Case No. 09-2386

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JUAN LOPERA, ET AL

Plaintiffs/Appellants

vs.

TOWN OF COVENTRY, ET AL.,

Defendants/Appellees

On Appeal From A Judgment Of The United States District Court
For The District of Rhode Island

BRIEF FOR THE DEFENDANTS/APPELLEES

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STATEMENT OF FACTS

Because this matter comes before the Court on a Motion for Summary Judgment, the Court must view the facts in the light most favorable to plaintiff. However, although the nonmoving party is given the benefit of all reasonable inferences, a party cannot rest on "conclusory allegations, improbable inferences, [or] unsupported speculation" to defeat a motion for summary judgment. *Welch v. Ciampa, 542 F.3d 927, 935 (1st Cir. Mass. 2008).* Thus, in reviewing a motion for summary judgment, this Court, like the District Court, does not ignore relevant facts or apply unreasonable conclusions to the undisputed facts.

On September 28, 2006, the Central Falls High School's men's soccer team played a game at Coventry High School. At some point, some of the Central Falls players entered the High School, with permission, to use the restrooms. At the end of the game, members of the Coventry football team accused one of the plaintiffs of stealing electronic equipment (ipod and cell phone) from the locker room located near the restrooms. These football players approached the Central Falls soccer coach, Robert Marchand, as the coach was leaving the field. *Deposition of Robert Marchand, (January 6, 2009), at 18-19 (hereinafter "Marchand Tr.") (Plaintiff's Appendix, at 57 (hereinafter "App. at __").* The plaintiffs were in the parking lot getting on their bus when the Coventry students approached the coach on the field. Coach Marchand responded by telling the Coventry players "let's get

to the bottom of this" and leading the Coventry students to the Central Falls's bus. Id. *at 19. (App at 57).* At that point there were no Coventry students around the bus. Id. *at 20 (App. at 57).* Coach Marchand made the Coventry players stop a short distance from the bus and then, with the help of his assistant coach, went on the bus and searched the plaintiffs' equipment. Id. *at 21-22 (App. at 5 to 58).* Coach Marchand did not inform his players what he was doing or why until he was approximately halfway done with the search. Id. During his deposition, Coach Marchand explained that he had been present during a prior incident between different rivaling schools where the students got out of control resulting in a "brawl". Id. *at 13-15 (App. at 56).* Coach Marchand thus thought it was best and safer for all involved to try to quickly diffuse the situation by searching his players himself. Id.

After searching all the players' bags, Coach Marchand determined that plaintiffs were not involved in the alleged theft. When Coach Marchand exited the bus to advise the Coventry students that he had found nothing, he discovered that the Coventry Athletic Director had arrived and that the group of less than 20 students had grown. Coach Marchand spoke directly with the Athletic Director and advised him that he had searched the players and was satisfied that they were not involved in the theft. Id. *at 15 & 23 (App. at 56 & 58).* Coach Marchand

offered to let the Coventry Athletic Director search the players himself but the Athletic Director declined. *Id. at15 & 24 (App. at 56 & 58*).

Just as Coach Marchand was relaying the results of his search to Coventry's Athletic Director, four (4) Coventry police officers quickly pulled into the parking lot with lights on. In their summary of facts, plaintiffs omit the undisputed fact that the Coventry Police Department had received two (2) calls that there were ongoing fights in the parking lot between the two teams thus explaining the officer's response. *Id. at 15 (App. at 56).* Upon the officers' arrival, the Coventry's Athletic Director and Coach Marchand quickly brought them up to speed on what was going on and assured them that there was no fight. Coach Marchand, in particular, informed the officers that there had been a theft in the school and that his players, the plaintiffs, were the "prime suspects." *Id. at 27 (App. at 59).* While the officers were speaking with Coach Marchand, some of the spectators started making various comments about not trusting the coach and insisting that the plaintiffs were involved in the theft. *Id. at 15-16 (App. at 56).* However, Coach Marchand confirmed that each time such statements were made, either the police officers or the Athletic Director would tell the spectators to stop, quiet down and that the officers would take care of things. *Id. at 16 & 27 (App. at 56 & 59).*

Coach Marchand testified that after he told the police officers that the plaintiffs were the prime suspects but that he conducted a search and was satisfied that they were not involved, there was "a pregnant pause" where it was obvious to Coach Marchand that the officers were trying to figure out what to do next. *Id. at 27 (App. at 59).* According to Coach Marchand, one of officers then asked if the Coach would allow the officers to also conduct a search.[1] Coach Marchand readily agreed because he believed that it was best to have his players names cleared and to leave the area for the safety of the plaintiffs. *Id. at 28 (App. at 59).* Under questioning by plaintiffs' attorney, Coach Marchand later testified that given his obligation as coach and "father" to the plaintiffs, he thought it would be best "take the high road" and allow the officers to search them in order to clear their names. *Id. at 28, 32 & 44-45 (App. at 59, 60 & 61-62).* In response to plaintiffs' attorney's inquiry as to the "duress" the Coach felt in giving this consent, the Coach explained that the duress was the result of the crowd around the bus and the uncertainty of how they would react. *Id. at 44-45 (App. at 61-62).* Sergeant Michailides testified that if the coach had not consented or if the plaintiffs themselves had protested, they would not have conducted the search. *Deposition of*

[1] Although not material for purposes of the instant motion, the officers testified that they did not ask for consent to search. Rather, it was Coach Marchand who offered to allow the officers to search the students. *Michailides Tr., at 44 (App. at 83).*

Stephen Michailides (December 18, 2008), at 47 (hereinafter "Michailides Tr.") (App. at 83).

Coach Marchand then instructed his players to allow the officers to look through their bags. For officer safety, the officers had the players step outside the bus and conducted a search by looking into their respective bags and having the students turn out their pockets. *Id. at 48-49 (App. at 83).* The officers completed their search and did not find the missing items. The officers then advised the Coach that they would escort the Central Falls's bus from the school. *Marchand Tr., at 31-32 (App. at 60).*

Although plaintiffs allege that they were subject to racial and ethnic slurs from the opposing team and the Coventry bystanders, the plaintiffs did not report these slurs to the defendants that day.[2] While the officers confirmed that they heard the Coventry spectators yelling accusations of theft at the Central Falls players, the officers themselves never heard any racial slurs against the plaintiffs. *Michailides Tr., at 41; Deposition of David Nelson (December 17, 2008)("Nelson*

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[2] It is noteworthy that although plaintiffs spend considerable time in their Brief outlining the racial slurs and comments made during the soccer game and before the officers' arrival, such accusations are immaterial to the instant Motion. A fact is 'material' if it potentially could affect the suit's outcome. An issue concerning such a fact is 'genuine' if a reasonable fact finder, examining the evidence and drawing all reasonable inferences helpful to the party resisting summary judgment, could resolve the dispute in that party's favor." *Cortes-Iriszarry v. Corporacion Insular DeSeguros, 111 F.3d 184, 187 (1st Cir. 1997) (citations omitted).*

Tr.”), at 45. Notably, the plaintiffs do not allege that the defendant officers used racial or ethnic slurs against the students. In support of their appeal, plaintiffs cite to the testimony of the students on the bus to support the claim that the spectators were yelling racial slurs while the officers were present. However, Coach Marchand, who was standing next to the officers during this timeframe, testified that although the spectators were accusing the players of theft, there were no racial slurs mixed in with these accusations. *Marchand Tr. at 45-46 (App. at 62).* In fact, according to Coach Marchand the officers were courteous and professional “at all times” and repeatedly told the bystanders to quiet down. *Id. at 26, 27 and 32 (App. at 59 &60).*

In this case, there is absolutely no evidence to support a finding that the officers were made aware of the comments and tension that occurred during the game.

SUMMARY OF ARGUMENT

Plaintiffs, all former soccer players for Central Falls High School, subsequently brought suit against the Town of Coventry, RI and several individual police officers seeking to recover pursuant to *§ 1983* for the alleged violation of plaintiffs' due process and equal protection rights, as well as pursuant to R.I.'s Racial Profiling Act, *R.I. Gen. Laws § 31-21.2* and the State's statute against ethnic intimidation, *R.I. Gen. Laws § 9-1-35*. Plaintiffs now maintain that Coach Marchand lacked authority to consent to a search on their behalf and that the officers' actions were motivated by discriminatory animus towards their race. After hearing, the District Court found it was not clearly established that the coach lacked authority to consent on the behalf of his players to the search and that the officers would not reasonably believe that they would be violating plaintiffs' rights by relying upon the consent to justify the search. The Court also found that the evidence was not sufficient to warrant a jury finding that the officers acted pursuant to discriminatory animus such to amount to a violation of plaintiffs' Equal Protection rights.[3]

Defendants submit the District Court did not err in finding that defendants were entitled to qualified immunity from plaintiffs' Fourth Amendment claims. The touchstone of whether an official is entitled to qualified immunity is whether

an objectively reasonable officer, standing in the shoes of these officers, would believe that their actions infringed upon a clearly established right. Although the Supreme Court in New Jersey v. T.L.O., *469 U.S. 325, 336 (1985)* had found that school officials are state actors for Fourth Amendment purposes when they conduct a search of students, since the issuance of T.L.O., courts have had an opportunity to address school personnel's *in loco parentis* standing in various circumstances with varying results. As outlined below, this Court itself has recognized that acting *in loco parentis,* school personnel seeking to promote the best interest of a child suspected of being the victim of abuse, did not infringe upon the student's Fourth Amendment right to be free from unlawful seizure by transferring the student to another school for questioning by state social workers. *Wojcik v. Town of North Smithfield, 76 F.3d 1, 3 (1st Cir. 1996).*

Moreover, in determining if a right is clearly established, the Court must look to the contours of the right in a more particular setting rather than on a general level. In this case, unlike T.L.O. and the other cases cited by plaintiffs, the plaintiffs were under the supervision of their coach, off-campus, several miles away from their school. Coach Marchand testified that it was his obligation as a "father" to the students in this circumstance that prompted in part his decision to consent to a search in order to quickly resolve the situation. Defendants submit

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[3] Plaintiffs have not appealed the District Court's finding that there were no facts to

that in light of the case law identifying various circumstances in which courts have recognized a level of authority by school personnel to act on behalf of students, as well as the unique circumstances of this case, it cannot be said that reasonable officers would believe that their actions violated a clearly established right.

The expressed concern by plaintiffs of the future implications of the District Court decision, coupled with the stated desire by the amicus curiae brief offered by the R.I. American Civil Liberties Union, for the Court to offer guidance to police personnel in this area, further demonstrates a lack of clarity on the issue. Quite simply, if the law is so clearly established to put these officers on notice that their actions infringed upon plaintiffs' constitutional rights, there would be no need to clarify the issue or offer guidance.

Plaintiffs further claim that even if the coach could consent on behalf of the students, a material factual issue as to whether the consent was voluntary precluded the entry of summary judgment. In the first instance, the determination of whether consent was coerced "is based, not on the perceptions of the individual searched, but on the the coerciveness of the officer's conduct in obtaining the consent." *U.S. v. Quezada, 1991 U.S. App. LEXIS 22712 (4th Cir. 1991) (unpublished per curiam opinion).* In this case, Coach Marchand testified that the officers did nothing, other than not taking his word that players did not have the contraband, to coerce his

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support the claims against the City and supervisory personnel.

consent. Although Coach Marchand testified that he was under "duress" from the presence of the crowd, there is no indication that the officers said or did anything to coerce this consent.

Defendants further submit that there is no basis to find that the officers acted out of discriminatory animus against plaintiffs' race such to warrant a finding that plaintiffs' Equal Protections rights or rights under R.I.'s Racial Profiling and Racial/National Origin Intimidation statutes were violated. First, plaintiffs pointed to absolutely no evidence that would support the conclusion that the defendant officers knew the plaintiffs' race at the time they sought permission to conduct the search. In addition, although plaintiffs recite various racial slurs and derogatory comments made by the Coventry soccer team during the game and members of the crowd after the game, it is undisputed that the officers did not say anything that would give rise to an inference of discriminatory animus. Plaintiffs nevertheless seek to impute the crowd's perceived prejudice upon the officers. As outlined below, there is simply no factual or legal support to transfer such animus onto the officers or to conclude that it motivated their decision to seek consent to search the students. As such, the District Court correctly held that defendants were entitled to summary judgment on plaintiffs' equal protection and state law claims.

In the final analysis, although the Court may question whether the officers' handling of the dispute was the best solution, as a matter of law, it cannot be said

that a reasonable officer would believe that they were violating a clearly established right or that the officers' actions were motivated by discriminatory animus. As such, summary judgment in favor of defendants should be affirmed and the instant appeal dismissed.

ARGUMENT

I. Defendants Are Entitled To Qualified Immunity

Defendants submit that the District Court correctly found that the defendants were entitled to qualified immunity from the instant suit. In the instant case, plaintiffs first alleged that their right to be free from unlawful search and seizure was violated by the officers. Of course, "an established exception" to the Fourth Amendment requirements is a search that is conducted pursuant to consent. *Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); U.S. v. Vilches-Navarrete, 523 F.3d 1, 15 (1st Cir. 2008).* The District Court found that in light of Coach Marchand's consent to search the plaintiffs, the defendant officers are entitled (at a minimum) to qualified immunity from plaintiffs' Fourth Amendment claim.[4] In reaching this holding, the District Court noted that the clarity of the law at the time was not such that a reasonable officer standing in the shoes of these officers would believe that relying on Coach Marchand's consent would violate plaintiffs' constitutional rights.

On appeal, plaintiffs seek to reverse the District Court's holding based primarily on the position that it was "clearly established" that a school coach lacked authority to consent to the search of high school players while the team was

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[4] The District Court also recognized that consent from a third party with apparent authority to provide the consent is a valid exception to the Fourth Amendment restrictions. *Lopera v. Coventry, at 9-10.*

at an away game. However, defendants submit that the determination of whether a particular officer is entitled to qualified immunity requires more analysis than simply the determination, on the general level suggested by plaintiffs, that a right is "clearly established" without further consideration of whether a reasonable officer would have understood that his conduct in that particular circumstance violated such a right. In the instant case, for the reasons outlined herein, not only was it not as clearly established as plaintiffs' suggest that the coach lacked authority to consent to the search of his players at an off-campus game, it nevertheless cannot be said that a reasonable officer in the shoes of these officers would have understood that these actions infringed upon the plaintiffs' rights. Accordingly, the District Court's entry of summary judgment in favor of defendants should be affirmed.

A. THE ALLEGED INABILITY OF COACH MARCHAND TO CONSENT ON BEHALF OF HIS PLAYERS DURING AN OFF-CAMPUS GAME WAS NOT SO CLEAR THAT A REASONABLE OFFICER STANDING IN THE SHOES OF THESE DEFENDANTS WOULD KNOW THAT HIS/HER CONDUCT VIOLATED PLAINTIFFS' CONSTITUTIONAL RIGHTS

Of course, the starting point in the instant case is the well-settled standard for determining if a governmental official is entitled to the protections of qualified immunity. Recently this Court reaffirmed that "[t]o determine whether a particular officer is entitled to qualified immunity, '[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." Maldonado v. Fontanes, *568 F.3d 263, 269 (1st Cir. 2009).*[5] The second step has two aspects: (1) "the clarity of the law at the time of the alleged civil rights violation" and (2) whether, on the facts of the case, "a reasonable defendant would have understood that his conduct violated the Plaintiffs' constitutional rights."[6] *Id. (emphasis added); see also* Anderson v. Creighton, *483 U.S. 635, 640 (1987) ("[To overcome qualified immunity, t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.")*. "Thus if a reasonable official would not have understood that his conduct violated Plaintiffs' constitutional rights. . . [they] must" be granted qualified immunity. Estrada v. R.I., *2010 U.S. App. LEXIS 2390, 14-15 (1st Cir. 2010)*.

Defendants submit that, given the state of the law regarding the coach's *in loco parentis* standing, a reasonable officer would not have understood that relying upon the coach's consent violated plaintiffs' constitutional rights. In support of the

[5] This Circuit has previously articulated qualified immunity analysis as a three-part test. *See, i.e.,* Bergeron v. Carbral, *560 F.3d 1, 7 (1st Cir. 2009).* However, recently, this Court adopted the "[Supreme Court's] two-part test and abandoned [the] previous usage of a three-step analysis." Estrada v. State of Rhode Island, *2010 U.S. App. LEXIS 2390 (1st Cir. 2010), n. 14 citing* Maldonado, *568 F.3d at 269.*

[6] As discussed *infra*, the Supreme Court has granted lower courts the discretion to "put to the side" the first step of this analysis and move on to determine whether

instant appeal, plaintiffs rely primarily upon New Jersey v. T.L.O., *469 U.S. 325, 336 (1985)* for the claim that the right was clearly established such to deny defendants qualified immunity. However, in focusing on T.L.O., plaintiffs miss the mark by failing to take into consideration its progeny.[7]

As recognized by the District Court, since the issuance of T.L.O., courts have had an opportunity to address school personnel's *in loco parentis* standing in various circumstances with varying results. As very recently held by the Supreme Court "[t]raditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination . . . . They are subject . . . to the control of their parents or guardians. When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them." *Morse v. Frederick, 551 U.S. 393 (2007)(emphasis added)(holding that schools were entitled to take steps to safeguard those entrusted to their care from speech that could reasonably*

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the claimed constitutional right is clearly established. *Pearson v. Callahan, 129 S. Ct. 808, 818 (2009).*

[7] Plaintiffs also claim that *R.I. Gen. Laws § 16-21.5-1 et seq.,* in particular, *§ 16-21.5-3* further supports the diminished role of school officials in the face of police interrogations. Plaintiffs reliance on *§ 16-21.5-1 et seq.* is misplaced first because it involved police interrogations, not searches. In addition, rather than diminish the in loco parentis role of school officials, the statute reaffirms their parental role in the absence of such a guardian or parent. Specifically, *§ 16-21.5-2* provides that if a parent or guardian is unavailable, "a school administrator, school counselor, or school teacher who is reasonably available and selected by the pupil, shall be present during the questioning."

be regarded as encouraging illegal drug use) quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654, 655 (1995) (citation omitted)). In Vernonia, the Supreme Court explained that a teacher, who is *in loco parentis*, "has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed." *Vernonia Sch. Dist. 47J, 515 U.S. at 655 (quoting 1 William Blackstone, Blackstone's Commentaries on the Laws of England 441 (1769)) (emphasis added). Compare Hampton v. Oktibbeha County Sheriff Dep't, 480 F.3d 358, 362 (5th Cir. Miss. 2007).*

As recognized, yet discounted by plaintiffs, after *T.L.O.* the Supreme Court found in *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822 (2002)* and *Vernonia School District, 515 U.S. at 646*, that there were circumstances in which the *in loco parentis* standing of school officials would justify a suspicionless, random search in the form of drug testing. Those circumstances, as recognized by plaintiffs themselves, include dangers to student safety and disruption to general school discipline due to illegal drug use. *Plaintiffs' Brief at 35.*

In finding that the case law presented a "lack of clarity on the issue", the District Court also cited to a number of Circuit Court cases that have utilized the *in loco parentis* doctrine since *T.L.O.* in such a way that would give rise to the

reasonable belief that the coach possessed such authority. *Lopera v. Town of Coventry, (C.A. No. 08-123S), at 15 (Addendum to Plaintiffs' Brief).*[8] In Hampton, for example, the Fifth Circuit relied upon an administrator's *in loco parentis* standing to support the conclusion that a school administrator qualified as a "guardian or custodian" of a student under Mississippi's statute governing youth records. *Hampton, 480 F.3d at 36.* In that case, the police had arrived at school to execute a juvenile arrest warrant. Before turning the student over to the officers, however, the School's director requested to see the warrant. *Id. at 361.* The officer resisted but subsequently "waved the warrant" in front of the director such that the director could see the student's name on the document. *Id.* The Director then had staff retrieve the student from class and turned him over to the officer. Reasoning that under Mississippi's youth record statute, only a parent or guardian had authority to demand to view the warrant, the officers subsequently charged the director with obstructing a police officer. The charges, however, were subsequently dismissed based on the finding that the Director's *in loco parentis* position to the student qualified him as a "guardian or custodian" in the absence of

[8] *Hampton, 480 F.3d at 362; Ramos v. Town of Vernon, 353 F.3d 171, 183 n. 5 (2d Cir. 2003); Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir. 2000); Wojcik v. Town of North Smithfield, 76 F.3d 1, 3 (1st Cir. 1996); Hassan v. Lubbock Indep. Sch. Dist., 55 F.3d 1075, 1080 n. 15 (5th Cir. 1995); Rhodes v Guarricino, 54 F.Supp.2d 186, 192 (S.D.N.Y. 1999); Seal v. Morgan, 229 F.3d 567, 582 (6th Cir. 2000) (Suhrheinrich, J., dissenting in part); Schleifer by Schleifer v. City of*

the parents in the presence of the police and their attempt to take the student into custody. Id.

This Circuit has also recognized that school officials act *in loco parentis* with students in determining their best interests when dealing with other governmental entities. In *Wojcik v. Town of North Smithfield, 76 F.3d 1, 3 (1st Cir. 1996)*, certain statements and actions by two (2) sisters gave rise to the school's suspicion that the students had been abused by their parents. After reporting the concerns to the R.I. Department of Children, Youth and their Families (DCYF), the school officials decided to drive one sister from her school to her sister's school in order that the two (2) could be questioned by DCYF together. The school officials explained that they thought the younger sister would feel more comfortable being in the presence of her older sister during the questioning. *Id.* The parents subsequently brought suit against the school officials for *inter alia* unreasonable seizure resulting from the transfer of the child to another school for the interview. In rejecting the § 1983 claim both on the merits and the qualified immunity grounds, this Court held that it could not find that it was "unreasonable for the school, acting *in loco parentis*, to move one of the children from one school to another school in the vicinity" in order to facilitate the questioning by DCYF. *Id.* This Court specifically cited to the school officials'

Charlottesville, 159 F.3d 843, 861 (4th Cir. 1998); Knox Cty. Educ. Ass'n v. Knox

underlying rationale that it was in the best interest of the younger child to be in her sister's presence during potentially emotional questioning. Id.

These cases, along with the others cited by the District Court, support a reasonable belief on the part of the attending officers that Coach Marchand, who it is undisputed, otherwise serves *in loco parentis* to the students, possessed the authority to consent on the students' behalf during an away game in the circumstances presented. This authority is buttressed by the recognition that the coach had taken the students off school grounds and out of city limits for a school event. Unlike the cases cited by plaintiffs, wherein the school official's interaction with the students is limited to the school building itself, Coach Marchand's responsibility for his players is even broader when the players are taken off-campus in his care. In fact, Coach Marchand testified that he felt a special responsibility to make the right decision for the plaintiffs to protect their safety.

As noted, in determining whether an official is entitled to qualified immunity, "[a] defendant's acts are held to be objectively reasonable unless all reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution or the federal statute as alleged by the plaintiff." Thompson v. Upshur Cty., *245 F.3d 447, 457 (5th Cir. 2001)*. A "reasonable, although mistaken, conclusion about the

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Cty. Bd. of Educ., *158 F.3d 361, 375 (6th Cir. 1998).*

lawfulness of one's conduct does not subject a government official to personal liability." <u>*Cookish v. Powell*</u>*, 945 F.2d 441, 443 (1st Cir. 1991)*. Thus, "[q]ualified immunity may exist even though in hindsight a court might determine that the action of the official violated the constitution." <u>*Berthiaume v. Caron*</u>*, 142 F.3d 12, 15 (1st Cir. 1998) citing* <u>*Harlow v. Fitzgerald*</u>*, 457 U.S. 800, 814-15 (1982)*. The Court has observed that the "qualified immunity standard 'gives ample room for mistaken judgments' by protecting' all but the plainly incompetent or those who knowingly violate the law.'" <u>*Rivera v. Murphy*</u>*, 979 F.2d 259, 263 (1st Cir. 1992) quoting* <u>*Hunter v. Bryant*</u>*, 502 U.S. 224, 229 (1991)*.

In the instant case, the officers clearly do not fall within the category of being "plainly incompetent or knowingly violating the law." <u>*Id.*</u> When the officers arrived not only did Coach Marchand inform them that his players were the "prime suspects" in the theft but he also advised them that he had searched the players and did not find the stolen items. *Marchand Tr., at 27 (App. at 59).* The coach also unequivocally testified that it was his obligation as coach and "father" to the plaintiffs to make the best decision on their behalf and thus he agreed to allow the officers to conduct their own search for the missing items.

In light of the circumstances presented to the officers, it is simply was not so "clearly established" that Coach Marchand lacked authority to consent on behalf of his student players while chaperoning them to an away game, such that a

reasonable officer would believe that they were infringing upon plaintiffs' rights. In fact, in this case, the coach himself believed he had the authority and, perhaps obligation, to make the decision on behalf of his players to quickly clear his players of suspicion. Even though the Supreme Court has held that in certain circumstances, school officials lose their *in loco parentis* standing and become state actors under Fourth Amendment standards, that level of analysis is insufficient in determining if the officers are entitled to qualified immunity in the instant case. "The relevant inquiry is whether it would be clear to a reasonable officer that his conduct would be unlawful in the situation he confronted, and this inquiry must be taken in light of the case's specific context, not as a broad general proposition." *Buchanan v. Maine, 469 F.3d 158, 169 (1st Cir. 2006) citing Saucier v. Katz, 533 U.S. 194, 201-02 (2001).* Simply put, a reasonable officer in the place of these officers would not have believed that their actions infringed upon plaintiffs' clearly established rights.[9] As such, the defendants are entitled to qualified immunity.

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[9] Plaintiffs further argue that qualified immunity should be denied because at least one of the officers knew no basis to conduct the search. Plaintiffs maintain that one officer told the students that the search was "stupid" because the students were watched while in the locker room. However, even if accepted as an undisputed fact, "the Supreme Court has held that an officer's subjective belief is not dispositive of whether probable cause existed." *U.S. v. Pardue, 385 F.3d 101, 106 n.2 (1st Cir. 2004); Florida v. Royer, 460 U.S. 491, 507 (1983) ("[T]he fact that the officers did not believe there was probable cause and proceeded on a consensual or Terry-stop rationale would not foreclose the State from justifying . .*

It is noteworthy that Plaintiffs' and the Amicus' concerns as to the future implications of granting defendants qualified immunity are not only red herrings but also operate to support a finding of qualified immunity. On appeal, plaintiffs specifically argue that the District Court's decision has "disturbing implications for the future of students' Fourth Amendment rights" because police could conspire to do an "end run" around warrant requirements by conspiring with school officials to obtain their consent to search students. *Plaintiffs' Brief, at 38.* The Rhode Island Affiliate of the American Civil Liberties Union ("ACLU") also offers an amici brief challenging the District Court's decision to address and decide the defendants' entitlement to qualified immunity based upon the second prong of qualified immunity analysis. The ACLU argues in part that by failing to address whether a constitutional violation occurred, the District Court left the door open for future violations. *Amicus Curiae Brief of ACLU ("ACLU's Amicus Brief"), at 6.*

First and foremost, the determination as to whether an official is entitled to qualified immunity is not based upon a third-party's interpretation of the decision granting the official immunity. Rather, it is based upon the clarity of the law at the time of the incident and whether a reasonable officer would interpret his or her

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. *custody by proving probable cause.").* Rather, for the purposes of qualified immunity, [the court] look[s] to the objective perspective of a reasonable officer and inquires whether given all the facts in the record, that officer would have believed that he was not violating the Plaintiffs' Constitutional rights in taking the action at issue." *Estrada, 2010 U.S. App. LEXIS 2390 at 21-22.*

actions to amount to an infringement on such a clearly established right. If the claimed right was not so clearly established such to put a reasonable officer on notice that his/her actions violated that right, the officer is entitled to qualified immunity regardless of whether third parties, in the future, may misinterpret the written decision.

In any event, even if it is an element to take into consideration in determining whether an official was entitled to qualified immunity, the concerns raised by both plaintiffs and the ACLU actually help demonstrate that it is not clearly established that the coach lacked authority to consent on behalf of his players. The ACLU specifically opines that by declining to make a determination as to whether the coach could give police consent to search his players in this type of circumstances, the District Court is "leaving the law unsettled and unarticulated in that regard." *ACLU's Amicus Brief, at 3.* Although the ACLU maintains on the one hand that the law is clearly established, it argues that the District Court should have first addressed whether a constitutional right has been violated because it is "essential to clarify" this area of the law to put officers "on notice" that the conduct violates the law. *Id. at 3 & 12*. The plaintiffs' own concerns as to the future implications of the District Court's decision also demonstrate a lack of clarity in this area of the law. It reasons that if the law was so clearly established, the

precedential value of this case would be meaningless in the face of the clearly established law.[10]

For all these reasons, defendants respectfully submit that the defendants are entitled to qualified immunity from plaintiffs' Fourth Amendment claims. As such the District Court did not err in granting defendants summary judgment and thus the District Court judgment should be affirmed.

B. DISTRICT COURT PROPERLY EXERCISED ITS SOUND DISCRETION UNDER *PEARSON*

As noted, the ACLU has filed an amicus curiae brief challenging the District Court's decision to address and decide the instant controversy based on the clearly established prong of the qualified immunity analysis. As recognized by the District Court, in *Pearson v. Callahan, 129 S. Ct. 808, 818 (2009),* the Supreme Court ruled that the Court need not take the two steps of qualified immunity analysis in "strict sequence." *Lopera v. Town of Coventry, (C.A. No. 08-123S), at 8 (Addendum to Plaintiffs' Brief).* *See also Estrada v. R.I., 2010 U.S. App. LEXIS*

[10] Yet another red herring is the plaintiffs' challenge to the manner in which the search was conducted. Plaintiffs specifically criticize the officers' decision to conduct the search alongside the school bus and not within the confines of the school bus. However, once the officers received consent to search, the manner in which they executed that search cannot be found to void such consent. In fact, this Court has consistently held that, while engaging in legitimate investigative conduct, "the police may take reasonable steps to protect themselves by searching a suspect for weapons or *taking other protective measures*." *Estrada, 2010 U.S. App. LEXIS 2390 (emphasis added) quoting U.S. v. Taylor, 162 F.3d, 12, 17 (1st Cir. 1998) and Flowers v. Fiore, 359 F.3d 24, 30 (1st Cir. 2004).*

2390, 14-15 (1st Cir. 2010). Rather, according to the Supreme Court, Courts "should exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis [as outlined in Saucier] should be addressed first in light of the circumstances in the particular case at hand." *Pearson, 129 S.Ct. 808, 818 modifying Saucier v. Katz, 533 U.S. 194 (2001).* Thus, in addressing defendants' claim of qualified immunity, the Court does not need to first determine whether a constitutional right has been violated.

In the instant case, after careful analysis, the District Court exercised his "sound discretion" and determined that the prudent approach was to address the reasonableness of the officers' actions under the clearly established prong of qualified immunity analysis, leaving "to the side" the question of whether an actual constitutional violation occurred. *Lopera, (C.A. No. 08-123S), at 11.* The District Court reasoned that the instant case involving Fourth Amendment reasonableness analysis was governed by two (2) areas of law: not only the actual authority of Coach Marchand to consent on behalf of his players but also the reasonableness of the officer's belief in Coach Marchand's "apparent authority." *Id. at 10 citing Illinois v. Rodriguez, 497 U.S. 177, 185-86 (1990) and U.S. v. Carrasco, 540 F.3d 43, 49 (1st Cir. 2008).* While opining that it was a close call as to whether a constitutional violation occurred, the Court reasoned that because the determination of whether a constitutional violation occurred could also be dictated

by the reasonableness of the officer's belief in the apparent authority of the coach, a more prudent approach was to address the reasonableness of the officers' actions under the clearly established prong. Id.

The ACLU has submitted an amicus curiae brief arguing that by deciding the instant matter under the clearly established prong, the District Court "missed an important opportunity to give guidance to local police and school departments on a significant issue of constitutional law." *ACLU's Amicus Brief, at 6.* The ACLU takes the position that a determination of the constitutionality of the officers' actions, while not necessarily dispositive of the instant case,[11] is "necessary to put police and school officials on notice that the challenged conduct violates the Fourth Amendment and deter similar violations." *Id. at 12.*

Defendants submit that the District Court properly exercised its discretion in putting the constitutional issue to one side and deciding the instant matter on the "clearly established prong." In addition to the reasoning articulated by the District Court, the rationale proffered by the ACLU does not justify disturbing the Court's discretionary approach. First, as noted by the Supreme Court, there are several additional reasons for taking the analysis out of sequence including "the "older,

[11] As more fully outlined above, the fact that the ACLU expresses the need for "clarification" of the law and a determination as to the constitutionality of the officers' actions supports a finding of qualified immunity based on the fact that the law was not clearly defined. That is, that a reasonable officer would not believe that his/her actions infringed upon a clearly established constitutional right.

wiser judicial counsel 'not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" Pearson, *129 S. Ct. at 821 quoting* Scott v. Harris, *550 U.S. 372, 388 (2007) (Breyer, J., concurring) (quoting* Spector Motor Service, Inc. v. McLaughlin, *323 U.S. 101, 105 (1944)) and* Ashwander v. TVA, *297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of").* In this case, as evident from the District Court decision, the constitutional question does not need to be addressed in order to resolve the instant dispute, thus justifying, in the first instance, the decision to put the issue to one side.

The ACLU nevertheless argues that the issue *should* be addressed in order to provide guidance to police officers who may encounter similar circumstances in future cases. The problem with this approach lies in the nature of a Fourth Amendment, illegal search claim. As this Court itself has recognized, the constitutionality of defendants' actions in Fourth Amendment cases "is highly idiosyncratic and heavily dependent on the facts." Buchanan v. Maine, *469 F.3d at 168 citing* Riverdale Mills Corp. v. Pimpare, *392 F.3d 55 (1st Cir. 2004).* At the summary judgment stage, "the precise factual basis for the plaintiff's claim or claims may be hard to identify . . . Accordingly, several courts have recognized that the two-step inquiry "is an uncomfortable exercise where . . . the answer [to]

whether there was a violation may depend on a kaleidoscope of facts not yet fully developed." Pearson, *129 S. Ct. at 819-820 quoting, inter alia* Dirrane v. Brookline Police Dep't, *315 F.3d 65, 69-70 (1st Cir. 2002).* Thus, the "law elaboration purpose" is not necessarily served in such Fourth Amendment cases. Id. *See also* Pearson, *129 S. Ct. at 819.* Moreover, as further recognized by the Supreme Court when it decided to leave the sequence to the District Court's discretion, "the development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity." Pearson, *129 S. Ct. at 821-822.*

Defendants thus submit that the District Court properly exercised it's discretion in deciding to leave the constitutional issue to one side and decide the instant matter on the issue of whether the constitutional right at issue was clearly established. There is no basis for this Court to divert from this approach.

II. The Undisputed Facts Support The Finding That Coach Marchand's Consent Was Voluntary

Plaintiffs further claim that summary judgment should be reversed because even if the law on Coach Marchand's authority to consent was not clearly established, the District Court erred in finding that Coach Marchand's consent was voluntary. Plaintiffs specifically claim that Coach Marchand's consent was given

in a "custodial" setting under pressure from a "mob"[12] thus giving rise to at least a factual issue as to whether the consent was voluntary. However, as held by the District Court, the deposition testimony of Coach Marchand puts to rest any concern as to the voluntariness of his consent.

Coach Marchand specifically testified that he readily agreed to the officer's request to search the players[13] because he knew that they did not take the items and believed that it was best to have his players names cleared and to leave the area for the safety of the plaintiffs. *Id. at 28 (App. at 59).* Under questioning by plaintiffs' attorney, Coach Marchand later testified that given his obligation as coach and "father" to the plaintiffs, he thought it would be best "take the high road" and allow the officers to search them in order to clear their names. *Id. at 28, 32 & 44-45 (App. at 59, 60 & 61-62).* According to Coach Marchand:

> I'm a First Amendment [sic] guy, you're getting no, you know, and I dread to say, screw you get a search warrant and I debated that. Okay. Then I said no, that's not my role, at that point my role as coach, I'm suppose [sic] to be the father, I'm suppose [sic] to take them home safe. *Marchand's Tr, at 32 (App. 60).*

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[12] It is noteworthy at this juncture that for purposes of the summary judgment only, defendants accepted plaintiffs' description of the spectators as qualifying as a "mob." If this matter were to go to trial, defendants would challenge both the number of spectators alleged to be watching the exchange as well as the description of them as being a "mob."

[13] Although not material for purposes of the instant motion, the officers testified that they did not ask for consent to search. Rather, it was Coach Marchand who offered to allow the officers to search the students. *Michailides Tr., at 44.*

During his deposition, in response to questions by plaintiffs' attorney, the Coach explained he felt he was under "duress" because the police did not have authority to conduct the search, did not take his word that they had not taken the items and because there was a crowd raising the possibility for potential violence. *Id. At 44 (App. At 61).*

Contrary to plaintiffs' current position, Coach Marchand did not testify that he felt that he was in custody or otherwise not free to leave. In fact, Coach Marchand made clear that it was the presence of the crowd that convinced him to allow the officers to search the students rather than anything the officers said or did. He noted that if there had not been a crowd, he would not have agreed so quickly to the search. *Id. At 45 (App. At 62).*

Of course, any outside influence by the crowd does not invalidate the coach's consent and thus is irrelevant to plaintiffs' constitutional claims. Rather, under well-settled precedent, in order to invalidate consent, there must be coercive action by the officers themselves. In this case, plaintiffs do not allege that the officers coerced Coach Marchand to consent to the search.[14] Any alleged pressure felt by Coach Marchand because of the crowd is thus irrelevant to the determination of whether the officers are entitled to qualified immunity.

[14] In fact, according to Coach Marchand, the police officers were courteous and professional "at all times" and repeatedly told the bystanders to quiet down. *Marchand Tr., at 26, 27 and 32.*

Courts have applied the holding of _Colorado v. Connelly_, *479 U.S. 157, 170 (1986)* to Fourth Amendment voluntary consent cases and required that a consenting party who alleges coercion demonstrate that the coercion emanated from the police officers themselves rather than any subjective or outside influence. In _Connelly_ the defendant claimed that his confession to the police was involuntary due to his mental condition. In rejecting the position that the statements should be suppressed under the Fourth Amendment due to the defendant's mental state, as opposed to police misconduct compelling the confession, the Court surveyed the cases over the past fifty years and summarized:

> Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law. Respondent correctly notes that as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the "voluntariness" calculus. But this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional "voluntariness."

_Id._ *at 164 (citation omitted).*

The Supreme Court thus rejected the defendant's claim that the Court must "find an attempted waiver invalid whenever the defendant feels compelled to waive his rights by reason of any compulsion, even if the compulsion does not flow from the police." _Id._ *at 170.* The Court held that there must be an "essential link between coercive activity _of the State_, on the one hand, and a resulting

confession by a defendant, on the other." *Id. at 165 (emphasis added)*. The Court underscored the "state actor" requirement by stating:

> The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause.

Id. at 166.

This rationale is based on the recognition that the Due Process clause and other civil rights specifically protect citizens from being deprived of their rights by "state actors." "Whether a waiver of the Fifth Amendment privilege is voluntary depends on "the absence of police overreaching, not on 'free choice' in any broader sense of the word." *Id. at 157. See i.e. U.S. v. Rosario-Diaz, 202 F.3d 54, 69 (1st Cir. P.R. 2000) ("Although Melendez-Garcia herself testified that she felt very scared and physically ill, there was no evidence whatsoever of physical coercion or intimidation, nor was there any indication of conduct by the law enforcement agents that would amount to psychological coercion or intimidation").*

As noted, *Connelly* has been applied to cases challenging the voluntariness of consent to search under the Fourteenth Amendment. *See, i.e., U.S. v. Jennings, 491 F.Supp.2d 1072, 1078 (M.D. Ala. 2007).* Although the voluntariness standard under the Fifth and Fourteenth amendments is slightly different, *id.,*[15] a party

[15] The distinction is based on the fact that while a consent to search must be voluntarily given, it need not be knowing and intelligent as required under the waiver of *Miranda* rights. *Jennings, 491 F.Supp.2d at 1079.*

challenging the validity of a consent to search based on undue coercion must likewise demonstrate coercive action by the governmental agent rather than subjective perception of coercion. For example, in *Jennings*, the defendant had claimed that because of his mental limitations he had not freely and voluntarily consented to the search of his personal bag by U.S. Postal inspectors. After concluding that *Connelly* applied to a determination of whether a consent to search was coerced, the Court held that "there is no basis for finding Jennings' consent to search involuntary 'absent any evidence of psychological or physical coercion on the part of the agents.'" *Id. at 1080.*

The *Jennings* Court relied upon *U.S. v. Barbour, 70 F.3d 580, 585 (11th Cir. 1995)*, where the Eleventh Circuit rejected the defendant's claim that his statements to Secret Service agents and his consent to search, both executed while he was undergoing psychiatric treatment for severe depression, was involuntary. Plaintiff claimed that given his severe mental depression and medicated state, the Secret Service Agent's promise to provide him help in obtaining mental health treatment was coercive. The Eleventh Circuit, however, noted the absence of "any evidence of psychological or physical coercion on the part of the agents." *Id.* Therefore, in applying *Connelly,* the Court held that there was no basis for finding that the defendant's statements and consent to search were involuntary. *Id.* See also *U.S. v. Amery, 2002 U.S. Dist. LEXIS 16974 (S.D.N.Y. Sept. 9, 2002)*

(applying Connelly to find that "[t]he defendant has failed to allege any coercive action or unreasonable behavior by the governmental agents to induce him . . . to consent to the various searches"); Smith v. Tenn., Dep't of Safety, 850 F.2d 692 (6th Cir. 1988) (unpublished opinion) (Rejecting claim that consent was coerced because of defendants subjective belief that he had no choice to agree because of his employment at the Bureau of Investigations and his belief that he could lose his job if he refused).

As these cases make clear, and as articulated by the Fourth Circuit, "a court's evaluation of the totality of the circumstances is based, not on the perceptions of the individual searched, but on the coerciveness of the officer's conduct in obtaining the consent. In other words, the relevant question is not whether the person whose consent is sought perceived coercion but, rather, whether there actually was coercion." *U.S. v. Quezada, 1991 U.S. App. LEXIS 22712 (4th Cir. 1991)(unpublished per curiam opinion) citing Connelly, 479 U.S. at 163-67.* In this case, the only thing the police did was park their cars around the bus. (Of course, it is undisputed that the police had received reports of an ongoing fight.) Coach Marchand, however, although noting that the police cars physically blocked the bus, did not testify that he felt that he or the students were not free to leave. Even more telling, however, is the fact that Coach Marchand did not testify that the officers did anything to him - either making him feel like he was in custody or

otherwise, to coerce him into consenting to the search. As readily confirmed by Coach Marchand, it was his own personal belief that, based on the presence of the crowd and his past experiences, it would be in the students' best interest to allow the police to search the students.

Thus, as correctly found by the District Court, there is no basis for a reasonable jury to find that the police unlawfully coerced Coach Marchand into consenting to the search of the students. Summary judgment in favor of defendants should thus be affirmed.

III. The Undisputed Facts Fail To Support A Finding That The Officers Violated Plaintiffs' Equal Protection Rights

Plaintiffs also appeals the District Court grant of summary judgment on plaintiffs' *§ 1983* for the alleged denial of plaintiffs' right to equal protection. Plaintiffs premise their equal protection claim on the accusation that the police officers treated them differently because of their race. However, as found by the District Court, there is absolutely no evidence, other than the difference in their races, to support even an inference of such discriminatory animus on the part of the officers. On appeal, plaintiffs claim that not only is the issue of the officers' discriminatory animus a factual issue but that the District Court erred in failing to impute the perceived discriminatory animus of the surrounding crowd to the officers. Defendants submit that there is no support on the law or facts for such a finding.

The Equal Protection Clause of the Fourteenth Amendment provides, in part, that "no State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const. amend. XIV*. Plaintiffs essentially maintain that the officers engaged in racial profiling in their decisions to request permission to search the plaintiffs. In order to succeed on such a claim, plaintiffs "must present evidence that [they were] treated differently from similarly situated white [individuals] and the action taken against him was motivated, at least in part, by his race." *Flowers v. Fiore, 239 F.Supp.2d 173, 178 (D.R.I. 2003). See also Reese v. Jefferson School District No. 14J, 208 F.3d 736, 740 (9th Cir. 2000)(in order to succeed on claim, litigant must prove that the police acted in a discriminatory manner and that the discrimination was intentional).* This has been broken down into two inquiries: (1) whether the appellant was treated differently than others similarly situated, and (2) whether such a difference was based on an impermissible consideration, such as race. *Macone v. Town of Wakefield, 277 F.3d 1, 10 (1st Cir. 2002) (citations omitted).*

In the instant case, plaintiffs fail to satisfy either element. In the first instance, there is no basis to support the allegation that plaintiffs were treated differently than "similarly situated individuals." Regardless of plaintiffs' race, the officers arrived in response to a call that students were fighting. When the officers arrived, the students were not fighting but tensions were clearly running high with

a group of spectators forming a semi-circle around the plaintiffs' bus and making accusations of theft against the players. The first person to speak to the officers was the plaintiffs' coach who informed the officers that the plaintiffs, his own players, were the "prime suspects." *Marchand Tr., at 27 (App. at 59).* Coach Marchand also informed the officers that he had searched the plaintiffs' belongings and did not find the stolen items and had been just offering to let the Coventry AD conduct the search. In response, the officers allegedly requested permission for them to search these students. There is nothing to suggest that the officers would not have asked permission to search the players if they had been white and identified as the "prime suspects."

Plaintiffs nevertheless attempt to demonstrate differential treatment by the officers' decision not to seek permission search members of the alleged "mob." However, these individuals were not similarly situated to plaintiffs in that they had not been identified as the "prime suspects" in the theft but rather were identified as the victims and interested parties.[16] Consequently, plaintiffs cannot offer any evidence to support the conclusion that the officers treated plaintiffs differently than similarly situated white individuals in a similar circumstance.

[16] In fact, it would make sense for the officers to assume that the group was comprised of either victims or of just spectators to the police presence and not the thief. Quite simply, it is a valid assumption that the thief would not have hung around and waited to be asked to be searched by the officers.

Plaintiff likewise fails to meet the second prong of an equal protection claim by proving that the action taken against him was motivated by their race. *Macone, 277 F.3d at 10 (1st Cir. 2002)*. Rather, the facts plaintiffs rely on to support these claim are meager and do not suffice to meet this standard. Essentially, the facts to support plaintiffs' claim are that:

1. they are members of a minority group;
2. defendants are Caucasian; and
3. Plaintiffs committed no crime.

To avoid summary judgment, plaintiffs "must produce evidence sufficient to permit a reasonable trier of fact to find by a preponderance of the evidence that [the] decision was racially motivated." *Keyser v. Sacramento City Unified Sch. Dist., 265 F.3d 741, 754 (9th Cir. 2001).* "A long line of Supreme Court cases makes clear that the Equal Protection Clause requires proof of discriminatory intent or motive." *Navarro v. Block, 72 F.3d 712, 716 (9th Cir. 1995); Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 53 (1st Cir.1990) (plaintiff "may not prevail simply by asserting an inequity and tacking on the self-serving conclusion that the defendant was motivated by discriminatory animus").* In support of the same, "the facts alleged must 'specifically identify the particular instance(s) of discriminatory treatment and, as a logical exercise, adequately support the thesis

that the discrimination was unlawful.'" Judge v. City of Lowell, *160 F.3d 67, 77 (1st Cir. 1998).*

The racial differential between plaintiffs and the defendant officers is not sufficient to create the inference of discriminatory intent or motive. Id.; Flowers, *239 F.Supp.2d at 178*. In Judge, for example, the plaintiff brought a *§ 1983* equal protection claim against city police officers and the medical examiner alleging that they failed to properly investigate the circumstances of her brother's death. The basis for the plaintiff's claim in that case was that the defendants failed to take certain actions such as notifying her of her brother's death solely because she was black. Judge, *160 F.3d at 77*. The plaintiff, however, offered no other evidence to support these allegations. The Court concluded that such "mere conclusory assertion[s]" that the defendant's actions were racially motivated is not sufficient to maintain an equal protection claim. Id. *See also* Flowers, *239 F.Supp.2d at 177 (dismissing an equal protection claim where the only evidence of discriminatory motive was the fact that the plaintiff was black and the officers were white).*

In this case, although plaintiffs may be able to present evidence that racial and prejudicial statements were being made by the spectators around the bus, as well as possibly by Coventry soccer team during the game, there is absolutely no evidence that the officers themselves engaged in this type of talk or otherwise exhibited any discriminatory motive. In fact, plaintiffs fail to point to any evidence

to demonstrate that the officers even knew the plaintiffs' race before asking for consent to search. In addition, Coach Marchand specifically testified that the officers were courteous and professional "at all times" and instructed the spectators to quiet down. *Marchand Tr., at 26, 27 and 32 (App. at 59 -60).*

On appeal, plaintiffs attempt to impute the perceived racial bias of the spectators to the officers. In support of this proposition, plaintiffs rely upon *U.S. v. Yonkers Bd. of Educ., 837 F.2d 1181, 1226 (2d Cir. 1987)*. Plaintiffs' reliance on *Yonkers*, however, is misplaced. In *Yonkers*, the Second Circuit was addressing the constitutionality of the City defendants' policy and practice of confining subsidized housing to portion of the city which resulted in the racial segregation of the school system in violation of *inter alia* the Equal Protection Clause. In response to the City defendants' claim that its legislative housing decisions could not demonstrate discriminatory animus on the part of the City defendants because they were in response to constituents' concerns, the Court held *inter alia* that in such circumstances the City could be held liable when a significant factor behind the public's concerns was the constituents' discriminatory animus. *Id. at 1224.*

Yonkers is thus distinguishable in the first instance because it was the City's legislative act fostering a discriminatory animus that gave rise to the constitutional violation. Notably, plaintiffs do not cite to a single case in which racial comments

by third-parties at the scene of a police investigation are found to support a finding of discriminatory animus on the part of the individual officers.

In addition, even if *Yonkers* could be applied to the instant case, the undisputed facts fail to warrant a finding that officers took on the discriminatory animus of the spectators. In *Yonkers*, the Court held that in order to impute the racial animus of the citizens on the City, a plaintiff must show "[1)] that the decision-making body acted for the sole purpose of effectuating the desires of private citizens, [2)] that racial considerations were a motivating factor behind those desires and [3)] that members of the decision-making body were aware of the motivations of the private citizens[s]." *Id. at 1225.* In this case despite spending a considerable amount of their Brief outlining alleged racial comments made by the Coventry soccer team and spectators during the game and before the officers arrived, it is undisputed that the plaintiffs did not report these slurs to the defendants that day. It is also undisputed that the defendant officers were professional and courteous at all times and did not use racial or ethnic slurs against the plaintiffs. While the officers confirmed that they heard the Coventry spectators yelling accusations of theft at the Central Falls players, the officers themselves never heard any racial slurs against the plaintiffs. *Michailides Tr., at 41; Nelson Tr., at 45.*

In support of their appeal, plaintiffs claim that a factual issue is raised as to whether the officers were aware of the alleged racial animus of the spectators because the plaintiffs themselves testified that they heard the spectators yelling racial slurs while the officers were present. However, even accepting the fact that these players heard such comments after the police arrived, Coach Marchand, who was standing next to the officers during this timeframe, testified that although the spectators were accusing the players of theft, there were no racial slurs mixed in with these accusations after the police arrived. *Marchand Tr., at 45-46 (App. at 62).* In fact, according to Coach Marchand the officers were courteous and professional "at all times" and repeatedly told the bystanders to knock it off and quiet down. *Marchand Tr., at 26, 27 and 32 (App. at 59 & 60).* Defendants thus submit that even if the proposition that a third-party's racial animus could be imputed to investigating officers, the undisputed facts in this case fail to support a finding that the officers were made aware of such discriminatory animus.

Finally, even if the Court were to accept plaintiffs' claims that the officers heard racial slurs by the crowd, the facts of this case fall far short of demonstrating that such "racial considerations were a motivating factor behind" their actions. *Yonkers, at 1225.* Perhaps the best evidence of the complete dearth of discriminatory animus by the officers is Coach Marchand's actions. There is absolutely no indication or even an insinuation that Coach Marchand discriminated

against these students or possessed any racial bias. Yet the officers took the exact same approach as Coach Marchand did. That is, they sought to quickly resolve the situation by asking for permission to search the players. Coach Marchand testified that he felt it was safer for all involved to quickly get to the bottom of the accusations by conducting the search and clearing his players. *Marchand Tr., at 28 (App. at 59).* Coach Marchand took this approach despite the fact that he was present and thus allegedly heard the racial slurs the players allegedly endured during the game. Having the same information as the officers, as well as further knowledge of perceived discriminatory bias, Coach Marchand still decided that it was best to search his players and clear their names. There was nothing discriminatory in Coach Marchand's approach and thus there is likewise nothing discriminatory in the officers' decision to follow a similar course by asking for consent to search. Consequently, the District Court did not err in granting defendants summary judgment on Count II and the judgment should accordingly be affirmed.

IV. There Is No Evidence Of Discriminatory Animus To Support A Finding That The Defendants Violated Rhode Island's Racial Prevention Act Or The Racial/National Origin Intimidation Statute

The District Court also granted defendants' summary judgment on plaintiffs' state law claims pursuant to the Rhode Island's Racial Prevention Act and the Racial/National Origin Intimidation Statute based on the conclusion that plaintiffs

had produce no evidence from which a reasonable trier of fact could that defendants' actions were motivated by plaintiffs' race.

The R.I. Racial Prevention Act, in pertinent part, bans racial profiling by state or municipal law enforcement officers. *R.I. Gen. Laws § 31-21.2-3.* "Racial profiling" is defined as "the detention, interdiction or other disparate treatment of an individual on the basis, in whole or in part, of the racial or ethnic status of such individual, except when such status is used in combination with other identifying factors seeking to apprehend a specific suspect whose racial or ethnic status is part of the description of the suspect, which description is timely and reliable." *Id.* *R.I. Gen. Laws § 31-21.2-3.* The Racial/National Origin Intimidation Statute meanwhile allows for a cause of action when an individual maliciously subjects another "to an act or acts which would reasonably be construed as intended to harass or intimidate the person because of his or her race. . ." *R.I. Gen. Laws § 9-1-35 (emphasis added).*

As evident from the face of both these statutes, discriminatory animus is the touchstone to proving a cause of action under either of these statutes. Similar to the utter lack of any evidence to support a finding that the officers possessed discriminatory animus in support of plaintiffs' Equal Protection claim, the lack of discriminatory animus by the officers supports the entry of summary judgment on

plaintiff's claim under the Racial Prevention Act and the Racial/National Origin Intimidation Statute.

CONCLUSION

For the reasons stated herein, defendants respectfully request that this Court affirm the decision of the District Court and deny and dismiss the instant appeal.

Respectfully submitted,
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By their Attorney,

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I hereby certify that the within document has been electronically filed with the Court on February 22, 2010, that it is available for viewing and downloading from the ECF system, and that the counsel of record listed below will receive notice via the ECF system:

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