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.	**:**	

M E M O R A N D U M

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.

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.

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

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

("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.

[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."

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

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.

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).

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.

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

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).

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"

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.

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.

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

[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.

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

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).

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

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

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

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.

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

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.

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.

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

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

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.

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.

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)).

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

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.

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

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).

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).

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.").

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).

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.

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

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.

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.

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

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).

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.

[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.

(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.");

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

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.

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

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.	**:**	

O R D E R

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.