UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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| GWEN FRISBIE-FULTON, *et al.*, | ) | |
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| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | 1:03-cv-2008-JDT-TAB |
| | ) | |
| LT. MICHAEL O'CONNOR, | ) | |
| | ) | |
| Defendant. | ) | |

**ENTRY ON CROSS-MOTIONS FOR SUMMARY JUDGMENT (DOCKET NOS. 44, 47)**

This action is brought pursuant to 42 U.S.C. § 1983, the statutory provision designed to redress the deprivation of rights secured by the Constitution of the United States under color of state law. The Plaintiffs are a group of demonstrators who claim that Lieutenant Michael O'Connor, the commander of the Indianapolis Police Department's intelligence unit, violated their First Amendment rights by denying them the opportunity to walk on city sidewalks of their own choosing. The parties have stipulated to the majority of facts, and both sides move for summary judgment. After carefully reviewing all motions and supporting materials, the court finds as follows:

## I. BACKGROUND

In August of 2003, the National Governors Association ("NGA") held a meeting in Indianapolis, Indiana. Most of the nation's governors and many state and federal dignitaries, including the Director of Homeland Security, attended the meeting. The Indianapolis Police Department ("IPD") and other law enforcement agencies were

responsible for providing security, with the IPD being primarily responsible for securing the buildings where the governors met and stayed, as well as the city's sidewalks contiguous to those buildings. Lt. O'Connor, as the head of the IPD intelligence unit, was in charge of the police department's role in the security efforts. The IPD intelligence unit consists of a group of officers responsible for providing counterintelligence services for the police and the city. This function entails the monitoring of subversive groups and protest activities, providing protection to dignitaries who visit the city, and investigating threats against public buildings.

In light of the NGA meeting, O'Connor formulated a plan to handle potential demonstrations outside of the Indianapolis Marriott, the hotel where the governors stayed and where many of the requisite meetings took place. Part of his plan included the creation of a "protest zone," described as an area outside of the hotel specifically allocated for protest activity. The zone was on Maryland Street, on the sidewalk, directly across from the hotel at a point which allowed the demonstrators to be seen from both the front and side entrances to the hotel. O'Connor chose this site because he believed it offered the demonstrators the best opportunity to be seen and heard, as well as to be safe. Cement barricades were placed near the curb of the protest zone, and IPD officers were placed at the east end of the area. The sidewalk was otherwise open. Once the protest zone had been established, O'Connor decided that protest activity could not occur anywhere else in the square block around the hotel.

On August 16, 2003, O'Connor learned that a group of demonstrators wished to walk the eight or nine blocks from St. Mary's Catholic Church at the intersection of New

Jersey and Vermont Streets in Indianapolis to the protest zone. O'Connor asked the demonstrators what route they planned to take, but received no reply. Eventually, approximately twenty-five people left St. Mary's and began walking south-west toward the protest zone. The demonstrators were silent, non-disruptive, and several carried signs. They did not have a marching permit, but stayed on the sidewalks and obeyed all traffic signals. Though they did not tell O'Connor their planned route, the demonstrators intended among themselves to travel exclusively on sidewalks, heading in a west and then south direction that would take them through the area of downtown Indianapolis known as the Circle[1] on their way to the protest zone. This route would have taken the demonstrators through a major shopping area in downtown Indianapolis and would likely have exposed them and their issues to a large number of people. The demonstrators hoped to attract additional supporters along the way, with the walk itself serving as part of the group's protest. A number of the demonstrators had their mouths taped shut, allegedly to protest both the fact that so much of the area around the Marriott had been declared off-limits to protest activities and that dissent in general was being restricted in Indianapolis. This march came shortly after the IPD raided the premises of Solidarity Books Collective ("SBC"), a local political awareness group. Several members of SBC participated in the march, and all of the demonstrators were concerned that the right of peaceful dissent was being suppressed in Indianapolis.

[1] The Circle is an area formed by the intersection of Meridian and Market Streets, with its most prominent feature being a large monument at its center.

Shortly after leaving St. Mary's, the demonstrators were met at the intersection of New York and Delaware Streets by twenty to thirty IPD police officers riding on bikes and in cars. These officers were under O'Connor's direct control, and positioned themselves in a line along the curb by the demonstrators on the sidewalk. O'Connor decided, on the spot, to prevent the demonstrators from walking through the Circle. Whenever the demonstrators came to an intersection that led south to the Circle or near the Circle, O'Connor directed the officers to block the crosswalks heading south and leave open the crosswalks heading west. To block the intersections, the officers formed a barricade by placing their bicycles wheel-to-wheel. This action forced the demonstrators to travel west on Ohio Street, north of the Circle. Upon reaching West Street, the demonstrators were guided by the officers south and then west again to the protest zone. Therefore, O'Connor developed the route that the demonstrators were required to take. The demonstrators remained on sidewalks at all times, except of course when crossing streets at crosswalks. The Circle remained open to pedestrians during the time that the demonstrators were walking to the protest zone. Although the Marion County Municipal Code generally requires a permit for parades, no permit is required for orderly processions on city sidewalks that do not violate any other ordinances. Further provisions of the Code prevent persons from standing or congregating on sidewalks in a way that disturbs the peace or causes obstruction.

Following the completion of protest activity in the protest zone, a number of the demonstrators wished to return to St. Mary's in a group, which they viewed as a continuation of their protest. They were allowed to do so, but were again escorted back

by the police along the same or similar indirect route without passing around the Circle. As before, the group stayed on sidewalks while the police rode nearby on the curb and blocked southerly intersections.

Plaintiffs Gwen Frisbie-Fulton, Jessica Neisler, Jonathan Nolen, Cate Woods-Russo, Sarah Willner, and Karly Knable participated in the walk from St. Mary's to the protest zone, and all allege they were denied the right and opportunity to take their protest walk in a direction of their own choosing. Plaintiffs Keni Washington and Karen Nielson were at the protest zone and walked back with the group to St. Mary's along the police-imposed route, and thus allege a denial of the same right and opportunity. Collectively, all Plaintiffs seek partial summary judgment on their First Amendment claims. Lt. O'Connor opposes Plaintiffs' motion for summary judgment and filed a cross-motion for summary judgment.

## II. LEGAL STANDARD

As noted, the parties seek to dispose of this case through the filing of cross-motions for summary judgment. The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, affidavits, and other materials demonstrate that there exists "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When analyzing a motion for summary judgment,

the court considers those facts that are undisputed and views additional evidence, and all reasonable inferences drawn therefrom, in the light most reasonably favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Baron v. City of Highland Park*, 195 F.3d 333, 337-38 (7th Cir. 1999). On cross-motions for summary judgment, each movant must individually satisfy the requirements of Rule 56, *ITT Indus. Credit Co. v. D.S. Am., Inc.*, 674 F. Supp. 1330, 1331 (N.D. Ill. 1987), and the traditional rules for summary judgment apply. *Blum v. Fisher & Fisher, Attorneys at Law*, 961 F. Supp. 1218, 1222 (N.D. Ill. 1997).

## III. DISCUSSION

### A. First Amendment

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. This provision applies to state governments under the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925). In this case, the Plaintiff-demonstrators (hereinafter "Plaintiffs") sought to walk on public sidewalks from a mutual gathering place to an area in the city of Indianapolis specifically set aside for protest activity. This walk, or march, was interfered with by the police, and Plaintiffs were forced along a path that was not of their own choosing. Peaceful marching on public sidewalks is a quintessential First Amendment activity. *See, e.g., Perry Educ. Ass'n v.*

*Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969). Public sidewalks represent a traditional public forum. *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). "When regulating First Amendment activity in a public forum the government has a difficult burden to carry." *Weinberg v. City of Chicago*, 310 F.3d 1029, 1035 (7th Cir. 2002) (citation omitted). The Seventh Circuit has opined that "'[g]iven their greater importance to the free flow of ideas, public fora receive greater constitutional protection from speech restrictions.'" *Id*. (quoting *Grossbaum v. Indianapolis-Marion County Bldg. Auth*., 100 F.3d 1287, 1297 (7th Cir. 1996)). This principle guides and illuminates the remainder of the court's analysis.

Merely because expressive activity occurs in a public forum does not mean that it can remain free from all regulation and restriction by the government. Accordingly, the Supreme Court holds that such activity is subject to reasonable time, place, and manner restrictions. *Perry Educ. Ass'n*, 460 U.S. at 45 (citations omitted). Such restrictions are constitutional if they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id*. (citations omitted); *see Weinberg*, 310 F.3d at 1036.

Government regulation of expressive activity is content-neutral if it can be "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations omitted). "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id*. (citation omitted). In this

case, Plaintiffs argue that O'Connor's actions were not content-neutral because he justified his regulation of their activity on the fact that they had a specific group purpose to demonstrate, and furthermore because his decision to regulate their activity was the product of his unbridled discretion. O'Connor, on the other hand, claims that his actions were content-neutral because he did not know what the Plaintiffs' were protesting about and simply acted as he did in order to curtail the secondary effects of their walk, such as traffic congestion and potential dangerousness.

O'Connor's position is untenable for several reasons. By essentially claiming ignorance as a defense in that he did not know what the Plaintiffs' specific cause was, O'Connor misses the point. O'Connor admits that he singled out this group of people because they had a certain purpose, which was to exercise their constitutional rights by demonstrating in front of, and on the way to, the Marriott Hotel.[2] In other words, O'Connor signaled out a specific group of speakers and chose to regulate their activity based not simply on a particular viewpoint but because they chose to engage in political expression in the first place. *See Burk v. Augusta-Richmond County*, 365 F.3d 1247,

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[2] The relevant exchange between Plaintiffs' counsel and O'Connor is as follows:

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| Plaintiffs' Counsel: | I assume that if you have a group of twenty pedestrians walking on the sidewalk or thirty pedestrians walking on the sidewalk to go shopping downtown, you don't escort them. Is that correct? |
| O'Connor: | That's correct. But this group [Plaintiffs] had a purpose. And the purpose was to go demonstrate in front of the Marriott Hotel where the Governors Conference was. |

(O'Connor Dep. at 36.)

1251 & n.6 (11th Cir. 2004). O'Connor recognized that Plaintiffs were in fact protesting as they walked from St. Mary's to the protest zone, that "they wanted to have their voices heard in opposition to the Governor's Conference," that they were hoping to convey a message through their walk, that they were united in a common cause, and that some of the demonstrators identified themselves as anarchists.[3] (O'Connor Dep. at 27, 62; Def.'s Resp. Br.) That the Plaintiffs' group was engaging in political expression is further borne out through an examination of the photographs attached to the parties' stipulations. These photographs depict members of the group carrying signs, with most members walking with their mouths taped shut and their hands tied behind their backs. From plain view this group certainly could not be called a group of neutral co-venturers on their way from point A to point B, and instead the group was visibly attempting to engage in political expression. As such, O'Connor's actions to restrict Plaintiffs on the basis of their exercise of political expression cannot be justified without reference to the content of the regulated speech. *See Burk*, 365 F.3d at 1252-53.

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[3] See the following portion of O'Connor's deposition testimony:

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| Plaintiffs' Counsel: | Did you consider what they [Plaintiffs] were doing between the church and the protest zone to be a demonstration? |
| O'Connor: | Yes. Anytime it's – it's in the ordinance that where it's a common cause and they have signs and they're moving from one point to another point, it is a demonstration of protest. |

(O'Connor's Dep. at 62).

Moreover, in his deposition O'Connor repeatedly states that he would not have treated a group of thirty co-venturing shoppers on the way to a mall in the same way that he treated the Plaintiffs in this case – despite both groups' production of the same or similar secondary effects related to traffic congestion – noting as the only difference the fact that the Plaintiffs' purpose was to protest. *Compare Hill v. Colorado*, 530 U.S. 703, 724 (2000) ("The statute does not distinguish among speech instances that are similarly likely to raise the legitimate concerns to which it responds. Hence, the statute cannot be struck down for failure to maintain 'content neutrality . . .'"). In this way, the instant case differs from the situation in *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). The Supreme Court in *Thomas* found to be content-neutral an ordinance that required a permit for all public assemblies of more than fifty people, regardless of purpose. 534 U.S. at 322. In holding as such, the Court explained that "the ordinance . . . is not even directed to communicative activity as such, but rather to *all* activity conducted in a public park. The picnicker and soccer player, no less than the political activist . . . must apply for a permit if the 50-person limit is exceeded." *Id*. As already noted, O'Connor chose to regulate a group engaging in political expression, stating that he would not have treated a group of thirty shoppers the same way. Yet, O'Connor's stated purposes of assuring the safety of the demonstrators and relieving traffic congestion would apply to all groups on the sidewalks, not just those engaged in political expression. The Defendant's action therefore "is not justified by its purported content-independent goals, and . . . [O'Connor] has regulated based on content." *Burk*, 365 F.3d at 1253.

In addition, O'Connor's decision to single out the Plaintiffs in this case for regulation based on perceived dangerousness does not make his action content-neutral. As the Seventh Circuit noted (when *Thomas* was before that Court), the reasonable time, place, or manner analysis is to be utilized where the regulation at issue "does not authorize any judgment about the content of any speeches, or other expressive activity - their dangerousness, offensiveness, immorality, and so forth." 227 F.3d 921, 924 (7th Cir. 2000), *aff'd*, 534 U.S. 316 (2002). The "curtailment of First Amendment rights must be based on a present abuse of rights, not a pre-nascent fear of future misconduct." *Beckerman v. City of Tupelo, Miss*., 664 F.2d 502, 510 (5th Cir. Dec. 1981).

O'Connor's use of unbridled discretion to determine, on the spot, that the Plaintiffs' group could have its First Amendment activity curtailed is also troubling. Though most often addressed in the context of government permit-review cases, "the prohibition against unbridled discretion is a component of the viewpoint-neutrality requirement." *Southworth v. Bd. of Regents of Univ. of Wis. Sys*., 307 F.3d 566, 579 (7th Cir. 2002); *see also Bourgeois v. Peters*, 387 F.3d 1303, 1317 (11th Cir. 2004) (noting the applicability of the discretion inquiry to a wide range of speech regulations). O'Connor is certainly correct that police officers must be granted "'large discretion under the police power to make instantaneous judgment calls'. . . ." *Potts v. City of Lafayette, Ind*., 121 F.3d 1106, 1112 (7th Cir. 1997) (quoting district court opinion). However, that discretion is bounded by, among other things, the Constitution and applicable law. "The First Amendment does not permit the government to place burdens on speech and

assembly in . . . an unprincipled, *ad hoc* manner." *Bourgeois*, 387 F.3d at 1318. In this case, both sides agree that a county ordinance expressly allows for orderly, non-disruptive processions on public sidewalks to occur without a permit and unfettered by police interference absent unlawfulness. The parties have stipulated that Plaintiffs were never disruptive during their walk on the sidewalks. O'Connor argues that he was not acting with unbridled discretion because there are other ordinances that give law enforcement officers the power to prevent offenses and maintain order. Whatever these general powers mean in other contexts, they do not override the specific ordinance that allows the orderly exercise of First Amendment activity on public sidewalks. O'Connor could clearly disperse Plaintiffs if they engaged in unlawful activity, but the interrelation between the applicable ordinance and the stipulation as to Plaintiffs' lack of disruption and overall orderliness, without more, demonstrates Plaintiffs were acting lawfully and thus within their rights. O'Connor ignored this limit on his discretion and decided, on the spot, to have Plaintiffs herded away along a police-imposed route.

In sum, the regulation at issue was content-based. However, even assuming *arguendo* that the regulation was content-neutral, the court finds that the regulation was not narrowly tailored to serve a significant government interest. Neither side disputes that O'Connor as a police officer has a legitimate interest in protecting citizens and maintaining the safe and efficient flow of traffic on city streets and sidewalks. Such concerns are clearly "intertwined with the concern for public safety." *Weinberg*, 310 F.3d at 1038; *see also Madsen v. Women's Health Ctr*., 512 U.S. 753, 768 (1994) ("The State . . . has a strong interest in ensuring the public safety and order, in promoting the

free flow of traffic on public streets and sidewalks . . ."). That being said, "[i]n the context of a First Amendment challenge under the narrowly tailored test, the government has the burden of showing that there is evidence supporting its proffered justification." *Weinberg*, 310 F.3d at 1038 (citation omitted).

O'Connor maintains that the traffic situation in downtown Indianapolis and corresponding safety concerns necessitated his regulation of Plaintiffs. In support of his position, O'Connor notes that Plaintiffs were in a group of about twenty-five people and the traffic signals at downtown intersections only last for twenty-five seconds, which in his mind meant that the group would have difficulty getting across streets at crosswalks. O'Connor further feared that the group could disintegrate into multiple groups, thereby increasing the danger of crossing streets within the applicable time frame. On top of traffic concerns, O'Connor was also aware that numerous anarchists had threatened to cause a civil disturbance at some point during the NGA meetings. According to police intelligence, between fifty and one-hundred of these so-called anarchists had gathered on a farm in Kentucky and were learning techniques to help them fight the police during protest activities.[4] O'Connor never claims that the Plaintiffs were among these Kentucky-trained anarchists, but stresses that *someone* was planning to cause a disturbance in downtown Indianapolis on the weekend in question.

O'Connor's fears sound reasonable enough on their face, but "First Amendment rights demand more than mere facial assertions," and he "cannot blindly invoke safety

[4] It is a bit ironic that anarchists might be so organized.

and congestion without more." *Weinberg*, 310 F.3d at 1038. Despite his claims, O'Connor has not directed the court to any objective evidence that Plaintiffs' walk disrupted traffic on city streets or sidewalks in any way. *See, e.g., id.* at 1039 ("The City offered no empirical studies, no police records, no reported injuries, nor evidence of lawsuits filed."). In fact, the photographs of Plaintiffs' march attached to the parties' stipulations belie even an inference that Plaintiffs may have obstructed traffic. Moreover, the group traveled the approximately three blocks from St. Mary's Church to the intersection of New York and Delaware Streets without incident, despite having to cross several intersections on the way. O'Connor clearly had the opportunity to observe them before he determined to divert them from the sidewalk path of their choice. (O'Connor Dep. at 28.) The group of demonstrators was small, with each member separated from the next in line by a foot or two, and there is no objective evidence that members of the group would have disobeyed traffic signals, raced across intersections in order to keep together, or otherwise caused traffic problems. The only evidence offered is to the contrary – the group of demonstrators was orderly, non-disruptive, and obeyed all traffic laws both before *and* after they were being herded to the protest zone. Tellingly, O'Connor admits that had the group simply stated where they planned to walk, he most likely would have accommodated them. (O'Connor Dep. at 62.) However, by refusing to tell him their intended path, in his mind the group became a "threat" to traffic flow and public safety.[5] O'Connor cannot, on the one hand, claim that there was an

[5] O'Connor never addresses why the demonstrators were at a greater risk of harm if they went their own route as opposed to the one which he selected for them, which was no shorter than Plaintiffs' intended route and took them through several busy

(continued...)

imminent risk of harm if Plaintiffs were allowed to take the route they wished to travel, and at the same time state that he would have let them go that way if they had told him so originally.

O'Connor was operating on mere speculation. The only evidence offered by the defense is conjecture as to what *might* have happened if Plaintiffs were allowed to walk on a route of their own choosing. "This is problematic; '[courts] have never accepted mere conjecture as adequate to carry a First Amendment burden.'" *Id*. (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000)); *see Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("When the government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease to be cured."). Nothing in the record supports O'Connor's claims that Plaintiffs were dangerous or posed a risk to the free and safe flow of traffic on city sidewalks and streets. All of the evidence is to the contrary, revealing that O'Connor's concerns were simply not justified. Moreover, coloring the entire background of this issue is the applicable ordinance that expressly allows non-disruptive groups of pedestrians to travel on public sidewalks free from government interference. The city of Indianapolis and Marion County recognize, although O'Connor

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intersections. Though he cites the lack of traffic signals at the Circle as one potential reason, that is in contradiction to his deposition testimony where he indicates that had Plaintiffs informed him of wanting to go through the Circle he would likely have allowed them to do so. Furthermore, O'Connor never address the fact that, in essence, each demonstrator had his or her own personal police escort. The argument that there was something further necessary to prevent a threat to public safety (i.e., the police-imposed route) thus loses merit.

apparently does not, that peaceful sidewalk assemblies are not to be disturbed without cause.

Finally, O'Connor's concerns that someone might plan a disruptive act of civil disobedience during the NGA meeting do not justify his actions. As stated above, the "curtailment of First Amendment rights must be based on a present abuse of rights, not a pre-nascent fear of future misconduct." *Beckerman*, 664 F.2d at 510. Indeed, "[t]he generally accepted way of dealing with unlawful conduct that may be intertwined with First Amendment activity is to punish it after it occurs, rather than to prevent the First Amendment activity from occurring in order to obviate the possible unlawful conduct." *Collins v. Jordan*, 110 F.3d 1363, 1371-72 (9th Cir. 1996) (citing *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 180-81 (1968)). In the words of the Seventh Circuit, "[u]sing a speech restrictive blanket with little or no factual justification flies in the face of preserving one of our most cherished rights." *Weinberg*, 310 F.3d at 1039. Once again, O'Connor's concerns were nothing if not vague and speculative. *Id*.

Though O'Connor had a substantial government interest in protecting Plaintiffs and the public from traffic-related problems and other dangerousness, the court must conclude that O'Connor has not sufficiently demonstrated that the regulation of Plaintiffs in this case advanced that interest. The court's discussion could end here, for the failure to advance a significant government interest means O'Connor's regulation was not a reasonable time, place, or manner restriction. *Id*. at 1040. Yet, in addition, O'Connor's actions were not narrowly tailored.

The Supreme Court holds that "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 799 (citation omitted). "This means the regulation need not be a perfect fit for the government's needs, but cannot burden substantially more speech than necessary." *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000) (citation omitted). The regulation also does not need to be "the least restrictive means of achieving the government purpose, so long as it can be considered narrowly tailored to that purpose." *Id*. (citation omitted).

In this case, as noted, O'Connor never explains or justifies why the Plaintiffs' group was at a greater risk of harm if they went their own route as opposed to the one forced upon them. O'Connor's testimony reveals that he probably would have let the demonstrators march through the Circle area had they told him that was where they wanted to go. Yet O'Connor never attempted to reach a "middle ground," such as use of police escorts instead of a police-imposed route, and simply prohibited Plaintiffs from walking freely along their own path. *Weinberg*, 310 F.3d at 1040. O'Connor, on the spot, denied Plaintiffs *all* opportunity to travel through the central area of downtown Indianapolis. In doing so, O'Connor burdened substantially more speech than was necessary, and thus the regulation was not narrowly tailored.[6]

[6] The Defendant briefed the issue of ample alternative channels, the final inquiry in the time, place, or manner restriction analysis, but Plaintiffs did not. Based on the court's holding with respect to content neutrality and narrow tailoring, it need not reach this issue.

Finally, O'Connor argues that there is no evidence to support Plaintiffs' contention regarding the demonstrators' march back to St. Mary's Church from the protest zone. O'Connor is correct that there is no direct evidence that he ordered police officers to force Plaintiffs along a predetermined route in a manner akin to that when Plaintiffs were on their way to the protest zone, and Plaintiffs concede as much. However, what Plaintiffs must demonstrate in a § 1983 action is that there is causal connection between a government official's actions and a citizen's deprivation of constitutional rights. *Conner v. Reinhard*, 847 F.2d 384, 396-97 (7th Cir. 1988). "[D]irect participation by a defendant is not necessary." *Id*. at 396. According to the Seventh Circuit, "[t]he requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights." *Id*. at 397 (citations omitted).

In this case, O'Connor ordered his subordinates to deny Plaintiffs' group the sidewalk route of their choice and to escort them on a path that avoided the Circle area as they traveled to the protest zone. As this court now holds, such action was unconstitutional. O'Connor has not directed the court to any evidence that he gave orders to his subordinates which countermanded his earlier decisions, and the only reasonable inference that can be drawn from the evidence in the record precludes him from now claiming that he was not responsible when those subordinates imposed the same or similar restrictions on Plaintiffs' group as it traveled back to St. Mary's Church. Having set this "series of events" in motion, O'Connor remains subject to liability under 42 U.S.C. § 1983.

**B. Qualified Immunity**

The court holds that O'Connor's actions in regulating the Plaintiffs' group's march were not content-neutral and were not narrowly tailored to advance a significant government interest. For these reasons, O'Connor's regulation was not a reasonable time, place, and manner restriction. Because Plaintiffs' constitutional rights were therefore violated, the next question becomes whether O'Connor is entitled to qualified immunity.

The doctrine of qualified immunity provides that "governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The plaintiff bears the burden of establishing that the right at issue is "clearly established." *Lunini v. Grayeb*, No. 04-1822, 2005 WL 89491, at *7 (7th Cir. Jan. 18, 2005) (citation omitted). To satisfy his or her burden, the plaintiff must show either (1) that "a court has upheld the purported right in a case factually similar to the one under review," or (2) "that the alleged misconduct constituted an obvious violation of a constitutional right." *Id*. Nevertheless, "'liability is not predicated upon the existence of a prior case that is directly on point.'" *Id*. (quoting *Nabozny v. Podlesny*, 92 F.3d 446, 456 (7th Cir. 1996)).

O'Connor argues that Plaintiffs have not carried their burden of showing that the right at issue in this case was clearly established at the time of the incident. In support

of his position, he claims that both the factual nature of this case and the "novel" claims asserted by Plaintiffs entitle him to qualified immunity. The court disagrees. Under the circumstances of this case, an ordinary police officer should have known that he risked violating Plaintiffs rights by herding them along a police-imposed route while they were engaging in political expression and when any threat to the public safety was nothing but conjecture.[7]

At the time that O'Connor blocked Plaintiffs' group from freely exercising their rights, the law was clear that it was insufficient to claim a *potential* harm to traffic and pedestrians as a reasonable basis for disrupting First Amendment activity on public sidewalks in the absence of objective evidence of such a need to regulate. *Weinberg*, 310 F.3d at 1039. O'Connor is correct that *Weinberg* involved a city ordinance and not a decision by a police officer, but that difference in circumstances does not alter the Seventh Circuit's affirmation of the principle that conjecture is never adequate to carry a

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[7] Though O'Connor may have been making light of the situation in his mind as he ordered the Plaintiffs' group along a police-imposed route, his knowledge and experience as a police officer should have made him aware of the proper parameters of the First Amendment. The following portion of O'Connor's deposition testimony is insightful:

> When they got to West Street, that's when I told them – you know, I was asked twice do we want to let them go west. I said, well, where are we going to take them. I mean, how far west – you know, the Speedway is the next thing we come to. I didn't want them to walk that far. Because that demonstration, while it would have been funny to some and cruel to others, it would have solved my problem by keeping them walking west. I didn't. I let them go south on West Street.

(O'Connor Dep. at 32.)

First Amendment burden. *Id*. And *Weinberg* is hardly a unique decision. That case clearly reflects the law, summarized by the Supreme Court in *Turner Broadcasting System, Inc*., 512 U.S. at 664, that the narrow tailoring requirement demands that a defendant demonstrate actual and not hypothetical harm, and that the regulation of the expressive activity actually addresses that harm.

O'Connor further attempts to distinguish *Weinberg* by noting that his decision was made on an *ad hoc* basis and accordingly deserves great leeway. Neither side disputes that police officers in the field must be allowed to operate with large discretion, but even this discretion is cabined by the Constitution. Simply because O'Connor was acting on the spur of the moment does not relieve him of the requirements for a reasonable time, place, and manner restriction. *Potts*, 121 F.3d at 1111. Both *Potts* and *Weinberg* instruct that a government official who interferes with one's First Amendment rights must demonstrate that the decision was content-neutral and narrowly tailored to advance a significant government interest. In *Potts*, the police crafted an order that, among other things, prohibited persons attending a Ku Klux Klan rally from entering with tape recorders. *Id*. at 1109. When the plaintiff was denied entry and arrested because he was carrying a tape recorder into the rally, he brought a § 1983 action against the city. *Id*. at 1110. The Seventh Circuit rejected his claims, finding that the prohibition on tape recorders was a reasonable restriction given the propensity for violence associated with KKK rallies and the very real possibility that objects such as tape recorders could be used as throwing weapons. *Id*. at 1112. *Potts*, however, does not extend as far as O'Connor would like. Unlike the instant case, the plaintiff in *Potts*

was not denied the ability to participate in First Amendment activity. He was simply denied the ability to carry a potential weapon into the rally. Moreover, the regulation in *Potts* applied to all non-media participants in the rally, with no evidence of selective enforcement. O'Connor posits that the evidence of potential danger in the instant case is greater than that in *Potts* given the intelligence he received with respect to potential anarchists. The *Potts* court expressly noted that "KKK rallies, by their very nature, breed violence." *Id*. In other words, KKK rallies by definition raise justified safety concerns. O'Connor has cited no cases where a group that may or may not contain "anarchists" will, by its nature, "breed violence." A vague, conjectural fear of potential violence from *someone* during the NGA meeting does not transform a group of otherwise peaceful demonstrators into a threatening mob. Moreover, O'Connor's assertion that he was forced to act out of an impending danger cuts against the parties' stipulations that Plaintiffs' group was non-disruptive. The relevant county ordinance provides that demonstrators on public sidewalks have a right to march unfettered so long as they are non-disruptive. O'Connor must have been aware of this ordinance, or at least should have been so aware.

In summation, the court holds that an ordinary police officer should have known that he or she risked violating Plaintiffs' constitutional rights by interfering with their march on public sidewalks. The First Amendment rights claimed to have been violated in this case were clearly established at the time of the incident on August 16, 2003. O'Connor must therefore be denied qualified immunity.

## IV. CONCLUSION

This case stands as a stark reminder that "[u]sing a speech restrictive blanket with little or no factual justification flies in the face of preserving one of our most cherished rights." *Weinberg*, 310 F.3d at 1039. Defendant O'Connor's interference with Plaintiffs' peaceful, non-disruptive march on city sidewalks was unjustified and represented a response that was neither content-neutral nor narrowly tailored to advance a significant government interest. An ordinary police officer should have recognized that such interference was unwarranted and unconstitutional. If a group of demonstrators as small, quiet, and peaceful as Plaintiffs' can be herded through the city on such shaky grounds as a twenty-five second traffic signal and a vague fear that someone, somewhere might cause a civil disturbance, then not only would Plaintiffs lose this case, but the Constitution's promise would be as hollow as a snare drum.

For these reasons, Plaintiffs' motion for partial summary judgment will be **GRANTED**. Defendant O'Connor's motion for summary judgment must be **DENIED**. So, the issue of liability has been decided in favor of the Plaintiffs, but the amount of damages to be awarded, if any, remains to be determined. Thus, today's decision does not constitute an appealable judgment. The court, by subsequent order, will set this case for trial on the question of damages.

ALL OF WHICH IS ENTERED this 9th day of February 2005.

John Daniel Tinder, Judge
United States District Court

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United States District Court

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