IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CUIRCUIT

No. 22-1116

CONFERENCE OF PRESIDENTS OF MAJOR ITALIAN AMERICAN ORGANIZATIONS, INC., PHILADELPHIA CITY COUNCILMEMBER MARK F. SQUILLA, THE 1492 SOCIETY, and JODY DELLA BARBRA,

Plaintiffs-Appellants

v.

CITY OF PHILADELPHIA and MAYOR JAMES F. KENNEY,

Defendants-Appellees

Appeal from the United States District Court for the Eastern District Of Pennsylvania in Case No. 2:21-cv-1609
District Judge C. Darnell Jones

APPELLANTS' BRIEF

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RULE 26.1 DISCLOSURE

Pursuant to F.R.A.P. 26 and L.A.R. 26.1, no corporate party to this matter has any parent corporations, stock held by publicly held companies, a publicly held company with an interest in the outcome of the proceeding, and this is not a bankruptcy appeal.

JURISDICTIONAL STATEMENT

The district court had jurisdiction of the case under 28 U.S.C. § 1331, as the complaint in this matter pled causes of action arising under federal law. The Court of Appeals has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. The order and opinion being appealed from were filed January 12, 2022, and timely appealed from on January 18, 2022.

The appeal is from a final order that disposes of all of Appellants' claims.

STATEMENT OF ISSUES FOR REVIEW

1. Whether the District Court erred in finding that Plaintiffs lack standing to bring this lawsuit, where they have suffered an injury-in-fact from discrimination Executive Order 2-21, the harm flows directly from the actions of the Mayor and the City, and prevailing in this matter will redress the harm.

2. Whether the District Court erred in finding that Executive Order 2-21 is government speech, where the Mayor and the City have no historical role in setting the holidays of the Commonwealth of Pennsylvania, and the Supreme Court has never embraced invidious discrimination as part of the government speech doctrine.

3. Whether Appellants state a viable equal protection claim, because the actions of the Mayor and the City in Executive Order 2-21 violate the Equal Protection Clause.

STATEMENT OF RELATED CASES

There is a related state court action filed in the Philadelphia Court of Common Pleas at April Term 2022, No. 01201, with the same named parties.

CONCISE STATEMENT OF THE CASE

A. Relevant Facts

Italian immigrants to America have, for two centuries, identified with Christopher Columbus as emblematic of both Italy and their journey to the United States. Appx011. These same Italian Americans have historically been the subject of extreme acts of discrimination, including the lynching of eleven Italian Americans on March 14, 1891, in New Orleans. Appx011. Columbus Day was recognized to shine a light on unlawful discrimination against Italian Americans, and was a source of pride in the face of widespread discrimination against Italian Americans—discrimination from groups such as the Ku Klux Klan. Appx012. Pushing back upon that anti-Italian American sentiment, the federal government began celebrating Columbus Day in 1934. Appx012-013.

Unfortunately, Italian Americans in Philadelphia reside in a city with a Mayor, Defendant Kenney, for whom discrimination against Italian Americans appears to be a long-held belief, and one that he now seeks to enforce by executive order. In 2016, in response to a concern over sanctuary cities, Mayor Kenney immediately sprang to using derogatory language about Italian Americans: "If this were Cousin Emilio or Cousin Guido (stereotypical Italian names), we wouldn't have this problem because they're white." Appx024.

On June 3, 2020, Mayor Kenney acted under cover of darkness to remove (and impound) the iconic statue of former Mayor Frank L. Rizzo from the steps of the Municipal Services Building: the excuse given for removing the statue of one of Philadelphia's most prominent Italian Americans was that it was vandalized—despite the fact that other vandalized statues were not torn down suddenly at night by the City. Appx020-021.

Later in June 2020, Mayor Kenney attempted to remove ***yet another*** statue important to the Italian American community, the 144-year-old statue of Christopher Columbus in Marconi Plaza, but was prevented by litigation brought swiftly to prevent the likely destruction of the marble sculpture. Appx021. In fact, although Mayor Kenney waived code violations for disorderly conduct with respect to some riots and public disturbances in Philadelphia during the summer of 2020, he labeled Italian Americans protecting the Columbus statue "vigilantes" and ordered them to "stand down[.]" Appx021-022. In connection with the issue in Marconi Plaza, Mayor Kenney went so far as to remove an Italian American police captain based upon his allegation concerning "vigilantes" in largely Italian American South Philadelphia. Appx022.

Shockingly, Mayor Kenney even used the City's response to the COVID-19 crisis to discriminate against Italian Americans, by fudging the City's vaccination

response criteria to lower the priority of a heavily Italian American zip code. Appx022-023.

1. Councilman Squilla Commissions Research on Christopher Columbus and City Council Legislatively Acts to Recognize Columbus Day

In light of Mayor Kenney's antipathy to the Italian American community, it is relevant that in 2018, Plaintiff and Councilman Squilla enlisted Robert F. Petrone, Esq.—a Philadelphia attorney (an Assistant District Attorney) and renowned Christopher Columbus expert—regarding the true historical record of Christopher Columbus. Appx013. Mr. Petrone's credentials made him the ideal person to take on this project, as he was conversant with the relevant primary source materials that were written during and shortly after Christopher Columbus's life, was fluent in Spanish, and he was well-versed at interpreting 15th century Spanish texts. Appx013.

After examining the historical texts in their original language and performing additional research, Mr. Petrone provided Philadelphia City Council with two reports detailing his findings with respect to the life and voyages of Christopher Columbus. Appx013-014. Mr. Petrone's reports demonstrate that the primary historical sources unanimously bear out that Christopher Columbus was the first recorded civil-rights activist of the Americas, having (1) prohibited the mistreatment and the enslavement of the tribal peoples during his tenure as

governor of the West Indies; (2) established the first "underground railroad" of the Americas by traveling around the West Indies on his Second Voyage; and (3) successfully petitioned the King of Spain to promulgate the first civil rights legislation of the Americas decreeing that "all the Indians of Hispaniola were to be left free, not subject to servitude, unmolested and unharmed and allowed to live like free vassals under law just like any other vassal in the Kingdom of Castile." Appx014.

Mr. Petrone's reports supported with scholarship the longstanding support of Philadelphia's City Counsel for Columbus Day. Each year, Philadelphia City Council designates the week encompassing the second Monday in October as "Italian American Heritage Week . . . in celebration of the festivities commemorating Columbus' historic voyage to the New World." Appx032. City Council, the legislative body under the Home Rule Charter, further recognizes that "The annual Philadelphia Columbus Day Parade began in South Philadelphia in 1957, and has since become one of the City's premier ethnic celebrations," and that The 1492 Society is the host of the annual Philadelphia Columbus Day Parade. Appx032.

2. Executive Order 2-21

Despite Philadelphia City Council having been provided with Mr. Petrone's detailed reports that conclude there is no support for the charges the City and

Mayor now level against Christopher Columbus, Mayor Kenney issued Executive Order 2-21 without submitting this serious decision to City Counsel. Appx015. Contrary to Mr. Petrone's findings, and apparently unsupported by any review of the direct historical record, Defendants stated in that Order: "Columbus enslaved indigenous people, and punished individuals who failed to meet his expected service through violence and, in some cases, murder" and thereby decided to cancel Columbus Day by replacing it with Indigenous Peoples Day. Appx015.

The Executive Order continues in this vein, excoriating a figure that City Council venerates every year and passed a resolution in support of celebrating, then proceeding to wipe from the public record: "[T]he story of Christopher Columbus is deeply complicated. For centuries, he has been venerated with stories of his traversing the Atlantic and 'discovering' the 'New World'. The true history of his conduct is, in fact, infamous. Mistakenly believing he had found a new route to India, Columbus enslaved indigenous people, and punished individuals who failed to meet his expected service through violence and, in some cases, murder . . . The City holiday celebrated on the second Monday in October, formerly known as Columbus Day, shall now be designated as Indigenous Peoples' Day." Appx015. Mayor Kenney proceeded to double down on his vituperative feelings about Columbus Day through a press release, in a manner consistent with his intent to erase Italian American heritage and celebrations from Philadelphia:

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

Appx015. Defendants thus recognize that Executive Order 2-21 is not mere speech in a vacuum—it in fact carries "power"—and they have explicitly chosen which ethnicities should be credited, supported, and approved by the City government, and which ethnicities should be shamed, disdained, and canceled.

3. Executive Order 2-21 Contravenes History

Only by ignoring history and the City's conduct for the past century can it be said that Columbus Day is not tied to the Italian American community and a holiday expressly established to celebrate the Italian American community. It is widely understood and accepted that the institution of Columbus Day occurred to recognize Italian Americans. Appx011-013. In fact, Philadelphia's own City Council recognizes Columbus Day as "one of the City's premier ethnic celebrations" and "the active participation of the Delaware Valley's Italian American community" in Columbus Day. Appx154-157. Resolution No. 170872 specifically provides for widespread recognition of Italian American heritage on and around Columbus Day. Appx154-157. ("In addition to the annual Columbus

Day Parade, festivities include an Italian Festival showcasing the culture and cuisine of the people of Italy. The Italian Festival . . . includes food, dance and music from the many different diverse regions of Italy.").

Plainly, Columbus Day is a holiday associated with an ethnicity, or national origin, and that association is with Italian Americans. Mayor Kenney recognized the importance of the historic nature of the holiday when he released a public statement following the issuance of Executive Order 2-21 that expressly recognized that renaming the holiday had "power" and was not merely symbolic. Appx015. While it is a noble act to designate a holiday in recognition of this Nation's Indigenous People (similar to the act of designating Columbus Day to recognize Italian Americans), it is apparent that Executive Order 2-21 was issued to confer a benefit to a specific ethnic group while attacking another by removing their holiday from official recognition. Appx015. It is apparent by Mayor Kenney's own words that Indigenous Peoples' Day was established as a City holiday on the Second Monday of October to "maintain[] racial iniquities," which is a goal that inherently requires one race and/or ethnic group to receive a benefit. Appx015. However, such benefit in this instance comes at the expense of Italian Americans. Appx015.

B. Relevant Procedural History and Rulings

The Complaint in this matter was filed on April 6, 2021. The Defendants moved to dismiss the Complaint on May 12, 2021; the District Court issued its Order and Opinion on January 12, 2022. Plaintiffs timely appealed on January 18, 2022.

C. Rulings Presented for Review

The ruling presented for review is the Order and Opinion of January 12, 2022, dismissing Counts I-III with prejudice (and dismissing Counts IV-VII without prejudice). Plaintiffs have elected to refile their state court claims in the Court of Common Pleas in Philadelphia, and appeal only the dismissal of the federal causes of action herein.

The relevant claims in the Complaint in this appeal are:

- Count I under § 1983 for violation of the Equal Protection Clause by making an invidious racial or ethnic classification in eliminating the celebration of Columbus Day and replacing it with Indigenous Peoples' Day in Executive Order 2-21;
- Count II for a declaratory judgment that Italian Americans are a protected class under the U.S. Constitution; and
- Count III for a declaratory judgment that Executive Order 2-21 violates the Equal Protection Clause by cancelling Columbus Day.

SUMMARY OF THE ARGUMENT

This case is fundamentally about whether Defendants and Appellees the City of Philadelphia ("the City") and Mayor Kenney ("the Mayor" or "Mayor Kenney") (collectively "Defendants") can discriminate against Italian Americans, and in favor of another ethnic group, in issuing Executive Order 2-21, which reads as follows:

> WHEREAS, the story of Christopher Columbus is deeply complicated. For centuries, he has been venerated with stories of his traversing the Atlantic and "discovering" the "New World". The true history of his conduct is, in fact, infamous. Mistakenly believing he had found a new route to India, Columbus enslaved indigenous people, and punished individuals who failed to meet his expected service through violence and, in some cases, murder;
>
> WHEREAS, over the last 40 years many states and cities have acknowledged this history by recognizing the holiday known as Columbus Day instead as Indigenous Peoples' Day. These jurisdictions include: Arizona, Michigan, Minnesota, North Carolina, Vermont, Virginia, Wisconsin and Washington, D.C.;
>
> WHEREAS, Black Lives Matter;
>
> NOW, THEREFORE, I, MAYOR JAMES F. KENNEY, Mayor of the City of Philadelphia, by the powers vested in me by the Philadelphia Home Rule Charter, do hereby ORDER as follows:
>
> **SECTION 1. DESIGNATION OF JUNETEENTH AS A CITY HOLIDAY**
>
> June 19 of every year is designated a holiday for all City employees and shall be treated as such in accordance

> with the applicable Civil Service regulations and Administrative Board rules.
>
> **SECTION 2. RENAMING OF HOLIDAY**
>
> The City holiday celebrated on the second Monday in October, formerly known as Columbus Day, shall now be designated as Indigenous Peoples' Day.
>
> **SECTION 3. DIRECTIVE TO CITY OFFICIALS**
>
> The Director of Finance, Chief Administrative Officer and Deputy Mayor for Labor are directed to make appropriate notifications to effectuate this Order.

Appx043-044 (emphasis in original). Plaintiffs The 1492 Society, Jody Della Barbra, COPOMIAO, and Councilman Squilla maintain that while the City and the Mayor were free to add an additional holiday and name it Indigenous Peoples' Day, the Defendants' erasure of Columbus Day from official recognition discriminated against Italian Americans, whose heritage is celebrated on Columbus Day.

The District Court erred in finding that Plaintiffs lacked standing and failed to set forth a prima facie case in several ways. First, the District Court refused to recognize that in instances of discrimination, this Court has set forth a low bar for standing—that in fact discrimination itself is harmful enough to provide for injury-in-fact—and that all Plaintiffs in this matter are so closely associated with the celebration of Columbus Day in Philadelphia's Italian American community that they meet this low bar. *Hassan v. City of New York*, 804 F.3d 277 (3d Cir. 2015).

Second, the District Court erred in finding that the Defendants engaged in government speech when they erased Columbus Day from official recognition and replaced it with Indigenous Peoples' Day. When the government speech test is applied to the actual facts of the matter, it turns out that the City and Mayor Kenney have no power or authority to rename Columbus Day, so they cannot meet the test to have Executive Order 2-21 recognized as government speech. Additionally, the government speech test is a First Amendment concept and not applied by the Supreme Court where invidious discrimination appears.

Finally, the Plaintiffs set forth a prima facie case of discrimination under the Equal Protection Clause: as is plain from the face of Executive Order 2-21, Italian Americans have had the holiday celebrating their heritage eliminated by the Defendants in favor of celebration of another race, ethnicity, or national origin, and there is no government purpose set forth by the Defendants justifying such a classification under strict scrutiny.

The District Court should be reversed.

ARGUMENT

The District Court erred in dismissing Plaintiffs' claims because there is unquestionably standing based on the discrimination inherent in Executive Order 2-21 as well as the fact that the "government speech" doctrine should never have been applied to this matter.

A. Standard of Review for Issues on Appeal

This Court exercises plenary review over a district court's order dismissing a case for lack of subject matter jurisdiction, accepting the allegations of the complaint as true where the attack on standing was facial, as is the case here. *Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 271 (3d Cir. 2014).

B. The District Court Erred in Finding that Plaintiffs Lacked Standing

Despite the Complaint in this matter containing substantial factual support for the invidious discrimination by the Defendants, the District Court erroneously held that Plaintiffs lacked standing, concluding that Plaintiffs did not satisfy the injury-in-fact requirement of Article III standing, as their allegations were too general, and there was still some ability on their part to celebrate Columbus Day. The District Court's error flows from the text of Executive Order 2-21 in the context of Mayor Kenney's other discriminatory actions (through the medium of the City) and the Executive Order's inherently discriminatory nature.

1. The Plaintiffs Possess Standing Based on Discrimination

This Court has enunciated a clear standard for standing in the discrimination context in *Hassan v. City of New York*, and the District Court has elected to walk away from the teachings of that case in order to deny standing to the Plaintiffs here. 804 F.3d 277, 289 (3d Cir. 2015), *as amended* (Feb. 2, 2016). As Plaintiffs meet the requirement for standing set forth in *Hassan*, the District Court should be reversed and this case permitted to proceed below.

Standing is a threshold inquiry in every case, one for which "[t]he party invoking federal jurisdiction bears the burden of [proof]." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992); *Hassan*, 804 F.3d at 289. Analyzing this requirement involves a three-part inquiry. Has at least one plaintiff suffered an "injury in fact"? *Id.* If so, is that injury "fairly . . . trace[able] to the challenged action of the defendant"? *Lujan,* 504 U.S. at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.,* 426 U.S. 26, 41-42 (1976)). And if the answer to both is yes, will that injury be "likely . . . redressed by a favorable decision"? *Id.* (quoting *Simon,* 426 U.S. at 38). Success on the merits is assumed for the purposes of standing and standing relies on facts plausibly alleged. *Hassan*, 804 F.3d at 289. Only a single plaintiff need demonstrate standing for each claim. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 53 n. 2 (2006).

The District Court focused on the injury-in-fact requirement, finding that Plaintiffs failed to demonstrate that "they have been personally impacted and harmed through the renaming Columbus Day to Indigenous Peoples' day." Appx167. As Plaintiffs' injury-in-fact standing is even clearer here than in *Hassan*, a discussion of that case is relevant.

In *Hassan*, Muslims brought suit against the New York City Police Department ("NYPD") for post-9/11 surveillance based upon their religious identity. 804 F.3d at 284. The *Hassan* plaintiffs alleged that they appeared in NYPD reports, but that in ten years, the surveillance had never been fruitful in generating law enforcement leads. *Id.* at 285, 287. They alleged that the existence of the surveillance program itself was stigmatizing and impaired the willingness of people to be associated with their faith. *Id.* at 287. This Court held, in no uncertain terms, that "discriminatory classification itself" is sufficiently harmful to allow injury-in-fact standing. *Id.* at 289-90. This Court rejected suggestions that discrimination standing had to be tied to a tangible benefit, outright condemnation of the class discriminated against, or the particularization of the injury. *Id.* at 290-91. In fact, this Court found that discriminatory standing required no more than "an identifiable trifle of harm" and that the "tort is said to be damage itself." *Id.* at 291, 293.

This finding from *Hassan* is consistent with prior law and should not be walked back, as the District Court has done in this matter. "[A] victim of discrimination suffers a dehumanizing injury as real as, and often of far more severe and lasting harm than, a blow to the jaw." *Mardell v. Harleysville Life Ins. Co.,* 65 F.3d 1072, 1074 (3d Cir. 1995) (internal quotation omitted); *see also Sandberg v. KPMG Peat Marwick, L.L.P.,* 111 F.3d 331, 335 (2d Cir. 1997) ("The fundamental concern of discrimination law is to redress the dignitary affront that decisions based on group characteristics represent, not to guarantee specific economic expectancies."); *see also Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 294 n. 44 (W.D. Pa. 2017) ("Courts have long recognized, for example, that a bare equal protection violation is sufficient to constitute an injury in fact for the purposes of establishing Article III standing because unequal treatment under the law is harm unto itself.").

Here, the Mayor and the City used Executive Order 2-21 to attack and single out, by erasure, the Italian American community in Philadelphia by eliminating Columbus Day and replacing it with Indigenous Peoples' Day. No other ethnic celebration was targeted: only Italian Americans, including Plaintiffs, were discriminated against by the striking of their celebration off the calendar by an official act.

The District Court's focus on *Allen v. Wright* misses the essential difference between a case focusing on the discretionary powers of the government and this matter, where Executive Order 2-21 is an express and direct instrument of discrimination, and actually barred by positive law that prohibits the City and the Mayor from renaming Columbus Day. In *Allen*, the parents of African American public-school children alleged that the Internal Revenue Service "has not adopted sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools." 468 U.S. 737, 739 (1984). The court in *Allen* held that an injury for racial discrimination provides "standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct[.]" *Id.* at 755. The plaintiffs in *Allen* attempted to show standing by arguing that they were "harmed directly by the mere fact of Government financial aid [being given] to discriminatory private schools." *Id.* at 752. Plainly, in *Allen*, the parents sought to move the levers of federal tax policy through litigation, and while their targets, racially discriminatory private schools, were reprehensible, the parents (or their children) were not directly affected by the tax policy in question and alleged stigmatic injury. Unlike this case, the parents never alleged any injury that was actually suffered as a direct result of having personally been denied equal protection. *Id.* at 755. The court held that a stigmatizing "injury accords a basis for standing only to those persons who are

personally denied equal treatment by the challenged discriminatory conduct, and respondents do not allege a stigmatic injury suffered as a direct result of having personally been denied equal treatment." *Id.* at 738. In other words, the plaintiffs in *Allen* never alleged a cognizable injury – they only alleged the government violated the law. *Id.* at 755 ("they do not allege a stigmatic injury suffered as a direct result of having personally been denied equal treatment.").

Unlike *Allen*, Plaintiffs here have alleged they were personally damaged by the denial of equal treatment. Plaintiffs allege that the cancelling of Columbus Day directly harmed their celebration of the Day through a festival and Parade that was tied to the holiday in Philadelphia, and Plaintiffs are not mere parade-goers or spectators: they organize the parade; they are prominent Italian American organizations involved in the celebration of Columbus Day with members in Philadelphia; and they are a City Councilmember responsible for advocating the Columbus Day celebration for the Italian American community. Further, Plaintiffs allege "Mayor Kenney's Executive Order discriminates against Italian Americans by repealing a holiday that recognizes their ethnicity while simultaneously awarding a new holiday, on that same day, to a different but similarly situated group. . . . Mayor Kenney's Executive Order 2-21 has the effect of distributing burdens and benefits unequally between Italian Americans and the Indigenous Peoples by replacing a holiday meant to recognize the contributions and hardships

of Italian Americans with a holiday that recognizes the contributions and hardships of the Indigenous Peoples. . . .” Appx026-028. The discrimination alleged is not remote or stigmatic, as in *Allen*; it directly removes recognition of Columbus Day, and the official recognition of the parade and celebration, that Plaintiffs have enjoyed, and transfers that recognition to another ethnic group in plain violation of the Equal Protection Clause. Plaintiffs have sufficiently alleged injury requisite to establish standing for an Equal Protection Claim based on discriminatory treatment. *Id.*

2. The Harmful Impact of Executive Order 2-21 Provides All Plaintiffs With Injury-in-Fact Standing

Although the District Court chooses not to cite to it, Plaintiffs provided plentiful factual support in their Complaint to show that the City and Mayor Kenney targeted Columbus Day to be renamed because of animus against the Italian American community. Appx025-029. The standard of review does not permit such plentiful facts to be disregarded or challenged, but rather the District Court must accept them as true. Executive Order 2-21 effectively repeals Columbus Day, a holiday that recognizes and shows appreciation for this nation’s Italian Americans, and replaces it with Indigenous Peoples’ Day, a different holiday that recognizes and shows appreciation for this nation’s Indigenous People. Appx005, 012, 029, 030. This act discriminates against Italian Americans, and

organizations advocating for Italian American celebrations such as the Columbus Day parade, by exalting another ethnic group in their place. Appx005, 023.

a. The 1492 Society and COPOMIAO

The 1492 Society is a Philadelphia-based non-profit that is "the host of the annual Philadelphia Columbus Day Parade." Appx032. The 1492 Society's "purpose is to promote Italian culture and traditions by sponsoring the annual Philadelphia Columbus Day Parade and Festival . . . [by] organiz[ing] Philadelphia's annual Columbus celebration and Columbus Day parade which celebrates Italian American heritage." Appx010. When Defendants illegally repealed Columbus Day by mayor fiat, The 1492 Society was directly harmed given that the City in which it operates no longer recognizes the holiday through which it "promote[s] Italian culture and traditions[,]" including the parade and festival, which are on specific days, and which occurred in 2021 and will recur in 2022. *Id.* The 1492 Society's interest in this matter is more than that of general members of the public. *Hassan*, 804 F.3d at 291. Rather, The 1492 Society's entire purpose is dedicated to recognizing Italian American heritage through Philadelphia's Columbus Day. Appx010.

COPOMIAO is a coalition organization that consists of the individual members of forty-six (46) smaller organizations and their respective Presidents. Appx009 ("consists of member Presidents of forty-six (46) different organizations

and their individual members"). Given the sheer size of COPOMIAO, it is no surprise that more than one thousand (1,000) of its individual members are Italian Americans that reside in the City of Philadelphia. *Id.* Each of these individuals have standing to institute the instant lawsuit in their own capacity but have elected for COPOMIAO to represent their collective interests. *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342-43 (1977) (setting forth the basis for associational standing).

The issuance of Executive Order 2-21 provides standing for The 1492 Society to institute the first three counts because its activities, as host of the Columbus Day parade, have been impaired by the actions of the Defendants through the withdrawal of official recognition and support (App154-157); and its members have been treated unequally under the law by having a holiday that recognizes their heritage and ancestry stripped as a City holiday and replaced with a holiday dedicated to a different ethnic group. Appx005, 026, 029. Unequal treatment is a judicially cognizable personal injury that qualifies for standing purposes. *See Hassan*, 804 F.3d at 289-90 ("Unequal treatment is a type of personal injury that has long been recognized as judicially cognizable . . . and thus qualifies as an actual injury for standing purposes"); *see also Evancho*, 237 F. Supp. 3d at 294 n. 44 ("Courts have long recognized . . . that a bare equal protection violation is sufficient to constitute an injury in fact for the purposes of

establishing Article III standing . . .”). Defendants did not attempt to recognize both ethnicities on the Second Monday in October, but rather swapped a holiday dedicated to Italian Americans in exchange for a holiday dedicated to Indigenous People. Appx005, 012, 026, 029, 030. Clearly, this unequal treatment is fairly traceable to the challenged action, Executive Order 2-21. *Hassan*, 804 F.3d at 292. Finally, the harm to The 1492 Society can be redressed by the relief requested in Counts I, II, and III, by recognition of its rights and restoration of Columbus Day. *Id.* at 293-94 (“For other plaintiffs, the major purpose of the suit may be to obtain a public declaration that the[y are] right and w[ere] improperly treated . . . along with nominal damages that serve as a symbolic vindication of [their] constitutional right[s] . . . Given the range of available remedies, redressability is easily satisfied.”) (internal citations and quotation marks omitted).

Standing for COPOMIAO is similarly satisfied, as a showing that a single member will suffer harm as a result of the challenged action makes out a sufficient case for associational standing. *Hunt*, 432 U.S. at 342-43. In this action, COPOMIAO has standing to represent its Italian American members as to each Count pled in the Complaint. Counts I, II, and III each directly address the Defendants’ discriminatory conduct that has resulted in the unequal treatment of COPOMIAO’s individual Italian American members. Appx025-038. Specifically, Mayor Kenney has enacted Executive Order 2-21 that effectively repeals

Columbus Day, a holiday that recognizes and shows appreciation for this Nation's Italian Americans, and replaces it with Indigenous Peoples' Day, a *different* holiday that recognizes and shows appreciation for this Nation's Indigenous People. Appx005, 012, 026, 029, 030. This act discriminates against Italian Americans by exalting another ethnic group in their place. Appx005, 026, 029 ("Mayor Kenney's Executive Order discriminates against Italian Americans by repealing a holiday that recognizes their ethnicity while simultaneously awarding a new holiday, on that same day, to a different but similarly situated group."). Defendants' discrimination has resulted in COPOMIAO's Philadelphia Italian American members sustaining a direct injury, by way of discrimination and unequal treatment, that has caused the only holiday dedicated to their heritage and ancestry to be repealed and replaced. Appx030. Clearly, this is not an injury of "general interest common to all members of the public," but rather a concrete and particularized injury that directly impacts Philadelphia's Italian Americans. *Ex parte Lévitt,* 302 U.S. 633 at 634; *see also Hassan*, 804 F.3d at 293 ("[D]iscrimination itself is [a] legally cognizable injury.").

b. Jody Della Barba and Councilmember Squilla

Jody Della Barba has standing to institute all Counts for the same reasons COPOMIAO's individual members have standing. Ms. Della Barba is an Italian American resident of Philadelphia who has been discriminated against by Mayor

Kenney's Executive Order 2-21. Appx010. She is also the Parade Organizer and Secretary of The 1492 Society, and as such has a personal interest in Executive Order 2-21's cancellation of the holiday upon which the annual parade she runs depends. Appx010. The act of taking a holiday prescribed to one ethnic group and exalting another in its place is discriminatory and in violation of the Equal Protection Clause. Appx005, 016, 026, 029. Much like the entity Plaintiffs, Ms. Della Barba has suffered an injury in fact because "discrimination itself is the legally cognizable injury[,]" *Hassan*, 804 F.3d at 293, her dignity as a member of that community has suffered an affront in addition to her own activities as an Italian American citizen being impaired because of the effect of Executive Order 2-21 on the parade she operates. Redress of her injuries is possible by a finding that Executive Order 2-21 violates the Constitution, and Executive Order 2-21 is undeniably the result of the actions of the Defendants.

Councilmember Mark Squilla has standing to bring each and every Count in his official and/or personal capacity. As a member of City Council, not only has Mark Squilla taken an oath to support the Constitution of the United States, the Commonwealth of Pennsylvania, and the Philadelphia Home Rule Charter,[1] but he has been deprived of his right and role to have the business and affairs of the City

[1] *See* Phila. Home Rule Charter § 8-300 ("All persons elected, appointed or employed under the provisions of this charter, . . . shall, before entering upon the duties of their offices or employments, take an oath of office to support the Constitutions of the United States and of the Commonwealth of Pennsylvania and this charter.").

of Philadelphia submitted to City Council by the Mayor;[2] and as an Italian American, he has suffered from the invidious classification present in Executive Order 2-21. As an Italian American resident of Philadelphia, Councilmember Squilla has the same standing as Jody Della Barba in this case, *supra*, and has been subject to discrimination by Defendants on the basis of ethnicity when Defendants repealed Columbus Day and replaced it with a new holiday, designated to a different ethnic group. Appx005, 016.

C. The District Court Erred in Finding that Executive Order 2-21 Was Government Speech

Executive Order 2-21 cannot be cloaked in the government speech doctrine in order to allow invidious discrimination barred by the Equal Protection Clause. The District Court erred by holding that Executive Order 2-21's provision replacing Columbus Day with Indigenous Peoples' Day somehow constituted speech rather than conduct because the District Court did not properly focus on the speaker in this instance, impermissibly eliding the differences between the City, Mayor Kenney, and non-party the Commonwealth of Pennsylvania. Furthermore, it erred by failing to limit the government speech doctrine to instances where government speech was at issue, rather than acts of invidious discrimination.

[2] 53 P.S. § 12127(a).

1. The Court Made Basic Factual Errors in Applying the Government Speech Test to This Case

The District Court used the three factors from *Pleasant Grove City, Utah v. Summum* to determine whether "holiday names constitute government speech." 555 U.S. 460 (2009); Appx172. It held as follows:

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

Appx173. By so holding, the District Court obliterated the limits on the speech by the City and Mayor Kenney (while acting as Mayor, such as when issuing Executive Order 2-21) and fatally confused the City with the Commonwealth: no power to set the holidays of Pennsylvania, nor to name them, is vested in the Defendants.

In *Summum*, a religious organization requested permission to erect a religious monument in a park containing (*inter alia*) a Ten Commandments monument. 555 U.S. at 465. The town government refused to accept the

monument, and that decision was found to be proper by the Supreme Court, which concluded that, while governments are limited by the First Amendment in regulating speech, they may express their own speech. *Id.* at 472-80.

In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the Supreme Court faced a challenge by a group seeking to have Texas print license plates bearing the Confederate battle flag; the Court found that the government speech doctrine allowed Texas to deny the request. 576 U.S. 200, 203-04 (2015). In doing so, *Walker* refined *Summum* and identified three factors in determining whether a government was engaged in speech: (1) whether the government has engaged in communication of its messages through that medium in the past; (2) whether the medium is identified in the mind of the public with the government; and (3) whether the government maintains control of that message. *Id.* at 210-13.

Here, when the District Court addressed whether Executive Order 2-21 was government speech, it erred in finding that the redesignation of a holiday was government speech under *Walker*. The statute cited by the District Court is a legislative enactment by the Commonwealth of Pennsylvania that defines Columbus Day as a holiday generally recognized throughout Pennsylvania. 44 Pa. Stat. Ann. § 11. *See also* 44 Pa. Stat. Ann. § 32 (requiring the Governor of Pennsylvania to recognize Columbus Day). The powers of the City and the Mayor are limited by 53 Pa. Stat. Ann. § 13133, which expressly states that "no city shall

exercise powers contrary to, or in limitation or enlargement of, powers granted by acts of the General Assembly which are . . . [a]pplicable in every part of the Commonwealth." Thus, the City and Mayor Kenney were acting outside of their authority through Executive Order 2-21, which radically alters the analysis deployed by the District Court.

Thus, the City and the Mayor have ***never*** historically communicated anything by the designation of Columbus Day as a holiday: it was mandated by the Commonwealth of Pennsylvania by legislation the Mayor and the City could not contravene. Similarly, the identification of a certain day in October with Columbus Day is identified with the Commonwealth (or the federal government, 5 U.S.C. § 6103(a)), as the relevant public, statutory authority has never placed discretion concerning Columbus Day in the hands of the City or Mayor Kenney. Finally, pursuant to the statutory authority (which neither Defendant has any power to vitiate), the Commonwealth, not the Defendants, maintain control of the identification of public holidays (including Columbus Day) in Pennsylvania.

The District Court, in blithely erasing the difference between governments in its analysis, misapplied the government speech test of *Walker*, and permitted Defendants to enrobe themselves in authority they do not possess. Because of this error, the District Court should be reversed.

2. Executive Order 2-21 Is Discrimatory Conduct and the Government Speech Test Is Inapplicable

The District Court further erred by using the government speech analysis in the first instance, as Plaintiffs were not seeking to compel the City or the Mayor to express Plaintiffs' viewpoint in a finite space on City property. Instead, Plaintiffs seek to prevent discriminatory government conduct based on ethnicity in violation of the equal protection clause.

a. The Government Speech Defense Is a First Amendment Concept

In its "recently minted" government speech doctrine, the Supreme Court of the United States in *Summum* interpreted the First Amendment to include a "government speech" defense to free speech claims by private parties. 555 U.S. at 481 (Stevens, J., concurring) (referring to "recently minted government speech doctrine.") In *Summum*, the Court addressed a first amendment claim brought by a religious organization against a municipality, and the Court framed the question narrowly within the confines of First Amendment jurisprudence: "whether the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected." *Id.* at 464. The Court found that "[p]ermanent monuments displayed on public property typically represent government speech," *id.* at 470, and therefore, the government's decision not to

display the religious organization's monument could not form the basis of a free speech claim because it involved an attempt to control the government's speech in selecting which monuments to display in a limited space.

Importantly, the Court in *Summum* did not conclude that, under the government speech doctrine, government conduct purposely selecting one ethnic group over another ethnicity would be immune from constitutional scrutiny. Indeed, this point was made clear by Justice Stevens' concurring opinion, joined by the late Justice Ginsburg, noting that "government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection clauses." *Id.* at 482. Further, in his concurring Opinion, Justice Breyer cautioned against a categorical or rigid "government speech" doctrine, urging "we would do well for us to go slow in setting its bounds." *Id*. at 484-85 (Breyer, J., concurring) (". . . 'government speech' doctrine is a rule of thumb, not a rigid category. Were Pleasant Grove City (City) to discriminate in selection of permanent monuments on grounds unrelated to the display's theme, say, solely on political grounds, its action might well violate the First Amendment. In my view courts must apply categories such as 'government speech,' . . . with an eye toward their purposes, lest we turn 'free speech' doctrine into a jurisprudence of labels.").

Four years later, the Sixth Circuit decided *Freedom from Religion Found., Inc. v. City of Warren, Mich.*, 707 F.3d 686 (6th Cir. 2013), which involved a private group challenging a municipalities' refusal to include an anti-religious "Winter Solstice" sign as part of a Christmas holiday display located on government property. Relying on the government speech doctrine from *Summum*, the Sixth Circuit held that the group could not compel the municipality to include its sign since the government had the right to express its Christmas holiday viewpoints and could not be compelled to include all other potential viewpoints. Again, it is important to note that the Sixth Circuit did not expand the government speech doctrine to protect the government from claims of invidious discrimination based on race or ethnicity simply because government speech maybe involved in some way. Rather, the doctrine is invoked to resolve a unique government problem when it comes to private speaker's access to government property: avoiding the requirement of forcing government to "accommodate[e] all or even most requests in a finite space." *Id.* at 698.

The Third Circuit in *Fields*, decided ten years after *Summum*, addressed the government speech doctrine in the context of "legislative prayer," where a group of anti-theists sought to compel the Pennsylvania legislature to include anti-theist guest chaplains to read the opening prayer for legislative sessions. In that specific factual context, where a group sought to force the government to give them access

to a "finite" government space on government property to express themselves, the Third Circuit, following *Summum*, found the government speech doctrine foreclosed relief under the First Amendment and Equal Protection grounds.[3] But, again, *Fields* did not address the specific legal question presented by the facts in this case: whether the government speech doctrine would protect government actors who discriminate by choosing to elevate one ethnic group over another ethnic group.[4]

b. The Government Speech Defense Does Not Apply in the Equal Protection Context

The District Court noted that neither it, nor the parties, could find a "government speech" case similar to this one. Appx172. This is not surprising, as when the Supreme Court has confronted similar conduct involving the government making ethnic or racially based public statements that sought to make

[3] Although the court in *Fields* determined the government speech doctrine applied to bar relief under the Equal Protection Clause, it noted there was a split in authority on whether the doctrine applied to equal protection claims. *Fields*, 936 F.3d at 160-61 (acknowledging the First and D.C. Circuits, and Justice Stevens in his concurrence in *Summum*, have suggested "that the Equal Protection Clause might apply to government speech.") (citing *Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 331 n. 9 (1st Cir. 2009); *People for Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23, 28 (D.C. Cir. 2005)). That distinction, Plaintiffs submit, is not relevant for purposes of this case because, as argued herein, the government speech doctrine does not apply to the conduct of the Defendants here. The doctrine cannot be used to immunize conduct of government officials that act to discriminate against groups based on ethnic or racial classifications.

[4] *Walker*, 576 U.S. 200 (2015), in inapposite, as the government in that case sought to deny permission to include the Confederate battle flag on a state-produced license plate, and not to engage in discriminatory behavior itself.

classifications along such lines, it has not been hampered by arguments about "government speech."

In *Lombard v. Louisiana*, the Supreme Court held that city officials' speech commanding continued segregation by private restaurants was a violation of the Equal Protection Clause. 373 U.S. 267 (1963). In *Lombard*, the Mayor of New Orleans publicly spoke out against "sit-in demonstrations" by civil rights activists, who refused to leave lunch counters after restaurant owners demanded they do so. Although the City did not have ordinances requiring segregation, the Mayor stated that such "sit-in demonstrations" would not be permitted. In an official statement published in the city newspaper, the Mayor specifically stated that:

> I have today directed the superintendent of police that no additional sit-in demonstrations . . . will be permitted . . . regardless of the avowed purpose or intent of the participants. It is my determination that the community interest, the public safety, and the economic welfare of this city require that such demonstrations cease, and that henceforth they be prohibited by the police department.

Id. at 272. The Court, interpreting the Mayor's statements, concluded: "as we interpret the New Orleans city officials' statements, they here determined that the city would not permit Negroes to seek desegregated service in restaurants." *Id.* Accordingly, the Court concluded the Mayor's public proclamation constituted state action in violation of the Equal Protection Clause. *Id.* at 273. Notably (and thankfully), the Court was not concerned with the fact that the Mayor had

expressed his views on the matter in a public statement. Nor was there a concern that "government speech" somehow precluded a finding that an equal protection violation was afoot.

Likewise, in *Anderson v. Martin*, the Supreme Court struck down, on equal protection grounds, a state law requiring that political candidates be identified by race on all ballots and nominating papers. The state sought to justify the law on the grounds that the state was merely enforcing its right to inform the electorate about candidates for public office. It was, in essence, a "government speech" type defense. But the Court, recognizing the danger of government speech creating classifications along race or ethnic lines, found this type of government conduct caused constitutionally cognizable harm and struck down the law on equal protection grounds:

> [T]his case . . . has nothing . . . to do with the right of a citizen . . . to receive all information concerning a candidate which is necessary to a proper exercise of his franchise. It has to do only with the right of a State to require or encourage its voters to discriminate upon the grounds of race . . . [B]y placing a racial label on a candidate at the most crucial state in the electoral process – the instant before the vote is cast – the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another.

375 U.S. 399, 401-02 (1964).

The Supreme Court has consistently found government conduct like that at issue here, where the government seeks to treat citizens differently based on the classification of race or ethnicity, to be constitutionally abhorrent. And, while these cases may have at some level involved a form of government speech expressing views on policy, the Supreme Court was not deterred from finding an equal protection violation. *See, e.g, Gratz v. Bollinger*, 539 U.S. 244 (2003) (invalidating university undergraduate admissions policy seeking to enroll underrepresented minority students); *Rice v. Cayetano*, 528 U.S. 495 (2000) (invalidating provision of Hawaii Constitution restricting right to vote in statewide elections to Hawaiians and native Hawaiians, each statutorily defined on the basis of ancestry as racial discrimination); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (judicial decision considering race of stepfather in custody invalid); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (forcible relocation of U.S. citizens to concentration camps, solely and explicitly on basis of race, is objectively unlawful and outside the scope of Presidential authority).

As the Supreme Court has consistently held, no public official or state actor has the right to make such ethnically based classifications. The narrow "government speech" doctrine was not meant to be applied in such a way to sanction government conduct that discriminates based on ethnicity. To the extent the City or Mayor Kenney believe they have the right to engage in such conduct

under the "government speech" doctrine, the Court, through this case, should disabuse him of such an unconstitutional notion and reverse the District Court.

D. The Plaintiffs Set Forth Cognizable Claims Under the Equal Protection Clause

The District Court further erred when it found that Plaintiffs had not set forth a prima facie case of discrimination under the Equal Protection Clause. According to the Supreme Court of the United States, the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The Defendants violated this Constitutional requirement in making an invidious classification based upon national origin (or ethnicity) in the removal of Columbus Day and its replacement with Indigenous Peoples' Day. As a government act that discriminates on its face, Executive Order 2-21 is subject to strict scrutiny, and it plainly fails that scrutiny and thus violates Plaintiffs' rights.

1. Plaintiffs Set Forth a Prime Facie Case

Plaintiffs easily set forth prima facie equal protection claims in the Complaint. To make such a claim, "a plaintiff must show that (1) compared with others similarly situated he was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion..." *Cash v. Wetzel*, 8 F. Supp. 3d 644, 664 (E.D. Pa. 2014).

Plaintiffs were selectively treated in this instance, as is plain on the face of Executive Order 2-21. It states, in relevant part:[5]

> WHEREAS, the story of Christopher Columbus is deeply complicated. For centuries, he has been venerated with stories of his traversing the Atlantic and "discovering" the "New World". The true history of his conduct is, in fact, infamous. Mistakenly believing he had found a new route to India, Columbus enslaved indigenous people, and punished individuals who failed to meet his expected service through violence and, in some cases, murder;
>
> WHEREAS, over the last 40 years many states and cities have acknowledged this history by recognizing the holiday known as Columbus Day instead as Indigenous Peoples' Day. These jurisdictions include: Arizona, Michigan, Minnesota, North Carolina, Vermont, Virginia, Wisconsin and Washington, D.C.;
>
> WHEREAS, Black Lives Matter;
>
> NOW, THEREFORE, I, MAYOR JAMES F. KENNEY, Mayor of the City of Philadelphia, by the powers vested in me by the Philadelphia Home Rule Charter, do hereby ORDER as follows:
>
> **SECTION 1. DESIGNATION OF JUNETEENTH AS A CITY HOLIDAY**
>
> June 19 of every year is designated a holiday for all City employees and shall be treated as such in accordance with the applicable Civil Service regulations and Administrative Board rules.
>
> **SECTION 2. RENAMING OF HOLIDAY**
>
> The City holiday celebrated on the second Monday in October, formerly known as Columbus Day, shall now be designated as Indigenous Peoples' Day.

[5] Plaintiffs make no claim objecting to the recognition of Juneteenth by the City of Philadelphia.

> **SECTION 3. DIRECTIVE TO CITY OFFICIALS**
>
> The Director of Finance, Chief Administrative Officer and Deputy Mayor for Labor are directed to make appropriate notifications to effectuate this Order.

Appx043-044 (emphasis in original). Black residents, and in particular descendants of those subject to the heinous practice of slavery, received the designation of a new holiday in Executive Order 2-21; people of indigenous origin or descent received recognition from the Defendants based on a newly named holiday "on the second Monday in October;" Italian Americans, on the other hand, saw the Defendants wipe from the calendar a holiday celebrating their national hero, Christopher Columbus, and a holiday which was established to incorporate Italian Americans into American life: Columbus Day. The order itself establishes, even without the additional, amplifying statements by Defendant Kenney—which add egregiousness to Executive Order 2-21 because of their diminishment of Italian Americans— that Plaintiffs were members of a protected class, treated differently from others similarly situated, for a reason based on national origin or ethnicity. This is the very definition of a prima facie equal protection case.

2. Strict Scrutiny Applies and Defendants Cannot Defend Executive Order 2-21

The Supreme Court has laid down, in no uncertain terms, the standard to be applied in equal protection cases like this. Where a statute (or Executive Order 2-21) falls under the general rule, and implicates no automatically suspect

categorization, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne*, 473 U.S. at 440. For example, in *City of Cleburne*, the Supreme Court rejected any heightened equal protection scrutiny as it applied to individuals with mental disabilities, because that classification was a natural classification for the state to make in its regulatory acts. *Id*. at 442-43.

Executive Order 2-21, however, makes a classification by national origin (or ethnicity) directly on its face, striking Columbus Day from governmental recognition and substituting Indigenous Peoples' Day. Such government actions face a very different level of scrutiny under the Equal Protection Clause:

> The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy-a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.

Id. at 440. The Supreme Court has swept aside, as invalid, many statutes that violate strict scrutiny under the Equal Protection Clause, on the simple rationale that the language of the statute benefitted or burdened a race, alienage, national origin, or ethnicity. *See Graham v. Richardson*, 403 U.S. 365, 374 (1971)

(prohibiting residency and citizenship restrictions on welfare benefits); *McLaughlin v. State of Fla.*, 379 U.S. 184 (1964) (invalidating statute making racial categorization in cohabitation). This case is, at its heart, no different: the Defendants must face strict scrutiny—and fail to meet it—because they cannot establish a compelling state interest in prioritizing Indigenous Peoples' Day over Columbus Day, which is historically and Italian American Holiday. The distinction in Executive Order 2-21 is made purely on the basis of national origin or ethnicity: indigenous peoples receive a holiday, and Italian Americans lose a holiday.

CONCLUSION

For all of the reasons set forth herein, Appellants respectfully requests that this Honorable Court reverse the District Court.

Respectfully submitted,

/s/ George Bochetto

_____

George Bochetto, Esquire
Attorney for Appellant

Dated: April 19, 2022

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(b) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 9,437 words according to Microsoft Word.

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Respectfully submitted,

/s/ George Bochetto

Dated: April 19, 2022

George Bochetto, Esquire
Attorney for Appellant

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Respectfully submitted,

/s/ George Bochetto

Dated: April 19, 2022

George Bochetto, Esquire
Attorney for Appellant

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Respectfully submitted,

/s/ George Bochetto

Dated: April 19, 2022

George Bochetto, Esquire
Attorney for Appellant

CERTIFICATE OF BAR MEMBERSHIP

At least one attorney whose name appears on this Brief is a member of the Bar of this Court.

Respectfully submitted,

/s/ George Bochetto

Dated: April 19, 2022

George Bochetto, Esquire
Attorney for Appellant

CERTIFICATE OF SERVICE

The electronic copy of this brief was filed and served via ECF, and that one paper copy of the appendix and brief were served on opposing counsel on April 19, 2022.

Respectfully submitted,

/s/ George Bochetto

Dated: April 19, 2022

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