. (Indeed, the Secret Service has affirmatively disclaimed any interest in the types of "time, place and manner" restrictions that the City may impose within the Public Demonstration Zone. (*See Id.* ¶ 31.)) Thus, in admitting

that the Secret Service has already disclosed all necessary information to the City, the Defendants have necessarily conceded that the request for an exchange of information between the Secret Service and the City was indeed redressable and has already been redressed, with the only remaining interim relief still at issue being a timetable or date-certain for the City to disclose the information sought by Plaintiffs.[5]

Accordingly, there is no basis to any part of the Secret Service's contention that the Plaintiffs' claims are not redressable.

B. Plaintiffs' Claims are "Ripe."

The Secret Service also contends that the Plaintiffs' claims are not "ripe," ostensibly because (at least the Defendants assert), all manner of contingencies may yet arise, and these contingencies render any judicial review at this moment too early. *See* Secret Service Resp. at 26-29. (*See also* Battista Decl., ¶ 16 ("it is impossible to anticipate every contingency that could arise, requiring a security plan that is flexible and rapidly adaptable."); *Id.* at ¶ 22 (declaring that "the ***decisions that have been made*** remain subject to change, and will remain subject to change *up to and during the convention*.") (emphases added).) This contention fails for two reasons. First, the Plaintiffs have never claimed, and the Defendants do not assert in their briefs, that the information Plaintiffs seek now in order to permit judicial review of restrictions on First Amendment activity will preclude Defendants from later altering or changing security plans if such changes are justified by legitimate security concerns. Plaintiffs seek judicial review of the current plans, which Defendants concede do exist, and thus are ripe for judicial review. That fact

[5] In fact, having now confessed that the relief sought against it in the Motion, thereby effectively confessing the Motion, the Secret Service ought not to be heard at all in opposition to the remainder of the relief the Motion seeks from the City.

that Defendants assert a hypothetical possibility that they may need to later adjust or alter those plans does not obviate the ripeness of a challenge to the restrictions as currently planned.

Second, neither the Secret Service nor the City will say when, exactly, the time for judicial review ***will*** be ripe, if ever. Implicit in that omission of a specific date for disclosure of the information sought in the Motion (other than once the Convention is already underway) is the clear indication that the Defendants' gambit here is simply to "run out the clock," to avoid any judicial review until there is no longer any time for it. Indeed, the Defendants' maneuver seems to be to avoid judicial review now, by proclaiming, "Too early, too early," and then, on the eve of the Convention, to declare "Too late, too late. We've installed concrete barricades and high-tech security apparatus that cannot now be re-configured without undermining security." The Defendants' attempt to manufacture a lack of ripeness is wholly without merit or precedent.

A claim is "ripe" for judicial review if it is sufficiently advanced in a "clean-cut and concrete form," and "the harm asserted has matured sufficiently to warrant judicial intervention." *Morgan v. McCotter*, 365 F.3d 882, 890 (10th Cir. 2004) (quotation omitted). To determine whether an issue is ripe, the Court must consider both "'the fitness of the issue for judicial resolution and the hardship to the parties of withholding judicial consideration.'" *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1116 (10th. Cir. 2008) (quoting *Sierra Club v. Yeutter*, 911 F.2d 1405, 1415 (10th Cir. 1990)).

The Plaintiffs' claims – both as to ultimate relief on the merits and their request that the Court issue interim injunctive relief to permit meaningful judicial review of the merits – are most certainly "ripe." Indeed, the Defendants' responses have done nothing to negate the essential thrust of the Plaintiffs' claim that the City and the Secret Service intend to exclude anyone without

a Convention credential, including Plaintiffs, from exercising their constitutional right to assemble peaceably and speak freely on the north sidewalk of Chopper Circle adjacent to the Pepsi Center during the Convention. In this fact lies the concreteness and the clarity of the Plaintiffs' injury, at least as to their right to assemble and speak in a traditional public forum. The remaining question as to the appropriateness of the alternative channel of communication offered by the Defendants through the "Public Demonstration Zone" is a merits question on which the Defendants have the burden of proof, not the Plaintiffs.

Moreover, as a result of the City's intention to begin processing applications for use of the Designated Parade Route beginning June 12, 2008, *see* Stipulation (Doc. #24, May 22, 2008), there is substantial hardship for the Plaintiffs in any delay beyond that date in learning of the location and arrangement of the Public Demonstration Zone and the planned terminus of the Designated Parade Route. This is because many of the Plaintiffs have applied for permits and are planning to conduct marches to the Pepsi Center during the Convention, and if the location and arrangement of the demonstration zone is insufficient to meet their needs, either in terms of capacity or access to the delegates, those Plaintiffs may wish to opt out of a request for access to the Designated Parade Route and convert their application to one for a different route, and/or seek judicial review of those insufficiencies as discussed below.

Thus, for example, if the entry points into the demonstration zone are insufficient to safely accommodate the numbers of persons piling into the zone at the end of in a large scale march, thereby leading to a risk of injury to marchers and others, organizers may wish to consider a parade route that does not lead people into what may be the dead-end trap of the Public Demonstration Zone. Alternatively, if the demonstration zone location is such that there is no real

opportunity to have the message of a protest march actually seen and heard by delegates, and while a challenge to that unconstitutional restriction is pending, organizers may wish to plan an additional march to hotels or other locations where they have a better chance of delivering their message to their intended audience regardless of the final result of judicial review. Because Plaintiffs must make their decisions concerning use of the Designated Parade Route between June 12 and 19, 2008, while judicial review of the restrictions will still be pending, there is great hardship to them in the refusal of the City to disclose the location and arrangement of the demonstration zone prior to that time period.

In addition to these immediate practical considerations for Plaintiffs, there is also the risk that with the continuing march of time in this case, the Court will simply run out of time within which to conduct a meaningful review of the Defendants' plans. Although the Defendants harp on the fact that this case and the Motion itself was filed almost four months before the Convention, ***we are now less than three months out from the Convention***, and by the time there is a full evidentiary hearing on just the "interim relief" requested in this Motion (in other words, not even the ultimate substantive review of the Defendants' planned restrictions of speech and assembly), there will likely be only two months left before the Convention. At that moment, the difficulties encountered by the judges in the Boston litigation will be looming over these proceedings with even more urgency. *See Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 16 (1st Cir. 2004) (Lipez, J., concurring).

The Court should not permit a repeat of the Boston litigation here. Were the Court to accept the Defendants' rationale for delay – that their plans are subject to change based upon future contingencies, including up to and during the Convention itself (*see* Battista Decl., ¶¶ 16,

22, 28, 30), the Plaintiffs' claims would never become ripe. (*See id.*, ¶ 22 (declaring that "decisions that have been made" with respect to the public demonstration zone will remain subject to change "during the convention"). In this cramped view, the Defendants' "plans" will never be "final," and therefore never ready for judicial review. Moreover, if the Court were to wait until the concrete barricades are in place, the fences erected and the barbed wire strung, the Court will be constrained by time and circumstance from effectuating any meaningful remedy, just as was the case in Boston. Though Defendants assert now that the alleged need for future potential "flexibility" precludes any judicial review, by the time the barriers are finally constructed, Defendants will certainly reverse court and argue that the plans are too "final" to be altered. Defendants' position – that current planned restrictions can evade any judicial review based only upon a hypothetical, and potential, need to alter portions of those plans, which simultaneously permits Defendants to profit from artificially creating a situation where the time for judicial review before the Convention is so short that there is too little time to redress any constitutional injury – cannot be countenanced.

At a minimum, the Defendants' bald assertions – that their plans for the Public Demonstration Zone are not yet sufficiently firm to warrant judicial intervention to assess the reasonableness (constitutionality) of those restrictions on free speech and assembly – should be subject to discovery and cross-examination in an evidentiary hearing, before this Court rejects, as not "ripe," Plaintiffs' demand for disclosure of certain information related to planned restrictions on First Amendment activity.

II. PLAINTIFFS HAVE MET THE STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF WITH RESPECT TO THE REQUESTED "INTERIM RELIEF"

A. The Mandamus Standard Is Not Applicable To The Interim Relief Sought Here.

The Secret Service contends that the Plaintiffs are not entitled to the interim relief they seek because, allegedly, the Plaintiffs' claims fail to meet the standards for mandamus relief. *See* Secret Service Resp. at 41-43. The Plaintiffs, however, do not seek a writ of mandamus, nor do the standards governing requests for mandamus apply to Plaintiffs' request for injunctive relief.

The Plaintiffs have acknowledged that to obtain the interim relief sought in this Motion, they must meet the heightened standard for a "mandatory" injunction. *See* Memo. at 14-15 (citing *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), *aff'd*, 546 U.S. 418 (2006)). The Secret Service, however, confuses the mandatory injunction standard with the standards courts have applied in determining cases arising under 28 U.S.C. § 1361. *See* Secret Service Resp. at 17-19. In fact, however, Plaintiffs have not even cited to that statute. Rather, they have relied on the jurisdictional provision of the All Writs Act, codified at 28 U.S.C. § 1651, which has been held, explicitly to provide a jurisdictional basis for injunctive relief against federal officers and others to aid a federal court in the exercise of its jurisdiction. *See Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1234-36 (10th Cir. 2005).

The case law cited by the Secret Service, in contrast, addresses the remedy of an order against a federal officer. In such circumstances, out of respect for the doctrine of Separation of Powers, courts have concluded that they lack jurisdiction to mandate action from the Executive Branch without a showing by a plaintiff of the standards for a writ of mandamus, *i.e.*, a clear right to relief and a peremptory or ministerial duty by the Executive Branch official to perform the

relief. *See Simmat*, 413 F.3d at 1236; *see also Rios v. Ziglar*, 398 F.3d 1201, 1206 (10th Cir. 2005).

The Secret Service's analysis, however, is completely inapposite here, for three reasons. First, this Court clearly has ***jurisdiction*** to hear Plaintiffs' claims for injunctive relief. *See Simmat*, 413 F.3d at 1232 ("Section 1331 thus provides jurisdiction for the exercise of the traditional powers of equity in actions arising under federal law. No more specific statutory basis is required."). Second, Plaintiffs seek an injunction pursuant to this Court's powers of equity. *See id.* at 1236. And third, the remedy available under 42 U.S.C. § 1983 against state actors, who are the only parties now contesting the remaining interim relief requested here, clearly has been held to provide for the kind of prophylactic injunctions to protect speech and assembly rights that the Plaintiffs seek here. *See Serv. Employee Int'l Union v. City of Los Angeles*, 114 F. Supp. 2d 966, 975 (C.D. Cal. 2000) (granting injunctive relief prohibiting police in Los Angeles from enforcing their plans for a "secured zone" as then constituted and requiring police to reconfigure the area to comply with demonstrators' constitutional rights as found by the court); *Stauber v. City of New York*, No 03-9162, 2004 WL 1593870, at *24-*25 (S.D.N.Y. July 16, 2004) (granting injunctive relief limiting various police practices at the Republican National Convention in New York) (copy attached); *see also Tucker v. City of Fairfield*, 398 F.3d 457, 464 (6th Cir. 2005) (affirming injunctive relief against restrictions preventing a labor union from using an inflatable balloon as part of its protest march); *cf. Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227 (9th Cir. 1990) (affirming an injunction prohibiting Coast Guard officials from enforcing a 75-yard exclusion zone in San Francisco Bay during naval parade exercises).

With respect to the interim relief requested in this Motion, the Secret Service already has conceded its compliance with the only aspect of injunctive relief sought from it. (*See* Michalko Decl., ¶ 26.) As a result, whatever aspect of the relief previously sought from the Secret Service that might have been deemed to be a request for mandamus has been effected already by those defendants. As to the remaining interim relief requested from the City – that it be ordered to disclose what restrictions the City will place on Plaintiffs' free speech and assembly rights in connection with the City's construction and maintenance of the "Public Demonstration Zone"[6] – the Court unquestionably has jurisdiction to protect the constitutional rights of the Plaintiffs as against the acts or omissions of the municipal defendants under 42 U.S.C. § 1983, and further, to aid in the exercise of this jurisdiction, under 28 U.S.C. § 1651. *See, e.g., Moore v. Gibson*, 195 F.3d 1152, 1165 (10th Cir. 1999) ("'Where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.'") (*quoting Harris v. Nelson*, 394 U.S. 286, 300 (1969)); *see also Harris*, 394 U.S. at 299 ("It has been recognized that the courts may rely upon [the All Writs Act, 28 U.S.C. §1651] in issuing orders appropriate to assist them in conducting factual inquiries. *Am. Lithographic Co . v. Werckmeister*, 221 U.S. 603, 609 (1911) (subpoenas duces tecum);

[6] Defendants mischaracterize the relief sought by the Plaintiffs' Motion as a demand that "security details" be publicly disclosed. *See* City's Resp. at 22; Secret Service Resp. at 1. However, Plaintiffs have ***not*** asked for such information. Nor have Plaintiffs requested disclosure of security arrangements at locations other than the Pepsi Center (despite the Defendants' extensive, and irrelevant, discussion of such security needs). Instead, Plaintiffs ask only that the Court order the Defendants to disclose which normally-public areas will be closed to the public, which areas will be remain open to First Amendment activity, and what "time, place and manner" restrictions the Defendants are currently intending to impose upon Plaintiffs' exercise of fundamental First Amendment rights. Nothing more.

Bethlehem Shipbuilding Corp. v. NLRB, 120 F.2d 126, 127 (1st Cir. 1941) (order that certain documents be produced for the purpose of pretrial discovery).").

Thus, the Court has jurisdiction to consider the claims brought here, and to determine whether the interim relief requested in the Motion is warranted and necessary.

B. The Plaintiffs Are Likely To Succeed On The Merits Of Their Claims.

The Plaintiffs have challenged, prospectively, the restrictions that the City will impose upon their constitutional rights – to free speech, assembly, and petitioning of the government – in connection with the Democratic National Convention. It is firmly established that in cases where government restrictions on fundamental liberty interests are challenged, it is ***the government***, not the plaintiffs, who bear the burden of proof and persuasion to establish that the restrictions it has imposed satisfy the applicable constitutional standard. *See, e.g.*, *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1220 (10th Cir. 2007) ("[I]n order to demonstrate that a challenged restriction is narrowly tailored, ***the government must demonstrate*** that the restriction 'serves a substantial state interest in a direct and effective way.'") (emphasis added) (citation omitted); *Id.* at 1221 ("[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) (quotation omitted); *Dellums v. Powell*, 566 F.2d 167, 202 (D.C. Cir. 1977) ("[B]ecause First Amendment rights occupy a 'preferred position,' the burden is on the government to existence of establish compelling circumstances, justifying a restriction.") (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963), and quoting *Saia v. New York*, 334 U.S. 558, 562 (1948)).

Accordingly, while Plaintiffs must demonstrate that they are entitled to the issuance of the interim injunctive relief sought in their Motion (i.e., inadequacy of any remedy at law, irreparable

harm, balance of hardships, and the injunction will serve the public interest), the Defendants bear the burden of demonstrating that the restrictions they plan to impose on the Plaintiffs' constitutional rights pass constitutional muster. Thus, in the first instance, the Defendants are the ones who should notify the Court whether they intend to put on evidence at a full evidentiary hearing in order to meet their burden of demonstrating that the continued secrecy of their planned (but as of yet unannounced) restrictions on the Plaintiffs' speech and assembly is narrowly tailored to advance a substantial governmental interest and leaves open ample alternative channels by which the Plaintiffs can communicate their intended messages to the Convention delegates and the press. (In this regard, the Court must be alert to the extent that continued secrecy could permit the Defendants to override their burden of proof with respect to the ultimate issue of the constitutionality of the Defendants' planned restrictions on speech and assembly; the Defendants should not be permitted to avoid their ultimate burden of proof simply by refusing to disclose the information necessary to evaluate the constitutionality of their plans.) In addition, if it is the Defendants' contention that their current plans are not yet "finalized" because they remain "flexible," and that this allegation by itself is sufficient to justify a blanket prohibition on disclosing any information, then Defendants must put on evidence to establish that assertion as well, and Plaintiffs must be permitted to contest that evidence via cross-examination.

Just as important, the Defendants' responses fail to give any basis to believe that come a full evidentiary hearing, the Defendants will be able to meet their burden of establishing that the secrecy they wish to veil around their plans for the location and arrangement of the Public Demonstration Zone and the terminus of the Designated Parade Route is narrowly tailored to serve the only significant interest that they have cited, security, and that it allows for ample alternative

channels of communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Citizens for Peace in Space*, 477 F.3d at 1219-20.

As is more fully discussed below, and conclusively demonstrated by the additional declarations accompanying this Reply, the proffered interest of security is not a legitimate government interest sufficient to satisfy Defendants' heavy burden because there is no real need for secrecy as to the location and arrangement of the demonstration zone and parade route. In fact, nowhere in any of the Defendants' declarations is there any concrete evidence of any actual threat – as opposed to conclusory speculation – created by disclosure of protest areas. As the Plaintiffs' rebuttal declarations demonstrate, there simply is no credible basis to believe that disclosure of the demonstration zone will threaten security. (*See* Dunn Decl., ¶¶ 10-11; Reinstein Decl., ¶¶ 13-14; Nelson Decl., ¶ 9; Bouza Decl., ¶ 18.) To the extent that Defendants can prove that some secrecy with regard to particular pieces of information is warranted, then the proper approach is to disclose and analyze that limited information pursuant to a protective order.

In addition, even if the interest in secrecy were legitimate, which it is not, this insistence on secrecy is not narrowly tailored to the government's interest. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-87 (1995) (holding that there must be a "fit" between a government regulation and its cited interest, that the restrictions advance the governmental interest in a "direct" and "material" way) (quotations omitted). The government here has failed to ensure a close "fit" between its interest in security and its chosen method of protection, *i.e.*, secrecy. It has allowed essentially unlimited access to its security plans by all manner of individuals, from organizers at the Democratic National Convention Committee and even the news media themselves, (*see* Memo., Ex. B), to extensive briefings that the City has provided to businesses and other interested

organizations.[7] The government has, thus, failed to protect the interest it asserts through an even-handed application of its chosen method of enforcement. *See Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005) (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"). And of course, the government's ill-conceived efforts to maintain security through secrecy are also unnecessary because the government can achieve its security interests through numerous alternative avenues. *See, e.g.*, *SEIU*, 114 F. Supp. 2d at 972; *see also U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1238 & n.11 (10th Cir. 1999) ("This is particularly true when such alternatives are obvious and restrict substantially less speech. . . . [A]n obvious and substantially less restrictive means for advancing the desired government objective indicates a lack of narrow tailoring."); *Lederman v. United States*, 291 F.3d 36, 46 (D.C. Cir. 2002) (holding that the availability of multiple alternative measures demonstrates that the government regulation is not narrowly tailored).

C. Independent Review of the Defendants' Contentions As To The Need For Secrecy Of The Location And Arrangement Of The Demonstration Zone And Parade Terminus Demonstrates That The Remaining Preliminary Injunction Factors Favor Issuance Of The Requested Interim Relief.

1. Defendants have no non-conclusory evidence to support their contention of irreparable harm.

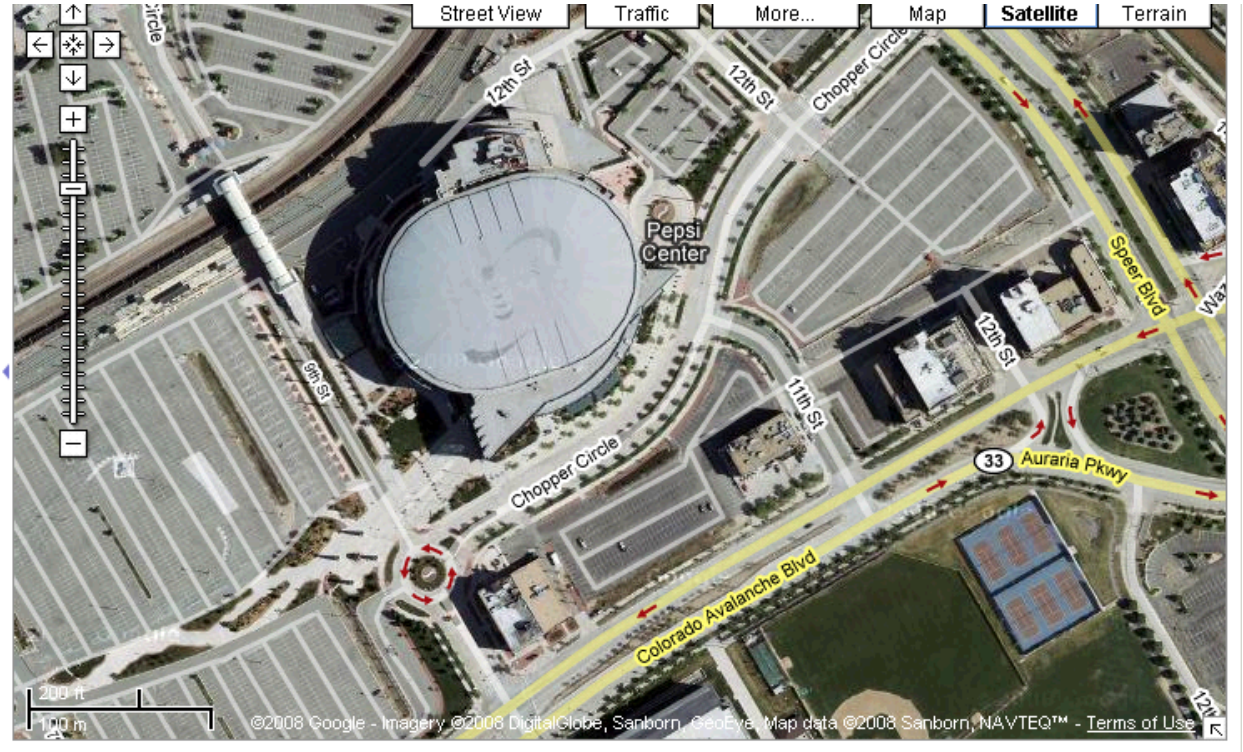
The crux of the Defendants' objection to the interim injunctive relief sought by the Plaintiffs – disclosure of the location, size, and other parameters of the so-called "Public Demonstration Zone" and the terminus of the "Designated Parade Route" – is their chorus that

[7] Plaintiffs expect that, under cross-examination, the City's witnesses will be forced to admit the substantial disclosures they have already made concerning security plans for the Convention. Because such information comes from adverse parties, Plaintiffs are not able to present the information here in the form of voluntary declarations.

advance public disclosure of their plans to restrict free speech and assembly during the Convention will inevitably and unavoidably undermine the security of those attending the Democratic National Convention. *See* City Resp. at 3- 4 ("The longer the City' security plans are in the public domain, the greater the risk to safety and security."); *Id*. at 22 ("a wrongdoer who knows the precise location of the public 'demonstration' area in relation to the Pepsi Center would necessarily be able to determine the size and magnitude of an explosion that would be needed to damage or destroy the Pepsi Center."); Secret Service Resp. at 10-11 (contending the requested disclosure "would allow the individual to determine what items he/she could successfully throw at the delegates, and what projectiles he/she could shoot with some type of device"]). However, the sole basis for these assertions is the bald and conclusory statements of two individuals, Defendant Michael Battista and Secret Service agent Kathy A. Michalko. (*See* Battista Decl., ¶¶ 24-26; Michalko Decl., ¶¶ 32-34.)

Such prognostications of potentially devastating terrorist attacks are meant to strike fear and trepidation in the Court and to anyone reading these predicted dire consequences, without regard to the fact that the only disclosure sought in the Motion is the general circumstances, location and arrangement of restrictions at the Public Demonstration Zone and other public fora at or near the Pepsi Center. Thus, the Defendants' argument fails to address two important issues and conflates a third issue: (1) the location and parameters of the demonstrations zone at past national political conventions were, in fact, publicly disclosed months in advance of those conventions and the same disclosures have been made for the upcoming Republican National

Convention in St. Paul;[8] (2) in the Stipulation filed by the parties, the Defendants have already disclosed that the Public Demonstration Zone for Denver's Convention will be "***on the grounds*** of the Pepsi Center," thus, anyone who has ever visited the Pepsi Center, or anyone who has access to the Internet, can readily determine the ***maximum*** distance the public demonstration zone will be from the Pepsi Center's outer perimeter:



(Search of Google Maps on June 2, 2008:http://maps.google.com/maps?hl=en&tab=wl.)

Defendants go to great lengths to mischaracterize Plaintiffs' requested interim relief as disclosure of "security details" and "security arrangements," when all that Plaintiffs request is information regarding planned restrictions on First Amendment activity. To put it mildly, the conclusory assertions of grave security threats flowing from the public disclosure of, for example,

[8] *See* Reinstein Decl., ¶¶ 6, 8 -10; Dunn Decl., ¶¶ 6-8; Nelson Decl., ¶ 6.

only the location , size, and configuration of the public demonstration zone, fall far short of any minimally probative evidentiary showing of the purported "need" to maintain secrecy of these facts up to the moment the Convention gets underway. At a minimum, the Court should not accept such conclusory and unsupported predictions of dire consequences compelling a complete preclusion of judicial review without requiring the Defendants to put on evidence, subject to cross-examination, to meet their evidentiary burden. *See, e.g., Jordan*, 504 F. Supp.2d at 1120-23 (although granting due deference to Bureau of Prisons' assessment of security risks in federal penitentiaries, finding a failure of any evidence presented of actual security risks); *Id.* at 1121 (discounting the "conclusory testimony" of two BOP employees); *Id.* at 1122 ("The Court defers to the BOP's general contention that content in a publication *could* cause a security risk, but ***there is little evidence*** as to how bylined articles in the news media present a unique risk," and thus giving little weight to the "hypothetical risk" advanced by the BOP) (emphases added).

2. The Court cannot accept at face value the Defendants' bald assertions as to the need for secrecy of the location and arrangement of the demonstration zone and parade terminus.

Remarkably, the Secret Service urges this Court to defer wholly to its assessment of the need for secrecy, even arguing that the Court lacks the competency to second-guess its determinations in that regard. *See* Secret Service Resp. at 40-41 ("The Court should avoid inserting itself into a security planning process that is so clearly within an Executive branch agency's responsibility and competence."); *Id*. at 55 (admonishing against "supplanting the proper exercise of a decision requiring the unique and well-established national security and public safety expertise of the Secret Service with that of the Court."). To the contrary, as one federal Court of Appeals stated eloquently, "[w]e are . . . troubled by the notion that the judiciary should abdicate

its decision-making responsibility to the executive branch whenever national security concerns are present. History teaches us how easily the specter of a threat to 'national security' may be used to justify a wide variety of oppressive government actions. ***A blind acceptance by the courts of the government's insistence on the need for secrecy . . . would impermissibly compromise the independence of the judiciary and open the door to possible abuse***."). *In re Washington Post Co.*, 807 F.2d 383, 391-92 (4th Cir. 1986) (discussing closure of court proceedings allegedly justified to protect against disclosure of classified information) (emphasis added); *see also United for Peace & Justice v. City of New York*, 323 F.3d 175, 178 (2d Cir. 2003) ("Not every regulation or governmental action designed to protect the public safety will necessarily win the imprimatur of the courts.").

Moreover, faced with similar assertions of dire security threats as a justification for curtailing free speech rights, other courts have recognized, "Although the government legitimately asserts that it need not show 'an actual terrorist attack or serious accident' to meet its burden, it is not free to foreclose expressive activity in public areas on mere speculation about danger. ***Otherwise, the government's restriction on first amendment expression in public areas would be essentially unreviewable***." *SEIU*, 114 F. Supp. 2d at 971 (quoting *Bay Area Peace Navy*, 914 F.2d at 1228) (emphasis added) (citations omitted).

Under the precedents cited above, the Court should not abdicate its duty, under Article III, to independently assess the government's purported justification for curtailing free speech and assembly rights in the public square, and for refusing to permit this Court the opportunity to meaningfully assess the constitutionality of those restrictions with sufficient time to develop and review the countervailing evidence, and effectuate any judicial remedy that may be imposed as a

result of that review. The interim relief requested in this Motion is necessary to permit that review and potential remedy.

3. Stripped of their conclusory and unsupported assertions, the Defendants have no basis to show irreparable harm, balance of harms, or public interest favoring non-disclosure.

Without their conclusory and unsupported assertions as to the purported necessity of secrecy in the location of the Public Demonstration Zone and the terminus of the Designated Parade Route, the Defendants have no rebuttal to the likelihood of irreparable harm that Plaintiffs will suffer if this information is not timely disclosed. As noted above, those Plaintiffs who are planning parades urgently need the information concerning the demonstration zone so as to determine whether they wish to participate in the use of the Designated Parade Route. Without such information, Plaintiffs may well be forced into using a parade route that either does not serve their needs or, if their marches are of the kind of size seen elsewhere, (*see* Kagan Decl., ¶ 4), will create unsafe situations at the excessively narrow choke points created by the undisclosed demonstration zone. In addition, of course, without disclosure of the requested information concerning the demonstration zone and parade terminus, the Plaintiffs also will suffer the irreparable harm of a lack of meaningful judicial review because there simply will not be sufficient time to test the Defendants' assertions and to craft effective remedies if the disclosure of the demonstration zone arrangements is withheld until the start of the Convention.

4. At a minimum, the Court should order an evidentiary hearing on the Defendants' assertions as to the need for secrecy.

As demonstrated above, Plaintiffs maintain that resort to common sense and past historical experience provide a sufficient basis for the Court to reject categorically the Defendants' unsubstantiated and conclusory assertion that disclosure of their planned "time, place and manner"

restrictions (including the location, size and capacity of the Public Demonstration Zone) will undermine security at the DNC and thus no disclosure can ever be made and no judicial review ever permitted. Thus, the Plaintiffs disclaim any need for an evidentiary hearing on that issue. Moreover, by relying exclusively upon the purported need to maintain the secrecy of their plans as the basis for resisting the interim injunctive relief sought in the Motion, Defendants are the parties who must inform the Court whether they desire an evidentiary hearing and how they plan to meet their heavy burden to support this assertion.

If, in fact, the Defendants continue to maintain that they must – in the interest of maintaining security – refuse to disclose their planned "time, place and manner" restrictions up until the start of the Democratic National Convention (thereby eliminating any opportunity for meaningful judicial review of those restrictions), then the Court is obliged to set an evidentiary hearing at which the Defendants can attempt to meet their burden of establishing their claimed *need* for such secrecy. If such a hearing is set, the Plaintiffs anticipate not only subjecting the Defendants' witnesses (and other adverse witnesses) to cross examination, but also hereby reserve their right to put on expert testimony to rebut any testimony by the Defendants and/or expert witnesses.

D. Even If The Court Concludes That Secrecy Is Warranted With Regard To Particular Information, The Court Should Nevertheless Ensure An Opportunity For Meaningful Judicial Review By Ordering Confidential "Attorneys-Eyes-Only" Disclosure.

The Declarations appended to this Reply make clear there is no merit to the Defendants' unsubstantiated assertion that it will significantly undermine security if they were to disclose publicly, prior to the start of the DNC, the location, size, capacity, routes of ingress and egress, and other particulars concerning the Public Demonstration Zone and the terminus of the

Designated Parade Route. Put simply, if the position now advanced by Defendants were correct, then the entities (including the Secret Service) who were responsible for ensuring security and safety of convention attendees in New York and Boston in 2004, and are now responsible with respect to the Republican National Convention in St. Paul in September 2008, have all "seriously impaired" (Battista Decl., ¶ 23; Machalko Decl., ¶ 24) security by disclosing such information months in advance of those respective conventions. Of course, however, as discussed above, there is no reason to believe that is indeed the case. *See* Part II.B., *supra*, and attached declarations.

Nevertheless, if after conducting a full evidentiary hearing on the purported need of the Defendants to maintain the confidentiality of their "time, place and manner" restrictions on free speech and assembly at the Public Demonstration Zone and the terminus of the designated parade route, the Court were to conclude that the evidence weighed in favor of maintaining secrecy with regard to some information requested by Plaintiffs up until the start of the Democratic National Convention, then the alternative means to provide for meaningful judicial review of those particular restrictions would be to impose an "attorneys-eyes only" protective order and require the Defendants to disclose those plans, in the next ten days, to the Plaintiffs' counsel, and to set a briefing schedule, as set forth *supra*, that will afford all parties a full and fair opportunity to litigate the merits (constitutionality) of those restrictions, including expedited appellate review, and time to implement whatever judicial relief this Court and the Tenth Circuit Court of Appeals, may issue. *See Netquote, Inc. v. Byrd*, No. 07-00630, 2007 WL 2438947, at *1-*2 (D. Colo. Aug. 23, 2007) (approving use of "attorneys-eyes-only" protection for highly sensitive information) (citing *Centurion Indus., Inc. v. Warren Steurer & Assocs.*, 665 F.2d 323, 325 (10th Cir. 1981))

(copy attached); *see also King v. PA Consulting Group*, 485 F.3d 577, 590 (10th Cir. 2007) (discussing with approval the District Court's use of such an order to protect trade secrets).

Clearly there can be no harm to the security plans and contingency planning of the Defendants if neither the public, nor the Plaintiff groups herein, are alerted to the particulars of the "time, place and manner" restrictions that this lawsuit was instituted to litigate, until the commencement of the Democratic National Convention. However, permitting the attorneys for the Plaintiffs, and their retained expert(s), and the Court, access to that information, will afford the Plaintiffs an opportunity to test the assumptions and conclusory assertions of "security concerns" that underlie those restrictions and to have meaningful judicial review. After all, "[n]ot every regulation or governmental action designed to protect the public safety will necessarily win the imprimatur of the courts." *United for Peace & Justice*, 323 F.3d at 178. However, it would unquestionably constitute irreparable harm to deny the Plaintiffs their right, under the First and Fourteenth Amendments to have an Article III Judicial Officer review the Defendants' planned restrictions on their fundamental First Amendment rights.

Make no mistake: The Plaintiffs are committed to the principle that proceedings in the nation's courts should be open for public scrutiny absent the most clear and unequivocal need, and lack of alternative means, to protect an interest of the highest order. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14 (1986); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980); *see also Mrs. Colo.-Am., Inc. v. Mrs. Colo. U.S. Pageant*, No. 05-2660, 2007 WL 1245565, at *1 (D. Colo. Apr. 30, 2007) ("The fact that the parties may agree that a particular document is confidential is irrelevant. As participants in what is a presumptively public form of dispute resolution, the parties are not free to merely agree among themselves to shield certain

material from public review. To hold otherwise would permit parties, by agreement, to routinely subvert the public nature of the judicial system. Moreover, the fact that the parties may have entered into and obtained approval of a general protective order governing disclosure of information during discovery is not dispositive.") (copy attached). The Plaintiffs maintain that the Defendants cannot meet the applicable standard in seeking to keep from public view the information sought by the Plaintiffs in the interim preliminary injunction. Nevertheless, if the Court determines that the Defendants *can* meet that standard (and they in fact do so with regard to the particular, limited information), then the appropriate method to allow the parties to adjudicate the constitutionality of the government restrictions on free speech and assembly that are the focus of this litigation is to conduct proceedings with regard to that information, in a timely and expedited fashion, under a Court-imposed protective order.

CONCLUSION

In light of the foregoing, the Court should enter an order directing the Municipal Defendants to announce no later than the close of business on June 13, 2008, the location and arrangement of the Public Demonstration Zone and the terminus of the Designated Parade Route and set a briefing schedule for review of the constitutionality of all of the Defendants' planned restrictions on speech and assembly activities at or near the Pepsi Center during the Convention, and if it has not already done so by the time of this briefing, the parties request that the Court also enter as an Order of the Court the proposed order (Doc. #24-2, May 22, 2008) that previously was submitted by the parties in conjunction with their Stipulation.

Respectfully submitted this 6th day of May, 2008

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CERTIFICATE OF SERVICE

Undersigned counsel for Plaintiffs certifies that on this 6th day of June, 2008, this **REPLY IN SUPPORT OF PLAINTIFFS' FIRST MOTION FOR PRELIMINARY INJUNCTION** (and supporting declarations) 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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