Rally?Rights Rumble: Fourth Circuit Clears Crowd-Controlling Cops from ‘Heckler’s Veto’ Heat in Balogh v. Virginia

Description

The United States Court of Appeals for the Fourth Circuit recently rendered a decision in the case *Balogh v. Virginia*.[1] This case arose in the wake of the “Unite the Right” rally in Charlottesville, Virginia, organized to protest the removal of a Robert E. Lee statue. The protest quickly turned violent between protesters and counter-protesters, leading one plaintiff to file suit against the Charlottesville Police and the Virginia State Police, alleging violations of his First and Fourteenth Amendment rights.

Background

In Charlottesville, Virginia, city council members voted to remove a statue of Robert E. Lee from Emancipation Park (formerly Lee Park). In response, the city issued a permit allowing a “Unite the Right” rally to take place in the park as a demonstration protesting the removal of the statue. This event drew counter-protesters, many of whom were associated with the group Antifa. Local law enforcement had received intelligence suggesting that “Unite the Right” supporters might arrive armed with bats, batons, flag sticks, knives, and firearms to confront opponents. Meanwhile, the counter-protesters were rumored to be planning disruptions by filling soda cans with cement and using balloons or water bottles loaded with paint, urine, or even fuel.

Fearing these reports would lead to violence, the city revoked the permit. However, the organizers sued, and a court ultimately ruled that the protest should be allowed to proceed. As preparations were made in anticipation of the event, the intended strategy for police was to declare the event unlawful if violence broke out, after which officers would commence dispersal efforts to safely clear the crowds.

Unfortunately, officers were not all on the same page: some believed they were to adopt a strict zero-tolerance approach, while others thought they were expected to stay back unless violence escalated to an extremely threatening level. As anticipated, altercations erupted between protesters and counter-protesters, with individuals from both sides asking the police to intervene. In line with certain interpretations of their directive, officers remained inactive and stood in silence watching the violence, until the Chief officially declared the assembly unlawful. When law enforcement eventually moved in, they issued dispersal orders for everyone in the crowd. The execution of that order, however, was chaotic and did not “ensure separation between the conflicting groups.”

Legal Framework

In the aftermath, Balogh sued the Charlottesville Police and the Virginia State Police for failing to protect his First and Fourteenth Amendment rights by not intervening in the violence and declaring an unlawful assembly. Hearing the case at the outset, the district court dismissed Balogh’s complaint, ruling there was no clearly established right to police intervention to protect First Amendment rights from third-party violence. Balogh then appealed to the United States Court of Appeals for the Fourth Circuit, tasking the court with considering the following questions: “Does the First Amendment protect

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speech amid violence?" More specifically, "Does the First Amendment obligate police officers to protect the constitutional rights of protesters amid violence?"

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United States Court of Appeals for the Fourth Circuit

On appeal, the Fourth Circuit affirmed the district court's judgment dismissing the complaint, holding that: "Where a rally erupted into violence between protesters and counter-protesters, effectively cutting off everyone's speech and ultimately leading to multiple injuries, widespread property damage, and one death, city officials did not violate a protestor's First Amendment rights because officers were not obligated to protect the constitutional rights of protesters amid violence."[2]

First, the court held that the First Amendment does not obligate police to protect protesters' constitutional rights amid violence. The court explained that the First Amendment is a "shield to guard against invasive speech regulations, not a sword to wield against violent disruptions."

The court addressed Balogh's second argument: that the defendants' actions or inactions during the rally—namely, by refusing to intervene and issuing an unlawful assembly order—amounted to a heckler's veto that unlawfully suppressed his speech. The heckler's veto doctrine prohibits a state from suppressing the speech of a peaceful speaker because of a hostile audience. Under this doctrine, it is well established "that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[3]

Furthermore, the United States Court of Appeals for the Ninth Circuit in *Meinecke v. City of Seattle* reiterated that "if speech provokes wrongful acts on the part of hecklers, the government must deal with those wrongful acts directly; it may not avoid doing so by suppressing the speech."[4] Simply put, a state cannot silence particular speech or a particular speaker due to an anticipated disorderly or violent reaction from the audience.

For the heckler's veto argument, the plaintiff relied on *Bible Believers v. Wayne County*, which explained that "police officers cannot 'sit idly on the sidelines—watching as the crowd imposes, through violence, a tyrannical majoritarian rule.' Rather, the police must first make bona fide efforts to protect the speaker from the crowd's hostility."[5] However, the Sixth Circuit also recognized an officer-safety backstop to the heckler's veto: "The Constitution does not require that the officer 'go down with the speaker.'"[6] The court explained, "If, in protecting the speaker or attempting to quash the lawless behavior, the officer must retreat due to risk of injury, then retreat would be warranted."[7]

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The court noted that the two cases referenced—*Bible Believers* and *Meinecke*—illustrate several hallmarks of a heckler's veto: (1) a peaceful speaker; (2) a hostile crowd; and (3) a state actor that "cuts off" only the peaceful speaker because of the crowd's reaction to their speech. However, comparing those cases with the present case, the court explained that even the most deferential reading of Balogh's complaint would show a mismatch between these hallmarks and his alleged facts. However peaceful the Unite the Right protesters may have been at the rally's inception, they did not remain so. More strikingly, law enforcement didn't decline to intervene on behalf of only one group, and when Chief Thomas declared an unlawful assembly, he didn't enforce that directive selectively. Most importantly, the court reiterated that the First Amendment protects peaceful protesters from a state seeking to suppress their speech. But this isn't a case where state actors silenced Balogh's voice while permitting lawlessness from a hostile public, nor is it a case where that hostile public received preferential treatment from the state. Instead, the state treated all speakers equally in disbanding a violent protest.

Addressing the remaining claims, the court found that Balogh's Equal Protection claim under the Fourteenth Amendment failed. To state a Fourteenth Amendment equal protection claim, "a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated, and that the unequal treatment was the result of intentional or purposeful discrimination."[8] Here, the Circuit explained that Balogh failed to provide sufficient facts to show intentional or purposeful discrimination. Finally, the court rejected Balogh's *Monell* claim against the City of Charlottesville, as he did not demonstrate any underlying constitutional violation and because the alleged rights were not clearly established.

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