

**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.

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CIVIL ACTION
NO. 21-1609

MEMORANDUM

Jones, II J.

January 12, 2022

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 Councilmember, 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.

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.

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.

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 2-21² 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 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

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

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, 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 filed

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.

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.

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

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