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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

SHANNAH M. KURLAND and GLADYS B. GOULD	: :	
VS.	:	C.A. NO. 14-524
CITY OF PROVIDENCE, by and through its Treasurer, James J. Lombardi, III, ET AL	: :	

DEFENDANTS' REPLY TO PLAINTIFFS' OBJECTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

Now come the defendants and file this brief reply to the plaintiffs' objection to the defendants' motion for summary judgment, as well as to the plaintiff's cross-motion for summary judgment (both collectively referred to as "plaintiffs' memoranda").

Plaintiffs' memoranda, while perhaps stating an admirable dissertation on First Amendment law, fails to respect the facts of this case. The restrictions on speech which the Court must focus on in this case are not that placed on the plaintiffs but, that placed on the entire group of protestors as a whole, *see Heffron*, 101 Sup.Ct. 2559, 2566-67 [6]. In *Heffron*, the Supreme Court specifically rejected the lower court's focus on whether or not an exemption to the restrictions put in place could have been crafted for the ISKCON group while still leaving it in place for the rest of the attendees at the fairgrounds, stating that "justification for the rules should not be measured by the disorder that would result from granting an exemption solely to ISKCON," *Id.* at 2566 [6]. The Court noted that that organization had no special claim to the First Amendment over that of the others, and that, in essence, what is good for one is good for all. "If (the rule in question) is an invalid restriction on the activities of ISKCON, it is no more valid with respect to the other social, political, or charitable

organizations that have rented booths at the fair and confined their distribution, sale, and fund solicitation to those locations, *Id.* at 2566-67 [6]. The Supreme Court went on to state that the lower court, by mistakenly focusing on the incidental effect of providing an exemption to ISKCON, did not take into account the fact that any such exemption cannot be meaningfully limited to ISKCON, and as applied to similarly situated groups, would prevent the state from furthering its important concern with managing the flow of the crowd, *Id.* at 2567 [6].

This analysis is critical to the case at bar since, as expected, the plaintiffs argue that they, and a very small group of people, were alone at Area C while the rest of the group had previously moved across the street to Area D. In other words, the plaintiffs argue that they should have been granted an exemption to the plan put in place by Lieutenant Perez to deal with the traffic issues that he and other police officers had already encountered at the scene. That argument is entirely at odds with the *Heffron* rationale that what is good for one must be good for all, and that such exemptions are not required to be given and are not the focus of the validity of the regulation.

A restriction is either valid or it is not, and it does not depend on whether or not one or more persons could have been given an exemption. As stated by Police Chief Clements and echoed in the *Heffron* decision, "you cannot have different sets of rules for different protestors without risking a return to the safety hazard that the rules of engagement were meant to address," Defs.' SUF No. 111.

The fact that the plaintiffs, Kurland and Gould, were standing alone or with a very few others in Area C is not determinative of the contemporaneous time, place and manner restriction ordered by Lieutenant Perez at the scene. In conjunction with ordinary traffic conditions at that time of day, coupled with the large numbers of event goers attending the fundraiser and the quickly swelling size in the number of protestors arriving, Lieutenant Perez (and the two officers there prior to him)

experienced a whole host of actual traffic issues (not theoretical issues), including pedestrians and protestors in the street, heavy vehicular traffic, blocked intersections (to the point that Perez could not even drive his patrol car down the access road to the casino), and made the determination that the safest way to control traffic and safety was to locate the protestors in one area (initially Area C, and when that filled, to Area D) in order to allow the on-scene officers to control the flow of vehicular traffic entering from the Elmwood Avenue entrance and the Linden and Rose Avenue intersection, while at the same time, tending to patrons crossing from various locations and keeping the protestors off of the roadway and on the grass curb edge of Area D.

Likewise, the plaintiffs argue that if there truly was a traffic safety issue, the police could have dealt with the issue by dealing with only those individuals going into the street, for example (plaintiffs' memoranda at p. 37). That argument is completely misplaced and totally rejected by the First Circuit's decision in the *Bl(a)ck Tea Society* case, 378 Fed.3d 8 at 13 [5-6]. In that matter, the plaintiffs argued that the City of Boston could not implement security requirements that substantially burdened speech on the basis of unrelated past experiences, and that in the absence of specific threat evidence, the City should have been limited to arresting miscreants and punishing unlawful conduct after it occurred, *Id*. In response to that argument, the Court stated that a per se rule barring the government from using past experience to plan for future events was not consistent with the approach adopted in the Court's time—place—manner jurisprudence, *Id. citing Hill*, 120 Sup.Ct. 2480. The First Circuit noted that the question is not whether the government may make use of past experience—it most assuredly can—but the degree to which inferences drawn from past experience are plausible, *Id.* at 14 [6].

In the case at bar, the "past experience" experienced by Perez and other officers on scene was only minutes old and continued to occur even as they dealt with the plaintiffs as other protestors attempted to cross from Area D back over to other areas, let alone at least two protestors nearly being struck by vehicles as they crossed back over to Area C (protestor Buchanan), and another unidentified individual as he attempted to cross.

Moreover, the plaintiffs' attempt to argue that the restrictions were somehow content based should be rejected out of hand. There is not a scintilla of evidence in the record that any protestor, let alone either plaintiff, was somehow banned from chanting or holding signs. Likewise, the plaintiffs' argument that since patrons to the event were free to cross the streets, etc., it must mean that the restrictions put on the protestors' movement had to be because of content. There is simply no basis in the record or in the law to promote such an argument. Where restrictions are based not on what is being said, but rather, where it is being said, the restriction is not based on content, *McCullen v. Coakley*, 134 Sup.Ct. 2518, 2531 2014 [12].

Plaintiffs' memoranda also seems to suggest (for the first time) that plaintiff Gould somehow had a Fourth Amendment right that was violated. The uncontroverted evidence is that Gould was never detained and always free to leave at her own volition. Likewise, Kurland was always free to leave Area C (indeed, that is what her First Amendment complaint is all about), and was only detained and ultimately arrested when she refused to comply with lawful orders of a uniformed police officer (then-Lieutenant Perez) who was authorized to control the traffic conditions (pedestrian and automobile) then existing. Kurland's refusal to do so, after repeated warnings, readily amounted to probable cause for various offenses as outlined in the defendants' summary judgment motion.

It is also interesting that the plaintiffs tried to defeat the defendants' qualified immunity argument by suggesting that the law in this area is "well established" given certain cases involving the City of Providence. At page 22 of the plaintiffs' memoranda, the plaintiffs cite to the *Reilly* decision, which bears no resemblance to the facts of the case at bar whatsoever. *Reilly* involved, at most, two persons attempting to pass out leaflets to persons attending a mayoral speech in a local school building. They were asked not to stand in front of the steps leading to the entranceways and the consent judgment in that action specifically limited the decision to the facts of the *Reilly* case and nothing more, and stated that the City's policy of keeping passageways open was unconstitutionally applied in the *Reilly* case only. The plaintiff also cited to two decisions, *Prince* and *Kurland*, neither of which involved decisions or rulings. *Prince* was dismissed after settlement. *Kurland* remains pending. Likewise, the plaintiffs' reference to the *Pombo* decision is equally misplaced. *Pombo* involved a lone musician who played his music on city sidewalks while requesting donations from passers-by. Such cases do not even begin to approach the threshold requirement for meeting the "well established" prong of the qualified immunity analysis.

Additionally, and as originally stated in the defendants' memorandum, plaintiff Gould's movement from Area A to Area B, and Area B to Area C, is of no moment. First and foremost, whoever ordered and/or requested Ms. Gould to move has never been identified and is not named as a defendant in this action. Whether it was a police officer or a security guard or whatever, is of no consequence. It was not defendant Perez or any of the defendants named in this action. Moreover, as acknowledged by plaintiff Gould, no one was moved from those initial locations until the crowd size grew too large for those persons to fit in those areas.

In similar fashion, the plaintiffs' repeated references to a peaceful group of demonstrators is hardly the point. The contemporaneous restrictions placed on the protestors were done in response to actual, on-scene traffic conditions (pedestrians and vehicular), and not because of any unruly conduct by the crowd. Congested pedestrian and vehicular traffic simply does not mix well, whether the pedestrians or the motor vehicle operators are madmen or whether they are peaceful grandmothers.

For all the reasons stated in the defendants' original motion for summary judgment and those re-emphasized herein, your defendants respectfully request that their motion for summary judgment be granted, and that the plaintiffs' cross-motion for summary judgment be denied.

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CERTIFICATION

I hereby certify that I have filed the within with the United States District Court on this 16th day of April, 2019, that a copy is available for viewing and downloading via the ECF system, and that I have caused a copy to be sent to:

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