

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

STEVEN BAGENSKI, GILDA
CUMMINGS, and JEFF GERAGI,

Plaintiffs,

No. 1:15-cv-22096

vs.

MIAMI-DADE COUNTY,
FLORIDA, MIAMI-DADE POLICE
DEPARTMENT DIRECTOR J.D.
PATTERSON, in his official
capacity, and OFFICER JOHN
ALEXANDER JR., in his individual
capacity,

Defendants.

/

COMPLAINT

Plaintiffs STEVEN BAGENSKI, GILDA CUMMINGS, and JEFF GERAGI
sue Defendants MIAMI-DADE COUNTY, FLORIDA, MIAMI-DADE COUNTY
POLICE DEPARTMENT DIRECTOR J.D. PATTERSON, and OFFICER JOHN
ALEXANDER JR., and allege as follows:

INTRODUCTION

1. The Miami Seaquarium (“Seaquarium”) houses and displays an orca,
or killer whale, called Lolita. For years, animal rights advocates, including
Plaintiffs, have opposed the Seaquarium’s captivity and treatment of Lolita, whom

it holds in a small tank without the companionship of other orcas. On the public sidewalk outside the Seaquarium, the advocates hold signs, chant slogans, speak to potential visitors, and hand them leaflets to persuade them not to patronize the facility. In response, the Seaquarium hired off-duty Miami-Dade Police Department (“MDPD”) officers to police the advocates. To assist these officers, MDPD created “red zones” on the public sidewalk where it prohibits advocacy. Pursuant to MDPD’s red zone policy, Officer Alexander arrested Bagenski who was advocating in the red zone. Also pursuant to the policy, MDPD officers, including Officer Alexander, have ordered Cummings and Geragi, as well as other advocates, not to stand in the red zone, virtually eliminating their ability to give leaflets to potential visitors or engage in conversations with them about the Seaquarium’s treatment of animals. Additionally, Officer Alexander has threatened to arrest advocates for distributing leaflets on any part of the public sidewalk, even outside of the red zones.

2. MDPD’s red zone policy and Officer Alexander’s leafletting ban each substantially burden the advocates’ opportunity to reach their intended audience and persuade visitors through conversation and leafletting on a public sidewalk—the quintessential example of a public forum. They violate the advocates’ free speech rights protected by the First Amendment to the U.S. Constitution.

JURISDICTION AND VENUE

3. Plaintiffs bring this action pursuant to 42 U.S.C. § 1983, for violation of their rights under the First, Fourth, and Fourteenth Amendments to the U.S. Constitution. All Plaintiffs seek declaratory and injunctive relief, and Bagenski also seeks monetary damages.

4. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1343(a)(3) (civil rights). Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202, and injunctive relief pursuant to Fed. R. Civ. P. 65.

5. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391. All Defendants and all Plaintiffs reside in this district, and the unconstitutional practices that give rise to the Complaint occurred in Miami-Dade County, Florida.

PARTIES

6. Defendant Miami-Dade County, Florida (“County”), is a political subdivision of the State of Florida organized under the laws of Florida. The County operates and controls the Miami-Dade Police Department. Beginning in the summer of 2014, MDPD instituted and enforced the red zone policy prohibiting advocacy in certain portions of the public sidewalk in front of the Seaquarium.

7. Defendant J.D. Patterson is the Director of MDPD and the official with final policymaking authority for the County with respect to law enforcement

activities by MDPD officers, including the creation and enforcement of the red zone policy. He is sued in his official capacity.

8. Defendant John Alexander Jr. is an officer in MDPD. He was at all times relevant to this complaint acting under color of law. Officer Alexander works off-duty at the Seaquarium and polices the advocates. He is sued in his individual capacity.

9. Plaintiff Steven Bagenski is an animal rights advocate who resides in Miami-Dade County. He recently retired from law enforcement, after 34 years in federal service, including, most recently, at U.S. Customs & Border Protection. He has advocated on several occasions on the public sidewalk in front of the Seaquarium and would like to do so in the future.

10. Plaintiff Gilda Cummings is an animal rights advocate who resides in Broward County, has regularly advocated on the public sidewalk in front of the Seaquarium for the past two years, and plans to continue doing so for the foreseeable future.

11. Plaintiff Jeff Geragi is an animal rights advocate who resides in Palm Beach County, has regularly advocated on the public sidewalk in front of the Seaquarium for the past five years, and plans to continue doing so for the foreseeable future.

FACTUAL ALLEGATIONS

12. Lolita is a 20-foot-long 7,000-pound orca who has lived at the Seaquarium since September 1970 in a tank that is approximately 80 x 60 x 20 feet. Since 1980, when a fellow orca died after repeatedly ramming his head into the walls of the tank, Lolita has lived there without the companionship of other orcas.

13. The Seaquarium is located at 4400 Rickenbacker Causeway on Virginia Key in Biscayne Key, Florida. A public sidewalk runs along the north side of the Seaquarium's parking lot and property. The sidewalk is approximately 9 feet wide. It is separated from the bike path and roadway by a greenspace approximately 16 feet wide.

14. Animal rights supporters, including Plaintiffs, have advocated in front of the Seaquarium on this public sidewalk for years to raise awareness about the treatment of Lolita.

15. While these rallies used to occur once or twice a month, they now occur almost every weekend.

16. Advocates communicate their support for animal rights and attempt to dissuade visitors from patronizing the Seaquarium in multiple ways. They display signs, wear printed T-shirts, chant slogans, distribute educational leaflets, and

engage in conversations with visitors to raise awareness about the Seaquarium's treatment of Lolita.

17. Through these actions, the advocates have persuaded many visitors not to patronize the Seaquarium. On a good weekend, they have persuaded 30-40 cars to turn back. On some occasions, the visitors who are persuaded not to patronize the Seaquarium have joined in with the advocates.

18. In the last five years, Plaintiffs are unaware of any traffic accidents or near-accidents related to the activities of animal rights advocates in front of the Seaquarium.

19. During these rallies, MDPD officers have worked and continue to work as security at the Seaquarium pursuant to off-duty assignments coordinated by MDPD's Police Operations Section.

20. According to these assignments, the primary responsibility of MDPD officers at the Seaquarium is to police the conduct of the advocates.

21. In the summer of 2014, MDPD's Police Operations Section began circulating maps to MDPD officers that displayed the public sidewalk in front of the Seaquarium. On the maps, MDPD initially designated approximately 15 feet of the public sidewalk west of the Seaquarium's entrance driveway a "red zone" ("entrance red zone"), where "[d]ue to safety concerns demonstrators are not allowed."

22. MDPD subsequently received a letter from an attorney at People for the Ethical Treatment of Animals informing it that the entrance red zone was unconstitutional and pointing out that the alleged “safety concerns” were pretextual, exposed by the fact that there was no similar red zone on the public sidewalk bordering the Seaquarium’s exit driveway.

23. In response to this criticism, in January 2015, MDPD revised its maps to designate approximately 25 feet of the public sidewalk bordering the Seaquarium’s exit driveway a “red zone” (“exit red zone”), and changed the terminology of the prohibition, from saying that “*demonstrators* are not allowed” to saying that “*individuals* are not allowed” in the red zone.

24. Before the summer of 2014, animal rights supporters engaged in advocacy while standing a few feet from the driveway on the public sidewalk in what is now the red zone, where they were closest to visitors and potential visitors.

25. Since the summer of 2014, MDPD has prohibited animal rights advocates from standing on the public sidewalk in the red zone, although not every officer consistently enforces the policy.

26. Exhibit 1, attached as ECF 1-1, displays the portions of the public sidewalk MDPD currently designates as a red zone, where it prohibits advocacy.

27. MDPD has designed the remainder of the public sidewalk outside the red zone as the “green zone,” where the public may engage in advocacy.

28. The public sidewalk in front of the Seaquarium, both in and out of the red zone, is a traditional public forum for speech.

29. No painted lines or other markings on the sidewalk demarcate where the red zone begins or ends.

30. Consistent with the maps and MDPD's policy, Officer Alexander and other MDPD officers have ordered advocates to leave that part of the public sidewalk in the red zone under threat of arrest.

31. Aside from Officer Alexander, Officer Dawn Lipscomb, Sergeant Pete Taylor, as well as at least one other MDPD officer whose name is unknown have enforced MDPD's policy of prohibiting advocacy on the public sidewalk in the red zone.

32. MDPD officers ordered advocates to vacate areas of the sidewalk and informed them that they were doing so pursuant to the red zone maps.

33. All Plaintiffs have been ordered out of the red zone by one or more MDPD officers.

34. On August 31, 2014, Bagenski attended a rally in front of the Seaquarium.

35. He held a sign about Lolita on the public sidewalk in the entrance red zone.

36. Officer Alexander ordered Bagenski to leave the red zone and arrested him when he did not immediately leave the red zone.

37. Officer Alexander showed Bagenski a copy of the MDPD map on his patrol car computer and told Bagenski that he was arrested for advocating in the red zone, a forbidden area

38. Bagenski was detained for over 13 hours before he was released at 4:00 a.m. after paying \$100 to a bail bond agent. He spent around \$60 for a taxi home. Bagenski subsequently paid \$2,500 to hire an attorney to defend against the arrest charges.

39. The prosecutor dropped the charges against Bagenski.

40. Officer Alexander and other MDPD officers have ordered advocates, including Cummings, not to hand leaflets to Seaquarium visitors from the red zone, or else face arrest.

41. MDPD has issued citations to one or more persons who stood on the public sidewalk in the exit red zone and distributed leaflets to visitors leaving the Seaquarium.

42. Officer Alexander ordered advocates, including Cummings, under threat of arrest, to cease distributing leaflets on the public sidewalk outside the red zone (in the “green zone”) to Seaquarium visitors who walk over to discuss Lolita.

43. Officer Alexander has likewise told Seaquarium visitors who go to the “green zone” in order to take a leaflet from advocates, including Geragi, that they many not take the leaflets or else the advocates will be arrested.

44. MDPD has issued one or more citations for trespassing on the Seaquarium’s property to advocates who have lost their balance and momentarily stepped onto the Seaquarium’s parking lot.

45. Defendants’ creation and enforcement of the red zone advocacy prohibition on the public sidewalk has substantially burdened Plaintiffs’ speech. It has prevented Plaintiffs from talking to visitors entering the Seaquarium in a normal conversational tone of voice. Instead, Plaintiffs must either remain silent or resort to yelling or using megaphones to get the attention of Seaquarium visitors. None of these alternatives are as effective at dissuading potential visitors as simply talking to them.

46. Individuals in the red zone are clearly visible and audible to visitors to Seaquarium. Only from the red zone can advocates engage vehicle occupants in conversation about Seaquarium’s treatment of Lolita. Only from the red zone can advocates distribute leaflets to vehicle occupants. The “green zone” is so far back from the Seaquarium’s driveways that the advocates’ signs there cannot easily be seen by prospective Seaquarium visitors. Thus, the public sidewalk outside the red

zone does not provide ample alternative channels for the advocates to effectively communicate their message to their intended audience.

47. Defendants' prohibitions have also substantially burdened Plaintiffs' ability to communicate with Seaquarium visitors by preventing them from distributing leaflets anywhere on the public sidewalk, whether in the "red zone" or the "green zone."

48. Geragi estimates that on weeks when the red zone is enforced by MDPD officers, and the advocates are pushed back 15 feet from the entrance and 25 feet from the exit, the advocates are able to persuade only about half as many visitors not to patronize the Seaquarium.

49. MDPD's enforcement of the red zone has deterred persons from advocating and reduced Plaintiffs' ability to attract other advocates to the Seaquarium. After a weekend in which MDPD officers arrest, cite, or threaten someone with arrest, that individual often does not return, and many other advocates also stay away. This reduces Plaintiffs' ability to magnify their speech with the participation of others.

50. Bagenski would like to stand and advocate on the public sidewalk in the red zone to dissuade visitors from patronizing the Seaquarium. However, MDPD's policy and threats of arrest have chilled him. He has returned only once

since his arrest because he fears that he will again be arrested pursuant to MDPD's red zone policy.

51. Cummings and Geragi, who still regularly attend rallies, would like to stand and advocate on the public sidewalk in the red zone. They would like to communicate with visitors one-on-one in a conversational tone and hand them educational leaflets regarding Lolita's treatment. But they have not done so because of MDPD's red zone policy and because they fear being arrested.

52. Defendants' creation and enforcement of the red zone policy substantially burdens Plaintiffs' speech in a public forum, as it has prevented and continues to prevent them from conversing with Seaquarium visitors or giving them literature on animal rights from those portions of the public sidewalk where they are most visible and audible.

53. Plaintiffs have suffered and will continue to suffer irreparable injury as a result of Defendants' creation and enforcement of the red zone policy. Unless restrained by this Court, Defendants will not discontinue this unconstitutional policy. Plaintiffs have no adequate remedy at law other than this action for declaratory and injunctive relief.

54. Defendants acted and threaten to continue acting under color of state law at all times alleged in this complaint.

COUNT I:
FREE SPEECH – FIRST AMENDMENT
(ALL PLAINTIFFS AGAINST ALL DEFENDANTS)

55. Plaintiffs reallege and incorporate by reference all of the foregoing allegations.

56. Through MDPD and its police officers, including Officer Alexander, Defendants have unreasonably restricted and continue to unreasonably restrict Plaintiffs' protected speech in a public forum in violation of the First Amendment (and made applicable to Defendants through the Fourteenth Amendment) of the U.S. Constitution. The Defendants' creation and enforcement of the red zone policy is the cause in fact of the constitutional injury.

57. As a result of the creation and enforcement of the red zone policy, Plaintiffs' speech has been chilled and they have been injured. The red zone policy deters Bagenski from attending rallies and eliminates Cummings' and Geragi's ability to converse with Seaquarium visitors in a normal tone of voice or give them leaflets from that part of the public sidewalk where they are most visible and audible to the visitors.

58. The County's red zone policy is unconstitutional upon its face and as applied to Plaintiffs.

59. This constitutional violation may be redressed pursuant to 42 U.S.C. § 1983.

COUNT II:
SEIZURE – FOURTH AMENDMENT
(PLAINTIFF BAGENSKI AGAINST ALL DEFENDANTS)

60. Plaintiff Bagenski realleges and incorporates by reference all of the foregoing allegations.

61. Through MDPD and its police officers, including Officer Alexander, by arresting Bagenski for standing on the public sidewalk a few feet from the entrance in the “red zone” and detaining him for over 13 hours, Miami-Dade County and Director Patterson deprived Bagenski of the right to be free from unlawful seizures as guaranteed by the Fourth Amendment (and made applicable to Defendants through the Fourteenth Amendment) of the U.S. Constitution. The County and Patterson’s creation of its red zone policy and Officer Alexander’s arrest of Bagenski pursuant to this policy are the causes in fact of the constitutional deprivation.

62. As a result of the arrest and detention, Bagenski suffered damages, including, but not limited to, humiliation, fear, loss of liberty, and emotional distress.

63. The County’s red zone policy is unconstitutional as applied to Bagenski.

64. This constitutional violation may be redressed pursuant to 42 U.S.C. § 1983.

COUNT III:
LEAFLETS – FIRST AMENDMENT
(PLAINTIFFS CUMMINGS AND GERAGI AGAINST DEFENDANT ALEXANDER)

65. Plaintiffs Cummings and Geragi reallege and incorporate by reference all of the foregoing allegations.

66. By prohibiting advocates from giving leaflets to Seaquarium visitors in the “green zone” and prohibiting visitors from getting leaflets from advocates in this area, Officer Alexander has unreasonably restricted and continues to unreasonably restrict Plaintiffs Cummings’ and Geragi’s protected speech in violation of the First Amendment (and made applicable to Officer Alexander through the Fourteenth Amendment) of the U.S. Constitution. Officer Alexander’s prohibition on distributing leaflets is the cause in fact of the constitutional injury.

67. As a result of this prohibition Plaintiffs’ speech has been chilled and they have been injured, effectively eliminating their ability to distribute leaflets from any place in front of the Seaquarium, even in those places Defendants acknowledge advocates are allowed to be.

68. Officer Alexander’s prohibition on leafletting is unconstitutional upon its face and as applied to Plaintiffs.

69. This constitutional violation may be redressed pursuant to 42 U.S.C. § 1983.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request the following relief:

- A. An order declaring MDPD's red zone policy, which unreasonably restricts protected speech on the public sidewalk in front of the Miami Seaquarium, violates, facially and as-applied, the First Amendment to the U.S. Constitution;
- B. An order declaring MDPD's arrest of Bagenski pursuant to the red zone policy violated the First and Fourth Amendments to the U.S. Constitution;
- C. An order permanently enjoining Defendants from enforcing the red zone policy;
- D. An order declaring Officer Alexander's prohibition of leafletting in front of the Miami Seaquarium violates, facially and as-applied, the First Amendment to the U.S. Constitution;
- E. An order permanently enjoining Officer Alexander from enforcing this prohibition;
- F. An award of compensatory damages for the violation of Bagenski's constitutional rights;
- G. An award to Plaintiffs of reasonable attorneys' fees, litigation expenses, and costs incurred in connection with this action from the Defendants pursuant to 42 U.S.C. § 1988;

H. An order retaining the Court's jurisdiction of this matter to enforce the terms of the Court's orders; and

I. Such further and different relief as is just and proper or that is necessary to make Plaintiffs whole.

Dated: June 2, 2015

Respectfully Submitted,

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