BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 03-CT-680

ANDREW E. BLOCH, **Appellant,**

v.

DISTRICT OF COLUMBIA, **Appellee.**

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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Cr. No. D-620-03

I N D E X

Page

STATEMENT OF THE CASE 1

THE TRIAL 3

The Government's Evidence 3

The Defense Evidence 6

The Trial Court's Ruling 9

ARGUMENT 11

The police line established on Pennsylvania Avenue on March 19, 2003, was a content-neutral, time, place, or manner restriction on speech; appellant's conviction for knowingly and intentionally crossing that police line was supported by the evidence and does not offend the Constitution. 11

A. Legal Principles 12

1. The Police-Line Regulation 12

2. The First Amendment 15

B. The police line was not a "prior restraint" on speech. 19

C. The police line was a valid, content-neutral, time, place, or manner restriction on speech. 23

1. The police line was narrowly-tailored to serve a significant government interest. 24

2. The police line left open ample alternative channels of communication. 30

D. The trial court's findings that appellant was aware of the police line and that the police line was lawful under 24 D.C.M.R. § 2100 were supported by the evidence. 31

1. Appellant received adequate notice of the police line. 33

2. The police line was necessary for police operations and the protection of the White House and its occupants. 34

CONCLUSION 36

TABLE OF CASES

* Abney v. United States, 616 A.2d 856 (D.C. 1992) 19, 29, 30

Adderley v. Florida, 385 U.S. 39 (1966) 15

Alexander v. United States, 509 U.S. 544 (1993) 19

Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus, 482 U.S. 569 (1987) 17

Bonowitz v. United States, 741 A.2d 18 (D.C. 1999), cert. denied, 529 U.S. 1077 (2000) 17

Boos v. Barry, 485 U.S. 312 (1988) 15, 17

City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) 22

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 15, 18, 30

Frisby v. Schultz, 487 U.S. 479 (1988) 16

Hill v. Colorado, 530 U.S. 703 (2000) 18, 24

Jones v. United States, 716 A.2d 160 (D.C. 1998) 33

* Leiss v. United States, 364 A.2d 803 (D.C. 1976), cert. denied, 430 U.S. 970 (1977) 15, 24, 26

Leonardson v. City of East Lansing, 896 F.2d 190 (6th Cir. 1990) 21-23

Lewis v. United States, 767 A.2d 219 (D.C. 2001) 33

* Madsen v. Women's Health Center, 512 U.S. 753 (1994) 12, 19-21

* Cases chiefly relied upon are marked by an asterisk.

* Markowitz v. United States, 598 A.2d 398 (D.C. 1991),
cert. denied, 506 U.S. 1035 (1992) 16, 18

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 15

* Pearson v. United States, 581 A.2d 347 (D.C. 1990),
cert. denied, 502 U.S. 808 (1991) 16, 17, 23

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983) 16, 17

Quaker Action Group v. Morton, 170 U.S. App. D.C. 124,
516 F.2d 717 (1975) 23, 24, 31

Schenck v. Pro-Choice Network of Western New York,
519 U.S. 357 (1997) 20

* Shiel v. United States, 515 A.2d 405 (D.C. 1986),
cert. denied, 485 U.S. 1010 (1988) 27, 28

* Smith v. United States, 445 A.2d 961 (D.C. 1982)
(en banc) 15, 16, 24, 27, 28

Smith-Caronia v. United States, 714 A.2d 764 (D.C. 1998) . 17

Thorne v. United States, 582 A.2d 964 (D.C. 1990) 35

United States v. Albertini, 472 U.S. 675 (1985) 18, 30

United States v. Grace, 461 U.S. 171 (1983) 16, 17

United States v. Wall, 521 A.2d 1140 (D.C. 1987) 16

* Ward v. Rock Against Racism, 491 U.S. 781
(1989) 12, 18, 24, 26, 30

* Washington Mobilization Committee v. Cullinane, 184 U.S.
App. D.C. 215, 566 F.2d 107 (1977) 13, 14, 31-34

* White House Vigil for ERA Committee v. Clark,
241 U.S. App. D.C. 201, 746 F.2d 1518 (1984) . . 25, 26, 31

OTHER REFERENCES

U.S. Const. amend. I 15

24 D.C.M.R. § 2100 . . . . 10, 12, 13, 19, 21, 28, 31-33

24 D.C.M.R. § 2100.1 . . . . 12-14, 26, 35

24 D.C.M.R. § 2100.3 . . . . 2, 7, 13, 20

24 D.C.M.R. § 2100.4 13

ISSUE PRESENTED

In the opinion of the United States of America as *amicus curiae*, the following issue is presented for review:

Whether the conviction of appellant for crossing a police line in violation of 24 D.C.M.R. § 2100.3 should be affirmed when (1) the police line was not a "prior restraint" designed to foreclose speech; (2) the police line was a reasonable and constitutional restriction on the "time, place, or manner" of speech which (a) was content-neutral, (b) was narrowly-tailored to serve the government's significant interest in maintaining the security of the White House grounds, and (c) left open an ample and comparable alternative location – Lafayette Park – in which appellant was permitted to, and did in fact, express his views; and (3) the trial court's factual finding that appellant was aware of the police line and intentionally crossed it was supported by the evidence, as was the court's finding that the police line was lawful under 24 D.C.M.R. § 2100.1.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT OF THE CASE

Appellant and twenty-six others were arrested on March 19, 2003, in the 1600 block of Pennsylvania Avenue, Northwest. The group had been protesting the military offensive that the United States was expected to launch against the Iraqi regime of Saddam Hussein. The protest began in Lafayette Park, located across Pennsylvania Avenue from the White House. The group then climbed over a police line marked by steel bicycle fences positioned at the north curb of Pennsylvania Avenue. The group continued their protest on the pavement of Pennsylvania Avenue. Appellant and his

fellow protesters were arrested and charged by information with crossing a police line in violation of 24 D.C.M.R. § 2100.3 (R. 4).[1/]

Appellant and seven co-defendants were tried before the Honorable Stephen G. Milliken on June 4, 2003. Judge Milliken found appellant and all but one of the co-defendants guilty of violating 24 D.C.M.R. § 2100.3.[2/] Appellant was sentenced to pay a $50 fine, with the execution of that sentence suspended, and was placed on three months of unsupervised probation with the condition that he perform community service (R. 7). Appellant filed a timely notice of appeal on July 2, 2003 (R. 8).

Appellant and the District of Columbia filed their briefs in appellant's direct appeal. In an order filed on October 14, 2004, this Court invited the United States of America and the American Civil Liberties Union to participate in this matter as *amici curiae* by filing briefs addressing "the constitutionality of the District

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[1/] "R." refers to the record on appeal. "Tr." refers to the transcript of trial proceedings before the Honorable Stephen G. Milliken on June 4, 2003. "S. Tr." refers to the 36-page supplemental transcript of trial proceedings on the same date.

[2/] Judge Milliken granted a motion for judgment of acquittal of co-defendant David Meza at the close of the government's evidence. The arresting officer was unable to identify Meza with certainty at trial, because Meza had shaved off a beard since the date of his arrest (S. Tr. 29).

of Columbia regulation at issue as applied to the facts of this case."

THE TRIAL

The Government's Evidence

On March 19, 2003, United States Park Police Officer Peter Ward was on duty, in uniform, in the 1600 block of Pennsylvania Avenue, Northwest (S. Tr. 17-18, 32). His duties included monitoring a police line that had been established at the north curb of Pennsylvania Avenue between 15th and 17th Streets, Northwest (S. Tr. 18; Tr. 24-25). Between eight and fifteen Park Police officers monitored the police line (S. Tr. 19). The police line was marked by a waist-high steel bicycle fence (S. Tr. 18).[3/] The police line "blocked off the entire street and the White House sidewalk" (id.). Only White House passholders or individuals with verified appointments at the White House were permitted to cross the police line (S. Tr. 19). Individuals authorized to enter Pennsylvania Avenue could do so at gates in the police line

[3/] The police line was not marked with police tape or signs (Tr. 26, 48).

monitored by officers of the United States Secret Service (Tr. 26).[4]

The police line had been established by the time Officer Ward came on duty at 6:00 a.m. (Tr. 28). Officer Ward was not involved in the discussions that led to establishment of the police line (Tr. 30). He recalled that March 19 was "either the day the ultimatum that President Bush issued to Iraq was expired or was about to expire" (S. Tr. 19). He believed that the "threat level" was orange (Tr. 31). He understood that a "threat assessment" by the Secret Service and the Park Police had led to creation of an "enhanced security zone" in front of the White House (S. Tr. 18). The area inside the police line was to be used for "crowd control operations [and] logistic[al] support" (id.). It provided police with space "to conduct operations should a large crowd arrive in the park" (id.). As Officer Ward testified:

> The reasons that I understand [] through, you know, my experience are [] that the Secret Service perceived that they needed to expand the area around the White House to allow for a police staging area for the crowds that are generally anticipated [to] occur when these types of actions are taken by the Government.[5] (Tr. 30.)

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[4] Bicycle fences also were positioned on the north side of Lafayette Park (Tr. 25). Breaks in the fences permitted pedestrians to enter the park (Tr. 26).

[5] Officer Ward testified that police lines were utilized by law enforcement around the White House for various reasons, such as (continued...)

Officer Ward's supervisor, Park Police Sergeant Dale Dawson, testified that the purpose of the police line on March 19 was "to make sure traffic could move freely" (Tr. 45). Sergeant Dawson noted that Pennsylvania Avenue was now permanently closed to vehicular traffic (with the exception of police vehicles) (id.). The street was open to public pedestrian traffic on some days, but on other days (such as the day of appellant's arrest) it was closed to public pedestrians as well (id.).

At about 1:10 p.m., appellant and his co-defendants gathered with protest signs in Lafayette Park (S. Tr. 20).[6/] Officer Ward was monitoring the police line from near his vehicle at the center line of Pennsylvania Avenue (S. Tr. 32; Tr. 27). Appellant and his group "started coming over the [bicycle] fence," about thirty or forty feet away from Ward (id.). Officer Ward "yelled out for them to stop and not to do it" (id.). The group continued over the bicycle fence and sat down on Pennsylvania Avenue, approximately ten feet away from the curb (S. Tr. 32).[7/]

[5/](...continued)
when a dignitary was staying at Blair House (Tr. 33).

[6/] Sergeant Dawson testified that on March 19, "Lafayette Park was open and demonstrators were allowed to come to the park in certain groups of 25 [people]" (Tr. 44).

[7/] Officer Ward was uncertain as to whether the group "sat down on their own," or whether they sat down after "compl[ying]
(continued...)

Officer Ward was instructed to serve as the arresting officer for the individuals who had crossed the police line (S. Tr. 33). He arrested twenty-seven people, including appellant, using "mass arrest procedures" (id.).[8/] Aside from their breach of the police line, the group was "very cooperative" and "peaceful" (Tr. 27). The group had not caused "injury to public security," but their conduct had interfered with security operations (Tr. 35).

The Defense Evidence

Appellant testified in his own defense.[9/] Appellant testified that he had "never been arrested before and [] never intended to be arrested on" March 19 (Tr. 58). In prior peaceful protests in which appellant had participated, any police line was "very clearly marked" (Tr. 59). Appellant had seen police lines marked with yellow tape, or marked by a row of police officers warning people not to cross the line (id.). On the date of his arrest, however, "no police officer [] had come up to [appellant] and told [appellant] that [he] was not allowed to cross over" the fence (Tr.

[7/] (...continued)
with instructions of other officers who told them they couldn't go any further" (S. Tr. 32).

[8/] Mass arrest procedures require that a photograph be taken of each arrestee with the arresting officer (S. Tr. 23).

[9/] Because appellant and his co-defendants represented themselves, the court permitted them to testify in a narrative format, subject to cross-examination (Tr. 58).

60). It was not very difficult for appellant to cross the police line; the fence was "not even waist high" and "all [he] had to do was step over the fence" (Tr. 60, 68). Appellant testified that "quite frequently the fences do not delineate an emergency zone" (Tr. 61).[10/] Appellant acknowledged under cross-examination that the barricade that he crossed on March 19 "obviously [was] meant for some form of crowd control" (Tr. 69). But it was not "apparent" to appellant "that it was an emergency zone" under 24 D.C.M.R. § 2100.3 (id.).

After appellant crossed the bicycle fence, he was instructed by a Park Police officer to "get down" (Tr. 64). Appellant knelt down with the other protesters (id.). After a while, they sat in a circle while some of them prayed and others spoke (id.). After a half-hour or one hour, the police handcuffed the protesters "one by one using plastic handcuffs" (id.). The protesters "had to wait a couple of hours in [] the police van" (id.). Some of the protesters "had to use the facilities and were not allowed to at first" (id.). Appellant and the other protesters then "were processed like common criminals" (Tr. 66).

Three of appellant's co-defendants also testified. Melinda Smale testified that she believed "that the invasion of Iraq was a

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[10/] Appellant testified that in the past he had seen people step over bicycle fences to enter Lafayette Park (Tr. 62).

crime against God . . . [and] against the poor people of Iraq and many other poor people in the world" (Tr. 73). She arrived in Lafayette Park and "felt a tremendous desire to be with [the people] praying in the street" so she "climbed over the bicycle fence" (Tr. 74). Ms. Smale felt that she was treated fairly by the police and "did not feel threatened in any way" (Tr. 74-75).

Phillip Anderson testified that he "felt the personal calling to protest [his] Government's imminent military intervention into Iraq" (Tr. 77). Mr. Anderson acknowledged under cross-examination that he "went over the fence" (Tr. 78). But he "did not intend to be arrested" (Tr. 79). The protesters were not warned that they would be arrested if they crossed the fence (id.).

Arthur Laffin testified that when he "stepped over the [] bicycle fence" he was thinking about time that he had spent in Iraq in 1998 (Tr. 81). Mr. Laffin and his co-defendants "were keeping the law and trying to prevent further death and suffering in Iraq" (Tr. 83). As Laffin "went over the bicycle fence, [he] encountered no police line" (Tr. 86). It was only "a short fence, and [the protesters] were given no warning [about] going into the street by any police officer" (id.). Laffin could not "say with certainty that there were not" other civilians on Pennsylvania Avenue (Tr. 89). "There were other brothers and sisters in uniform and suit coats and ties and what have you" (Tr. 90).

The Trial Court's Ruling

The trial court first rejected the argument that a "defense of necessity" could excuse appellant and his co-defendants from violations of the police-line regulation (Tr. 102). The necessity defense "ha[d] been repeatedly rejected and [the court is] bound by that precedent," Judge Milliken ruled (id.). Judge Milliken also rejected the defense's invitation – alluded to during closing arguments – that the court "make a nullification" through its verdicts (id.). The question before the court was whether "what's been offered to me today in your cases [is] proof beyond a reasonable doubt" of the charged violation (Tr. 103).

The court then noted that "[t]he [police-line] law is constitutional" (Tr. 103). "The law says that the police may establish a line and that it can't be violated unless there is due authorization . . ." (id.). The question in this case, according to the court, was whether "the Government, through a police officer acting for the chief of police, establish[ed] a police line and was it noticed [by the defendants] that that was done and did [the defendants], any or all, then traduce that line intentionally?" (Tr. 104.)

After reviewing the facts, the court concluded that "it's absolutely clear . . . and certainly proven beyond a reasonable doubt, that each and every [defendant] was in the 1600 block of

Pennsylvania Avenue on the south side of that bicycle fence that the Government claims establishes a . . . lawful police line under" 24 D.C.M.R. § 2100 (Tr. 105-06). The court also characterized the police line as a "barricade," which "plainly notified [the defendants] that [they] were not to traduce it, jump it, cross it, [or] be within it" (Tr. 106). The court emphasized appellant's testimony that the police line was "obviously [] meant for some sort of crowd control" (Tr. 109). "Any person of ordinary intelligence [in] those circumstances on that day would have known that the police . . . had, by the establishment of the fence, prohibited [the defendants] from being in that particular roadway, the 1600 block of Pennsylvania Avenue" (id.). The court therefore found that the defendants "did knowingly and intentionally . . . violate a police line regulation as charged" (id.).

The court noted that prior challenges to the vagueness of the police-line regulation had been rejected "because of the necessity for flexibility in emergent and other circumstances" (Tr. 106). In this case, it was "established beyond a reasonable doubt" and "uncontr[o]verted" that the circumstance which led to establishment of a police line on March 19 "was [that it was] the eve of international military action when the Government of the United States had issued an ultimatum to Iraq, particularly Saddam Hussein" (id.). "The police, in establishing a staging area, had

the lawful authority to establish a [police] line," the court concluded (id.). With respect to whether the police line infringed First Amendment rights, however, the court apparently believed that the question had not been presented to it. To the extent the defendants objected to the police line as an impermissible "time, place and manner restriction[]" on "sacred" or "time-honored" protest ground, the court found that it did not "have either authority or evidence to find that there was an illegal police line" (Tr. 106-07). The court noted further:

> The Government justifies and is well within it[]s rights to justify the activity as solely to create a police staging area for the movement of police activities in the environ of the White House and it's not before me and not to say today whether or not that's an illegal time, place, and manner restriction (Tr. 107-08).

ARGUMENT

The police line established on Pennsylvania Avenue on March 19, 2003, was a content-neutral, time, place, or manner restriction on speech; appellant's conviction for knowingly and intentionally crossing that police line was supported by the evidence and does not offend the Constitution.

Appellant raises three challenges to his conviction. First, appellant contends that the police line was "used as a prior restraint" on March 19, and that in these circumstances "the Police Line Regulation is void for overbreadth and vagueness" (Brief for Appellant at 8). Second, appellant asserts that the police line

"was an unconstitutional infringement on [appellant's] freedom of speech" (id. at 13). Third, appellant argues that the bicycle fence provided him with inadequate notice that a police line was in place (id. at 15-18).

These claims are without merit. The police line did not operate as a "prior restraint" on speech. Appellant was "not prevented from expressing [his] message in any one of several different ways," including in Lafayette Park. Madsen v. Women's Health Center, 512 U.S. 753, 763 n.2 (1994). The police line was instead a "time, place, or manner" restriction on the location in which appellant was permitted to speak. That restriction did not violate the First Amendment, because it was content-neutral, narrowly-tailored to serve a significant government interest, and it left open ample alternative channels of communication. See Ward v. Rock Against Racism, 491 U.S. 781 (1989). And the trial court's factual finding that appellant had adequate notice of the police line and "knowingly and intentionally" crossed it was supported by the evidence.

A. Legal Principles

1. The Police-Line Regulation

Section 2100 of the District of Columbia Municipal Regulations provides police special authority for "crowd and traffic control." Section 2100.1 provides:

> When fires, accidents, wrecks, explosions, parades, or other occasions cause or may cause persons to collect on the public streets, alleys, highways, or parkings, the Chief of Police, an inspector or captain of the police, or an officer acting for him or her may establish an area or zone that he or she considers necessary for the purpose of affording a clearing for the following:
>
> (a) The operation of firemen or policemen;
>
> (b) The passage of a parade;
>
> (c) The movement of traffic;
>
> (d) The exclusion of the public from the vicinity of a riot, disorderly gathering, accident, wreck, explosion, or other emergency; and
>
> (e) The protection of persons and property.

24 D.C.M.R. § 2100.1. When an area is cleared by the police under 24 D.C.M.R. § 2100.1, "no person shall enter the emergency area or zone unless duly authorized by the person in command of the emergency occasion," unless a regulatory exception applies. 24 D.C.M.R. § 2100.3. Exceptions are provided for members of the press, insurance adjusters or underwriters, and other authorized persons. 24 D.C.M.R. § 2100.4.

The facial constitutionality of 24 D.C.M.R. § 2100 was analyzed in Washington Mobilization Committee v. Cullinane, 184 U.S. App. D.C. 215, 566 F.2d 107 (1977). Cullinane rejected vagueness and overbreadth challenges to the regulation. The court found that the regulation gives "fair notice of the standard of conduct to which a citizen is held accountable." Cullinane, 184

U.S. App. D.C. at 225-26, 566 F.2d at 117-18. "If the location of the line is clearly indicated and if adequate notice is given, which [the court] interpret[ed] to be requirements implicit in the regulation, its application will not trap innocent persons." Id. Cullinane also concluded that the enumerated circumstances under which police lines may be established under 24 D.C.M.R. § 2100.1 were sufficiently precise. Cullinane, 184 U.S. App. D.C. at 226, 566 F.2d at 118.

Cullinane itself involved a challenge to police lines that had been established to control or block the advance of seven separate, sizeable protests. The court noted that "the police may, in conformance with the First Amendment, impose reasonable restraints upon demonstrations to assure that they be peaceful and not obstructive . . . [or] to contain or disperse demonstrations that have become violent or obstructive." Cullinane, 184 U.S. App. D.C. at 227, 566 F.2d at 119. The court also observed that in the demonstrations at issue, "the police did not interfere with the demonstrations because of the content of the message they sought to present." Id. The court concluded that "because either obstructive conduct or actual or imminent violence infected the demonstrations in substantial measure, the First Amendment did not insulate them from restraint by way of police lines and sweeps . . . ." Id. at 228, 566 F.2d at 120.

2. The First Amendment

The First Amendment "reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide open.'" Boos v. Barry, 485 U.S. 312, 318 (1988) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).[11] At the same time, "[t]he Supreme Court squarely has rejected the notion 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" Smith v. United States, 445 A.2d 961, 966 (D.C. 1982) (en banc) (quoting Adderley v. Florida, 385 U.S. 39, 48 (1966)). "Our fundamental regard for First Amendment liberties is not diminished by a recognition of the established principle that the government may make reasonable regulations, unrelated to the content of the message, concerning the time, place, and manner of the exercise of those liberties." Leiss v. United States, 364 A.2d 803, 807 (D.C. 1976), cert. denied, 430 U.S. 970 (1977). See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.").

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[11] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

"[T]he government may regulate speech and communicative conduct on public property only in a narrow and reasonably necessary manner which serves significant government interests." Smith, 445 A.2d at 964. The standard by which such a regulation is assessed depends upon the nature of the government property at issue, that is, "whether the place has been devoted to assembly and debate." Pearson v. United States, 581 A.2d 347, 352 (D.C. 1990), cert. denied, 502 U.S. 808 (1991).

A "traditional" public forum is property that has "immemorially been held in trust for the use of the public" for assembly and debate. Frisby v. Schultz, 487 U.S. 479, 480-81 (1988) (citation omitted). "[A]ll public streets are held in the public trust and are properly considered traditional public fora," as are public sidewalks. Id. at 481; United States v. Grace, 461 U.S. 171, 179 (1983). A "designated" public forum is property that, "while not a public forum by tradition, has been designated a public forum by governmental action, usually for some limited purpose." United States v. Wall, 521 A.2d 1140, 1143 (D.C. 1987). A "nonpublic forum" is "governmental property that is not a public forum either by tradition or by designation." Id. See generally Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983); Markowitz v. United States, 598 A.2d 398, 403 (D.C. 1991) (D.C. courts have recognized and adopted tripartite

forum standard enunciated by Supreme Court), cert. denied, 506 U.S. 1035 (1992).

In both traditional public fora and designated public fora, "the government may enforce reasonable content neutral time, place and manner regulations that are 'narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'"[12/] Pearson, 581 A.2d at 351 (quoting Perry Education Association, 460 U.S. at 45). See Grace, 461 U.S. at 176; Bonowitz v. United States, 741 A.2d 18, 20 (D.C. 1999) (as amended), cert. denied, 529 U.S. 1077 (2000); Smith-Caronia v. United States, 714 A.2d 764, 766 (D.C. 1998). In a non-public forum, the government has more latitude to restrict public access; "like any private property owner, the government has the right 'to preserve the property under its control for the use to which it is lawfully dedicated.'" Pearson, 581 A.2d at 352 (quoting Perry Education Association, 460 U.S. at 46). In addition, the government may enforce reasonable time, place and manner restrictions on speech in non-public fora. Id.

[12/] A content-based restriction on speech may be appropriate in a public forum if the restriction is "narrowly drawn to effect a compelling state interest." Pearson, 581 A.2d at 351 (emphasis added). See Boos, 485 U.S. at 321; Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus, 482 U.S. 569, 573 (1987); Bonowitz v. United States, 741 A.2d 18, 20 (D.C. 1999) (as amended), cert. denied, 529 U.S. 1077 (2000).

"Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.' " Ward, 491 U.S. at 791 (quoting Clark, 468 U.S. at 293). Thus, a "regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." Ward, 491 U.S. at 791. See Hill v. Colorado, 530 U.S. 703, 719-20 (2000); Markowitz, 598 A.2d at 405.

"[T]he requirement of narrow tailoring is satisfied 'so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" Ward, 491 U.S. at 799 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)). The government need not choose the "least restrictive or least intrusive means" of "serv[ing] [its] legitimate content-neutral interests." Id. at 798. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, [] the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Id. at 800. See Markowitz, 598 A.2d at 406. Thus, as this Court has noted, "[t]he idea that courts should engage in second-guessing the responsible authorities about how a legitimate governmental interest might have been achieved better has been rejected

explicitly by the Supreme Court." Abney v. United States, 616 A.2d 856, 860 (D.C. 1992).

B. The police line was not a "prior restraint" on speech.

Appellant contends that because the police line was established "well in advance" of his demonstration, it was an unconstitutional "prior restraint" on speech (Brief for Appellant at 8). We disagree. "The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." Alexander v. United States, 509 U.S. 544, 550 (1993) (emphasis in original) (internal quotations and citation omitted). "Temporary restraining orders and permanent injunctions – i.e., court orders that actually forbid speech activities – are classic examples of prior restraints." Id.

The police line established in this case did not "forbid" communications at all. It restricted physical access of the public – public "communicators" and "non-communicators" alike – to a limited geographic area deemed by law enforcement to be an emergency zone under 24 D.C.M.R. § 2100. Cf. Madsen, 512 U.S. at 763 n.2 (no "prior restraint" where protesters were "simply prohibited from expressing [their message] within [a] 35-foot buffer zone" around health clinic). Appellant was permitted to

communicate – and did so – in adjacent Lafayette Park; he also could have continued his communications in countless other public fora in the District of Columbia that day. Because the police line did not "prevent[] appellant from expressing [his] message in any one of several different ways," it was not a "prior restraint" on speech. Madsen, 512 U.S. at 763 n.2. See Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 374 n.6 (1997) (no prior restraint where "alternative channels of communication" left open to protesters).

In a related argument, appellant contends that 24 D.C.M.R. § 2100.3 "is void for overbreadth and vagueness" (Brief for Appellant at 8). Appellant concedes that the regulation was upheld against these very challenges in Cullinane.[13] He relies instead on

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[13] Appellant argues that Cullinane is "suspect" because of "more recent Supreme Court opinions requiring more rigorous analysis than the time, place, and manner analysis" used in Cullinane (Brief for Appellant at 8). But appellant cites only to Madsen, which involved an injunction. Madsen made clear that the heightened standard it applied – "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest" – would not apply in cases, such as this one, involving a generally-applicable regulation or ordinance. Madsen, 512 U.S. at 764-65. The Court wrote: "If this were a content-neutral, generally applicable statute, instead of an injunctive order, its constitutionality would be assessed under the [time, place, or manner] standard set forth in [Ward] and similar cases." Id. at 764. Thus, Madsen does not undermine Cullinane.

Moreover, appellant's argument that the injunction standard should apply here, notwithstanding the absence of any injunction (continued...)

Leonardson v. City of East Lansing, 896 F.2d 190 (6th Cir. 1990), which analyzed a city ordinance that mirrored 24 D.C.M.R. § 2100 in part, but contained an additional section ("Section 112"), not found in the District of Columbia regulation, that permitted establishment of a "safety zone or police line" to "prevent" or "suppress" an "occurrence or event." Leonardson, 896 F.2d at 192. As Leonardson explains, the East Lansing ordinance was drafted and passed in 1987 for the very purpose of preventing the future occurrence of a semi-annual "raucous" student event – "Cedarfest" – that had led to property damage and violence in the past. Id. at 193, 195. The ordinance succeeded – in 1987, "[t]he establishment of the police line and pass system effectively prevented the occurrence of Cedarfest and the destruction of property previously experienced." Id. at 193. And as a result of subsequently-issued injunctions, "the bi-annual event has not occurred since." Id.

[13/] (...continued)
(Reply Brief for Appellant at 12), should be rejected. The rationale set forth in Madsen for subjecting injunctions to more rigorous review was that injunctions are imposed upon a particular party, as a judicial remedy, and thus "carry greater risks of censorship and discriminatory application than do general ordinances." Madsen, 512 U.S. at 764. And injunctions are governed by a "general rule" that the relief granted "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Id. at 765 (internal quotations and citation omitted). A police line, by definition, restricts the general public and not one particular party; it is distinguishable from an injunction and is not covered by Madsen.

The Sixth Circuit agreed with Cullinane that the portion of the city ordinance that mirrored the District's regulation was "not unconstitutionally vague." Id. at 197. Leonardson invalidated only Section 112, under which "the city could establish a police line in order to prevent the occurrence of a political demonstration." Id. The court found that Section 112 (unlike the remainder of the ordinance) "allow[ed] a system of prior restraint to exist" in the sense that it would "keep the idea the demonstrators wished to advocate from entering the marketplace of ideas based on a fear of violence."[14] Id. at 198. The court distinguished Section 112 from a mere time, place, or manner regulation, because Section 112 "[did] not purport to limit its restrictions based upon the special nature of a particular place or time." Id. at 199.

Leonardson is of no assistance to appellant. It reaffirms Cullinane's holding that the District of Columbia police-line

[14] Because the Leonardson court was considering an "overbreadth" challenge to Section 112, it evaluated whether there was "a realistic danger that the statute itself [would] significantly compromise recognized First Amendment protections of parties not before the court.'" Leonardson, 896 F.2d at 195 (quoting City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984)). The court did not consider Cedarfest to be an event warranting First Amendment protection, but it was concerned that, in another context, Section 112 could permit "the city [to] establish a police line in order to prevent the occurrence of a political demonstration." Leonardson, 896 F.2d at 197.

regulation under which appellant was prosecuted is facially constitutional. It invalidates a provision, absent from the District's regulation, that served as a prior restraint on speech by "preventing" communication altogether, without regard to concerns about a "particular place or time." And it makes clear that "site-specific or time-specific" restrictions on speech – unlike Section 112 – can "pass constitutional muster." Leonardson, 896 F.2d at 199. As discussed next, the police line in this case is one of those "site-specific or time-specific" restrictions on speech that can – and indeed does – pass muster.

C. The police line was a valid, content-neutral, time, place, or manner restriction on speech.

Appellant does not contest that the police line established on March 19 was a "content-neutral" restriction on the time, place, or manner of speech (Brief for Appellant at 13, 15). It is also clear that the "place" to which the restriction applied – Pennsylvania Avenue and its south sidewalk outside the White House grounds – is a traditional public forum. See Quaker Action Group v. Morton, 170 U.S. App. D.C. 124, 132, 516 F.2d 717, 725 (1975) (as amended) (White House sidewalk, Lafayette Park, and Ellipse constitute unique situs for exercise of First Amendment rights); Pearson, 581 A.2d at 351 n.9 (most common examples of quintessential public fora are parks and streets which have traditionally been used for

assembly and communication). Thus, the question before the Court is whether the police line was "narrowly-tailored to serve a significant government interest" and left open "ample alternative channels of communication."[15] Ward, 491 U.S. at 791. Both requirements are met here.

1. The police line was narrowly-tailored to serve a significant government interest.

The Supreme Court has noted that "[s]tates and municipalities plainly have a substantial interest in controlling the activity around certain public and private places," particularly when "special governmental interests" are present. Hill, 530 U.S. at 728 (providing as examples schools, courthouses, polling places, and private homes). On the public property surrounding the White House, "special governmental interests" loom large. See Smith, 445 A.2d at 965 (noting "unique nature of the grounds of the Executive Mansion"); Leiss, 364 A.2d at 808 ("White House fulfills significant governmental, public, and private functions which make it far more than a symbol of the executive branch of government toward which individual grievances legitimately may be directed."); Quaker Action Group, 170 U.S. App. D.C. at 134, 516 F.2d at 727

[15] Appellant incorrectly cites the Madsen standard (Brief for Appellant at 13) which, as already discussed (see supra note 13), applies to injunctions and is stricter than the time, place, or manner standard applicable here.

(security interest in White House area "cannot be blinked" and justifies permit system for public gatherings there). As the United States Court of Appeals for the District of Columbia Circuit has observed:

> No one can deny the substantiality or the significance of America's interest in presidential security. At stake is not merely the safety of one man, but also the ability of the executive branch to function in an orderly fashion and the capacity of the United States to respond to threats and crises affecting the entire free world.

White House Vigil for ERA Committee v. Clark, 241 U.S. App. D.C. 201, 211, 746 F.2d 1518, 1528 (1984) (footnote omitted).

As Officer Ward testified, the police line was established on March 19 in response to global events – the imminent United States invasion of Iraq – that raised concerns about crowd control and the security of the White House grounds. A "threat assessment" performed by the Park Police and the Secret Service indicated a need to prepare the White House vicinity for law-enforcement operations that could be more extensive and challenging than usual. To that end, the police established an "enhanced security zone" – the area between the White House fence and the north curb of Pennsylvania Avenue – that they deemed necessary to "conduct operations should a large crowd arrive in" Lafayette Park (S. Tr. 18).

White House security – in an era when the likelihood of an attack on United States citizens and landmarks is subject to daily, color-coded calibration – is a matter about which law enforcement must be afforded considerable deference. See Leiss, 364 A.2d at 808 (declining to fashion rule "which would complicate further the complex and elaborate security precautions which already are necessary at the White House"); White House Vigil, 241 U.S. App. D.C. at 216, 746 F.2d at 1533 (need for effective security in vicinity of White House is great, and geographical position of Mansion renders it inherently insecure). Moreover, the measures taken by law-enforcement in this case were "narrowly tailored to serve the government's legitimate, content-neutral interests." Ward, 491 U.S. at 798. Those interests were to ensure that police traffic could "move freely" on Pennsylvania Avenue and that police would have space for crowd-control operations in order to fulfill their function of protecting the White House and its occupants (S. Tr. 18; Tr. 45). See 24 D.C.M.R. § 2100.1(a), (c), (e) (authorizing police line to afford clearing for operation of police, movement of traffic, and for protection of persons and property). The space secured – the south sidewalk of Pennsylvania Avenue and the width of the Avenue itself – was not "substantially broader than necessary to achieve the government's interest." Ward, 491 U.S. at 800.

Indeed, the movement of police vehicles cannot even theoretically be assured without at least a street-width of space reserved for that purpose. The police thus did not engage in an unreasonable or excessive "land grab" here. They did not close the north sidewalk of Pennsylvania Avenue. They did not shut the public out of Lafayette Park. They secured the space that they reasonably believed could be needed by law enforcement in the unusual circumstances that prevailed on that day. Cf. Shiel v. United States, 515 A.2d 405, 407 (D.C. 1986) (assessing early closure of Rotunda by Capitol Police in context of the "circumstances prevailing on the afternoon in question," which was the day of the State of the Union Address), cert. denied, 485 U.S. 1010 (1988).

Appellant's factual observation that a relatively small number of police officers were stationed in the block at the time he was arrested (Brief for Appellant at 13) does not undermine Officer Ward's testimony that the emergency zone was established as a police staging area. This Court observed in the context of a peaceful demonstration on the White House grounds:

> We cannot agree that the Secret Service must wait until a demonstration at the White House becomes violent or boisterous before steps are taken to curb it. Protests and politically motivated demonstrations inherently involve some degree of controversy. When controversy is flaunted before a large captive audience, there is always a chance for violence or unrest, however slight. The officers of the Secret Service have a duty to preserve the safety of all those within the White House complex,

> from the President to the thousands of tourists who pass through the mansion.

Smith, 445 A.2d at 965-66. While appellant is correct that "[i]nside the White House fence, the government may be much more restrictive of speech than on the sidewalk outside" (Reply Brief for Appellant at 14), White House security personnel must be permitted to use a reasonable degree of foresight in their operations outside the White House fence as well.

If, as the "threat assessment" done on March 19 apparently suggested might occur, large and possibly unruly crowds had gathered outside the White House, and had attempted to breach the White House grounds, then the emergency zone established under 24 D.C.M.R. § 2100 would have served the vital purpose of allowing police reinforcements to arrive quickly. Clearing Pennsylvania Avenue between 15th and 17th Streets would allow additional police personnel and/or equipment to arrive from either the East or the West, and would permit those reinforcements to be inserted, if needed, between the White House fence and any protesters or other individuals or groups who threatened the White House. Whether or not those events in fact occurred is not the point. See Shiel, 515 A.2d at 408 (mere possibility that demonstrators might have left Rotunda voluntarily in time for State-of-the-Union security sweep "did not remove the threat of trouble at the time [the police] acted" by closing the Rotunda). The police could not be effective

if they did not anticipate potential problems and prepare for them. Where, as here, those predictions and preparations are reasonable and measured, and First Amendment activity is accommodated rather than suppressed, the Constitution is not offended.

This Court's 1992 Abney opinion is analogous and instructive. On January 18, 1991, the United States Capitol Police were faced with "increased security concerns created by the Persian Gulf crisis and potential threats of terrorist activities as a result of it." Abney, 616 A.2d at 857. In order to "insure the safety of government officials and visitors by maintaining unobstructed passageways for rapid evacuation in case of fire or explosion and to protect persons and property by preventing anyone from placing a bomb or other dangerous device in the area," the Capitol Police "clos[ed] all steps and the areas adjacent to the U.S. Capitol except for certain specified areas." Id. at 857-58. The goal was "to create a comfortable perimeter around the building so that police could provide better security for the Capitol, its visitors and workers in the event of bomb explosions or attack." Id. at 858.

This Court upheld the measures, finding that there was "a legitimate government interest in protecting the Capitol, government officials, and others who work and visit there from potential bomb threats during a unique period of crisis, and it [was] apparent that the area would have been exposed to greater

danger without the regulation than with it." Abney, 616 A.2d at 860. The Court observed that it was "not in a superior position to the Capitol Police ' . . . to judge how much protection of [the Capitol grounds] is wise and how that level of [protection] is to be attained.'" Id. (quoting Clark, 468 U.S. at 299).

Likewise in this case, law enforcement confronted a "unique period of crisis." The responsible agencies made a rational judgment that a restricted "perimeter" on the north side of the White House would enhance their ability to protect that important property. The validity of this action "'does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests' or the degree to which those interests should be promoted." Ward, 491 U.S. at 800 (quoting Albertini, 472 U.S. at 689).

2. The police line left open ample alternative channels of communication.

The police line also left open "ample alternative channels of communication." Lafayette Park and its south sidewalk, which immediately abutted the police line, were ample alternative public fora available to appellant for his speech activities. Lafayette Park was where appellant's protest began. Like Pennsylvania Avenue and its south sidewalk, Lafayette Park faces the front of the White House, providing important visibility to protesters.

It is true, as appellant notes (Brief for Appellant at 14), that the Quaker Action Group court observed that "there are First Amendment values in use of the White House sidewalk." Quaker Action Group, 170 U.S. App. D.C. at 140, 516 F.2d at 733. On an ordinary day, in ordinary circumstances, the White House sidewalk is and must be available for use by protesters with valid permits. See id. at 134, 516 F.2d at 727 (in light of governmental interests in White House area, permit system is constitutional prior restraint on First Amendment activity). Even then, however, special restrictions on the manner in which demonstrations occur apply, because the White House sidewalk is a "unique situs for considerations of presidential and national security." White House Vigil, 241 U.S. App. D.C. at 216, 746 F.2d at 1533. On an unusual day, such as March 19, 2003, when heightened law-enforcement concerns are present, temporary restrictions on access to the White House sidewalk are permissible under both 24 D.C.M.R. § 2100 and the Constitution.

D. The trial court's findings that appellant was aware of the police line and that the police line was lawful under 24 D.C.M.R. § 2100 were supported by the evidence.

In its evaluation of a vagueness challenge to the police-line regulation, the court in Cullinane noted that "[v]agueness may take two forms, both of which result in a denial of due process." Cullinane, 184 U.S. App. D.C. at 225, 566 F.2d at 117. The first

form occurs when a "vague ordinance denies fair notice of the standard of conduct to which a citizen is held accountable." Id. The second form occurs when an ordinance constitutes "an unrestricted delegation of power, which in practice leaves the definition of its terms to law enforcement officers, and thereby invites arbitrary, discriminatory and overzealous enforcement." Id.

Cullinane found that the police-line regulation withstood scrutiny for both forms of vagueness. As to the first form – concerning "fair notice to the citizen" – the court ruled that an implicit requirement in the regulation was that the location of the police line be "clearly indicated" and that "adequate notice" of the police line be given to citizens. Cullinane, 184 U.S. App. D.C. at 226, 566 F.2d at 118. As to the second form – concerning "unrestricted delegations of power" to law enforcement – the court ruled that because the regulation mandates that "[a]ny police line [] be 'necessary' to achieve one of three basic purposes" set forth in the regulation, the regulation "limits police discretion to the accomplishment of [] specified and properly narrow purposes." Id. at 226-27, 566 F.2d at 118-19.

The trial court found in this case that, as Cullinane requires, appellant had been given adequate notice of the police line, and that the police line was "lawful" under 24 D.C.M.R.

§ 2100 (Tr. 105-06, 109). Both of these rulings are supported by the evidence and should be upheld.

1. Appellant received adequate notice of the police line.

Appellant contends that the absence of yellow tape or other markings on the interlocking bicycle fence gave him inadequate notice of the police line, precluding his conviction for knowingly crossing it (Brief for Appellant at 17-18). See Cullinane, 184 U.S. App. D.C. at 225-26, 566 F.2d at 117-18. The trial court focused on this issue, and this claim amounts to a challenge to the sufficiency of the evidence supporting appellant's conviction. In reviewing such challenges, this Court "examine[s] the evidence in the light most favorable to sustaining the verdict," Jones v. United States, 716 A.2d 160, 162 (D.C. 1998), and gives "deference . . . to the factfinder's duty to determine credibility, weigh the evidence, and draw justifiable inferences of fact." Lewis v. United States, 767 A.2d 219, 222 (D.C. 2001).

The trial court found that the physical structure of the police line – a waist-high "barricade" with no breaks except for monitored gates where Secret Service officers were conducting identification checks – "plainly notified [the defendants] that [they] were not to traduce it, jump it, cross it, [or] be within it" (Tr. 106). Appellant himself testified that the bicycle fence was "obviously meant for some form of crowd control" (Tr. 69). And

it was undisputed that uniformed Park Police officers and cruisers were stationed inside the bicycle fence to monitor it. This evidence amply supports the trial court's ruling that appellant was given "adequate notice" of the existence of a police line. It is unnecessary, and would be both unwise and impractical, for courts to prescribe the precise means (e.g., with yellow tape) by which a police line must be marked, particularly because "the regulation deals only with extraordinary or emergency 'occasions' in which substantial factors of unpredictability exist." Cullinane, 184 U.S. App. D.C. at 227, 566 F.2d at 119.

2. The police line was necessary for police operations and the protection of the White House and its occupants.

The trial court credited Officer Ward's testimony that the police line was established on March 19 because of unusually tense and unpredictable geopolitical circumstances – it was "the eve of international military action when the Government of the United States had issued an ultimatum to Iraq, particularly Saddam Hussein" (Tr. 106). For the reasons previously discussed – particularly the special concerns associated with White House security that are self-evident and have been recognized in this Court's and the D.C. Circuit's case law – the record in this case supports a finding that the police line was "necessary for the purpose of affording a clearing" for (1) the "operation of . . .

policemen," (2) the "movement of traffic," and (3) the "protection of persons and property." 24 D.C.M.R. § 2100.1(a), (c), (e).

If the Court instead concludes that the trial testimony in this case is inadequate to support a finding that the requirements of 24 D.C.M.R. § 2100.1 were met, or that the police line was narrowly-tailored to serve a significant government interest, *amicus curiae* urges the Court to rule narrowly, based solely on the thinness of the record in this case. This trial was completed quickly – in only one day – and, as a result, the record is less extensive than would be desired when vital issues of First Amendment rights and White House security are being litigated. There also appears to have been uncertainty among the parties as to precisely what issues were being pressed at trial, with the result that Judge Milliken explicitly declined to rule on whether the police line was a constitutional "time, place, or manner" restriction on speech (Tr. 107-08), and no defendant objected to the absence of such a ruling.[16/] This case is not an appropriate vehicle in which to announce restrictive rules governing the proper balancing of First Amendment rights and White House security interests.

[16/] Thus, there is support for appellee's argument that appellant's constitutional claims are subject to plain-error review (Brief for Appellee at 6-7). See Thorne v. United States, 582 A.2d 964, 965 (D.C. 1990) ("A party who neglects to seek a ruling on his motion fails to preserve the issue for appeal.").

CONCLUSION

WHEREFORE, the United States of America, as *amicus curiae*, respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of November, 2004, I caused two copies of the foregoing Brief for the United States as Amicus Curiae to be served by first-class mail, postage prepaid, to:

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