COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1601 **Cir. Ct. No. 2011CV4913**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

JEREMY RYAN, LAURI MARIE HARTY, ANNE MARY HOPPE, KATHLEEN D. HOPPE, JENNA BRIANNE POPE, AND VALERIE ROSE WALASEK,

PLAINTIFFS-RESPONDENTS,

V.

CHARLES TUBBS, CHRIS WEISS, STEVEN B. MAEL AND JAMES BROOKS,

DEFENDANTS-APPELLANTS.

APPEAL from judgments of the circuit court for Dane County: FRANK D. REMINGTON, Judge. *Reversed and cause remanded with directions.*

Before Kloppenburg, P.J., Lundsten, and Blanchard, JJ.

¶1 PER CURIAM. The defendants in this civil rights action, who were at pertinent times employed by the State Capitol Police Department, appeal

the circuit court's denial of the defendants' motion for summary judgment based on qualified immunity. The circuit court rejected the defendants' qualified immunity defense, concluding that they violated the plaintiffs' "clearly established" constitutional rights when the defendants enforced then-applicable administrative regulations requiring that anyone seeking to display a sign in the Wisconsin State Capitol must first obtain a permit. More specifically, the defendants issued citations to the sign-displaying plaintiffs who had not obtained permits and who refused to display the signs in areas of the Capitol building where the permit requirement had been temporarily suspended.

¶2 We conclude that the defendants are entitled to qualified immunity because the plaintiffs have not met their burden of proving, "beyond debate," that the defendants' conduct violated "clearly established" rights of the plaintiffs under prior case law. Accordingly, we reverse, without needing to reach the questions of whether the then-applicable regulations were facially unconstitutional or unconstitutional as applied.

BACKGROUND

¶3 In 2011, the plaintiffs filed this civil rights action against the defendants pursuant to 42 U.S.C. § 1983. The plaintiffs' complaint alleged that WIS. ADMIN. CODE §§ Adm 2.07(2) and 2.14(2)(zd) (Feb. 2002), which made it a forfeiture violation to display a sign without a permit in certain areas of the Capitol building, violate the First Amendment to the United States Constitution

and that the defendants violated the plaintiffs' rights by citing the plaintiffs under these regulations.[1]

¶4 The version of WIS. ADMIN. CODE § Adm 2.07(2) (Feb. 2002) in effect in 2011 provided in pertinent part that a person may not "display" a "sign[]" in a state office building "without the express written authority of the department" of administration.[2] Pursuant to WIS. ADMIN. CODE § Adm 2.14(2)(zd) (Feb. 2002), anyone who "[e]ngage[d] in conduct otherwise prohibited by this chapter without the express written approval of the department" was "subject to a forfeiture of not more than $500." Section Adm 2.14(2)

¶5 As pertinent to the issue we resolve on appeal, we are asked to review the circuit court's most recent decision that the defendants are not entitled to qualified immunity because the rule as enforced by the defendants violated

[1] These regulations were amended effective August 1, 2014. Unless otherwise indicated, all references to the WIS. ADMIN. CODE ch. Adm 2 are to the previous version, which became effective in February 2002 and was applicable to the events at issue here, which occurred in March 2011.

[2] The regulation provided in pertinent part:

> **Adm 2.07 Exterior and Interior displays and decorations**….
>
> **(2)** DISPLAYS AND DECORATIONS. No displays, signs, banners, placards, decorations or graphic or artistic material may be erected, attached, mounted or displayed within or on the building or the grounds of any state office building or facility without the express written authority of the department.... The department may set reasonable time limits on permitted activities.
>
> ….
>
> **(4)** DEPARTMENT APPROVAL.... The department may specify the size and location of any display, sign, banner or graphic and artistic material, as indicated in sub. (2).

plaintiffs' clearly established First Amendment rights.[3] The circuit court also concluded that WIS. ADMIN. CODE § Adm 2.07(2) is unconstitutional on its face. The court held a one-day bench trial on the issue of damages and attorneys' fees, and awarded both to the plaintiffs.[4]

¶6 Prior to trial, the parties stipulated to the following pertinent facts. Each plaintiff was cited by at least one defendant for displaying a sign, under one or more of the circumstances described below in this paragraph, without first obtaining a permit. At pertinent times, the defendants allowed any person in the Capitol to display a sign, even if the person did not have a permit, as long as the person did so on the ground floor of the Capitol, the street level of the building.[5]

[3] This is the third time that aspects of this case have been reviewed by this court, but the first time that the qualified immunity issue has been squarely presented to us. ***Ryan v. Huebsch***, No. 2013AP895, unpublished slip op. (WI App April 17, 2014), centered around whether WIS. ADMIN. CODE § Adm 2.07 (or instead some other regulation) was at issue in this action, whether "displaying" a sign under the terms of § Adm 2.07 includes holding a sign, whether the circuit court properly framed the issues in addressing a summary judgment motion by the defendants, and a potential mootness issue. As the State correctly observed in its briefing before us in that appeal, the plaintiffs did not then directly challenge the defendants' asserted entitlement to qualified immunity, and in any case neither side developed qualified immunity arguments. *See* ***id.***, ¶¶2, 66. For these reasons, we declined to address the merits of a qualified immunity defense. *See* ***id.***, ¶66. We took the same approach in a subsequent summary order addressing solely a challenge by the defendants to a procedural order of the circuit court, ***Ryan v. Huebsch***, No. 2014AP2250-AC slip op. at 9 (WI App Dec. 22, 2014).

[4] We reject the plaintiffs' position that the defendants cannot now appeal the circuit court's denial of the defendants' summary judgment motion because there was a trial. "An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon." WIS. STAT. RULE 809.10(4) (2013-14). The federal precedent cited by the plaintiffs in support of their position misses the target, the target being the decision of the circuit court to reject the defendants' qualified immunity argument at the summary judgment stage.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[5] Regarding the floors of the Capitol, we take judicial notice of the following facts. Unlike most buildings, the street level floor of the Capitol is called the ground floor and the next (continued)

Members of the public were informed of the requirement to display signs only on the ground floor by way of a notice that authorities posted on the first floor of the Capitol, the level above the ground floor. The parties stipulated that all of the plaintiffs were cited for displaying signs while on the first floor. Further, the parties stipulated that all were cited either for holding a sign that was larger than two feet by three feet or for displaying a sign of any size over the balcony railing on the mezzanine area of the first floor, overlooking the ground floor.[6] Before issuing the challenged citations, the defendants asked the plaintiffs either to refrain from holding signs over the balcony railing or to display their signs on the ground floor only.

¶7 The parties further stipulated that the State had legitimate interests in enforcing WIS. ADMIN. CODE § Adm 2.07(2) that included preserving the Capitol building and its appearance, preventing potential hazards to people in the Capitol, preserving the order necessary for the enjoyment of the Capitol by all visitors and occupants, and protecting the aesthetic beauty of the Capitol by keeping it clutter-free. We include additional facts as necessary in our discussion below.

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level up is called the first floor. The first floor has a mezzanine area with a balcony railing overlooking the ground floor and, therefore, if an object that is held over the railing on the mezzanine area of the first floor falls, depending on the circumstances, it might land in a place on the ground floor where people are.

[6] Neither party argues that any differences in the conduct among plaintiffs are significant to the qualified immunity analysis here, but in the interest of accuracy, we observe that the stipulated facts are in some respects ambiguous regarding the specific conduct for which each plaintiff was cited. Notably, the stipulated facts could be read to suggest either that all plaintiffs were holding signs over the balcony railing on the mezzanine area of the first floor when cited, or instead that only some were. In our summary in the text, we resolve this ambiguity in favor of the plaintiffs, by assuming that some plaintiffs did not hold a sign over the balcony railing but merely held somewhat large signs elsewhere on the first floor, not over the balcony railing. Similarly, we assume that each plaintiff held only one sign, although the stipulated facts could be read to suggest that in some cases plaintiffs held multiple signs.

DISCUSSION

¶8 We now summarize the applicable legal standards and then explain why we conclude that the defendants are entitled to qualified immunity because the plaintiffs fail to carry their burden of showing that it was "clearly established" at the time of the challenged conduct that the defendants violated a constitutional right of the plaintiffs, that is, a constitutional right that would have been understood by every reasonable official in the shoes of the defendants.

¶9 Under settled precedent of the supreme courts of both the United States and Wisconsin, "[q]ualified immunity is a judicial doctrine that protects government officials performing discretionary functions from civil liability so long as their conduct does not violate a person's clearly established … constitutional right of which a reasonable person would have known." ***Arneson v. Jezwinski***, 225 Wis. 2d 371, 384-85, 592 N.W.2d 606 (1999) (citing ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982) and ***Barnhill v. Board of Regents***, 166 Wis. 2d 395, 406, 479 N.W.2d 917 (1992)). The question of the defendants' entitlement to qualified immunity is a matter of law, which we decide de novo, without deference to the reasoning of the circuit court. ***Arneson***, 225 Wis. 2d at 384.

¶10 Qualified immunity is an affirmative defense that must be raised in the first instance by the defendants. ***Id.*** at 390. However, once the defense is raised, the burden is on the plaintiffs to demonstrate that the defendants' conduct violated a clearly established constitutional right. *See* ***id.*** (once qualified immunity is raised as a defense, "the plaintiff … bears the burden of demonstrating by closely analogous case law that the defendants have violated his clearly established constitutional right."). In order for a constitutional right to be

clearly established, it must be so clear "that every reasonable official" would have understood that what he or she "is doing violates that right"—that is, "existing precedent must have placed the … constitutional question beyond debate." ***Reichle v. Howards***, __ U.S. __, 132 S. Ct. 2088, 2093 (2012) (internal quotations and quoted sources omitted).

¶11 Courts may properly resolve qualified immunity questions "on the ground that a purported right was not 'clearly established' by prior case law, without resolving the often more difficult question whether the purported right exists at all." ***Id.*** (citing ***Pearson v. Callahan***, 555 U.S. 223 (2009)). Thus, the Court has explained,

> [A] court can often avoid ruling on the plaintiff's claim that a particular right exists. If prior case law has not clearly settled the right, and so given officials fair notice of it, the court can simply dismiss the claim for money damages. The court need never decide whether the plaintiff's claim, even though novel or otherwise unsettled, in fact has merit.

Camreta v. Greene, 563 U.S. 692, 705 (2011). Following this approach, we proceed directly to an analysis of whether the plaintiffs have shown that prior case law had clearly established that the defendants were violating the plaintiffs' constitutional rights by citing them for violations of WIS. ADMIN. CODE § Adm 2.07, without addressing the constitutionality of § Adm 2.07.

¶12 In defining the right that a defendant allegedly violated, that right "must be established not as a broad general proposition, but in a particularized sense so that the contours of the right are clear to a reasonable official." ***Reichle***, 132 S. Ct. at 2094 (internal quotations and quoted sources omitted). For example, qualified immunity "is no immunity at all if 'clearly established' law can simply

be defined as the right to be free from unreasonable searches and seizures." ***City & Cty. of San Francisco v. Sheehan***, ___ U.S. ___, 135 S. Ct. 1765, 1776 (2015).

¶13 This rights-framing principle was illustrated in ***Reichle***. The plaintiff asserted that federal agents violated his First Amendment rights by retaliating against him for engaging in constitutionally protected speech when they arrested him following his encounter with a federal official. ***Reichle***, 132 S. Ct. at 2091-92. The Court explained that, in analyzing whether the plaintiff's right was clearly established, the question was not whether the plaintiff had a First Amendment right to be free from retaliation for his speech, which of course he had, but instead whether he had "the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause." ***Id.*** at 2094.

¶14 Similarly, the question presented in this case is not whether the First Amendment guaranteed the plaintiffs a right to freedom of expression in the Capitol, a public place. That is beyond doubt. Given the stipulated facts we recite above, the question is whether the plaintiffs had a clearly established right to do the following on the first floor of the Capitol, without first obtaining a permit, while foregoing the posted and announced option of displaying a sign on the ground floor: (1) display a somewhat large sign; or (2) display a sign over a balcony railing above public space on the floor below. We will refer to these as "the constitutional rights at issue."

¶15 Only limited categories of case law are sufficient to establish that the constitutional rights at issue were clearly established. *See* ***Arneson***, 225 Wis. 2d at 389. Clearly established rights are defined in "the controlling authority of this state, as well as the highly persuasive authority found within the Seventh Circuit." ***Id.*** In the absence of controlling authority, our supreme court has explained that "a 'sufficient consensus based on all relevant case law, indicating

that the officials' conduct was unlawful' is required." ***Id.*** at 389-90 (quoted sources omitted).

¶16 Plaintiffs fail to cite any controlling authority on point in support of their argument that the constitutional rights at issue were clearly established. Instead, the plaintiffs cite to cases that are plainly inapposite, *see, e.g.*, ***Smith v. Executive Dir. of Indiana War Mem'ls Comm'n***, 742 F.3d 282, 289 (7th Cir. 2014) (discussing requirements for holding public gatherings); ***Surita v. Hyde***, 665 F.3d 860, 877 (7th Cir. 2011) (discussing discretion vested in government officials with respect to the amount that could be charged as a fee for certain licenses), or to cases that establish the undisputed general right to engage in expressive activity, ***FW/PBS v. City of Dallas***, 493 U.S. 215 (1990); ***Shuttlesworth v. City of Birmingham, Ala.***, 394 U.S. 147 (1969).

¶17 The closest that the plaintiffs come to citing a case on point is ***Milwaukee Mobilization for Survival v. Milwaukee Cty. Park Comm'n***, 477 F. Supp. 1210 (E.D. Wis. 1979). However, even if ***Milwaukee Mobilization*** carried the weight that the plaintiffs assign to it, which we explain below it does not, it is not sufficient in the qualified immunity context. Federal district court opinions are not reliable authorities for what is a "clearly established" right, although such opinions may provide evidence of the state of the law when they are considered together with other authority. *See* ***Arneson***, 225 Wis. 2d at 389 ("In considering the weight to accord district court decisions, we recognize that by themselves, they cannot '*clearly* establish a constitutional right' for they 'have no weight as precedents, no authority.'") (emphasis in original) (citations omitted).

¶18 Moreover, at best, ***Milwaukee Mobilization*** lends modest support for the plaintiffs' position. The district court concluded that a Milwaukee

ordinance that prohibited the distribution or display of signs and similar items in a public park "without the written permit of the Park Commission" was facially unconstitutional because it afforded "unlimited discretion" to permitting authorities. ***Milwaukee Mobilization***, 477 F. Supp. at 1218 (citation omitted). However, the regulation at issue here is factually distinguishable because, as we discuss in more detail below, the permitting regulations in WIS. ADMIN. CODE ch. 2 did not afford the State "unlimited discretion."

¶19 We could end here, for the reasons we have explained. However, we now summarize additional support that defendants provide, we think justifiably, for their position.

¶20 As defendants correctly argue, whatever support the 1979 ***Milwaukee Mobilization*** opinion provides is undercut by a 1996 federal district court opinion addressing demonstration in the Capitol. *See* ***Gaylor v. Thompson***, 939 F. Supp. 1363 (W.D. Wis. 1996). This is not to say that we consider ***Milwaukee Mobilization*** necessarily inconsistent with ***Gaylor***. As we have explained and will address again, there was apparently no limitation on permitting discretion in ***Milwaukee Mobilization***, unlike in ***Gaylor***. However, even if the two opinions could be read as being inconsistent, as we have already explained the plaintiffs bear the burden of establishing that the constitutional rights at issue were clearly established, and under the standards that we have recited above, if two courts within the same jurisdiction were to come down on opposite sides of a constitutional issue the "tie" would favor qualified immunity.

¶21 Turning to the substance of ***Gaylor***, the facts are generally similar to the facts here and the reasoning of the court is on point. The district court considered a constitutional challenge to WIS. ADMIN. CODE § Adm 2.08(1) (1993),

the immediate predecessor "sign" rule to WIS. ADMIN. CODE § Adm 2.07(2) (Feb. 2002), in circumstances analogous to the circumstances here.[7] ***Gaylor***, 939 F. Supp. at 1372. The main difference between the facts in ***Gaylor*** and the facts here is that the plaintiffs in ***Gaylor*** initially applied for, and were granted, a permit, whereas here none of the plaintiffs applied for a permit to display a sign. *See* ***id.*** at 1367. In ***Gaylor***, police issued a permit to an organization to display a large sign (9 1/2 feet by 28 inches) in the Capitol building. ***Id.*** Two weeks before the permit was set to expire, State officials amended the permit to allow only a much smaller sign. ***Id.*** at 1366. The organization refused to reduce the size of its sign, and State officials removed the organization's large sign. The organization claimed that this violated the organization's First Amendment rights. ***Id.*** at 1366, 1369.

¶22 The court in ***Gaylor*** held that the State's regulation of the right to display a sign in the Capitol was a reasonable time, place, and manner restriction. ***Id.*** at 1370-71. The court reasoned that the plaintiffs' First Amendment rights to free speech in public are not unlimited, and that "[t]he State can implement ... restrictions" and impose "regulations on the time, place[,] and manner of the displays" within public buildings. ***Id.*** at 1370. The court concluded that the State has legitimate interests in "maintaining the capitol's appearance" and "advanc[ing] aesthetic values," "keeping the capitol rotunda free from visual clutter" that large

[7] The two "sign" rules are nearly identical. The rule analyzed by the ***Gaylor v. Thompson***, 939 F. Supp. 1363 (W.D. Wis. 1996) court read in pertinent part as follows:

> **Interior displays and decorations**. (1) No displays, signs, placards, banners or any graphic or artistic material may be erected, attached, mounted, or displayed within any state office building or facility without authorization by the department of administration.

WIS. ADMIN. CODE § Adm 2.08 (1993).

signs tend to create, and imposing a size restriction that protects "the capitol from visual degradation" that such a "display" may create. ***Id.*** at 1370-71.

¶23 The court in ***Gaylor*** also considered the potential prior restraint issue, that is, whether the requirement that those who wished to display signs had to obtain a permit constituted an impermissible prior restraint. ***Id.*** at 1371-73. The court held that WIS. ADMIN. CODE § Adm 2.08(1) did not create an unconstitutional prior restraint. ***Gaylor***, 939 F. Supp. at 1371-73. The court concluded that the permitting scheme set forth in WIS. ADMIN. CODE ch. 2 provided sufficient protections to those seeking permits. ***Id.*** at 1372. The court reasoned that, while those "seeking to hold a meeting or place a display in the capitol rotunda must seek prior approval," "not all licensing or permit systems constitute unlawful prior restraints. Such systems will be considered prior restraints if they place 'unbridled discretion in the hands of a government official or agency.'" ***Id.*** (citations omitted). The court held that the permitting rule did not place "unbridled discretion" in the hands of the government decisionmaker because it was limited by WIS. ADMIN. CODE §§ Adm 2.04(1) and 2.04(5) (1993).[8] ***Id.*** Although the regulations left some room for discretion, the court held that § Adm 2.04(1) stood as an "adequate bulwark" against "unbridled administrative

[8] WISCONSIN ADMIN. CODE §§ Adm 2.04(1) and (5) were substantially the same in both the 1993 version of WIS. ADMIN. CODE ch. 2 at issue in ***Gaylor*** and the 2002 version at issue here.

Plaintiffs assert that the circuit court in this case concluded that the defendants are not entitled to qualified immunity because the regulatory scheme here "vested unbridled discretion in a government decisionmaker as to whether to grant or deny a permit." However, for this proposition, plaintiffs cite to record passages in which the court concluded no such thing, and instead merely made passing references to other cases that referenced the concept of "unbridled discretion." We caution counsel that vigorous advocacy does not include misleading use of the record.

discretion" in granting display permits. ***Id.*** ("Rather than providing defendants unbridled authority, the regulations contained in § Adm 2.04 require the granting of a permit unless the activity would disrupt the functioning of the state government.").

¶24 Plaintiffs attempt to distinguish ***Gaylor*** by arguing that the court there mentioned WIS. ADMIN. CODE § Adm 2.08(1) "exactly once" and by observing that the display of the sign at issue in ***Gaylor*** involved mounting it on, or attaching it to, a fixed object in the Capitol rotunda, as opposed to people merely holding the signs. Plaintiffs also argue that the court in ***Gaylor*** did not rule that WIS. ADMIN. CODE § Adm 2.04 provided guidelines for officials to follow in considering permit applications under § Adm 2.08(1). These arguments are without merit.

¶25 As the defendants observe, although the court in ***Gaylor*** explicitly referred to WIS. ADMIN. CODE § Adm 2.08(1) only once, *see* ***Gaylor***, 939 F. Supp. at 1372, the court mentioned throughout the opinion the plaintiffs' constitutional challenge involving a "permit" to "display" a "banner." *See, e.g.,* ***id.*** at 1366, 1367, 1368, 1369, 1370, 1371, 1372. In the court's "unbridled discretion" discussion, the court reproduced the permitting guidelines governing WIS. ADMIN. CODE ch. 2, as set forth in § Adm 2.04, and explained that "§ Adm 2.08 pertains specifically to interior displays and decorations and requires individuals to receive the express written authorization of the Department of Administration before mounting any such items." ***Id.*** at 1372. In the course of its analysis, the court clearly applied the permitting guidelines from § Adm 2.04 to the permit requirement for displays in § Adm 2.08. In sum, we conclude that the regulations at issue in ***Gaylor*** are identical in all pertinent respects to those at issue here,

including the requirement to obtain a permit to display a sign and the use of the permitting guidelines.

¶26 To recap, the ***Gaylor*** court held that WIS. ADMIN. CODE § Adm 2.08(1) placed valid time, place, or manner restrictions on the organization's First Amendment rights, and that § Adm 2.08(1), when enforced in accordance with WIS. ADMIN. CODE § Adm 2.04(1), was not an unlawful prior restraint. Because the language of the applicable rules was substantially the same when ***Gaylor*** was decided and at all times pertinent here, this provides further support for the defendants' arguments that it was not clearly established in March 2011 that WIS. ADMIN. CODE § Adm 2.07(2) was not a valid time, place, or manner regulation and that § Adm 2.04(1) and § Adm 2.07(2) imposed a system of unlawful prior restraint in 2011.

¶27 Further, while neither party addresses it on appeal, the circuit court in this case referenced a 1969 Wisconsin Supreme Court decision that also weighs against the plaintiffs' qualified immunity argument. *See* ***State v. Zwicker***, 41 Wis. 2d 497, 164 N.W.2d 512 (1969). ***Zwicker*** arose as a challenge to the arrests of several individuals demonstrating on a university campus. ***Id.*** at 502-03. Prior to the demonstration, officials charged with regulating the use of university buildings implemented a rule prohibiting demonstrators from taking signs into campus buildings. ***Id.*** at 503. Zwicker was among several people who were advised by officials of the rule prohibiting sign displays in campus buildings, and he was among demonstrators who ignored multiple requests by the officials to put their signs down when inside campus buildings. ***Id.***

¶28 The court rejected Zwicker's challenge to his disorderly conduct conviction based on his asserted constitutional right to display a sign in a public

building. The court explained that the demonstrators' behavior was "'subject to regulation even though intertwined with expression ....'" ***Id.*** at 512 (quoted source omitted). Although the discussion on this topic in ***Zwicker*** was brief and arose in the context of a challenge to a criminal conviction, the fact that the court held that officials did not violate the First Amendment by regulating the display of signs in a public building further supports our conclusion that the constitutional rights at issue here were not clearly established in March 2011.

¶29 In sum, the plaintiffs cite inapposite authority with the possible exception of a single federal district court opinion that cannot clearly establish the rights at issue and is, in any case, distinguishable. Moreover, ***Gaylor*** and ***Zwicker*** provided the defendants with reasonably strong indications to the contrary. Because the defendants are entitled to qualified immunity, there was no basis on which to award the plaintiffs damages and fees. Accordingly, we remand to the circuit court with directions to dismiss the plaintiffs' complaint in its entirety, and to vacate its judgment awarding the plaintiffs damages and attorneys' fees.[9]

By the Court.—Judgments reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[9] Our qualified immunity decision is dispositive and we do not address other grounds that the defendants argue would support reversal.

Separately, we deny the plaintiffs' motion to strike a portion of the defendants' reply brief, because the challenged portion involves an argument that we do not reach.