*IN THE UNITED STATES COURT OF APPEALS*
*FOR THE THIRD CIRCUIT*

*No. 07-1461*

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*SUSAN STARTZELL, MARK DIENER, LINDA BECKMAN, RANDALL BECKMAN, DENNIS GREEN, GERRY FENNELL, JAMES CRUSE, ARLENE ELSHINNAWY, MICHAEL MARCAVAGE, LAUREN MURCH, NANCY MAJOR*

*Appellants*

*v.*

*CITY OF PHILADELPHIA; WILLIAM V. FISHER, individually and in his official capacity; JAMES TIANO, individually and in his official capacity; KAREN SIMMONS, individually and in her official capacity; PHILLY PRIDE PRESENTS, INC.; FRAN PRICE; CHARLES F. VOLZ, JR.*

*Appellees*

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*APPEAL FROM THE UNITED STATES DISTRICT COURT*
*FOR THE EASTERN DISTRICT OF PENNSYLVANIA*

*05-05287*

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# *BRIEF OF APPELLANTS AND JOINT APPENDIX VOLUME I*

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## *STATEMENT OF JURISDICTION*

Subject matter jurisdiction is proper over Plaintiff's federal civil rights claims pursuant to 28 U.S.C. §§ 1331 and 1343 and over his supplemental state law claims pursuant to 28 U.S.C. §1367. Appellate jurisdiction is proper over this case pursuant to 28 U.S.C. §1291 as this is an appeal from the final Orders of the United States District Court for the Eastern District of Pennsylvania dated August 3, 2006, August 8, 2006, August 9, 2006 and December 8, 2006.

## *STATEMENT OF ISSUES*

1. Where there was no dispute as to the material facts in the case and where the evidence established that Plaintiffs were deprived of their free speech rights based on their viewpoint and/or content and/or the Defendants' concern about the perceived negative reaction of the crowd to Plaintiffs' message, did the Trial Court err as a matter of law and abuse its discretion in denying Plaintiffs' Motion for Summary Judgment and granting Defendants' Motion for Summary Judgment.

2. Where the Philly Pride Defendants obtained a permit which allowed them to close off the streets within the event area to traffic but where the event itself was open to the general public, did the Trial Court err as a matter of law and abuse its discretion in finding that the permit obtained by the Philly Pride Defendants empowered Defendants to exclude persons from the event area who were expressing a contrary viewpoint?

3. Where the evidence established that Defendants acted to restrict Plaintiffs right to free speech because of their viewpoint/content, did the Trial court err as a matter of law and abuse its discretion in holding that the restrictions imposed by the Municipal Defendants constituted reasonable time, place and manner restrictions?

4. Did the Trial Court err as a matter of law and abuse its discretion in holding that a heckler's veto only applies to established regulations which serve to completely prohibit speech before it is undertaken based on anticipated listener reaction to the speech?

5. Did the Trial Court err as a matter of law and abuse its discretion in holding that the Supreme Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) acts to allow the Philly Pride Defendants to exclude Plaintiffs from the OutFest event held on the public streets and sidewalks.

6. The Trial Court erred as a matter of law and abused its discretion in finding that Plaintiffs were not denied equal protection of the laws.

7. Where the well settled case law clearly establishes the rights of individuals to engage in free speech activities on the public streets and sidewalks, did the Trial Court err as a matter of law and abuse its discretion in finding that the municipal defendants were entitled to qualified immunity?

8. Where Plaintiffs presented evidence showing that the Philly Pride Defendants conspired with the Municipal Defendants to violate Plaintiff's rights protected under the First Amendment, did the Trial Court err as a matter of law and abuse its discretion in granting Defendants' Motion for Summary Judgment?

9. Did the Trial Court err as a matter of law and abuse its discretion in granting the Municipal Defendants' Motion for Summary Judgment on the issue of wrongful arrest and malicious prosecution.

## *STATEMENT OF THE CASE*

This action was brought to protect Plaintiffs' constitutional rights from the unconstitutional policies, practices and customs of the City of Philadelphia and its duly appointed and/or elected officials. These policies, as evinced through Defendants' unlawful arrest, harassment and intimidation of Plaintiffs, have had the effect of frustrating and interfering with the exercise of Plaintiffs' constitutionally protected speech activities and free exercise of religion. Plaintiffs also have alleged that the Philly Pride Defendants conspired with the Municipal Defendants to violate Plaintiffs' constitutionally protected rights.

Plaintiffs filed a Motion for Partial Summary Judgment seeking an entry of judgment as a matter of law on all of their claims against the Municipal defendants. The Municipal Defendants as well as the Philly Pride Defendants also filed Motions for Summary Judgment. On January 18, 2007, the Honorable Lawrence

Stengel entered an Order and Opinion denying Plaintiffs' Motion for Partial Summary Judgment and granting summary judgment in favor of all Defendants. Plaintiffs then timely filed this appeal.

## *STATEMENT OF FACTS*

Plaintiffs (sometimes referred to as "Philly 11") are Christians who believe, and whose religion teaches, that homosexuality is sinful. They further believe that it is their duty to God to warn others about the destructiveness of sin through public proclamation of the gospel of Jesus Christ. (JAII-21) To carry out this duty, Plaintiffs regularly go to different locations to peaceably express their message in love that homosexual behavior is sinful and to encourage passersby to be set free from sin through putting their faith and trust in Jesus Christ. (Id.)

Plaintiffs display signs with a biblical message and offer literature to passersby in an effort to persuade men and women to abandon their sinful lifestyle and place their faith and trust in Jesus Christ. (Id.) At the same time, they also engage in other peaceful expressive activities including, but not limited to, open air preaching, talking individually to people about the Scriptures, praying, singing, playing music, and worshiping their Lord and Savior Jesus Christ. JAII – 21-22.

On October 10, 2004, Defendant, Philly Pride Presents, Inc. ("Philly Pride"), a private organization, held an event called "Outfest" on the public streets and sidewalks of Philadelphia. Outfest is an annual event in which Philly Pride hosts a

block party to celebrate "National Coming Out Day", a celebration of the individual's proclamation of his/her homosexuality. JAII-309. Outfest activities are held on the public streets and sidewalks within an area of approximately fifteen (15) city blocks described by event organizers as the "GAYborhood". JAII- 310-312.

Prior to the event taking place Defendant Tiano and Defendant Fisher met with representatives of the event organizers on about ten (10) occasions. During many of these meetings they specifically discussed how to handle any demonstrators that would be present. JAII – 70-83; 84-87; 223-224; 261-266. The Philly Pride Defendants also advised the City Defendants that they would have present a security force known as the "pink angels" and discussed the actions that the "pink angels" would be taking. JAII -191, 192, 261-262; 217-220. The "pink angels" would be carrying pink Styrofoam boards, blowing whistles and shadowing Plaintiffs. JAII– 264-265. The sole purpose of the "pink angels" presence was to prevent Plaintiffs from being able to get their message out and to frustrate Plaintiffs so greatly by blocking their access to event participants, holding the foam boards and blowing whistles that the Plaintiffs would not want to come again. JAII – 88-90; 230; 322; 335. Defendants Fisher and Tiano were well aware of the strategy that the Philly Pride Defendants directed the "pink angels" to take. Even though Defendants Fisher and Tiano were concerned about the strategy, they

did nothing to dissuade the Philly Pride Defendants and instead, through their silence, encouraged and supported their activities. JAII–228-230; 264-266; 334-335.

Defendant Tiano, at roll call, advised the police officers that they knew that Plaintiffs were going to be attending the event. He referred to Plaintiffs as the "religious right" and described their message as being from the "religious right". JAII – 223-224; 334. Defendant Tiano further advised the police officers that there would be people in pink shirts, called the "pink angels", working with the police to exchange information. The "pink angels" would be present to act as counter-protestors and their duties would include acting as a human barricade and to block the signs that Plaintiffs would be holding. JAII - 334. Defendant Tiano stated that he was sure that this (the "pink angels'" actions) would cause a problem and that it will be interesting to see what happens. JAII - 334.

The day of the event, Plaintiffs were met at the parking lot by members of the Philadelphia police department including Defendant Captain Fisher. JAII-268; JAII-335. As Plaintiffs were walking down the sidewalk (escorted by the police officers and Defendant Fisher) to enter the event area, Plaintiffs were met by a group of individuals wearing pink shirts who created a blockade to prevent Plaintiffs from entering the event area. JAII -271-272; 335.

After a delay of several minutes, the police finally ordered the individuals to stop blocking the sidewalk. JAII – 233-234; 277; 335.

Plaintiff, Michael Marcavage then tried to enter the event but was confronted by Defendant, Cpt. Fisher, who told Plaintiff that he "did not want any silliness". JAII – 277-278. Cpt. Fisher was concerned about the effect that Plaintiffs' message would have on the crowd attending the event. JAII – 279-282. He did not, however, give a similar instruction to the "Pink Angels" who were surrounding Plaintiffs and heckling them. JAII -283; 335.

After Plaintiffs were able to enter the event area, Plaintiff, Michael Marcavage spoke with Defendant Fisher about whether there was a particular location from which Plaintiffs could express their message. Captain Fisher responded that, because Outfest was located on public streets and sidewalks, Plaintiffs could go wherever they wanted. JAII-279; 335. Plaintiffs then chose a location on the public street to preach and convey their message. JAII – 285-286; 335.

As soon as Plaintiffs entered the event area, though, they were surrounded by the "Pink Angels" who formed a tight circle around them, isolating Plaintiffs from other Outfest attendees. JAII-335. The Pink Angels then began blowing ear-piercing whistles and hollering in loud voices. They also held pink styrofoam

boards that stood approximately ten (10) feet high. These actions prevented Plaintiffs' message from reaching other Outfest attendees. JAII-335.

Plaintiffs asked Captain Fisher to take action against the Pink Angels, but he refused to do so. JAII-335. The noise generated by the Pink Angels prompted Henry David, the Outfest emcee, to demand that police "move [Plaintiffs] out of my way" because they were "annoying." JAII-335.

Defendant Fisher then told Plaintiffs that they had to move and that Plaintiffs would be arrested if they did not do so. JAII- 287-289; 335. Plaintiffs agreed to move and complied with Cpt. Fisher's request. JAII-224; 335. Captain Fisher then escorted Plaintiffs north on 13th Street towards Walnut Street. JAII-335.

After about a block, Captain Fisher told Plaintiffs to stop at that location on the street and that they could preach there. JAII-110; 335. Shortly after Plaintiffs began speaking at the location approved by Captain Fisher, Plaintiffs were told that they had to move to Walnut Street, an area on the outside perimeter of OutFest. JAII-237; 335. This was because Defendant Tiano was concerned about how the crowd was reacting to Plaintiffs' message. At the same time, Plaintiffs were surrounded about 30-40 other people including police officers and also by the Pink Angels who were still holding their large signs. JAII – 89-90; 291-292; 335. Plaintiffs were not given the option to move to any other location in the event area;

they were directed to a specific location by Defendant Tiano and that was the only place they would be allowed to go. JAII – 241; 335.

The area that Defendant Tiano Ordered Plaintiff to move to was away from the people attending the event and was less crowded. JAII-245. No one else attending the event had their movements restricted like the Defendants' restricted Plaintiffs' movements. JAII-250; 335.

When he heard this order, Mr. Marcavage approached Defendant Tiano and asked him to cite the law Plaintiffs were allegedly violating. Tiano refused to respond. JAII-335. Mr. Marcavage then voiced his concern that the order to relocate along the outer perimeter of Outfest would prevent Plaintiffs from conveying their message to their intended audience. Chief Inspector Tiano did not respond to Mr. Marcavage's concerns, but at one point told a police officer that if Plaintiffs did not move soon, to "call for a wagon". JAII- 243-244.

Plaintiffs agreed to move, but did not want to move towards Walnut Street, but rather to another area of the festival away from the area where the vendors were. JAII-111-119; 253; 335. Chief Inspector Tiano informed Plaintiffs that they could not move in the direction that they wanted to move, but refused to tell Plaintiffs why or what law they were allegedly violating. JAII-246, 250-252.

Plaintiffs then began moving away from the area that Captain Fisher had told them was an acceptable place to be. JAII-246-247. As Plaintiffs began

moving Tiano immediately stopped Plaintiffs and placed them under arrest. JAII-247. Plaintiffs were at the site of the event for less than 30 minutes before they were arrested. JAII-335.

Up to the time they were arrested, Plaintiffs had not been doing anything wrong or violating any laws. JAII- 236-237. Plaintiffs were arrested for failing to comply with Chief Tiano's Order to move to the corner of Walnut and 13th Streets. JAII-248.

All Plaintiffs were then handcuffed by police, herded into a paddy wagon, and taken down to a police station for booking. Plaintiffs were placed under arrest at approximately 1:30 pm on the afternoon of October 10, 2004. JAII-335. Plaintiffs were incarcerated for approximately 21 hours and were charged with many crimes, including hate crimes. JAII- 248-249. All criminal charges were ultimately dismissed against all Plaintiffs.

## ***STANDARD OF REVIEW***

When reviewing a District Court's decision granting summary judgment, the Court of Appeals exercises plenary review and applies the same test used by the District Court. *U.S. ex rel. Quinn v. Omnicare Inc.*, 382 F.3d 432, 436 (3d Cir. 2004); *Rivas v. City of Passaic* 365 F.3d 181, 193 (3d Cir. 2004). A district court may grant summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

The moving party bears the burden to show an absence of any genuine issues of material fact. "[I]nferences to be drawn from the underlying facts contained in the evidential sources ... must be viewed in the light most favorable" to the non-moving party. *Hollinger v. Wagner Mining Equipment Co.,* 667 F.2d 402, 405 (3d Cir.1981). "[I]f a disputed fact exists which might affect the outcome of the suit under the controlling substantive law," summary judgment is not appropriate. *Belitskus v. Pizzingrilli,* 343 F.3d 632, 639 (3d Cir. 2003). Any doubt a court has about the existence of a genuine issue of material fact should be resolved in the non-moving party's favor. *Continental Ins. Co. v. Bodie,* 682 F.2d 436, 438 (3d Cir.1982). Summary judgment is appropriate when there is no genuine issue of material fact to be resolved at trial. *Gruenke v. Seip,* 225 F.3d 290, 298 (3d Cir. 2000).

## *SUMMARY OF ARGUMENT*

This case at its core raises two fundamental questions: whether a private organization has the right to exclude people from an event held on the public streets and sidewalks that is open to the general public and whether police can justify restrictions on free speech simply because of the crowd's reaction, or possible reaction, to that speech. In essence, the trial court held that Plaintiffs could be on the streets (public forum), but that they could then be excluded from

the public forum because of their viewpoint and the content of their expressive activity.

When considering whether free speech rights have been violated, the Court must examine whether the speech deserves protection, the nature of the forum, and whether the government's proffered justification satisfies the appropriate standard. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 797 (1985). Here, the Trial Court conceded that Plaintiffs' speech was protected and that the area where the OutFest event was being held was a public forum.

The remaining question, then is whether the government's proffered justification satisfies the appropriate standard. As a matter of law, discrimination against speech because of its viewpoint is presumed to be unconstitutional. *Rosenberger v. Rectors & Visitors of the Univ. of VA.*, 515 U.S. 819 (1995). It seems obvious that since it was Plaintiffs' viewpoint about homosexuality that was being restricted from the event by Defendants, Defendants were engaging in unconstitutional viewpoint discrimination. However, even if the restrictions were not viewpoint based, they certainly were based upon the content of Plaintiffs message. Speech is content-based when it is based on the likes or dislikes of an audience. *Forsyth County vs. Nationalist Movement*, 505 U.S. 123, 135 (1992). In this case, there is no real dispute that Defendants acted because of the content of

Plaintiffs' speech and the crowd's actual/anticipated reaction to that speech– they admit as much.

The question then is whether Defendants can satisfy the strict scrutiny analysis which applies when discrimination is based on the content of the speech. However, the Trial Court avoids this issue, instead finding that Plaintiffs' claim that Defendants acted because of the content of their message is wrong because the Philly Pride Defendants had a valid permit for the event. This permit only allowed Defendants to block off the streets to traffic. It did not (nor could it have) give them exclusive control over the event area. Nevertheless, the Court held Defendants had the right to exclude Plaintiffs from the event under the United States Supreme Courts' decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) even though Defendants agree that the event was open to the general public without restriction, the area where Plaintiffs sought to engage in free speech activities was on the public streets and sidewalks and that Plaintiffs were not seeking to participate in the event. However, the Trial Court's reliance on *Hurley* is misplaced.

Unlike the situation in *Hurley*, Plaintiffs here only sought to be able to engage in free speech activities and express their message on the public streets and sidewalks where the event was being held. They did not seek to participate in the event. *Hurley* does not preclude this. In fact, the type of free speech activity that

Plaintiffs sought to engage in was completely permissible and could not be excluded by Defendants. See, *Gathright v. City of Portland, Oregon*, 439 F. 3d 573 (9th Cir. 2006).

The Trial Court also erred in holding that a heckler's veto only applies to situations where the government acted preemptively to restrict speech before it took place. In fact, the seminal case on heckler's vetoes, *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), addressed a situation where a Pastor had been arrested *while preaching* in a church in Chicago, because an agitated crowd had gathered outside the church in response to his message. The Supreme Court reversed the Pastor's conviction for disorderly conduct his speech could not be restricted simply because the crowd was getting upset. *Terminiello* at 4.

The evidence in this case clearly establishes that Defendants acted to restrict Plaintiffs' speech because of Defendants' concern about the crowd's reaction to Plaintiffs' message. Had the Trial Court applied the proper standard for heckler's vetoes, Plaintiffs submit that the Court would have been compelled to find that Defendants' actions constituted an unconstitutional heckler's veto. Because the Trial Court erred in its finding that Defendants had the right to exclude Plaintiffs from the event area and that the heckler's veto did not apply, its rulings on the other issues in the case likewise must be reversed because they depend on those two findings.

The Trial also erred in finding that the Defendants were entitled to qualified immunity. The doctrine of qualified immunity protects government officials from civil damage suits for official conduct that does not violate clearly established law of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, (1982). At the time of the OutFest event, Plaintiffs' right to engage in free speech activities on the public streets and sidewalks was clearly established. As police officers sworn to uphold among other things, the Constitution of the United States of America, these Defendants are charged with knowing and understanding our constitutionally protected rights. As a result, the Trial Court erred in finding that Defendants were entitled to qualified immunity.

Finally, the Court erred in finding that there was not sufficient evidence of a conspiracy to submit the claim to the jury. This ruling contradicted a prior ruling made by the Court denying Defendants' Rule 12(b)(6) Motion to Dismiss. Moreover, it ignored the substantial facts accumulated by Plaintiffs which provided evidence of the conspiracy, facts which the Court was required to weigh in favor of Plaintiffs. The question of whether an agreement exists should not be taken from the jury in a civil conspiracy case so long as there is a possibility that the jury can "infer from the circumstances that the alleged conspirators had a 'meeting of the minds' and thus reached an understanding" to achieve the conspiracy's objectives...." *Smith v. Wambaugh* 29 F.Supp.2d 222, 229 (M.D.Pa.,1998).

Plaintiffs submit that there was more than sufficient evidence from which the jury could infer a civil conspiracy. As a result, the Trial Court erred in granting summary judgment to Defendants on this issue.

## *ARGUMENT*

### *1. Ban On Expression Deprives Philly 11 of Constitutional Rights*

In determining whether Defendants violated Plaintiffs' First Amendment right to free speech, the Court must examine (a) whether the speech deserves protection, (b) the nature of the forum, and (c) whether the government's proffered justification satisfies the appropriate standard. *Cornelius,* 473 U.S. at 797; *Parks v. City of Columbus*, 395 F.3d 643 (6th Cir. 2005).

#### *A. Plaintiffs' Expression Constituted Protected Speech and Took Place in a Public Forum – the First Two Prongs of the Test are Satisfied.*

In its opinion, the Trial Court concedes that Plaintiffs have satisfied the first two prongs of the test set forth in *Cornelius*. Initially, the Trial Court agrees that Plaintiffs' speech was protected. JAI- 15.

The Trial Court also held that the area where the OutFest event took place constituted a public forum. JAI – 16. The Court could not have reached any other conclusions for it is well settled that a government cannot alter the status of a public forum by government fiat. See, e.g., *United States Postal Service vs. Council of Greenburgh Civic Assn.*, 453 U.S. 114, 133 (1981)(The government "may not by its own *ipse dixit* destroy the "public forum" status of streets and

parks which have historically been public forums...."); *Irish Subcommittee of Rhode Island Heritage Com'n. v. Rhode Island Heritage Com'n*, 646 F. Supp. 347, 353 (D.R.I. 1986).

Thus, despite the existence of a permit to block traffic, the streets and sidewalks with the OutFest event areas remain open for free access and continue to serve as a public thoroughfare.

### *B. Prohibition of Expression is Not a Reasonable Time, Place and Manner Restriction*

The state may only enforce regulations of the time, place, and manner of expression that are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *United States Postal Service v. Council of Greenburgh,* 453 U.S. 114, 132 (1981); *Perry Educ. Ass'n. vs. Perry Local Educators' Ass'n.*, 460 U. S. 37, 45 (1983).

#### *1. Plaintiff's Expression was Restricted Because of its Content*

The Supreme Court has made it clear that a restriction on speech is content-based when it is based on the likes or dislikes of an audience. *Forsyth County vs. Nationalist Movement*, 505 U.S. 123, 135 (1992); *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) In short, "[l]isteners reaction to speech is not a content-neutral basis for regulation." *Forsyth Co.* at 134. *See Texas v. Johnson*, 491 U.S. 397, 414-15 (1989) (Supreme Court held that

regulations which consider anticipated "unrest" or "violent reaction" to expression are content-based and therefore unconstitutional).

In this case there can be no real dispute that Defendants acted because of the content of Plaintiffs' speech. The Philly Pride Defendants did not want Plaintiffs there because Plaintiffs' message was contrary to the celebration of homosexuality being proclaimed at OutFest. See e.g. JAII -84-90, 335. Likewise, the Municipal Defendants acted only because they were concerned about the crowd's reaction to Plaintiffs' message. JAII – 300-302.

The fact is that if Plaintiffs had been at the event proclaiming support for the homosexual lifestyle, there would have been no objection. The only objection came because Defendants did not want Plaintiffs' message, that homosexuality is sin, Christ can set you free, to be proclaimed at the event. This is classic content based discrimination.

In its Opinion, the Trial Court argues that Defendants did not act because of the content of Plaintiffs' message because the Philly Pride Defendants had a valid permit for the event. JAI – 16. The Trial Court is correct that Plaintiffs have not challenged the constitutionality of the City's permitting scheme. However, the case is not, as the Trial Court claims, about the permit. JAI-_17. The permit which Philly Pride obtained only allowed them to block off the streets to vehicular traffic. JAII- 312-312a. That is all. They did not have an exclusive use permit

which allowed them to control all speech within the event area and determine who could attend the event and who could not. See, e.g. *Sistrunk v. City of Strongville*, 99 F.3d 194 (6th Cir. 1996); *Schwitzgebel v. City of Strongsville*, 898 F. Supp. 1208 (N.D. Oh. 1995).

There can be no legitimate dispute that the reason Defendants acted the way that they did towards Plaintiffs and took the actions that they did against Plaintiffs was because of the content of Plaintiffs' message and/or its viewpoint and the crowd's possible reaction to that message/viewpoint. Accordingly, the restrictions were not, by definition, content neutral. As a result the time, place and manner restriction analysis does not apply.

### 2. *Prohibition Is Not Narrowly Tailored*

Even assuming, though, that Defendants' actions were content neutral, Defendants must establish that the actions that were taken against Plaintiffs were narrowly tailored to serve a significant government interest and left open ample alternative channels of communication. *USPS v. Council of Greenburgh, supra*; *Perry, supra*. In its decision, the Trial Court errantly placed the burden on Plaintiffs to prove that there exclusion from OutFest was not narrowly tailored to serve a significant governmental interest. JAI – 19. This, however, was actually Defendants' burden. Indeed, the Trial Court never actually made a finding that the Defendants had met their burden of proving that the restrictions were narrowly

tailored, what significant governmental interest was served or that there were ample alternative channels of communication so that the burden would then shift to Plaintiffs. Nevertheless, the evidence establishes that the restrictions were not narrowly tailored and that there were not ample alternative channels of communication available to Plaintiffs.

In order to regulate speech constitutionally, a restriction must be narrowly drawn so as not to infringe on protected speech. *Grayned v. City of Rockford,* 408 U.S. 104, 116-17 (1972). A restriction is "narrowly tailored" if it eliminates no more evil than it seeks to remedy. *Frisby Schultz,* 487 U.S. 474, 485 (1988). In this case, the restriction imposed upon Plaintiffs was complete removal from the event area and incarceration until the event was over. This restriction was not narrowly tailored, it completely shut down Plaintiffs' speech.

In its opinion, the Trial Court acknowledges that there are many facts and characterizations of facts that are contested by the parties. The Court states, however, that none of these differences constituted material issues of genuine fact and, therefore the Motions can be decided as a matter of law. JAI – 5. Plaintiffs submit that there are facts that are not in dispute from which the Court could have rendered its ruling. For example, the parties do not dispute that the OutFest event was open to the general public. JAII – 312-312a. The parties also do not dispute that Defendants took action to restrict Plaintiffs' speech because the viewpoint

being expressed by Plaintiffs was contrary to that of the event and that Defendants were concerned about the crowd's reaction to that message. JAII -225-226, 227, 239, 249, 254, 279-282. Defendants further do not dispute the Plaintiffs were not allowed to move freely about the event area, as other people who were attending the event were allowed to do. JAII – 256,250-252.

If, when deciding Plaintiffs' Motion for Summary Judgment, the Court found that these facts as presented by Plaintiffs were in dispute, then the Court could, as it did, deny Plaintiffs' Motion. However, when ruling on Defendants' Motion for Summary Judgment, the Court was required to weigh all facts in favor of Plaintiffs. This, the Court did not do. Rather, in rendering its decision granting Defendants' Motion, the Court relied upon in own determination about facts that were disputed by the parties.

For example, the Court made findings that it was Plaintiffs' conduct that resulted in Plaintiffs being removed from the event and, thus, Plaintiffs' exclusion from OutFest was narrowly tailored to serve a significant governmental interest. However, not only were the facts relied upon by the Court in reaching this conclusion material facts that are in dispute, Plaintiffs submit that a reasonable interpretation of the undisputed facts actually compels an opposite conclusion.

The evidence established that Plaintiffs had not done anything wrong up to the time that they decided to move south on 13th Street, when Defendant Tiano

wanted them to go North. JAII- 236-237. It is also not disputed that the reason Defendant Tiano wanted them to move was because he felt the crowd was getting upset because of Plaintiffs' message. JAII -225-227, 239, 249, 254, 279-282. While Defendant Tiano also testified that Plaintiffs had to move because they were blocking the vendors, this excuse was a pretext. [1] After all, if blocking the vendors was the primary problem, why were Plaintiffs not told they were blocking vendors and why were they not allowed to move to another location within the event? Instead, Defendant Tiano ordered them to move to 13th and Walnut and arrested them when they did not do so. JAII -245-248.

In fact Defendant Tiano testified that he never intended to exclude Plaintiffs from the event (Plaintiffs dispute this assertion as discussed in Section 7, *infra.).* Rather, Defendant Tiano testified that Plaintiffs were arrested and removed from the event because they chose to walk South instead of North on 13th Street.

Important too, is that fact that Defendants ordered Plaintiffs to move to an area on the outskirts of the event area, away from the main activity of the event where they wanted to be because of the content of their message and Defendants'

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[1] At the time they were ordered to move, Plaintiffs were surrounded by the police and the pink angels. Defendant Fisher described it as a "conglomerate of a lot of people around him". JAII -291-292. However, the Defendants were not concerned about anyone else who was blocking the vendors, only with Plaintiffs who were not even the ones closest to the vendors. JAII-250; 335. Moreover, Plaintiffs were never told that they were blocking vendors.

concern about how the crowd was going to react to that message. JAII -225-227, 239, 249, 254, 279-282. This leads back to the conclusion that the restriction was not content-neutral and, therefore, the time, place, manner restriction analysis does not apply. Additionally, it is clear, based on these facts, that the restriction amounted to censorship, was imposed on Plaintiffs based upon the subjective beliefs of the police, and was not narrowly tailored to meet a significant governmental interest.

Plaintiffs submit that the undisputed facts in the case compel a finding that Defendants violated Plaintiffs' constitutionally protected right to free speech and that Summary Judgment should have been entered in their favor. At the very least, however, the facts that the Court relied upon in granting summary judgment were not weighed in Plaintiffs favor as required nor did the Trial Court give proper consideration to the fact that there were material facts that were in dispute concerning Defendants' Motion for Summary Judgment. As a result, the Court's decision should be reversed.

### *3. Prohibition Leaves No Ample Alternative Channels of Communication*

Defendants also fail to show the existence of ample alternative channels of communication. *Perry*, 460 U.S. at 45. Plaintiffs wished to engage in a number of speech activities, ranging from use of signs, leafleting, conversation about their faith, counseling with individuals, and public preaching. However, Defendants

precluded Plaintiffs from engaging in all of these activities and offered no reasonable alternative means for expressing the message.

That Plaintiffs could have held their own event or demonstrated outside the event, as the Court argues, does not satisfy this requirement. It is not a viable alternative to tell Plaintiffs that they can convey their message in another area or at another time. *See Mahoney v. Babbitt,* 105 F.3d 1452, 1459 (D.C. Cir. 1997)(The Court held that government could not choose what public forum speaker could use noting "it cannot rightly be said that all such forums are equal"); *U.S. v. Grace*, 461 U.S. 171, 180-181 (1983)(Governments' argument that speakers could convey message from across street did not cure unconstitutional ban on speech on the sidewalk). Plaintiffs strategically sought to speak on the public streets during the OutFest event because of the opportunity of communicating their message to the maximum number of individuals available at that time. Plaintiffs were not afforded any other opportunity to speak to the same individuals at any other location or any other time other than the desired station at the desired time.

### *C. The Police Cannot Restrict Speech Because of Concerns about the Crowd's Reaction – There is no Heckler's Veto*

The final prong of the *Cornelius* test is whether the government's proffered justification satisfies the appropriate standard. In granting Defendants' Motion, the Trial Court failed to recognize that Defendants' actions were taken because of Plaintiffs' viewpoint. The Court also misinterpreted the heckler's veto. Finally,

the Court misapplied the Supreme Court's holding in *Hurley v. Irish- American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

Plaintiffs do not, as the Trial Court contends, claim a freedom of speech without limits. What Plaintiffs do claim is the right to engage in free speech on the public streets and sidewalks without restriction based upon their viewpoint and without having that right restricted simply because the crowd does not like their message. These are not rights that Plaintiffs pulled out of thin air, but rather have existed "time out of mind". See e.g., *Hague vs. CIO*, 308 U.S. 496, 515 (1939); *Rosenberger v. Rectors & Visitors of the Univ. of VA.*, 515 U.S. 819 (1995).

### *1. Viewpoint Discrimination is Always Unconstitutional*

Discrimination against speech because of its viewpoint is presumed to be unconstitutional. *Rosenberger v. Rectors & Visitors of the Univ. of VA.*, 515 U.S. 819 (1995). In *Perry*, the Supreme Court warned that "viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech'". *Id.* at 62. The mere fact that Plaintiffs' viewpoint may be one that certain people find unpleasant or uncomfortable and do not want discussed publicly, is not enough to justify suppression of that speech. *Tinker v. DesMoines*, 393 U.S. 502, 509 (1969); *Faith Center Church Evangelistic Ministries v. Glover*, 480 F. 3d 891, 2006 WL 2684813 (9th Cir. 2006)(Viewpoint discrimination occurs when the government

prohibits speech by particular speakers thereby suppressing a particular view about a subject.). As the Third Circuit Court of Appeals recently held in *Monteiro v. City of Elizabeth* 436 F.3d 397, 404 (3d Cir. 2006): Viewpoint-based restrictions violate the First Amendment regardless of whether they also serve some valid time, place, manner interest.

There is no dispute that the area of the OutFest event was open to the general public. JAII-279, 312-312a. However, Plaintiffs discovered immediately upon entering the event that even though the event area was open to the general public and that other people were allowed to freely walk, congregate, and speak anywhere within the event area, Plaintiffs and their contrary viewpoint opposing the celebration of the homosexual lifestyle were not going to be afforded that same privilege. JAII-335.

In this case, Defendants acted to restrict Plaintiffs' movements within the event area and sought to restrict Plaintiffs to an area on the outside edge of the event based on Plaintiffs' viewpoint that the Bible teaches that "homosexuality is sinful, Christ can set you free". JAII – 225-227, 239, 249, 254, 279-282. Defendants allowed contrary viewpoints, such as that of the "pink angels" supporting the homosexual lifestyle, but restricted Plaintiffs' viewpoint from the forum. This is classic viewpoint discrimination. As such, the Trial Court erred as

a matter of law in denying Plaintiffs' Motion for Summary Judgment on their claim that their First Amendment rights had been violated.

### *2. Heckler's Vetoes are Prohibited*

One of the significant questions this case raises is whether a police officer's "concern" about audience response to a speaker's viewpoint can serve as a basis for forbidding or restricting the exercise of First Amendment rights. The law is clear it cannot.

When the police impose restrictions on speech based on the reaction of others, the police allow for a heckler's veto, granting unruly hecklers the power to eliminate the speech they happen to dislike. These sorts of restrictions are uniformly unconstitutional. *E.g. NAACP v. Claiborne Hardware*, 458 U.S. 886, 932-34 (1982); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) (protestors cannot be punished because of "resentment" of spectators); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991)( "Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.").

"As a general matter, ...in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Boos v. Barry,* 485 U.S. 312, 322 (1988); *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46, 56 (1988); *Collin*

*v. Smith*, 578 F.2d 1197 (7th Cir. 1978). This is true even if "the speech in question may have an adverse emotional impact on the audience." *Id.* at 55. *See also Robb v. Hungerbeeler*, 370 F.3d 735, 743 (8th Cir. 2004) ("'The First Amendment knows no heckler's veto'")

In its opinion, the Trial Court dismisses Plaintiffs' argument that Defendants actions resulted in an unconstitutional heckler's veto. The Trial Court held:

> This branch of First Amendment jurisprudence is inapposite because it concerns government censorship that completely prohibits speech before it is made based on anticipated listener reaction to the speech. JAI – 22.

If the Court is correct, then the free speech protections afforded under the First Amendment mean little, if anything. After all, popular speech does not need protection, controversial speech does. Rather, it is clear that the heckler's veto applies equally, if not more strongly, to those situations where the police restrict speech that is actually taking place because of the crowd's reaction to that speech, real or perceived.

The seminal case on a heckler's veto is *Terminiello v. City of Chicago*, 337 U.S. 1 (1949). In *Terminiello*, the Supreme Court addressed a situation where a Pastor had been arrested while preaching in a church in Chicago, because an agitated crowd had gathered outside the church in response to his message. In reversing the Pastor's conviction for disorderly conduct based upon his speech which upset the crowd, the Court held:

> It [free speech] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest. . . . There is no room under our Constitution for a more restrictive view." *Terminiello*, at 4.

In *Ovadal v. City of Madison, Wisconsin*, 416 F.3d 531 (7th Cir. 2005), the Court addressed a situation where the police had prevented protestors from having pro-abortion signs alongside a roadway because motorists were getting angry. In reversing the grant of summary judgment in favor of the Defendants, the Court held:

> "Listeners' reaction to speech is not a content-neutral basis for regulation." . . . "Speech cannot ... be punished or banned, simply because it might offend" those who hear it. . . . It cannot be denied that drivers who yelled, gestured, and slammed on their brakes when they saw Ovadal's signs created a safety hazard on the Beltline. However, it is the reckless drivers, not Ovadal, who should have been dealt with by the police, perhaps in conjunction with an appropriate time, place, and manner restriction on Ovadal. The police must preserve order when unpopular speech disrupts it; "[d]oes it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto." . . .
>
> *Ovadal*, at 537.

See also, *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966) ("Participants in an orderly demonstration in a public place are not chargeable with the danger,

unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence"); *Worldwide Street Preachers' Fellowship v. City of Owensboro*, 342 F. Supp. 2d 634 (W.D. Ky 2004); *Grove v. City of York, PA*, 342 F. Supp. 2d 291 (M.D. Pa 2004).

"Consider a parallel: the police are supposed to preserve order, which unpopular speech may endanger. *Does it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto.* (Emphasis supplied.)" *Hedges v. Wauconda Community Unit Sch. Dist No. 118, et al.,* 9 F.3d 1295, 1299 -1300 (7th Cir. 1993). See also, *Forsyth County,* 505 U.S. at 133-34 (It is unconstitutional for government to restrict expressive activities based upon the anticipated hostile reaction of others since it turns on "the public's reaction to speech.")

In this case, the facts show that Defendants were concerned only about the crowd's reaction to Plaintiffs' message and took every step including ultimately arresting Plaintiffs, to get Plaintiffs out of the area so they could maintain "peace". Indeed, Defendants candidly admitted that they were concerned about how the crowd would react to Plaintiffs' message. JAII -225-226, 239, 249-250, 254, 278-278a-c, 279, 281-282. However, rather than take steps to control the crowd and protect Plaintiffs' First Amendment rights, , the Defendants violated Plaintiffs' rights by restricting their movements and ultimately arresting Plaintiffs. Defendant

Tiano perhaps put Defendants' attitude towards the situation best: "Once he [Plaintiffs] left [by way of Defendants' having Plaintiffs' arrested], it was like a different event". JAII-250.

The evidence in this case clearly establishes that the actions taken by Defendants were guided directly by the content of Plaintiffs' message and the crowd's response or anticipated response to that message. Then, when Plaintiffs' refused to comply with Defendant Tiano's unlawful order to leave and instead, sought to move to a different area of the event, on the public streets and sidewalks, Defendants had Plaintiffs placed under arrest.

The Trial Court clearly erred when it found that the "heckler's veto" analysis did not apply to these facts. Had the Court properly applied the law to the facts it would have been compelled to find that Defendants' actions constituted a hecklers veto.

### *2. OutFest is Not Empowered to Exclude Protected Speech of Philly 11*

In its decision, the Trial Court relies principally on its finding that Defendants had the right to exclude whomever they pleased from the event area and to control all speech within the event area to support it decision granting Defendants' Motion for Summary Judgment. The Court bases its finding on two points: first, that the Philly Pride Defendants had a permit and second the United

States Supreme Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

As discussed above, the permit that the Philly Pride Defendants obtained did not allow them to control access to the event, which was being held on the public streets and sidewalks. In fact, Defendants concede as much. JAII -312-312a. Additionally, the *Hurley* decision likewise does not support the Courts' findings.

### *A. Philly 11's Speech is Not Participatory Speech; OutFest Only has Right to Control its Own Message, Not the Message of Others*

The Trial Courts' reliance on the United States Supreme Courts' decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), for the proposition that they can exclude Plaintiffs and their message that is contrary to the message OutFest seeks to convey, is misplaced. There is no allegation in this case that Plaintiffs' rights were violated because they were not allowed to participate in the event activities have use of a stand or speak from the stage. Rather, Plaintiffs only sought to be able to engage in free speech activities and express their message on the public streets and sidewalks where the event was being held. *Hurley* does not preclude this.

In *Hurley*, a homosexual rights group sued a private organization that sponsored an annual St. Patrick's Day parade for permission to include a float in the parade. The group that organized and sponsored the parade was a private group that obtained a permit each year for the parade. The Court held that the

parade organizers, as a private organization, had a First Amendment right to express a certain viewpoint and, as a corollary to that right, the parade organizers could exclude homosexual groups from expressing their homosexual message from the actual parade, but not the adjoining sidewalks.

Where the Trial Court erred, though, is that *Hurley* addressed only the right of the homosexual group to *participate* in the parade. At no point, did the Court hold that the parade organizers could exclude the homosexual group from attending the event. *Hurley*, 515 U.S. at 570.

In *Gathright v. City of Portland, Oregon*, 439 F. 3d 573 (9th Cir. 2006), the Ninth Circuit dealt with a situation very similar to that before the Court in this case. In *Gathright*, the plaintiff sought to enjoin the City of Portland's policy of enforcing the right of permit holders sponsoring an event to evict any member of the public who espouses a message contrary to the permit holder. *Gathright* at 575. The Court rejected the City's argument that *Hurley* required the Court to vacate the District Court injunction because its policy of evicting on request those who express messages the permitees disapprove of as a valid time, place and manner restriction and held:

> We disagree with the City's reading of *Hurley*. *Hurley* involved the exclusion of those who wished to *participate* in the parade as marchers, not those who witnessed or opposed the procession. *Cf. Mahoney v. Babbitt,* 105 F.3d 1452, 1456 (D.C.Cir.1997) (refusing to extend *Hurley* to allow parade organizers to exclude people wishing to stand along parade route holding protest signs). As the district court

has here observed, "[t]here is a distinction between participating in an event and being present at the same location. Merely being present at a public event does not make one part of the organizer's message for First Amendment purposes." *Gathright v. City of Portland,* 315 F.Supp.2d 1099, 1103 (D.Or.2004).

* * * * *

*Hurley* does not, by its own terms, extend to these circumstances, where a speaker in a public forum seeks only to be heard, not to have his speech included or possibly confused with another's, and has not violated a valid statute or ordinance. . . . Here, there is no risk that Gathright's provocations could be mistaken by anybody as part of the message of the events he protests. . . . *Gathright may be a gadfly to those with views contrary to his own, but First Amendment jurisprudence is clear that the way to oppose offensive speech is by more speech, not censorship, enforced silence or eviction from legitimately occupied public space.* . . . (Emphasis supplied.)

*Gathright* at 577 – 578.

See also, *Wickersham v. City of Columbia, Missouri,* 371 F. Supp. 2d 1061 (W.D. MO 2005)(Plaintiffs conduct in attending the event to distribute leaflets and circulate petitions was equivalent of attending the parade and not participating in it. As a result, event organizer could not exclude Plaintiffs under *Hurley.*)

In *Mahoney v. Babbitt*, 105 F.3d 1452, 1456 (D.C. Cir. 1997), the Court, found a significant difference in precluding speech that sought to participate and speech that only sought to be in the area.

The protesting demonstrators in *Hurley* sought to compel the private organizers to allow their participation in the parade. Mahoney and his co-plaintiffs do not seek compulsion or even permission to participate in the Inaugural Parade organized by the Inaugural Committees and other supporters of President Clinton. All they seek is the First

> Amendment-protected right to stand on the sidewalk and peacefully note their dissent as the parade goes by. Nothing in *Hurley* says that the organizers of the St. Patrick's Day Parade at issue in that case ever tried to prevent their ideological opponents from doing precisely that.
>
> *Mahoney,* 105 F.3d at 1456.

*See also, Klu Klux Klan* v. *Thurmont,* 700 F. Supp. 281, 290 (D. Md. 1988) (In ruling that NAACP could not participate in a parade, court held: "The NAACP is certainly permitted to shout on the adjoining sidewalks").

While *Mahoney* did involve the Government as the event organizer, this is a distinction of little import. As the *Mahoney* Court noted, even though the government was involved, *Hurley* still did not apply because the Plaintiffs were not seeking to participate in the parade. "All [the Plaintiffs] seek is the First Amendment protected right to stand on the sidewalk and peacefully note their dissent as the parade goes by." *Mahoney* at 1453.

Additionally, the Trial Court's argument that there was no area within OutFest for the plaintiffs to stand and peacefully express their contrary message (JAI – 29.) is contrary to *Hurley.* If the Trial Court is correct, then the homosexual group in *Hurley* would not even have been able to stand on the sidewalk adjacent to the parade route since that area would certainly have been included as part of the event area. Moreover, the Trial Court's finding is not supported by the undisputed facts. For example, Defendant Tiano testified that the area that he wanted to move Plaintiffs to was within the event area. Defendant

Tiano also testified that it was his plan to allow Plaintiffs to move around the event after he had gotten the crowd calmed down. JAII – 238-239, 250-251.

In *Parks v. City of Columbus*, 395 F. 3d 643, 654 (6th Cir. 2005), the court held that a municipality could not evict a controversial street preacher from a permitted event held on the public street simply because the event's organizers found the preacher's message to be odious. The Sixth Circuit distinguished *Hurley* on that basis that Parks "did not seek inclusion in the speech of another group.". Instead, he was "merely another attendee" or a permitted event open to the public, in a public forum. *Parks* at 651.[2]

While the Philly Pride Defendants had composed an ensemble of organizations to communicate their pro-homosexual message, Plaintiffs were not seeking to be one of those organizations. See, e.g. *Gathright*, *Wickersham*. Moreover, there was no risk that anyone would confuse Plaintiffs message as being part of the event and thus participating in the message of the vent. After all, the message that Plaintiffs were seeking to convey was directly contrary to that of the event. See, *Gathright v. City of Portland* 315 F.Supp.2d 1099, 1104 (D.Or.,2004), aff'd in relevant part, 439 F.3d 573 (9th Cir. 2006)([I]n this case, there was no danger that any member of the public would attribute plaintiff's pietistic messages

[2] The Trial Court seeks to distinguish *Parks*, arguing that the Court in *Parks* did not apply *Hurley* because the event was not expressing a particular message. However, in *Parks*, the Court did impute a message to the event, "visual and performance art", for purposes of the *Hurley* analysis.

to the private organizers of the events in the City parks. Plaintiff's preaching was often unrelated to or directly contrary to the ideas being expressed at these events.) The fact is that *Hurley* does not give *carte blanche* authority to a city to block First Amendment protected speech from a traditional public forum outside the confines of any speech the permittee may have, upon City's own whim to do so.

The cases where *Hurley* has been applied to exclude speech are distinguishable. For example, both *Sistrunk v. City of Strongville*, 99 F.3d 194, 196 (6th Cir. 1996); *Schwitzgebel v. City of Strongsville*, 898 F. Supp. 1208 (N.D. Oh. 1995) involve cases where the event organizer had an exclusive use permit to an area with restricted access and which a person had to have an invitation to attend. These cases differ from those in this case where Plaintiffs were not seeking inclusion in a closed event strictly limited to the members of the organization and their invitees. *Sistrunk* at 196; *Gathright*, 439 F.3d at 579; *Parks* at 652 (The City cannot … claim that one's constitutionally protected rights disappear [where] a private party is hosting an event that remain[s] free and open to the public".

Plaintiffs did seek to participate in any speech at the OutFest event. They only wished to deliver their own message independent of any Event expression. This is clearly allowed under *Hurley* and the Court erred in granting Summary Judgment in favor of Defendants.

### 3. *Plaintiffs Were Denied Equal Protection of the Laws*

To set forth a claim for violation of equal protection under the Fourteenth Amendment Plaintiffs must establish that: (1) the person, compared with others similarly situated, was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person. *Homan v. City of Reading,* 963 F.Supp. 485, 490 (E.D.Pa.,1997).

Plaintiffs submit that the evidence in this case clearly establishes that they were denied the equal protection of the law, especially as compared to the "Pink Angels". Defendants permitted the Pink Angels unfettered access to the public ways at Outfest while Plaintiffs were denied such access. Defendants did not interfere with the sign display of the Pink Angels while Defendants ordered Plaintiffs to lower their signs. JAII-335. Defendants allowed the Pink Angels to obstruct the public streets and sidewalks while Plaintiffs were not allowed to access the public area of their choice.

The Trial Court states that the distinction between the Plaintiffs and the other individuals at the event, including the "pink angels" who were allowed to freely speak, was that the Philly Pride volunteers complied with police directives while Plaintiffs did not. The Court's evidence of this is that the "pink angels"

stopped blocking the sidewalk when threatened by the police with arrest if they did not do so. First, the "pink angels" were actually breaking the law when they were blockading the sidewalk. 18 Pa.C.S. §5507. Additionally, Defendant Tiano agrees that up to the point that Plaintiffs walked South on 13th Street, rather than North, Plaintiffs had complied with all police directives [JAII -236-237]. Importantly, Defendant Tiano did not restrict the "pink angels" or anyone else in the event to only go north on 13th Street. Rather everyone (including the "pink angels") except for Plaintiffs were allowed to go wherever they wanted within the event. Only Plaintiffs movements were restricted. JAII-250; JAII-335.

From the moment Plaintiffs arrived at the event, they were treated differently than all other individuals at the event. They were escorted by the police, their movements were directed by the police, they were told where they could go and where they could not go.

In short, Defendants intentionally and impermissibly distinguished between two groups of similarly situated speakers on the basis on the viewpoint expressed for the purpose of preventing Plaintiffs from expressing their message. These acts clearly were in violation of the Equal Protection Clause of the Fourteenth Amendment.

### 4. *Defendants Are Liable for Malicious Prosecution/Unlawful Arrest under both Section 1983 and Pennsylvania Law*

In order to sustain a cause of action for malicious prosecution relating to a criminal prosecution, the plaintiff must prove that the defendant (1) instituted proceedings against the plaintiff, (2) without probable cause, (3) with malice, and (4) that the proceedings were terminated in favor of the plaintiff. *DiBella v. Borough of Beechwood*, 407 F.3d 599 (3d Cir., 2005); *Corrigan v. Central Tax Bureau of Pa., Inc.*, 828 A.2d 502, 505 (Pa.Cmwlth., 2003). A claim for malicious prosecution under Section 1983 also adds the requirement that "the plaintiff suffered a deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding". *DiBella, supra.*

Probable cause is a reasonable ground of suspicion supported by circumstances sufficient to warrant that an ordinary prudent person in the same situation could believe a party is guilty of the offense charged. *Miller v. Pennsylvania Railroad Co.,* 89 A.2d 809, 811-812 (1952). When determining the element of malice, Pennsylvania courts have repeatedly held that "malice" can be inferred from lack of probable cause. *Wright v. Schreffler*, 618 A.2d 412, 415 (Pa.Super.,1992). Malice can also be found since the unrest that Plaintiffs were alleged to have caused was actually caused by a pre-planned response by the

"pink angels"/crowd which formed the conspiracy between the Philly Pride Defendants and the City Defendants to stifle Plaintiffs free speech.

When Plaintiffs' were arrested on October 10, 2004 they were charged with the crime of disorderly conduct. JAII-248. In its opinion, the Trial Court holds that the police had probable cause to arrest plaintiffs "for disorderly conduct because there were thousands of people at the event and the crowd was becoming irate and hostile largely as a result of the plaintiff's conduct (Plaintiffs viewpoint)." JAI-35. However, as the United States Supreme Court instructed in *Terminiello*, *supra*, crowd reaction to a speaker's message cannot be the basis for a disorderly conduct charge against the speaker. *Terminiello* at 5 (Conviction of speaker for disorderly conduct because his speech stirred people to anger, invited public dispute, or brought about a condition of unrest may not stand.)[3]

The fact is that Plaintiffs did not commit any crimes and there was no probable cause to arrest them. Defendants did not like what Plaintiffs were saying and wanted to move them out of the way so they would not bother those attending the event. When Plaintiffs would not cooperate with Defendants' unlawful requests, Defendants arrested them to remove them.

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[3] The law in Pennsylvania is clear that the disorderly conduct statute may *not* be used against persons engaging in First Amendment protected activity. See *Com. v. Mastrangelo*, 414 A.2d 54 (Pa. 1980); *Com. v. Gowan*, 582 A.2d 879 (Pa. Super. 1990).

After Plaintiffs' arrest, they spent approximately 21 hours in jail. They were released and had to attend several criminal court proceedings. As a result, Plaintiffs were denied their liberty and subjected to a seizure.

Since there was no probable cause, the Court can infer that there was malice. The other two elements, that proceedings were instituted against them and they were terminated in their favor, have also been established. As a result, the Trial Court erred in granting Defendant's summary judgment on Plaintiffs' Fourth Amendment claims and denying Plaintiffs' Motion for Summary Judgment.

### 5. *Plaintiffs Have Established a Municipal Liability Claim Against Defendant City of Philadelphia*

It is well settled that municipalities may be sued directly under Section 1983. In *Monell v. Department of Social Services of City of New York* 436 U.S. 658 (1978), the United States Supreme Court held:

> "Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials . . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law."
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> *Id.* at 690-691; See also, *Board of County Com'rs of Bryan County, Okl. v. Brown* 520 U.S. 397 (1997).

In *Beck v. City of Pittsburgh,* 89 F.3d 966, 971 (3rd Cir. 1996), the Court held:

> A government policy or custom can be established in two ways. Policy is made when a "decisionmaker possess[ing] final authority to

> establish municipal policy with respect to the action" issues an official proclamation, policy, or edict. A course of conduct is considered to be a "custom" when, though not authorized by law, "such practices of state officials [are] so permanent and well-settled" as to virtually constitute law.

Alternatively, a plaintiff can show that a policy or custom at issue concerns a failure to train or supervise where that failure reflects a deliberate indifference of officials to the rights of persons that come into contact with these municipal employees. *See, City of Canton v. Harris,* 489 U.S. 378, 387 (1989).

"[I]t is for the jury to determine whether *their* [policymakers'] decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur ··· or by acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity. *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1481 (3rd Cir. 1990)

Plaintiffs submit that the evidence presented in this matter is more than sufficient to meet their burden of proving that their constitutional rights were violated as a result of the custom, policy and practice of the City of Philadelphia. First, Defendants' violation of Plaintiffs' First Amendment rights is clear and cannot even seriously be disputed. As concerns this conduct being evidence of the City's custom policy or practice, it is important to note that this is not a case where Plaintiffs' rely on one isolated incident. Rather, the incident which is the basis for this Complaint is only one of more than eight separate incidents where City of

Philadelphia Police Officers, including Defendants Tiano and Fisher, acting as agents of the City, deliberately and without any legal basis interfered with the constitutionally protected rights of Plaintiff Michael Marcavage and other Plaintiffs. In each instance Plaintiffs were told that he would have to leave the area and that they could not engage in their activities and/or were prohibited from engaging in there activities on the public streets and sidewalks where they wanted to be.[4] It would be one thing if the Court was being presented with one or two isolated incidents, but it is not.

Defendant is also guilty of failing to properly train and supervise the officers in the City of Philadelphia Police Department. Again, these officers are charged with, among other things, upholding the United States Constitution. Yet, they do not recognize, well-established, rights of individuals to engage in free speech activities on the public streets and sidewalks. They also have apparently been authorized to use or threaten the use of inapplicable laws (disorderly conduct and obstructing a highway to name two) in an effort to harass and intimidate those who have the courage to insist on being allowed to exercise their constitutionally protected freedoms. If this was a situation where the Police were consistently breaking into houses without probable cause and without a warrant, no-one would

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[4] These other claims were raised in a separate lawsuit captioned Marcavage v. City of Philadelphia et al. After a jury trial, judgment was entered in favor of Defendants. Plaintiffs filed an appeal which is presently pending before this Court at 07-1049.

hesitate to acknowledge a failure to train/supervise. Neither would they deny that consistently allowing that type of activity to take place evidences a custom, policy or practice. The rights at issue in this case are no less important.

The City is culpable, along with the individual Defendants, for the deprivation of Plaintiffs' constitutionally protected rights. The evidence is sufficient to establish that the City has a custom, policy and practice which resulted in the deprivation of Plaintiffs' constitutionally protected rights. As a result, The Trial Court erred in granting Defendants' Motion for Summary Judgment.

### *6. Defendants Are Not Entitled to Qualified Immunity*

The doctrine of qualified immunity protects government officials from civil damage suits for official conduct that does not violate clearly established law of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, (1982). Qualified immunity " 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' " *Hunter v. Bryant,* 502 U.S. 224, 229 (1991).

At the time of the OutFest event, it is was clearly established that content-based restrictions on speech in a public forum are subject to strict scrutiny, while viewpoint-based restrictions violate the First Amendment regardless of whether they also serve some valid time, place, manner interest. *See, e.g., Monteiro, supra.*, Plaintiffs' right to engage in free speech activities on the public streets and

sidewalks was also clearly established. See, discussion *supra.*; *United States v. Grace*, 461 U.S. 171 (1983); *Hague v. CIO,* 308 U.S. 496 (1939). It is similarly well established that the government cannot restrict the free speech rights of individuals simply because their message is offensive or might make the listener upset. *Forsyth County, supra; Simon & Schuster, Inc. v. Members of NY State Crime Victims Bd, 502 US 105 (1991); NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).*

As police officers sworn to uphold the Constitution of the United States of America, these Defendants are charged with knowing and understanding Constitutionally protected rights. As Plaintiffs have set forth (and the cases cited are a small sampling of cases where Courts have rendered similar decisions concerning free speech rights) the free speech rights at issue in this case are not only clearly established, but have been the law of this land for more than two hundred years. Moreover, there is also all of the other evidence of the conspiracy.

Defendants cannot seriously argue that a sworn police officer would not be reasonably expected to understand the law (Free Speech) and know that their actions committed against Plaintiffs as asserted in this action violated these clearly established rights. As a result, the Trial Court erred in finding that Defendants were entitled to qualified immunity. See, e.g. *Keefer v. Durkos*, 371 F. Supp. 2d 686 (W.D. Pa. 2005)(denying immunity where free speech rights at issue were

clearly established and reasonable people in Defendants; positions would know that their actions were violating those rights.); *Grove v. City of York, PA*, 342 F. Supp. 2d 291 (2004)(M.D. PA 2004)(Denying claim for qualified immunity where reasonable police officer should have known that confiscation of signs was a violation of plaintiff's first amendment rights.); *Altieri v. Pennsylvania State Police*, 2000 WL 427272, (E.D. PA, 2000)(Plaintiff's free speech rights clearly established at time violation occurred. Claim for qualified immunity denied.)

Even if Defendants are entitled to qualified immunity that immunity only applies to Plaintiffs' claims for damages and not to their claims for declaratory and injunctive relief. *Torisky v. Schweiker*, 446 F. 3d 438, 448 (3rd Cir, 2006); *Acierno v. Cloutier*, 40 F. 3d 597 (3rd Cir. 1994)(Defense of qualified immunity does not apply to claims for injunctive relief).

### 7. *There Was An Agreement Between the Philly Pride Defendants and the City Defendants to Violate Plaintiffs' Rights at the OutFest 2004 Event*

A conspiracy is a "combination of two or more persons to do a criminal act, or to do a lawful act by unlawful means or for an unlawful purpose". *Marchese v. Umstead*, 110 F. Supp. 361, 371 (E.D. Pa. 2000). To set forth a claim under Section 1985(3) a Plaintiff must establish the following:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is injured in

> his person or property of any right or privilege of a citizen of the United States.

See, *Griffin v. Breckenridge*, 403 U.S. 88, 101-102 (1971)

The elements of a conspiracy claim under 42 U.S.C. §1983 are slightly different:

> To demonstrate a civil conspiracy under § 1983, a plaintiff must establish (1) the existence of a conspiracy and (2) a deprivation of civil rights in furtherance of the conspiracy by a party to the conspiracy. . . .
>
> *Victory Outreach Center v. Melso*, 371 F.Supp.2d 642, 647 (E.D.Pa.,2004)

"In order to prove the existence of a civil conspiracy, a plaintiff is not required to provide direct evidence of the agreement between the conspirators; "circumstantial evidence may provide adequate proof of conspiracy." Absent the testimony of a coconspirator, it is unlikely that direct evidence of a conspiratorial agreement will exist. Thus, the question whether an agreement exists should not be taken from the jury in a civil conspiracy case so long as there is a possibility that the jury can "infer from the circumstances that the alleged conspirators had a 'meeting of the minds' and thus reached an understanding" to achieve the conspiracy's objectives···" *Smith v. Wambaugh* 29 F.Supp.2d 222, 229 (M.D.Pa.,1998). See *Addickes v. S.H. Kress*, 398 U.S. 144 (1970).

In *Reinsmith v. Borough of Bernville*, 2003 WL 22999211, *10 (E.D. Pa. 2003, the Court discussed the requirement of showing an agreement in a conspiracy claim:

> An express agreement among all the conspirators is not a necessary element of civil conspiracy as long as the participants in the conspiracy share a general objective or the same motives. For desiring the intended conspiratorial result. To demonstrate the existence of a conspiratorial agreement, it simply must be shown that there was a single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences.

See also, *Hampton v. Hanrahan*, 600 F.2d 600, 621 (7th Cir. 1979)(rev'd in part on other grounds.)

The conspiracy in the case occurred when the Philly Pride Defendants conspired with the Municipal Defendants to use the "pink angels" to violate Plaintiffs' First Amendment rights and to ultimately set Plaintiffs up so they would be removed from the event and arrested. See Summary of Facts at 5-12. Plaintiffs submit that taking all of the facts established by Plaintiffs and the reasonable inferences that arise from these facts in the light most favorable to Plaintiffs, these facts are more than sufficient to demonstrate a conspiracy to violate Plaintiffs' First Amendment rights.

At the outset of this case, the Trial Court denied a Motion to Dismiss filed by Defendants finding, on less facts than now shown by Plaintiffs, that the facts shown by Plaintiffs at that time and the reasonable inferences from those facts

were sufficient to demonstrate a conspiracy to violate Plaintiffs' constitutional rights. JAII -53-69. Plaintiffs, through discovery, proved every fact pled in the Complaint which the Court previously held was sufficient to show a conspiracy. Importantly, though, Plaintiffs uncovered even more significant facts in discovery which further supported the conspiracy claim. For example:

- The Philly Pride Defendants told the City Defendants, well before the event, that they were going to be using the "pink angels" to thwart Plaintiffs' constitutionally protected activities. JAII-45-46; 70-83; 261-266.

- During those meetings the Philly Pride Defendants advised the City Defendants that they would have present a security force known as the "pink angels" and discussed the actions that the "pink angels" would be taking. JAII – 191-192; 217-220; 261-262.

- The purpose of the "pink angels" presence was to prevent Plaintiffs from being able to get their message out. JAII – 230; 322; 335.

- Even though Defendants Fisher and Tiano were aware of the actions that the Philly Pride Defendants intended the "pink angels" to take, and even though they were concerned about the actions, they did nothing to dissuade the Philly Pride Defendants and instead encouraged and supported the activities. JAII – 334; 335 228-230; 264-266.

- Defendants, through their counsel, had been putting great pressure on the City Defendants to exclude Plaintiffs from the event. JAII – 170a-170b.

- Removal of Plaintiffs from the event was something that the City Defendants felt would be a good thing. As Defendant Tiano put it: "Once he [referring to Plaintiff Marcavage as well as the other Plaintiffs] left it was like a different event. JAII – 250.

The actions of the City Defendants and the Philly Pride Defendants on the day of the event further evidenced the conspiracy. See Summary of Facts, *supra*. Their actions were those of people who were working in concert, to achieve a specific goal, in this case, of preventing Plaintiffs from exercising their First Amendment rights at the OutFest event.

In its Opinion, the Trial Court states that it told Plaintiffs in its decision denying Defendants' Motion to Dismiss that they could not rely on bald allegations of conspiracy. JAI- 43-44. However, while the Court did note in a footnote that one paragraph of Plaintiffs' Second Amended Complaint, ¶162, was a "bald assertion of conspiracy", the Court also held that Plaintiffs had pled sufficient facts to infer a conspiracy and that the complaint alleges a number of facts sufficient to support an inference of a conspiracy. JAII -59-60. The Court then specifically references at least eight paragraphs in the Complaint which provided specific fatal allegations in support of the conspiracy.

In reaching its decision on this issue, the Trial Court did not weigh all the facts in support of the non-moving party. The Court also ignored the fact that there were material issues in dispute. In its opinion, the Trial Court states that there was no evidence that the Municipal Defendants were aware of the details of the counter-protest. The Court goes so far as to say that "[t]his is uncontroverted". JAI- 39. This simply is incorrect. The evidence clearly established that both

Defendant Fisher and Defendant Tiano were well aware of the counter- protest ("the pink angels") and had discussed what the group would be doing during the meeting in advance of the event JAII – 70-83, 84-87, 88-90, 191-192, 217, 223-224, 230, 261-266. At the police roll call held before the event, Defendant Tiano explained to the police officers what the "pink angels" would be doing. He then said that it will be "interesting to see what happens". JAII-334. These facts alone are sufficient to infer that Defendants had reached an understanding of their goal to exclude Plaintiffs from the event.

Additionally, the actions of the City Defendants and the Philly Pride Defendants on the day of the event further evidenced the conspiracy. For example: see Summary of Facts at 5-12, *supra*. Their actions were those of people who were working in concert, to achieve a specific goal, in this case, of preventing Plaintiffs from exercising their First Amendment rights at the OutFest event. They were not the actions of people who were adverse to each other as the Trial Court found. Indeed, the Trial Courts' belief that the Philly Pride Defendants and the City Defendants had an adversarial relationship simply is belied by the facts. At no time did the City Defendants ever do anything adverse to the Philly Pride Defendants. In fact, the evidence showed the City Defendants took active steps to support the actions of the 'pink angels":

- When "pink angels" blockaded the sidewalk so that Plaintiffs could not pass, the City Defendants allowed the illegal blockade to continue

for more than 5 minutes, even though Defendant Fisher arrived with Plaintiffs and Defendant Tiano arrived shortly afterwards. JAII – 335.

- When the "pink angels" surrounded Plaintiffs after they arrived at the event and began blowing whistles and making loud obnoxious noses, the police Ordered Plaintiffs' to move under threat of arrest, and took no action against the "pink angels". JAII – 287-289; 335.

- After Plaintiffs stopped at a location on the public street where Defendant Fisher told them to stop, they were ordered to move because they were blocking the vendors. However, Defendants never told the "pink angels", who were surrounding Plaintiffs, who out numbered Plaintiffs and who were closer to the vendors to move. JAII – 237; 335.

- Plaintiffs were ordered by the City Defendants to move to 13th and Walnut Streets on the outside perimeter of the event and were not allowed to move freely around the event area. JAII – 251; 335.

- Even though the City Defendants were concerned about the reaction of the "pink angels" and others in the crowd to Plaintiffs' message, the City Defendants did not take any action against the "pink angels" such as moving them away from the area or creating a buffer zone between the "pink angels" and Plaintiffs. JAII – 249a – 51; 335.

The facts established in this case clearly establish the existence of a conspiracy between the Defendants or at the very least, establish sufficient facts from which a jury could infer a conspiracy. In granting the Philly Pride Defendants' Motion, the Trial Court looked for facts to counter those alleged by Plaintiffs is support of the conspiracy. Rather than weigh all facts in favor of Plaintiffs, the Court resolved all factual disputes in favor of Defendants. The Court

also ignores the many material facts that are in dispute, instead relying solely on Defendants' version of the facts as if they are undisputed when they clearly are not.

Contrary to the Trial Court's holding, Plaintiffs did produce sufficient evidence from which a jury could infer a conspiracy. *Smith, supra.* That is all that is required. Indeed, the Trial Court denied Defendants' Motion to Dismiss on less facts than these. As a result, the Trial Court erred in granting summary judgment in favor of Defendants.

### *8. Punitive Damages*

In *Brennan v. Norton*, 350 F.3d 399, 428 -429 (3d Cir. 2003) the Court discussed the standard for awarding punitive damages in a case under Section 1983:

> The standard for awarding punitive damages under § 1983 has been summarized as follows:
>
> a jury may ... assess punitive damages ... under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. . . .
>
> In *Savarese v. Agriss,*. . . we noted that this standard is disjunctive and not conjunctive. We explained:
>
> [F]or a plaintiff in a section 1983 case to qualify for a punitive award, the defendant's conduct must be, at a minimum, reckless or callous. Punitive damages might also be allowed if the conduct is intentional or motivated by evil motive, but the defendant's action need not necessarily meet this higher standard.

As discussed above, the law concerning Plaintiffs' right to engage in free speech activities on a public street is well established. Defendants, as law enforcement officers, knew this law. Yet they acted anyway in callous and reckless disregard of those well-established rights. This is a case where punitive damages clearly are warranted.

## *CONCLUSION*[5]

It is unfortunate when citizens still have to fight for the right to engage in free speech activities on the public streets and sidewalks. "Time out of mind", these rights have always been upheld. However, in this one decision, the Trial Court set those rights aside.

The Trial Court conceded that Plaintiffs' speech was protected and that the area where the OutFest event was being held (the public streets and sidewalks of the City of Philadelphia), was a public forum. Additionally, Defendants admitted that they took action against the Philly 11 because of their viewpoint/content of their message. However the Trial Court erred when it found that the Government's proffered reason for restricting the Philly 11's rights passed constitutional muster. Moreover in reaching its decision, the Trial Court impermissibly made factual

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[5] In its decision, the Trial Court addressed the issue of the Noerr-Pennington Doctrine which had been raised by Defendants in their Motion for Summary Judgment. However, the Trial Court held that it did not need to determine whether the communications between Philly Pride and the municipal defendants constituted protected petitioning activities. JAI – 52. Since the Trial Court did not rule on this issue, Plaintiffs are not addressing in their Brief.

determinations in favor of Defendants even though the Court was supposed to weigh all facts in favor of Plaintiffs when considering Defendants' Motion for Summary Judgment.

Plaintiffs submit that the facts of the case clearly establish that it was Plaintiffs' viewpoint about homosexuality that was being restricted from the event and that Defendants were engaging in unconstitutional viewpoint discrimination. However, even if the restrictions were not viewpoint based, they certainly were based upon the content of Plaintiffs' message which was equally unconstitutional. Defendants do not make any real attempt to justify their unconstitutional conduct and what explanations they do offer are belied by the facts.

The Trial Court does not, in any real sense, take on the question of whether Defendants' conduct satisfied the appropriate standard. Rather, the Trial Court relies upon its erroneous conclusion that Defendants, by virtue of the permit given to Philly Pride, had the right to exclude Plaintiffs from the event.

Contrary to the Trial Court's decision, the Plaintiffs did not seek to commandeer the OutFest event and there are no facts that support the argument that they did. Rather, the evidence established that the Plaintiffs only sought to be able to engage in free speech activities and express their message on the public streets and sidewalks.. This type of activity that Plaintiffs sought to engage in was completely permissible and could not be excluded by Defendants.

The Trial Court also erred in holding that a heckler's veto only applies to situations where the government acts preemptively to restrict speech before it takes place. The evidence in this case clearly establishes that Defendants acted to restrict Plaintiffs speech because of Defendants' concern about the crowd's reaction to Plaintiffs' message. Had the Trial Court applied the proper standard for heckler's vetoes, the Court would have been compelled to find that Defendants' actions constituted an unconstitutional heckler's veto.

Because the Trial Court erred in its finding that Defendants had the right to exclude Plaintiffs from the event area and that the heckler's veto did not apply, its rulings on the other issues in the case likewise must be reversed because they depend on those two findings.

The Trial Court also erred in finding that the Defendants were entitled to qualified immunity. The doctrine of qualified immunity protects government officials from civil damage suits for official conduct that does not violate clearly established law of which a reasonable person would have known. At the time of the OutFest event, it is was clearly established that content-based restrictions on speech in a public forum are subject to strict scrutiny, while viewpoint-based restrictions violate the First Amendment regardless of whether they also serve some valid time, place, manner interest. Plaintiffs' right to engage in free speech activities on the public streets and sidewalks was also clearly established. As

police officers sworn to uphold the Constitution of the United States of America, these Defendants are charged with knowing and understanding our constitutionally protected rights. As a result, the Trial Court erred in finding that Defendants were entitled to qualified immunity.

Finally, the Court erred in finding that there was not sufficient evidence of a conspiracy to submit the claim to the jury. This ruling contradicted a prior ruling made by the Court in denying Defendants' 12 (b)(6) Motion to Dismiss. Moreover, it ignored the substantial facts accumulated by Plaintiffs which provided evidence of the conspiracy. The question of whether an agreement exists should not be taken from the jury in a civil conspiracy case so long as there is a possibility that the jury can infer from the circumstances that the alleged conspirators had a meeting of the minds and thus reached an understanding to achieve the conspiracy's objectives. Plaintiffs submit that there was more than sufficient evidence from which the jury could infer a civil conspiracy. As a result, the Trial Court erred in granting summary judgment to Defendants on this issue.

Plaintiffs are asking that this Court reverse the Trial Court's decision denying their Motion for Partial Summary Judgment and direct that an Order be entered granting judgment in Plaintiffs favor on the issues raised in Plaintiffs' Motion. Plaintiffs are also requesting that this Court reverse the Trial Court grant of summary judgment in favor of the Defendants.

Respectfully Submitted:

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Date: May 22, 2007

## *CERTIFICATION OF BAR MEMBERSHIP*

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

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## *CERTIFICATE OF FILING AND SERVICE*

I hereby certify that on this 22nd day of May, 2007, the Brief for Appellants and the Joint Appendix Vols I and II, were served via United States First Class Mail, postage prepaid, upon the following:

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I also hereby certify that on this 22nd day of May, 2007, the required number of the Brief for Appellants and Joint Appendix, were filed at the Office of the Clerk, United States Court of Appeals for the Third Circuit by electronic means and United States First Class Mail, postage prepaid.

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## *CERTIFICATE OF COMPLIANCE*

1. This brief complies with the type-volume limitation of rule 32(a)(7)(B), F.R.A.P. because:

This Brief contains 13,895 words or less than 14,000 words, excluding the parts of the Brief exempted by Rule 32(a)(B)(iii), F.R.A.P.

2. This Brief complies with the typeface requirements of Rule 32(a)(5), F.R.A.P. and the type style requirements of Rule 32(a)(6), F.R.A.P., because:

This Brief was prepared in Microsoft Word 2007;

Double spaced typeface; and

14 point Times New Roman font.

As permitted by Rule 32(a)(7)(C), F.R.A.P., the undersigned has relied upon the word count of this word-processing program in preparing this certificate.

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## *CERTIFICATE OF IDENTICAL BRIEFS*

Appellant certifies that the electronic brief filed in this matter is identical to the hard copies that are being filed.

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## *CERTIFICATE OF VIRUS SCAN*

Appellant certifies that a virus scan was performed on the electronic brief being filed in this matter using McAfee Antivirus software. The virus scan indicated that there were no viruses.

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Date: May 22, 2007

*IN THE UNITED STATES COURT OF APPEALS*
*FOR THE THIRD CIRCUIT*

*No. 07-1461*

---

*SUSAN STARTZELL, MARK DIENER, LINDA BECKMAN, RANDALL BECKMAN, DENNIS GREEN, GERRY FENNELL, JAMES CRUSE, ARLENE ELSHINNAWY, MICHAEL MARCAVAGE, LAUREN MURCH, NANCY MAJOR*

*Appellants*

*v.*

*CITY OF PHILADELPHIA; WILLIAM V. FISHER, individually and in his official capacity; JAMES TIANO, individually and in his official capacity; KAREN SIMMONS, individually and in her official capacity; PHILLY PRIDE PRESENTS, INC.; FRAN PRICE; CHARLES F. VOLZ, JR.*

*Appellees*

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*APPEAL FROM THE UNITED STATES DISTRICT COURT*
*FOR THE EASTERN DISTRICT OF PENNSYLVANIA*

*05-05287*

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# *JOINT APPENDIX VOLUME I*
*1- 56*

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Joint Appendix Vol 1

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*IN THE UNITED STATES DISTRICT COURT*
*FOR THE EASTERN DISTRICT OF PENNSYLVANIA*

| | | |
|---|---|---|
| ***SUSAN STARTZELL, et al.*** | : | ***Civil Action No. 05-05287*** |
| ***Plaintiffs,*** | : | |
| *v.* | : | ***The Honorable Lawrence F. Stengel*** |
| | : | |
| ***CITY OF PHILADELPHIA,*** | : | |
| ***PENNSYLVANIA, et al.*** | : | |
| ***Defendants,*** | : | |



***NOTICE OF APPEAL***

Notice is hereby given that Susan Startzell, Michael Marcavage, Mark Diener, Nancy Major, Arlene Elshinnawy, Linda Beckman, Randall Beckman, Lauren Murch, Dennis Green James Cruse, and Gerald Fennell, Plaintiffs in the above captioned case, hereby appeal to the United States Court of Appeals for the Third Circuit from the Order of the United States District Court for the Eastern District of Pennsylvania dated January 18, 2007 denying Plaintiffs' Motion for Summary Judgment and granting Defendants Philly Pride Presents, Fran Price and Charles Volz's Motion for Summary Judgment and granting Defendant City of Philadelphia, James Tiano, William Fisher and Karen Simmon's Motion for Summary Judgment

Respectfully submitted:

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Date: 2/13/2006

JAI-1

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| **SUSAN STARTZELL, et al.,** | : | **CIVIL ACTION** |
| **Plaintiffs,** | : | |
| | : | |
| **v.** | : | **NO. 05-05287** |
| | : | |
| **CITY OF PHILADELPHIA, et al.,** | : | |
| **Defendants.** | : | |

**ORDER**

**AND NOW**, this 18th day of January, 2007, after hearing oral argument and upon consideration of Plaintiffs' Partial Motion for Summary Judgment (Document No. 45), Municipal Defendants' Motion for Summary Judgment (Document Nos. 47 and 50), Defendant Philly Pride's Motion for Summary Judgment (Document No. 48) and the responses thereto, it is hereby **ORDERED** that Plaintiffs' Motion for Summary Judgmen is **DENIED** and Defendant Philly Pride and the Municipal Defendants' Motions are **GRANTED**.

The Clerk of the Court is directed to mark this case closed for statistical purposes.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.

JAI-2

*IN THE UNITED STATES DISTRICT COURT*
*FOR THE EASTERN DISTRICT OF PENNSYLVANIA*

| | | |
|---|---|---|
| *SUSAN STARTZELL, et al.* | : | *Civil Action No. 05-05287* |
| *Plaintiffs,* | : | |
| *v.* | : | *The Honorable Lawrence F. Stengel* |
| | : | |
| *CITY OF PHILADELPHIA,* | : | |
| *PENNSYLVANIA, et al.* | : | |
| *Defendants,* | : | |

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ***Plaintiff's Notice of Appeal*** was served upon the following in the manner indicated:

Notice to be served Electronically and First Class U.S. Mail upon the following:

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JAI-3

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| **SUSAN STARTZELL, et al.,** | : | **CIVIL ACTION** |
| **Plaintiffs,** | : | |
| | : | |
| v. | : | **NO. 05-05287** |
| | : | |
| **CITY OF PHILADELPHIA, et al.,** | : | |
| **Defendants.** | : | |

**ORDER**

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_____The Clerk of the Court is directed to mark this case closed for statistical purposes.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.

JA I-4

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| **SUSAN STARTZELL, et al.,** **Plaintiffs,** | : | **CIVIL ACTION** |
| **v.** | : | **NO. 05-05287** |
| **CITY OF PHILADELPHIA, et al.,** **Defendants.** | : | |

**MEMORANDUM**

**STENGEL, J.** **January 18, 2007**

This case concerns the competing First Amendment rights of two parties: (1) a group of evangelical Christians and (2) the organizers of "OutFest," a gay pride celebration. The City of Philadelphia, which acted to preserve public order and the First Amendment rights of both groups, is also a defendant. All parties filed motions for summary judgment. For the reasons discussed below, I will deny the plaintiffs' motion for summary judgment and grant the defendants' motions for summary judgment.

## I. BACKGROUND[1]

Susan Startzell, Nancy Major, James Cruise, Gerald Fennell, Randall Beckman, Linda Beckman, Michael Marcavage, Mark Diener, Dennis Green, Arlene Elshinnawy, and Lauren Murch (collectively "plaintiffs") are Christians who believe that homosexual behavior is sinful. Pls' Summ. Uncontested Facts ¶ 1. They believe "that it is their duty

[1] Many facts and characterizations of facts are contested by the parties. However, none of these differences constitute material issues of genuine fact and therefore the motion can be decided as a matter of law.



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to God to warn others about the destructiveness of sin through public proclamation of the gospel of Jesus Christ." Id. Plaintiffs communicate their message by displaying signs, offering literature, and engaging in "open air preaching" that includes talking to people about the Scriptures, praying, singing, playing music and worshiping. Id. ¶ 3.

Philly Pride Presents, Inc. ("Philly Pride") is a private not-for profit corporation that organizes several lesbian, gay, bisexual, and transgendered ("LGBT") events each year including Pride Day in June and OutFest in October. Philly Pride Defs' Statement Uncontested Facts ¶ 1. OutFest is an annual street festival to celebrate "National Coming Out Day" and to affirm LGBT identity. Id. ¶ 2. In 2004, OutFest activities occurred in an area known as the "Gayborhood," the center of the Philadelphia's gay community. Id. The event was spread over fifteen city blocks and is bordered by Walnut Street to the north, Pine Street to the south, 11th Street to the east, and Juniper Street to the west. Id. ¶ 6. Philly Pride obtained a permit for the festival.[2] Price Dep. p. 22. The festival included stages, dance, sport, and amusement areas, a family zone, a flea market, and paying vendors from for-profit and non-profit organizations. Id. p. 32. The event was free and open to the public. Id. p. 23. Christian community groups supported OutFest as well as other Philly Pride events. Id. p. 38. Fran Price, the executive director of Philly Pride, and

[2] The City issued a permit for a general street festival at four city locations from 7 am to 8 pm. Plaintiffs pin much of their legal argument on their characterization of the permit. See ft. nt. 8 *infra*. The permit is not part of the record. At the court's request, the Philly Pride defendants submitted a copy of the permit after oral argument. There is no question or dispute about the language of the permit. The parties disagree about the legal significance of the event permit. The court has now had the opportunity to review the permit issued by the City of Philadelphia Department of Streets Right-of-Way Unit and does not find the language of the permit determinative of the underlying legal issues.



JAT-6

Charles Volz, OutFest Coordinator and Senior Advisor, consider themselves to be Christian. Philly Pride Defs' Statement Uncontested Facts ¶¶ 3-5.

Prior to OutFest 2004, the Philly Pride defendants were aware that individual plaintiffs had attended previous gay pride events with the purpose of expressing an anti-homosexual message. Id. ¶¶ 8-9. Specifically, some of the plaintiffs had attended the SundayOut street festival on May 2, 2004 and the Philadelphia Gay Pride Parade on June 13, 2004. Id. ¶¶ 11, 17. Defendant Philly Pride expected plaintiffs to attend OutFest 2004. Philly Pride Defs' Mot. Summ. J. Ex. R, Timothy Cwlek, "Protesters to Attend OutFest," Philadelphia Gay News (*quoting* plaintiff Marcavage as saying "We'll evangelize at OutFest as long as these types of events continue. But its our hope that OutFest will come to an end.").

On September 15, 2004, Daniel Anders, Esquire, who was serving as *pro bono* counsel to Philly Pride, sent a letter to the Chief Deputy City Solicitor for the City of Philadelphia stating defendant Philly Pride's understanding of First Amendment jurisprudence concerning their right to maintain the integrity of OutFest's message. Philly Pride Defs' Mot. Summ. J. Ex. S. It is clear that this letter anticipated the Plaintiffs' evangelical activities at OutFest 2004. Noting concerns regarding the "increased tension between the LGBT community and the protestors" and a "real danger of physical confrontation," Mr. Anders suggested that "[p]reventing anti-LGBT protestors from entering the permitted area during the OutFest block party will protect all persons



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and will minimize the City's exposure in the unfortunate event of any incidents related to the protestors. It will also uphold Philly Pride's constitutional right to control its message of LGBT pride and equality." Id. Philly Pride defendants made follow-up oral requests to city officials to exclude plaintiffs from the event. Philly Pride Defs' Statement Uncontested Facts ¶ 27.

The City of Philadelphia disagreed with Philly Pride's position and informed Philly Pride that anti-LGBT protestors would be allowed inside the permitted area. Id. ¶ 29. Philly Pride decided to recruit volunteers to form a "human buffer" between anti-LGBT protestors and OutFest attendees. Id. ¶31. The City of Philadelphia took no position on the use of the "human buffer zone" and instead instructed that it would make an on-site determination on the use of the volunteers. Id. ¶ 32. Further, on the morning of OutFest, Karen Simmons, the legal advisor to the Philadelphia Police Department instructed the police officers that they were to protect the First Amendment rights of everyone at the event. Id. ¶ 34, Roll Call video. The officers were also told to let the protestors into the event, even though Philly Pride had requested that they be kept out. Roll Call video.

During the afternoon of October 10, 2004, plaintiffs attended OutFest. Pls' Summ. Uncontested Facts ¶ 11. Plaintiffs did not seek or obtain a permit to conduct any expressive activities at the OutFest location. Marcavage Dep. pp. 217-218. Plaintiffs arrived with a documentary film crew and recorded the Police Department's roll call



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("Roll Call video") prior to the event as well as their own attendance at the event ("Event video").[3] Municipal Defs' Statement Undisputed Facts ¶ 2. Plaintiffs carried bullhorns to amplify their voices and they carried large signs.[4] Id. ¶ 6. Plaintiffs also brought literature expressing an anti-gay message to distribute to attendees. Philly Pride Defs' Statement Uncontested Facts ¶ 10. The pink-shirted Philly Pride volunteers met the plaintiffs, linked arms, and formed a human barrier to prevent the plaintiffs from entering the permitted area. Pls' Summ. Uncontested Facts ¶ 13. The police ordered the Philly Pride volunteers to step aside and allow the plaintiffs into the event. Id. ¶ 14; see also Fisher Dep. pp. 45-46, 63. The police informed the Philly Pride volunteers that they would be arrested if they did not comply with the order to move. Simmons Dep. p. 60. The Philly Pride volunteers complied with the police request. OutFest video. As the plaintiffs entered, Captain William Fisher, who is the commanding officer of the civil affairs unit, told plaintiff Marcavage that he didn't want any "silliness." Pls' Summ. Uncontested Facts ¶ 15. Captain Fisher explained that he meant he "didn't want [Marcavage] to get into a situation where I have to save him and he started getting beat up." Fisher Dep. p. 51.

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[3] Plaintiffs attached these two video tapes as exhibits in support of their motion. The court has viewed the videos and cited to them throughout this opinion.

[4] Some of the signs read: "Christ Died to Save Sinners;" "Remember Sodom and Gomorrha;" "Prepare to Meet Thy God;" "We Must Be Born Again."



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Plaintiffs entered OutFest at 13th Street and began to "convey their message" about 20 yards from the main stage at 13th and Locust Streets. Pls' Summ. Uncontested Facts ¶ 19; Fisher Dep. pp. 67-68. The Philly Pride volunteers surrounded the plaintiffs holding ten-foot high pink Styrofoam boards shaped like angels at the top and blowing whistles. Pls' Summ. Uncontested Facts ¶¶ 20-21. Captain Fisher instructed the plaintiffs to move down the street so they would not block the stage once the musical program began and the plaintiffs complied. Id. ¶¶ 24-25.

Captain Fisher escorted the plaintiffs further north on 13th Street toward Walnut Street. Id. ¶ 25. The Philly Pride volunteers followed with their Pink Angel signs and continued to surround the plaintiffs. Municipal Defs' Statement Undisputed Facts ¶ 9. At this point in time, plaintiff Diener engaged a transgendered attendee in conversation, calling the individual a "she-man" and saying "The mirror lied to you this morning. Your shadow is showing." Id. ¶ 16. The individual argued back with Diener and the conversation ended by Diener warning the transgendered individual that "You won't be preaching like this in hell, she-man." Event Video. Thousands of people were present at the event and at this point, Captain Fisher characterized the crowd as volatile and irate. Fisher Dep. pp.85-87.

The Police and defendant Simmons told plaintiffs they had to move because they were blocking attendees' access to the vendors' booths. Pls' Summ. Uncontested Facts ¶ 28. Simmons Dep. pp. 72-76; Fisher Dep. p. 88, Tiano Dep. pp. 76-77. Chief Inspector



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James Tiano ordered plaintiffs to relocate to 13th and Walnut Street, an area on the perimeter of OutFest near a large gay bar named "Woody's," a popular event location. Pls' Summ. Uncontested Facts ¶ 34; Tiano Dep. pp.78-80. Plaintiff Marcavage responded that the group was not leaving the event. Municipal Defs' Statement Undisputed Facts ¶ 22. Marcavage, the leader of the group, instructed plaintiffs to move in a different direction than the one the police requested. Id. ¶ 37-41; Marcavage Dep. pp. 354-55. Chief Tiano ordered that the police place the plaintiffs under arrest for disorderly conduct, disobeying the order of a police officer, and related charges. Municipal Defs' Statement Undisputed Facts ¶ 29. Prior to his arrest, Marcavage lay on the ground in a form of civil disobedience. Id. ¶ 30.

The police arrested plaintiffs at approximately 1:30 p.m. after they had been at OutFest for less than 30 minutes. Id. ¶¶ 43, 45. Plaintiffs were incarcerated for 21 hours; all criminal charges were ultimately dismissed.[5] Id. ¶¶ 44, 46.

Plaintiffs initiated this civil rights case on October 6, 2005, alleging (1) seven violations of 42 U.S.C. § 1983 ("section 1983"); (2) a violation of 42 U.S.C.§ 1985(3) ("section 1985(3)"); (3) three violations of the Pennsylvania Constitution; and (4) state law claims for battery and false imprisonment. The Philly Pride defendants filed a motion to dismiss on February 7, 2006, seeking to dismiss count 7 (conspiracy in violation of

[5] Plaintiffs were charged with eight criminal counts. The felony counts were: (1) criminal conspiracy; (2) ethnic intimidation; and (3) riot. The misdemeanor counts were: (1) obstructing a highway; (2) recklessly endangering another person; (3) failure to disperse; (4) disorderly conduct; and (5) possession of an instrument of crime.



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section 1983) and count 8 (conspiracy in violation of section 1985(3)) of the Complaint. The court denied that motion on May 26, 2006. Startzell v. City of Philadelphia, No. 05-05287, 2006 U.S. Dist. LEXIS 34128 (E.D. Pa. May 26, 2006). Now pending before the court are the parties' cross motions for summary judgment.

## II. LEGAL STANDARDS

Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party initially bears the burden of showing the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial Celotex burden can be met simply by demonstrating "to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. A fact is "material" only when it could affect the result of the lawsuit under the applicable law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and a genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non[-]moving party." Id. The moving party must establish that there is no triable issue of fact as to all of the elements of any issue on which the moving party bears the burden of proof at trial. See In re Bessman, 327 F.3d 229, 237-38 (3d Cir. 2003) (citations omitted).



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After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); see also Williams v. West Chester, 891 F.2d 458, 464 (3d Cir. 1989). A motion for summary judgment looks beyond the pleadings and factual specificity is required of the party opposing the motion. Celotex, 477 U.S. at 322-23. The non-moving party may not merely restate allegations made in its pleadings or rely upon "self-serving conclusions, unsupported by specific facts in the record." Id. Rather, the non-moving party must support each essential element of its claim with specific evidence from the record. See id.

A district court analyzing a motion for summary judgment "must view the facts in the light most favorable to the non-moving party" and make every reasonable inference in favor of that party. Hugh v. Butler County Family YMCA, 418 F.3d 265, 267 (3d Cir. 2005) (citations omitted). The standards governing cross-motions for summary judgment are the same, although the court must construe the motions independently, viewing the evidence presented by each moving party in the light most favorable to the nonmovant. Grove v. City of York, 342 F. Supp.2d 291, 299 (M.D. Pa. 2004). Summary judgment is therefore appropriate when the court determines that there is no genuine issue of material fact after viewing all reasonable inferences in favor of the non-moving party. See Celotex, 477 U.S. at 322.



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## III. DISCUSSION

### A. Plaintiffs' First Amendment Claim.

The right to speak and assemble in public places is not without limits. "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." Cox v. Louisiana, 379 U.S. 536, 554 (1965).

There is no constitutional right to drown out the speech of another person. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387 (1969) (stating that "the right of free speech of...any other individual does not embrace a right to snuff out the free speech of others."). Governments are permitted to place reasonable time, place, and manner restrictions on First Amendment activity as long as the restrictions are necessary to further significant government interests and are not based on the content of the speech. Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); see also Police Dept. of Chicago v. Mosley, 408 U.S. 92, 98 (1972); Adderley v. Florida, 385 U.S. 39 (1966). In other words, the fundamental right to free speech would not be served by requiring the government to allow two parades to simultaneously march down the same street. Cox v. New Hampshire, 312 U.S. 569, 576 (1941); We've Carried the Rich for 200 Years, Let's



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Get Them Off Our Backs–July 4th Coalition v. City of Philadelphia, 414 F. Supp. 611, 613 (E.D. Pa. 1976).

**(1) Enforcing the City's content-neutral permitting scheme does not restrict plaintiffs' First Amendment rights.**

All three parties move for summary judgment on their First Amendment claims. The crucial considerations are: (1) whether the plaintiffs' speech deserves protection;[6] (2) the nature of the forum; (3) whether the government's justification satisfies the appropriate standard. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 797 (1985). The crux of this dispute focuses on the City's justifications for restricting plaintiffs' speech.

Plaintiffs' view of this case is simplistic. They claim a freedom of speech without limits. They contend that they attempted to speak on the public streets of Philadelphia and were discriminated against based on the content of their speech. Pls' Mot. Summ. J. pp. 5-8. The plaintiffs ignore the context of their actions and advance a constitutional argument untethered to the facts of this case.

[6] For the purpose of this motion, it is sufficient to find that plaintiffs' speech is entitled to First Amendment protection without characterizing the speech. Neither defendant strenuously argues that plaintiffs' speech does not deserve constitutional protection. Plaintiffs characterize their speech as religious. The Philly Pride defendants label plaintiffs' speech as anti-homosexual. The municipal defendants suggest plaintiffs' speech is personal and does not address matters of public concern. For the purposes of the Cornelius analysis, the court is not prepared to say that plaintiffs' message is unprotected. The Supreme Court has been reluctant to hold that speech is not protected by the First Amendment, noting that even private speech is not beyond the protection of the First Amendment if it does not fall "into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction." Connick v. Myers, 461 U.S. 138, 147 (1983).



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The activity in question took place in a public forum. There is no doubt that the venue for Outfest, a designated section of the streets and sidewalks of Philadelphia, was a public place. Frisby v. Schultz, 487 U.S. 474, 481 (1988) ("[A]ll public streets are held in the public trust and are properly considered traditional public fora."). However, the First Amendment discussion does not stop with the recognition that the plaintiffs were speaking in public. The government has a limited ability to restrict free speech rights, even in a public forum. It is a well-settled rule that the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." United States v. Grace, 461 U.S. 171, 177 (1983) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983)).

To the plaintiffs, their ouster from OutFest was in response to the content of their message. They totally ignore the fact that Philly Pride had obtained a permit for its activity. In truth, the response to the plaintiffs was a response to context, not content. The context developed from the City's issuing of a valid permit to Philly Pride.

Permitting schemes have long been recognized as a content neutral method for allocating free speech rights in the public forum. Cox v. New Hampshire, 312 U.S. 569 (1941). These schemes prevent diverse groups with different messages from expressing their views simultaneously, thus creating "a cacophony where no one's message is heard"



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and further enforce that one individual has no right to drown out the message of another. Schwitzgebel v. City of Strongsville, 898 F. Supp. 1208, 1217 (N.D. Ohio 1995). While content-neutrality governs the granting of permits, issued permits can be enforced to protect the permitted message even if this excludes other messages.[7] Id. at 1219. This enforces the very purpose behind permitting schemes–to enable the expression of a particular message. In other words, an administrative permit scheme must be capable of enforcement. Kroll v. U.S. Capitol Police, 847 F.2d 899, 903 (D.C. Cir. 1988); The World Wide Street Preachers Fellowship v. Reed, 430 F. Supp.2d 411, 415 (M.D. Pa. 2006) (*citing* Diener v. Reed, 232 F. Supp.2d 362, 382 (M.D. Pa. 2002) *aff'd* 77 Fed. Appx. 601 (3d Cir. 2003)).

The government only violates the principle of content neutrality by selectively granting permits based on the expressive message. Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding a permitting scheme where the licensing board had no discretion to unfairly discriminate against applicants); Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) (holding a permit scheme that allowed the government to vary the fee for the permit based on the estimated cost of maintaining public order invalid because it allowed the administrator to consider the content of the message in order to determine the cost of the permit); Collin v. Smith, 578 F.2d 1197, 1199 (7th Cir. 1978), *cert denied* 439

[7] There is no question in this case about the permit. The plaintiffs have never claimed that the permit was issued in response to, or in approval of the Philly Pride "message," or to the content of the Philly Pride activities at OutFest.



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U.S. 916 (1978) (invalidating an ordinance that allowed city officials to deny a permit upon finding that the parade would incite violence or hatred).

Plaintiffs do not challenge the constitutionality of the City's permitting scheme. Nor do they allege that they were denied a permit. Marcavage Dep. pp. 217-18. Without a supported allegation that the City issued permits in a content-discriminatory way, plaintiffs' allegations that they were excluded from the event because of their "viewpoint" have no support in fact or in the law. Once the City issued a permit to Philly Pride for OutFest,[8] it was empowered to enforce the permit by excluding persons expressing contrary messages. See Sistrunk v. City of Strongsville, 99 F.3d 194 (6th Cir. 1996) (finding that plaintiff's claim of content-based exclusion failed because plaintiff, a supporter of presidential candidate Bill Clinton who was excluded from expressing her views at a Bush-Quayle rally, did not apply for a permit and therefore was not denied a permit based on the content of her message); Schwitzgebel v. City of Strongsville, 898 F.

[8] Plaintiffs mischaracterize Philly Pride defendants' argument concerning the legal effect of obtaining a permit. They argue that since Philly Pride did not have an exclusive use permit and only a permit to block traffic "the streets and sidewalks with (sic) the OutFest event areas remain open for free access and continue to serve as a public thoroughfare." Pls' Resp. Def. Philly Pride Mot. Summ J. p. 6. Philly Pride defendants do not argue that the permit converted the streets into a non-public forum. Even in a public forum, the government can place reasonable time, place, and manner restrictions on speech. Plaintiffs further seek to distinguish the permit from other cases applying First Amendment principles to permitted areas by arguing that Philly Pride did not have an "exclusive use" permit that exclusively reserved the forum for OutFest but a permit that only allowed Philly Pride to block the streets to traffic. Plaintiffs cite no legal authority to support this distinction. The Supreme Court's analysis in Hurley, the first case that recognized a permit holder's right to exclude contrary messages, does not examine what kind of permit the organizers obtained. 505 U.S. 557. Further, other federal courts have cautioned that courts must enforce content neutral permitting schemes without regard to the specific language of the permit. For example, a federal court found the city's enforcement of the permit to be dispositive instead of examining the language of the permit. The World Wide Street Preachers Fellowship, 430 F. Supp.2d at 413. Another federal court held that despite a permits' exclusive use language, a traditional public forum analysis applied and permitted exclusion of contrary messages at a permitted event. Schwitzgebel v. City of Strongsville, 898 F. Supp. 1208, 1217 (N.D. Ohio 1995). Therefore, this court will not decide the First Amendment issues based solely on the language of the actual permit.



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Supp. 1208, 1217 (N.D. Ohio 1995) (finding that the plaintiffs, who were protesting President George Bush's inaction on AIDS research and funding, were properly excluded from a Bush-Quayle rally "...because they physically intruded upon another previously permitted event and interfered with the speech of the permittee" and not because the government disagreed with the content of their message).

The plaintiffs have a burden here to show that their "exclusion" from OutFest was not narrowly tailored to serve a significant government interest.[9] They are not able to meet this burden. The City did not exclude plaintiffs' "counter-speech" from OutFest. In fact, the City let them in and encouraged them to offer their message at a place where there would be a reduced possibility of a confrontation. The plaintiffs were "excluded" only when they refused to obey police orders and threatened peace at a large outdoor event. The City instructed the Philly Pride volunteers to allow plaintiffs to access the event and move freely until plaintiffs insulted individual attendees, blocked access to vendors, and disobeyed direct orders from the police, who were trying to preserve order and keep the peace.

A videotape of the interactions between the police and the plaintiffs is part of the record and I had an opportunity to view this tape. The video of OutFest shows that

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[9] The access the City granted to plaintiffs is distinguishable from a similar case where a court found that the governments' actions were not narrowly tailored. The World Wide Street Preachers Fellowship, 430 F. Supp.2d at 415. In that case, the police excluded a similar group of Christian evangelists with an anti-homosexual message from a permitted gay rights event. Id. However, the area where the plaintiffs sought to speak from was not being used, even if it was a portion of the permitted venue. Id. Therefore, the court reasoned that there was no government interest in excluding the plaintiffs from the unused area. Id.



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plaintiffs attempted to speak in the heart of the crowded OutFest event. The police permitted the plaintiffs to enter and speak until their presence disrupted public order. It appears that the defendants' actions were narrowly tailored to serve a significant government interest. The City went out of its way to grant plaintiffs access to OutFest.

Finally, the plaintiffs had alternative channels or means to communicate their message. They were free to apply for a permit to organize their own expressive event. Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 578 (1995); Diener v. Reed, 77 Fed. Appx. 601, 608-09 (3d Cir. 2003); Schwitzgebel v. City of Strongsville, 898 F. Supp. 1208, 1218 (N.D. Ohio 1995). This is an alternative plaintiffs did not even attempt to implement in seeking to have their message expressed in counter-point to OutFest. Marcavage Dep. pp. 217-18. Further, since OutFest was held in a well-defined section of Philadelphia, plaintiffs could have communicated their message from outside of the permitted area to individuals as they entered and left the event. Schwitzgebel, 898 F. Supp. at 1218 (finding plaintiffs could communicate their message on the adjoining sidewalk to the event that was held on a public commons area). In fact, the Police attempted to direct plaintiffs to a less crowded area within OutFest away from the vendors and the stage.

The City imposed reasonable time, place, and manner restrictions on plaintiffs' First Amendment right to speak in a public forum in order to ensure the expressive



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message of OutFest. Therefore, summary judgment is appropriate for defendants as a matter of law on this issue.

**(2) There was no "heckler's veto" in this case because the municipal defendants did not restrict plaintiffs' speech based on the anticipated reaction of OutFest attendees.**

Plaintiffs argue that the Municipal defendants restricted their speech because of concerns about the audience's reaction to their unpopular message. Pls' Mot. Summ. J. pp. 8-10. This is the so-called "heckler's veto," which is prohibited by the First Amendment. See generally Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) ("The fact that society may find speech offensive is not a sufficient reason for suppressing it."); Boos v. Barry, 485 U.S. 312, 322 (1988) ("...in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment."); Bachellar v. Maryland, 397 U.S. 564, 567 (1970) ("...under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers..."); Brown v. Louisiana, 383 U.S. 131, 133 n.1 (1966) ("Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence.") (citations omitted).



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In advancing this argument, plaintiffs draw an imperfect analogy to the heckler's veto cases. See Pls' Mot. Summ. J. pp. 8-10. This branch of First Amendment jurisprudence is inapposite because it concerns government censorship that completely prohibits speech before it is made based on anticipated listener reaction to the speech. The "heckler's veto" analysis involves basic First Amendment principles: the government may impose reasonable time, place, and manner restrictions on speech but may not limit speech solely on the basis of content. Collin v. Smith, 578 F.2d 1197, 1201-02 (7th Cir. 1978), *cert denied* 439 U.S. 916 (1978).

One of the more well-known heckler's veto cases involved the town of Skokie, Illinois' efforts to ban a parade by a Nazi political group. Id. at 1199. The majority of the town's population was Jewish and included several thousand survivors of the Holocaust. Id. In order to prevent the Nazi march, the town first petitioned for and received a preliminary injunction, which was stayed by the Supreme Court. Id. (*citing* Nat'l Socialist Party of America v. Vill. of Skokie, 432 U.S. 43 (1977)). The town later passed ordinances to enact a permitting scheme for all parades. Id. As a prerequisite for obtaining a permit, the scheme required town officials to find that the assembly "will not portray criminality, depravity or lack or virtue in, or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation." Id. Based on this ordinance, the town refused to issue plaintiffs a permit for their parade. Id. at 1200. The Seventh Circuit held that this

ordinance violated the First Amendment because it turned on the content of the demonstration. However, the court reasoned that there was "[n]o doubt" that "the Nazi demonstration could be subjected to reasonable regulation of its time, place, and manner." Id. at 1201 (*citing* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 98 (1972)); Grayned v. City of Rockford, 408 U.S. 104, 115-16 (1972); Adderley v. Florida, 385 U.S. 39 (1966); Cox v. Louisiana, 379 U.S. 536, 554-55 (1965). Unlike the Skokie case, the municipal defendants in this case imposed reasonable time, place, and manner restrictions. See Section III.A.(1) *supra*.

The other cases plaintiffs cite can be similarly distinguished because, like the ordinance in Collin, they concern laws that censor a class of speech in advance based on its content. The Eighth Circuit struck down a state law limiting eligibility to participate in Missouri's Adopt-A-Highway program to groups "for whom state or federal courts have not taken judicial notice of a history of violence." Robb v. Hungerbeeler, 370 F.3d 735, 740 (8th Cir. 2004). The court found that limiting participation in the program, which required participants to collect litter on highways in exchange for the State installing signs bearing the name of the groups on the highway, implicated the First Amendment. Id. at 744. Based on this law, the State denied the application of a Klu Klux Klan group that sought to participate in the program. Id. at 737. The court affirmed the district court's holding that the law was unconstitutional because "[t]he mere fact that an applicant's organizational name includes certain widely-used language that has been used



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in the past by groups for which judicial notice has been taken of having a history of violence is inadequate to demonstrate that the applicant itself violates the dictates of the regulation. There has been no individualized inquiry...". Id. at 741. The court further found that there was no legitimate state interest in censoring the speech of participants in the program because of the "*potential responses*" of the audience: "[t]he First Amendment knows no heckler's veto and the State's desire to exclude controversial organizations in order to prevent 'road rage' or public backlash on the highways against the adopters' unpopular beliefs is simply not a legitimate governmental interest that would support the enactment of speech-abridging regulations." Id. at 743 (emphasis added)(citations omitted).

The state law at issue in Robb is distinguishable from the municipal defendant's actions in this case. The municipal defendants did not ban plaintiffs from OutFest in advance based on the potential hostile response of OutFest attendees. Instead, the municipal defendant's on-site response is just the kind of individualized inquiry the Eighth Circuit required of free speech restrictions in Robb. Most of the other heckler's veto cases plaintiffs cite are distinguishable on this basis. See Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105 (1991) (holding that New York's "Son of Sam" law requiring that anyone who contracts with an accused or convicted person to submit a copy of the contract and turn over all profits was unconstitutional); Boos v. Barry, 485 U.S. 312 (1988) (invalidating District of Columbia



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law banning signs critical of foreign governments within 500 feet of embassies); Coates v. City of Cincinnati, 402 U.S. 611 (1971) (striking down an ordinance that prohibited three or more people from assembling on any sidewalk and annoying passerbys).

The City of Philadelphia did not ban plaintiffs' speech at OutFest by obtaining an injunction, by passing a law, or by denying them a permit to speak. Instead, the Roll Call video shows the Police Department instructing officers to allow plaintiffs into the event because they had a First Amendment right to express their message. The municipal defendants acted on this instruction by disbanding the "human blockade" by the Philly Pride volunteers and ensuring plaintiffs' entry into the event. While the municipal defendants anticipated plaintiffs attendance at OutFest and the crowd's reaction to this message, the municipal defendant did not restrict Plaintiffs' speech in advance of the event. The plaintiffs' own actions caused the municipal defendants to remove plaintiffs from Outfest. The municipal defendants did not enact a heckler's veto but used reasonable time, place, and manner restrictions to enforce a content neutral permitting scheme.

**(3) Defendant Philly Pride had the right to exclude plaintiffs and their contrary message from their expressive, permitted event.**

In Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 559-60 (1995), the Supreme Court held that a private event organizer could not be compelled to include a group of gay, lesbian, and bisexual descendants of Irish immigrants in their annual St. Patrick's Day parade because the organizers had a right to



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exclude messages with which they did not agree. The Court overturned a state court that had applied a state public accommodations law to order the inclusion of this group in the parade. The Court cautioned that under the state court's approach

> ...any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message. Id. at 573.

The Court recognized that it was essential to the protection of free speech rights to give an event organizer the right to shape the message of its event. The counter-point to this right includes the right to be free not to endorse speech with which the speaker disagrees. Id. (*citing* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that the State could not compel school children to salute the American flag)).

Plaintiffs assert that they did not interfere with or interject themselves into OutFest and therefore are not barred by the Hurley principle.[10] Further, plaintiffs argue that this court should apply an interpretation of Hurley that permits dissenting speech by non-participatory groups during expressive events. Id. pp. 20-22. I disagree with both of these propositions. First, courts have applied Hurley more broadly. Second, plaintiffs

[10] Plaintiffs contend that "[a]ll Hurley stands for is the principle that a parade organizer can select who can participate in the parade and can prohibit participants whose message would be contrary to the message of the parade." Pls' Resp. Br. Philly Pride Defs' Mot. Summ. J. p. 21.



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sought to confrontationally inject their message into OutFest and therefore their speech cannot be characterized as "non-participatory."

Plaintiffs mischaracterize Hurley's right to exclude. The issue in Hurley was whether expressive speech was at issue. The Court determined that parades were a form of expression. Hurley, 515 U.S. at 568. Even though parades are composed of diverse units including spectators and participants, the Court found that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." Id. at 569. Therefore, it is immaterial that event organizers include a variety of groups. The event does not become less expressive because many different voices are allowed to participate. Additionally, the Court considered the "counter-speech:" a gay, lesbian, and bisexual group, and found it equally expressive. The Court found that the gay and lesbian group "seeks to communicate its ideas as part of the existing parade, rather than staging one of its own." Id. at 570.

The fact that the Hurley analysis hinges on the type of speech at issue and not on a close reading of the language of the event permit is further illustrated by its broad application beyond parades. Hurley has been applied to a political rally, Sistrunk v. City of Strongsville, 99 F.3d 194 (6th Cir. 1996); Schwitzgebel v. City of Strongsville, 898 F. Supp. 1208, 1217 (N.D. Ohio 1995), and to a street festival. Parks v. City of Columbus, 395 F.3d 643, 651 (6th Cir. 2005) (ultimately holding that Hurley did not apply because



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the Arts Festival was not expressing a particular message and there was no evidence that the counter-speech interfered with the event).

OutFest is an expressive, permitted event and the organizers of the event have a right to exclude those bearing contrary messages under Hurley. OutFest was first celebrated in 1990 in Philadelphia and has continued annually as a crowded street event. Price Dep. pp. 21-24. OutFest is held in conjunction with National Coming Out Day, which celebrates "coming out" or the first step in the process of publically admitting one's homosexuality. Voltz Dep. pp. 13-16. The festival is designed to advance lesbian, gay, and bisexual rights by providing a positive and supportive environment for homosexuals, bisexuals, and transgendered individuals to come out. Anders Dep. pp. 30-32. The event is held in the Gayborhood section of Philadelphia, which is the center of Philadelphia's gay community. Id.; see also Map of OutFest 2004 Permitted Area, Defs' Philly Pride Mot. Summ. J. Ex. B. Plaintiffs sought to communicate their own message that homosexuality is sinful in direct contrast to the message of OutFest, which aspires to create a nurturing environment for individuals to acknowledge their homosexual identity. Plaintiffs are in the same position as the lesbian, gay, and bisexual group that the Court excluded from the St. Patrick's Day Parade in Hurley, finding that the group "seeks to communicate its ideas as part of the existing parade, rather than staging one of its own." 515 U.S. at 570.



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Plaintiffs argue that their speech is not excluded by Hurley, because it was non-participatory and did not dilute or interfere with OutFest. Pls' Resp. Br. Philly Pride Defs' Mot. Summ. J. p. 21 *citing* Mahoney v. Babbitt, 105 F.3d 1452, 1456 (D.C. Cir. 1997). Mahoney involved a group who wanted to demonstrate against President Clinton's abortion policies during the President's second Inaugural Parade. 105 F.3d at 1453. The court found Hurley distinguishable for two reasons: (1) the government and not a private actor organized the parade and (2) the demonstrators only wanted to "stand on the sidewalk and peacefully note their dissent as the parade goes by" instead of marching in the parade. Id. at 1456. However, the facts of Mahoney are distinguishable from this case. OutFest is a street festival encompassing several city blocks. The "expression" occurs in the streets throughout the event area including stages, dance, sports, and amusement areas, a family zone, and a flea market. Map of OutFest 2004 Permitted Area, Defs' Philly Pride Mot. Summ. J. Ex. B.; Price Dep. p. 32. There were also over one hundred vendors from for-profit and non-profit organizations lining the streets who sought to communicate with homosexual, bisexual, and transgendered attendees. Like the parade organizers in Hurley, the Philly Pride defendants had carefully composed an ensemble of organizations to communicate their overall pro-homosexual message. Unlike the parade in Mahoney, there was no area within OutFest for the plaintiffs to stand and peacefully express their contrary message.[11]

[11] The record suggests that if plaintiffs had wanted to stand outside of OutFest and protest, they probably could have.



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Additionally, facts that are not in material dispute show that plaintiffs' interaction with the crowd was not peaceful. Unlike the plaintiffs in Mahoney, the plaintiffs did not just communicate passively with signs. The plaintiffs amplified their voices and spoke to the crowd and sang songs to communicate their message. Plaintiffs' attendance at OutFest cannot be classified as peaceful. One plaintiff communicated through incendiary language, including remarks that "Jesus Christ's blood was not HIV positive" and that one transgendered participant would "go to hell." Event Video.

I find that the City imposed reasonable time, place, and manner restrictions on plaintiffs' speech in a public forum in order to ensure the expressive message of OutFest. Therefore, summary judgment is appropriate for defendants on plaintiffs' First Amendment claims.

**B. Plaintiffs' First Amendment Retaliation Claim**

The municipal defendants move for summary judgment on plaintiffs' First Amendment Retaliation claim. In order to sustain a First Amendment retaliation claim, a plaintiff must allege: "(1) constitutionally protected conduct, (2) retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the constitutionally protected conduct and the retaliatory action." Thomas v. Independence Twp., 463 F.3d 285, 296 (3d Cir. 2006). Under this standard, plaintiffs' First Amendment retaliation claim fails along with their First



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Amendment claim because plaintiffs cannot show that their participation in OutFest was constitutionally protected. See Section III.A *supra*.

### C. Plaintiffs' Equal Protection Claim

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated people should be treated alike. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). The Supreme Court has recognized that equal protection claims can be brought by a "class of one" if "the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Willowbrook v. Olech, 528 U.S. 562, 564 (2000). Plaintiffs allege that they were similarly situated to the Philly Pride volunteers, but treated differently by the police. Compl. ¶¶ 119-126.

In order to prove an equal protection claim premised on a theory of selective enforcement, a plaintiff must establish (1) selective treatment compared with a similarly situated individual and (2) that the selective treatment "was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person." Homan v. City of Reading, 963 F. Supp. 485, 490 (E.D. Pa. 1997).

Plaintiffs contend that they were similarly situated to the Philly Pride volunteers, yet treated differently. Pls' Resp. Municipal Defs' Mot. Summ. J. pp. 16-17. According to plaintiffs, the municipal defendants permitted the Philly Pride volunteers "unfettered



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access to the public ways at Outfest" while denying plaintiffs access. Id. p. 16. The record does not support this assertion of selective treatment. The municipal defendants restricted the actions of both groups. The "distinction" between the groups is that the Philly Pride volunteers complied with police directives while the plaintiffs did not. The police directed the Philly Pride volunteers to break their human barricade and allow plaintiffs into the event or they would be arrested. The Philly Pride volunteers complied. In contrast, the plaintiffs disobeyed direct police orders concerning their movements at OutFest. They were confrontational to the police and to certain OutFest participants. Plaintiffs cannot show "selective treatment" at the hands of the police.

Plaintiffs allege "selective treatment" by arguing that the municipal defendants ordered them to lower their signs and restricted their movements at Outfest while not placing similar restrictions on the Philly Pride volunteers. These two groups were not similarly situated, see the court's First Amendment analysis, Section III.A *supra*. The Philly Pride volunteers were part of the expressive message of OutFest. In contrast, the plaintiffs had no First Amendment right to interject their contrary message into the event. There is no support for plaintiffs' equal protection claim and summary judgment for the municipal defendants is appropriate.



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### D. Plaintiffs' Fourth Amendment Claims

Plaintiffs raise Fourth Amendment claims of unreasonable seizure, false arrest, and malicious prosecution stemming from plaintiffs' arrest[12] on October 10, 2004. municipal defendants contend, in this summary judgment motion, they had probable cause to arrest plaintiffs for disorderly conduct, failure to disperse, and obstructing a highway and therefore plaintiffs' Fourth Amendment claims must fail.[13]

An arrest without probable cause violates the Fourth Amendment. Orsatti v. New Jersey State Police, 71 F.3d 480, 482 (3d Cir. 1995) (*citing* Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972)). Probable cause requires more than mere suspicion and "exists when the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested." Id. Because the decision of whether there is probable cause to arrest must be made on the spot under pressure, the determination is not reviewed under a "reasonable doubt" or "preponderance" standard. Paff v. Konek, 204 F.3d 425, 436 (3d Cir. 2000). The Third Circuit notes that probable cause is "a fluid concept–turning on the assessment of

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[12] These criminal charges were ultimately dismissed. See ft. nt. 5 *supra*.

[13] The municipal defendants do not address probable cause to arrest plaintiffs for the other crimes for which they were charged: ethnic intimidation, conspiracy, possessing an instrument of crime, inciting to riot, reckless endangerment. This does not prevent the court from deciding plaintiffs' Fourth Amendment claims as a matter of law because the parties' briefing on disorderly conduct, obstructing a highway, and failing to disperse show the municipal defendants had probable cause to arrest plaintiffs. Therefore, plaintiffs' Fourth Amendment claims of unreasonable seizure and false arrest will fail.



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probabilities in particular factual context–not readily or even usually, reduced to a neat set of legal rules." Id. (*citing* Illinois v. Gates, 462 U.S. 213, 232 (1983)). Therefore, it is the court's role to determine whether the objective facts available to the police officer at the time of the arrest were sufficient to justify a reasonable belief that an offense was being committed. Victory Outreach Ctr. v. Melso, 313 F. Supp.2d 481, 488 (E.D. Pa. 2004) (*citing* United States v. Glasser, 705 F.2d 1197, 1206 (3d Cir. 1984)). A district court can conclude, as a matter of law, that probable cause existed if the evidence viewed most favorably to the non-movant would not reasonably support a contrary factual finding. Id. (*citing* Sherwood v. Mulvihill, 113 F.3d 396, 401 (3d Cir. 1997)).

In Pennsylvania, disorderly conduct occurs when a person "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof [and] (1) engages in fighting or threatening, or in violent or tumultuous behavior; (2) makes unreasonable noise; (3) uses obscene language, or makes an obscene gesture; or (4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor." 18 PA. CONS. STAT. ANN. § 5503. Whether speech or conduct rises to the level of disorderly conduct depends on whether it causes or risks creating a public disturbance. Giles v. Davis, No. 03-0529, 2004 U.S. Dist. LEXIS 28732 (W.D. Pa. Apr. 22, 2004) *aff'd* 427 F.3d 197 (3d Cir. 2005) (*citing* Commonwealth v. Hock, 728 A.2d 943 (Pa. 1999)).



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Here, the police had probable cause to arrest plaintiffs for disorderly conduct because there were thousands of people at the event and the crowd was becoming irate and hostile largely as a result of the plaintiffs' conduct. This was especially true after plaintiff Diener insulted a transgendered attendee. Municipal Defs' Mot. Summ. J. p. 16. Captain Fisher noted that the crowd was irate and that he was concerned that ten to fifteen civil officers would not be enough to diffuse the situation if the crowd became volatile. Fisher Dep. pp. 85-87. Further, plaintiffs refused to follow police orders concerning their movement at OutFest.

Plaintiffs do not really contest the municipal defendants' representation of the facts. Instead, plaintiffs overstate the law by arguing "[t]he law in Pennsylvania is clear that the disorderly conduct statute may not be used against persons engaging in First Amendment protected activity." Pls' Resp. Municipal Defs' Mot. Summ. J. p. 18. Plaintiffs "support" this sweeping statement by citing two distinguishable cases: Commonwealth v. Mastrangelo, 414 A.2d 54, 55 (Pa. 1980) and Commonwealth v. Gowan, 582 A.2d 879, 880 (Pa. Super. Ct. 1990). These cases involved disorderly conduct convictions based on speech.

Gowan vacated the conviction of Anabaptist preachers who were preaching loudly in a public park because the evidence did not show beyond a reasonable doubt that the preaching constituted unreasonable noise. 582 A.2d at 882. In particular, the court noted that only one person testified to being directly affected by the preachers. Id. at 881. The



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other people in the park either moved away, listened and watched, or laughed at the preaching. Id. Therefore, the court classified the preaching as creating no more than an "annoyance to the people in and around the park." Id. In reversing the conviction, the court stressed that "the municipality can regulate the degree to which appellants can use the park and the manner in which they can preach, so long as it is uniform and equally applicable to all similar use." Id. at 882. In contrast, the court in Mastrangelo refused to vacate appellant's conviction for disorderly conduct because "appellant was not exercising any constitutionally protected right; rather, in a loud boisterous and disorderly fashion, he hurled epithets at the meter maid" which the court determined to be fighting words unprotected by the First Amendment. 414 A.2d at 58.

Mastrangelo and Gowan are distinguishable because they involved challenges to criminal convictions. In this case, the City subsequently dismissed criminal charges against plaintiffs. The issue before this court is whether there was probable cause to arrest plaintiffs for disorderly conduct. The City need not prove guilt beyond a reasonable doubt for the purposes of this case. Paff v. Konek, 204 F.3d 425, 436 (3d Cir. 2000) (probable cause is not judged according to the criminal law reasonable doubt standard). Moreover, even if these cases were controlling, plaintiffs' behavior is more closely analogous to the unprotected speech in Mastrangelo rather than the protected peaceful activity in Gowan.

The First Amendment is not an absolute shield against a disorderly conduct charge. Gowan, 582 A.2d at 881 ("[I]t is incumbent upon the courts to differentiate between activity which is the exercise of free speech and unreasonable noise. It is incontrovertible that the exercise of free speech can go beyond constitutionally protected boundaries to the realm of prohibited and criminal behavior."); see also Diener v. Reed, 77 Fed. Appx. 601 (3d Cir. 2003) ("While speech may be protected, an individual's choice to disobey police officers is not."); The World Wide Street Preachers Fellowship, 430 F. Supp.2d at 415 (noting that "[t]he city...can still arrest people when their conduct exceeds activity protected by the First Amendment."). As plaintiffs were not engaged in protected First Amendment activity at the time the police arrested them,[14] the fact that they were speaking does not shield them from arrest for disorderly conduct.

The circumstances surrounding plaintiffs' arrest determine if the police had probable cause. Two cases are illustrative. In Giles v. Davis, the court held that the police had probable cause in a strikingly similar situation. No. 03-0529, 2004 U.S. Dist. LEXIS 28732 (W.D. Pa. Apr. 22, 2004), *aff'd* 427 F.3d 197 (3d Cir. 2005). In that case, the plaintiffs were preaching against homosexuality on a college campus. Id. at *26. The court found the police had probable cause to arrest because the situation had escalated into a "near riot" when the speaker began insulting individuals in a crowd of 75-100 people. Id. In contrast, the Third Circuit found that the defendant police officer

[14] See *supra* Section III.A.



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did not have probable cause to arrest plaintiff after plaintiff called him a "son of a bitch" when the officer questioned him. Johnson v. Campbell, 332 F.3d 199, 211-12 (3d Cir. 2003). The court reasoned that muttering a curse did not make the plaintiff's speech fighting words and therefore outside the protection of the First Amendment. Johnson v. Campbell, 332 F.3d 199, 211-12 (3d Cir. 2003). This case is similar to the hostile crowd and incendiary speech in Giles, not the one-on-one minor altercation in Johnson.

Summary judgment for the municipal defendants is appropriate. Deposition testimony and the video tape of the event support the municipal defendants' position that the objective facts available to the civil officers policing OutFest at the time of plaintiffs' arrest provided a basis for arresting plaintiffs for disorderly conduct, failing to disperse,[15] and obstructing a highway.[16] While probable cause can be left to the jury, in

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[15] The Pennsylvania statute provides that "[w]here three or more persons are participating in a course of disorderly conduct which causes or may reasonably be expected to cause substantial harm or serious inconvenience, annoyance or alarm, a peace officer or other public servant engaged in executing or enforcing the law may order the participants and others in the immediate vicinity to disperse. A person who refuses or knowingly fails to obey such an order commits a misdemeanor of the second degree." 18 PA. CONS. STAT. ANN. § 5502. Since the court finds that the municipal defendants had probable cause to arrest plaintiffs for disorderly conduct, there is sufficient probable cause for this offense as well. Further, plaintiffs do not contest the factual basis of these charges but instead repeat their argument that "a person cannot be deemed to be acting disorderly because they are engaging in free speech activities." Pls' Resp. Municipal Defs' Mot. Summ. J. p. 18.

[16] Under the Pennsylvania statute, there are two bases for liability under this offense: obstructing and refusing to move on. 18 PA. CONS. STAT. ANN. § 5507. Obstruction occurs when a "person, who, having no legal privilege to do so, intentionally or recklessly obstructs any highway, railroad track or public utility right-of-way, sidewalk, navigable waters, other public passage, whether alone or with others, commits a summary offense, or, in case he persists after warning by a law officer, a misdemeanor of the third degree. No person shall be deemed guilty of an offense under this subsection solely because of a gathering of persons to hear him speak or otherwise communicate, or solely because of being a member of such a gathering." Id. at (a). Refusing to move on occurs when a "a person in a gathering...refuses to obey a reasonable official request or order to move: (i) to prevent obstruction of a highway or other public passage; or (ii) to maintain public safety by dispersing those gathered in dangerous proximity to a fire or other hazard. (2) An order to move, addressed to a person whose speech or other lawful behavior attracts an obstructing audience, shall not be deemed reasonable if the obstruction can be readily remedied by police control of the size or location of the gathering." Id. at (b). Plaintiffs argue that they cannot be



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this case, the parties have essentially agreed on the facts. The plaintiffs recorded the videotape of the scene and the parties agree on the actions of the plaintiffs and of the defendants. *Contra* Victory Outreach Ctr. v. Melson, 313 F. Supp.2d 481, 489 (E.D. Pa. 2004) (denying summary judgment on plaintiff's Fourth Amendment claims because there were genuine issues of material fact about the manner in which plaintiff preached to the crowd and the crowd's reaction to the message). In addition, plaintiffs' claim for malicious prosecution has no basis because the municipal defendants had probable cause to arrest the plaintiffs.[17]

### E. Plaintiffs' federal claims against the City fail to allege a policy, practice, or custom under Monell.

The question posed by the municipal defendants is whether the plaintiffs have shown that the City violated their constitutional rights pursuant to a policy, custom, or practice. This issue is controlled by Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) and its progeny.

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guilty of obstruction because of the "gathering of persons to hear him speak" terminology. Pls' Resp. Municipal Defs' Mot. Summ. J. pp. 18-19. However, plaintiffs do not contest that they disobeyed police orders to move north on 13th Street. Therefore, Police had probable cause to arrest Plaintiffs for failing to follow an order to move on that was necessary to preserve public order at OutFest and ensure access to vendors.

[17] To state a claim for malicious prosecution, a plaintiff must show: "(1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in the plaintiff's favor; (3) the proceeding was initiated without probable cause; (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) the plaintiff suffered a deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding." DiBella v. Borough of Beachwood, 407 F.3d 599, 601 (3d Cir. 2005).



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In Monell, the Supreme Court held that municipalities may not be found liable on a theory of *respondeat superior* under Section 1983. 436 U.S. at 691. See also Colburn v. Upper Darby Township, 946 F.2d 1017, 1027 (3d Cir. 1991). Section 1983 municipal liability is only proper when a municipal employee or official deprives the plaintiff of his or her federally protected rights pursuant to a municipal policy,[18] custom,[19] or practice. 436 U.S. at 691. In order to recover from a municipality under Section 1983, a plaintiff must: (1) identify a policy or custom that deprived him or her of a federally protected right, (2) demonstrate that the municipality, by its deliberate conduct, acted as the "moving force" behind the alleged deprivation, and (3) establish a direct causal link between the policy or custom and the plaintiff's injury. Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 404 (1997). Alternatively, a plaintiff can also plead a Monell claim "where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." City of Canton v. Harris, 489 U.S. 378, 387-88 (1989).

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[18] A municipal policy, for purposes of section 1983, is a "statement, ordinance, regulation, or decision officially adopted and promulgated by [a government] body's officers." Monell, 436 U.S. at 690; see also Berg v. County of Allegheny, 219 F.3d 261, 275 (3d Cir. 2000) ("Policy is made when a 'decisionmaker possessing final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict.") (citation omitted). Such a policy "generally implies a course of action consciously chosen from among various alternatives." Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985). Limiting liability to identifiable policies ensures that municipalities are only liable for "deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." Brown, 520 U.S. at 403-04.

[19] A custom, while not formally adopted by the municipality, may lead to liability if the "relevant practice is so widespread as to have the force of law." Brown, 520 U.S. at 404. This requirement should not be construed so broadly as to circumvent Monell: "[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy...". Oklahoma City v. Tuttle, 471 U.S. 808, 823-824 (1985).



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Plaintiffs allege that "[i]t is the policy, practice, or custom of the City of Philadelphia to exclude Christian evangelism...suppress peaceful Christian evangelism...suppress expressive activity that disfavors homosexuality." Compl. ¶¶ 92-94. Plaintiffs also assert that the City "fails to adequately train its police officers to protect the First Amendment rights of its inhabitants." Id. ¶ 96. At the summary judgment stage, plaintiffs argue "that the evidence presented in this matter is more than sufficient to meet their burden of proving that their constitutional rights were violated as a result of the custom, policy and practice of the City of Philadelphia." Pls' Resp. Municipal Defs' Mot. Summ. J. p. 22. To support this assertion, plaintiffs point to a prior civil case against the City for eight instances of interference with their street preaching activities.[20] Plaintiffs fail to note that a jury entered a civil verdict in favor of the defendants in that case. Marcavage v. City of Philadelphia, No. 04-4741 (E.D. Pa. Aug. 18, 2006) (Document No. 99). References to allegations in plaintiffs' earlier unsuccessful civil suit are not sufficient to raise an issue of material fact under FED. R. CIV. P. 56.

Plaintiffs offer no evidence in support of their failure to train and supervise claim. In fact, the only evidence in the record shows that the City actually conducts training of municipal supervisors and officers in the specific subject of protecting the protestors'

[20] Plaintiffs have previously argued that the alleged constitutional violations they suffer constitutes a custom or practice under Monell without success. Marcavage v. City of Philadelphia, No. 04-4741, 2006 U.S. Dist. LEXIS 55643 at *26 (E.D. Pa. Aug. 3, 2006) (holding that plaintiff's seven interactions with the police are insufficient for liability because "[e]ven it a jury were to find that individual officers violated Marcavage's rights, the testimony on which plaintiff relies merely establishes that the Philadelphia Police Department has, on several occasions, confronted Marcavage, but not that it has an established policy or custom of any unconstitutional abuse." ).



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First Amendment rights. The Roll Call video shows police officials and legal counsel instructing the officers who would patrol OutFest that the protestors had a right to attend the event and that the officers were obligated to protect the First Amendment rights of all attendees while maintaining peace and order. The officers were also encouraged to call a supervisor whenever they had a problem and were assured that the legal advisor to the Department would be on hand throughout the event to handle concerns.

There is no basis for a Monell claim in this case. I will grant summary judgment to the City of Philadelphia on plaintiffs' federal constitutional claims.

### F. Qualified Immunity

The individual municipal defendants contend that they have qualified immunity. The application of qualified immunity is a question of law. Sherwood v. Mulvihill, 113 F.3d 396, 401 (3d Cir. 1997).[21]

The Third Circuit uses a two-part test to determine whether qualified immunity is available as a defense. First, "the court must determine whether the facts, taken in the light most favorable to the plaintiff, show a constitutional violation." Id. If the plaintiff cannot show a constitutional violation, the analysis ends and the officer is granted immunity. If, however, there is a constitutional violation, the court must determine whether the constitutional right was clearly established. Id. In other words, the court

[21] Additionally, the issue of qualified immunity must be resolved at the earliest possible time because the privilege will be effectively lost if the case is erroneously permitted to go to trial. Bennett v. Murphy, 274 F.3d 133, 136 (3d Cir. 2001).



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must determine "in the factual scenario established by the plaintiff, would a reasonable officer have understood that his actions were prohibited?" Id. The officer is entitled to qualified immunity only if "it would not have been clear to a reasonable officer what the law required under the facts alleged...." Id. at 136-37.

The plaintiffs have not proven violations of their First, Fourth, or Fourteenth Amendment rights. On this basis alone, the individual municipal defendants are entitled to qualified immunity. If I had found a possible constitutional violation at this stage of the case, I believe a reasonable officer would not have known his actions were prohibited. The officers attempted to accommodate the plaintiffs, then communicated with them, then directed them to move to a place where the possibility of a disturbance of the peace was less and they only arrested the plaintiffs when the plaintiffs plainly disregarded police directions and began to escalate the situation.

### G. Conspiracy Claims[22]

The Philly Pride and municipal defendants move for summary judgment on plaintiffs' Section 1983 Conspiracy Claim (Count Seven) and the Section 1985(3) Conspiracy Claim (Count Eight). The court initially considered this issue when denying the Philly Pride defendants' motion to dismiss these claims. Startzell v. City of Philadelphia, No. 05-05287, 2006 U.S. Dist. LEXIS 34128 (E.D. Pa. May 26, 2006). At that point in time, the court noted that plaintiffs must do more than baldly assert the

[22] These are the only claims brought against the Philly Pride defendants.



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existence of a conspiracy in order to move forward on these claims. Id. at *11 n.6. Plaintiffs have not met this burden. The material facts in the record do not show a mutual understanding or agreement between the municipal defendants and the Philly Pride defendants to deprive plaintiffs of their First Amendment rights.

**(1) Plaintiffs' Section 1983 and Section 1985(3) Conspiracy Claims fail because there is no underlying constitutional violation and no direct or circumstantial evidence that the municipal defendants and the Philly Pride defendants formed an agreement to exclude plaintiffs from OutFest.**

To state a claim for conspiracy in violation of Section 1983, a plaintiff must allege "(1) the existence of a conspiracy involving state action; and (2) a [deprivation] of civil rights in furtherance of the conspiracy by a party to the conspiracy." Marchese v. Umstead, 110 F. Supp. 2d 361, 371 (E.D. Pa. 2000).

To state a Section 1985(3) Conspiracy Claim, "a plaintiff must allege: (1) a conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons to the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States." Russo v. Voorhees Twp., 403 F. Supp. 2d 352, 359 (D.N.J. 2005).

The conspiracy claims are legally inadequate for two reasons. First, there is no underlying violation of plaintiffs' First Amendment rights. See Sections III. A. and III. C. *supra*. This removes the basis for a Section 1983 conspiracy claim.

Second, the record simply does not establish the existence of a conspiracy. For a conspiracy, a plaintiff must show "a combination of two or more persons to do a criminal act, or to do a lawful act by unlawful means or for an unlawful purpose" by making "specific factual allegations of combination, agreement, or understanding among all or between any of the defendants to plot, plan, or conspire to carry out the alleged chain of events." Marchese, 110 F. Supp. 2d at 371. Central to any conspiracy claim are specific factual allegations that "there was a mutual understanding among the conspirators to take actions directed toward an unconstitutional end." Lamb Found. v. N. Wales Borough, No. 01-950, 2001 U.S. Dist. LEXIS 18797, at *47 (E.D. Pa. Nov. 16, 2001) (citing Duvall v. Sharp, 905 F.2d 1188, 1189 (8th Cir. 1990)); Russo v. Voorhees Twp., 403 F. Supp.2d 352, 358 (D. N.J. 2005); Safeguard Mut. Ins. Co. v. Miller, 477 F. Supp. 299, 304 (E.D. Pa. 1979). Circumstantial evidence may be used to prove a conspiracy. Smith v. Wambaugh, 29 F. Supp.2d 222, 229 (M.D. Pa. 1998). Therefore, whether there is a conspiracy is typically a jury question if there is a possibility to "infer from the circumstances that the alleged conspirators had a meeting of the minds and thus reached an understanding to achieve the conspiracy's objections." Id. (citations omitted). Here, there is insufficient direct or circumstantial evidence in the record showing that the



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municipal defendants and the Philly Pride defendants formed a mutual understanding and plan to deprive plaintiffs of their First and Fourteenth Amendment rights.

**(a) The defendants did not agree to exclude plaintiffs from OutFest prior to the event.**

Plaintiffs fail to allege an agreement between the municipal defendants and Philly Pride defendants to exclude plaintiffs from OutFest. Plaintiffs' attendance at OutFest was widely publicized in advance of the event and the defendants took diametrically opposed positions as to how to deal with their presence. If anything, the record shows a marked disagreement between Philly Pride and the City as to how best to respond to the plaintiffs.

The Philly Pride defendants were familiar with plaintiffs' proselytizing and expected them to attend OutFest. See Philly Pride Def. Mot. Summ. J. Ex. R, Timothy Cwlek, "Protesters to Attend OutFest," Philadelphia Gay News (predicting that "[t]he increasingly familiar scenario of anti-gay protesters at gay events is expected to continue" at OutFest 2004). Philly Pride asked the municipal defendants to bar plaintiffs from attending OutFest. Daniel Anders, *pro bono* counsel to Philly Pride, sent a letter to the City requesting that it exclude all anti-LGBT protestors from entering the permitted areas in order to protect the public and "uphold Philly Pride's constitutional right to control its message of LGBT pride and equality." Philly Pride Def. Mot. Summ. J. Ex. S. The City refused to honor this request and informed Philly Pride defendants that it would not direct its civil officers to exclude anti-LGBT protestors from the permitted OutFest area.



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The use of the Philly Pride volunteers and the "Pink Angels" did not result from an agreement with the City.[23] The record shows that using the volunteers was Philly Pride's own plan to exclude the protestors. Philly Pride publicized this plan in the Philadelphia Gay News. Charles Volz told the reporter that a "security force" of volunteers would be at the event to block the protestors' access to OutFest attendees. Philly Pride Def. Mot. Summ. J. Ex. R, Timothy Cwlek, "Protesters to Attend OutFest," Philadelphia Gay News. Mr. Volz is quoted as saying "We'll have a moving pink wall around [the protesters]. Hopefully, they will be so frustrated, they won't come again. Talking to a piece of Styrofoam is not the same as talking to a crowd of people." Id.

The Philly Pride defendants also informed the municipal defendants about their plan to interject volunteers between the anti-LGBT protestors and OutFest attendees. The record shows that the municipal defendants took no position as to the human buffer zone and were not aware of the details of this counter-protest. This is uncontroverted. Mr. Anders testified that "[t]he City's response was that they would make an on site determination on the use of our volunteers and the buffer zone that they were going to create." Anders Dep. p. 49. Captain William Fisher testified that he did not understand what the Philly Pride volunteers' counter-protest would be until OutFest. Fisher Dep. p.

[23] The litany of conspiracy evidence that plaintiffs list in their brief does not show parties acting in concert. See Pls' Resp. Philly Pride Defs' Mot. Summ. J. pp. 9-14. At most, the facts show the two defendants communicating regarding event logistics. Plaintiffs construe the municipal defendants' silent receipt of Philly Prides counter-protest plans as encouraging and supporting through silence. Id. p. 10. While an agreement can be reached through silence and a conspiracy can be proved through circumstantial evidence, the overall record in this case does not support a finding that the two defendants reached a mutual agreement or plan for dealing with plaintiffs at OutFest.



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27. Captain Fisher further testified that the only instructions he gave to Philly Pride was that their volunteers must "stay within the confines of the law like everyone else." Id. This neutral advice does not indicate that the defendants conspired to hamper plaintiffs' First Amendment rights.

The record shows that the Philly Pride defendants formed their own plan to discourage plaintiffs from attending LGBT pride events. The municipal defendants did not actively support this plan and were not knowledgeable about the details of the counter-protest. Their neutral warning that the Philly Pride volunteers must stay within the confines of the law can hardly be construed as encouragement or support. In fact, the municipal defendants took the same neutral "wait and see" approach in allowing plaintiffs to enter OutFest. The evidence indicates that the municipal defendants gave equal consideration to the First Amendment rights of both the plaintiffs and Philly Pride defendants and refused to preemptively stop the speech of either party until it became unlawful.

**(b) The municipal defendants did not support the Philly Pride volunteers' efforts to stop plaintiffs' speech at OutFest.**

Plaintiffs contend that "[a]t no time did the City defendants ever do anything adverse to the Philly Pride defendants." Pls' Resp. Philly Pride Defs' Mot. Summ. J. p. 12. This statement ignores the municipal defendants' order that the Philly Pride volunteers break their human barricade and allow the plaintiffs to enter the event or be



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arrested themselves. This action again emphasizes the neutral approach the municipal defendants took in policing OutFest.

Plaintiffs rely on purely semantical arguments to evince an agreement between the defendants. Plaintiffs allege a conspiracy by noting that the municipal defendants indicated during roll call that the Philly Pride volunteers would provide information to the police officers at the event. Roll Call video. There is no evidence that this was at the request of the Police Department. Instead, this action was part of Philly Pride's overall plan to exclude plaintiffs from the event. It was Philly Pride's intent to keep the plaintiffs out. The City did not share this intent. Additionally, there is no evidence that Philly Pride defendants and the municipal defendants conspired to direct plaintiffs' movement inside the event. Instead, it was vendor complaints that led the municipal defendants to order plaintiffs to move from their chosen preaching location. Simmons Dep. pp. 72-76; Fisher Dep. p. 88, Tiano Dep. pp. 76-77.

Plaintiffs also argue that the Police only ordered plaintiffs, and not the Philly Pride volunteers who were shadowing them, to move in response to vendor complaints. This argument ignores the practicalities of a counter-protest: the Philly Pride volunteers would disperse as soon as the plaintiffs did. See Tiano Dep. p. 77 ("I was moving [plaintiffs] first and then I knew if [plaintiffs] would move, I wouldn't have to worry about the [Philly Pride volunteers]. They'd move to."); Anders Dep. p. 121 (stating that the Philly Pride counter-protestors would not have been at the event if plaintiffs had not attended).



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It would have been counter-productive for the police to order the Philly Pride volunteers to disperse while plaintiffs, the target of their protest, were still present. In the circumstances, the path could only be cleared by moving the plaintiffs, then the Philly Pride volunteers. Chief Tiano's testimony shows that this is precisely what occurred and that the counter-protest dispersed once the plaintiffs left OutFest. Tiano Dep. p. 117 (stating that once plaintiffs left OutFest "...it was like a different event.").[24]

Plaintiffs' Section 1983 Conspiracy Claim cannot survive this motion for summary judgment because plaintiffs fail to make "specific factual allegations of combination, agreement, or understanding among all or between any of the defendants to plot, plan, or conspire to carry out the alleged chain of events." Marchese, 110 F. Supp. 2d at 371. The record shows that the Philly Pride defendants formed their own plan to deter the plaintiffs from protesting at OutFest. This plan was widely publicized and carried out without the explicit or implicit agreement of the municipal defendants, who interfered with the counter-protest from its start by ordering the Philly Pride volunteers to let the plaintiffs into OutFest. The Philly Pride defendants and the municipal defendants acted on their own, not in concert. Therefore, summary judgment for the defendants is appropriate as a matter of law.

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[24] Plaintiffs attempt to use this remark as evidence that the municipal defendant thought that removing plaintiffs from the event would be a "good thing." Pls' Resp. Philly Pride Defs' Mot. Summ. J. p. 12. This argument is unconvincing considering that it was the municipal defendants who permitted plaintiffs to enter OutFest by breaking the Philly Pride volunteer barricade.



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**(2) Philly Pride's communications with the municipal defendants may also be protected petitioning activity under the Noerr-Pennington doctrine.**

Defendant Philly Pride also argues it should be granted summary judgment on plaintiffs' conspiracy claims because the communications between Philly Pride and municipal defendants that form the basis of the claim constitute petitioning activity protected by the Noerr-Pennington Doctrine. Philly Pride Defs' Mot. Summ. J. p. 12; see E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) ("Noerr") and United Mine Workers v. Pennington, 381 U.S. 657 (1965) ("Pennington").

Although the Noerr-Pennington doctrine originated in the context of antitrust litigation, the Third Circuit has followed the general trend of expanding this doctrine by holding that individuals are immune from liability for exercising their First Amendment right to petition the government. Barnes Found. v. Township of Lower Merion, 242 F.3d 151, 159 (3d Cir. 2001). This doctrine protects petitioning of all departments of the government including the legislative, executive, and judicial branches. A.D. Bedell Wholesale Co. v. Philip Morris Inc., 263 F.3d 239, 250 (3d Cir. 2001).

Federal courts have applied the doctrine in a similar context to the current case. See Delguerico v. Springfield Township, No. 02-3453, 2002 U.S. Dist. LEXIS 23505 at * 14-15 (E.D. Pa. Nov. 26, 2002) (holding that the defendant's complaints to the township about how the neighbors were using their property was protected by the First Amendment to the extent that the defendants "acted to influence, or induce, action by the Township.");



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Pellegrino Food Prods. Co. v. City of Warren. 136 F. Supp.2d 391, 411-12 (W.D. Pa 2000) (finding that complaints to the police were protected activities but not deciding whether these constitute petitioning activity under the Noerr-Pennington doctrine). However, without binding precedent from the Third Circuit and having already dismissed plaintiffs' conspiracy claims, this court does not have to determine whether the communications between Philly Pride and the municipal defendants constitute protected petitioning activity.

### H. Plaintiffs' State Law Claims

#### (1) Constitutional Claims

Plaintiffs made three claims under the Pennsylvania Constitution: Equal Protection (Count Nine), Right to Free Speech (Count Ten), and Freedom of Conscience/Religious Freedom (Count Eleven). At oral argument, plaintiffs' counsel withdrew these claims. Tr. Summ. J. Hr'g, Nov. 14, 2006 p. 87.

#### (2) Other State Law Claims

In addition to their state constitutional law claims, plaintiffs also bring state law tort claims against the City and individual officers for malicious prosecution (Count Six), battery (Count Twelve), and false imprisonment (Count Thirteen). The municipal



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defendants move for summary judgment on these claims because they are barred by the Political Subdivision Tort Claims Act 42 PA. CONS. STAT. ANN. § 8541 *et. seq.*.[25]

The Tort Claims Act states that "...no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." The Pennsylvania Supreme Court has noted that this creates an "absolute rule of governmental immunity" intended to insulate political subdivisions from tort liability. Mascaro v. Youth Study Ctr., 523 A.2d 1118, 1123 (Pa. 1987). The phrase "any injury" has been construed widely to include all physical, mental, reputational, or economic injuries. E-Z Parks, Inc. v. Philadelphia Parking Auth., 532 A.2d 1272, 1277 (1987) alloc. denied, 519 Pa. 656 (1988). The Tort Claims Act therefore provides broad immunity to the City of Philadelphia because none of the specifically enumerated exceptions apply.[26]

The Tort Claims Act also immunizes the individual municipal defendants. The Act provides that individual municipal employees cannot be held liable unless their actions were criminal or done with actual malice or willful misconduct. 42 PA. CONS.

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[25] Plaintiffs did not respond to this argument in their opposition brief or at oral argument on the cross-motions for summary judgment.

[26] Section 8542 waives immunity in eight situations concerning (1) the operation of motor vehicles; (2) care, custody, and control of personal property of others in the possession or control of the local agency; (3) care, custody and control of real property; (4) dangerous conditions of trees, traffic controls and street lighting; (5) dangerous conditions of utility service facilities; (6) dangerous conditions of streets; (7) dangerous conditions of sidewalks; (8) care, custody and control of animals. 42 PA. CONS. STAT. ANN. § 8542(b)(1)-(8). None of these exceptions are applicable to plaintiffs' claims.



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STAT. ANN. § 8550. Plaintiffs do not allege that the individual defendants' behavior was criminal. There is no evidence in the record showing that defendants acted with malice or willful misconduct to the plaintiffs. Courts have defined willful misconduct as requiring a plaintiff to prove the equivalent of an intentional tort or specific intent: "that the actor desired to bring about the result that followed." Bright v. Westmoreland County, 443 F.3d 276, 287 (3d Cir. 2006). Plaintiffs have not adduced evidence to show willful violations by the individual municipal defendants for these state law claims. Therefore, summary judgment for the municipal defendants is appropriate for plaintiffs' state law claims.

**I. Punitive Damages**

The municipal defendants argue that plaintiffs' claims for punitive damages should be dismissed. The Supreme Court has held that punitive damages for Section 1983 claims are not available against municipalities. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981) ("Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct..."); Bolden v. SEPTA, 953 F.2d 807, 811 (3d Cir. 1991).

In their responsive brief, plaintiffs do not renew their claim for punitive damages against the City but only for punitive damages against the law enforcement officers. Pls' Resp. Municipal Defs' Mot. Summ. J. p. 24. A court cannot impose a punitive damages



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award against an official acting in his or her individual capacity unless the actor's conduct is, at a minimum, reckless or callous. Brennan v. Norton, 350 F.3d 399, 428-29 (3d Cir. 2003). There is no evidence that the municipal defendants callously or recklessly disregarded plaintiffs' federal constitutional rights. Instead, the evidence shows that the municipal defendants' actions at OutFest were narrowly tailored to protect public order. Therefore, plaintiffs' punitive damages claims will be dismissed.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| **SUSAN STARTZELL, et al.,** | : | **CIVIL ACTION** |
| **Plaintiffs,** | : | |
| | : | |
| **v.** | : | **NO. 05-05287** |
| | : | |
| **CITY OF PHILADELPHIA, et al.,** | : | |
| **Defendants.** | : | |

**ORDER**

**AND NOW**, this 18th day of January, 2007, after hearing oral argument and upon consideration of Plaintiffs' Partial Motion for Summary Judgment (Document No. 45), Municipal Defendants' Motion for Summary Judgment (Document Nos. 47 and 50), Defendant Philly Pride's Motion for Summary Judgment (Document No. 48) and the responses thereto, it is hereby **ORDERED** that Plaintiffs' Motion for Summary Judgment is **DENIED** and Defendant Philly Pride and the Municipal Defendants' Motions are **GRANTED**.

The Clerk of the Court is directed to mark this case closed for statistical purposes.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.

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