UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JUDITH REILLY,	:	
Plaintiff	:	
v.	:	**C.A. No. 10-461S**
	:	
CITY OF PROVIDENCE, by and through its Treasurer, STEPHEN T. NAPOLITANO, alias, and PAUL KENNEDY, alias, and ALYSSA DeANDRADE, alias, individually and in their official capacities as police officers in the City of Providence Police Department, and DEAN ESSERMAN, alias, individually and in his official capacity as Chief of the City of Providence Police Department,	:	
Defendants	:	

PLAINTIFF'S COMBINED MEMORANDUM OF LAW IN SUPPORT OF HER MOTION FOR PARTIAL SUMMARY JUDGMENT AND OBJECTION TO THE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

This action is brought by the Plaintiff seeking declaratory and injunctive relief and compensatory and punitive damages for acts and/or omissions of Defendants in violation of Plaintiff's rights to freedom of speech and of the press protected under the First and Fourteenth Amendments to the United States Constitution and under Article 1, §§20 and 21 of the Rhode Island Constitution. Plaintiff seeks relief for violation of her federal constitutional rights pursuant to 42 U.S.C. §1983 and seeks relief directly under the Rhode Island Constitution for violation of her state constitutional rights, *Jones v. State of Rhode Island*, 724 F. Supp. 25, 34-36 (D.R.I. 1989).

Defendants City of Providence ("City"), Dean Esserman, and Paul Kennedy ("City Defendants") and Defendant DeAndrade have separately filed motions pursuant to Fed.R.Civ.P 56 and Lr. Cv. 56 seeking summary judgment as to both counts alleged in Plaintiff's Verified Complaint ("Complaint"). Plaintiff has duly filed objections to these motions as well as a cross motion for

partial summary judgment against all the Defendants as to liability on all counts.

Plaintiff contends that she is entitled to partial judgment as a matter of law, insofar as banning Plaintiff from distributing political flyers on a City sidewalk in front of a public building, under the circumstances presented, was not a permissible manner, place and time restriction and therefore contravened Plaintiff's constitutionally protected right to freedom of expression. Plaintiff also seeks partial summary judgment against the City Defendants on the ground that, as applied, the City policy of authorizing police to keep a passageway clear in the event of a mass evacuation of a building impermissibly infringed on Plaintiff's right to freedom of expression. Plaintiff all seeks partial summary judgment against the City Defendants on the ground that the City, by and through Defendant Esserman, as the City's chief policy making official, acquiesced to and condoned the deprivation of Plaintiff's constitutionally protected rights and failed to properly train, supervise and/or discipline officers in the City police department relative to the constitutionally protected right of people to peaceably distribute political flyers on public sidewalks and in other public fora.

II. SUMMARY

It is beyond dispute that at the core of free speech protection under the state and federal constitutions is political speech. Viewing the facts in a light most favorable to the Plaintiff, the Plaintiff, under the threat of arrest, was banned from distributing political flyers on the three (300) hundred foot long and fifteen (15) to seventeen and one half (17 ½) foot wide public sidewalk in front of a large, multi-purpose school facility in the City. Viewing the facts in a light most favorable to Defendant DeAndrade, the Plaintiff was banned from a one hundred seventy (170) foot portion of the public sidewalk in front of that building. In either case, it is undisputed that, at the time of the challenged conduct, there was no impediment to pedestrian or vehicle traffic, no blocking of exits or entrances, no crowds gathering, no breach of the peace, disruption or disorderly conduct of any kind, and no interference with the conduct of the event taking place inside the building**.** Indeed, at the time of the challenged conduct, it was rather quiet and calm on the sidewalk and foot traffic was

relatively sparse. It is also undisputed that the Defendants purport to rely on a City policy authorizing police officers to keep open exit passageways in the event of the necessity for a mass evacuation of a building for unforeseen circumstances. Based on well-settled law, where, as here, there was no actual or reasonably anticipated, reasonable and specific concerns of a threat to public safety, there is no significant governmental interest to justify interfering with expressive conduct taking place on a public sidewalk. This consistent, clear and authoritative line of cases began with a decision by the Supreme Court nearly thirty (30) years ago in *United States v. Grace,* 461 U.S. 171, 180 (1983). In that case, which is directly on point in all pertinent respects, the Court held that absent obstruction of the sidewalk or access to the adjacent building, threatened injury to any person or property, or interference with the orderly administration of the building or grounds thereof, the need to maintain proper order and decorum does not justify a ban on the distribution of leaflets on the sidewalk in front of a public building and constitutes a violation of the leafleter's freedom of expression. *Id*.

Under the circumstances presented described above—including the configuration of the site as depicted by the plans and photographs contained in Plaintiff's Record Appendix (Exhibits 4-15)—and applicable law established by *Grace* and its progeny, Plaintiff submits no reasonable police officer could have believed that banning Plaintiff from the sidewalk, either in whole or in part, was constitutionally permissible. Additionally, the City police department policy on which the Defendants rely to justify their conduct, which was purportedly correctly applied in this case, is constitutionally deficient as applied, as is the training purportedly provided consistent therewith, thereby establishing municipal liability under §1983 against the City. Finally, the facts in the record establish supervisory liability under §1983 against Defendant Esserman, the Police Chief at the time, and Defendant Kennedy, the Deputy Chief at the time, for their respective roles in precipitating the challenged conduct. Accordingly, based on well settled law and the record before the Court, this Court is compelled on the face of the record before it to enter partial summary

judgment in favor of Plaintiff and against the Defendants for impermissibly infringing on Plaintiff's right to freedom of speech and of the press protected under the state and federal constitutions.

III. MATERIAL FACTS

Background to the Dispute

On the evening of February 2, 2010, former Mayor David Cicilline ("Mayor") was scheduled to deliver the State of the City address at the Providence Career and Technical Academy ("PCTA"), located at 91 Fricker Street in Providence. Plaintiff's Statement of Undisputed Facts ("SUF") at ¶8. The address was to commence at 7:00 p.m. *Id*. at ¶9. Defendant Dean Esserman ("Esserman"), Chief of the City police department at the time, and the Chief policy making official of the City of Providence ("City") police department, and Defendant Paul Kennedy ("Kennedy"), then Deputy Chief of the City police department, both attended the Mayor's address. *Id*. at ¶¶6, 10. Esserman was in attendance as a representative of the City police department. *Id*. at ¶11. Esserman has a law degree. *Id*. at ¶7. Kennedy attended as a representative of the command staff. *Id*. at ¶12.

Defendant, Alyssa DeAndrade ("DeAndrade"), then a sergeant with the City police department, was given the assignment to supervise a small group of patrolmen who would handle, among other things, the safe crossing of pedestrian traffic heading into the event. *Id*. at ¶13. Defendant DeAndrade has a law degree and a masters in public administration. *Id*. at ¶5. Four officers were assigned under DeAndrade's command at the PCTA event: Patrolmen Jason Dalton, Roberto Gutierrez, Andre Elie, and Jared Stanzione. *Id*. at ¶14. The officers were assisting in crossing people who were parked in the Citizens Bank parking lot and the Central High School parking lot as well as other pedestrians entering from wherever they may have parked. *Id*. at ¶15. Officers Elie and Stanzione were assigned to assist pedestrians primarily in the area between Fricker Street and the front entrance to the PCTA, and Officers Jason Dalton and Roberto Gutierrez where assigned to assist pedestrians crossing Cranston Street in the vicinity of the Citizens Bank parking lot toward

the west end of the building. *Id*. at ¶16. Defendant DeAndrade was stationed on the sidewalk in front of the main entrance near the red pole. *Id*. at ¶17.

Configuration of the PCTA

The PCTA was a relatively new building which had just opened that year. *Id*. at ¶18. The PCTA is located in the City of Providence at the intersection of Cranston, Westminster and Fricker Streets, and is a public building owned and operated by the City. *Id*. at ¶¶19-20. The front facade and entrance to the auditorium of the PCTA where the event was held faces north on Cranston Street. *Id*. at ¶21. Across Cranston Street from the PCTA is a Citizens Bank and bank parking lot. *Id*. at ¶21. The PCTA is bound to the east by Fricker Street. Across Fricker Street from the PCTA is the Central High School parking lot. *Id*. at ¶22. The PCTA is bound to the west along Cranston Street opposite Fricker Street by an athletic field. *Id*. at ¶23.

The lower sidewalk in front of the PCTA adjacent to Cranston Street ranges in width from between about fifteen (15') feet to seventeen and one half (17 ½') feet. *Id*. at ¶24. The upper sidewalk or patio or plaza area in front of the PCTA adjacent to Cranston Street is one hundred seventy (170') feet in length and ranges in width from between about thirteen and one-half (13 ½') feet to twenty (20') feet. *Id*. at ¶25. From between two (2) to three (3) steps run the entire one hundred seventy (170') foot length of the upper sidewalk and separate the upper sidewalk from the lower sidewalk adjacent to Cranston Street. *Id*. at ¶26. The length of the PCTA building adjacent to Cranston Street is three hundred (300') feet. *Id*. at ¶27.

There are ten (10) sets of doors containing a total of twenty-two (22) doors exiting from the PCTA on the side adjacent to Cranston Street. *Id*. at ¶28. Of these doors, approximately eight (8) exit directly from the area of the auditorium where the event was held. *Id*. at ¶29. There are only two sets of exit doors located on the so-called façade portion of the PCTA adjacent to Cranston Street between the main entrance to the auditorium and Fricker Street. *Id*. at ¶30. These doors are plainly discernable by the vertical silver flashing framing the doors visible in the photographs at-

tached as Plaintiff's Record Appendix Exhibits 8-9. *Id*. at ¶31. Those doors are approximately sixty (60') feet apart. *Id*. at ¶32. The distance from these doors to the center of the lower sidewalk ranges from between about twenty two and one-half (22 ½') feet to about thirty (30') feet. *Id*. at ¶31. The distance from the entrance doors of the auditorium where the event was held to the center of the lower sidewalk is also about thirty (30') feet. *Id*. at ¶34. The PCTA auditorium where the event was held has a maximum capacity of approximately 396 people. *Id*. at ¶35.

Kennedy described the lower sidewalk as being "wide" and the upper sidewalk or patio area as being "spacious." *Id*. at ¶36. Esserman described the lower sidewalk as being "broad" and the upper sidewalk as being "pretty wide." *Id*. at ¶37. Motor vehicles were prohibited from parking along Cranston Street adjacent to the PCTA during the event. *Id*. at ¶38.

Leafleting at the Event

When Kennedy arrived around 6:15 to 6:30 p.m., he went inside and took a seat in the auditorium. *Id*. at ¶39. The Plaintiff arrived at the PCTA around 6:30 p.m. on the evening of the event and met up with Oscar Lemus ("Lemus"), a member of the Olneyville Neighborhood Association ("ONA"), where they intended to distribute fliers to attendees at the Mayor's address. *Id*. at ¶40. Plaintiff was an ally and supporter of the ONA. *Id*. at ¶41. Plaintiff and Lemus were handing out flyers critical of the Mayor's reappointment of Steven Durkee to the City Planning Commission. *Id*. at ¶42. At that time, Durkee was accused of a state code of ethics violation. *Id*. at ¶42. The fliers read, in part, *"If Mayor Cicilline is against corruption, WHY is he reappointing Steven Durkee to the City Planning Commission?!" Id*. at ¶43. The flyers were representative of both the Plaintiff's personal views and ONA's position. *Id*. at ¶44.

The Plaintiff and Lemus were distributing flyers to people entering the PCTA auditorium to attend the Mayor address. *Id*. at ¶45. Plaintiff and Lemus were walking up and down the lower sidewalk adjacent to Cranston Street from opposite ends of the building peaceably distributing the

flyers. *Id*. at ¶46. Lemus was moving up and down the sidewalk adjacent to Cranston Street in front of the PCTA on the athletic field or westerly end of the building so he could reach patrons coming from that end of Cranston Street and from the Citizens Bank parking lot across the street. *Id*. at ¶47. Plaintiff was moving up and down the sidewalk adjacent to Cranston Street in front of the PCTA between Fricker Street and the auditorium entrance distributing flyers to patrons attending the event. *Id*. at ¶48.

No crowds gathered nor was there any disruption, dissent or disorderly conduct. *Id*. at ¶49. People were arriving in clusters of two, threes and fives; there was no line jammed up at the door. *Id*. at ¶50. People either took or refused the flyers that Plaintiff and Mr. Lemus were distributing and moved on. *Id*. at ¶51. In fact, at the time, it was rather quiet and calm and foot traffic was relatively sparse. *Id*. at ¶52.

At or about this time, someone approached Esserman inside the event and spoke to him. *Id*. at ¶53. He does not remember the details of the discussion, whether it was flyers being distributed or whether it was people obstructing. *Id*. at ¶53. Esserman does not have a clear recollection of the event or the matters at issue. *Id*. at ¶54. In any event, his best recollection is that he told Kennedy to "check it out and deal with it." *Id*. at ¶55. Defendant Kennedy ordered Defendant DeAndrade to move Plaintiff and Lemus from the front of the building and clear the sidewalk. *Id*. at ¶56. .

Prior to receiving that order, Defendant DeAndrade did not regard either the Plaintiff or Lemus to be a threat to public safety requiring any action on her part. *Id*. at ¶57. DeAndrade ordered the four patrolmen to clear the sidewalk. *Id*. at ¶58. Subsequently, Lemus was told by a male City police officer in uniform, presumably officer Dalton or Gutierrez, to move across the street by Citizens Bank or down the street past the end of the building toward the athletic field, but he could not stay on the sidewalk on Cranston Street in front of the PCTA. *Id*. at ¶59. The substance of the forgoing conversation was overheard by the Plaintiff and subsequently told to her by Lemus. *Id*. at ¶60. .

Initially, Lemus moved part way down the sidewalk toward the end of the building by the athletic fields. *Id*. at ¶61. After Lemus was approached the first time, Defendant DeAndrade instructed the officers to tell Lemus to move across Cranston Street. *Id*. at ¶62. A few minutes after he was first approached, Lemus was approached again by two police officers, presumably officers Dalton and Gutierrez, and told to either go across the street or down to the end of the building toward the athletic field or he would be arrested. *Id*. at ¶63. Plaintiff was approached by another male City police officer and told to move across the street by Citizens Bank or down the street by the athletic field or across Fricker Street by the Central High School parking lot, but she could not stay on the sidewalk on Cranston Street in front of the PCTA or she would be arrested. *Id*. at ¶64.

Plaintiff felt she had the right to be on the sidewalk adjacent to Cranston Street in front of the PCTA. *Id*. at ¶65. Accordingly, she initially moved down the sidewalk adjacent to Cranston Street to the corner with Fricker Street and continued distributing flyers. *Id*. at ¶66. She gradually drifted toward the auditorium entrance so that she could more effectively distribute flyers to patrons entering the facility, when she was again approached by a male police officer and told to move from the sidewalk on Cranston Street in front of the building or be arrested. *Id*. at ¶67. Under the threat of and in fear of possible arrest, Plaintiff moved across Fricker Street to a location in front of the Central High School parking lot. *Id*. at ¶68.

Just prior to Plaintiff being approached, Lemus observed the Mayor and upper level officers in the City police department at the windows at the front façade of the PCTA conversing and looking out at Plaintiff distributing flyers on the sidewalk. *Id*. at ¶69. Plaintiff subsequently had a conversation with State Representative and former City Councilman David Segal, who informed her that he had helped write the City Ordinance on the subject, and that Plaintiff and Lemus had a right to peaceably distribute flyers on the public sidewalk in front of the PCTA. *Id*. at ¶70. Plaintiff did not want to surrender her constitutional rights to distribute flyers and express her political beliefs *without interference from the police*. *Id*. at ¶71. She thought what the police were doing was wrong

and she wanted to try one more time to distribute flyers in front of the building where she could more effectively reach patrons attending the event. *Id*. at ¶71. She found it hard to believe that the police would not be aware that it was a basic right to distribute political flyers on a public street in a non-dangerous and non-threatening manner. *Id*. at ¶72. Plaintiff could glean no other reason for threatening her with arrest if she did not move, under the circumstances, other than the fact that she was distributing political flyers critical of and embarrassing to the Mayor. *Id*. at ¶73. The flyers were huge with big lettering and it would have been almost impossible not to see what was on the flyer. *Id*. at ¶74. She was hoping that the police were bluffing and trying to impress the higher-ups—the white-shirted, command level officers present at the event, or possibly the Mayor or his staff, and that they would not really arrest her. *Id*. at ¶75.

Accordingly, the Plaintiff once again moved back across the street to the public sidewalk in front of the PCTA on Cranston Street. *Id*. at ¶76. She was approached almost immediately by Defendant DeAndrade and one or two other City police officers and she reiterated that the Plaintiff had to move or she would be arrested. *Id*. at ¶77. Plaintiff advised Defendant DeAndrade that she had a right to remain on the public sidewalk in front of the PCTA and peaceably distribute political flyers. *Id*. at ¶78. Plaintiff advised her of the conversation with Representative Segal and offered to put her in touch with him by cell phone. *Id*. at ¶79. Defendant DeAndrade related that she did not care what Representative Segal said. *Id*. at ¶80. Defendant DeAndrade further stated, "All I know is, when my Commander says to move you, I move you." *Id*. at ¶81. Defendant DeAndrade advised Plaintiff that the Commander to which she was referring was Defendant Kennedy**.** *Id*. at ¶82.

Defendant DeAndrade told Plaintiff that if she and Lemus wanted to continue to distribute the flyers, they had to move across the street by Citizens Bank or down the street by the athletic field or across the street by the Central High School parking lot. *Id*. at ¶83**.** Defendant DeAndrade reiterated that if Plaintiff and Lemus did not leave the sidewalk in front of PCTA, they would be arrested. *Id*. at ¶84. Defendant DeAndrade did not want the Plaintiff standing anywhere on the side-

walk in front of the PCTA and expressly told the Plaintiff that she could not be in the front of the building. *Id*. at ¶85.

The areas to which Plaintiff and Lemus were directed by Defendant DeAndrade were locations where they were less likely to encounter people entering the PCTA auditorium. *Id*. at ¶86. People attending the event were the target for the flyer because they were individuals interested in politics, elected officials and people who worked in City government. *Id*. at ¶87**.** Plaintiff believed if people arrived early enough they would take the time to read the flyer and possibly talk about it to other people at the event. *Id*. at ¶88. Since the literature was designed for individuals attending the event at the PCTA, moving to a location less proximate to the front of the auditorium would largely defeat the purpose of the activity. *Id*. at ¶89.

Defendant DeAndrade never claimed that Plaintiff or Lemus were violating any laws, obstructing the sidewalk or creating a disturbance—only that they could not remain on the public sidewalk in front of the PCTA. *Id*. at ¶90. Notwithstanding the Plaintiff's contentions, Defendant DeAndrade never even paused to consider whether the Plaintiff might have the right to remain on the sidewalk. *Id*. at ¶91. When Defendant DeAndrade directed the Plaintiff to move off the sidewalk on Cranston Street in front of the PCTA, she had no reason to believe that the Plaintiff presented a clear and present danger to public health or safety. *Id*. at ¶92. Nevertheless, under threat of arrest, Plaintiff and Mr. Lemus moved across the street to the area by Citizens Bank, even though it materially impaired if not prohibited their ability to effectively distribute flyers to people entering the auditorium. *Id*. at ¶93. Although Plaintiff believed then, and still believes now, that the Defendants' demand that she cease distributing flyers on the public sidewalk in front of the PCTA was unlawful and in violation of her right to freedom of speech, Plaintiff left the area to avoid being arrested. *Id*. at ¶94. The Plaintiff and Lemus eventually want across the street to the Citizens Bank parking lot. *Id*. at ¶95. After she and Lemus left the sidewalk on Cranston Street adjacent to the PCTA, there were still people entering the auditorium from the PCTA side of the street, whom they were

unable to reach because they were across the street. *Id*. at ¶96. Plaintiff and Lemus subsequently left the vicinity altogether, insofar as the Defendants had rendered their intended purpose of distributing flyers to individuals entering the auditorium largely futile and ineffective by banning them from the public sidewalk in front of the PCTA. *Id*. at ¶97. The Plaintiff and Lemus passed out over a hundred leaflets prior to being forced from the sidewalk in front of the PCTA. *Id.* at ¶99a.

When the Plaintiff was approached by police officers on the first two occasions and told to move, she was approximately 80 to 100 feet from the front entrance to the auditorium on a direct line. *Id*. at ¶98. When the Plaintiff was approached by Defendant DeAndrade, she was approximately 50 feet from the front entrance to the auditorium on a direct line. *Id*. at ¶99.

Circumstances Surrounding and at the Event

Neither the City police nor any of the Defendants received a bomb threat nor any information regarding a threat or disruption at the event. *Id*. at ¶¶100-101. Neither the City police nor any of the Defendants had any reason to believe that the building was not compliant with all fire and safety code requirements nor any reason to believe that the building was not equipped with all the requisite number of fire exits and entrances. *Id*. at ¶¶102-103**.** Neither the City police nor any of the Defendants had any reason to believe that the building was anything other than a safe, modern building. *Id*. at ¶¶104.

There was no profanity, fighting, violence, threats of bodily harm or property damage at the site of the event. *Id*. at ¶¶105-109. The sidewalk was not crowded with people and there was no interference with the pedestrian or motor vehicle flow. *Id*. at ¶¶110-111. No one was blocked from entering the PCTA. *Id*. at ¶¶112. There was no disturbance or disorderly conduct of any kind at the site of the event. *Id*. at ¶¶113-114. There were no kiosks, tables or vendors set up on the sidewalk. *Id*. at ¶115. There was no interference with the conduct of the event taking place in the PCTA. *Id*. at ¶116**.**

Neither Defendant DeAndrade nor the other officers at the scene had any reason to believe that either the Plaintiff or Lemus would be unable or unwilling to comply with a directive to move off the sidewalk in the event of a mass evacuation. *Id*. at ¶¶117-119. If the Plaintiff moved off the sidewalk in the event of a mass evacuation of the PCTA, she would not have presented an impediment to people exiting the building. *Id*. at ¶120.

Events Subsequent to Flyer Distribution

On or about February 16, 2010, Plaintiff filed a detailed Civilian Complaint form with the City police department requesting that corrective action be taken to remedy the conduct of the Defendants described above and to ensure that people would not be prevented from peaceably distributing political flyers on public sidewalks in the City in the future. *Id*. at ¶¶121. Plaintiff was subsequently in communication with Inspector Francisco Colon of the City Police Department, the internal affairs officer assigned to investigate the Plaintiff's Civilian Complaint. *Id*. at ¶¶122-123. On or about March 1, 2010, Plaintiff submitted a written follow-up communication to the City police department reiterating and expanding upon her previous complaint and responding to matters raised by Inspector Colon. *Id*. at ¶124. On or about March 23, 2010, Plaintiff received an email from Inspector Colon wherein, among other things, he expressed uncertainty as to whether the actions of the police officers involved in threatening to arrest her for the peaceable distribution of literature contravened Plaintiff's right to freedom of expression and/or constituted misconduct. *Id*. at ¶125. Inspector Colon indicated that he thought the law was confusing and that there was a possible misunderstanding because there was a City Ordinance purportedly banning commercial literature. *Id*. at ¶¶126-127. Almost two and one-half months after filing her original complaint, the Rhode Island Affiliate of the American Civil Liberties Union ("RIACLU") submitted a letter dated May 11, 2010 to Inspector Colon. *Id*. at ¶128. In that letter, the RIACLU, among other things, posited that "no police officer should be unaware of the fact that members of the public have a fundamental First

Amendment right [established more than seventy years ago] to peacefully distribute literature on public sidewalks." *Id*. at ¶129. A copy of the foregoing letter was also sent to Defendant Esserman, wherein he was asked to take appropriate action to ensure his officers were properly trained on this issue. *Id*. at ¶130.

According to the established process, investigations of Civilian Complaints are to be completed within thirty (30) days (or an additional thirty (30) days for good cause). *Id*. at ¶131. One of the reforms instituted by Esserman was that civilian complaints would be handled in a timely fashion and would not linger. *Id*. at ¶132. When a civilian complaint is received the Chief is notified/briefed and a case is opened, and thereafter there are weekly briefings on the status of the case. *Id*. at ¶¶133-134. No case is supposed to be closed until it is presented to all the majors, deputy chief and the chief in a staff setting where the inspector is present; then the case has to be discussed and a determination must be made by the Chief. *Id*. at ¶135. The standard procedure was that a determination would be made in writing and the complainant notified. *Id*. at ¶136. The Plaintiff's complaint lingered for some time waiting for a legal determination from the City law department. *Id*. at ¶137. Esserman is not aware of whether the case was fully closed, which is consistent with Plaintiff's contention that she never received any further response from or a resolution of her complaint by the City or any representative thereof. *Id*. at ¶¶138-139. It was a common occurrence for civil suits to be filed against the City police department. *Id*. at ¶140.

Municipal Liability

It is the policy of the City police department that the police are authorized "to keep open exit passageways in the event of the necessity for a mass evacuation of [a] building for unforeseen circumstances such as bomb scares or other matters that would necessitate an evacuation and also public safety concerns relative to pedestrians crossing the street or being forced into to the street due to the side walk being blocked." *Id*. at ¶141. The entire 170 foot long by fifteen (15') to seventeen

and one half (17 ½') feet in width lower sidewalk adjacent to Cranston Street in front of the steps to the PCTA was considered an exit passageway in accordance with the City police department policy. *Id*. at ¶142.

DeAndrade's conduct at the event complied with the above department policy. *Id*. at ¶143. The action taken by DeAndrade in ordering the Plaintiff to be moved off the sidewalk in front of the PCTA was consistent with the training she received by the City police department as it relates to constitutional limits on police authority in such situations. *Id*. at ¶144. Providence police officers are trained to apply and implement the above policy in the same manner under the same or similar circumstances. *Id*. at ¶145. The Defendant City has not changed the above policy or the interpretation thereof as it applies to the same or similar circumstances. *Id*. at ¶145. If Defendant DeAndrade were faced with the same circumstances as than on the subject night in question, she would instruct an individual who was passing out flyers in front of the PCTA to move off the sidewalk from in front of the building and she would arrest that person if they did not comply. *Id*. at ¶146. Neither Officer Elie nor Stanzione believes they did anything wrong and believe their conduct was consistent with their training, and they would take the same action again if faced with the same or similar circumstances. *Id*. at ¶147. None of the individual Defendants in this matter or the other officers at the scene were counseled, reprimanded or disciplined regarding their conduct at the event as it relates to their orders to the Plaintiff or Lemus. *Id*. at ¶148. In fact, Defendant DeAndrade was promoted.

IV. STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Grubb v. KMS Patriots, L.P.,* 88 F.3d 1, 3 (1st Cir. 1996); *see also, Kelly v. United States*, 924 F.2d 355, 357 (1st Cir. 1991); Fed.R.Civ.P. 56(c). All justifiable inferences to be drawn from the underlying

facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). When considering cross-motions for summary judgment, the Court will make all inferences in favor of the party against whom the motion under consideration was made. *Allen v. City of Chi.*, 351 F.3d 306, 311 (7th Cir.2003). The court's task is not to "weigh the evidence and determine the truth of the matter but [to] determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

Nevertheless, in making this determination, the court "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000).[1] Accordingly a court must disregard facts that are "patently untrue,"[2] or where, as here, documentary evidence conclusively establishes that an issue of fact is "not genuine, but feigned."[3] In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 251-52. A party opposing the motion must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co.*, 475 U.S. at 586. In order for a court to conclude that there are no genuine issues of material fact, the court must be satisfied that no reasonable trier of fact could have

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[1] *See Scott v. Harris*, 550 U.S. 372, 380 (2007) (when the record contradicts a party's description of the facts, it does not create a genuine dispute); *accord Blaylock v. City of Philadelphia*, 504 F.3d 405, 413 (3d Cir.2007); *see also Cuesta v. School Bd. of Miami-Dade County*, 285 F.3d 962, 970 (11th Cir.2002) (Summary judgment proper "when the inferences that are drawn from the evidence, and upon which the non-movant relies, are implausible.")(internal quotations omitted); *Dillon, Read & Co., Inc. v. United States*, 875 F.2d 293, 300 (Fed.Cir.1989) *(*trial court has duty to reject stipulations which are demonstrably false*)*; *Cf. Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 746 (1983) (in determining whether case involves genuine issues of material fact for purposes of reasonable-basis determinations, NLRB may reject "plainly unsupportable inferences" and "patently erroneous submissions.").

[2] *Penato v George*, 52 AD2d 939, 941, 383, N.Y.S.2d 900 (1976), *appeal dismissed* 42 N.Y.2d 908, 397 N.Y.S.2d 1004, 366 N.E.2d 1358 (1977); *accord Leo v. Mt. St. Michael Acad.*, 272 A.D.2d 145, 146, 708 N.Y.S.2d 372, 374 (2000).

[3] *Leo v. Mt. St. Michael Acad.*, 272 A.D.2d 145, 146, 708 N.Y.S.2d 372, 374 (2000); *Glick & Dolleck v. Tri–Pac Export Corp.*, 22 N.Y.2d 439, 441, 293 N.Y.S.2d 93, 239 N.E.2d 725 (1968); *Carlin v. Crum & Forster Ins. Co.*, 191 A.D.2d 373, 595 N.Y.S.2d 420 (1993).

found for the non-movant, or, in other words, that the evidence favoring the non-movant is insufficient to enable a reasonable jury to return a verdict for the non-movant. *Id.* at 250 n. 4. If the record, viewed in this light, could not lead a rational trier of fact to find for the party opposing the motion, summary judgment is proper. *Matsushita Elec. Indus. Co.,* 475 U.S. at 587. The availability of summary judgment thus turns upon whether a proper jury question is presented. *Anderson*, 477 U.S. at 249. A court may grant summary judgment on less than all claims or issues or with respect to liability only. *See* Fed.R.Civ.P. 56(c) and (d).

V. ARGUMENT

Freedom of Speech and of the Press

Freedom of speech and that of the press are fundamental personal rights and liberties, and the exercise of these rights lies at the foundation of free government by free people.[4] One who is rightfully on a street open to the public "carries with him there as elsewhere the constitutional right to express his views in an orderly fashion [, including] . . . the communication of ideas by handbills and literature as well as by the spoken word."[5]

Political Speech

The Supreme Court has recognized that the First Amendment reflects a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open," and has consistently commented on the central importance of protecting speech on public issues.[6] Political speech such as that involved in the case at bar is entitled to the fullest possible measure of constitutional protection.[7]

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[4] *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 161 (1939).

[5] *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984) (quoting *Jamison v. Texas*, 318 U.S. 413, 416 (1943)).

[6] *Boos v. Barry*, 485 U.S. 312, 318 (1988)(quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

[7] *Taxpayers for Vincent*, 466 U.S. at 816.

Leafleting

Distribution of flyers, leaflets or handbills is protected by the First Amendment guarantees of freedom of speech and freedom of the press.[8] "In its traditional form, leafleting occurs when individuals offer handbills, pamphlets, tracts, advertisements, notices and other information to individuals on the street or sidewalk, who remain free to accept or reject the document."[9]

"[Leafleting] is a venerable and inexpensive method of communication that has permitted citizens to spread political, religious and commercial messages throughout American history, starting with the half a million copies of Thomas Paine's *Common Sense* that fomented the American Revolution."[10]

The right to distribute literature protects both the interests of speakers in sharing information and the interests of citizens in receiving it.[11] Many people do not have the time to actively participate in political campaigns, nor do they have the money to make substantial financial contributions to candidates or causes they support. Leaflets and flyers are a simple and inexpensive means for an individual without significant resources to share his or her ideas and express support for political

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[8] *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938); *see also U.S. v. Grace*, 461 U.S. 171, 176 (1983)("There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment."); *Jamison v. Texas*, 318 U.S. 413, 416 (1943) ("[The] constitutional right to express . . . views in an orderly fashion . . . extends to the communication of ideas by handbills and literature as well as by the spoken word.").

[9] *Taxpayers for Vincent*, 466 U.S. at 809-10 ("The [leafletting] right recognized in *Schneider [v. New Jersey*, 308 U.S. 147 (1939),] is to tender the written material to the passerby who may reject it or accept it, and who thereafter may keep it [or] dispose of it . . .").

[10] *Jobe v. City of Catlettsburg*, 409 F.3d 261, 266 (6th Cir. 2005); *see Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (noting that "pamphlets and leaflets ... have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest"); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) ("The hand distribution of religious tracts is an age-old form of missionary evangelism--as old as the history of printing presses."); s*ee also Watchtower Bible & Tract Soc'y of New York v. Vill. of Stratton*, 536 U.S. 150, 153 (2002) (religious speech); *Hill v. Colorado*, 530 U.S. 703, 716 (2000) (political speech); *Breard v. Alexandria*, 341 U.S. 622, 624 (1951) (commercial speech); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993) (commercial speech).

[11] *See Martin*, 319 U.S. at 146-47 ("Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved."); *id.* at 143 (explaining that the freedom of speech "necessarily protects the right to receive [literature]" and considering "the right of the individual householder to determine whether he is willing to receive" a leafletter's message); *see also Gilleo*, 512 U.S. at 56; *Taxpayers for Vincent*, 466 U.S. at 812 n. 30, *Schneider*, 308 U.S. at 164.

and social causes.[12] The flyers such as that in the case at bar, "that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community."[13]

Public Forum—Sidewalks

"Leafleting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum."[14] "City streets are recognized as a normal place for the exchange of ideas by speech or paper."[15] Public streets and sidewalks are considered traditional public forums that, "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[16] Accordingly,

[12] *Martin*, 319 U.S. at 146 ("Door to door distribution of circulars is essential to the poorly financed causes of little people."); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 57 (striking ordinance that prevented homeowners from displaying signs in their own windows and commenting that "[r]esidential signs are an unusually cheap and convenient form of communication"); *Watchtower Bible & Tract Soc'y of New York*, 536 U.S. at 162 ("[P]erhaps the most effective way of bringing [pamphlets] to the notice of individuals is their distribution at the homes of the people.") (quoting *Schneider*, 308 U.S. at 164)*; Discovery Network*, 507 U.S. at 424 (striking ordinance that banned the placement on public streets of newsracks containing commercial, but not non-commercial, handbills).

[13] *City of Ladue*, 512 U.S. at 54.

[14] *See, e.g., Boos v. Barry*, 485 U.S. 312, 322 (1988); *United States v. Grace*, 461 U.S. 171, 180 (1983); *Hannan v. City of Haverhill*, 120 F.2d 87, 88 -89(1st Cir. 1941)("The streets are natural and proper places for purposes of assembly, of interchange of thought and opinion on religious, political and other matters, either by word of mouth or by the distribution of literature. Such use of the streets and public places, sanctioned by ancient usage, has become part of the liberties of the people protected by the Fourteenth Amendment from state encroachment.").

[15] *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (Reed, J.,plurality opinion)(majority agreed with this analysis*; see id*., at 96-97 (Frankfurter, J., concurring); *id*., at 97-98 (Jackson, J., concurring)); *see also Jamison v. Texas*, 318 U.S. 413, 416 (1943).

[16] *Hague v. CIO*, 307 U.S. 496, 515 (1939) (Roberts, J., plurality opinion). "[F]rom ancient times, [streets and public places] been a part of the privileges, immunities, rights, and liberties of citizens.... [S]treets and parks ... have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id; see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995) ("Having availed itself of the public thoroughfares 'for purposes of assembly [and] communicating thoughts between citizens,' the [petitioner] is engaged in a use of the streets that has 'from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.' ") (quoting *Hague*, 307 U.S. at 515); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (noting that streets and parks are "[a]t one end of the spectrum" among "places which by long tradition or by government fiat have been devoted to assembly and debate").

"[s]treets and sidewalks are quintessential public forums, and the Supreme Court has consistently affirmed the right of demonstrators to use them."[17]

Free Speech Limitations on Police Power

Free speech claims challenging restrictions on expressive conduct are analyzed in three steps. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.,* 473 U.S. 788A 797 (1985). The first step is to determine whether the plaintiff's conduct is protected speech. As they must in light of the case law cited above, Defendants concede that the Plaintiff's leafleting activity constitutes protected First Amendment conduct. DeAndrade Memorandum of Law at p. 5; City Memorandum of Law at p. 10. The second step is to " 'identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic.' " *Id.* at 797. Again, in light of the case law cited above, the Defendants concede that the sidewalk in front of the PCTA is a public forum. DeAndrade Memorandum of Law at p. 5, 6; City Memorandum of Law at p. 10. Assuming the restriction is content neutral, [18] " '[r]easonable restrictions as to the time, place, and manner of speech in public fora are permissible, provided that those restrictions . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.' " *Bl(a)ck Tea Soc'y v. City Of Boston*, 378 F.3d 8, 12 (1st Cir. 2004)(quoting *Ward v. Rock Against Racism,* 491 U.S.

[17] *Town of Barrington v. Blake*, 568 A.2d 1015, 1019 (R.I. 1990); *see also, supra*, note 8.

[18] Plaintiff asserts that the record before the Court raises a material dispute of fact as to whether the Defendants were aware of and motivated by the content of the Plaintiff's leaflet in taking the challenged conduct, SDF Reilly of DeAnd. at ¶25; SDF Reilly of City at ¶¶31, 47, 54, or instead had no knowledge of the content of the leaflet and therefore acted in a content neutral manner, SUF DeAnd. at ¶25; SUF City at ¶¶31, 47, 54. The opposing facts in the record juxtapose the bald faced denials of the Defendants against the compelling inference based on numerous undisputed facts that the Defendants' purported public safety justification for the Plaintiff being banned from the sidewalk was false—a fabrication, and that the Defendants were instead motivated by an intent to prevent or impede the exercise of Plaintiff's First Amendment rights. At trial, a finder of fact would be both permitted and justified, under the circumstances, to reject the Defendants' bald faced denials and find they acted based on the political content of the flyer. At this stage, viewing the facts in the record in a light most favorable to the non-moving party, this Court must find a material dispute of fact, and therefore refuse to apply the more stringent content based test to Plaintiff's cross motion for summary judgment. Nevertheless, Plaintiff submits that it is not material to an adjudication of the pending cross motions for summary judgment since, for the reasons stated in the text, the Defendants' conduct is not justified even under the more relaxed intermediate scrutiny test.

781, 791 (1989). A regulation is narrowly tailored if "the means chosen are not substantially broader than necessary to achieve the government's interest." *Id.* at 800 (citing *Ward*, 491 U.S. at 800). An inquiry into the validity of time-place-manner regulations in such a situation has been termed "intermediate scrutiny." *Id*. at 12 (citing *Nat'l Amusements, Inc. v. Town of Dedham,* 43 F.3d 731, 736 (1st Cir.1995)).

The third step is to determine "whether the justifications for exclusion from the relevant forum satisfy the requisite standard." *Cornelius*, 473 U.S. at 797. For the reasons discussed below, the Defendants' conduct in banning Plaintiff from even a portion of the public sidewalk in front of the PCTA fails to satisfy even the first prong of the intermediate scrutiny test, insofar as there was no significant governmental interest to justify *any* interference with the Plaintiff's protected First Amendment conduct under the circumstances presented, nor was the restriction narrowly tailored.

A. <u>This Court Must Reject Defendant DeAndrade's Proposed Undisputed Fact That Exit Doors Run Along The Entire Length Of The Front Façade Of The PCTA Adjacent To Cranston Street, Insofar As Documentary Evidence In The Record Conclusively And Irrefutably Establishes That Such A Contention Is False</u>.

The exit doors on the Cranston Street side of the PCTA *do not* run the entire length of the front facade.[19] There are only two sets of exit doors located on the so-called façade portion of the PCTA adjacent to Cranston Street between the main entrance to the auditorium and Fricker Street. SUF Reilly at ¶30. These two doors are plainly discernable by the vertical silver flashing framing the doors visible in the photographs attached as Plaintiff's Record Appendix Exhibits 8-9. SUF Reilly at ¶31. Accordingly, both the photographs and as-built and compilation plans of the exterior of the PCTA conclusively and irrefutably establish that Defendant DeAndrade's Statement of Un-

[19] On the face of the record before Court, there is a dispute of fact as to whether exit doors run along the entire length of the front façade of the PCTA adjacent to Cranston Street, SUF DeAnd. at ¶¶6, 27, or whether there are only two (2) sets of doors—approximately sixty (60) feet apart—located on the façade between Fricker Street and the auditorium entrance/exit doors where the Plaintiff was situated, SUF Reilly at ¶¶28-32; SDF Reilly of DeAnd. ¶¶6, 27. For the reasons set forth in the text, the Plaintiff submits this Court must disregard Defendant DeAndrade's patently erroneous, if not *post hoc* manufactured, contention and find that there is no dispute of fact on this issue.

disputed Fact ¶6 is false. In determining whether there is a genuine issue for trial, this Court "must disregard all evidence favorable to the moving party that the jury is not required to believe," *Reeves*, 530 U.S. at 151, and disregard facts that are "patently untrue," or where, as here, documentary evidence conclusively establishes that an issue of fact is "not genuine." *See supra*, cases cited in footnotes 1-3.

B. <u>Under The Circumstances Presented, There Was Neither a Compelling[20] nor Significant Governmental Interest To Justify Banning Plaintiff From Distributing Political Leaflets On The Public Sidewalk In Front Of The PCTA, Nor Was The Restriction Narrowly Tailored</u>.

1. There was no significant governmental interest to justify the restriction.

Plaintiff submits that Defendants utterly and completely fail to establish any legitimate governmental interest—let alone a "significant" one—to justify their conduct, whether it is described as a partial or total ban on leafleting from the sidewalk in front of the PCTA or a "restriction" on where leafleting was permitted. The facts and law compelling a determination in favor of the Plaintiff in this case do not turn on semantics. In analyzing the Defendants' proffered reasons, it must be kept in mind that First Amendment standards "must give the benefit of any doubt to protecting rather than stifling speech." *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*,

[20] For the reasons set forth *supra* in footnote 18, Plaintiff contends there is case law support for application of strict scrutiny to an adjudication of the Defendants' conduct in this case. For the reasons set forth in the text above and on the basis of the doctrine first announced in *Madsen v. Women's Health Ctr., Inc*., 512 U.S. 753, 764-66 (1994), heightened scrutiny is the proper standard for evaluating the Defendants' conduct in this case. In *Masden*, the Court reasoned that because injunctions are not the result of a democratic, deliberative process and are not generally applicable, they present more risk of arbitrary action. *Id*. Accordingly, the Court ruled standard time, place, and manner analysis was not sufficiently rigorous and that the proper test required that "the injunction burden no more speech than necessary to serve a significant government interest." *Id*. For the same policy reasons, the Second and Third Circuits and at least one federal district court have adopted this approach in evaluating *ad hoc* police directives issued by officers in the field and non-statutory restrictions which burden free speech—both of which are present in this case, insofar as they both pose risks similar to those presented by an injunction. *McTernan v. City of York*, 564 F.3d 636, 654–55 (3d Cir.2009) (applying the *Madsen* standard to "a police directive, issued by officers in the field," because it "pose[d] risks similar to those presented by an injunction, warranting heightened scrutiny"); *Huminski v. Corsones*, 386 F.3d 116, 155 (2d Cir.2004) (applying heightened scrutiny under *Madsen* to a "Notice Against Trespass," issued by court security personnel to a protester); *Ross v. Early*, 758 F. Supp. 2d 313, 323-24 (D. Md. 2010), *reconsideration denied* (Feb. 25, 2011)(applying *Masden* to content-neutral but not generally applicable restriction embodied in City protocol not promulgated through formal regulatory or legislative processes). ***Nevertheless, while Plaintiff maintains that heightened scrutiny applies***, Plaintiff analyzes the Defendants' conduct based on intermediate scrutiny, as the Defendants' conduct is clearly unconstitutional under well-settled law such that it could not satisfy either standard.

551 U.S. 449, 469 (2007) (opinion of Roberts, C.J.)(citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 269–270 (1964)). In general, "the government's ability to permissibly restrict expressive conduct [on public streets and sidewalks] is very limited." *United States v. Grace*, 461 U.S. 171, 177 (1983). "Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *Id*. at 177 (citations omitted). Indeed, the First Circuit has expressly noted that the government "bears a heavy burden in justifying [a] ban on leafleting, an activity that long has enjoyed the full protection of the First Amendment." *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth*., 984 F.2d 1319, 1324 (1st Cir. 1993)(citing *Lovell v. City of Griffin*, 303 U.S. 444, 450–52 (1938)); *see also, Lee v. Int'l Soc. for Krishna Consciousness, Inc.*, 505 U.S. 672, 679 (1992)(Rehnquist, J., opinion of Court)("[G]overnment has a high burden in justifying speech restrictions relating to traditional public fora . . .."). Courts on numerous occasions, including the Supreme Court on several, have struck down bans or restrictions on the distribution of leaflets in public fora.[21]

[21] *See, e.g., Lee v. Int'l Soc. for Krishna Consciousness, Inc.*, 505 U.S. 830, 831 (1992)(*per curiam*)(ban on continuous and repetitive distribution of literature in the Port Authority airport terminals is invalid under the First Amendment); *United States v. Grace*, 461 U.S. 171, 183-84 (1983) (striking down statute forbidding leafleting on the sidewalks surrounding the Supreme Court); *Jamison v. Texas*, 318 U.S. 413, 414 (1943) (striking ordinance forbidding leafleting on public streets); *Schneider*, 308 U.S. at 162-63 (striking ordinances forbidding leafleting on public streets); *Bays v. City of Fairborn*, 668 F.3d 814 (6th Cir. 2012)(striking down solicitation policy of private festival at public park banning solicitation and distribution of literature outside of fixed booths); *Saieg v. City of Dearborn*, 641 F.3d 727 (6th Cir. 2011)(striking down restriction banning the distribution of literature on public sidewalks adjacent to private organization's festival, even though distribution was permitted from fixed booths at festival); *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 577 (9th Cir.1993) (invalidating a ban on literature distribution in portions of city park because there was no evidence that handbill distribution interfered with park operations); *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1321-22 (1st Cir. 1993) (striking down MBTA guidelines banning noncommercial expressive activity, including leafleting, from paid areas of all subway stations and free areas of twelve stations); *Lederman v. United States*, 291 F.3d 36 (D.C.Cir.2002) (striking a regulation banning leafleting on a sidewalk near the Capitol Building); *Ascherl v. City of Issaquah*, 2011 WL 4404145 (W.D. Wash.)(striking down ordinance prohibiting leafleting at festival held on city streets closed to vehicular traffic for event, even though distribution was permitted from fixed locations at festival); *see also Providence Journal Co. v. City of Newport*, 665 U.S. 107, 117 (D.R.I 1987)(striking down city ordinance banning newspaper racks from public sidewalks where governmental interest in safe pedestrian traffic flow could be served by requiring minimum sidewalk clearance of six (6) feet). The Supreme Court has also invalidated bans on door-to-door leafleting, where individuals offer the homeowner informational tracts at the same time that they try to engage the homeowner about the religious, political or commercial message they wish to convey. *See, e.g., Martin v. City of Struthers*, 319 U.S. 141, 149 (1943) (striking ordinance that forbade ringing a doorbell or otherwise summoning a resident to the door to receive handbills); *Schneider*, 308 U.S. at 165 (striking ordinance that forbade door-to-door leafletting). And it has invalidated licensing requirements for door-to-door solicitors and leaflet-

Accordingly, the Defendants' conduct must be evaluated in light of the forgeoing well-settled and substantial protections against the banning or restricting of literature distribution in public fora, and in light of the materially undisputed circumstances presented. The Plaintiff and Lemus were distributing political leaflets on a public sidewalk in the City critical of and embarrassing to the Mayor, who was in attendance at the event, because it purported to expose corruption in his administration. The upper sidewalk or plaza or patio area is 13 ½ to 20 feet in width—which Kennedy described as "spacious" and Esserman described as "pretty wide"—while the lower sidewalk adjacent to Cranston Street is 15 to 17 ½ feet in width—which—Kennedy described as being "wide" and Esserman described as "broad." The length of the sidewalk in front of the stairs running along the front façade and auditorium entrance portion of the PCTA is one hundred and seventy (170') feet. The length of the building adjacent to the sidewalk on Cranston Street was three (300') feet.

There are approximately eight (8) exit doors that lead directly from the area of the auditorium where the event was held. ***Contrary to Defendant DeAndrade's contention, it is irrefutable that there are only two sets of exit doors situated approximately sixty (60') feet apart located on the so-called façade portion of the PCTA adjacent to Cranston Street between the main entrance to the auditorium and Fricker Street.*** *See supra*, Section V.A.

Neither the City nor any of the Defendants had any reason to believe any disruption or need for a mass evacuation would occur. Nor did the City or any of the Defendants have any reason to believe that the PCTA was other than a new, safe and modern building compliant with all fire and safety codes and containing all the requisite number of exits and entrances. Nor did the City or any of the Defendants have any reason to believe that either Plaintiff or Lemus would be unable to un-

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ers. *See Watchtower Bible & Tract Soc'y of New York*, 536 U.S. at 168 (striking ordinance prohibiting canvassers from going door-to-door among residences without a permit because it was "not tailored to the Village's stated interests"); *Lovell*, 303 U.S. at 451 (striking ordinance prohibiting "the distribution of literature of any kind at any time, at any place, and in any manner without a permit").

derstand or would not obey a command to leave the sidewalk in the event of a mass evacuation. If the Plaintiff moved off the sidewalk in the event of a mass evacuation of the PCTA, she would not have presented an impediment to people exiting the building. Prior to receiving the order from Kennedy, neither DeAndrade nor the other police officers at the scene viewed Plaintiff as a threat to public safety requiring action on their part. When Defendant DeAndrade directed Ms. the Plaintiff to move off the sidewalk on Cranston Street in front of the PCTA, she had no reason to believe that the Plaintiff presented a clear and present danger to public health or safety. Defendant DeAndrade never claimed that Plaintiff or Lemus were violating any laws, obstructing the sidewalk or creating a disturbance**.**

There was not profanity, fighting, violence, threats of bodily harm or property damage at the site of the event. The sidewalk was not crowded with people and there was no interference with the pedestrian or motor vehicle flow. No one was blocked from entering the PCTA. There was no disturbance or disorderly conduct of any kind at the site of the event. In fact, it was relatively quiet and calm and foot traffic was relatively sparse. Plaintiff and Lemus were not stationary, but would move along the sidewalk to pass leaflets to patrons, who either accepted them or not and moved on. Other than patrons entering the PCTA and the officers on the scene, there was no one else on the upper or lower sidewalk in front of the PCTA. There was no parking allowed on Cranston Street adjacent to the PCTA on the night of the event. ***Perhaps most determinative of this case, there was undisputedly no interference with the conduct of the event taking place in the PCTA***.

The Plaintiff was never closer than fifty (50') feet to the entrance to the auditorium. The Plaintiff never blocked an exit or entry door. She was never closer than about twenty-five (25) to thirty (30) feet to any exit door. SUF Reilly at ¶31. Notwithstanding the forgoing circumstances, the Plaintiff was ordered on three separate occasions to leave the sidewalk in front of the PCTA, the last two times under the threat of arrest. When the Plaintiff was approached by police officers on the first two occasions and told to move, she was approximately 80 to 100 feet from the front

entrance to the auditorium on a direct line.

Under the above circumstances presented, Defendant DeAndrade nevertheless attempts to justify banning Plaintiff from the sidewalk due to purported concern that "distribution of flyers directly in front of the stairway . . . *could* create a bottleneck that *could* endanger the safety of attendees *in the event* of an emergency evacuation." DeAndrade Memorandum of Law ("DeAndrade Memo") at 9 (emphasis added). The City Defendants attempt to justify their conduct based on "[t]he government's interest in preventing congestion of crowds, and maintaining order and public safety, at the entrances and exits of a crowded public event[, which] reasonably justifies restraint on expressive activity at these specified areas of a public forum." City Memorandum of Law ("City Memo") at 12. As stated previously, Defendants' justifications do not satisfy the first prong of the test, specifically the requirement that there be at least a "significant" governmental interest in justifying the ban. The purported justifications of the Defendants are insufficient for numerous reasons on more that one level.

First, to justify limitations on First Amendment freedoms, a " 'reasonable' burden on expression requires a justification far stronger than mere speculation about serious harms."[22] The Defendants must do more than "assert[] interests [that] are important in the abstract"—they may not simply "posit the existence of the disease sought to be cured."[23] The proponents of a restriction on

[22] *U.S. v. National Treasury Employees Union*, 513 U.S. 454, 475-476 (1995)(quoting *Whitney v. California*, 274 U.S. 357, 376 (1927))(Brandeis concurring opinion)("To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.")); *Thomas v. Collins*, 323 U.S. 516, 530 (1945)("For these reasons any attempt to restrict [First Amendment] liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger."); *Nat'l Amusements Inc. v. Town of Dedham*, 43 F.3d 731, 741 (1st Cir. 1995) "[G]overnmental interest woven exclusively out of the gossamer threads of speculation and surmise cannot be termed substantial."); *Multimedia Pub. Co. v. Greenville–Spartanburg Airport District*, 991 F.2d 154, 161–62 (4th Cir.1993) (record revealed government's asserted interests to be illusory, tenuous, and non-verified).

[23] *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994)(citations and internal quotations omitted); *see Bl(a)ck Tea Society v. City of Boston*, 378 F.3d 8, 13 (1st Cir. 2004)("Security is not a talisman that the government may invoke to justify any burden on speech (no matter how oppressive)."); *see also Bays v. City of Fairborn*, 668 F.3d at 823; *Saieg v. City of Dearborn*, 641 F.3d at 738-737; *Ascherl*, 2011 WL 4404145 at *3.

free expression have the burden of "demonstrat[ing] that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a material way."[24] Second, as the First Circuit has recognized, "the Supreme Court has dismissed the danger to traffic congestion as a justification to ban leafleting. The Court has explained that '[t]he distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey.' [*Lee v. Int'l Soc. for Krishna Consciousness, Inc.*, 505 U.S. 830, 831 (1992)(O'Connor, J., concurring)(quoting *United States v. Kokinda*, 497 U.S. 720, 734 (1990))]. *Bottlenecks, therefore, are unlikely to develop*. Because leafleting is a particularly unobtrusive form of expression, the Court recently invalidated a ban on leafleting, even within a nonpublic forum." *Jews for Jesus, Inc*., 984 F.2d at 1324 (1st Cir. 1993)(emphasis added; some internal quotations omitted)(citing *Lee*, 505 U.S. at 830) (*per curiam*)).

Application of Law to Facts

The facts in the record clearly and undisputedly establish that any purported justification for the ban imposed by Defendants was nothing more than conjecture, speculation and surmise—if not a *post hoc* invention to justify the conduct once legally challenged. The City Defendant's justification is merely a general expression about the concern for maintaining order and public safety at the entrances and exits to a "crowded" public event. They fail to relate their concern to the specific forum or conditions present at the time of the challenged conduct. *Jews for Jesus, Inc*., 984 F.2d at 1324 (challenged restrictions must be reasonable in light of the forum's purpose and the surrounding circumstances); *see also Bays v. City of Fairborn*, 668 F.3d 814, 822-23 (6th Cir.

[24] *Turner Broadcasting System*, 512 U.S. at 664; *see Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 803 (1984)(Court "may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity.") (internal quotation marks omitted); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) ("[A] 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist' ")(citation omitted); *see also Bays v. City of Fairborn*, 668 F.3d at 823 ("[Government must do more . . . than 'assert interests [in reduced congestion and crowed control] that are important in the abstract.'"); *Saieg*, 641 F.3d at 738-737 ("[General] interests [in public safety and order] that the defendants have named are merely 'conjectural,' as opposed to 'real.'"); *Ascherl*, 2011 WL 4404145 at *3 (City's identified interest of facilitating orderly flow of pedestrians during festival based more on conjecture than reality).

2012)(issue is whether purported governmental interests are significant in context of the forum and activities thereon). Also, in light of the undisputed facts and for the reasons previously discussed in Section V.A above, no entrances or exits were in fact impacted by the Plaintiff's activity, as she was nowhere near any. In addition, as a matter of undisputed fact, the event was not crowded. SUF Reilly ¶¶49-52. Moreover, 390 people (the maximum auditorium capacity) in a nearly 100,000 square foot modern, recently constructed facility would not appear to provide a reasonable, forum-specific basis for public safety and order concerns on public sidewalks adjacent to the event.[25] App. Exs. 4-6. Although Defendant DeAndrade does attempt to tie her concern to the forum by reference to the stairway, her justification uses the word "could" twice along with the term "in the event" to express the concern if there was an "emergency." The choice of words alone underscores the improbability of the "concern" expressed. *See, e.g., Ascherl,* 2011 WL 4404145 at *3 (City's

[25] The Defendants' reliance on *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.,* 452 U.S. 640, 650-51 (1981) to support a partial a ban on literature distribution on a public sidewalk is misplaced. In *Heffron,* the Supreme Court upheld a regulation limiting literature distribution to fixed locations during the Minnesota State Fair given that the regulation applied to a temporary event where "the flow of the crowd and demands of safety [were] more pressing." 452 U.S. at 651. However, the Minnesota State Fair in *Heffron* was held in a limited public forum, *i.e*., a fenced in public fairgrounds where attendees were required to pay a fee for admission. In addition, attendance at the Fair included 1.400 exhibitors and well over 100,000 daily visitors. *Id.* at 650. Moreover, as the Supreme Court noted there are considerable differences between fairgrounds and public streets and sidewalks:

> A street is continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment. The Minnesota Fair, as described above, is a temporary event attracting great numbers of visitors who come to the event for a short period to see and experience the host of exhibits and attractions at the Fair. The flow of the crowd and demands of safety are more pressing in the context of the Fair.

Id. at 651. Accordingly, as the Court cautioned, "any comparisons to public streets are necessarily inexact." *Id.* In this context, any such comparison is inapposite. A ban from literature distribution on a, wide open and un-crowded public sidewalk is not comparable to the restriction of literature distribution to a fixed location at a crowded, fenced in state fair.

The three other cases cited in support by the Defendants are also inapposite, but for different reasons. *Marcavage v. City of New York*, 689 F.3d 98, 105 (2d Cir. 2012) and *Bl(a)ck Tea Soc'y,* 378 F.3d 8, 13 (1st Cir. 2004) involved challenges to security protocols restricting expressive activity at public forums surrounding national political conventions held in major cities, where the restrictions were imposed due to reasonable and legitimate public safety concerns, based on previous experience with enormous crowds at such events. *Marcavage v. City of Chicago*, 659 F.3d 626, 634 (7th Cir. 2011) involved smaller groups of protesters, but again, largely at crowded environs where there was substantial pedestrian traffic, and where there was evidence in the record that the plaintiffs *actually* blocked and impeded pedestrian traffic—not that they might have, "if."

identified interest of facilitating orderly flow of pedestrians during festival based more on conjecture than reality). Moreover, this is the very type of "what if" concerns rejected by the Court in *United States v. Grace*, 461 U.S. 171, 182 (1983) in striking down a ban on expressive conduct on a public sidewalk nearly thirty (30) years ago.[26] In addition, as discussed above, both the Supreme Court and the First Circuit have expressly found that a ban on leafleting cannot be justified by pedestrian congestion concerns because bottlenecks rarely develop—this would appear to be particularly true, where, as here, distribution is occurring on a broad public sidewalk in front of a stairway 170 feet long.

Perhaps even more significantly, none of the Defendants had any reason to believe that any disruption or need for a mass evacuation would occur at the event. SUF Reilly at 100-104. As a matter of fact, there was no disruption or disorderly conduct of any kind or any disruption in pedestrian or motor vehicle flow. Indeed, prior to receiving the directive from Defendant Kennedy, the Defendants did not view the Plaintiff as a threat to public safety, and even at the time Defendant DeAndrade ordered Plaintiff off the sidewalk, she had no reason to believe Plaintiff was a danger to public health and safety. SUF Reilly at ¶¶57, 92. Nor did the Defendants have any reason to believe that the Plaintiff would be unable to understand or would not obey a command to leave the sidewalk in the unlikely event of a mass evacuation. SUF Reilly ¶117-119. Moreover, Plaintiff was not distributing flyers from a fixed location on a narrow sidewalk—she was moving up and down a wide, broad public sidewalk ranging from 15 to 17 ½ feet in width, distributing flyers to patrons who took them or declined and moved on.

In addition, the sidewalk area along the front façade of the PCTA was not a critical safety

[26] It is only when the probability of the "if" becomes sufficiently high and the harm it represents sufficiently great that restrictive measures may be called for. This is admittedly not a formula capable of precise determinations, nevertheless a basic appreciation of the legal tenets involved and a healthy dose of common sense should be sufficient to guide law enforcement personnel and protect them from lawsuits second guessing their determinations. Unfortunately, as discussed in detail in the text, both were sorely missing from this case. As stated previously, this was not a close call; it was a blown call and by a large measure. There was no reasonable basis for the Defendants' conduct based on actual or reasonably anticipated conditions at the forum—plain and simple.

area as a matter of irrefutable fact, whether as a "passageway" or otherwise. As previously argued and established above, contrary to Defendant to DeAndrade's erroneous contention, there are only two sets of exit doors on the front façade between Fricker Street and the main auditorium entrance where the Plaintiff was distributing flyers. Those exit doors are approximately 60 feet apart and open onto a spacious upper sidewalk or patio area that is between 13 ½ to 20 feet in width. Adjacent to that is the wide, broad sidewalk on which Plaintiff was located. Moreover, the Plaintiff was never closer than 50 feet to the front entrance at any time and could not have been closer than probably 25 to 30 feet to any exit door at any time. SUF Reilly ¶¶33-34. However, what conclusively establishes that this was not a critical safety area is the fact that there is not one, but three fixed benches installed on this upper sidewalk or patio area adjacent to the front façade. App. Exs. 10, 13. It is inconceivable that this new, modern building housing school children would have been designed and built with fixed benches installed in an area that was so critical to people exiting the auditorium, that the presence of a single individual distributing leaflets on the adjacent sidewalk would create a public safety hazard.[27]

Finally, the Defendants' claimed governmental interest is further undermined by the fact that the sidewalk in front of the PCTA remained open to foot traffic for everyone, except for Plaintiff and Lemus—the only ones engaging in communicative activity.[28] It must be kept in mind that what

[27] It is instructive to place the site of the challenged conduct and the number of people present into perspective. The approximate area of the lower sidewalk is about 2,900 square feet. App. Ex. 6. The approximate area of the upper sidewalk or patio area is approximately 2,200 square feet. *Id*. Accordingly, patrons exiting the auditorium, without entering the road or leaving the area in front of the steps, could exit onto a combined upper and lower sidewalk area of about 5,100 square feet. According to state fire safety regulations, the "occupant load," or number of people for whom appropriate means of egress are required, in areas not in excess of 10,000 square feet is one person per 5 square foot. App. Ex. 16 (Rhode Island Life Safety Code §§12.1.7.1. and 12.1.7.1.1 (*see* R.I.GL. §23-28.01-4 adopting the current version of the Life Safety Code (NFPA 101) of the National Fire Protection Association as the state fire safety code, as may be modified by state regulation)). What this means is that in a 5,100 square foot *interior* area with adequate exits and entrances, you could potentially safely have up to 1,020 people. With respect to an interior area the size of the lower sidewalk alone, you could potentially safely have up to 580 people. The maximum capacity of the auditorium was 396 people. App. Ex. 5. Accordingly, based on the forging calculations, *all the people in the auditorium on the night in question could technically have fit on the lower sidewalk, with room to spare, including Plaintiff and Lemus.*

[28] *City of Ladue v. Gilleo,* 512 U.S. 43, 52,(1994)("Exemptions from an otherwise legitimate regulation of a

Plaintiff and Lemus were doing was no different—except they did not enter the building, but continued walking up and down the sidewalk distributing literature—a distinction without any significance under the circumstances presented.[29]

In a case directly on point in all pertinent respects, the Supreme Court struck down a ban on public demonstrations, including the distribution of literature, on the sidewalk in front of the Supreme Court building. *United States v. Grace*, 461 U.S. 171, 182 (1983). In the absence of any obstruction of the sidewalks or access to the building, threatened injury to any person or property, or any interference with the orderly administration of the building or other parts of the grounds, the Court found no basis for restricting the exercise of First Amendment freedoms on the public sidewalk. *Id*. The Court reasoned "[a] total ban on that conduct is no more necessary for the maintenance of peace and tranquility on the public sidewalks surrounding the building than on any other sidewalks in the city." *Id*. The same may be said for the ban on Plaintiff's distribution of literature from the public sidewalk in front of the PCTA.

Simply put, there was no reasonable basis for the Defendants' conduct based on actual or reasonably anticipated conditions at the forum or based on previous experience or history relative to the same or similar events at this forum. Accordingly, the Defendants have failed to establish that, under the circumstances presented, there was a significant governmental interest justifying the ban on Plaintiff's distribution of flyers from the sidewalk in front of the PCTA. *Lee v. Int'l Soc. for Krishna Consciousness, Inc.,* 505 U.S. 672, 690-92 (1992)(O'Connor, J., concurring)(ban on continuous and repetitive distribution of literature in airport terminals invalid under the First Amendment, where court found no problem intrinsic to leafleting that would make it incompatible

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medium of speech . . . may diminish the credibility of the . . . rationale for restricting speech in the first place.").

[29] *Saieg v. City of Dearborn*, 641 F.3d 727 (6th Cir. 2011)(governmental interest in crowd control and public safety not substantial where sidewalks remained open to normal pedestrian traffic); *Jews for Jesus, Inc*, 984 F.2d at 1325 (condoning similar activity undermined claim leafleting activities threatened public safety); (*Ascherl*, 2011 WL 4404145 at *4 (governmental interest in crowd control undermined where it leaves adjacent sidewalks open for typical non-festival pedestrian traffic).

or inconsistent with intended use of non-public forum); *Bays v. City of Fairborn*, 668 F.3d 814, 822-823 (6th Cir. 2012)(striking down solicitation policy of private festival at public park banning solicitation and distribution of literature outside of fixed booths, where court found purported governmental interest in reduced congestion and crowed control not significant in absence of any space or crowd concerns specific to festival); *Saieg v. City of Dearborn*, 641 F.3d 727,730, 740 (6th Cir. 2011)(striking down restriction banning distribution of literature on public sidewalks adjacent to private organization's festival held on public streets and sidewalks, even though distribution was permitted from fixed booths at festival, where court found leafleting restriction did not further purported significant governmental interests relating to various public order and safety concerns); *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1321-22 (1st Cir. 1993) (striking down MBTA guidelines banning noncommercial expressive activity, including leafleting, from paid areas of all subway stations and free areas of twelve stations, where the government failed to present credible reason why the regulations furthered the forum's purpose; neither handshaking and greeting nor leafleting in fact threatened public safety in Boston subway system); *Ascherl v. City of Issaquah*, 2011 WL 4404145 *3-4 (W.D. Wash.)(striking down ordinance prohibiting leafleting at festival held on city sidewalks and streets closed to vehicular traffic for event, even though distribution was permitted from fixed locations at festival; where court found no evidence leafleting causes congestion or prohibits orderly flow of pedestrian traffic, let alone creates public safety concern); *See also , supra*, other cases cited in footnote 21.[30]

2. Banning Plaintiff from the sidewalk was not narrowly tailored.

Where, as here, Defendants have failed to establish even a significant governmental interest justifying the ban on Plaintiff's distribution of literature from the sidewalk in front of the PCTA,

[30] Viewing the facts in a light most favorable to Plaintiff, Plaintiff was banned from the entire sidewalk area in front of the PCTA. Therefore, on the basis of the holding in *Grace*, Defendants' motions for summary judgment must be denied. Construing the facts in a light most favorable to the Defendants, Plaintiff is entitled to summary judgment on the basis of *Grace* and its progeny insofar as, under the circumstances presented, there was no basis for banning Plaintiff from the 170 foot portion of the sidewalk along the stairway in front of the PCTA.

there is no necessity to consider the "narrowly tailored" element.[31] *See, e.g., Saieg*, 641 F.3d at 740 (requirements for time, place, and manner restrictions are conjunctive). Nevertheless, since the latter often may further inform the insufficiency of the former, because it focuses on the "nexus" between the regulation and the purported governmental interest, *Grace*, 461 U.S. at 181, a brief discussion may be worthwhile.

Instead of banning Plaintiff from the sidewalk and unnecessarily infringing on expressive activity, the Defendants could have simply enforced existing law, if the need arose. *See Lederman v. United States*, 291 F.3d 36, 45 (D.C.Cir.2002)(enforcing existing laws barring disorderly conduct or obstructing or impeding passage would have been substantially less restrictive and equally effective means to promote safety and orderly traffic flow on sidewalk to Capitol grounds as opposed to banning leafleting). If at any point in time, the Plaintiff, alone or in conjunction with others, was "blocking" pedestrian traffic on the sidewalk, the Defendants could have relied on the enforcement of the existing City ordinance regarding "Obstruction of Public Ways." City Ordinance §16-13 prohibits expressive conduct on sidewalks where there is less than three feet of unobstructed sidewalk access. App. Ex.24. In the alternative, if the need arose, they could have relied on City police General Order #44. App. Ex. 23. Although designed primarily for picketing and labor disputes, that policy provides in pertinent part, among other things, that expressive conduct (picketing) is permitted on sidewalks "provided they are peaceful and orderly and do not stop or impede persons or vehicles," and a "[p]erson may stand adjacent to doors or entrances and

[31] The same is true relative to the "ample alternative channels of communication" element, which Plaintiff contends is also not satisfied in this case. *United States v. Grace*, 461 U.S. 171, 180 (1983)(ban on leafleting on public sidewalk in front of Supreme Court building unconstitutional even though such conduct was permitted on sidewalk across the street); *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 377 (1997)("[A] prohibition on classic speech [, including leafleting,] in limited parts of a public sidewalk [is not] permissible" absent a "record of abusive conduct."); *Providence Journal Co. v. City of Newport*, 665 F. Supp. 107, 118 (D.R.I. 1987)(banning newspaper racks from public sidewalks fails ample alternative channels test because there are no alternative channels left open within the public forum), *and cases cited therein; see also Bay Area Peace Navy v. United v. United States,* 914 F.2d 1224, 1229 (9th Cir. 1990) (internal quotation marks omitted)("An alternative is not ample if the speaker is not permitted to reach the intended audience."); *accord Saieg v. City of Dearborn*, 641 F.3d 727, 740 (6th Cir. 2011); SUF Reilly at ¶¶71, 87-89, 96-97; SUF City Defendants at ¶¶40-41, 43-44.

distribute leaflets or pamphlets to persons going in and out of the [building], but they are not permitted to stand in front of the door or entrance or in any way block any entrance or impede traffic." Or, in the unlikely event of an emergency requiring a mass evacuation, where the Plaintiff did not spontaneously move off the sidewalk, the Defendants could have directed her to leave under the threat of arrest for obstructing a police officer. *See* R.I.G.L. §11-32-1.

Particularly under the circumstances presented, a spacious public sidewalk, where pedestrian traffic was moving smoothly and without incident or disruption of any kind (or any expectation thereof) and there was no reason to believe the Plaintiff would not comply with a request to leave the sidewalk in the event of an emergency, any of the alternatives described above would have been equally if not more effective than banning the Plaintiff from all or any portion of the sidewalk in front of the PCTA—without any unnecessary infringement on her expressive conduct.[32]

C. Defendant Kennedy Must Be Denied Summary Judgment As There Is A Material Dispute Of Fact As To Whether He Has Supervisory Liability For Ordering DeAndrade To Clear The Sidewalk.

Defendant DeAndrade claims that her superior, then Deputy Chief Kennedy, ordered her to clear the sidewalk in front of the PCTA. SUF Reilly at ¶56. DeAndrade also told the Plaintiff, "when my commander [Kennedy] says to move you, I move you." SUF Reilly at ¶81. DeAndrade then ordered the four patrolmen to clear the sidewalk. SUF Reilly at ¶57; SUF of City at ¶32. As discussed in detail above, ordering the Plaintiff to leave the sidewalk in front of the PCTA violated her First Amendment rights. Kennedy does not admit he ordered DeAndrade to clear the sidewalk. City SUF at ¶29. Construing the facts in a light most favorable to the Plaintiff, Plaintiff has established supervisory liability against Kennedy under §1983. "Supervisory liability under § 1983

[32] *See Providence Journal Co. v. City of Newport*, 665 U.S. 107, 117 (D.R.I 1987)(city ordinance banning newspaper racks from public sidewalks not narrowly tailored where governmental interest in safe pedestrian traffic flow could be served by requiring minimum sidewalk clearance of six (6) feet); *Bl(a)ck Tea Soc'y v. City Of Boston*, 378 F.3d 8, 12 (1st Cir. 2004)(regulation is narrowly tailored only if "the means chosen are not substantially broader than necessary to achieve the government's interest")(citation omitted). It goes without saying that, under the circumstances presented, the Defendants' conduct would also not satisfy the more stringent heightened scrutiny standard which requires hat the restriction "burden no more speech than necessary to serve a significant government interest." *See, supra*, footnote 20.

'cannot be predicated on a *respondeat* theory, but only on the basis of the supervisor's own acts or omissions.' " *Ousley v. Town of Lincoln through its Fin. Dir.*, 313 F. Supp. 2d 78, 87 (D.R.I. 2004)(citing *Aponte Matos v. Toledo Davila,* 135 F.3d 182, 192 (1st Cir.1998) (quoting *Seekamp v. Michaud,* 109 F.3d 802, 808 (1st Cir.1997))). Thus, to establish supervisory liability a §1983 plaintiff must establish (1) subordinate liability, and (2) that "the supervisor's action or inaction was 'affirmatively linked' to the constitutional violation caused by the subordinate." *Id.* (quoting *Seekamp,* 109 F.3d at 808). The affirmative link must entail " 'supervisory encouragement, condonation or acquiescence, or gross negligence amounting to deliberate indifference.' " *Id.* (quoting *Lipsett v. Univ. of Puerto Rico,* 864 F.2d 881, 902 (1st Cir.1988)). For the reasons previously discussed above, DeAndrade, Kennedy's subordinate, is liable to Plaintiff under §1983, insofar as *Grace* and its progeny prohibit banning leafleters from a public sidewalk under the circumstances presented. Where, as here, there is evidence in the record that a subordinate has taken unconstitutional action on the basis of an order received from a supervisor, supervisory liability has been established under §1983.

D. The Defendants City and Esserman Are Liable Under §1983 For The Infringement Of Plaintiff's Constitutionally Protected Rights, Insofar As The Challenged Actions Of Defendant DeAndrade And Other Officers At The Scene Were Taken In Accordance With Official Policy Of The City Police Department And Based On Deficient Training.[33]

Municipal Liability

Plaintiff alleges municipal liability in two ways that is supported by the undisputed evidence in the record: 1) a custom or policy and/or 2) failure to train that permitted, condoned and/or

[33] Based on the doctrine of municipal liability under §1983, all of the individual Defendants are also liable in their official capacities. A claim against an official in his or her official capacity "is not a suit against the official but rather is a suit against the official's office." *Rhode Island Bhd. of Corr. Officers v. Rhode Island* ("*RIBCO*"), 264 F.Supp.2d 87, 92 (D.R.I.2003) (quoting *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71 (1989)). Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham,* 473 U.S. 159, 165-66, (1985)(quoting *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 690, n. 55 (1978). In an official-capacity action in federal court, death or replacement of the named official will result in automatic substitution of the official's successor in office. *Kentucky v. Graham,* 473 U.S. 159, 166 (1985)(citing Fed.R.Civ.P. 25(d)(1)).

encouraged the deprivation of the constitutionally protected right of people to peaceably distribute political flyers on public sidewalks and in other public fora. Comp. at 85-86 (App. Ex 1). The pertinent facts follow. Defendant Esserman is the chief policy making official of the City police department. SUF Reilly at ¶6; *see also Young v. City of Providence*, 396 F. Supp. 2d 125, 145 (D.R.I. 2005)(City of Providence police chief has final policy making authority so as to subject City to *Monell* liability under §1983). As such, he was responsible for promulgating, approving and overseeing proper implementation of all City policy department policy. *Id*. It is the policy of the City police department that the police are authorized "to keep open exit passageways in the event of the necessity for a mass evacuation of [a] building for unforeseen circumstances such as bomb scares or other matters that would necessitate an evacuation and also public safety concerns relative to pedestrians crossing the street or being forced into to the street due to the side walk being blocked." SUF Reilly at ¶141. The entire 170 foot long by fifteen (15') to seventeen and one half (17 ½') feet in width lower sidewalk adjacent to Cranston Street in front of the steps to the PCTA was considered an exit passageway in accordance with the City police department policy. *Id*. at ¶142.

According to Defendant Esserman, DeAndrade's conduct at the event complied with the above department policy. *Id*. at ¶143. The actions taken by DeAndrade in ordering the Plaintiff to be moved off the sidewalk in front of the PCTA was consistent with the training she received by the City police department as it relates to constitutional limits on police authority in such situations. *Id*. at ¶144. City police officers are trained to apply and implement the above policy in the same manner under the same or similar circumstances. *Id*. at ¶145. The Defendant City has not changed the above policy or the interpretation thereof as it applies to the same or similar circumstances. *Id*. at ¶145. If Defendant DeAndrade were faced with the same circumstances as those on the subject night in question, she would instruct an individual who was passing out flyers in front of the PCTA to move off the sidewalk from in front of the building and she would arrest that person if they did

not comply. *Id*. at ¶146. Neither Officer Elie nor Stanzione believes they did anything wrong and believe their conduct was consistent with their training, and they would take the same action again if faced with the same or similar circumstances. *Id*. at ¶147. None of the individual Defendants in this matter or the other officers at the scene were counseled, reprimanded or disciplined regarding their conduct at the event as it relates to their orders to the Plaintiff or Lemus. *Id*. at ¶148. Although it is unclear whether the Plaintiff's subsequent civilian complaint filed with the City police department was ever finally determined, Defendant Esserman, who was fully briefed and informed on her complaint and the factual and legal basis thereof, has affirmed that Defendant DeAndrade's conduct did not violate the above City police department policy. *Id*. at ¶133-135, ¶143.

In *Monell,* the United States Supreme Court held that municipalities could be liable, for purposes of 42 U.S.C. § 1983, based upon the actions of their officials when those officials' "edicts or acts may fairly be said to represent official policy." *Monell v. Dep't of Social Servs.,* 436 U.S. 658, 694 (1978). "[O]nly those municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability." *City of St. Louis v. Praprotnik,* 485 U.S. 112, 123 (1988) (quoting *Pembaur v. City of Cincinnati,* 475 U.S. 469, 483, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)). Municipal liability under §1983 may be established by several theories, including where, as here (1) the alleged constitutional injury emanates from the enforcement or application of an unconstitutional ordinance, regulation, or written policy or an unwritten or informal municipal policy; or, (2) the municipality's failure to train causes the constitutional injury. *See Bordanaro v. McLeod,* 871 F.2d 1151, 1156 (1st Cir.1989). Municipal liability may therefore be established where the "act complained of is simply an implementation of [a generally applicable] policy." *Bd. of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 417 (1997). A plaintiff need only show "a causal link between the municipality's action (or inaction) and the alleged constitutional deprivation." *Ousley v. Town of Lincoln,* 313 F. Supp.2d 78, 83-84 (D.R.I. 2004)(citing *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)).

Official Policy. In response to an interrogatory request posed as to why the Plaintiff was ordered to leave the sidewalk, every Defendant in this matter cited to the above described general policy as the authorization and justification. SUF Reilly at ¶141 (Dep. Esserman at 60-67, 74-76; Int. Esserman at ¶7 (App. Ex 29); City Int. ¶7 (App. Ex 28); DeAnd. Int. ¶7 (App. Ex 26); Kennedy Int. ¶7 (App. Ex 27)) In his deposition, the chief policy making official of the City police department at that time, Defendant Esserman, confirmed that this was a policy of the City police department. *Id.* Defendant Esserman further confirmed that DeAndrade's conduct at the event complied with this policy. *Id*. at 143. Indeed, all the City Defendants contend that the conduct of DeAndrade and other officers at the scene was proper. *See generally* City Defendants' Memo. For the reasons discussed in detail previously in Section V.B. above, Defendant DeAndrade's conduct in ordering Plaintiff to leave the sidewalk in front of the PCTA infringed on her constitutionally protected right to free speech. Accordingly, enforcement of this City police department policy as interpreted and, according to the Defendant City, correctly applied in this case, directly led to the deprivation of the Plaintiff's First Amendment rights. [34]

[34] Plaintiff would be remiss if she did not point out that the Defendant City's policy applied in this case is not only unconstitutional, but it is also absurd. First, it provides a police officer with unfettered discretion to assume a mass evacuation or emergency, *irrespective of the actual or anticipated conditions at the forum* or the past history or experience relative to the forum and the activity thereon. Second, if the over 15 -17 ½ foot wide, 170 foot long exterior public sidewalk adjacent to Cranston Street in front of the PCTA is a "passageway" according to the policy, then virtually every square foot of sidewalk in front of an exit or entrance to any building in the City is a passageway and, therefore, a location from which people are banned from distributing literature—regardless of the size, width or amount of pedestrian traffic on the adjacent sidewalk. This means people could not stand on the sidewalk in front of the entrance to the Providence Performing Arts Building or a Dunkin Donuts, or the federal or state courthouses, or any other commercial or public building in the City. In short, it permits police officers to make the very "what if" assumptions of public disorder or dire emergency in all cases at all times, without reference to the actual or anticipated conditions at the forum, which was clearly and expressly rejected by *Grace* and its progeny. Moreover, the policy as applied and interpreted in this case, as well as the apparent training provided to City police officers consistent therewith, poses the risk of the type of danger that inevitably accompanies the grant of unfettered discretion to police officers—arbitrary treatment. A provision that allows arbitrary application is "inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth County, Ga. v. Nationalist Movement,* 505 U.S. 123, 131 (1992) (quoting *Heffron* v. *Int'l Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640, 649 (1981). Indeed, it would appear that one of the primary reasons for promulgating General Order #44 was to avoid the appearance of bias when dealing with demonstrators, particularly those involving labor disputes, by providing more specific guidance to police officers in the field. Unfortunately, neither the letter nor spirit of General Order #44 was applied to Plaintiff's situation in this case. Nor was common sense.

Failure to Train. The City Defendants have admitted that the City trains its police officers at the police training academy relative to the constitutionally protected rights of people to peaceably distribute political flyers on public sidewalks and in other public forums. SUF of City Defendants at 50; App. Ex. 28 (City Int. ¶8); App. Ex. 27 (Kennedy ¶8). Defendant Esserman confirmed in his deposition that the action taken by DeAndrade in ordering the Plaintiff to be moved off the sidewalk in front of the PCTA, under the circumstances presented, was consistent with the training she received by the City police department as it relates to constitutional limits on police authority in such situations. SUF of Reilly at 144 (Dep. Esserman at 82). Further, that Providence police officers are trained to apply and implement the above policy in the same manner under the same or similar circumstances.[35] *Id* at 145. Additionally, none of the Defendants in this matter nor any of the officers at the scene believe they did anything wrong. Nor does then Internal Affairs Inspector Colon. A municipality's failure to train must "reflect[ ] a 'deliberate' or 'conscious' choice by a municipality—a 'policy' as defined by our prior cases—[to] be liable for such a failure under § 1983." *Ousley*, 313 F. Supp.2d at 84 (quoting *Canton*, 489 U.S. at 389). Where, as here, a municipality elects to train police officers to act in an unconstitutional manner, it has made a deliberate policy choice sufficient to trigger liability under §1983. Under the circumstances of this case, the requisite causal link between the deficient training and the injury inflicted on the Plaintiff has rather clearly and obviously been established—since it is fair to infer that City police officers act in accordance with their training and that was what the City intended.[36] Moreover, even when it was brought to

[35] It should be pointed out that a fair reading of the City Defendants submissions on summary judgment in this case indicates that the they are not disputing that the Plaintiff was ordered to completely leave the sidewalk in front of the PCTA—as opposed to just vacating the area in front of the 170 foot stairway. *See, e.g.*, SUF City Defendants at ¶¶32, 34, 38; City Defendants' Memo. Law at pp. 11, 13. A ban from the entire 300 foot sidewalk in front of the PCTA not only places the case in an identical factual context with *Grace*, but it further underscores both the unconstitutionality and absurdity of their position. *See, infra*, footnote 34. As stated previously, Plaintiff submits the Defendants' conduct was unconstitutional in either case.

[36] Where, in an unusual situation such as this, a municipal entity is instructing police officers to act in a constitutionally deficient manner, municipal liability attaches under §1983 because the municipality has constructive, if not actual, notice that the training will lead to the violation of constitutional rights. *See Connick v. Thompson*, 131 S. Ct. 1350, 1360 (2011)(citation omitted)("Thus, when city policymakers are on actual or constructive notice that a

Defendant DeAndrade's attention by Plaintiff that she had a right to distribute flyers from the sidewalk in front of the PCTA, DeAndrade refused to even pause to reconsider, SUF Reilly at ¶91—further evidence that she was apparently acting in accordance with her deficient training.

Esserman Supervisory Liability

Defendant Esserman, as chief of the City police department, is the chief policy making official and makes the final determination regarding all disciplinary matters. SUF Reilly at ¶¶6 and 135. As such, he was responsible for promulgating, approving and overseeing proper implementation of all City policy department policy. *Id*. He has not denied responsibility for either the policy at issue or the deficient training and he does not believe any of the officers at the scene did anything wrong. In addition, none of the individual Defendants in this matter or the other officers at the scene were counseled, reprimanded or disciplined regarding their conduct at the event as it relates to their orders to the Plaintiff or Lemus. *Id*. at ¶148. Accordingly, a sufficient affirmative link has been established in this case as it relates to the action or inaction of Esserman to show " 'supervisory encouragement, condonation or acquiescence, or gross negligence amounting to deliberate indifference.' " *Ousley v. Town of Lincoln through its Fin. Dir.*, 313 F. Supp. 2d 78, 87 (D.R.I. 2004)(citing *Aponte Matos v. Toledo Davila*, 135 F.3d 182, 192 (1st Cir.1998)(quoting *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 902 (1st Cir.1988)). Accordingly, where, as here, Esserman was responsible for promulgating, approving and overseeing the implementation of constitutionally deficient policy *and* training, there is sufficient evidence in the record to deny Defendant Esserman summary judgment and grant summary judgment to the Plaintiff against Esserman for supervisory liability.

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particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program.").

E. None Of The Defendants Are Entitled To Qualified Immunity Insofar As Their Conduct Violated Well-Settled Law And Was Not Objectively Reasonable.[37]

A plaintiff prevails on a §1983 claim if he or she can demonstrate (1) the defendant deprived him or her of a right secured by the Constitution or the laws of the United States, and (2) the deprivation was achieved by the defendants acting under color of state law. *Paul v. Davis*, 424 U.S. 693, 696–97 (1976). Qualified immunity, however, shields government officials, including police officers, *see Schultz v. Braga*, 455 F.3d 470, 476 (4th Cir.2006), performing discretionary functions from civil damages pursuant to §1983 as long 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).

In *Pearson v. Callahan*, 515 U.S. 223, 230-232 (2009), the Supreme Court reiterated that the qualified immunity inquiry is a two-part test. *Maldonado v. Fontanes*, 568 F.3d 263, 268-69 (1st Cir. 2009). "A court must decide: (1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was 'clearly established' at the time of the defendant's alleged violation. *Id.* at 269 (quoting *Pearson*, 515 U.S. at 232. The Court has often described the analysis as a two-step test. *Id.* (citations omitted). The second, "clearly established" step of the qualified immunity analysis that the second step, in turn, has two aspects. *Id*. One focuses on the clarity of the law at the time of the alleged civil rights violation and requires an analysis of whether "[t]he contours of the right [were] sufficiently clear [such] that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S.

[37] It should be pointed out that neither the City nor the Defendants in their official capacities are entitled to assert qualified immunity. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166 (1993) (reaffirming the principle that "municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983"); *Kentucky v. Graham*, 473 U.S. 159, 167 (1985)(qualified immunity unavailing in official capacity suits under §1983). Nor does it apply where declaratory and/or injunctive relief along with counsel fees and cost are being sought. *See, e.g., Pulliam v. Allen*, 466 U.S. 522, 527 (1984)(immunity not bar to award of declaratory and injunctive relief under §1983 and award of counsel fees and costs under §1988). Insofar as the primary relief sought in this matter is declaratory and injunctive relief, the immunity issue is very tangential to the challenge to the unconstitutional conduct.

635, 640, n. 2 (1987). "The other aspect focuses more concretely on the facts of the particular case and whether a reasonable defendant would have understood that his conduct violated the plaintiffs' constitutional rights." *Maldonado,* 568 F.3d at 269, Indeed, "[i]t is important to emphasize that this inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.' " *Id*. (citations omitted). Cognizant of both the contours of the allegedly infringed right and the particular facts of the case, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Brosseau v. Haugen,* 543 U.S. 194, 198 (2004)(*per curiam*)(quoting *Saucier v. Katz,* 533 U.S. 194, 201 (2001). That is, the salient question is whether the state of the law at the time of the alleged violation gave the defendant fair warning that his particular conduct was unconstitutional. ." *Maldonado,* 568 F.3d at 269 (citing *Hope v. Pelzer,* 536 U.S. 730, 741 (2002)).

For the reasons discussed in detail above, Plaintiff submits that the first prong—whether there has been a violation of a constitutional right—has been established. The Plaintiff's rights to freedom of speech and of the press were infringed by the Defendant's conduct banning her, in whole or in part, from the sidewalk in front of the PCTA. The determination was made without any significant governmental interest at stake in light of the actual or reasonably anticipated conditions at the forum or based on previous experience or history relative to the same or similar events at this forum.

The second prong is also equally and clearly met, beginning with the first aspect, whether the contours of the right were sufficiently clear. To determine whether a right was clearly established at the time of the alleged infringement courts look at "controlling authority in the jurisdiction

in question or on a 'consensus of cases of persuasive authority.' " *Wilson v. Layne*, 526 U.S. 603, 617 (1999)).[38]

1. *United States v. Grace*, 461 U.S. at 171, a case essentially directly on point decided almost thirty (30) years ago, teaches that absent disorderly or disruptive conduct or interference with the operation of the adjacent building, demonstrations, including the distribution of literature, cannot be banned from a public sidewalk—yet Plaintiff was still banned.

2. *Grac*e and its progeny (*see* cases cited, *supra*, footnote 21) also clearly and unequivocally express the broad first amendment protection accorded to individuals distributing literature in a public forum, as well as the heavy burden necessary to sustain restrictions on speech in public fora.

3. *Lee v. Int'l Soc. for Krishna Consciousness, Inc.*, 505 U.S. 830, 831 (1992) and *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1321-22 (1st Cir. 1993), among others, clearly instruct that congestion and crowd control is not a basis for banning literature distribution in a public forum—yet Defendants cited potential pedestrian congestion and bottlenecks as the primary justification for their conduct.

4. *Providence Journal Co. v. City of Newport*, 665 U.S. 107, 117 (D.R.I 1987) provides guidance that a minimum sidewalk clearance of six (6) feet from fixed newspaper racks was sufficient to protect the governmental interest in safe pedestrian traffic flow on crowed Newport sidewalks during tourist season. In the case at bar, there was between 15 and 17 ½) feet of unobstructed sidewalk—yet the Plaintiff was still banned.

5. Indeed, the only cases to which the Defendant's cite where restrictions on first amendment activity on public sidewalks were upheld subsequent to *Grace* involved either actual interference with pedestrian traffic or reasonable and legitimate crowd control concerns at the site of national public events held in major cities based on actual conditions or past experience or history. *See, supra*, footnote 25.

6. Finally, although not dispositive of whether the Defendants were or should have been on notice of the existence or contours of a *federa*l right, it would appear that applicable state law and local provisions would have alerted the Defendants to exercise caution and restraint in situations such as this involving expressive activity on a public sidewalk.[39]

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[38] Contrary to the Defendants suggestion, the applicable standard does not require plaintiffs to demonstrate that the very action at issue in the case had previously been found unlawful—*i.e.*, banning leafleters from the sidewalk on Cranston Street adjacent to the PCTA. *See Young v. City of Providence*, 396 F. Supp. 2d 125, 135 (D.R.I. 2005)(citing *Anderson*, 483 U.S. at 640; *Savard*, 338 F.3d at 28 (plaintiff need not show that "materially indistinguishable conduct has previously been found unlawful"); *Limone v. Condon*, 372 F.3d 39, 48 (1st Cir.2004) ("[t]here is no requirement that the facts of previous cases be materially similar to the facts *sub judice*")). Nevertheless, as discussed in the text above, Plaintiff contends there was ample legal guidance and materially identical, *i.e.*, *Grace*, or similar previous authoritative case determinations.

[39] *See, e.g.*, R.I.G.L. §11-45-1 (exempting lawful picketing or demonstrations from the definition of "disorderly conduct"); City Ord. Sec.16-13 (exempting individuals exercising right to protest from obstruction of way definition where is three (3) feet or more of unobstructed sidewalk access); City police General Order #44 (permitting unlimited number of demonstrators/picketers to demonstrate on public sidewalks as long as there was no disorderly conduct or actual interference with pedestrian traffic or access to adjacent buildings.).

The second aspect involves an analysis of whether the Defendants' conduct was objectively reasonable, that is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.[40] This aspect is overwhelmingly met in this case in light of the above clear and well settled case law and the salient undisputed facts:

1. None of the Defendants had any reason to believe any disruption or need for a mass evacuation would occur at the site. Nor, in fact, was there any disruption or congestion of any kind. The sidewalk was not crowded with people and there was no interference with the pedestrian or motor vehicle flow. In fact, it was relatively quiet and calm and foot traffic was relatively sparse. No one was blocked from entering the PCTA.

2. Nor did the Defendants have any reason to believe that the PCTA was other than a new, safe and modern building compliant with all fire and safety codes and containing all the requisite number of exits and entrances. The PCTA is large, multi purpose school facility comprising almost 100,000 square feet of interior space; whereas, the auditorium used for the event had a maximum capacity of only 396 people.

3. The Plaintiff was distributing flyers along a 170 foot long, broad and spacious, unobstructed sidewalk 15 to 17 ½ feet wide adjacent to an upper sidewalk or patio area 13 ½ to 20 feet wide. *See also, supra*, footnote 27. The Plaintiff was never closer than 25-30 feet of an entry or exit door. Plaintiff and Lemus were not stationary, but moved along the sidewalk to pass leaflets to patrons, who either accepted them or not and moved on.

4. The Defendants had no reason to believe that either Plaintiff or Lemus would be unable to understand or would not obey a command to leave the sidewalk in the event of a mass evacuation. Prior to receiving the order from Kennedy, neither DeAndrade nor the other police officers at the scene viewed Plaintiff as a threat to public safety requiring action on their part.

5. When Defendant DeAndrade directed Ms. Reilly to move off the sidewalk on Cranston Street in front of the PCTA, she had no reason to believe that Ms. Reilly presented a tclear and present danger to public health or safety**.** Moreover**,** at no time was there any interference with the conduct of the event taking place in the PCTA.

6. Both DeAndrade and Esserman have law degrees.

This was not a situation where the Defendants where faced with a fast-paced, evolving situation and were forced to make a "split-second decision[] . . . in the line of fire," on the basis of complex and/or contradictory legal authority. *Young v. City of Providence*, 396 F. Supp.2d 125, 136-37

[40] Because qualified immunity is an affirmative defense, *Harlow*, 457 U.S. at 815 (citing *Gomez v. Toledo*, 446 U.S. 635 (1980)), the burden rests upon the Defendants to establish that it would not have been clear to a reasonable officer in his position that his conduct was unlawful. *See Franklin v. Clark*, 454 F. Supp.2d 356, 361 (D.Md.2006).

(D.R.I. 2005). To the contrary, the Defendants made a decison under no time or event pressures and with the guidance of clear and well-settled legal authority in the jurisdiction—and yet still made an objectively horribly wrong decision. Under the circumstances presented, "a reasonable defendant would have understood that his conduct violated the plaintiffs' constitutional rights." *Lopera v. Town of Coventry,* 652 F.Supp.2d 203, 211 (D.R.I. 2009). No reasonable officer could have believed his conduct was lawful in the situation confronted.[41]

Considerations in Analyzing Supervisory Liability of Esserman and Kennedy.

Qualified immunity protects "supervisory officials from suit when they could not reasonably anticipate liability." *Camilo-Robles v. Hoyos,* 151 F.3d 1, 6 (1st Cir.1998). The two prong test is slightly modified when analyzing qualified immunity of a supervisor. *Young v. City of Providence*, 396 F. Supp. 125, 132 (D.R.I. 2005). In order "for a supervisor to be liable "the 'clearly established' prong of the qualified immunity inquiry requires that (1) the subordinate's actions violated a clearly established constitutional right, and (2) it was clearly established that a supervisor would be liable for constitutional violations perpetrated by his subordinates in that context." *Id.* (citing *Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 456 (5th Cir.1994); *Shaw v. Stroud,* 13 F.3d 791, 801 (4th Cir.1994)). Under the "objective legal reasonableness" aspect, a court must ask whether the supervisor "should reasonably have understood that his conduct jeopardized [the plaintiff's clearly established constitutional] rights." *Camilo-Robles,* 151 F.3d at 7. For all the reasons set forth above, the above tests are met with respect to the supervisory liability of Esserman and Kennedy. First, DeAndrade violated the Plaintiff's clearly established constitutional rights. Second, there can

[41] Nor is Defendant DeAndrade shielded from liability because she may have mistakenly believed there were exit doors running along the entire front façade. *See Anderson v. Creighton,* 483 U.S. 635, 641 (1987)(qualified immunity protects officials who act "reasonably but mistakenly"). This is so for three primary reasons. First, failing to determine the number, configuration and location of the exit doors on the façade located just a few feet away before banning an individual engaged in expressive conduct from a public sidewalk *on the basis of those exit doors* is tantamount to deliberate indifference or intentional conduct—not a mere mistake. Second, DeAndrade was advised by the Plaintiff that she was wrong to ban her from the sidewalk, but she refused to reconsider. Third, ultimately, it is irrelevant whether the façade was lined with exit doors or not; under the circumstances presented, the Plaintiff's distribution of flyers up and down a wide, spacious and un-crowded sidewalk no closer than 25- 30 feet to the front façade presented no reasonable public safety concern whatsoever.

be no question that where, as here, a supervisor directs a subordinate to take the challenged action—such as Kennedy ordering DeAndrade to "clear" the sidewalk—or endorses or acquiesces to the conduct—such as Esserman endorsing the correctness of the policy as applied and the adequacy of the training as provided, while acquiescing in the challenged conduct by DeAndrade and other officers at the scene by taking no remedial action and asserting they did nothing wrong—a supervisor should be well aware that he or she would be held legally responsible for such conduct by a subordinate. Indeed, just by virtue of the unconstitutional policy as interpreted and applied and the deficient training, *see, supra*, Section IV F, Esserman knew or should have known that his conduct threatened the constitutional rights of others.

G. The Plaintiff Is Entitled To the Remedy of Declaratory And Injunctive Relief

In the future, Plaintiff would also like and intends to communicate, among other things, support of or opposition to various issues and/or her support of or opposition to candidates for political office by distributing flyers and other such literature on public sidewalks and other public forums in the City. *Id*. at ¶155. Nevertheless, Plaintiff is reluctant to expend the time and/or money to produce or peaceably publish and/or distribute political flyers on public sidewalks and in other public forums in the City, insofar as she faces potential arbitrary interference, arrest and criminal prosecution at the whim of the Defendants, notwithstanding her constitutionally protected right to engage in such conduct. *Id*. at ¶156. . Plaintiff's freedom of speech and of the press were impaired and curtailed in the past and she has a reasonable apprehension of impairment of rights in the future by the Defendants.[42] Plaintiff has established sufficient harm to afford her standing to seek relief.[43]

[42] Even a temporary deprivation of First Amendment freedom of expression rights is generally sufficient to establish irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Citizens for a Better Environment v. City of Park Ridge*, 567 F.2d 689, 691 (7th Cir. 1975).

[43] *See Osediacz v. City of Cranston*, 414 F.3d 136, 143 (1st Cir. 2005)(record must show either evidence of actual harm or sufficient evidence to indicate objectively reasonable possibility plaintiff would be subject to allegedly unconstitutional governmental approval because there is no limitation on decision-maker's exercise of discretion)(citing *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183-84 (2000)(explaining plaintiff *need not*

VI. CONCLUSION

WHEREFORE, for all the foregoing reasons, Plaintiff respectfully prays that this Court:

1. Grant partial summary judgment in favor of Plaintiff and against the Defendants as to liability on both counts alleged in the Verified Complaint.

2. Restrain and enjoin Defendants from interfering with the exercise of the Plaintiff's rights to freedom of speech and of the press guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article 1, §§20 and 21 of the Rhode Island Constitution.

3. Restrain and enjoin the Defendants City and Esserman from enforcing the policy at issue in a manner so as to infringe upon the constitutionally protected right of people to peaceably distribute political flyers on public sidewalks and in other public forums in the City.

4. Restrain and enjoin the Defendants City and Esserman and direct them to properly select, train, instruct, supervise and/or discipline officers in the City Police Department relative to the constitutionally protected right of people to peaceably distribute political flyers on public sidewalks and in other public forums in the City.

5. Declare that the Defendants, in the manner described herein, violated the First and Fourteenth Amendments to the United States Constitution and Article 1, §§20 and 21 of the Rhode Island Constitution by placing impermissible restrictions on Plaintiff's rights to freedom of speech and of the press.

6. Continue the matter for such further proceedings as may be necessary, including the determination of appropriate relief and damages and an award of attorney's fees pursuant to 42 U.S.C. §1988.

Plaintiff, Judith Reilly
By her attorneys,

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show certainty of future harm to establish standing, so long as there is reasonable threat of such harm)); *accord Driver v. Town of Richmond*, 570 F. Supp.2d 269, 273-275 9 (D.R.I. 2008).

Date: October 15, 2012

/s/ Richard A. Sinapi

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CERTIFICATION

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I hereby certify that on **October 15, 2012**, a true copy of the within was filed electronically via the Court's CM/ECF System. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system and the filing is available for viewing and downloading from the Court's CM/ECF System. Service on the counsel of record listed above has been effectuated by electronic means.

/s/ Richard A. Sinapi