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	121jdwolc HEARING	
1	UNITED STATES DISTRICT COURT	
	SOUTHERN DISTRICT OF NEW YORK	
2	x	
3	JARRET WOLFMAN and OCCUPY THE COURTS,	
4	Plaintiffs,	New York, N.Y.
5 6	V.	12 Civ. 0443 (LAK)
7	WESLEY FRENCH and JOANNA ROSATO, GENERAL SERVICES ADMINISTRATION,	
	Defendants.	
9	x	
10		January 19, 2012 1:42 p.m.
12	Before:	
13	HON. LEWIS A. KAPLAN,	
14		District Judge
15	APPEARANCES	
16	GIDEON ORION OLIVER	
17	Attorney for Plaintiffs - and -	
18	LAW OFFICE OF RANKIN & TAYLOR BY: MARK C. TAYLOR	
19	- and - ROBERT J. BOYLE	
20	- and - BINA AHMAD	
21	PREET BHARARA	
22	United States Attorney for the Southern District of New York	
23	Attorney for Defendants BY: NATALIE N. KUEHLER	
24	JEFFREY OESTERICHER Assistant United States	Attorneys
25		

1	THE COURT: Good afternoon.		
2	THE CLERK: Jarret Wolfman and Occupy the Courts		
3	versus Wesley French and Joanna Rosato, General Services		
4	Administration.		
5	Will the parties please state their appearances for		
6	the record.		
7	MR. OLIVER: Gideon Oliver for the plaintiffs. Good		
8	afternoon, your Honor.		
9	THE COURT: Mr. Oliver.		
10	MR. TAYLOR: Mark Taylor, Rankin & Taylor, for the		
11	plaintiffs.		
12	MS. AHMAD: Bina Ahmad of		
13	THE COURT: I'm sorry, I couldn't understand you.		
14	MS. AHMAD: Bina Ahmad.		
15	THE COURT: Thank you.		
16	MR. BOYLE: And Robert Boyle, 299 Broadway, for the		
17	plaintiffs. Good afternoon, your Honor.		
18	THE COURT: Good afternoon.		
19	MS. KUEHLER: Good afternoon, your Honor. Natalie		
20	Kuehler. I am an Assistant U.S. Attorney for the Southern		
21	District of New York, and I represent the government.		
22	THE COURT: All right. Given the time exigencies, it		
23	seems to me that does the government wish to call witnesses		
24	this afternoon?		
25	MS. KUEHLER: Your Honor, we do have three potential		

witnesses here. We would, however, like to, rather than calling them to the stand, submit declarations.

I have one declaration here with me, and my colleague is on the way over with an additional declaration for the Court.

THE COURT: When is your colleague going to get here?

MS. KUEHLER: He should be here momentarily.

The government would also respectfully request some additional time. We don't need much longer, perhaps a half hour or so, after this hearing to submit a written opposition to the plaintiffs' memorandum of law, which we could e-mail or fax to chambers or hand deliver.

THE COURT: What do the plaintiffs have to say on these points?

MR. OLIVER: Well, your Honor, we would certainly like the opportunity to review declarations from witnesses who may give testimony.

THE COURT: If the declarations are submitted and there are no factual issues, there is not going to be any testimony. So I don't understand your suggestion.

MR. OLIVER: My suspicion is there may be factual issues even after the declarations are submitted. We have had an opportunity to review the first declaration for about two minutes.

THE COURT: Maybe I could have such an opportunity.

1 MS. KUEHLER: Yes. 2 (Handing to the Court) 3 Your Honor, this is a declaration by a member of the United States Marshal Service. 4 5 (Pause) THE COURT: OK. Well, let's start with that. I have 6 7 read the affidavit or the declaration of Mr. Howard, the Supervising Deputy U.S. Marshal of the United States Marshal 8 9 Service in this district. 10 Do the plaintiffs wish to cross-examine Mr. Howard? 11 MR. OLIVER: We will, your Honor. 12 THE COURT: Any problem with that, Ms. Kuehler? 13 MS. KUEHLER: No, your Honor. And similarly with 14 respect to any other declarations that we might submit, we 15 would be willing to make the witnesses available later in the day to the extent there is any need to cross-examine the 16 17 witnesses. THE COURT: There isn't a lot of time here; you 18 understand that. So if we can, I think what we will do is we 19 20 will proceed with Mr. Howard. The government can put in his 21 declaration through him instead of having him repeat it, and 2.2 then we'll hear cross-examination. 23 MR. OLIVER: Your Honor, I don't even think there is a

MR. OLIVER: Your Honor, I don't even think there is a second copy of the declaration in the courtroom.

MS. KUEHLER: We do not have one.

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               MR. OLIVER: So I literally -- I mean, we literally
      had two minutes to leaf through it very quickly.
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               THE COURT: We will get you a second copy.
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               MR. OLIVER: Thank you, your Honor.
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               MS. KUEHLER: Thank you, your Honor.
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               (Pause)
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               THE COURT: Does either side wish to argue this matter
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      apart from the issue of examining the witnesses?
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               MR. OLIVER: Yes, your Honor.
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               THE COURT: Well, should we perhaps use this time to
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      do that?
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               MR. OLIVER: If I can just have one moment, your
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      Honor?
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               THE COURT: Yes.
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               (Pause)
               So who wishes to be heard exactly for the plaintiffs?
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               MR. TAYLOR: Mark Taylor.
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               THE COURT: OK. Would you go to the lectern, please.
               MR. TAYLOR: Your Honor, our client Mr. Wolfman and
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      his group have been seeking to have a demonstration outside
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      this courthouse tomorrow in conjunction with demonstrations
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      that are happening across this country at active federal
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      courthouses. Mr. Wolfman first reached out in the middle of
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      December to the General Services Administration in regards to
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      where this demonstration could be held effectively at the
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location of the federal courthouse. He was requesting either to be in front of 40 Centre Street, on the steps there, or outside this courthouse.

He was told that it would not be possible for him to be on Centre Street because of construction there. He was flexible and said, you know, certainly we could do it outside this courthouse. Since then -- and we have had a lot of correspondence -- Mr. Wolfman has been very flexible about where people are, about the constraints on numbers of people. He certainly understands, and we understand, that there are considerations here as far as the use of the courthouse and security. And to the extent that there is a larger rally of people that is going to occur tomorrow, it is understood that that can happen at Foley Square, where more people could be permitted. But it is very important, because of the nature of this protest, that a group of people be allowed to gather outside the courthouse. And we have been pushing very hard to be told where that might be able to happen given the constraints, you know, of the justice system, and the answer --

THE COURT: I have a question for you.

MR. TAYLOR: Sure.

THE COURT: Mr. Wolfman's declaration attaches the letter from GSA, dated January 13th, which denies the permit application for 500 Pearl Street but said, "As we discussed, we will continue to offer your group assistance in coordinating

with city agencies and in finding an alternate location." 1 2 What has been done pursuant to that indication, if 3 anything, since January 13th? 4 MR. OLIVER: May I address that question, your Honor? 5 Well, what's been done is very little. There hasn't 6 been assistance from GSA in dealing with the city agencies. 7 THE COURT: Well, did you ask them for assistance? MR. OLIVER: Well, no, in part because the assistance 8 9 that was being given was -- I am not sure how to characterize 10 it. I believe that GSA essentially directed the clients to 11 city agencies that don't have anything to do with issuing 12 permits for the public spaces that we are talking about. 13 THE COURT: What they said was "offer assistance in 14 coordinating with city agencies, " point one, and, point two, 15 "finding an alternate location," which might or might not involve city agencies, right? 16 17 MR. OLIVER: Certainly, your Honor. 18 Then the answer to your question is that there hasn't been coordination since the denial letter. 19 20 THE COURT: Well, has there been any effort to work 21 with GSA on finding an alternate location for tomorrow 22 afternoon? 23 MR. OLIVER: No, your Honor, not since the letter. 24 MR. WOLFMAN: Can I speak, your Honor? If you want to 25 know, I could say.

THE COURT: Look, who are you? 2 MR. OLIVER: This is the plaintiff, your Honor.

3 is Jarret Wolfman.

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THE COURT: Look, if we get to testimony, we'll get Mr. Wolfman's testimony.

MR. WOLFMAN: Sorry.

MR. OLIVER: So I think the short answer to your question, your Honor, is no.

There are also questions about whether or not GSA, aside from whatever building spaces GSA administers, there are questions, given nature of the property -- you know, it is like GSA administers over here but the city administers five feet away. So it is a very complicate public space that way.

THE COURT: That is true of every place there is federal property, it abuts state or city or local or private property, right? There is always that factor?

MR. OLIVER: Yes.

THE COURT: So nothing has been done to attempt to find another location with GSA?

MR. OLIVER: No, your Honor. I would make a record that there were last night and this morning good faith efforts from the U.S. Attorney's Office to discuss a possible negotiated resolution. The truth is that things proceeded so quickly this morning that it really wasn't possible to pursue that in the form of having a meeting or something.

of discussion, about the importance of at least some people being right next to a federal courthouse, there is a wealth of opportunities in the City of New York that's probably not equal anywhere in the country. There is this building. There is 40 Centre Street. There is the Court of International Trade on the other side of Foley Square. There is the U.S. Bankruptcy Court on Bowling Green. There is the United States District Court for the Eastern District of New York at 225 Cadman Plaza. There is the Eastern District Bankruptcy Court a block away from that. None of which have quite the same problems, at least tomorrow, that this building has. So has any attention been given to any of those locations?

MR. OLIVER: Absolutely, your Honor.

THE COURT: I understand about 40.

MR. OLIVER: 40, right. I was going to say 40.

As to the others, no. I think the truth is that if there had been a response in the form of a denial or even indications that there would be serious problems with issuing the permit for 500 Pearl Street, I'm sure the organizers would have been able to look at those different locations. But given that it is Thursday and the rally is tomorrow, I'm not sure those would be able alternatives —

THE COURT: Last Friday GSA said we're prepared to assist in finding an alternate location and you didn't take

them up on the offer.

MR. OLIVER: Well, that did follow, your Honor, literally months of negotiations and efforts by Mr. Wolfman working I think very closely with Mr. French, and some of those negotiations are memorialized in a trail of e-mails, and they certainly spent a lot of time, at least in the e-mails, discussing500 Pearl versus Centre Street, you know, versus other locations right around here, but there weren't discussions of other courthouses.

THE COURT: When you say "Centre Street," you are referring to 40 Centre Street?

MR. OLIVER: That is right, your Honor.

It is my understanding that it is GSA's position that because the renovation is going on, that is not accessible at all as a location. I think the recommendation was --

THE COURT: Well, was that a reaction to your wish to be on the steps, or was that a categorical rejection of 40 Centre Street, whether on the steps or out in front of the steps?

MR. OLIVER: I think out in front of the steps is city property. So out in front of the steps would not be --

THE COURT: So did you go to the city?

MR. OLIVER: I don't think there is a need, actually, to go to the city, your Honor, as long as there is no amplified sound or --

THE COURT: So if you are correct that you don't need any city permit and that the property in front of 40 Centre Street is not federal property, there is no reason you can't do this in front of 40 Centre Street at 4 o'clock tomorrow, if you want, am I correct?

MR. OLIVER: I think that's correct, your Honor, except that it is an inactive courthouse, and so I don't think it is an ample alternative in that respect. Certainly, if we are talking about GSA's actions in this case, I don't think it counts as offering an ample alternative to say, you know, you can just go on the sidewalk, that's not our problem.

THE COURT: I'm not sure that I understand that it is the government's obligation to provide you with an adequate alternative. The question of whether there is an adequate alternative regardless of 500 Pearl is relevant to the First Amendment analysis, if we ever get there, right?

MR. OLIVER: Yes.

THE COURT: OK. So if it is true today, Thursday, at 2 p.m., as you say, that you could hold this whole thing out in front of 40 Centre Street tomorrow, it doesn't matter whether the GSA led you by the hands to that conclusion or whether you came up with it on your own. The question is is that adequate under all the circumstances, right?

MR. OLIVER: I think that's part of the question. I think it is -- to put it a little different way in the First

Amendment terms, I think the question isn't whether ample 1 alternatives exist in the world as potential theoretical 2 3 options or even practical options but whether the government offered ample alternatives, whether the government's --4 5 THE COURT: I don't think that is true. 6 MR. OLIVER: -- alternatives -- offered alternatives 7 were ample. THE COURT: I mean, I have had this issue before, and 8 9 I don't remember, probably you do. Let me just take a look. 10 might be right. 11 My understanding of the law is that you have no 12 constitutionally protected right to the location of choice. 13 There is just an overall assessment of whether, if your choice 14 is rejected, there is something else adequate. 15 MR. OLIVER: That's slightly different than my understanding of the law. I think the government, you know, 16 17 does have an obligation to offer ample alternatives, and that 18 is part of the analysis that the Court should --19 THE COURT: What cases are you relying on? 20 MR. OLIVER: I can't cite you a case right now, your 21 I would be happy to cite you a case if given the 22 opportunity later this afternoon.

THE COURT: Well, we are quickly running out of "this afternoon."

MR. OLIVER: I understand.

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THE COURT: OK. Mr. Taylor, did you want to continue?

MR. TAYLOR: You know, I think, particularly one of
the questions here is whether or not the defendants in this
action have a proposal for an alternative that would work as
far as outside this courthouse, and, you know, I know that my
clients would be -- have great flexibility and would be willing
to consider any available alternatives, and it is very
difficult for us to believe that nothing at all could be found.
And I think that issue affects not only this protest but
generally the public's ability to protest outside this building
or to have demonstrations outside this building, and it is
entirely reasonable --

THE COURT: I have enough on my hands with this case.

MR. TAYLOR: Certainly, your Honor, but it is entirely reasonable that there will be constraints for any such demonstrations from here in going forward, but I think it is also the right of the people to assemble outside this building because this is the active federal courthouse.

THE COURT: I put it to you that Van Cortlandt Park is outside this building. So, you know, that is kind of a area generalization.

MR. TAYLOR: You know, we can talk about other alternatives here. I think it is upon the government to provide a reason that literally apparently nothing can be worked out, and I don't think we have seen that reason.

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THE COURT: Look, this gets back to a conversation I was having with your colleague a minute ago. My understanding may be incorrect. I certainly haven't had as much time as you have had to think about this problem, but it is certainly not the First Amendment demonstration case I have ever had. And my understanding is that the government, under Ward v. Rock Against Racism, is entitled, at least where we're dealing with a public forum and a content-neutral regulation -- and there is a big question as to whether we are dealing with a public forum here; it is highly doubtful, but even granting you that assumption for the purpose of discussion -- is entitled to impose reasonable restrictions on the time, place, and manner of protected speech provided, first, that they are justified on a content-neutral point without regard to content -- and there is not even a claim here that this is content or neutral -second, that the restrictions are narrowly tailored to serve a significant government interest; and, third that they leave open -- not that the government has provided, but that the restriction leaves open ample alternative channels for communication of the information.

Now, I am on record years ago for the proposition that in an appropriate case location can be important in this analysis of alternative venues. But I see nothing at all in what I have just summarized to you and I am not aware of anything at all that says that the government has the

obligation to provide you with an alternate location. My understanding -- subject to correction if I am mistaken -- is only that the restriction is not so Solomonesque that there is no alternative.

So if you are telling me that you want to demonstrate in front of the courthouse and it is important to you, you know, I have no problem with that, I really don't. But your colleague just told me that, as far as he understands it, he can go about 300 feet down the road, to the building that this court occupied since 1938, that the Court of Appeals has occupied since 1938, and that the entire Court of Appeals and part of this court is moving back to perhaps as early as 120 to 160 days from today. And it is flanked on the one side by the State Supreme Court and across the street by a functioning United States court, the U.S. Court of International Trade, and it is within sight of this building. So even granting your point about the importance of the location, I am having some problem with the idea that there is no alternative location.

MR. OLIVER: May I, your Honor?

THE COURT: Sure.

MR. OLIVER: First of all -- and this goes a little bit to something that I saw in the declaration that we just received at the very end about the connection to Occupy Wall Street -- the last time there was a protest in that area, the Police Department, New York City Police Department, and other

law enforcement response was incredibly heavy-handed. There were scores of arrests and a lot of violence.

THE COURT: I'm sorry. Where?

MR. OLIVER: At Foley Square, your Honor, in front of -- roughly in front of the courthouse that we are talking about, 40 Centre Street, November 5, 2011, and --

THE COURT: Well, there is no evidence before me as to what happened there.

MR. OLIVER: Well, you know, if we have to, we can certainly try and put some evidence before you.

THE COURT: How would it help you?

MR. OLIVER: Well, I think it might go to the ample alternative question.

But if I could get back very briefly to another part of the Ward v. Rock Against Racism analysis that you mentioned, the general sort of time, place, manner restriction? Under Grayned v. City of Rockford, the crucial question in determining whether expressive conduct may be prohibited is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

And so there is a balancing test that -- if that goes into the Court's analysis of whether a particular time, place, manner restriction is constitutionally permissible, and I just don't want it to get lost in this discussion about whether or not there are ample alternatives -- you know, that the

restriction that we are talking about here is a flat-out denial. It's not even a --

THE COURT: It is a flat-out denial for a two-hour period tomorrow is what it is.

MR. OLIVER: Yes, your Honor.

THE COURT: It is not a flat-out denial for the venue ever. It isn't even a flat-out denial for a different time tomorrow. I don't know what the GSA would do. Now I have read Mr. Howard's declaration, and I suppose I have a suspicion, but I don't know that because the only thing you asked for was a two-hour period tomorrow -- a particular one, not just any two-hour period.

MR. OLIVER: Yes, your Honor. It is important that it be that two-hour period.

THE COURT: Well, so you say.

MR. OLIVER: Well, because these events take organization, because they take time to build, because people have to be -- you know, I mean, that is part of the harm in a situation like this where there is a very late denial -- a very late in the game, in the negotiation and a discussion that has been going on for a month, really. And that is part of why -- I mean, aside from the fact that it is coordinated with these actions that are taking place across the country.

THE COURT: Possibly some of the difficulty is of your own making, I am not sure, but you surely could have applied

for other locations a month ago. You could have applied for other times and other dates.

MR. OLIVER: I think, your Honor, if we put some -- if you hear some testimony from Mr. Wolfman later and if we get into some of the back and forth with Mr. French from GSA, I think that the facts will show that there was a tremendous amount of discussion and negotiation. And everybody thought -- everybody from this side of the table -- namely, Mr. Wolfman -- thought that it was going in the direction of issuing a permit, and it wasn't until very late in the process that there was any concern that was raised from the government -- any significant concern that was raised from the government in terms of the possibility of denying a permit.

THE COURT: Well, you don't know when the Marshal Service granted it, do you?

MR. OLIVER: I would certainly like to know that. I don't.

THE COURT: And you certainly could have covered yourself by applying for whatever locations you wanted regardless of what is going on between you and Mr. French, is it, and thus have been in a position to have either been in a situation where they were all denied or maybe some of them would have been granted, right?

MR. OLIVER: That is true, your Honor. I have never dealt with a situation where people applied -- you know, deal

with permitting applications for First Amendment assemblies that way, particularly because, like I said, these are events that require a tremendous amount of building and organizing in order to pull off. And, you know, to apply for five different locations and not know where to build would make organizing them impossible as a practical matter. So usually what happens is people apply for permits, and once there is a negotiation that is going on with an agency, you know, sometimes the agency says, well, what about this courthouse or what about this, you know, different location, and it comes out of that negotiation process.

And I don't think that the restrictions — that the denial in question is narrowly tailored. You know, there is no doubt that the government's interests in the public safety, crowd control, and the other interests that are mentioned in Marshal Howard's declaration are important and the government has a legitimate interest in all of those things, but whether the denial that we are talking about here actually serves those interests is a question — is a question of fact. And, you know, I would submit that a flat-out denial, you know, is almost never narrowly tailored when you are talking about a public space that in normal usage sees just a ton of traffic by the public.

THE COURT: You keep calling it flat-out denial, but, you know, it is kind of like saying if you say to somebody may

I raise my hand six inches and the person says, no, you may not raise it six inches, you call that a flat-out denial, and it is not really a very good argument if the question is if you can raise it four inches. I know it is a silly example but you see the logic of the point?

MR. OLIVER: I do, your Honor, although there is no prior restraint. OK.

THE COURT: Yes. OK. Anything else?

MR. TAYLOR: You know, I think, fundamentally, you know, the Pearl Street entrance of this building, there is a plaza outside that entrance that we are all very familiar with. The government's papers would indicate some 12, 1600 people come in and out of this building every day and there is a pleasant amount of space there. There could be a gathering of people tomorrow afternoon, 150 people in that space. It would not block the access to this building. This is not a demonstration with amplified sound. The government has not —

THE COURT: Excuse me. What is the guarantee that there won't be more than 150 people?

MR. TAYLOR: Your Honor, I am sure that the Marshal Service would like to control access to that space if there is a demonstration, and we can certainly work with them to limit that access. There is already --

THE COURT: I don't understand the point. You can work with them? What does that mean? That we are going to

have numbered tickets to get onto Pearl Street?

MR. TAYLOR: No, your Honor. What that means is that the Marshal Service can control the ability for the public to get into that space, and when there are 150 people in that space they can say no further people can come. That has been our understanding, that those kind of restrictions would need to be in place, and the Marshal Service, I am sure, will wish to do that and we can understand that.

But the reality is that we all know that there is space for people to gather there, that that gathering can happen without disrupting the activities in this courthouse. That is what has been requested, and I don't think the government has shown a legitimate reason why that can't happen tomorrow afternoon.

THE COURT: OK. Anything else?

MR. TAYLOR: No, your Honor. Thank you.

THE COURT: Ms. Kuehler.

MS. KUEHLER: Good afternoon, your Honor.

And I also understand that my colleague just brought over two declarations from GSA. We could distribute them to the Court and to plaintiffs' counsel.

THE COURT: Why don't you do that. Maybe he brought two copies this time.

MS. KUEHLER: And, your Honor, he has also brought a hard copy of the Memorandum of Law that we would like to submit

to the Court.

THE COURT: Fine.

(Pause)

Just give me a second to scan them, please. You gave me two full copies of everything. Have you provided the plaintiff with copies as well?

MR. OESTERICHER: I am doing that right now.

THE COURT: You are doing that now. OK. So let me give my law clerks a set.

(Pause)

OK. Go head, Ms. Kuehler.

MS. KUEHLER: Your Honor, as your Honor himself has recognized early on, the freedom of speech protections under the First Amendment are not unlimited but, rather, the protections depend on the nature of the forum that is at issue, and depending on whether the forum is a public forum or a nonpublic forum, a different level of judicial scrutiny applies to any restrictions on the First Amendment.

Here we are dealing with a nonpublic forum. The plaintiffs seem to have simply assumed that the plaza outside I would call it the 500 Pearl Street plaza, for easy reference, is a public forum because the public can traverse it. But in fact the Second Circuit has held that courthouse buildings and spaces outside the courthouse are not public fora. And this court, in August of last year, 2011, Magistrate Judge James

Cott issued an opinion that addressed this precise question with respect to the precise parcel or property at issue, the 500 Pearl Street plaza, and found that the 500 Pearl Street plaza is a nonpublic forum that is not traditionally made available for freedom of speech exercises.

As such, the judicial scrutiny that applies is the most relaxed judicial scrutiny available. All that the government must show is that the restrictions that are placed on the proposed expressive activity are reasonable and that they are viewpoint-neutral. Here there is no question that the restriction was, quote-unquote, viewpoint neutral, and, respectfully, there is also no question that they are reasonable.

There are simply quite unique security concerns at issue with this courthouse and with the precise location that plaintiffs intend to applied for a permit to hold their rally. These security concerns are detailed in the declaration by James Howard that we had submitted. But among other things, it is public knowledge that this courthouse is on the terrorist target lists. It is in the midst of a group of federal buildings that themselves are high-profile buildings and have their own security concerns. The plaza at issue is boxed in, so to speak, amongst streets that are not generally publicly accessible. They are narrow. They are closed off. Motor vehicles may not enter. And it is right in front of the area

where the proposed rally was to take place, it is right in front of the main entrance to this courthouse where hundreds of visitors enter and exit on a daily basis. And it would simply be impossible for the United States Marshal Service to determine which of the people is seeking to enter as part of the protest or as part of a group or an individual seeking to enter the courthouse with other business. As your Honor knows, this courthouse is a 24-hour facility; business does not stop at 4 p.m., and certainly this Friday it won't stop at 4 p.m.

So for these various security concerns, the government decided to deny the permit.

I would also like to note the permit application was only submitted on December 29, 2011. The government turned it around expeditiously, within ten days — within ten working days and denied that permit application.

If the plaintiffs appealed that denial, technically the government has ten days in order to issue any determination on that appeal. We are aware, of course, that here in this case a more expeditious review would be necessary, but the government still reacted with expediency in the case.

THE COURT: Well, there was a certain amount, was there not, of indication for some period of time that the government was likely to permit this for this location?

MS. KUEHLER: Your Honor, I would not believe that that is an appropriate characterization of the communications.

There were certainly communications between the plaintiff and the GSA officials who reviewed the initial permit application about the reasonableness and feasibility of holding a protest in that particular area and whether or not the protest could be moved elsewhere around the courthouse. I would not characterize those discussions, however, as indications that a permit would be granted.

THE COURT: Is it Mr. French you are referring to?

MS. KUEHLER: That is correct, your Honor.

THE COURT: OK. Would it matter if that were an appropriate characterization?

MS. KUEHLER: No, your Honor, it would not, because ultimately at issue is the agency's final decision. That was Mr. Howard's letter denying the application for a permit that was issued on January 13th. And, in fact, that denial listed precisely the security concerns at issue and the problem with ensuring the proper business operations of this courthouse if a protest were to take place on the 500 Pearl Street plaza because that is the main means of ingress and egress for purposes of the courthouse.

THE COURT: Well, Mr. Wolfman's declaration says that there was an e-mail from Mr. French on December 16th in which Mr. French suggested that they apply for 500 Pearl Street, and that he said -- and the plaintiff purports to quote him -- As far as the rules, pretty simple, apply, you and I go over any

specifics like date, time and place, where to hold everything, you and I work out -- excuse me, work the federal law enforcement issues with the U.S. Marshal Service and Homeland Security folks, hold the event, leaving the property in the same condition that your group found it. Close quote.

Now, doesn't that sound a little bit to you like maybe the government led them into the 500 Pearl Street application?

MS. KUEHLER: Well, your Honor, certainly the plaintiffs were able to submit any other applications they wish to submit as well and, as they themselves have noted just earlier, for their alternative locations. And, in fact, the alternative location they seem to have chosen, based on their Facebook and Web page, they need not have any permit applications at all. The invitation by Mr. French to submit a permit was simply that; it was not a guarantee that that permit would be granted, and it specifically noted the necessity for the GSA to coordinate with the appropriate law enforcement bodies in order to ensure that any protest could take place.

I would also like to note that, unlike plaintiffs seem to indicate --

THE COURT: This is kind of like why people sometimes make the joke "I'm from the government and I'm here to help you" as being possibly not the most reliable assertion, on occasion. I'm not commenting on Mr. French in this case.

MS. KUEHLER: Yes, your Honor.

And I think it is important to note that GSA is not in charge of the security at this building or at the federal complex as a whole, and they simply are not aware, nor, you know, are they fully authorized to make security determinations. That can only come at the point where the Marshal Service is involved, which, in turn, comes when an application for a permit is in fact submitted, and that was not until the very end of December of last year.

Moreover, I think it is quite critical to note that, unlike the plaintiffs indicate in their papers, the 500 Pearl Street plaza has not previously been used for any types of demonstrations or rallies. There have not been any demonstrations or rallies that have taken place there. In fact, there have not even been any official permit applications to hold a protest at that space, because whenever informal inquiries have come in, individuals have been directed to alternate locations such as plaintiffs were directed as well.

In addition to the locations that were mentioned earlier today, those locations include the space directly across the courthouse, on the Worth Street side, which is a city sidewalk and a city park; Foley Square, where plaintiffs in fact are going to host their main rally for this event later on tomorrow; as well as the Thomas Paine Park, which is connected to Foley Square; and that, of course, does not include the other alternatives mentioned, including Zuccotti

Park that the plaintiffs have chosen as their new meeting location.

THE COURT: I am confused by something in Mr. French's declaration. He says that last Thursday he met with Mr. Wolfson -- Wolfman to discuss the moving of the proposed area to the north section of the plaza, etc.

What is the north section of the plaza?

MS. KUEHLER: I believe that what is meant by that is the area by the Worth Street entrance of the courthouse. So the 500 Pearl Street plaza is the triangular space outside the main courthouse entrance. There is a passageway that stretches along the side of the courthouse building and it ends in a smaller plaza on the Worth Street side.

THE COURT: Right outside the security bollards and north of the Maya Lin sculptures.

MS. KUEHLER: Correct, your Honor.

THE COURT: All right.

MS. KUEHLER: So, your Honor, based on the applicable First Amendment standards, there in fact is no requirement for the government to provide any type of alternative fora. All the government has to show is that the restriction was reasonable and that it was viewpoint neutral.

However, even if a stricter scrutiny were to apply because 500 Pearl Street -- the plaza at 500 Pearl Street were found to be a public forum rather than a nonpublic forum, there

were still alternatives available to the plaintiffs, and in fact the plaintiffs are poised to take full advantage of those alternatives. It is not a requirement for the government to in fact provide alternative space. The requirement simply is — and this comes from the <u>Irish Lesbian and Gay Organization</u> case — that other alternatives be available. That is not that all alternatives for the proposed freedom of expression activity are foreclosed. And, in fact, the case law very strongly recognizes that plaintiffs have no right to their particular forum of choice and as long as there is an alternative forum that allows them to express their views.

Here they are going to be hosting a main rally at Foley Square, which, as your Honor had indicated, is a central space. It is flanked by state courthouses and federal courthouses. We understand that that is going forward.

In addition, the meeting location for the rally that plaintiffs initially envisioned taking place at 500 Pearl Street is now going to be at Zuccotti Park. And as your Honor discussed with plaintiffs' counsel earlier, plaintiffs could also simply meet on the city sidewalk in front of 40 Worth Street, if they so chose.

So there are plenty of opportunities that are available to the plaintiffs and plenty -- and those opportunities would provide the plaintiffs with ample opportunity to express their viewpoints and be heard.

1 THE COURT: Thank you. Have you finished? MS. KUEHLER: Yes, your Honor, unless you have any 2 3 further questions for the government. THE COURT: No. 4 5 Anything else from the plaintiffs before we get to the issue of whether we need evidence? 6 7 MR. OLIVER: Very briefly, your Honor. 8 THE COURT: Yes. 9 MR. OLIVER: You know, on the logic that if just ample 10 alternatives exist, it is OK to deny a permit application, if 11 that's the rule --12 THE COURT: Well, no one has suggested that it is. 13 MR. OLIVER: OK. Then perhaps I was taking it too 14 far. But --15 THE COURT: Lawyers have a way of doing that. I did 16 it my whole career. 17 MR. OLIVER: All right. We'll back off that one, then. 18 The only thing I will have to say, I guess, is that I 19 20 think what I'm hearing and what I have just read in the 21 declarations is that GSA has a policy of prohibiting First 22 Amendment demonstrations outside of the courthouse, and I was 23 surprised to hear --24 I guess they would put it differently, but THE COURT: 25 you seem to be right that they have a policy about not

permitting them. It is a question of whether their First

Amendment demonstration kind of begs the question, don't you agree?

MR. OLIVER: Well, to a certain extent. But I think that if you look as comparator information other events that may pose some of the same concerns, I mean, I'm thinking of hords of press, for example -- not "hords of press," but, you know, press --

THE COURT: You would for a moment be well advised to refer to the press as a hoard, wouldn't you?

MR. OLIVER: Withdrawn.

Members of the press congregated in groups outside of this very courthouse --

THE COURT: Obviously, a dexterous gathering of learned citizens.

MR. OLIVER: Yes, what the Judge said. You know, certainly gathered obviously without bothering to apply for a permit or being made to jump through any of these hoops.

THE COURT: Who gathered? I'm sorry.

MR. OLIVER: Members of the press -- respected members of the press in connection with high-profile cases, sentencings. I have certainly come out of the courthouse and seen barricades up with more than 150 people behind them, including press and supporters, in political cases. It is simply not correct that there are not and there have not been

rallies and demonstrations on the property that we are talking about. There have been. There have been many of them. And several of them have exceeded -- several of them that I can think of anecdotally have exceeded 150 people.

THE COURT: Well, there is a factual difference, isn't there, between a situation where somebody is sending out e-mails and other communications saying you all come, we're going to have a big rally to protest X in front of the courthouse, and something going on in the courthouse that is of public interest that leads any number of people independently to decide that they are going to go down there? A newsworthy event.

MR. OLIVER: Yes, your Honor. I think there are -THE COURT: The sentence of Mr. Madoff, or whatever.

MR. OLIVER: For example. Yes. Absolutely. I think there is a difference, although there is not a difference -- I don't think there is a difference from the perspective of thinking about the logistical and public-safety concerns. I mean, you know, 150 bodies in a spot is 150 bodies in a spot, you know. And if you walk outside this courthouse and look at that triangle on the Pearl Street entrance and imagine a barricade that 150 people are behind for an hour or two tomorrow, I have a very hard time understanding how that would present the threats to public safety or the operation of the court that are discussed in very, very broad strokes in

particular in Marshal Howard's declaration.

THE COURT: Assuming for the sake -- well, do you agree, first of all, with your adversary that the standard here, in the event the area you have selected is not a public forum, is merely that the regulation be content neutral and reasonable?

MR. OLIVER: I would want to double-check myself, but I believe that is correct.

THE COURT: OK. Now, what is the scope of a review on the issue of reasonableness in those circumstances? Is it analogous to deferential review of a constitutional issue as to legislation? That is to say, if Congress, in the case of legislation, were the official in a case like this, dealing with a nonpublic forum, reasonably could have come to the conclusion that was reached, that's the end of it on the reasonableness prong? Or is it a de novo issue for me to decide as to whether I think it is reasonable?

MR. OLIVER: I think it's more the latter, your Honor, because it is an as-applied --

THE COURT: Well --

MR. OLIVER: I'm sorry. I didn't mean to cut you off.

THE COURT: Ms. Kuehler. I'm sorry, I don't know how to pronounce your name.

MS. KUEHLER: That was perfectly appropriate.

Your Honor, the government would respectfully suggest

than you are answering.

that in that type of situation, the court would refer to the reasonableness determination made, amongst other things, by the Marshal Service, which is the body in charge — the governmental body in charge of determining security issues — THE COURT: I am asking a different question, I think,

The issue, if your nonpublic forum premise is correct, is, putting aside content neutrality, whether the decision by the GSA official was reasonable. Now, the GSA official was told whatever he was told by the Marshal Service. On one view of the review here, the question is whether given what he was told by the Marshal Service, it was reasonable for him to deny the permit. Another approach to this could be that we try de novo the issue of whether the Marshal Service was right, and if I disagree with them, then I set aside, or enjoin, or whatever the right word is in this context, the permitting decision. Which do you say it is?

MS. KUEHLER: Yes, your Honor. I believe the first approach would be the appropriate one. GSA here was interpreting its own regulations when it issued its denial of the requested permit, and as such it is entitled to judicial deference with respect to their interpretation of their regulation.

THE COURT: Even in a First Amendment case? Yes?

MS. KUEHLER: I have no case law to point to. I would

request the opportunity to submit authorities on that point, 1 2 your Honor, but I believe that would be the case. 3 THE COURT: OK. Anything else? 4 (Pause) 5 All right. Well, I do not hear any serious argument -- correct me if I am wrong, counsel -- that there is 6 7 any basis for me to conclude that this area is a public forum. Am I right about that, plaintiff? 8 9 MR. OLIVER: It is our position, you know, that it is, 10 your Honor, although we just got the briefing -- we just got 11 the government's briefing that references Magistrate Cott's 12 decision, which we've looked at but I am not prepared to argue 13 that point right now. 14 THE COURT: Well, moreover, it is your burden, in 15 order to get a preliminary injunction, to demonstrate that you are likely to prevail on that, and there is no evidence before 16 17 me that --MR. OLIVER: Well, your Honor, we do cite <a href="Grace">Grace</a> -- we 18 19

MR. OLIVER: Well, your Honor, we do cite <u>Grace</u> -- we do cite <u>United States v. Grace</u> in the administrative appellate letter, which stands for the proposition that -- well, the entry of courthouses certainly are not public forums, space outside of courthouses are. I, of course, am very much paraphrasing.

THE COURT: You are what?

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MR. OLIVER: I was very much paraphrasing as I try and

find the --

THE COURT: You certainly don't have any evidence that the Pearl Street plaza is a public forum, right?

MR. OLIVER: I don't think that is true, your Honor.

I think it is our position it is a traditional public forum.

THE COURT: What affidavit, what declaration contains facts that would even permit, let alone compel, a conclusion that it is a public forum? What you have is, thus far, uncontradicted declarations to the effect that the GSA, as a matter of policy, has never granted a permit for a demonstration there.

MR. OLIVER: Or received one. Right.

THE COURT: OK. Fair enough. So there has never been a permitted demonstration. Nobody ever applied for one. And how does that carry your burden of showing that it is a public forum?

MR. OLIVER: Well, I think that we would -- I think that we would like to -- do you have something to say about that, Mr. Taylor?

MR. TAYLOR: I would argue that we would put forth that it is a traditional public forum because it meets all the criteria that have been set forth to hold something a public forum.

THE COURT: What are those?

MR. TAYLOR: Those, coming from the <a href="Hotel Employee">Hotel Employee</a>

Restaurant Union case and I think the standard of the four criteria, is whether the whether the property falls within the category of properties historically deemed to be traditional public fora. This is a courtyard. It is an open space, accessible from the sidewalk other than the bollards. I believe that type every space is traditionally deemed public fora.

Whether it is the type of property that should be so classified given its physical characteristics. It is open space. It is level with the sidewalk. The bollards are there, creating a very permissible barrier. I mean, physically looking at that space, it is a courtyard, and it is a courtyard owned by the government. I don't think there is an argument that traditionally that is not considered a public space.

THE COURT: So the courtyard in the middle of the CIA building at Langley is in that category, right.

MR. TAYLOR: I am not familiar with Langley. I am --

THE COURT: How about the courtyard in the center of the Main Justice building in Washington?

 $$\operatorname{MR.}$$  TAYLOR: We are talking about a courtyard that on its longest side abuts the sidewalk. It is --

THE COURT: It abuts the sidewalk of a street.

MR. TAYLOR: Yes.

THE COURT: That has been closed to vehicular traffic and that you can't enter without passing a guard booth at

1 either end. 2 MR. TAYLOR: But you can freely enter and pass 3 through. You can use that street. That street is open to the 4 public. 5 THE COURT: Unless the guard decides there is a 6 problem. 7 MR. TAYLOR: That is correct. That courtyard also does abut passageway between the 8 9 two courthouses. There is regular traffic there. 10 The other criteria: The objective way in which the 11 courtyard is used. The courtyard is used as a meeting space by 12 the public, by attorneys. The press gather in that courtyard. 13 THE COURT: You are now presenting what in ordinary 14 circumstances would be a matter for the taking of evidence and you presented no evidence of it. 15 16 MR. TAYLOR: Your Honor --17 THE COURT: Do you want me to take judicial notice that it is used as a meeting space by the public? I decline to 18 I don't think that's incontrovertible. 19 do so. 20 MR. OLIVER: Well, we would like an opportunity to 21 submit further proof on that point, your Honor. 22 THE COURT: Well, you know, you've got all the time 23 you want.

MR. OLIVER: We don't want very much time.

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THE COURT: I am going to rule on this in the next

hour or so. Unless you want to postpone this whole thing, in which case I suspect the problem largely goes away, but maybe it doesn't, and then we'll do this on a more measured basis.

The fact is this permit got denied last Friday and you wait until 24 hours before you want to hold the demonstration, and everybody is supposed to turn the world upside-down. And, no doubt, you are intending to go to the Court of Appeals, or at least that is my assumption, and so I've got to do something. I mean, I just don't have the luxury.

If you want to submit evidence tomorrow? OK, you know. You want me to withhold a decision until you have submitted more evidence? I will.

MR. OLIVER: I think we'll have to have a moment to discuss it, if your Honor --

THE COURT: Well --

MR. OLIVER: I hear you, your Honor.

THE COURT: Do you understand? I am not hostile here.

I am really not. I am not even -- well, I won't comment on what I was to say.

But you have left me an infinitesimal window, and you are asking me to assume facts in your favor that you had a week to put together evidence on and didn't. And they are not facts that I can properly assume.

MR. OLIVER: I understand.

Just in terms of the timing, your Honor, you know, the

administrative appeal was submitted literally as quickly as it could be put together, and there was a need to give GSA at least some time to consider it and respond. We gave them a "Wednesday by noon" sort of if you don't respond we will consider it constructively denied. I began calling GSA on Wednesday and I called the U.S. Attorneys at 5 o'clock. So --

THE COURT: I understand all of that. But, look, normally you would be out of here for failure to exhaust administrative remedies, in all likelihood, which I'm not doing, given the time exigencies. But, you know, you could have been in here on Monday morning, and then if they granted your appeal in the interim, the case is moot. And if they didn't, there would have been a whole working week to deal with it. But here we are 3 o'clock on Thursday afternoon and this thing is supposed to come off in 25 hours.

(Pause)

MR. OLIVER: Understood.

THE COURT: That is the problem. OK?

So, look, I simply do not have a record before me that could possibly justify my finding that this is a public forum. Surely it isn't as a matter of law. Whether it is on the facts, I couldn't possibly express a view because I don't have the evidence, and it is the plaintiffs' burden to show that it is a public forum. So we are in the nonpublic forum box of the analysis.

There being no evidence that it is anything other than 1 a nonpublic forum, the issue is whether it is content neutral. 2 3 Now, first of all, is there any evidence that it is not content 4 neutral? 5 MR. OLIVER: Well, the only way you get that kind of 6 evidence is through some -- having an opportunity to do some 7 discovery. So, no, we don't have evidence that it is not content neutral at this time. 8 9 THE COURT: OK. So then the issue of likelihood of 10 success depends entirely on the reasonableness question, 11 whichever the scope of review may be. 12 So is there anything in the declarations that have 13 been submitted by either side that either side thinks is 14 pertinent to the reasonable question and as to which you want to cross-examine the declarant on the other side? 15 MR. OLIVER: Could I request a brief opportunity to 16 17 consult with my co-counsel? 18 THE COURT: Sure. Take ten minutes. 19 MR. OLIVER: Thank you very much, your Honor. 20 THE CLERK: All rise. 21 (Recess) 22 THE COURT: OK, folks. Be seated. 23 So? 24 MR. OLIVER: Your Honor, what we would propose to do 25 is to put on Mr. Wolfman and to ask to cross-examine Marshal

1 Howard. 2 THE COURT: You want to put on Mr. Wolfson -- Wolfman 3 for what purpose? 4 MR. OLIVER: We would like to mark as an exhibit and 5 have introduced into evidence a copy of the chain of e-mails between him and Mr. French, and I believe that he also has some 6 7 testimony that's relevant to the reasonableness analysis and, in particular, in terms of the location and the importance of 8 9 the location. So not too much, really. 10 THE COURT: Well, whatever there was to say about the location of course could and should have been in his 11 12 declaration; right? 13 MR. OLIVER: We did the best we could on his affidavit 14 given the timing, your Honor, so I don't think --15 THE COURT: As long as it is short. MR. OLIVER: I don't think it is going to be very long 16 17 at all. 18 THE COURT: Any objection from the government? 19 MS. KUEHLER: No objections, your Honor. 20 THE COURT: Now, so you'll get to cross-examine him. 21 OK. Fine. Call Mr. Wolfman. 22 MR. OLIVER: Thank you, your Honor. 23 Mr. Taylor will do it. 24 MR. TAYLOR: Your Honor, the plaintiffs will call 25 Jarrett Wolfman to the stand.

Could I examine from the table, your Honor? 1 THE COURT: I would prefer that you use the lectern; I 2 3 am more likely to hear you. 4 JARRET WOLFMAN, 5 the plaintiff herein, 6 having been duly sworn, testified as follows: 7 THE CLERK: Keep your voice up, and the microphone is 8 on. 9 If you can state and spell your full name for the 10 record? 11 THE WITNESS: It's Jarret Wolfman, J-a-r-r-e-t 12 W-o-l-f-m-a-n. 13 THE COURT: You may proceed, Mr. Taylor. 14 DIRECT EXAMINATION 15 BY MR. TAYLOR: Q. Mr. Wolfman, have you been organizing a protest scheduled 16 17 for tomorrow here in the vicinity of the U.S. Court? 18 A. Yes. And could you tell us briefly why this location is 19 20 important to you for this demonstration? 21 A. Well, the point of the demonstration is because Saturday 22 actually is the second anniversary of Citizens United, which 23 really hasn't been mentioned in court today. And that's kind of why this location is important as opposed to, say, the other 24 25 federal properties that you mentioned, your Honor. And, you

know, and the fact that it is more like maybe a difference.

And also the fact that this is an open and active courthouse. Part of the national call that was put out by the organization that, you know, put out the call for this national day of action. You know, and the reason that they are — that they suggested that we do it on Friday, the day before the anniversary, is because the courts wouldn't be open on Saturday. That's the reason that they wanted us to do it and why we wanted to do it on Friday.

So while, yes, we do appreciate that Foley Square and 40 Centre Street is, you know, a great location, and that's why we wanted to do it there, too. The point of the day -- not "the point of the day" but they were calling for, you know, every federal courthouse to be occupied, as it were -- it is called Occupy the Courts -- to make that statement. And so we decided that we would have it at both locations and that it would be important that we had it at both locations for all of those reasons, so that we could have that direct contact with people who were maybe leaving work at that time, you know, and then also mark the courthouse in Foley Square.

Q. OK. Thank you, Mr. Wolfman.

On behalf of the group, have you been reaching out and in charge of securing this location for this demonstration?

A. Yes.

Q. And what did you do in terms of attempting to secure this

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THE COURT: Isn't this substantially all in the

3 | affidavit?

MR. TAYLOR: Yes.

- Q. Did you have an e-mail exchange with Mr. French at the GSA
- 6 in regards to securing this location?
- 7 A. Yes.
  - Q. And have you reviewed the copy that I have of that e-mail exchange?
- 10 | A. Yes.

THE COURT: Mr. Taylor, what you do is you mark it for identification. You show it to the witness. Because actually for all he knows, you are holding up your grocery list, because he can't see it across the courtroom, and that is the way it is done.

MR. TAYLOR: OK.

THE COURT: The Clerk has exhibit stickers.

MR. OLIVER: Thank you, your Honor.

(Pause)

20 | THE COURT: And first show it to the government,

please.

MR. OLIVER: Yes, your Honor.

- 23 BY MR. TAYLOR:
- Q. Mr. Wolfman, could you review the document that I am
- 25 | handing up that has been marked as Plaintiff's Exhibit 1 for

1 purposes of identification?

MR. OLIVER: May I approach the witness, your Honor?

3 THE COURT: Yes.

BY MR. TAYLOR:

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- Q. Could you tell us what that document appears to be?
- 6 A. This is the span of e-mails between me and Mr. French.
  - Q. Is that a true and accurate copy of your e-mail exchange?
  - A. Yes, as far as I can tell by looking at it.

MR. TAYLOR: I would move that this exhibit be introduced into evidence as Plaintiff's Exhibit 1.

MS. KUEHLER: No objections, your Honor.

THE COURT: It is received.

(Plaintiff's Exhibit 1 received in evidence)

BY MR. TAYLOR:

- 15 | Q. Mr. Wolfman, there is an e-mail you received from
- 16 Mr. French on December 16th that I believe there is a flag
- 17 marking that exhibit.
- 18 THE COURT: It is in evidence. If there is something
- 19 | in particular you want to draw my attention to, please do it
- 20 | rather than showing it --
- 21 | Q. In that e-mail, Mr. Wolfman, is it your recollection that
- 22 Mr. French suggested that you apply for a permit at 500 Pearl
- 23 || Street?
- 24 A. I'm sorry. What was the date?
- 25 | Q. I believe it was December 16th.

wolh Wolfman - direct

- 1 A. December 16th. Yes, I am looking at that. Say it again.
- 2 | I'm sorry.
- 3 | Q. Did Mr. French suggest that you apply for the permit at 500
- 4 | Pearl Street?
- 5 | A. Yes.
- 6 Q. OK. Thank you.
- 7 MR. TAYLOR: That is all.
- 8 THE COURT: OK. Cross-examination.
- 9 CROSS-EXAMINATION
- 10 BY MS. KUEHLER:
- 11 Q. Good afternoon, Mr. Wolfman. I will be very brief. I have only two questions.
- Is it correct that, based on your Facebook page, over
- 14 | 2,500 people have been invited to join the protest scheduled
- 15 | for tomorrow?
- 16 A. I have not had a chance to check the Facebook page in the
- 17 | past few days so I could not answer that honestly, but that
- 18 | would be shocking to me because the last time I looked it
- 19 certainly was nowhere near that number.
- 20 | Q. Is it correct that the Facebook page now indicates as a
- 21 | meeting spot for the rally to be held tomorrow the Zuccotti
- 22 | Park location?
- 23 A. We needed to have an alternative location prepared if this
- 24 did not go well. So, yes, we do have a possible alternative at
- 25 | Liberty Plaza, yes.

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- Q. And, in fact, that is the only meeting point that is currently on the invitations for the rally tomorrow, is that correct?
- A. Well, yes, because we didn't want to send people to a location where they might not be allowed to gather. So we didn't feel like we had a choice.

MS. KUEHLER: Thank you.

THE COURT: OK. Redirect, any?

MR. TAYLOR: No, your Honor.

THE COURT: OK. Thank you, Mr. Wolfman.

THE WITNESS: Thank you.

(Witness excused)

THE COURT: Anything else?

MR. OLIVER: Just testimony from Marshal Howard, Judge.

THE COURT: Oh, you are going to call Marshal Howard?

MR. OLIVER: We would like to call Marshal Howard.

THE COURT: Ms. Kuehler.

MS. KUEHLER: Yes, your Honor. The government is willing to make Mr. Howard available. I have noted to counsel earlier, and I would like to note again, that we do have some concerns about making a Deputy United States Marshal generally available to cross-examination on the security of the federal buildings here. So we may object to questions on a case-by-case basis. And, in fact, to the extent that

plaintiffs have any area in particular in Mr. Howard's declaration that they would seek to dispute through his testimony, perhaps given that plaintiffs bear the burden of proof, they could make a brief proffer of any such areas that they wish to call into question so that the Court can determine whether Mr. Howard in fact needs to testify at all.

THE COURT: Sounds reasonable. Why not?

MR. OLIVER: Mr. Boyle.

MR. BOYLE: Good afternoon, your Honor. Robert Boyle.

In the interest of moving it along, I would be prepared to do that. Ordinarily it wouldn't be a practice to disclose the questions I would ask on cross-examination --

THE COURT: That is not exactly what's been asked.

MR. BOYLE: Essentially what I was planning to do is just go through his declaration. He makes certain assertions regarding the particular security concerns regarding the location outside this courthouse. For example, he asserts that — he attaches the testimony of former Mayor Giuliani that it was on a particular list, and apparently that testimony is information that was given to Mayor Giuliani from someone and there is additional buildings.

I would want to elicit from him, and that certainly he would agree, that whether it was on a list or not, every federal building could be potentially a potential terrorist target.

THE COURT: I will give you this. I will assume that any building in the United States of America is potentially on a terrorist list.

MR. BOYLE: Yes.

THE COURT: And I think, in the spirit of cooperation, possibly you might acknowledge that this building would certainly be in the top decile of federal courthouses that are potential terrorist targets. Wouldn't you agree with that? To put it very charitably to the plaintiffs.

MR. BOYLE: I would with agree, with this proviso. I mean, this particular being that it is known as a high terrorist target, and I would hate to -- there could be other federal buildings which would be maybe a more likely target which wouldn't have the issues.

THE COURT: Absolutely. Absolutely.

What are you going to cross-examine Marshal Howard about? I assume he hasn't talked to the head of al-Qaeda lately.

MR. BOYLE: I could go further.

The point -- the only thing I would intend to elicit from him was his agreeing that that would apply generally to every federal building and even private buildings.

THE COURT: I'm sorry, Mr. Boyle. What would apply generally to every federal building?

MR. BOYLE: That they are a potential terrorist

target.

THE COURT: I take judicial notice of that.

Next.

MR. BOYLE: Next, secondly, he asserts that about 1100 people come in every day.

THE COURT: He says an average.

MR. BOYLE: That is a security concern.

I would ask him if he would agree -- and I think we see this every day -- that people come in and before they are even searched they are inside the building, and they are allowed to do that. And there is often a line of people on both sides of the courthouse, often over 100, who are inside the building prior to going through the scanners.

What we are intending to do with the protestors is have people outside the building, behind barricades, which presents significantly less security concern than really what goes on every day. If someone really wanted — because they can be inside the building. And so there is really less of a concern here.

THE COURT: I will assume for the sake of this decision that the facts, as opposed to the conclusions, you recited are true. That is to say, that at present individuals wishing to enter the building actually get through the doors before they go through metal detectors.

Anybody object to my accepting that as true?

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               MS. KUEHLER: No, your Honor.
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               THE COURT:
                          Mr. Boyle?
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               MR. BOYLE:
                           No.
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               THE COURT:
                          That solves that problem. Let's go to the
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      next one.
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               MR. BOYLE: The only thing I would ask, in his
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      experience, in observing gatherings in that plaza, be it
      gatherings of the media -- because I believe he has been in
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      this district for a significant period of time -- gatherings of
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      the media after expecting verdicts or sentencings in notorious
      cases, that there have been and it is not unusual to permit
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      gatherings of 100 or more behind the barricade either on the
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      Pearl Street side or the Worth Street side. And that
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      notwithstanding that no permits have ever been granted, the
15
     Marshal Service permits that and permits that in this space.
16
      And --
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               THE COURT: Well, the first -- you know, I want to
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      hear what the government has to say to that, but you say it
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     permits that in this space.
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                           In the plaza area.
               MR. BOYLE:
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               THE COURT:
                          The Pearl Street entrance?
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               MR. BOYLE: The Pearl Street -- I have seen it
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      actually in both, and that's what I was going to ask the
24
      witness.
25
               THE COURT: But we are dealing with the rejection of
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the permits for the Pearl Street entrance. 1 2 MR. BOYLE: Yes. 3 THE COURT: And that alone, right? 4 MR. BOYLE: Yes. 5 THE COURT: OK. So let's at least deal with what 6 we're dealing with. 7 Now, what do you say to that, Ms. Kuehler. MS. KUEHLER: Well, your Honor, whether or not there 8 9 is press that occasionally gathers outside the courthouse 10 simply has no implication as to whether or not the permit in 11 this case -- which is required for demonstrations or rallies, 12 not for press gatherings -- was or was not reasonably denied by 13 the government. 14 That sounds reasonable. MR. BOYLE: 15 THE COURT: I will let you examine on that subject and 16 we'll see where it goes. We'll just see where it goes. 17 What is next? 18 MR. BOYLE: And that would also go to the public 19 nature of the space, not just the reasonableness, because of 20 the lack of restrictions. So --21 THE COURT: Look, I said I would let you go a bit, at 22 least, on those factual questions. What constitutional 23 implications it has are up to me, not to Marshal Howard. 24 MR. BOYLE: And the other would be just general 25 questions about that plaza that I think came up through the

1 argument, that people are permitted to walk freely through it 2 back and forth --3 THE COURT: I take judicial notice people walk through 4 it all the time. 5 And freely onto Pearl Street on both ends MR. BOYLE: 6 if they are on foot. If you are coming from, for example --7 THE COURT: I will take judicial notice that people every day walk onto Pearl Street from outside to the area 8 9 between the courthouses. 10 MR. BOYLE: And --11 THE COURT: Does that solve your concern about that? 12 MR. BOYLE: And in general they are never asked to 13 state their business or asked a reason why they would be going 14 onto Pearl Street. They can be going from Foley Square to 15 Chinatown and just be passing through. THE COURT: I don't know about that. We'll see. 16 17 Anything else? 18 MR. BOYLE: And I think just as a subsidiary, as you 19 are aware, that even other than the media, lawyers gather in 20 the plaza, stand around and discuss, and things of that nature. 21 THE COURT: So you are going to ask him whether if he 22 has seen three people together he asked them for Bar cards? 23 MR. BOYLE: It wouldn't have to be lawyers, it could

And he makes also -- I wanted to elicit regarding the

be anyone who would be gathering in that area.

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Metropolitan Correctional Center, which is in his declaration, that often you have visitors who gather before visiting hours in front of the Metropolitan Correctional Center. It can be quite a large number of people, scores of them, and they are permitted in that area prior to going through the search procedures of the MCC. Obviously they are searched and scanned before entering the building, but they are in that area and permitted to gather.

And then there would just be some questions about how, if at all, the gathering that is proposed for tomorrow would affect or not affect the potential swearing in I believe that is scheduled for at or about that time.

THE COURT: I don't believe he ever said it would affect it. I don't think so. I promise you she will be sworn in, at least if she shows up for the job, and, actually, she is on the job. It is a ceremony.

All right. Let's --

MR. BOYLE: That is essentially it.

THE COURT: Let's start. Keep it short. And we'll see where we go.

Mr. Howard.

And stick with the areas that were not resolved, please.

(Continued on next page)

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1
       JAMES HOWARD,
 2
           called as a witness by the plaintiffs,
 3
           having been duly sworn, testified as follows:
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               THE CLERK: Thank you.
 5
               Please be seated. State and spell your full name for
      the record.
6
 7
               MR. BOYLE: One second, your Honor. I just want to
8
      get my notes.
9
               (Pause)
10
               THE WITNESS: James Howard, J-a-m-e-s H-o-w-a-r-d.
11
               THE COURT: Proceed, counselor.
                           Thank you, your Honor.
12
               MR. BOYLE:
13
      DIRECT EXAMINATION
14
     BY MR. BOYLE:
         Good afternoon, Mr. Howard.
15
      Ο.
16
         Good afternoon, sir.
17
      Q. You executed a declaration on behalf of the government in
      this case, is that correct?
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     A. Yes, sir.
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               MR. BOYLE: And, your Honor, has the declaration been
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     marked as an exhibit or be deemed admitted?
22
               THE COURT: It will be filed.
23
               MR. BOYLE:
                           Thank you.
24
         And in that you indicated that you served as the Deputy --
25
      Supervising Deputy U.S. Marshal since January of 2011?
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- Α. Yes, sir.
- And prior to that you had some responsibilities with 2
- 3 respect to the United States District Court for the Southern
- 4 District of New York, is that right?
- 5 A. Yes, sir.
- 6 And how long have you had responsibilities in connection
- 7 with this district?
- Pertaining to security concerns? 8
- 9 Ο. Yes.
- 10 Α. Since about 2002.
- And so you are familiar in general with the courthouse 11
- 12 area and the comings and goings?
- 13 Α. Yes, sir.
- 14 And you come here every day?
- Yes, sir. 15 Α.
- And you indicate -- and as you know, this proceeding 16
- 17 concerns the plaza area outside the Pearl Street entrance of
- the courthouse, is that right? 18
- 19 A. Not exactly. I was told initially Pearl Street and then
- 20 potentially Worth Street.
- 21 OK. Well, I will first direct some of my questions to the
- 22 area generally and then focus it down.
- 23 Now, you indicated in your declaration that, to your
- 24 knowledge, no permit has ever been issued to authorize a
- 25 demonstration or a protest in front of the courthouse, is that

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- 1 | correct?
- 2 | A. Yes, sir.
- 3 | Q. OK. And --
- THE COURT: Meaning the 500 Pearl Street courthouse;
- 5 | is that right, Mr. Howard?
- 6 THE WITNESS: Yes, sir. Yes, your Honor.
- 7 BY MR. BOYLE:
- Q. And you have been present in the courthouse when celebrated
- 9 or notorious cases have taken place, is that correct?
- 10 | A. Yes, sir.
- 11 | Q. Including, I think your Honor mentioned, the sentencing of
- 12 Mr. Madoff?
- 13 | A. Yes, sir.
- 14 Q. Were you present on the day when the attorney Lynne Stewart
- 15 was sentenced?
- 16 | A. Yes, sir.
- 17 | Q. And would it -- did you observe the outside of the
- 18 courthouse -- the 500 Pearl Street courthouse on either of
- 19 | those days?
- 20 A. Yes, sir, on both days.
- 21 | Q. And were there people -- significant numbers of people
- 22 | gathered on both of those days outside the courthouse?
- 23 | A. Yes, sir.
- 24 | Q. And that would be both on the Pearl Street side and the
- 25 Worth Street side, correct?

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- No, sir, only on the Worth Street side.
- It is your testimony there was no person gathered on Q. OK. the Pearl Street side?
  - Α. No significant numbers.

Can I explain?

- Ο. Please.
- Generally the press gathers on the Worth Street side behind the -- we'll set up French barriers directly adjacent and in contact with the bollards, and the press is on the street side of the bollards, which is actually city property. Occasionally what the press likes to do to secure their shot, I guess -- you know, I am not a press person, I don't know the lingo, but they'll position a cameraman or a videographer, they will position them on Pearl Street in case the person doesn't exit out of Worth Street so they get the shot. But the bulk of the press corps is always on Worth Street, and that's controlled by NYPD and DCPI.

THE COURT: I'm sorry. What does that acronym stand for?

THE WITNESS: That is a good question, Judge. not exactly sure. I just know it is their press -- our public affairs section, our version of a public affairs section.

THE COURT: I quess what I am trying to find out is You said that where the press pools typically gather is this. on the city side of the line on the Worth Street, right?

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THE WITNESS: Yes, your Honor.

THE COURT: And that the people who control that -permit it/don't permit it -- are the NYPD; is that right?

THE WITNESS: Yes, sir.

THE COURT: OK. Go ahead.

## BY MR. BOYLE:

- Q. And with respect to that, did you -- when those gatherings occurred, you have communication with the NYPD about the gathering?
- For the cases you've cited we did, yes.
- 11 Ο. And did you object to those gatherings taking place?
- 12 We didn't. We were not in a position to object because it
- 13 is not our property, but we did coordinate with them --
- 14 specifically to those two instance, we coordinated with them
- 15 prior. We addressed our concerns, what we would be concerned
- with on our side of the property line, and we had discussions 16
- 17 with them.
- 18 Q. OK. Did you in any manner ask them to prohibit such
- 19 gatherings -- that gathering, either event?
- 20 Prohibit? No, sir.
- 21 Q. And now with respect to the Pearl Street side, you
- 22 observed, have you not, media, even if only a small group of
- 23 them, waiting outside the entrance to get their shot, as you
- 24 put it?
- 25 Yes, sir. Α.

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- 1 | Q. OK. And that's routinely permitted, is it not?
- 2 | A. Yes, sir.
- 3 MR. BOYLE: May I have a moment, your Honor?
- 4 THE COURT: Yes.
- 5 (Pause)
- 6 BY MR. BOYLE:
- 7 | Q. Now, you are aware, also, that tomorrow there is supposed
- 8 to be -- there is scheduled a swearing in of a new federal
- 9 judge?
- 10 A. Yes, sir.
- 11 Q. Did that play any role in the determination to deny the
- 12 permit?
- 13 (Ms. Kuehler rose)
- 14 | THE COURT: I will sustain the objection.
- MS. KUEHLER: Thank you, your Honor.
- 16 THE COURT: I don't believe this witness is in a
- 17 position to have personal knowledge.
- 18 BY MR. BOYLE:
- 19 | Q. The --
- 20 MR. OLIVER: Your Honor, could I just get
- 21 clarification on that, or could we get clarification on that?
- 22 | THE COURT: He didn't deny the permit.
- 23 MR. OLIVER: I believe that Mr. French's declaration
- 24 | says that in fact the Marshal Service recommended that they
- 25 deny the permit.

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THE COURT: Yes. But I ruled on the question that was

3 MR. OLIVER: I'm sorry, your Honor.

asked, not the one that might have been asked.

- 4 BY MR. BOYLE:
- 5 Q. Now, did you communicate with the GSA concerning the request for a permit for tomorrow's gathering? 6
  - Yes, sir.
- In the course of that communication -- I will make 8 Ο. OK.

these questions specific -- did you communicate a concern that

- 10 because there was a potential swearing in scheduled for a judge
- 11 tomorrow, that it would be -- that the permit should be denied
- 12 by GSA?
- 13 I did not make that an area of concern. Α.
- 14 Did you air any concern with respect to that whatsoever
- 15 with the GSA?
- Myself personally, no, sir. 16
- 17 Did anyone in your office do that? Ο.
- THE COURT: Ms. Kuehler. 18
- 19 MS. KUEHLER: Objection, your Honor. I don't know how
- 20 Mr. Howard can --
- 21 THE COURT: Well, he might have been standing right
- 22 there. That is one possibility.
- 23 Q. Are you aware of any such communication from the Marshal
- 24 Service to the GSA of that?
- 25 I want to explain. We had a meeting and various people

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were present. It was raised in a meeting. I can't remember

- Well, was it a person from the Marshal Service who raised it?
- I'm not sure. Α.

specifically who raised it.

Let me just pose this question. Ο. OK.

The permit for the gathering tomorrow, it is your understanding it was for an event that would start at about 4 and ended approximately 6; is that your understanding?

THE COURT: It doesn't matter what he understands. have the application in the record.

> MR. BOYLE: OK.

THE COURT: It is like asking whether you understand what the serial number of a dollar bill is. You could look.

MR. BOYLE: Let me just pose the question.

What impact, if any, would the proposed gathering of between 150 to 200 people behind a barricade on the Pearl Street side of the courthouse have on the smooth functioning of the swearing in of the federal district judge?

> THE COURT: If any?

MR. BOYLE: If any.

Α. I'm not sure. I'm not sure.

> MR. BOYLE: Thank you, sir.

That is all. Thank you, your Honor.

THE COURT: Thank you. Anything further?

1	MS. KUEHLER: No, your Honor.
2	THE COURT: Thank you, Mr. Howard. You are excused.
3	THE WITNESS: Thank you, your Honor.
4	(witness excused)
5	THE COURT: OK. Any other evidence?
6	MR. OLIVER: No, your Honor.
7	THE COURT: Ms. Kuehler?
8	MS. KUEHLER: Nothing from the government, your Honor.
9	THE COURT: The record is closed.
10	OK. Anybody want to be heard any further?
11	MR. BOYLE: May I have a moment, your Honor?
12	THE COURT: Yes.
13	(Pause)
14	MR. OLIVER: Just, your Honor, that we would request
15	an hour after we leave court to be able to review the memo of
16	law the government submitted and possibly submit a reply.
17	THE COURT: An hour?
18	MR. OLIVER: One hour.
19	MR. BOYLE: Two hours.
20	MR. OLIVER: Two hours? Ask for two and get one.
21	Approximately an hour. I mean, we want as little time
22	as possible but we would like an opportunity to reply.
23	THE COURT: You can do it orally.
24	MR. OLIVER: Well, to have a few we would like an
25	opportunity to reply after

THE COURT: Look, I am entirely sympathetic to the plight in which you find yourself on this. But there are at this late hour — well, let me ask you this question. If the decision is adverse to you here, are you in a position to indicate whether you intend to go to the Court of Appeals or not, or to rule that out?

MR. OLIVER: Not at this time, your Honor. No. We are not in a position to indicate that.

THE COURT: So the practical reality is that you are asking me to do nothing until 5:30, receive further submissions, and then get out a decision in time for you to get to the Court of Appeals, in time for the Court of Appeals to act by 4 o'clock tomorrow. I don't think that's practical.

So if you want to preserve an appellate avenue, I am going to rule very promptly so that whichever side loses has a chance to go to the Court of Appeals and they have a chance to act on it.

MR. OLIVER: I withdraw my application.

THE COURT: OK. So I ask you again whether anybody wants to be heard further?

MS. KUEHLER: Nothing from the government, your Honor.

MR. OLIVER: Nothing further from plaintiffs, your Honor.

THE COURT: All right. I am going to take somewhere between 15 minutes and a half an hour, and we'll gather again

121 jwolh and I'll rule orally on this in all likelihood if I don't have 1 2 it in writing. So we will recess briefly and I will see you 3 then. 4 MR. OLIVER: Thank you, your Honor. 5 THE COURT: If within that period of time you, you 6 know, read the government's memo again and have a brainstorm or 7 find some case, obviously I will consider it. But I just can't 8 take all the time you want me to take, which I could have done 9 if you had gotten here even one day earlier, and would have 10 done. 11 OK. Thank you very much. 12 MR. OLIVER: Thank you, your Honor. 13 (Recess) 14 (Continued on next page) 15 16 17 18 19 20 21 22

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THE COURT: Please be seated.

OK. I'm prepared to rule on this matter now in the interest of getting anybody who wants the opportunity to go up to the Court of Appeals a fair shot at that. I hope everybody will appreciate that I am doing this after considerable thought, but I certainly haven't had an opportunity to write anything up to now. So this may be a little holding and I may edit or revise it in due course, if that ever becomes appropriate.

I am just getting my papers in order.

This matter is before the Court on a motion by the plaintiff, Jarret Wolfman, for a preliminary injunction requiring the General Services Administration to issue a permit to hold a protest, rally or demonstration, the characterization being unimportant, tomorrow between the hours of 4 and 6 on what I will refer to as the Pearl Street entrance plaza to this building. By that, I am referring to an area in front of the building at the Pearl Street end bounded on the south by Pearl Street on what I take to be essentially the northwest by a line that intersects diagonally with Pearl Street, parallel to the diagonal facade of the State Supreme Court, the building at 60 Centre Street, and part of distance between the wall of the State Supreme Court building and the court building we are in right now, and by a third side that runs diagonally from Pearl Street at more or less a 90-degree angle to the other diagonal

along the edge of the federal court building. So it is a triangle bounded by Pearl Street, the federal court on the more or less southeast side, and a line parallel to the State Supreme Court building on the northwest.

The facts that have some material or other bearing on this are as follows:

Mr. Wolfman, the plaintiff, has been involved with the Occupy Wall Street movement, about which nothing more needs to be said. Occupy Wall Street, and a variety of other organizations, issued a call some time ago to mark the second anniversary, on January 20, 2012, of the Supreme Court's decision in the <u>Citizens United</u> case.

As Plaintiff's Exhibit 1, which is an e-mail train between Mr. Wolfman and Mr. French, of the GSA, indicates it is Mr. Wolfman's view -- and I quote him -- that "Overturning the Citizens United ruling is the key to taking back our democracy from corporations and special interests and returning it to the human people, where it belongs."

Still quoting Mr. Wolfman: "Every problem we face in this country and the world can be traced back to the undue influence of money interests on our elected officials. This is our chance to stand up to the powers that be and declare that our Constitution was meant to protect we, the people, not we, the corporations, and standing on the steps of the highest federal courthouse in New York City I thought would be a

powerful statement." End of quote.

Mr. Wolfman, and his colleagues are obviously not alone in at least the highly critical sentiment about <u>Citizens</u>

<u>United</u>. If my memory is accurate, they were joined in the State of the Union address last January by the President of the United States.

Another organization put out a call for action on January 20th -- tomorrow -- which is the day before the second anniversary of the <u>Citizens United</u> decision. It was a call for protests in front of federal courthouses to focus attention on what the organizers characterize as, generally speaking and paraphrasing, effective constitutional liberties.

Mr. Wolfman's group decided that it wanted to hold such an event at 4 or 5 o'clock in the afternoon tomorrow either at 40 Centre Street or at 500 Pearl Street, and then march from whichever venue was concerned to Foley Square.

Mr. Wolfson began -- Wolfman, excuse me. I once represented a man named Wolfson and it is quite habitual. It was a very long time ago but old habits die hard.

Mr. Wolfman began discussions -- and I don't mean necessarily verbally, both verbally and in writing -- with the General Services Administration on or about December 15th regarding a permit for such an event. He made clear in an e-mail dated December 15, 2011, which is a part of Plaintiff's Exhibit 1, that their first choice was to hold the event at 40

Centre Street. And in the course of the e-mail chain that continues -- and I won't go into all of the detail -- it is clear that, at least to Mr. Wolfman and certainly to others in his group, though by no means for all, that was the first choice location from the beginning.

At some point in the early stages of all of this,

Mr. French made it clear that 40 Centre Street is closed for

renovation. He said that even the GSA could not use the steps

of 40 Centre Street, because of the construction, to do some

kind of video or another that it wanted to do. He suggested to

Mr. Wolfman that he apply for permission at 500 Pearl Street.

The e-mail speaks for itself. While he did suggest applying for 500 Pearl Street, there was no assurance that permission would be granted. He spoke in terms of the process being simple but didn't speak in terms of the likely result.

In any case, on December 29th Mr. Wolfman applied to the GSA for a permit to have the first part of the event in that Pearl Street entrance plaza, the triangular area that I described earlier.

On January the 5th, Mr. French advised him there might be a problem with that location; specifically, that space was tight, as I recall the e-mail. On January 9th, Mr. French said there was another problem. He referred to an immigration proceeding involving a large number of people in the courthouse in the morning and the scheduled ceremonial swearing in of my

1 collea

colleague Judge Nathan in the afternoon. He pointed out that this might create a problem for holding another event in that little plaza.

And Mr. French suggested, on January 9th, that it would be better to work together to get the event moved to the front of 40 Centre Street, saying, in addition, that the area around Pearl Street is very limited, a point he made earlier, I believe, and that it may be blocked off for security. Indeed, he went on to reiterate that he thought it safer to assure that the event goes off better to move over in front of 40 Centre Street.

The point was also made in this correspondence, although I can't put my finger on it at this precise second, by Mr. French that the sidewalk in front of the 40 Centre Street courthouse was city property and it was not within the power of the federal government to grant or deny permission; it was a matter on which the plaintiff would have to be in touch with the city Police Department. Apparently, the plaintiffs had some trouble doing that, or they had gone in their minds too far down the road toward 500 Pearl Street, whatever; it just didn't happen.

There was more discussion. If I understand the e-mail chain correctly -- and I think I am -- on January 9th

Mr. Wolfman in fact wrote to Mr. French by e-mail about the sidewalk in front of 40 Centre Street, and acknowledged that

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the problem about that as far as he was concerned was not the federal government, they were having trouble getting to the right people in the local police precinct. But he went on to say that they might be able to work the sidewalk in front of 40 Centre Street into their plans.

There was then a meeting on January 12th between Mr. French and Mr. Wolfman. They both addressed this in their There are some very minor and I think immaterial declarations. differences -- and I say "differences," not necessarily conflicts, in their accounts, but one thing that struck me as significant -- if I can put my hand on the right piece of paper, there it is -- is that Mr. Wolfman says in his declaration that Mr. French told Mr. Wolfman that he had discovered since all of this had begun that the property line between state and federal property in the Pearl Street plaza, near the entrance, runs approximately halfway between the federal courthouse and the state courthouse, and went on to say that he hoped that Mr. Wolfman would relocate his event but that if he could get the OK from the city to use the city's side of the plaza, it should be OK with the federal government.

The next day the GSA denied the application to use the federal property in the plaza. Now, it doesn't say it in those many words, but obviously the GSA has no authority to grant permits or to withhold permits for the use of the state-owned property behind the Supreme Court house that is immediately

opposite the Pearl Street entrance. They may not like it but it is not their job, and they have no authority over it, as far as I understand, and apparently as far as Mr. French understands.

That was January 13th, six days ago.

Now, as a now superannuated but nevertheless experienced civil litigator in my day, I know that it takes time to put together papers and you can't get to court in two hours most of the time and all of that. But the application the plaintiffs have filed before me did not reach me until somewhere between 11 and 12 noon this morning. Where they were for the last six days I can't say.

They say they wanted to give the GSA a little time to rule on their appeal, and I'm sure that's true, but the fact is that the time pressure upon which we all find ourselves at 4:30, or 4:22, the night before — less than 23 hours before this proposed event is the product of the plaintiffs not having filed their lawsuit a long time ago, by Monday certainly, and thus giving everybody a little bit more time to deal with it. That's neither here nor there; it is the outcome. It just explains the expedited nature of the proceeding.

So they had brought this case to ask me to issue a mandatory injunction requiring the GSA to grant the permit.

The standard that governs here is absolutely clear. I quote from <u>Mastro Vincenzo v. City of New York</u>, 435 F.3d 78,

decided by the Second Circuit: "A district court may enter a prohibitory preliminary injunction staying government action taken in the public interest pursuant to a statutory or regulatory scheme only when the moving party has demonstrated that, one, absent injunctive relief he will suffer irreparable injury, and, two, there is a likelihood that he will succeed on the merits of his claim. Alternatively, a district court may enter a mandatory preliminary injunction against the government only if it determines that in addition to demonstrating irreparable harm the moving party has shown a clear or substantial likelihood of success on the merits."

That's what we are dealing with here, a request for a mandatory injunction against the government to require the government to issue a permit.

Moreover, cautioning against granting relief in the absence of a strong showing of likelihood of success is the equally well-established principle that such a showing is required in a case where the effect of granting a preliminary injunction would be to give the plaintiff all the substantially available relief that the plaintiff would be entitled to in the event that the plaintiff ultimately prevailed in the action. That is also the case here, because if I were to order the GSA to issue the permit, the event would go forward as scheduled tomorrow barring a stay from the Court of Appeals and there would be nothing left to litigate; the case would be moot.

Now, as an initial matter, I would assume, without necessarily deciding, that the plaintiffs have shown a threat of irreparable injury. That is not really contested, I think. In any case, I assume.

The next question is whether the plaintiffs have shown the requisite likelihood that they will prevail on the merits of this action.

Now, in their memorandum they advanced one argument — indeed, I think it is limited to a footnote, perhaps not — that they have not pressed here on the argument and hearing. I think as a practical matter it is therefore abandoned, but I will deal with it anyway, and it is this. Although the plaintiff applied for a permit, which was in some sense an acknowledgment that they could not lawfully go forward holding this event on a federal property in its absence, it made the argument in their memorandum that the denial of the permit was inappropriate because the GSA has permitting authority only with respect to public areas within federal buildings and not outside federal buildings. Another way of putting the argument is that they are arguing they didn't need a permit in the first place from the federal government.

Assuming for the sake of discussion that that argument has not been abandoned, I reject it, and certainly hold that it is an argument on which the plaintiffs are not likely to prevail.

Section 102-74.465, which is in subpart B of Title 41 of the Code of Federal Regulations, provides that "Any person wishing to use a public area" — which relates to public areas of public buildings — "must file an application for a permit" and so forth, that subpart that spells out the details of the permitting application.

Section 102-74.460 states that the subpart in question establishes rules for the occasional use of public areas in public buildings as provided by Section 581(h)(2) of Title 40 of the United States Code. That statute says, in relevant part, and I quote, "The administrator may make available on occasion, on terms and conditions that the administrator considers to be in the public interest, an auditorium, meeting room, courtyard, rooftop, or lobby of a public building to a person, firm, or organization engaged in a cultural, educational, or recreational activity that will not disrupt the operation of the building."

I find that the space in question is a courtyard. I do that for a couple of reasons.

First of all, that is precisely how Mr. Taylor characterized it, using precisely that word during his argument. I think he was right on this point.

Secondly, the Merriam-Webster Dictionary says that the word "court" is a synonym of the word "courtyard" and among the definitions of the word court are these -- a manor, house or

large building surrounded by usually enclosed grounds, and an open space enclosed wholly or partly by buildings or circumscribed by a single building, or a wide alley with only one opening off the street.

I think, therefore, that the area in question is included in the permitting regulations. This falls within the GSA's authority. Certainly, the GSA has so construed the statute, and I think there is little or no likelihood of success on this highly technical and possibly abandoned argument as to GSA's authority.

So we come then to what is really the heart of the case, which is the plaintiffs' contention that the denial of the permitting violates the First Amendment.

Now, let me be entirely clear. There are a lot of people in this country who share the plaintiffs' view about <a href="Citizens United">Citizens United</a>. And even if there were nobody who shared <a href="Mr">Mr</a>. Wolfman's view, he has a perfect right to it. He has a perfect right to demonstrate against it. He has a perfect right to try to persuade others that he's correct. He has got a perfect right to try to persuade Congress to amend the <a href="Constitution to reverse Citizens United">Constitution to reverse Citizens United</a>. That's one of the things this country is all about. And I respect it and I think everybody else should respect it regardless of whether I or anybody else agrees with it.

All of that said, the First Amendment analysis here is

really crystal clear, and although there are some fine points of disagreement, its basic outlines are undisputed.

The first question is whether the area in question is a public forum or not. If it is a public forum in constitutional terms, the GSA's action is subjected to greater scrutiny than if it is not a public forum.

I am persuaded, for purpose of this application, both that it is not a public forum as a matter of law and that if the issue is one of fact, the plaintiffs have not presented evidence which would permit me to find or persuade me to find that it is a public forum.

We start with the fact of Magistrate Judge Cott's decision, I believe earlier this year, in the <u>Heicklen</u> case, subsequently adopted on the basis of Judge Cott's opinion by Judge Holwell and, for whatever significance it may have to anybody, not appealed by the recent authority, that as a matter of law the precise area that we are concerned with in this case is not a public forum.

Now, I understand that it is not controlling on me, but I find the reasoning persuasive. I understand that a higher court might conceivably take a different view of it, and so in the alternative I will address this as a matter of fact.

The plaintiff has the burden of proof on the public forum issue; I think there is no doubt about it. They have offered no persuasive evidence to support the public forum

1 argume

argument. To the extent that we have evidence in the record, it's all against them on this issue.

We have, first of all, the fact that the GSA says it has an established policy not to grant permits for events in that space -- certainly some evidence, right or wrong their policy might be, that this is not a public forum.

Secondly, Deputy Marshal Howard testified -- and, in any event, I take judicial notice -- that people come in and out of that area every day; there isn't any controversy about that. There is, however, no persuasive evidence that demonstrations, protests, or organized gatherings of any kind have ever taken place there. And it is as far from the soapboxes of Madison Square Park of years ago as one could possibly imagine.

Furthermore, the people do not enter and leave there without any scrutiny at all. Vehicular traffic is barred. It is accessible only after being passed through vehicle barriers, retractable vehicle barriers. And, moreover, at both ends of Pearl Street, and in the middle of Pearl Street, there are guard booths manned by court security officers who observe the pedestrians coming in or out and are in a position to sound an alarm if they see anything suspicious.

The plaintiffs place principal reliance here on the argument that there are, as they said and as I kidded them for so characterizing it, on the argument that hords of press

members gather in that area. Deputy Marshal Howard said not so; that big groups of press are kept on the Worth Street side of the building outside the traffic bollards, the vehicle bollards, and beyond the boundary line of the courthouse premises. They are not permitted in by the federal security people in large numbers. And the area where they gather is under the control of the city, not the federal government.

I credit all of that testimony. I credit his testimony that there have not been significant gatherings in the Pearl Street entrance plaza, and that, with the exception of occasional small numbers with the odd camera, the press in significant numbers does not gather outside the Pearl Street entrance.

Now, given that it is a nonpublic forum, the test is whether the denial of the permit was content neutral and reasonable. There is no evidence at all that it was anything but content neutral. There has been a compete failure of proof on that point. Indeed, the undisputed evidence establishes that the GSA ultimately acted, at least in part, pursuant to an established policy not to allow any permitted gatherings in that area, the essence of a content neutral policy, whether one agrees with it or not.

We move then to the question of reasonableness. I am going to assume, for the sake of brevity, that I review this question in all respects de novo.

I credit Deputy Marshal Howard's affirmation or declaration in all respects. There are clear security issues about the access by substantial numbers of persons — gatherings of substantial numbers of persons in that area. They are too clear to warrant extended discussion.

There is no way to know that the plaintiffs' prediction that this gathering would be 200 people or less will come to pass. It is a prediction that is convenient for purposes of this application. I don't question the sincerity of Mr. Wolfman and counsel in advancing it. But the fact of the matter is the event is on Facebook. Governments have been overthrown on such, what to call it, social media-generated outpourings of sentiment. I don't mean to compare this enterprise to any of that in detail. My only point about it is there is no way of knowing what would happen in terms of numbers, given the fact that this is not a secret and that the event has been advertised or publicized through the social media.

Moreover, I find that tomorrow, and in particular the hour, are both quite problematic, unusually problematic. Fridays are naturalization days in this building. They draw crowds of sometimes as many as — and I believe often more than — 400 people, including both naturalization candidates and accompanying family and friends. There are often — and, you know, if anybody disputes this, because this is a matter of

judicial notice, I will withdraw it, but I will judicially notice, in the absence of objection, that on Fridays, in advance of naturalization ceremonies, there are quite frequently long lines out the door of the courthouse and onto the street, or depending on how the traffic is managed on a given day, into the area between the State Supreme Court building and the federal court because of the extraordinarily heavy volume of traffic associated with the naturalization.

In addition, tomorrow at 4 o'clock I referred to the long-scheduled installation of Judge Nathan, an event to which a large number of people have been invited; someone used a figure in these papers of 150. Of course, this is another event the occurrence of which is well known in the legal community. There isn't any way to be sure how big a crowd turns out for that. And it is scheduled for precisely the same time as plaintiffs sought the permit for.

So that there are security concerns, traffic management concerns, access and egress concerns, and safety, apart from terrorism and criminal behavior concerns, all of which are implicated — reasonably implicated by the particular time and date of the event that plaintiff chose to apply for.

Now, I don't have before me the question of whether a permit application for a different time, a different day could constitutionally be denied. I don't have to rule on that. All I have to rule on is this one. And I find that all of the

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concerns advanced are reasonable, they reasonably justify the denial of the permit.

I want the plaintiffs to understand that I have also taken into account the argument that they make about the place being important to them and about alternative fora.

It's crystal clear from the e-mail chain, Plaintiff's Exhibit 1, that the sidewalk in front of 40 Centre Street is an adequate alternative forum and it's availability is not implicated by the GSA permit denial because it is not federal property, as both the plaintiffs have said and as I understand Mr. French's e-mail communications to have indicated. As far as I can see, though I may not be fully informed, they are at liberty to go to 40 Centre Street tomorrow afternoon at 4 o'clock, the plaintiffs. And this in fact was the preferred forum before all of this started. In any case, they surely haven't proved that it's not an adequate an alternative forum.

The argument is made by the plaintiff, also, that he doesn't like that forum so much because they want to do this in front of an active federal courthouse and that building is closed, hopefully for just a few more months until the Court of Appeals moves back in when the renovation is completed. Again, I'm not questioning anybody's sincerity, but Mr. Wolfman made clear in e-mails that that was his preferred forum after he knew it was closed for renovations.

Furthermore, there is an abundance, or seems to be an

abundance, of adequate and nearby alternative active federal courthouse opportunities. There is the Court of International Trade, which is actually closer to Foley Square than this building; it is right across Lafayette Street. There is the U.S. Bankruptcy Court for this district on Bowling Green -- a very active court. There is the U.S. District Court for the Eastern District of New York, which is at 225 Cadman Plaza West, which has the added benefit of a very large city park immediately across from the entrance as well as a street that is right in front of it.

So I understand that there are logistical concerns at this late hour. But with all due respect, those are matters that the plaintiffs should have considered earlier. And they knew at least as early as January 5th that Mr. French, despite having spoken earlier of applying for 500 Pearl Street, was indicating to the plaintiff that there were issues about 500 Pearl Street. They knew this permit was not a slam-dunk two weeks ago.

So that takes care of the nonpublic forum analysis.

Even if this were a public forum -- oh, I should add one more thing on it. Certainly, the Supreme Court's decision in <u>United States v. Grace</u>, 461 U.S. 171, supports my view of the public forum issue. In that case, the Supreme Court held that the Supreme Court and its grounds were not transformed into a public forum simply because the public is allowed freely

to enter and leave the grounds at practically all times and they are admitted to the building during specified hours. It sounds a lot to me like this building, Pearl Street, and the plaza in question.

Now moving to the public forum analysis, that, too, is clear.

The relevant standard is this. Even if it is a public forum, the government may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are content neutral, narrowly tailored to serve a significant federal interest, and leave open ample alternative challenge for communication of the information.

I have already disposed of two of those three criteria. This is content neutral and there are, and I find, ample alternative channels open for the communication. Even taking account the plaintiffs' preference for doing this symbolically in front of a federal courthouse, a preference that probably is not much, if any, constitutional relevance, a subject I addressed in Million Youth March, Inc. v. Safir, 18 F. Supp. 2d 334 at page 347.

So the only remaining question under that standard is the narrow tailoring question, and it is important in that regard to understand what that does and does not mean. It most assuredly does not mean that the government must adopt the least restrictive alternative to accomplishing its objectives.

It means, simply, that the government may not burden substantially more speech than is necessary to further the government's legitimate interests.

Now, that can't be considered apart from the alternative means open to the plaintiffs. Even taking their point that as a matter of preference they want to demonstrate in front of a federal courthouse, I've already detailed an abundance of them, all within walking distance of the site in question and at least two of them extremely close, a matter of vards.

There is also the possibility, although I hesitate to make a definitive call on it, but based on Mr. French's statements about the area behind the Supreme Court, even the possibility of their being in a position to do this on the state-controlled side of this triangular area that I have discussed. I'm not ruling on that; I'm simply noting that it is a possibility.

So what are we talking about, then? We're talking about whether the plaintiffs having to move ten feet to the state side of this triangular area, or 250 feet, or whatever exactly it is to the sidewalk in front of 40 Centre Street, or 450 feet, or whatever it is, to the front of the Court of International Trade, or a fraction of a mile, I think, to the front of the Bankruptcy Court on Bowling Green would so limit their ability to make the statement they want to make that I

would have to regard the burden as so substantial as to overcome the government's legitimate interests. I can't. It is just not on it. I cannot make such a finding. I cannot make such a ruling. It just isn't.

Now, therefore, I find as follows.

I'm assuming, because it is immaterial to the decision, the plaintiffs have made a showing of a threat of irreparable injury, but I find that they have most assuredly not shown a likelihood of success on the merits — absolutely not — and, therefore, the preliminary injunction must be denied.

I will save everybody time, effort and aggravation. If the plaintiffs intend to seek an injunction pending appeal from the Court of Appeals, they are obliged under Rule 8, in ordinary circumstances, of the appellate rules to come to me first. I will spare you. If such an application is made to me, I will deny it for the same reason that I have denied the preliminary injunction. You are free to go to the Court of Appeals for whatever relief you want as far as I am concerned.

The motion is denied.

I appreciate all of the effort that went into this on everybody's part. I've been there. I know what putting something like this together is like on short notice. You have my sympathy and my admiration.

Mr. Wolfman, go and demonstrate to your heart's

Decision

1	content but not right outside the Pearl Street entrance on
2	federal property.
3	That's my ruling.
4	OK. Thanks, folks.
5	That concludes the matter.
6	Is there anything else I have to deal with?
7	MR. OLIVER: Not from our side.
8	MS. KUEHLER: No, your Honor.
9	THE COURT: One other question I always ask when I
10	rule in this manner: Does anybody think I made a factual
11	mistake that is material to the result? If so, let me know.
12	And if I think you are right, I will correct it. And if it
13	changes the result, it changes the result.
14	Counsel?
15	MR. OLIVER: No, your Honor.
16	MS. KUEHLER: No, your Honor.
17	THE COURT: OK. Anybody think I overlooked some
18	controlling decision that would change the result?
19	MR. OLIVER: Not that I am aware of, your Honor. No.
20	MS. KUEHLER: No, your Honor.
21	THE COURT: OK. Thank you, all. I appreciate it.
22	I have Plaintiff's Exhibit 1. I will return it to the
23	plaintiffs here.
24	MR. OLIVER: Thank you, your Honor.
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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK	DOCUMENT FUNCTIONICALLY FILED
JARRET WOLFMAN and OCCUPY THE COURTS,	9/5/19
Plaintiffs,	50 #: 2/12/1d
-against-	12 Civ. 0443 (LAK)
WESLEY FRENCH, et al.,	
Defendants.	
ORDER	

LEWIS A. KAPLAN, District Judge.

The complaint in this case sought a declaration that the denial by the General Services Administration of a permit to hold a demonstration on January 20, 2012 was unconstitutional, an injunction requiring the issuance of such a person, and unspecified damages, costs and attorneys' fees.

The plaintiffs' motion for a preliminary injunction was denied on January 19, 2012, the events of January 20, 2012 now are history, and the claims for declaratory and injunctive relief appear to be moot. Nor has it appeared that there remain any viable claims for other relief. Accordingly, on February 1, 2012, the Court directed the plaintiffs to show cause, on or before February 9, 2012, why this action should not be dismissed as moot insofar as it seeks prospective relief and for failure to state a claim upon which relief may be granted insofar as it refers to retrospective relief. Plaintiffs have not responded to the order.

Accordingly, this action is dismissed as moot insofar as it seeks prospective relief and for failure to state a claim upon which relief may be granted insofar as it refers to retrospective relief. The Clerk shall enter judgment and close the case.

SO ORDERED.

Dated:

February 15, 2012

United States District Judge