APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

Opinion of the United States Court of Appeals for the Third Circuit (January 27, 2023) 1a

Memorandum Opinion of the United States District Court for the Eastern District of Pennsylvania Granting Motion to Dismiss (January 12, 2022) 9a

Order of the United States District Court for the Eastern District of Pennsylvania, Dismissing Counts (January 12, 2022) 34a

REHEARING ORDER AND JUDGMENT

Order of the United States Court of Appeals for the Third Circuit Denying Petition for Rehearing En Banc (February 21, 2023) 36a

Judgment of the United States Court of Appeals for the Third Circuit (March 1, 2023) 38a

OTHER DOCUMENT

Complaint (April 6, 2021) 40a

Exhibit A. Executive Order No. 2-21, Renaming Columbus Day to Indigenous Peoples' Day 88a

Exhibit X. Resolution Declaring Italian American Heritage Week 91a

OPINION* OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (JANUARY 27, 2023)

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CONFERENCE OF PRESIDENTS OF MAJOR ITALIAN AMERICAN ORGANIZATIONS, INC.; MARK F. SQUILLA, Philadelphia City Councilmember; THE 1492 SOCIETY; JODY DELLA BARBA,

Appellants.

GRAND LODGE OF PENNSYLVANIA SONS AND DAUGHTERS OF ITALY

v.

CITY OF PHILADELPHIA;
MAYOR JAMES F. KENNEY

No. 22-1116

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2:21-cv-01609)
District Judge: Honorable C. Darnell Jones II

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* This disposition is not an opinion of the full Court and, under I.O.P. 5.7, is not binding precedent.

Submitted Under Third Circuit L.A.R. 34.1(a):
January 18, 2023

Before: AMBRO, PORTER, and
FREEMAN, Circuit Judges.

(Filed: January 27, 203)

PORTER, *Circuit Judge*.

Philadelphia Mayor James Kenney issued an executive order rescinding the city's recognition of Columbus Day and redesignating the holiday as Indigenous People's Day. A group of Italian Americans sued Mayor Kenney and the City of Philadelphia for depriving them of equal protection of the laws. The District Court dismissed their complaint after it found that they had alleged no injury-in-fact. We will affirm.

I

The federal government observes Columbus Day on the second Monday in October to commemorate "the anniversary of the discovery of America." H.J. Res. 10, 73d Cong. (1934) (enacted), *see* J.A. 52; 5 U.S.C. § 6103. Until 2021, the city of Philadelphia similarly marked Columbus Day as a city holiday. In recognition of Christopher Columbus's Italian heritage, the Philadelphia City Council traditionally designates the week of the holiday as "Italian American Heritage Week." And since 1957, the city has conducted an annual Columbus Day Parade.

On January 27, 2021, Mayor Kenney issued Executive Order 2-21 replacing Columbus Day with Indigenous People's Day. J.A. 43-44 and Exhibit A

hereto. The Conference of Presidents of Major Italian American Organizations, Inc. (COPOMIAO), Philadelphia Councilmember Mark Squilla, the 1492 Society, and the 1492 Society secretary Jody Della Barba (collectively, "Plaintiffs") took offense.[1] They view Executive Order 2-21 to be the latest act in a pattern of hostility by Mayor Kenney against Italian Americans. According to Plaintiffs, additional evidence of Kenney's discriminatory animus includes: removing a statue of Italian American mayor and police commissioner Frank Rizzo from the Municipal Services Building; refusing to return the statue to its owner, the Frank L. Rizzo Monument Committee; making preparations to remove a Christopher Columbus statue in Marconi Plaza; referring to Italian Americans who challenged the Columbus statue's removal as "vigilantes"; reassigning police captain Lou Campione from his South Philadelphia command; omitting a zip code with a high concentration of Italian Americans from a COVID-19 vaccination list; and using derogatory language towards Italian Americans.

Plaintiffs sued Philadelphia and Mayor Kenney in the Eastern District of Pennsylvania under 42 U.S.C. § 1983 alleging that they violated the Equal Protection Clause by redesignating Columbus Day as Indigenous Peoples' Day. They asked the District Court to nullify Executive Order 2-21 and hold it

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[1] COPOMIAO is a New York nonprofit that represents forty-six Italian American organizations across the country including in Pennsylvania. Squilla is an Italian American councilmember for Philadelphia's First District. The 1492 Society is a Pennsylvania nonprofit based in Philadelphia that sponsors the Columbus Day parade and festival. Della Barba is an Italian American secretary of the 1492 Society and its parade organizer.

unconstitutional, stop the city from changing the holiday, and declare that Italian Americans are a protected class.

The District Court dismissed the suit for lack of standing because Plaintiffs failed to plead an injury-in-fact. Plaintiffs timely appealed.[2] We have jurisdiction under 28 U.S.C. § 1291.

II

We review de novo a motion to dismiss for lack of subject matter jurisdiction. In re Horizon Healthcare Servs. Data Breach Litig., 846 F.3d 625, 632 (3d Cir. 2017). In their motion to dismiss, Kenney and Philadelphia facially attacked the sufficiency of Plaintiffs' complaint. We apply the same Rule 12(b)(6) standard on review, accepting all well-pleaded factual allegations as true and drawing all reasonable inferences in Plaintiffs' favor. *Id.* at 632–33 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

III

Article III of the Constitution limits our judicial power to "cases" and "controversies." U.S. Const. art. III, § 1. We apply the doctrine of standing to identify those suits that are justiciable under Article III as cases or controversies. *See Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Whether a party has Article

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[2] The Grand Lodge of Pennsylvania intervened on the side of the plaintiff in District Court. The Grand Lodge did not file a notice of appeal and was not named in the appeal filed by COPOMIAO, Squilla, the 1492 Society, and Della Barba. Its claims are dismissed for failure to comply with Federal Rule of Appellate Procedure 3(c)(1)(A).

III standing to sue is the "threshold inquiry in every case." *Hassan v. City of New York*, 804 F.3d 277, 289 (3d Cir. 2015). The party asserting federal jurisdiction has the burden of proving standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

To decide standing, we ask three questions. Has the plaintiff suffered an injury-in-fact? *Id.* at 560. Is the injury "fairly traceable to the challenged action of the defendant"? Id (internal ellipses and brackets omitted). And is the injury "likely" to be "redressed by a favorable decision"? *Id.* at 561 (quotation omitted). A plaintiff has standing when all three questions are affirmatively answered.

An injury-in-fact is "an invasion of a legally protected interest" that must be "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal quotation and citations omitted). The burden of alleging an injury-in-fact is low. Hassan, 804 F.3d at 289. A discriminatory classification may qualify as an injury-in-fact when "a citizen's right to equal treatment is at stake." *Id.* at 289–90 (citing *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 657 (1993)). *See also Fields v. Speaker of the Pa. House of Representatives*, 936 F.3d 142, 160 (3d Cir. 2019) (quoting *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017) ("[T]he gravamen of an equal protection claim is differential government treatment, not differential government messaging.").

Here, Plaintiffs lack standing because they failed to plead an injury-in-fact. They allege two theories of

harm, but neither amounts to "an invasion of a legally protected interest." *Lujan*, 504 U.S. at 560.[3]

First, Plaintiffs claim that renaming Columbus Day is a discriminatory classification of Italian Americans, an injury in itself, because it "is a holiday widely known to recognize Italian Americans." J.A. 26; *see* Appellant's Br. 10. Citing Hassan, they argue that a discriminatory classification is sufficient to show injury-in-fact. Appellant's Br. 18 (citing Hassan, 804 F.3d at 289–90). But in Hassan, the discriminatory classification qualified as an injury-in-fact because it resulted in unequal treatment. 804 F.3d at 289. The plaintiffs in Hassan alleged that they were victims of a discriminatory NYPD surveillance program targeting Muslims in the aftermath of the September 11, 2001 terrorist attacks. *Id.* at 284. Surveillance programs, we explained, "can . . . violate . . . rights that give rise to cognizable harms." *Id.* at 292. So the injury was not the discriminatory classification itself, but the discriminatory surveillance program directed at the Plaintiffs because of the classification. *Id.* at 284.

Second, Plaintiffs allege that they experienced unequal treatment because Mayor Kenney conferred a benefit on Indigenous People and imposed a burden on Italian Americans by renaming the city holiday. But they have failed to show that redesignating an ethnic holiday is an "invasion of a legally protected interest."

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[3] Plaintiffs attempt to add a third theory of harm in their appeal. They argue that Executive Order 2-21 negatively impacted the Columbus Day parade and festival. We do not consider this claim because parties may not amend their pleadings in a brief. *Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988).

The government does not violate the Equal Protection Clause every time it affirms or celebrates an ethnicity. Otherwise, Columbus Day itself would arguably have been an equal protection violation—but of course it wasn't. Under Plaintiffs' theory, every national or ethnic group in Philadelphia—Asians, Scandinavians, Arabs, Pacific Islanders, and so on—could assert claims against Mayor Kenney and the city for declaring a holiday celebrating a nationality or ethnicity different than theirs. But the Fourteenth Amendment "does not require absolute equality or precisely equal advantages." *Ross v. Moffit*, 417 U.S. 600, 608 (1974) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973)).

Plaintiffs argue that "[n]o other ethnic celebration was targeted" by Executive Order 2-21. Appellants' Br. 19. "[O]nly Italian Americans . . . were discriminated against by the striking of their celebration off the calendar by an official act." *Id*. True, but "[n]o other ethnic celebration was targeted" because almost no other ethnic celebrations were specifically recognized in the first place.

Philadelphia observes twelve holidays. Philadelphia City Holidays, Philadelphia City Council, https://phlcouncil.com/holidays/ (last visited Dec. 12, 2022). Most of the city holidays have no racial or ethnic valence, but honor events and causes common to Americans. Only two arguably embrace a particular ethnicity; other ethnicities receive no special recognition. For example, Irish American city employees who wish to celebrate St. Patrick must take a personal day. The city does not close for Yom Kippur. There is no time off for the Lunar New Year. Plaintiffs might be able to show injury under the Equal Protection

Clause if Philadelphia celebrated every ethnicity but conspicuously excluded Italian Americans. But we cannot say that they have suffered "invidious discrimination" when the city selectively celebrates particular ethnicities with designated holidays. *See Jamieson v. Robinson*, 641 F.2d 138, 142 (3d Cir. 1981) ("[I]t is only invidious discrimination which offends the Constitution.") (internal quotation and citations omitted).

We do not affirm the District Court's judgment cavalierly. Christopher Columbus is an important and inspiring figure for Plaintiffs, Italian Americans generally, and other Americans. To many, the mayor diminished Columbus's legacy. But a politician's flex does not create a federal case or controversy unless it is accompanied by unlawful discriminatory treatment. To the extent that Plaintiffs seek redress for this offense, their remedy is political, not legal. *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2103 (2019) (Gorsuch, J., concurring) ("[R]ecourse for disagreement and offense does not lie in federal litigation."); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 636 (Scalia, J., concurring) ("[G]eneralized grievances affecting the public at large have their remedy in the political process.").

IV

For the reasons stated above, we will affirm the District Court.

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA GRANTING MOTION TO DISMISS (JANUARY 12, 2022)

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

CONFERENCE OF PRESIDENTS OF MAJOR ITALIAN AMERICAN ORGANIZATIONS, INC., ET AL.,

Plaintiffs,

v.

CITY OF PHILADELPHIA and MAYOR JAMES F KENNEY,

Defendants.

Civil Action No. 21-1609

Before: JONES, II., Judge.

January 12, 2022

MEMORANDUM

I. Introduction

At its core, this case is about the City of Philadelphia and its Mayor, James Kenney, issuing

an Executive Order ("Executive Order 2-21") that allegedly discriminates against Italian Americans by designating that the City holiday known as "Columbus Day" shall be known as "Indigenous Peoples' Day" in the City of Philadelphia. Philadelphia City Council-member, Mark Squilla, Jodi Della Barba, the 1492 Society, Grand Lodge of Pennsylvania, Sons and Daughters of Italy,[1] and Conference of Presidents of Major Italian American Organizations, Inc. (collectively "Plaintiffs") bring the present action against the City of Philadelphia and Mayor James F. Kenney (collectively "Defendants"), alleging violations of: the Equal Protection Clause under 42 U.S.C. § 1983; the Philadelphia Home Rule Charter; the separation of powers doctrine; the Pennsylvania Sunshine Act; and the Home Rule Act. Plaintiffs also seek declaratory judgments to find that Italian Americans are a protected class, and that Executive Order 2-21 violates the Equal Protection Clause.

Defendants have moved to dismiss the above-captioned case in its entirety, arguing that: Plaintiffs lack standing, the name change of the holiday constitutes government speech, and, Plaintiffs fail to state a viable equal protection claim. For the reasons stated herein, Defendants' Motions for Dismissal (ECF Nos. 17 and 18) are granted.

[1] This party was brought in as an Interpleader, but, for purposes of this opinion, the Court will refer to the Grand Lodge and all other Plaintiffs collectively.

II. Statement of Facts

A. Columbus Day Nationally

Columbus Day has been recognized as a national government holiday since at least 1934. Compl., ECF No. 1, ¶ 34. Italian immigrants and Italian Americans have historically embraced, and continue to celebrate, Christopher Columbus as a symbol of the voyage their families endeavored when immigrating from Italy to the United States. Compl. ¶ 26. Plaintiffs state that Columbus Day was recognized, at least in part, due to the discrimination Italian Americans faced. Compl. ¶ 30.

B. Columbus Day in Philadelphia

Plaintiffs claim that both Christopher Columbus and Italian Americans are facing persecution throughout the country. Compl. ¶ 36. Specifically, in Philadelphia, Italian Americans became concerned when the city began discussing whether to cancel Columbus Day. Compl. ¶ 36. In early 2018, Plaintiff and City Councilmember, Mark Squilla, enlisted Robert F. Petrone, Esq., a renowned Christopher Columbus expert, to research Columbus's true historical record. Compl. ¶¶ 37-38.

After conducting his investigation, Petrone provided Philadelphia City Council with two (2) reports detailing his findings, which found no evidence that Columbus mistreated Indigenous People. Compl. ¶¶ 41-43; *see* Petrone's Reports attached to Compl. as Exhibit F. Rather, his reports indicate that Columbus repeatedly protected tribal people. Compl. ¶ 43. Despite Philadelphia City Council having been provided with

Petrone's reports, Mayor Kenny issued Executive Order 2-21[2] on January 27, 2021, stating:

> [T]he story of Christopher Columbus is deeply complicated . . . Columbus enslaved indigenous people, and punished individuals who failed to meet his expected service through violence and, in some cases, murder . . . [O]ver the last 40 years[,] many states and cities have acknowledged this history by recognizing the holiday known as Columbus Day instead as Indigenous Peoples' Day . . . The City holiday celebrated on the second Monday in October, formerly known as Columbus Day, shall now be designated as Indigenous Peoples' Day.

Compl. ¶¶ 44-45; *see* Executive Order No. 2-21, attached to Compl. as Exhibit A.

Following the issuance of Executive Order 2-21, Mayor Kenny noted:

> While changes to City holidays may seem largely symbolic, we recognize that symbols carry power. We hope that for our employees and residents of color, this change is viewed as an acknowledgment of the centuries of institutional racism and marginalization that have been forced upon Black Americans, Indigenous people, and other communities of color. At the same time, we are clear-eyed about the fact that there is still an urgent

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[2] Plaintiffs state that Mayor Kenney issued such Executive Order unilaterally. Compl. ¶ 44.

> need for further substantive systemic change in all areas of local government.

Compl. ¶ 46.

C. Other Discriminatory Acts by Mayor Kenney

In addition to changing the name of Columbus Day, Plaintiffs allege that Mayor Kenney has repeatedly taken steps that form a pattern of racial discrimination against Italian Americans. Compl. ¶ 66. For example, in a 2016 statement about immigration and his desire for Philadelphia to remain a sanctuary city, Mayor Kenney stated, "This is undocumented brown and black people[,] and that's what drives the underlying source of anger . . . If this were [C]ousin Emilio or Cousin Guido, we wouldn't have this problem because they're white." Compl. ¶ 82.

In addition to his comments, Plaintiffs suggest that Mayor Kenney participated in a chain of discriminatory conduct, beginning with the removal of the Frank L. Rizzo statue from the steps of the Municipal Services Building. Compl. ¶ 67. To date, the City has not returned the statue to the Frank L. Rizzo Monument Committee. Compl. ¶ 68.[3]

After removing the Rizzo statue, Mayor Kenney prepared to remove the Christopher Columbus statue from Marconi Plaza. Compl. ¶ 69. Despite this plan, Plaintiffs' counsel was notified by a City Hall employee,

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[3] The removal of the Frank L. Rizzo statue is currently part of a separate lawsuit before this Court (21-CV-1609). For purposes of the present opinion, the Court will not further consider the merits of such claim.

and an immediate injunction halted its removal. Compl. ¶ 69.[4]

When Italian Americans from South Philadelphia gathered around the Columbus statue in Marconi Plaza, Mayor Kenney labeled them as "vigilantes" and ordered them to "stand down." Compl. ¶ 72. On the belief that such "vigilantes" were roaming the city, on June 16, 2020, Mayor Kenney ordered the reassignment of Police Captain Lou Campione from his command in South Philadelphia. Compl. ¶ 73. However, when crowds gathered to protest in support of the Black Lives Matter movement, he waived code and curfew violations. Compl. ¶¶ 70-71.

In a more recent discriminatory action, Plaintiffs claim that Mayor Kenney purposefully delayed COVID-19 vaccine distribution to Italian American communities. Compl. ¶ 75. When Philadelphia released the first twenty (20) Philadelphia zip codes eligible to receive the COVID-19 vaccines, he skipped over those with the largest concentration of Italian Americans. Compl. ¶¶ 76-77.

III. Procedural History

On April 6, 2021, Plaintiffs commenced the present action in the United States District Court for the Eastern District of Pennsylvania. *See* Compl. ¶ 1. On April 12, 2021, the Grand Lodge of Pennsylvania, Sons and Daughters of Italy filed a Motion to Intervene (ECF No. 10), which this Court granted on April 27, 2021 (ECF No. 14). On May 12, 2021, Defendants

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[4] Litigation over the removal of the Christopher Columbus statue is in state court. Therefore, the Court will not consider the merits of this issue further.

filed the present Motions to Dismiss (hereinafter "Motions") for both lack of jurisdiction and failure to state a claim. ECF Nos. 17 & 18. Defendants argue that, not only are Plaintiffs' allegations frivolous, but they lack standing to bring the present Complaint. Plaintiffs filed Responses in Opposition (hereinafter "Responses") on May 26, 2021, arguing not only that the Government cannot treat ethnic groups differently, but also that all Plaintiffs have standing either as Italian Americans themselves or as advocates on behalf of Italian Americans. ECF Nos. 19 & 20. With these filings, Defendants' Motions are ripe for the Court's review.

IV. Standards of Review

A. Subject Matter Jurisdiction Under Fed. R. Civ. P. 12(b)(1)

A challenge to subject matter jurisdiction under Rule 12(b)(1) may take two (2) forms: a facial or factual challenge. *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012). If a facial challenge concerns an alleged pleading deficiency, the trial court is restricted to a review of the allegations of the complaint and any documents referenced therein. *CNA v. United States*, 535 F.3d 132, 139 (3d Cir. 2008); *Gould Elec. Inc. v. United States*, 220 F.3d 169, 177 (3d Cir. 2000). With a facial challenge, "the trial court must consider the allegations of the complaint as true." *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977).

A factual challenge "concerns the actual failure of a plaintiff's claims to comport factually with the

jurisdictional prerequisites." *CNA*, 535 F.3d at 139 (internal citation and quotation marks omitted). If the challenge before the trial court is a factual challenge, the court does not accord any presumption of truth to the allegations in the complaint, and the plaintiff bears the burden of proving subject-matter jurisdiction. *Id.* With a factual challenge, the court may weigh evidence outside the pleadings and make factual findings related to the issue of jurisdiction. *Id.*; *U.S. ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 514 (3d Cir. 2007). "[T]he existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of the jurisdictional claims." *Mortensen*, 549 F.2d at 891. A court must grant a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) "if it lacks subject-matter jurisdiction to hear a claim." *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d at 243.

B. Failure to State a Claim Under Fed. R. Civ. P. 12(b)(6)

Rule 12(b)(6) provides for dismissal of a complaint, in whole or in part, for failure to state a claim upon which legal relief can be granted. In deciding a motion to dismiss, "'[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 318 (3d Cir. 2008) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). While these claims do not require detailed facts, "a complaint must do more than allege the plaintiff's entitlement to relief. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009). A complaint must "show" the plaintiff is entitled to relief.

Id. (quoting *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 234-235 (3d Cir. 2008)). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Courts reviewing a motion to dismiss pursuant to Rule 12(b)(6) must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *See Phillips*, 515 F.3d at 233 (quoting *Pinker v. Roche Holdings, Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2008)); *see also Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 n.8 (2007). In the Third Circuit, the Court's review "is normally broken into three parts: (1) identifying the elements of the claim, (2) reviewing the complaint to strike conclusory allegations, and then (3) looking at the well-pleaded components of the complaint and evaluating whether all of the elements identified in part one of the inquiry are sufficiently alleged." *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011).

Dismissal is appropriate when, even assuming all of plaintiff's claims as true, plaintiff has not pleaded "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. If a plaintiff does not "nudge [his/her] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Id.*

V. Discussion

A. Standing

Derived from Article III, standing "is the threshold inquiry in every case, one for which the 'party invoking federal jurisdiction bears the burden of [proof].'" *Hassan v. City of N.Y.*, 804 F.3d 277 (3d Cir. 2015) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). Article III standing limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong. *Philadelphia Fed'n of Tchrs. v. Ridge*, 150 F.3d 319, 322-323 (3d Cir. 1998); *Pro. Dog Breeders Advisory Council, Inc. v. Wolff*, 752 F. Supp. 2d 575, 583 (E.D. Pa. 2010).

To establish standing, "a plaintiff invoking federal jurisdiction bears the burden of establishing three elements . . . First, it must establish that it has suffered an 'injury in fact,' meaning a concrete and particularized invasion of a legally protected interest." *Hartig Drug Co., Inc. v. Senju Pharmaceutical Co. Ltd.*, 836 F.3d 261, 269 (3d Cir. 2016) (citing *Lujan*, 504 U.S. at 560)). "Second, [a plaintiff] must establish a 'causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Id.* (citing *Lujan*, 504 U.S. at 506) (internal quotation marks omitted). Third, a plaintiff must establish "a likelihood 'that the injury will be redressed by a favorable decision.'" *Id.* (citing *Lujan*, 504 U.S. at 561).

"The existence of Article III standing often turns on the injury-in-fact element." *Hendrick v. Aramark Corp.*, 263 F. Supp. 3d 514, 519 (E.D. Pa. 2017) (citing

Spokeo, Inc. v. Robins, 578 U.S. 330, 338-339 (2016)). Injury-in-fact requires particularization— "it must affect the plaintiff in a personal and individual way[,]" and it requires the injury to be concrete— "'real' as opposed to 'abstract[,]' [though not necessarily] 'tangible.'" *Id.*

1. Standing Based on Discrimination

Each Plaintiff alleges to have standing, at least in part, because they either are or are affiliated with Italian Americans, and they state that Executive Order 2-21 discriminates against them by replacing it with a holiday designated to a similarly situated group (Indigenous People). Response, ECF No. 20, 10-11. Defendants state that any alleged discrimination is about messaging from changing the holiday's name, not treatment, and it only conveys a generalized grievance, not a particularized and concrete harm. Mot., ECF No. 17, 10. Plaintiffs respond that the act of changing the name of Columbus Day is an affirmative action that results in taking from one group and giving to another at the former's expense. Response, ECF No. 20, 25-26. Having reviewed the filings, the Court agrees with Defendants.

"Unequal treatment is 'a type of personal injury [that] ha[s] long [been] recognized as judicially cognizable[.]'" *Hassan*, 804 F.3d at 289 (citing *Heckler v. Mathews*, 465 U.S. 728, 738 (2004)). "'Discriminatory classification is itself a penalty,' and thus qualifies as an actual injury for standing purposes, where a citizen's right to equal treatment is at stake." *Id.* at 290 (citing *Saenz v. Roe*, 526 U.S. 489, 505 (1999)).

Just because a plaintiff disagrees with the Government's actions, however, does not equate to discrim-

inatory treatment. In *Allen v. Wright*, parents of Black children who were attending public schools in seven (7) school districts sued the Internal Revenue Service ("IRS"), alleging that the IRS had not adopted sufficient standards to deny tax exempt status to racially discriminatory private schools. 468 U.S. 737 (1984). As one claim for standing, the parents alleged that they were directly harmed by the stigmatizing injury caused by racial discrimination. *Id.* at 738. The Supreme Court found that such stigmatic injury is insufficient for standing because, if so, "standing would extend nationwide to all members of the particular racial group against which the Government was alleged to be discriminating . . . [.]" *Id.* at 756. "Recognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *Id.* at 756 (citing *U.S. v. SCRAP*, 412 U.S. 669, 687 (1973)). *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982) ("[P]sychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III[.]")

Similarly, here, Plaintiffs fail to identify any discriminatory impact they have personally experienced from Executive Order 2-21. Like *Allen*, if standing is found in this case based on alleged discriminatory treatment, then any person, apparently located in any state, would have standing because they either have some percentage of Italian ancestry (no matter how small) or consider themselves allies of Italian Americans. Though it is true that standing should not be denied just because many plaintiffs may bring

a claim, Plaintiffs fail to explain, and this Court fails to see, how they have been personally impacted and harmed through the renaming Columbus Day to Indigenous Peoples' day.[5]

Plaintiffs continually reference *Hassan* to support that discriminatory classification is, itself, an injury sufficient for Article III standing. 804 F.3d at 291. In *Hassan*, a group of Muslim plaintiffs sued the city of New York, alleging that in the wake of the 9/11 terrorist attacks, the New York City Police Department began singling out Muslims for extra surveillance. *Id.* at 285-286. The court found that these plaintiffs possessed standing, at least in part, because they claimed, "to be the very targets of the allegedly unconstitutional surveillance, [and that] they are unquestionably 'affect[ed] . . . in a personal and individual way.'" *Id.* at 291 (citing *Lujan*, 504 U.S. at 560 n. 1).

Unlike the plaintiffs in *Hassan*, Plaintiffs, here, fail to state any discriminatory treatment by changing Columbus Day to Indigenous People's day. While the plaintiffs in *Hassan* possessed a right to be free from unconstitutional searches, and they were being targeted by the Government entirely based on their ethnicity, such action is not present here. There is no constitutional right to have the second Monday in October go by a certain name or to have a holiday celebrate a particular ethnicity. Additionally, while the Government in *Hassan* targeted the plaintiffs entirely because of their ethnicity, Plaintiffs, here, fail to show how

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[5] Plaintiffs can seek redress through the legislative process if affronted by the decision. Federal Courts were never intended to be a work-around for such a process.

the name change is related to Christopher Columbus's heritage rather than his individual actions. Moreover, they have failed to show even one (1) instance of how their lives have changed because of Executive Order 2-21. Thus, the guidance *Hassan* provides is minimal.

Similarly, Plaintiffs' reliance on *Evancho v. Pine-Richland Sch Dist.* is equally unpersuasive because the plaintiffs in *Evancho* were able to show that they were clearly being singled out for their gender-identity. 237 F. Supp. 3d 267 (W.D. Pa. 2017). In that case, three (3), transgender high school students alleged that a new school board resolution, which required transgender students to either use a single-user bathroom or the bathrooms labeled for those that match the sex on their birth certificates, was a violation of the Equal Protection Clause. *Id*. at 273-274. The court found that "[t]he Plaintiffs are being distinguished by governmental action from those whose gender identities are congruent with their assigned sex. The Plaintiffs are the only students who are not allowed to use the common restrooms consistent with their gender identities." *Id.* at 285. Unlike the plaintiffs in *Evancho*, Plaintiffs' Complaint is silent in explaining how their lives have been personally impacted or different by the changing of the holiday's name. Without such, *Evancho*'s ruling is unavailing.

Plaintiffs' reference to *Sandberg v. KPMG Peat Marwick, L.L.P.* also provides little guidance to the Court because that case, though mentioning a claim of discrimination, dealt entirely with what appropriate statute of limitation should apply. 111 F.3d 331 (2d Cir. 1997). Whether the plaintiff possessed standing to bring suit was never addressed, so the Court will

not concern itself any further in evaluating the case's applicability to the present action.

Much like *Sandberg*, *Mardell v. Harleysville Life Ins. Co.* also does not address the issue of standing in the discrimination context. The *Mardell* court references discrimination as an injury only to consider what period for backpay from employment discrimination was appropriate. 65 F.3d 1072, 1074 (3d Cir. 1995). This Court agrees that, in some instances, discrimination is, itself, a real injury, but Plaintiffs fail to explain how *Mardell* is applicable to the present case where they fail to state any discriminatory impact to warrant standing. Because *Mardell* does not contest the plaintiff's standing, its applicability to the present action is limited.

Though Plaintiffs repeatedly reiterate that they have experienced alleged discrimination from Executive Order 2-21, their filings are completely devoid of any particularized discriminatory impact or injury to a legally protected interest. Accordingly, any allegation that all Plaintiffs possess standing because discrimination, itself, is a cognizable injury is entirely insufficient.

2. Standing Based on Columbus Day Parade and Celebrations

In addition to the generalized grievances of discrimination, Plaintiffs, specifically Plaintiff Della Barbra, the 1492 Society's Columbus Day parade organizer, the 1492 Society, and the Grand Lodge appear to imply further injury because of Executive Order 2-21's alleged impact on their Columbus Day parade/celebrations. Response 30. Defendants respond that Plaintiffs do not, and cannot, claim that Executive

Order 2-21 will prevent them from organizing a parade or further celebrations honoring Christopher Columbus and/or Italian American Heritage. Response 12. Because Plaintiffs' Complaint is void of any alleged inability to still celebrate Christopher Columbus or Italian American ancestry with the holiday's new name,[6] such an implication is also insufficient to warrant standing.

"Allegations of 'possible future injury' are not sufficient to satisfy Article III [standing]." *Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3d Cir. 2011) (quoting *Whitmore v. Arkansas, et al.*, 495 U.S. 149, 158 (1990)). Rather, "[a] threatened injury must be certainly impending." *Whitmore*, 495 U.S. at 155 (internal citation and quotation marks omitted). Imminence "has been stretched beyond the breaking point when . . . the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control." *Lujan*, 504 U.S. at 564 n.2. The threatened injury must "proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Id.*

Plaintiffs fail to suggest any impending harm from Executive Order 2-21 because they can still celebrate Christopher Columbus under the holiday's new name. Nothing in Executive Order 2-21 prevents Italian Americans from organizing a parade to honor Columbus and/or Italian American heritage, and Plain-

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[6] This is particularly true given that the Federal Holiday's name has not changed.

tiffs do not, and cannot, suggest that it does.[7] *See Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 542 (3d Cir. 2011) ("In the equal protection context, an injury resulting from governmental racial discrimination accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct.") (internal citations omitted). It is within Plaintiffs' own control whether and how they choose to celebrate the holiday formerly known as Columbus Day, so any implication that such is controlled by Executive Order 2-21 is false and cannot afford standing.

3. Standing Based on Miscellaneous Discriminatory Acts

In addition to their primary complaints over Executive Order 2-21, Plaintiffs also list numerous, miscellaneous grievances against Defendants. Because the removal of the Frank L. Rizzo statue and attempted removal of the statue of Christopher Columbus are being handled as separate lawsuits, this Court looks to whether Plaintiffs have standing for: the manner

[7] In fact, despite the name change, a parade was still successfully organized in South Philadelphia to commemorate Christopher Columbus and Italian American heritage. *See* Jasmine Payoute, 'It's Insulting': Attendees Of Columbus Day Parade Upset With Latest Ruling On Controversial Marconi Plaza Statue, CBS PHILLY (Oct. 11, 2021, 12:02 AM), https://philadelphia.cbslocal.com/2021/10/11/philadelphia-columbus-day-parade-marconi-plaza-statue/. As "[c]ourts may . . . take judicial notice of news reports to evaluate 'what was in the public realm'" when deciding a motion to dismiss, the Court's consideration of this fact is appropriate. *U.S. v. Kindred Healthcare, Inc.*, 469 F. Supp. 3d 431, 438 n.3 (E.D. Pa. 2020) (citing *Benak ex rel. Alliance Premier Growth Fund v. Alliance Capital Mgmt. L.P.*, 435 F.3d 396, 401 n.15 (3d Cir. 2006)).

in which the City distributed COVID relief vaccinations; the reassignment of one Police Captain from his assignment in the First Police District; the Mayor's statement that Italian Americans gathering at the Columbus statue were "vigilantes"; and Mayor Kenney's statement in 2016 in which he "stereotyped" Italian Americans.

Again, Plaintiffs do not explain, and this Court fails to see how any such allegations amount to "an injury that is both concrete in nature and particularized to them." *In re U.S. Cath. Conference*, 885 F.2d 1020, 1023 (2d Cir. 1989). *See Mehdi v. U.S. Postal Serv.*, 988 F. Supp. 721, 730 (S.D.N.Y. 1997) ("[W]hile the stigmatizing injury caused by discrimination 'is one of the most serious consequences of government actions and is sufficient in some circumstances to support standing, . . . such injury accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct.'") (quoting *Allen*, 468 U.S. at 755 (internal citation and quotation marks omitted)). Even with these allegations, Plaintiffs have still failed to state a single basis on which this Court may find standing to consider their Equal Protection claim.

B. *Arguendo* Equal Protection Violations

1. Government Speech

Assuming *arguendo* that any of the above-mentioned Plaintiffs had standing to bring the present action, a conclusion that this Court does not find, Counts I-III of the Complaint must still be dismissed because Defendants' actions are protected by the government speech doctrine. When the Government

is speaking, it has the right to hold its own viewpoint. A government entity "is entitled to say what it wishes," *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 833 (1995), and to select the views that it wants to express. *See*, *e.g., Rust v. Sullivan,* 500 U.S. 173, 194 (1991). "The government must take substantive positions and decide disputed issues to govern. . . . So long as it bases its actions on legitimate goals, [the] government may speak despite citizen disagreement with the content of its message, for [the] government is not required to be content-neutral." *Keller v. State Bar of Cal.*, 496 U.S. 1, 10 (1990).

The parties have failed to cite, and this Court has failed to find, any cases determining whether holiday names constitute government speech. Accordingly, the Court looks to two (2) related cases for guidance. In *Pleasant Grove City, Utah v. Summum*, the Supreme Court considered whether a religious group's free speech rights were violated by the city's denial of its request to erect a monument in a public park where a Ten Commandments monument stood. 555 U.S. 460 (2009). The Supreme Court upheld the city's decision, ruling that the display of permanent monuments in public parks is a form of government speech. *Id*. at 464.

In making this conclusion, the *Summum* Court relied on three (3) main factors. First, the Court looked to the history of governmental use of monuments, explaining that governments "have long used monuments to speak to the public" and that when a "government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see

the structure." *Id.* at 470. Second, it considered whether the message conveyed by the monuments selected would be ascribed to the Government and found that "there is little chance" that people in the park will fail to identify the Government as the speaker. *Id.* at 471. Third, the Court analyzed whether the municipality "effectively controlled" the messages sent by the monuments because it exercised "final approval authority over their selection." *Id.* at 473.

A few years after *Summum*, the Supreme Court revisited the government speech doctrine in *Walker v. Tex. Div., Sons of Confederate Veterans, Inc*. when it considered whether the rejection of a specialty license plate design featuring a Confederate flag by the Texas Department of Motor Vehicles violated the First Amendment. 576 U.S. 200 (2015). Concluding that specialty license plates convey government speech, the Supreme Court held that Texas was entitled to refuse to issue the plates that featured the proffered design. *Id*. at 219-20. Applying the *Summum* factors, the Court held that the license plates constitute government speech because: (1) "they long have communicated messages from the States," (2) they are "often closely identified in the public mind" with the State, and (3) "Texas maintains direct control over the messages conveyed on its specialty plates." *Id.* at 201-213 (internal citation and quotation marks omitted).

The *Summum/Walker* three-factor test controls here, and each of these factors favor finding that the naming of holidays constitutes government speech. Considering the first factor, the Government has historically communicated through City holidays. The Government determines which days of the year will

be recognized as holidays and which employees benefit from a day off. *See* 44 Pa. Stat. Ann. § 11 (West). Second, observers will undoubtedly associate City as the speaker because it chose to change the holiday name. Third, the City of Philadelphia maintains direct control over the messages conveyed of holiday names. Like *Summum* and *Walker*, Philadelphia "has effectively controlled the messages conveyed by exercising final approval authority over their selection." *Id.* at 201 (citing *Summum*, 555 U.S. at 473). Thus, the Court concludes that Executive Order 2-21 renaming Columbus Day constitutes government speech.

Because Executive Order 2-21 constitutes government speech, Plaintiffs, even if they had standing, could not bring a successful Equal Protection violation. The Third Circuit has held that, "[t]he Equal Protection Clause does not apply to government speech." *Fields v. Speaker of Pa. H.R.,* 936 F.3d 142, 161 (3d Cir. 2019). This is because "private citizens have no personal interest in government speech on which to base an equal protection claim." *Id.* at 160. Thus, even if Plaintiffs had standing to bring an Equal Protection violation, Counts I-III of their Complaint would still require dismissal.

2. Prima Facie Equal Protection Claim

Assuming *arguendo* that Executive Order 2-21 was not government speech, a conclusion this Court does not support, Plaintiffs still fail to put forth a *prima facie* Equal Protection claim. The Equal Protection Clause of the Fourteenth Amendment directs that no state shall "deny to any person within its jurisdiction the equal protection of the laws." *Hassan*, 804 F.3d at 294. "The Clause announces a fundamental principle:

the State must govern impartially." *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979). "Thus, an equal protection claim arises when a person 'receiv[es] different treatment from that received by other [persons] similarly situated.'" *Italian Am. One Voice Coal. v. Twp. of W. Orange*, No. 20-CV-12650, 2021 WL 3260855, at *2 (D.N.J. July 30, 2021). "In order to prove a claim of discrimination in violation of Equal Protection, 'a plaintiff must show not only that the state action complained of had a disproportionate or discriminatory impact but that also the defendant acted with the intent to discriminate.'" *Mehdi*, 988 F. Supp. at 729-730 (citing *United States v. Yonkers Bd. Of Educ.*, 837 F.2d 1181, 1216 (2d Cir. 1987)).

Here, Plaintiffs have failed to state *any* discriminatory impact they have personally experienced from the renaming of Columbus Day. As previously explained at length, Plaintiffs cannot claim that they have been prevented from celebrating either Christopher Columbus or Italian American heritage with the renaming of the holiday, and Plaintiffs can still, personally, refer to the holiday as Columbus Day. Though Plaintiffs allege that Defendants' renaming of Columbus Day wipes away recognition of Italian Americans in favor of Indigenous People, they fail to state any discriminatory impact that supports such a conclusion. Put simply, Plaintiffs do not provide this Court with any details as to how their lives have changed because of the renaming of the holiday. Without such proof, any Equal Protection allegation is futile.

If Plaintiffs had sufficiently alleged discriminatory treatment, they would still fail to establish a prima facie Equal Protection claim because they have not

plausibly shown discriminatory intent. Specifically, Plaintiffs have "failed to sufficiently allege that Columbus's heritage contributed to Defendants' decision to" change the name of the holiday. *Italian Am. One Voice Coal.*, 2021 WL 3260855, at *3. *See Page v. Bartels*, 144 F. Supp. 2d 346, 348 (D.N.J. 2001) (denying an Equal Protection claim where race was not the "predominant motive" for government action, even if there was a tangential effect on racial groups); *Italian Am. One Voice Coal.*, 2021 WL 3260855, at *3 ("Defendants removed the [Christopher Columbus] Monument to promote a message of inclusiveness to benefit individuals from all national origins—including Italian Americans—given the historical underpinnings of the Monument.").

Based upon the above, Plaintiffs have failed to plausibly plead a prima facie Equal Protection violation. Accordingly, Counts I-III warrant dismissal.

C. Pennsylvania State Court Violations

Following the dismissal of Plaintiffs' Equal Protection claims, what remains are allegations under the Philadelphia Home Rule Charter, the Separation of Powers, the Sunshine Act, and the Home Rule Act. For the reasons set forth herein, such claims must be dismissed without prejudice.

Federal courts have original jurisdiction over claims based on federal constitutional law. 28 U.S.C. §§ 636(c), 1331. State law claims that are part of the same "case or controversy" as those federal claims are subject to the Court's supplemental or pendent jurisdiction. *Id.* at § 1367(a). Courts are given discretion to dismiss even those state law claims over which jurisdiction exists under § 1367(a) in four (4)

circumstances: (1) when the claim raises a "novel" or "complex" state law issue; (2) when the state law claim would "substantially predominate" over the related federal claim; (3) when the district court has dismissed all claims over which is had original jurisdiction; and (4): in "exceptional circumstances," when "there are other compelling reasons for declining jurisdiction." *Id.* at § 1367(c). When determining whether to dismiss a state law claim despite supplemental jurisdiction, courts must consider: (1) judicial economy; (2) convenience; (3) fairness; and (4) comity. *Carnegie Mellon University v. Cohill*, 484 U.S. 343, 350 (1988). When all claims establishing original jurisdiction are dismissed before trial, federal courts generally "decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so." *Hedges v. Musco*, 204 F.2d 109, 123 (3d Cir. 2000).

The Third Circuit has repeatedly held that "pendent jurisdiction should be declined where the federal claims are no longer viable, absent 'extra-ordinary circumstances.'" *Shaffer v. Bd. of Sch. Directors of Albert Gallatin Area Sch. Dist.*, 730 F.2d 910, 912 (3d Cir. 1984) (quoting *Tully v. Mott Super-markets,* 540 F.2d 187, 196 (3d Cir.1976)). The fact that "some investment of time has already been made" should not have dispositive weight. *Id.* "[W]here the underlying issue of state law is a question of first impression with important implications . . . in Pennsylvania, factors weighing in favor of state court adjudication certainly predominate." *Id.* at 913.

Here, no "particular prejudice," nor much additional expense, would result from any additional

delay because Plaintiffs can easily file similar briefs in state court. Because Plaintiffs raise many claims that closely impact the citizens of Philadelphia, state court is a more appropriate venue to address their supplemental state law claims, so Counts IV-VII are dismissed without prejudice.

VI. Conclusion

For the foregoing reasons, Defendants' Motions to Dismiss are granted, and Plaintiffs' Complaint and the Interpleader action must be dismissed in their entirety. An appropriate Order follows.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, DISMISSING COUNTS (JANUARY 12, 2022)

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

CONFERENCE OF PRESIDENTS OF MAJOR ITALIAN AMERICAN ORGANIZATIONS, INC., ET AL.,

Plaintiffs,

v.

CITY OF PHILADELPHIA ET AL.,

Defendants.

Civil Action No. 21-1609

Before: C. Darnell JONES, II., Judge.

ORDER

AND NOW, this 12th day of January, 2022, upon consideration of Defendants' Motions to Dismiss (ECF Nos. 17 & 18) and Fed. R. Civ. P. 24(b)(1)(B), it is hereby ORDERED that said Motion is GRANTED.

It is FURTHER ORDERED that Counts I-III of Plaintiffs' Complaint are DISMISSED WITH PREJU-

DICE, and Counts IV-VII are DISMISSED WITHOUT PREJUDICE.

BY THE COURT:

/s/ C. Darnell Jones, II
Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING EN BANC (FEBRUARY 21, 2023)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1116

CONFERENCE OF PRESIDENTS OF MAJOR ITALIAN AMERICAN ORGANIZATIONS, INC.; MARK F. SQUILLA, Philadelphia City Councilmember; THE 1492 SOCIETY; JODY DELLA BARBA,

Appellants.

GRAND LODGE OF PENNSYLVANIA SONS AND DAUGHTERS OF ITALY

v.

CITY OF PHILADELPHIA;
MAYOR JAMES F. KENNEY
(D.C. No. 2:21-cv-01609)

ORDER

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN and AMBRO,[1] Circuit Judges.

ORDER

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ David J. Porter
Circuit Judge

Date: February 21, 2023
Amr/cc: All counsel of record

[1] Judge Ambro assumed senior status on February 6, 2023.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (MARCH 1, 2023)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1116

CONFERENCE OF PRESIDENTS OF MAJOR ITALIAN AMERICAN ORGANIZATIONS, INC.; MARK F. SQUILLA, Philadelphia City Councilmember; THE 1492 SOCIETY; JODY DELLA BARBA,

Appellants.

GRAND LODGE OF PENNSYLVANIA SONS AND DAUGHTERS OF ITALY

v.

CITY OF PHILADELPHIA;
MAYOR JAMES F. KENNEY

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. No. 2:21-cv-01609)
District Judge: Honorable C. Darnell Jones II

Submitted Under Third Circuit L.A.R. 34.1(a):
January 18, 2023

Before: AMBRO, PORTER, and
FREEMAN, Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted on January 18, 2023. On consideration whereof, it is now

ORDERED and ADJUDGED by this Court that the District Court's order dated January 12, 2022, is hereby AFFIRMED. All of the above in accordance with the Opinion of this Court. Costs shall be taxed against Appellants.

ATTEST:

/s/ Patricia S. Dodszuweit
Clerk

Dated: January 27, 2023

Certified as a true copy and issued in lieu of a formal mandate on March 1, 2023

Teste: /s/ Patricia S. Dodszuweit
Clerk, U.S. Court of Appeals
for the Third Circuit

COMPLAINT
(APRIL 6, 2021)

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

CONFERENCE OF PRESIDENTS OF MAJOR ITALIAN AMERICAN ORGANIZATIONS, INC.

and

PHILADELPHIA CITY COUNCIL MEMBER MARK F. SQUILLA

and

THE 1492 SOCIETY

and

JODY DELLA BARBA

Plaintiffs,

v.

CITY OF PHILADELPHIA

and

MAYOR JAMES F. KENNEY

Defendants.

Case No. 2:21-cv-01609

DEMAND FOR JURY TRIAL

COMPLAINT

Plaintiffs, The Conference of Presidents of Major Italian American Organizations, Inc., Councilmember Mark F. Squilla, The 1492 Society and Jody Della Barba, by and through undersigned counsel, bring this Complaint against the City of Philadelphia and Mayor James F. Kenney and allege the following facts and claims upon personal knowledge, investigation of counsel, and information and belief.

NATURE OF THE ACTION

1. This lawsuit arises from the continued, unrelenting, and intentionally discriminatory acts undertaken by Mayor James F. Kenney and the City of Philadelphia against its Italian American citizens.

2. On January 27, 2021, Mayor Kenney issued Executive Order 2-21 *canceling* Columbus Day—a historic holiday under Pennsylvania and Federal law—and replaced it with "Indigenous Peoples' Day."

3. Mayor Kenney's order reads, in part: "The City holiday celebrated on the second Monday in October, *formerly* known as Columbus Day, shall now be designated as Indigenous Peoples' Day." *See* Executive Order No. 2-21, attached as Exhibit "A." (Emphasis added.)

4. While both groups' ethnicity deserve recognition, Mayor Kenney may not take action that discriminates against Italian Americans to exalt another ethnic group in its place.

5. Mayor Kenney unilaterally issued Executive Order No. 2-21 without regard for the multiple restrictions of the Philadelphia Home Rule Charter

applicable to the designation of holidays, without regard to the separation of powers that it and state law provide, without regard to Pennsylvania's Sunshine Act, 65 Pa.C.S. §§ 701-716, and without regard to the Home Rule Act prohibiting the City from taking any action "contrary to" state law.

6. Mayor Kenney made no proposal to City Council about canceling Columbus Day, nor ever sought its approval, never obtained approval from the Civil Service Commission, never provided the public with the requisite notice and opportunity to be heard, never considered (or explicitly ignored) Pennsylvania state law (which expressly designates Columbus Day as a holiday across the Commonwealth), and never engaged in activity integral to a functioning democracy.

7. The canceling of Columbus Day is the most recent—but probably not the last—act in a long line of divisive, anti-Italian American discriminatory actions taken by Mayor Kenney during his Administration.

8. For example, Mayor Kenney previously took unilateral actions against two iconic Italian American statues prominently displayed for decades within the City of Philadelphia: first, the removal of the Frank L. Rizzo statue (in the middle of the night) from the plaza at the Municipal Services Building and, second, the attempted removal of the 140 year-old Christopher Columbus statue from its longtime home at Marconi Plaza.

9. No other statues in the City (amongst the many hundreds) have been targeted by the Mayor.

10. Both attempted seizures of Italian American statues are the subject of separate lawsuits now

pending against the City of Philadelphia and Mayor Kenney.

11. By way of further recent example, Mayor Kenney blatantly discriminated against Philadelphia's First Councilmanic District (largely populated by Italian Americans) by purposely depriving them of COVID relief vaccinations when making city-wide allocations.

12. Mayor Kenney also recently demoted Captain Louis Campione from his longtime assignment in Philadelphia's First Police District, baselessly accusing him of sanctioning "vigilantism" when South Philadelphia Italian American residents sought to protect the Columbus Statue located at Marconi Plaza from vandalism by protestors.

13. Further still, Mayor Kenney has a long history of making public anti-Italian American comments. For instance, in a 2016 rant by Mayor Kenney about immigration and his desire for Philadelphia to remain a "Sanctuary City", he stated: "If this were Cousin Emilio or Cousin Guido, we wouldn't have this problem because they're white."

14. Such actions collectively paint a picture of a Mayor unmistakably bent on prejudicing Italian Americans and governing the City of Philadelphia according to crude racial stereotypes and unconstitutional racial classifications.

THE PARTIES

15. Plaintiff, Conference of Presidents of Major Italian American Organizations, Inc. ("COPOMIAO"), is a New York non-profit corporation that has its main office at 1296 Midland Avenue, Yonkers, New

York 10704. The President of The COPOMIAO is Basil M. Russo. The COPOMIAO consists of member Presidents of forty-six (46) different organizations and their individual members, among which include[1]:

1) Italian Sons and Daughters of America; Basil M. Russo, President
2) OSDIA-Commission for Social Justice; Robert Ferrito, President
3) OSDIA-Sons of Italy Foundation; Comm. Joseph Sciame, President
4) Order Sons of Italy in America; Nancy DiFiore Quinn, National President
5) UNICO National; Frank N. DeFrank, President
6) Italian Welfare League; Joan Prezioso, President
7) Italian American Legal Defense Fund, Inc.; Prof. Santi Buscemi
8) California Italian American Task Force; William Cerruti, Chairman
9) National Italian American Bar Association; Francis M. Donnarumma, President
10) American Italian Federation of the Southeast; Charles Marsala, President

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[1] These Italian American organizations have a physical presence in at least the following states: Pennsylvania, New York, New Jersey, Washington, D.C., Connecticut, South Carolina, Louisiana, Delaware, Massachusetts, Nevada, California, Illinois, and Virginia. Many of these organizations are nationally or globally recognized.

11) American Society of the Italian Legions of Merit; Gr. Uff. Rosemarie Gallina-Santangelo, President Emerita

12) American Italian Renaissance Foundation (American Italian Cultural Center); Frank Maselli, Chairman

13) A Chance in Life (Boys' & Girls' Towns of Italy); Gabriele Delmonaco, President/ Executive Director

14) Coalition of Italo American Associations; Uff. Cavaliere Maria Fosco

15) Coccia Foundation; Elisa Coccia, President

16) The Coccia Institute for the Italian Experience in America; Mark Rotella, Director

17) Columbus Citizens Foundation; Marian U. Pardo, President

18) Columbus Heritage Coalition; Angelo Vivolo, President

19) Cooley's Anemia Foundation, Inc.; Craig Butler, Executive Director

20) Delaware Commission on Italian Heritage and Culture; Richard A. DiLiberto, Jr., Chairman

21) Garibaldi Meucci Museum; Carl Ciaccio, Chairman & Stephanie Lundegard, Administrator

22) Italian Academy Foundation, Inc.; Stefano Acunto, Chairman

23) Italian American Alliance, Inc.; Dr. Francis Mazzaglia, Chairman

24) Italian American Baseball Foundation; Joseph J. Quagliano, President

25) Italian American Club of Southern Nevada; Angelo A. Cassaro, President

26) Italian American Committee on Education; Berardo Paradiso, President

27) Italian American Democratic Leadership Council; Jim Rosapepe, Vice Chairman

28) Italian American Museum; Dr. Joseph Scelsa, President

29) Italian American Museum of Los Angeles; Marianna Gatto, Executive Director

30) Italian American One Voice; Dr. Emanuel Alfano, Chairman

31) Italian American War Veterans of the United States; Tony Ficarri, National Commander

32) Italian Heritage and Culture Committee of the Bronx and Westchester; Patricia A. Santangelo, President

33) Italian Heritage and Culture Committee of New York, Inc.; Joseph Sciame, President & Chair

34) Italian Language Foundation; Margaret I. Cuomo, M.D., President

35) Joint Civic Committee of Italian Americans; Ron Onesti, President

36) Justinian Society of Lawyers; Hon. Scannicchio, President

37) La Festa Italiana di Lackawanna County; Chris DiMattio, President

38) National Council of Columbia Associations; Pietro Segalini, Senior Vice President

39) National Columbus Education Foundation; John Viola, Executive Director

40) Filitalia International; Paula DeSanctis-Bonavitacola, President

41) National Council for the Promotion of the Italian Language in American Schools, Inc.; Dr. Daniel L. Stabile, National President

42) American Delegation of the Sacred Military Constantinian Order of Saint George; Brendan Young, Executive Director & John Viola, Delegate

43) NJ Italian Heritage Commission; Robert DiBiase, Chair & Cav. Dr. Gilda Rorro

44) The Italian Cultural Foundation at Casa-Belvedere; Gina Biancardi, President

45) Tuscan Association of New York, Inc.; Joan Marchi Migliori, President

46) UNICO Foundation; Kathleen Strozza, Representative/Trustee

16. Plaintiff, Councilmember Mark F. Squilla, is an adult individual, Italian American, Philadelphia resident and member of Philadelphia City Council. Councilmember Squilla represents City Council's First District, and was first elected in 2011. Councilmember Squilla maintains an office at Philadelphia City Hall, Room 332, Philadelphia, PA 19107, and brings this action in his official capacity as a Member of

Philadelphia City Council and as an individual resident and taxpayer of the City of Philadelphia.

17. Plaintiff, The 1492 Society[2] is a Pennsylvania non-profit corporation that has its main office at 1526 Wolf Street, Philadelphia, Pennsylvania 19145.

> [The 1492 Society's] purpose is to promote Italian culture and traditions by sponsoring the annual Philadelphia Columbus Day Parade and Festival through fundraising activities. . . . The 1492 Society through a broad range of philanthropic, educational & cultural activities, organizes Philadelphia's annual Columbus celebration and Columbus Day parade which celebrates Italian American heritage. [It] hold[s] a parade & festival each year. The parade & festival are open to the general public & also seeks to foster a spirit of multi-culturalism and respect for people of all ethnic backgrounds.[3]

18. Plaintiff, Jody Della Barba, is an adult individual, Italian American and Philadelphia taxpaying resident. Jody Della Barba is the Parade Organizer and Secretary of The 1492 Society.

19. Defendant, City of Philadelphia (the "City"), is a municipality existing under the laws of the Common-

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[2] The members of The 1492 Society are primarily Philadelphia Italian Americans. The 1492 Society hosts the annual Philadelphia Columbus Day Parade and maintains the objective of recognizing the Italian explorer, Christopher Columbus.

[3] *Nonprofit overview,* Great Nonprofits, https://greatnonprofits.org/org/1492-society.

wealth of Pennsylvania, with headquarters at 1515 Arch Street, Philadelphia, Pennsylvania 19102.

20. Defendant, Mayor James F. Kenney ("Mayor Kenney"), is the Mayor of the City of Philadelphia. He maintains an office at Philadelphia City Hall, Room 215, Philadelphia, Pennsylvania 19107.

JURISDICTION AND VENUE

21. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343(3) in that the controversy arises under the United States Constitution and under 42 U.S.C. § 1983.

22. Plaintiffs further invoke the supplemental jurisdiction of this Court over the pendent state law claims pursuant to 28 U.S.C. § 1367(a).

23. All of the acts alleged herein were done by Defendants, or their officers, agents and employees, under color and pretense of the statutes, ordinances, regulations, customs and usages of the City of Philadelphia and the Office of the Mayor.

24. This Court has personal jurisdiction over Defendants because the acts that give rise to this action all took place in Philadelphia, Pennsylvania.

25. This Court has authority to award attorney's fees pursuant to 42 U.S.C. § 1988.

FACTS COMMON TO ALL COUNTS
THE HISTORY OF COLUMBUS DAY

26. For the past two centuries, Italian immigrants and Italian Americans have embraced Christopher Columbus as a symbol of the courageous voyage their families endeavored when immigrating from Italy to the United States of America.

27. As Italian immigrants and Italian Americans began facing widespread discrimination in the late 1800s, many rallied around Christopher Columbus as a symbol of the contributions Italians have made to this Nation and the courage they endured historically.

28. On March 14, 1891, eleven Italian Americans were lynched in New Orleans after being falsely accused of the murder of the New Orleans police chief.[4]

29. Those lynched were ordinary working-class immigrants that arrived in the United States from Italy to build a better life for themselves and their families.[5]

30. Columbus Day was recognized in part in light of the discrimination of Italian-Americans and (more broadly) Catholics. It quickly became an annual observance and "a source of dignity and self-worth for Italian Americans."[6]

31. As described in Charles Mires' *Encyclopedia of Philadelphia,*

> The ethnic and religious character of the holiday was clear in Philadelphia in 1892, the four-hundredth anniversary of the first

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[4] Erin Blakemore, *The Grisly Story of America's Largest Lynching,* History (Oct. 25, 2017) ("March 14, 1981 would go down in history as one of the darkest moments in the United States' long history of anti-Italian discrimination."), attached as Exhibit "B."

[5] *Id.*

[6] *NIAF Statement on Christopher Columbus & Columbus Day,* NIAF, https://www.niaf.org/culture/christopher-columbus/, attached as Exhibit "C."

> Columbus voyage, which came in the midst of a surge of Italian immigration. In addition to celebrations in Italian neighborhoods, the Columbus commemoration activities that year included a torchlight parade of Catholic organizations on Broad Street, a Solemn Pontifical Mass at the Cathedral on Logan Square, and a performance by parochial schoolchildren at the Academy of Music.[7]

32. In the 1920s and 1930s, the Ku Klux Klan attempted to destroy Columbus Day because of their bigotry toward Catholics and Italian immigrants.

33. In an effort to dispel the pervasive discrimination against Italian Americans, Congress took action to further recognize and show appreciation for this Nation's Italians.

34. In 1934, Congress issued a joint resolution requesting that the President issue a proclamation designating October 12 of each year as Columbus Day. H.R.J. Res. 10, 73d Cong. (1934), attached as Exhibit "E."

35. In 1937, President Franklin D. Roosevelt issued a proclamation recognizing Columbus Day.

36. Today, Christopher Columbus and Italian Americans are facing persecution throughout the country at levels not seen since the 1920s when the KKK charged Christopher Columbus with the same heinous—and *unsupported*—wrongdoings Mayor Kenney and the City of Philadelphia are making in

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[7] Charles Mires, *Columbus Day,* The Encyclopedia of Greater Philadelphia, https://philadelphiaencyclopedia.org/archive/columbus-day/, attached as Exhibit "D."

support for their effort to cancel the Columbus Day holiday.

CITY OF PHILADELPHIA COUNCILMEMBER MARK F. SQUILLA ENLISTED AN EXPERT TO INVESTIGATE CHRISTOPHER COLUMBUS

37. In early 2018, City of Philadelphia Councilmember Squilla enlisted Robert F. Petrone, Esq.—a Philadelphia attorney (an Assistant District Attorney) and renowned Christopher Columbus expert—regarding the true historical record of Christopher Columbus.

38. Mr. Petrone's credentials made him the ideal person to take on this project, as he was conversant with the relevant primary source materials that were written during and shortly after Christopher Columbus's life, was fluent in Spanish, and he was well-versed at interpreting 15th century Spanish texts.

39. To aid Mr. Petrone in this important work, Mr. Petrone was provided with *History of the Indies,* by Bartolome de las Cases, which is one of the most important and authoritative primary sources regarding the life, trans-Atlantic expedition, and gubernatorial administration in the West Indies of Christopher Columbus, as well as a comprehensive history of the first sixty-eight years of the Spanish settlements in that region.

40. Mr. Petrone also had access to copies of the original texts which were written in 15th and 16th century Spanish, and he verified the accuracy of the sources' translation to English.

41. After extensive focused research and investigation, Mr. Petrone provided Philadelphia City Council with two reports detailing his findings with respect

to the life and voyages of Christopher Columbus. Both reports are attached hereto as Exhibit "F": A Report by Robert F. Petrone, Esquire, to City Council of the City of Philadelphia on History of the Indies Book I of VI; A Report by Robert F. Petrone, Esquire, to City Council of the City of Philadelphia on History of the Indies Books II and III (of III).

42. Mr. Petrone's reports not only unequivocally demonstrate there is no support in the primary source materials to corroborate the heinous wrongdoings Mayor Kenney and the City of Philadelphia now falsely charge Christopher Columbus with, but also demonstrate that the primary historical sources unanimously bear out that Christopher Columbus was the first recorded civil-rights activist of the Americas, having (1) prohibited the mistreatment and the enslavement of the tribal peoples by the hidalgos (low, landed nobles of Spain) during his tenure as governor of the West Indies; (2) established the first "underground railroad" of the Americas by traveling around the West Indies on his Second Voyage rescuing Tainos from enslavement by the man-eating Carib and Canib tribes; and (3) successfully petitioned the King of Spain to promulgate the first civil rights legislation of the Americas decreeing that "all the Indians of Hispaniola were to be left free, not subject to servitude, unmolested and unharmed and allowed to live like free vassals under law just like any other vassal in the Kingdom of Castile."

43. Mr. Petrone's research found that nowhere in any of the three volumes of *History of the Indies* is there evidence that Columbus mistreated the Indigenous People. Nor does any evidence appear in any of the primary sources. Quite to the contrary, de las

Casas's *History of the Indies* and all primary sources explicitly indicate that Christopher Columbus repeatedly protected the tribal peoples, even the cannibalistic Caribs who often attacked him and his sailors unprovoked. *Id.*

EXECUTIVE ORDER 2-21

44. Despite Philadelphia City Council having been provided with Mr. Petrone's detailed reports that conclude there is no support for the charges the City and Mayor now level against Christopher Columbus, Mayor Kenney—unilaterally—issued Executive Order 2-21 that claimed: "Columbus enslaved indigenous people, and punished individuals who failed to meet his expected service through violence and, in some cases, murder" and thereby decided to cancel Columbus Day by replacing it with Indigenous Peoples Day. *See* Executive Order No. 2-21, Exhibit "A."

45. The Executive Order further reads: "[T]he story of Christopher Columbus is deeply complicated. For centuries, he has been venerated with stories of his traversing the Atlantic and 'discovering' the 'New World'. The true history of his conduct is, in fact, infamous. Mistakenly believing he had found a new route to India, Columbus enslaved indigenous people, and punished individuals who failed to meet his expected service through violence and, in some cases, murder . . . The City holiday celebrated on the second Monday in October, formerly known as Columbus Day, shall now be designated as Indigenous Peoples' Day." *Id.*

46. In a Press Release that followed the issuance of Executive Order 2-21, the Mayor stated:

> While changes to City holidays may seem largely symbolic, we recognize that symbols carry power. We hope that for our employees and residents of color, this change is viewed as an acknowledgement of the centuries of institutional racism and marginalization that have been forced upon Black Americans, Indigenous people, and other communities of color. At the same time, we are clear-eyed about the fact that there is still an urgent need for further substantive systemic change in all areas of local government.

See City's Pathways to Reform, Transformation, and Reconciliation, City of Philadelphia (Feb. 3, 2021), Exhibit "G."

47. Mayor Kenney and the City are thus explicitly choosing which ethnicities should be credited, supported, and approved by the City government, and which ethnicities should be shamed, disdained and canceled. The United States Constitution forbids such governmental behavior.

48. In issuing Executive Order No. 2-21, Mayor Kenney could have recognized *both* ethnicities on the second Monday of October, or could have provided the Indigenous People with their own holiday, or could have taken any approach that treats each ethnicity equally under the law. (Of course, proceeding by Executive Order in any respect is not within Mayor Kenney' s authority, as detailed below.)

A FOCUSED RECITATION OF HISTORY OF THE "INDIGENOUS PEOPLE" AS IT RELATES TO THIS ACTION

49. The historic record also demonstrates that slavery and other wrongdoings were practiced in North America long before and irrespective of Christopher Columbus's arrival.

50. At no fault of the "Indigenous People" living today, some of their ancestry contains irrefutable evidence of wrongdoing of massive proportions regarding the practice of slavery.

51. It is well established that when Christopher Columbus made landfall in what is now the Bahamas, he came into contact with tribal people referred to as the "Caribs" and "Tainos."

52. When Christopher Columbus conversed with the Tainos, they informed him, and he later learned first-hand, that the Caribs were going from island to island in the West Indies, capturing Tainos, murdering and eating the Taino men, castrating and enslaving the Taino boys—and then, when they matured into men, killing and eating them; eating the rest of the Taino children; kidnapping and raping "all the [Taino] women they can take"; and then, when the rape victims gave birth, eating the babies (Bartolome de las Casas's Digest of Columbus's Log Book; *Historia de las Indias,* Chapter 63; Letter of Columbus dated February 15, 1493; Letter of Dr. Diego Chanca [from whence the quote comes]) ("They say that man's flesh is so good, that there is nothing like it in the world[.]").

53. As for the Tainos, the source materials indicate Christopher Columbus's relationship with the Tainos was entirely peaceful.

54. Columbus reported favorably to the Crown about the Tainos and he praised them for their simplicity and gentleness.

55. Even after Christopher Columbus was "deprived of his gubernatorial power of the Indies, and in the face of [another ruler's] sinister machinations and tyranny, Columbus exerted his influence as best he could to protect the indigenes. Columbus petitioned the Court of Spain, resulting in an 'instructions' to the settlers from the Crown that included 'a very specific clause all the Indians of Hispaniola were to be left free, not subject to servitude, unmolested and unharmed and allowed to live like free vassals under law just like any other vassal in the Kingdom of Castile[.]'" *Id.* at Report II (citing Book II, 83).

56. Stanford University Professor Emeritus Carol Delaney, who left her tenured university position to dedicate ten years of her life to travel the world in the study of Columbus, reports that all the tired calumny repeatedly charged against Christopher Columbus is simply a collection of lies. "[H]e's been terribly maligned," she wrote of Columbus, by revisionists who are "blaming [him] for things he didn't do."[8]

57. Similarly, the continental tribes' people were also not free from widespread wrongdoing according to today's standards.

58. In fact, Native American Indian Tribes engaged in systemic ownership and trade of slaves.

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[8] Carol Delaney, *Columbus and the Quest for Jerusalem* (Sept. 20, 2011). This scholarly work is generally regarded as the most authoritative book on the subject.

59. For many decades, "scholars peered at the painful and complex topic of American slavery through a purely 'black-white' lens—in other words, black slaves who had white masters. The sad reality that some Native Americans (in particular, the Creek, Cherokee, Choctaw, Chickasaw, and Seminole, or 'the Five Tribes') also participated in chattel and race-based slavery, was rarely acknowledged in the historical annals."[9]

60. National Museum of the American Indian Curator—Paul Chaat Smith—noted that "it is imperative to provide . . . [the] public with an unflinching history, even when doing so is painful. . . . In the case of the Trail of Tears and the enslavement of blacks by prominent members of all five so-called 'Civilized Tribes' (Cherokee, Chickasaw, Choctaw, Creek and Seminole), Smith went one step further, likening the ugly truth of history to a 'mangy, snarling dog standing between you and a crowd-pleasing narrative.'"[10]

61. Smith further stated: "The Five Civilized Tribes were deeply committed to slavery, established their own racialized black codes, immediately reestab-

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[9] Nakia Parker, Black Slaves, Indian Masters: Slavery, Emancipation, and Citizenship in the Native American South, by Barbara Krauthamer (2013), Not Even Past produced by The University of Texas at Austin (March 26, 2014), https://notevenpast.org/black-slaves-indian-masters-slavery-emancipation-and-citizenship-in-the-native-american-south-by-barbara-krauthamer-2013/, attached as Exhibit "H."

[10] Ryan P. Smith, *How Native American Slaveholders Complicate the Trail of Tears Narrative* (March 6, 2018), https://www.smithsonianmag.com/smithsonian-institution/how-native-american-slaveholders-complicate-trail-tears-narrative-180968339/, attached as Exhibit "I."

lished slavery when they arrived in Indian territory, rebuilt their nations with slave labor, crushed slave rebellions, and enthusiastically sided with the Confederacy in the Civil War."[11]

62. Tiya Miles—an African American historian at the University of Michigan—agrees: "[S]he [has] meticulously laid out primary-source evidence to paint a picture of Indian/African American relations in the years leading up to the Civil War."[12]

63. Miles stated: "The Cherokee owned slaves for the same reasons their white neighbors did. They knew exactly what they were doing. In truth, . . . the Cherokee and other Civilized Tribes were not that complicated. They were willful and determined oppressors of blacks they owned, enthusiastic participants in a global economy driven by cotton, and believers in the idea that they were equal to whites and superior to blacks."[13]

64. Importantly, "[n]one of this lessens the very real hardship endured by Cherokees and other Native Americans compelled to abandon their homelands as a result of the Indian Removal Act."[14]

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

MAYOR JAMES F. KENNEY HAS EXHIBITED A LONG PATTERN OF DISCRIMINATION AGAINST ITALIAN AMERICANS

65. In issuing Executive Order 2-21, Mayor Kenney has selectively chosen which ethnic group to support at the government level, and which ethnic group to condemn.

66. While a consistent pattern of official discrimination is not necessary to predicate a violation of the Equal Protection Clause, Mayor Kenney has repeatedly taken steps that forms an unmistakable pattern of racial discrimination against Italian Americans. A *few* examples are detailed below.

67. On June 3, 2020, Mayor Kenney ordered the immediate removal with the cover of nighttime (at 1:00 a.m. in the morning) of the Frank L. Rizzo statue from the steps of the Municipal Services Building,[15] thus unilaterally condemning to extinction a widely beloved statue of an iconic Italian American citizen.[16] [17] [18]

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[15] To Plaintiffs' knowledge, other Philadelphia statues that were heavily vandalized during the civil unrest following the death of George Floyd remain. For instance, a statue of outspoken abolitionist Matthias Baldwin—located outside of City Hall—was defaced with the messages "colonizer" and "murderer[,]" red paint was also tossed on the statue, yet it was not removed. Zachary Evans, *Park Volunteer Outraged over Vandalism of Philadelphia Abolitionist Statue* . . . National Review (June 11, 2020), https://www.nationalreview.com/news/park-volunteer-outraged-over-vandalism-of-monument-to-philadelphia-abolitionist-he-was-blm-before-there-was-a-slogan/, attached hereto as Exhibit "J."

[16] The Associated Press, *Philadelphia removes controversial Frank Rizzo statue overnight,* Penn Live, (June 3, 2020), https://

68. In addition to violating the laws and regulations of the City of Philadelphia in surreptitiously removing the Frank Rizzo statue in the middle of the night, Defendants further abused the Philadelphia Italian American community by refusing to return

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www.pennlive.com/news/2020/06/philadelphia-removes-controversial-frank-rizzo-statue-overnight.html, attached as Exhibit "K." ("Saying he 'never liked' it, Mayor Jim Kenney on Monday said he had planned to move the statue later this month. 'I can't wait to see it go away.' Kenney said.")

[17] Plaintiffs' counsel in this action also represents the Frank L. Rizzo Monument Committee in a pending federal action against these same Defendants for illegally removing the Frank Rizzo statue from the steps of the Municipal Services Building. *(Frank L. Rizzo Monument Committee v. City of Philadelphia, et al.,* Case Number 2:20-cv-03245-CDJ filed in the United States District Court for The Eastern District of Pennsylvania.)

[18] Frank L. Rizzo ("Frank Rizzo"), a South Philadelphia native, was a prominent Italian American, and the son of Italian immigrants. Frank Rizzo's father came to the United States from Calabria, Italy with nothing to his name but through hard work and perseverance, was able to establish himself and his family in the Philadelphia community. The Rizzo family was, and still is, known to Philadelphia Italian Americans as an example of Italian immigrants coming to this country with nothing and rising through the ranks of the City to eventually become Mayor—the first and only Italian American Mayor and Police Commissioner of Philadelphia. Indicative of Frank Rizzo's prominence in the Italian American community is that local Philadelphians still maintain the Frank L. Rizzo Monument Committee and proudly display a banner with his picture and the text "Philadelphia's First Italian Mayor and Police Commissioner" at the annual Columbus Day Parade even to this day, almost thirty (30) years after his death. *See History of Italian Americans in Philadelphia,* Wikipedia, https://en.wikipedia.org/wiki/History_of_Italian_Americans_in_Philadelphia ("Notable people . . . Frank Rizzo, [f]irst and only Italian Philadelphia Police Commissioner [and] 93rd mayor"), attached as Exhibit "L."

the Statue to the Frank L. Rizzo Monument Committee, its lawful owner.

69. After that illegal act, in mid-June 2020, Mayor Kenney was again poised to act under cover of night. Plaintiffs' counsel was notified by a whistle-blowing City Hall employee that Mayor Kenney hired a non-union rigger to remove the Christopher Columbus Statue from Marconi Plaza later that evening.[19] But for that tip, and an immediate injunction action brought by counsel on Sunday afternoon at 4:00 p.m., that Statue would no longer be standing in South Philadelphia. (That litigation is still pending in multiple parts before the Philadelphia Court of Common Pleas and the Commonwealth Court of Pennsylvania.[20])

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[19] "The Christopher Columbus Monument was originally erected on the Centennial Exposition grounds at the intersection of Fountain and Belmont Avenues, near the Conservatory and dedicated on October 12, 1876 as a tribute from Italy to America. . . . On the front cap of the pedestal are the words 'Presented to the city of Philadelphia by the Italian Societies' . . . . On the remaining two sides of the pedestal are the coats of arms of Italy and the United States." Statue of Christopher Columbus (Philadelphia), Wikipedia, https://en.wikipedia.org/wiki/Statue of Christopher_Columbus_ (Philadelphia),attached as Exhibit "M;" *see also Fifth Agricultural Report & Centennial Report—1876—KANSAS, Page 99* ("A statue of colossal size made in Italy, and dedicated during the summer with imposing ceremonies; a representative of Victor Emanuel, King of Italy, having come to assist in the ceremonies. It was the gift of Italians in America."), attached as Exhibit "N."

[20] *Friends of Marconi Plaza, et al. v. City of Philadelphia, et al.*, Phila. Ct. Com. P1., Docket No. 000741; *Friends of Marconi Plaza, et al. v. City of Philadelphia, et al.*, Pa. Commw. Ct., Docket No. 929 CD 2020.

70. At the same time, when the City of Philadelphia was faced with widespread riots and protests that left businesses ravished and public property destroyed, particularly along Walnut Street (where one notable building was literally burned to a crisp), Mayor Kenney "waive[d] all protest-related code violations[.]"[21] He further waived all code violations "for all forms of disorderly conduct as well as failure to disperse and curfew violations."[22]

71. Mayor Kenney publicly stated:

> My decision to waive these violations is not a statement on the validity of the individual citations. Rather, it is a recognition of the core concerns that caused thousands to demonstrate on the streets of Philadelphia. In waiving these notices, I recognize that those issues are vitally important, that the pain of those marching is very real, and that their message—Black lives matter—needs to be heard every day until systemic racism is fully eradicated from this city and nation.[23]

72. But when Italian American residents from South Philadelphia gathered at the Christopher Columbus Statue in Marconi Plaza that Sunday evening to prevent it from being vandalized, Mayor

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[21] Emily Scott, *Mayor Kenney Waives code violation notices for recent Philly protests,* WHYY (July 8, 2020), https://whyy.org/articles/mayor-kenney-waives-code-violation-notices-for-recent-philly-protests/, attached as Exhibit "O."

[22] *Id.*

[23] *Id.*

Kenney labeled them "vigilantes" and ordered them to "stand down[.]"[24]

73. To rub salt in the Italian wound, on or about June 16, 2020, Mayor Kenney ordered, again without any legitimate basis but acting on his belief that "vigilantes" were roaming South Philadelphia, the reassignment of Captain Lou Campione from his command in South Philadelphia.

74. In response, the Fraternal Order of Police formally stated:

> A 43-year veteran of the department, Captain Campione is well respected by his officers, fellow commanders and, most importantly the community he has served tirelessly. Captain Campione's dedication to the community he serves is second to none and is the Gold Standard in Police Commands. The Mayor and Police leadership are more concerned with appeasing the anarchist mobs descending upon our city and are less concerned about our citizens, our neighborhoods and the overall public safety of our great city.[25]

75. As yet additional and more recent acts against the Italian American community, Mayor Kenney kicked

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[24] Mark Zimmaro, *Campione exiled, is Columbus next?,* South Philly Review (June 19, 2020), https://southphillyreview.com/2020/06/19/campione-exiled-is-columbus-next/, attached as Exhibit "P."

[25] Philadelphia Fraternal Order of Police Lodge #5 (@FOPLodge5), Twitter (June 16, 2020, 10:03 AM), https://twitter.com/FOPLodge5/status/1272892520545095686/photo/1, attached as Exhibit "Q."

Italian Americans to the bottom of the COVID-19 vaccination barrel.[26]

76. On February 19, 2021, the City, at Mayor Kenney's direction, released the first 20 Philadelphia zip codes eligible to receive the COVID-19 vaccine. The 20 zip codes were supposed to be areas that displayed the "highest COVID-19 incidence and deaths."[27]

77. The zip code 19148—that is home to the largest concentration of Italian Americans in Philadelphia—was conspicuously omitted from the list.

78. Based on the City's own data, on February 19, 2021 when Defendants released the first 20 zip codes of those eligible for the vaccine, 19148 would have tied for *fifth* on the list of vaccine eligible zip codes with respect to most COVID-19 deaths and seventh with respect to most hospitalizations.[28]

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[26] The City of Philadelphia has prioritized certain racial and ethnic groups in their vaccine distribution to the detriment of Italian Americans. *See Philadelphia Covid-19 Vaccine Distribution Plan,* Department of Public Health (March 3, 2021), https://www.phila.gov/media/20210305111041/Phila_Vaccine_Distribution_Plan_030321-1.pdf, attached as Exhibit "R."

[27] Allie Miller, *Walk-up, 24-hour COVID-19 vaccine site now open to eligible Philly residents,* Philly Voice (February 19, 2021), https://www.phillyvoice.com/walk-up-covid-19-vaccine-clinic-temple-philadelphia/, attached as Exhibit "S."

[28] Plaintiffs further note that if a death to population or hospitalization to population ratio was used, 19148 would still rank sixth and fourteenth respectively on the list of 20 zip codes selected. These estimates are based on data that is publicly

79. Between March 17-22, 2021, Defendants organized a "walk-up" vaccination clinic at the Pennsylvania Convention Center for residents that "live in one of 22 selected zip codes, which have so far seen lower vaccination rates."[29]

80. Peculiarly, zip code 19148 was still omitted from the list of eligible zip codes despite showing higher deaths and hospitalizations than many of the selected zip codes and the people in 19148 not previously being eligible for vaccination.[30]

81. Mayor Kenney also has a long track record of stereotyping Italian Americans and making derogatory comments towards them.

82. For instance, in a 2016 rant by Mayor Kenney about immigration and his desire for Philadelphia to remain a sanctuary city, he stated: "If this were Cousin Emilio or Cousin Guido, we wouldn't have this problem because they're white."[31]

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available on the City's website. *See* OpenDataPhilly, https://www.opendataphilly.org/dataset?q=covid.

[29] Sean Collins Walsh, *Pennsylvania Convention Center vaccine site will start taking walk-ups,* The Philadelphia Inquirer (March 16, 2021), https://www.inquirer.com/health/coronavirus/live/covid-coronavirus-vaccine-philadelphia-pa-nj-stimulus-checks-20210316.html#card-2105496193, attached as Exhibit "T."

[30] James Garrow, *Open access at the Center City Vaccination Center for six days only!,* City of Philadelphia (March 16, 2021), https://www.phila.gov/2021-03-16-open-access-at-the-center-city-vaccination-center-for-six-days-only/, attached as Exhibit "U."

[31] Mike Newall, *Newall: Under pressure to smile, Mayor Kenney reviews his rookie season,* The Philadelphia Inquirer (Dec. 20, 2016), https://www.inquirer.com/philly/news/politics/20161221_Newall_An_unsmiling_Mayor_Kenney_reviews_his_rookie_

COUNT I
42 U.S.C. § 1983
EQUAL PROTECTION
ALL PLAINTIFFS v. ALL DEFENDANTS

83. Plaintiffs hereby incorporate by reference all of the paragraphs of this Complaint as though fully set forth herein at length.

84. 42 U.S.C. § 1983 permits individuals and organizations to sue governmental actors to enforce constitutional rights as well as rights created by federal statutes.

85. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]" 42 U.S.C. § 1983.

86. Local governing bodies are deemed to be "persons" within the meaning of Section 1983 and can be sued directly under the act for monetary, declaratory, or injunctive relief.

87. To establish municipal liability, a plaintiff must (1) demonstrate the existence of an unlawful

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season.html, attached as Exhibit "V;" *Guido* (slang), Wikipedia, https://en.wikipedia.org/wiki/Guido_(slang) (last visited March 15, 2021) ("Guido . . . is a North American ethnic slur or slang term, often derogatory, for a working-class urban Italian-American."), attached as Exhibit "W."

policy or custom, and (2) prove that the municipal practice was the proximate cause of the injury.

88. To establish causation, a plaintiff must allege a "plausible nexus" or "affirmative link" between the violation and the municipality's custom or practice.

89. Unequal treatment is a type of personal injury that has long been recognized as judicially cognizable and virtually every circuit court has reaffirmed—as has the Supreme Court—that a discriminatory classification is itself a penalty, and thus qualifies as an actual injury for standing purposes, where a citizen's right to equal treatment is at stake.

90. Mayor Kenney's Executive Order discriminates against Italian Americans by repealing a holiday that recognizes their ethnicity while simultaneously awarding a new holiday, on that same day, to a different but similarly situated group.

91. Mayor Kenney's Executive Order, discriminating against one ethnic group in favor of another ethnic group, was issued without a compelling government interest and is not narrowly tailored to serve any government interest.

92. The Equal Protection Clause of the Fourteenth Amendment directs that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

93. The Equal Protection Clause applies to government classifications. This occurs when government action imposes a burden or confers a benefit on one class of persons to the exclusion of others. Government classifications may be "facial" or "in effect."

94. If a classification appears on the face of the government mandate (*i.e.*, in the express words of the order), it is subject to equal protection scrutiny.

95. The classification in this action appears on the face of Mayor Kenney's Executive Order 2-21.

96. The order reads, in part: "The City holiday celebrated on the second Monday in October, formerly known as Columbus Day, shall now be designated as Indigenous Peoples' Day." Executive Order No. 2-21, Exhibit "A."

97. Classifications appear on the face of this Executive Order in two regards: first, the order references Columbus Day—which is a holiday widely known to recognize Italian Americans—and, second, redesignates that holiday to the "Indigenous People," a term widely understood to refer to a different ethnic group.

98. Even if Defendants' Executive Order is facially neutral, it is subject to equal protection scrutiny if it has the "effect of distributing burdens and benefits unequally. It is enough that the Defendants' Executive Order produced an unequal effect.

99. Mayor Kenney's Executive Order 2-21 has the effect of distributing burdens and benefits unequally between Italian Americans and the Indigenous Peoples by replacing a holiday meant to recognize the contributions and hardships of Italian Americans with a holiday that recognizes the contributions and hardships of the Indigenous Peoples.

100. Defendants' Executive Order, which contains 'suspect classifications,' is to be subject to strict scrutiny and can be justified only if it furthers a com-

pelling government purpose and, even then, only if no less restrictive alternative is available.

101. This Court should apply the rigorous "strict scrutiny" test to Defendants' action; a standard under which a challenged state action will be upheld only if it advances a compelling state interest *and* is narrowly tailored to meet that interest.

102. Strict scrutiny is applied where the challenged action or legislation involves a "suspect" classification, *i.e.*, a classification based on race, ethnicity, alienage, or national origin.

103. A successful equal protection claim requires proof that the plaintiff was subjected to intentional or purposeful discrimination.

104. Notably, intentional discrimination need not be motivated by ill will, enmity, or hostility to contravene the Equal Protection Clause—all that is required is an intent to treat two groups differently.

105. To show discriminatory purpose, Plaintiffs only need to demonstrate that Defendants issued Executive Order 2-21 at least partially because the action would benefit or burden an identifiable group.

106. Had Mayor Kenney not intended to treat two groups differently, he would have, could have, and should have issued an executive order that recognizes both groups equally.

107. Both the Italian Americans and Indigenous People are directly impacted by Defendants' decision to recognize just one group's ethnicity and hardships on the second Monday in October.

108. Both the Italian Americans and Indigenous Peoples' history contain controversial actions undertaken by their distant ancestors.

109. Accordingly, the Court should review Executive Order 2-21 under the strict scrutiny standard to determine if the Order serves a compelling government interest and, if so, it is narrowly tailored to serve that interest.

110. For all of the reasons stated herein, Executive Order 2-21 fails strict scrutiny analysis, and is therefore unconstitutional under the Equal Protection Clause.

COUNT II
DECLARATORY JUDGMENT
ITALIAN AMERICANS ARE A PROTECTED CLASS ENTITLED TO EQUAL PROTECTION UNDER THE U.S. CONSTITUTION
ALL PLAINTIFFS v. ALL DEFENDANTS

111. Plaintiffs hereby incorporate by reference all of the paragraphs of this Complaint as though fully set forth herein at length.

112. Italian Americans are an ethnic group that warrant protection from discrimination under the Equal Protection Clause of the United States Constitution.

113. An actual controversy exists between the Parties within the meaning of 28 U.S.C. § 2202, which is of sufficient immediacy and reality to warrant declaratory relief.

114. Mayor Kenney—by both his words and deeds as set forth above—apparently does not recognize

the constitutional reality that Italian Americans are a protected class of people that cannot be discriminated against under the Equal Protection Clause.

115. Plaintiffs therefore seek a declaratory judgment from this Court acknowledging that Italian Americans are a protected class entitled to Equal Protection under the United States Constitution.

COUNT III
DECLARATORY JUDGMENT MAYOR KENNEY'S EXECUTIVE ORDER 2-21 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION
ALL PLAINTIFFS v. ALL DEFENDANTS

116. Plaintiffs hereby incorporate by reference all of the paragraphs of this Complaint as though fully set forth herein at length.

117. Mayor Kenney's Executive Order 2-21—that *cancels* Columbus Day—violates the Equal Protection Clause of the United States Constitution. *See* Executive Order 2-21, Exhibit "A."

118. An actual controversy exists between the Parties within the meaning of 28 U.S.C. § 2202, which is of sufficient immediacy and reality to warrant declaratory relief.

119. Plaintiffs seek a declaratory judgment from this Court pronouncing Executive Order 2-21 unconstitutional and violative of the Equal Protection Clause.

COUNT IV
VIOLATIONS OF THE PHILADELPHIA HOME RULE CHARTER
ALL PLAINTIFFS v. ALL DEFENDANTS

120. Plaintiffs hereby incorporate by reference all of the paragraphs of this Complaint as though fully set forth herein at length.

121. The Mayor of Philadelphia does not have the power to unilaterally repeal a City holiday and replace it with a different holiday of his choosing.

122. The Philadelphia Home Rule Charter provides that "[r]egulations pertaining to . . . holidays . . . shall be submitted by the Personnel Director for approval to the Civil Service Commission and Administrative Board . . . [and after the requisite approvals shall have been obtained, the regulations shall be filed by the Personnel Director with the Department of Records, where they shall be available for public inspection for thirty days, and public notice of such filing shall be given as in the case of other regulations." Phila. Home Rule Charter § 7-400; *see also* Phila. Home Rule Charter § 7-401 ("The regulations shall provide for: . . . holidays[.]").

123. "The approval of the Administrative Board is required of civil service regulations pertaining to . . . holidays . . . because these regulations will affect the operating budget, the expenditure of City moneys, and the availability of personnel. They should therefore be subject to the approval of the Mayor, the Director of Finance, and the Managing Director who are primarily concerned with these important phases of municipal administration." *Id.* at n. 2.

124. "The Administrative Board shall approve or disapprove: . . . Those parts of the civil service regulations which deal with . . . holidays[.]" Phila. Home Rule Charter § 4-300.

125. Defendants did not obtain the requisite approvals prior to issuing Executive Order 2-21 and did not provide the public with an opportunity for inspection or an opportunity to be heard.

126. Pursuant to the Philadelphia Home Rule Charter and the Sunshine Act, as further detailed below, Plaintiffs should have the opportunity to observe and address the Civil Service Commission and Administrative Board during their deliberation process with respect to any changes in a designated holiday. Phila. Home Rule Charter § 7-400.

127. Here, Mayor Kenney illegally circumvented all established processes and unilaterally mandated that Columbus Day be replaced by Indigenous Peoples' Day.

128. Accordingly, Defendants' Executive Order 2-21 should be voided by the Court.

COUNT V
VIOLATION OF SEPARATION OF POWERS
ALL PLAINTIFFS v. ALL DEFENDANTS

129. Plaintiffs hereby incorporate by reference all of the paragraphs of this Complaint as though fully set forth herein at length.

130. Mayor Kenney and the City of Philadelphia must govern themselves in accordance with the Constitution of Pennsylvania, State statutes and its home rule charter.

131. The right to engage in home rule flows from Article IX, Section 2 of the Pennsylvania Constitution, which permits a home rule municipality to "exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time." Pa. Const. art. IX, § 2.

132. Pursuant to Article IX, Section 2 of the Pennsylvania Constitution, home rule charters are subservient to limitations imposed by the General Assembly.

133. Mayor Kenney may not bypass City Council and unilaterally legislate through an executive order.

134. When the Mayor issues an executive order, he must not infringe upon the powers of another branch of the municipal government.

135. The Philadelphia Home Rule Charter states that "[t]he legislative power of the City, including any such power which may hereafter be conferred on the City by amendment of the Constitution or by the laws of the Commonwealth of Pennsylvania, shall be exclusively vested in and exercised by a Council, subject only to the provisions of [the] charter." Phila. Home Rule Charter § 1-101.

136. Each year, Philadelphia City Council designates the week encompassing the second Monday in October as "Italian American Heritage Week . . . in celebration of the festivities commemorating Columbus' historic voyage to the New World." *See* Resolution No. 170872, attached as Exhibit "X."

137. The Resolution reads: "The annual Philadelphia Columbus Day Parade began in South Phila-

delphia in 1957, and has since become one of the City's premier ethnic celebrations." *Id.*

138. The Resolution also recognizes The 1492 Society as the host of the annual Philadelphia Columbus Day Parade. *Id.*

139. 53 P.S. § 12127(a) provides that lilt shall be the duty of the mayor: . . . To recommend, by message in writing to the council, all such measures connected with the affairs of the city and the protection and improvement of its government and finances as he shall deem expedient."

140. Mayor Kenney issued Executive Order No. 2-21 without properly recommending it to City Council despite the Order having a direct connection to the affairs of the City.

141. Executive Order No. 2-21 directly impacts the affairs of the City since Philadelphia City Council annually recognize "Philadelphia Columbus Day." Resolution No. 170872, Exhibit "X"

142. Through Executive Order No. 2-21, Mayor Kenney declared that the City of Philadelphia will no longer recognize Columbus Day.

143. Executive Order No. 2-21 reads more like a bill or ordinance as opposed to an executive directive that falls within the powers afforded to Mayor Kenney by the Philadelphia Home Rule Charter.

144. Mayor Kenney's Executive Order No. 2-21 states, in relevant part:

> NOW, THEREFORE, I, MAYOR JAMES F. KENNEY, Mayor of the City of Philadelphia, by the powers vested in me by the Phila-

> delphia Home Rule Charter, do hereby ORDER as follows: . . . Section 1 . . . June 19 of every year is designated a holiday for all City employees and shall be treated as such in accordance with the applicable Civil Service regulations and Administrative Board rules . . . Section 2 . . . The City holiday celebrated on the second Monday in October, formerly known as Columbus Day, shall now be designated as Indigenous Peoples' Day . . . The Director of Finance, Chief Administrative Officer and Deputy Mayor for Labor are directed to make appropriate notifications to effectuate this Order.

Executive Order No. 2-21, Exhibit "A."[32]

145. Mayor Kenney may not direct government officials to "effectuate" an Order that legislates the replacement of a City holiday and mandates all branches of the City government recognize the same.

146. In Section 1 of Executive Order 2-21, Mayor Kenney designates Juneteenth as a City holiday to the extent permitted by the "applicable Civil Service regulations and Administrative Board rules[.]" *Id.*

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[32] It is important to note the distinction between Section 1 of Executive Order No. 2-21, which designates Juneteenth as a City holiday "in accordance with the applicable Civil Service regulations and Administrative Board rules," from Section 2, which broadly cancels Columbus Day as a City holiday in its entirety, without regard for the Civil Service regulations or the Administrative Board rules. *See* Executive Order No. 2-21, Exhibit "A."

147. *However,* Section 2 of Executive Order 2-21 is much broader, does not seek to comply with the applicable Civil Service regulations and Administrative Board rules, and mandates that the City designate and celebrate an entirely new holiday. *Id.*

148. Section 2 of Executive Order 2-21 is clearly a legislative act that requires City Council approval.

149. Executive Order 2-21 directly stifles City Council's annual tradition of recognizing "Philadelphia Columbus Day" through a Resolution.

150. The only municipal branch capable of legislating that the City of Philadelphia repeal one holiday and recognize another in its place is City Council.

151. Mayor Kenney does not have the power to bypass this City's legislative branch by executive order and unilaterally decide which holidays the City will recognize and celebrate.

152. Accordingly, it is appropriate for this Court to void Section 2 of Executive Order 2-21.

COUNT VI
VIOLATION OF SUNSHINE ACT ALL PLAINTIFFS v. ALL DEFENDANTS

153. Plaintiffs hereby incorporate by reference all of the paragraphs of this Complaint as though fully set forth herein at length.

154. The Philadelphia Home Rule Charter requires that multiple municipal agencies meet, confer and approve the change of any City holiday. *See* Phila. Home Rule Charter §§ 4-300, 7-400 and 7-401.

155. Section 7-400 of the Philadelphia Home Rule Charter requires that "[r]egulations pertaining to . . . holidays . . . shall be submitted by the Personnel Director for approval to the Civil Service Commission and Administrative Board." Phila. Home Rule Charter § 7-400.

156. In other words, to repeal one City holiday and replace it with a new one, multiple agencies must confer and take official action to approve the change.

157. When Mayor Kenney issued the instant Executive Order 2-21, he bypassed agencies that are required to meet to approve of any change in holidays.

158. Mayor Kenney's Executive Order 2-21 states that "[t]he Director of Finance, Chief Administrative Officer and Deputy Mayor for Labor are directed to make appropriate notifications to effectuate this Order." Executive Order 2-21, Exhibit "A." (Emphasis added).

159. Mayor Kenney may not direct the heads of his agencies to simply "effectuate" an order without regard for the City's Charter or the Sunshine Act.

160. As required by Philadelphia Home Rule Charter § 7-400, the Civil Service Commission and Administrative Board must provide their approval to repeal and/or replace a City holiday.

161. The Civil Service Commission and the Administrative Board are agencies that fall under the Sunshine Act.

162. In reaching their decision whether to approve or deny any holiday change, the Civil Service Com-

mission and Administrative Board must comply with the Sunshine Act.

163. The Sunshine Act mandates that the public has the right "to be present at all meetings of agencies and to witness the deliberation, policy formulation and decision-making of agencies is vital to the enhancement and proper functioning of the democratic process and that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society." 65 Pa.C.S.A. § 702(a).

164. The Sunshine Act further requires that it be the "public policy of this Commonwealth to insure the right of its citizens to have notice of and the right to attend all meetings of agencies at which any agency business is discussed or acted upon as provided in this chapter." 65 Pa.C.S.A. § 702(b).

165. "Official action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public unless closed under" an application exception. 65 Pa.C.S.A. § 704.

166. The Defendants may not simply implement Executive Order 2021 without complying with the Sunshine Act and ensuring that any and all official action be conducted at an open meeting. *Id.*

167. To repeal or implement a City holiday, multiple municipal agencies must take official action which requires compliance with the Sunshine Act.

168. Therefore, before any holiday may be repealed and/or instituted, the agencies with jurisdiction—as provided for in the Philadelphia Home Rule

Charter—must comply with the Sunshine Act in reaching their respective decisions.

169. Defendants issued the instant Executive Order without regard for the Sunshine Act.

170. Accordingly, the Court should void Executive Order 2-21.

COUNT VII
VIOLATION OF HOME RULE ACT 53 P.S. §§ 13131
ALL PLAINTIFFS v. ALL DEFENDANTS

171. Plaintiffs hereby incorporate by reference all of the paragraphs of this Complaint as though fully set forth herein at length.

172. Municipalities, like the City of Philadelphia, only have as much authority as the General Assembly affords.

173. Municipalities are creatures of the Commonwealth and possess only such powers of government as are expressly granted to them and as are necessary to carry the same into effect.

174. A municipality is therefore powerless to enact executive orders except as authorized by statute, and executive orders not in conformity with the municipality's enabling statute will be void.

175. Like the powers of other types of municipalities, the powers of a home rule municipality are largely constitutionally and statutorily determined.

176. In that regard, the Pennsylvania Constitution provides that "[m]unicipalities shall have the right and power to frame and adopt home rule charters"

and that pursuant to such charters, a home rule municipality "may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time." Pa. Const. art. IX § 2.

177. Meanwhile, the Home Rule Act, 53 P.S. §§ 13101-13157, which is the enabling legislation for home rule by a first-class city like Philadelphia, provides that the City "shall have and may exercise all powers and authority of local self-government and shall have complete powers of legislation and administration in relation to its municipal functions . .," subject to certain enumerated limitations. *Id.* at § 13131.[33]

178. Among the limitations are that no city "shall exercise powers *contrary to,* or in *limitation* or enlargement of, powers granted by acts of the General Assembly which are . . . [a]pplicable in every part of the Commonwealth." *Id.* at § 13133.

179. Thus, under the Home Rule Act, the General Assembly gave the City of Philadelphia "complete powers of legislation and administration *in relation to its municipal functions,"* 53 P.S. § 13131 (emphasis added), but also prohibited it from "exercise[ing] powers *contrary to,* or *in limitation* or enlargement of," statutes enacted by the General Assembly "which are . . . [a]pplicable in every part of the Commonwealth." *Id.* at § 13133 (emphasis added).

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[33] Philadelphia is the only first-class city in Pennsylvania. It adopted its home rule charter to the terms of the Home Rule Act on April 17, 1951.

180. Mayor Kenney's Executive Order 2-21 runs afoul of this prohibition.

181. 44 P.S. § 32 (Columbus Day) mandates that:

> The Governor shall issue, annually, his Proclamation designating and setting apart October 12 as Columbus Day, and calling upon the people of the Commonwealth, the public schools and other educational institutions and historical organizations to observe the discovery of the New World with appropriate exercises and programs, to the end that the discovery of America shall be commemorated each year.

182. However, in violation of 44 P.S. § 32, Mayor Kenney legislates that: "The City holiday celebrated on the second Monday in October, formerly known as Columbus Day, shall now be designated as Indigenous Peoples' Day." Executive Order 2-21, Exhibit "A."

183. The General Assembly has statutorily mandated that this Commonwealth, its people, public schools, and other public institutions are to recognize Columbus Day.

184. Mayor Kenney's Executive Order 2-21 illegally repeals Columbus Day as a City recognized holiday and thereby violates 44 P.S. § 32.

185. The General Assembly has also designated Columbus Day as a holiday of this Commonwealth by way of 44 P.S. § 11.

186. Specifically, 44 P.S. § 11 designates as holidays "[t]he following days and half days, namely:

. . . the second Monday in October, known as Columbus Day[.]"

187. Mayor Kenney's Executive Order 2-21 runs contrary to a Commonwealth statute—44 P.S. § 11—which is binding on the City of Philadelphia.

188. Therefore, Section 2 of Executive Order 2-21 is void since it attempts to override an enacted and binding statute of this Commonwealth.

189. Accordingly, this Honorable Court should declare Section 2 of Mayor Kenney's Executive Order 2-21 void since it is preempted by two Commonwealth statutes that run to the contrary.

CLAIMS FOR RELIEF

WHEREFORE, Plaintiffs respectfully request judgment against both Defendants as follows:

a. Declaring Executive Order 2-21 void;

b. Enjoining Mayor Kenney and the City of Philadelphia from taking any action to implement Executive Order 2-21 insofar as it seeks to cancel Columbus Day in anyway;

c. Declaring Italian Americans a protected class entitled to Equal Protection under the U.S. Constitution;

d. Declaring Mayor James F. Kenney's Executive Order 2-21 violates the Equal Protection Clause of the U.S. Constitution;

e. Awarding Plaintiffs' attorney's fees;

f. Awarding Plaintiffs' costs of the proceeding; and

g. Such other and further relief as the Court deems just and equitable.

Respectfully submitted,

BOCHETTO & LENTZ, P.C.

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Dated: April 6, 2021

EXHIBITS TABLE OF CONTENTS

Ex A. Mayor James F. Kenney's Executive Order No. 2-21

Ex B. Erin Blakemore, *The Grisly Story of America's Largest Lynching*

Ex C. NIAF Statement on Christopher Columbus & Columbus Day, NIAF

Ex D. Charles Mires, *Columbus Day,* The Encyclopedia of Greater Philadelphia

Ex E. Congress' 1934 Joint Resolution-Columbus Day Proclamation

Ex F. Reports by Robert F. Petrone, Esquire to City Council of the City of Philadelphia

Ex G. City's Pathways to Reform, Transformation, and Reconciliation, City of Philadelphia

Ex H. Nakia Parker, *Black Slaves, Indian Masters: Slavery, Emancipation, and Citizenship in the Native American South, by Barbara Krauthamer*

Ex I. Ryan P. Smith, *How Native American Slaveholders Complicate the Trail of Tears Narrative*

Ex J. Zachary Evans, *Park Volunteer Outraged over Vandalism of Philadelphia Abolitionist Statue: "He Was BLM Before There Was A Slogan'*

Ex K. The Associated Press, *Philadelphia removes controversial Frank Rizzo statue overnight,* Penn Live

Ex L. Wikipedia, *History of Italian Americans in Philadelphia, Notable people, Frank Rizzo*

Ex M. Wikipedia, *Statue of Christopher Columbus (Philadelphia)*

Ex N. 1876 Fifth Agricultural Report & Centennial Report

Ex O. Emily Scott, *Mayor Kenney Waives code violation notices for recent Philly protests,* WHYY

Ex P. Mark Zimmaro, *Campione exiled, is Columbus next?,* South Philly Review

Ex Q. Philadelphia Fraternal Order of Police Lodge #5, Statement concerning Captain Campione, Twitter

Ex R. Department of Public Health, Philadelphia Covid-19 Vaccine Distribution Plan

Ex S. Allie Miller, *Walk-up, 24-hour COVID-19 vaccine site now open to eligible Philly residents,* Philly Voice

Ex T. Sean Collins Walsh, *PA. Convention Center vaccine site will take walk-ups,* The Philadelphia Inquirer

Ex U. James Garrow, *Open access at the Center City Vaccination Center for six days only!,* City of Philadelphia

Ex V. Mike Newall, *Newall: Under pressure to smile, Mayor Kenney reviews his rookie season,* The Philadelphia Inquirer

Ex W. Wikipedia, Guido (slang)

Ex X. City of Philadelphia, Resolution No. 170872, *Italian American Heritage Week*

EXHIBIT A
EXECUTIVE ORDER NO. 2-21, RENAMING COLUMBUS DAY TO INDIGENOUS PEOPLES' DAY

EXECUTIVE ORDER NO. 2-21
DESIGNATING JUNETEENTH AS AN OFFICIAL CITY HOLIDAY AND RENAMING THE HOLIDAY FORMERLY KNOWN AS COLUMBUS DAY TO INDIGENOUS PEOPLES' DAY

WHEREAS, the City of Philadelphia holds an integral place in our nation's founding as the birthplace of democracy, the Constitution, and the Declaration of Independence, where the following words were written: "that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness";

WHEREAS, despite these words, the United States continued to be stained by the institution of slavery and racism;

WHEREAS, President Lincoln's Emancipation Proclamation, ending slavery in the Confederacy, did not mean true freedom for all enslaved Africans;

WHEREAS, on June 19, 1865, Major General Gordon Granger issued an order informing the people of Texas "that in accordance with a proclamation from the Executive of the United States, all slaves are free";

WHEREAS, the General's order established the basis for the holiday now known as Juneteenth, which is now the most popular annual celebration of emancipation of slavery in the United States;

WHEREAS, on June 19, 2019, Governor Tom Wolf designated June 19th as Juneteenth National Freedom Day in Pennsylvania;

WHEREAS, the City of Philadelphia is a diverse and welcoming city where, according to the 2018 American Community Survey, 40% of residents are Black;

WHEREAS, Juneteenth has a unique cultural and historical significance here in Philadelphia and across the country.

WHEREAS, Juneteenth represents the resiliency of the human spirit, the triumph of emancipation and marks a day of reflection;

WHEREAS, the need to acknowledge institutional and structural racism is needed now more than ever;

WHEREAS, the City of Philadelphia is committed to work for true equity for all Philadelphia residents, and toward healing our communities;

WHEREAS, the story of Christopher Columbus is deeply complicated. For centuries, he has been venerated with stories of his traversing the Atlantic and "discovering" the "New World". The true history of his conduct is, in fact, infamous. Mistakenly believing he had found a new route to India, Columbus enslaved indigenous people, and punished individuals who failed to meet his expected service through violence and, in some cases, murder;

WHEREAS, over the last 40 years many states and cities have acknowledged this history by recognizing the holiday known as Columbus Day instead as Indigenous Peoples' Day. These jurisdictions

include: Arizona, Michigan, Minnesota, North Carolina, Vermont, Virginia, Wisconsin and Washington, D.C.;

WHEREAS, Black Lives Matter;

NOW, THEREFORE, I, MAYOR JAMES F. KENNEY, Mayor of the City of Philadelphia, by the powers vested in me by the Philadelphia Home Rule Charter, do hereby ORDER as follows:

Section 1. Designation of Juneteenth as a City Holiday

June 19 of every year is designated a holiday for all City employees and shall be treated as such in accordance with the applicable Civil Service regulations and Administrative Board rules.

Section 2. Renaming of Holiday

The City holiday celebrated on the second Monday in October, formerly known as Columbus Day, shall now be designated as Indigenous Peoples' Day.

Section 3. Directive to City Officials

The Director of Finance, Chief Administrative Officer and Deputy Mayor for Labor are directed to make appropriate notifications to effectuate this Order.

/s/ James F. Kenney
Mayor, City of Philadelphia

Date: January 27, 2021

EXHIBIT X
RESOLUTION DECLARING
ITALIAN AMERICAN HERITAGE WEEK

City of Philadelphia

Council of the City of Philadelphia
Office of the Chief Clerk
Room 402, City Hall
Philadelphia
(Resolution No. 170872)

RESOLUTION

Designating the week of Monday, October 2 through Monday, October 9, 2017 as "Italian American Heritage Week" in the City of Philadelphia. This is done in celebration of the festivities commemorating Columbus' historic voyage to the New World and honoring Connie Francis as Grand Marshall of the 2017 Philadelphia Columbus Day Parade.

WHEREAS, Five hundred and twenty-five years ago, an Italian explorer set out on what would become one of the most momentous journeys in the annals of history. Christopher Columbus and the maps he charted to the "New World" were guiding lights to every ship that came to America; and

WHEREAS, The annual Philadelphia Columbus Day Parade began in South Philadelphia in 1957, and has since become one of the City's premier ethnic

celebrations. On October 8, 2017, the 1492 Society will host the annual parade. In addition to the active participation of the Delaware Valley's Italian American community, the Philadelphia Columbus Day Parade tradition includes the world-famous Philadelphia Mummers string bands, outstanding high school and elementary school marching bands and many other marching groups representing the various ethnic traditions of our great City. The Parade seeks to foster a spirit of multiculturalism and respect for people of all ethnic backgrounds; and

WHEREAS, Grand Marshall Connie Francis, born Concetta Rosa Maria Franconero, on December 12, 1938 in Newark, New Jersey, is the daughter of first generation Italian American parents. At age 14, Connie won a spot on The Arthur Godfrey Talent Scout Show, on which, every Christmas, rather than featuring the usual adult singers, Godfrey would highlight child performers instead; and

WHEREAS, In 1958, Cashbox, Billboard and the Jukebox Operators of America named Connie Francis as the #1 Female Vocalist. She was named Top Female Vocalist by all the trades for six consecutive years—a record never surpassed. As well, England's prestigious New Musical Express also named her the World's #1 Female Vocalist. She earned two gold records for "Who's Sorry Now?" and "Stupid Cupid". "Where the Boys Are", Connie's song for a movie of the same name, sold over one million copies-selling and was so popular that Connie recorded it in five other languages Italian, Spanish, French, German and Japanese it reached #1 in 19 countries.; and

WHEREAS, Connie appeared on The Ed Sullivan Show more frequently than any other female artist;

these famous Sullivan TV appearances including exciting, once-in-a-lifetime shows aired from Paris' Moulin Rouge, Guantanamo Naval base and at the Berlin Wall; and

WHEREAS, Today, Connie Francis is widely involved in some very interesting and diverse projects. Of greatest importance and passion is to help returning American Veterans of war. Connie Francis is the national spokeswoman for Mental Health America's S.T.A.R. Campaign (Stress, Trauma, Awareness and Recovery) an important national campaign to raise awareness of what veterans are facing every day of their lives. Another long-awaited autobiography Among My Souvenirs, The Real Story is being officially released this year; and

WHEREAS, In addition to the annual Columbus Day Parade, festivities include an Italian Festival showcasing the culture and cuisine of the people of Italy. The Italian Festival takes place at Marconi Plaza the day of the Parade and includes food, dance and music from the many diverse regions of Italy; now, therefore, be it

RESOLVED, BY THE COUNCIL OF THE CITY OF PHILADELPHIA, That we hereby designate the week of October 2 through October 9, 2017 as "Italian American Heritage Week" and honor Connie Francis as Grand Marshall of the 2017 Columbus Day Parade.

CERTIFICATION: This is a true and correct copy of the original Resolution, Adopted by the Council of the City of Philadelphia on the fifth of October, 2017.

Darrell L. Clarke
President of the Council

Michael A. Decker
Chief Clerk of the Council

Introduced by: Councilmembers Squilla and Henon

Sponsored by: Councilmembers Squilla and Henon