SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION
Civil Actions Branch

TWO RIVERS PUBLIC CHARTER SCHOOL, *et al.*, Plaintiffs, v. ROBERT WEILER, JR., *et al.*, Defendants.	Case No. 2015 CA 009512 B Civil II, Calendar No. 7 Judge Jeanette J. Clark Next Court Event: Initial Conference March 11, 2016; 9:30 a.m.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT JOHNATHAN DARNEL'S SPECIAL MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendant Johnathan Darnel, by counsel, submits this Memorandum of Points and Authorities in support of her Special Motion to Dismiss Plaintiffs' Complaint.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are the Two Rivers Public Charter School and its Board of Trustees. (Compl. at 1.) They bring two claims, one for intentional infliction of emotional distress and one for private nuisance/conspiracy to commit private nuisance. (*Id.*) They assert that their purpose is "to protect the well-being of the students" of the school from Defendants' demonstrations against the construction of a Planned Parenthood facility across the street from the Two Rivers middle school and next door to its elementary school. (*Id.*) The Complaint alleges that on four occasions, August 27, 2015, November 16, 2015, November 23, 2015, and December 7, 2015, a few individuals have appeared on the public ways near the school and displayed signs and orally expressed their opposition to Planned Parenthood, its practice of offering abortions, and the erection of the facility at that location. (*Id.* at ¶¶33-35, 37-40, 52-59, & 63-66.) Significantly,

Darnel was present on only one of those four days, November 23, 2015, and she is substantively mentioned only twice in the entire Complaint. (*See id.* at ¶¶57 & 58.)

The Complaint alleges that Darnel "approached cars as they came to drop off children and yelled at students *while attempting to hand them pamphlets*." (Compl. ¶58; emphasis added.) She is also alleged to have "shouted to two middle school students that they should '[t]ell [their] parents to stop this bloodbath that's coming across the street . . . the little babies need your voice.'" (*Id.* (second alteration in original)) The Complaint further avers that Darnel also shouted: "'Abortion kills children. A big abortion baby-killing business is coming to your neighborhood, the bloodbath is about to begin.'" (*Id.*)

In fact, Darnel never directed her comments toward elementary-aged children, but instead addressed primarily the parents and adults. *See* Ex. 1 [Darnel Decl. ¶ 6].) Her purpose was not to annoy, upset, or threaten anyone but simply to exercise her right, on the public ways, to advocate on a matter of public concern, namely the erection of the Planned Parenthood facility, where she contends that Planned Parenthood intends to kill innocent children in the womb. (Ex. 1 [Darnel Decl. ¶¶3, 4 & 6].) In addition to speaking to passersby, Darnel also handed out leaflets to willing recipients that contain information about Planned Parenthood, its history, and its promotion of abortion. (Ex. 1 [Darnel Decl. ¶ 5].)

Moreover, Darnel was not even present on August 27, November 16 or December 2, 2015, and she had nothing to do with the alleged actions of those who were alleged to have been present on those days. (Ex. 1 [Darnel Decl. ¶ 2].) Accordingly, the activities alleged to have occurred on those days cannot be held against Darnel.[1]

Darnel's activities were constitutionally protected speech and expressive conduct in a

[1] Plaintiffs' naked allegation of conspiracy, without more, is insufficient as a matter of law. *See, e.g.*, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007).

traditional public forum. Plaintiffs attempt to censor her by means of a content-based restriction on speech in direct violation of the District of Columbia's Anti-SLAPP Act. For this reason, and because Plaintiffs lack standing and are otherwise unable to show a likelihood of success on the merits, Plaintiffs' injunction should be denied and their Complaint dismissed with prejudice.

I. DARNEL'S EXPRESSIVE ACTIVITIES ARE CONSTITUTIONALLY PROTECTED AND FALL SQUARELY WITHIN THE ANTI-SLAPP ACT.

"A 'strategic lawsuit against public participation' or 'SLAPP' is a lawsuit 'filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view.'" *Doe No. 1 v. Burke*, 91 A.3d 1031, 1033 (D.C. 2014) (quoting D.C. Council, Comm. on Pub. Safety and the Judiciary, Report on Bill 18–893 at 1 (Nov. 18, 2010)). While masquerading as an ordinary lawsuit, its "true objective is to use litigation as a weapon to chill or silence speech." *Id.* The District of Columbia enacted a so-called "Anti-SLAPP" Act in 2010 "to protect the targets of SLAPPs and encourage 'engag[ement] in political or public policy debates.'" *Id.* at 1036 (alteration in original) (quoting D.C. Council Comm. Report at 4). The statute provides "absolute or qualified immunity to individuals engaged in protected actions." *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 36 (D.D.C. 2012). It provides in pertinent part that "[a] party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim." D.C. CODE ANN. § 16-5502(a) (West, Westlaw through Dec. 29, 2015). Once a party "makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits . . . ." *Id.* § 16-5502(b).

What constitutes an act in furtherance of the right of advocacy specifically includes "[a]ny written or oral statement" made "[i]n a place open to the public or a public forum in

connection with an issue of public interest . . . . ." D.C. CODE ANN. §16-5501(1)(A)(ii) (West, Westlaw through Dec. 29, 2015). An issue of public interest is defined as "an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place." *Id.* §16-5501(3).

Once the moving party makes a "prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest," the motion "shall" be granted unless the opposing party demonstrates a likelihood of success on the merits of his or her underlying claim. *Id.* §16-5502(b). Thus, the burden of proof shifts to Plaintiffs once Darnel has made the prima facie showing, as she does here.

This Special Motion to Dismiss is timely, having been filed well within the 45-day limit prescribed in section 16-5502(a). Moreover, Darnel's activities are plainly protected under the Act (and under the First Amendment). Plaintiffs' claims are centered on Darnel's expressive activities, which consisted of nothing more than oral expressions of her opposition to Planned Parenthood's abortion business (a service in the market place) together with the peaceful distribution of leaflets providing further information supporting her position, all of which occurred on the public sidewalks and public ways, which Plaintiffs do not dispute. (*See* Compl. ¶¶57 & 58; *see also* Ex. 1 [Darnel Decl. ¶¶ 3-6].) These activities are precisely what the Anti-SLAPP Act is intended to protect. *See Mann v. Nat'l Review, Inc.*, 2013 D.C. Super. LEXIS 8, at *10, 43 ELR 20169, 141 Daily Wash. Law Rptr. 1713, 1715 (D.C. Super. Ct. 2013).

A. Darnel's Expressive Activities are Entitled to Special Protection under the First Amendment.

Quite apart from the purpose of the District of Columbia's anti-SLAPP statute, the Supreme Court of the United States repeatedly has emphasized the importance of protecting speech on matters of public concern:

> "[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc*., 472 U.S. 749, 758-759, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985) (opinion of Powell, J.) (quoting *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 776, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978)). The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). That is because "speech concerning public affairs is more than self-expression; it is the essence of self- government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964). Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) (internal quotation marks omitted).

Snyder v. Phelps, 562 U.S. 443, 451-52 (2011). *Snyder* involved a claim for intentional infliction of emotional distress under circumstances far worse than those here. In *Snyder*, the defendants picketed the funeral of a deceased lance corporal killed in the line of duty in Iraq. *Id.* at 448. Standing on the public ways outside the church where a memorial service was held, their signs contained such messages as "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Priests Rape Boys," "God Hates Fags," and "God Hates You." *Id.* Snyder brought a diversity lawsuit in federal court alleging five different torts, including intentional infliction of emotional distress. *Id.* at 449-450. After a trial on three of those torts, a jury found for the plaintiff on all three claims, awarding $2.9 million in compensatory damages and $8 million in punitive damages. *Id.* at 450.

On appeal, the Fourth Circuit reversed, holding that the speech was protected under the First Amendment as a matter of law. *Id.* at 450-51. In an 8-1 decision, the Supreme Court affirmed. Considering the content, form, and context of the speech, the Court concluded that it was speech on a matter of public concern because the political and moral issues it highlighted were "matters of public import" and it occurred "on the public ways next to a public street." *Snyder*, 562 U.S. at 454-55.

The same analysis applies with equal force here: Darnel's speech is plainly protected under the First Amendment. It addressed a matter of public import, and it was expressed publicly on the public ways. Instead of placards, Darnel used her unaided voice and leaflets to communicate her views. "Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, ..." *Schenck v. Pro-Choice Network of West. N.Y.*, 519 U.S. 357, 377 (1997).

B. Darnel's Expressive Activities Are Covered by the Anti-SLAPP Act.

Snyder teaches that speech "at a public place on a matter of public concern" is entitled to "special protection under the First Amendment" and "cannot be restricted simply because it is upsetting or arouses contempt." *Id.* at 458 (internal quotation marks and citation omitted). Similarly, the D.C. Anti-SLAPP Act protects advocacy and expressive conduct on matters of public interest. Because Darnel's speech and expressive conduct here furthered the right of advocacy on a matter of public interest and occurred on the public ways, and because Plaintiffs cannot show that they are likely to prevail on the merits, her Special Motion to Dismiss should be granted.

II. PLAINTIFFS CANNOT SHOW LIKELIHOOD OF SUCCESS ON THE MERITS.

Under the Anti-SLAPP Act, once Darnel has shown that her actions were in furtherance of the right of advocacy on an issue of public interest, the burden of proof shifts to Plaintiffs to show that they are likely to succeed on the merits. D.C. CODE ANN. § 16-5502(b) (West, Westlaw through Dec. 29, 2015). Plaintiffs cannot meet this high burden for at least three reasons. First, they lack standing to assert the rights of students and their parents; second, as a matter of law, Darnel's expressive activities on the public ways do not rise to the level of intentional infliction of emotional distress or an actionable private nuisance; and third, even if

they did, expressive conduct cannot be enjoined under a nuisance theory. For all of these reasons, and as discussed more fully below, Plaintiffs' case against Darnel should be dismissed.

A. Plaintiffs Cannot Establish Standing to Sue on behalf of Their Students and Their Parents.

Plaintiffs assert that they have brought this action on behalf of their students. (Compl. at 2.) They further allege that Defendants' actions have caused students emotional distress. (Compl. ¶¶14 & 81.) In a nutshell, Plaintiffs assert associational standing on behalf of their students with respect to claims of alleged emotional harm that are uniquely personal to those students and their parents. Because Plaintiffs cannot meet the requirements of associational standing, their case should be dismissed.[2]

B. Darnel's Expressive Activities are not Actionable as a Matter of Law.

Quite apart from Plaintiffs' lack of standing, the allegations against Darnel fail to state legal causes of action. As a matter of law, her alleged actions do not meet the high standard for pleading a claim for intentional infliction of emotional distress. Nor do they rise to the level of a private nuisance. Moreover, the District of Columbia does not recognize an independent cause of action for private nuisance. Plaintiffs therefore are unable to show a likelihood of prevailing on the merits, and their Complaint should be dismissed.

1. Darnel's activities do not rise to the level of intentional infliction of emotional distress.

"In order to prove the tort of intentional infliction of emotional distress, 'a plaintiff must show (1) extreme and outrageous conduct on the part of the defendant which (2) intentionally or recklessly (3) causes the plaintiff [to suffer] severe emotional distress.'" *Ortberg v. Goldman Sachs Grp.*, 64 A.3d 158, 163 (D.C. 2013) (alteration in original) (quoting *Baltimore v. Dist. of*

[2] Nicdao incorporates by reference under Rule 10(c), SCR-Civ. the arguments and authorities in her Motion to Dismiss for Lack of Subject Matter Jurisdiction, filed simultaneously herewith.

Columbia, 10 A.3d 1141, 1155 (D.C.2011)) (reversing preliminary injunction against protesters based on claims of intentional infliction of emotional distress ["IIED"] and private nuisance). There are "strict tests" for the elements of IIED in the case law. *Id.* The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* The Court also must consider the context in which the conduct occurred, including the relationship between the parties and the environment. *Id.* "In any context, no liability can be imposed for mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.* (quoting *Homan v. Goyal*, 711 A.2d 812, 818 (D.C. 1998)).

Ortberg is directly on point. In that case, a small group of environmental activists engaged in repeated demonstrations outside the offices of Goldman Sachs, *as well as outside the residence* of its managing director. *Ortberg*, 64 A.3d at 161. The group also used bullhorns and airhorns, in addition to carrying posters. *Id.* Occasionally they would go into the lobby of the Goldman Sachs offices, but the conduct for the most part "took place on public streets, and consisted mostly of chanting slogans and some vague threats." *Id.* at 163. The managing director testified that "he felt 'afraid' that the protests would lead to violence and that he found the protests 'humiliating, embarrassing and intimidating.'" *Id.* at 163. He also testified that "his family felt 'targeted and terrorized in our own home because of the actions of these people.'" *Id.* Under these circumstances, the trial court entered an injunction prohibiting this kind of conduct.

The District of Columbia Court of Appeals in *Ortberg* nevertheless reversed, concluding that this type of activity is "part and parcel 'of the frictions and irritations and clashing of temperaments incident to participation in a community life,' especially life in a society that recognizes a right to public political protest." *Id.* at 163-64 (quoting *Homan*, 711 A.2d at 818).

The court further observed that, in most instances, "a few unwelcome visits, accompanied by some harassing conduct, would not be cognizable in an action for a tort which requires proof of extreme or outrageous conduct." *Id*. at 164 (internal quotation marks omitted). Even though the protests were "loud and disturbing," the *Ortberg* court determined that more is required to support a claim of "extreme and outrageous conduct." *Id.* Because the threshold finding of "extreme and outrageous conduct" is a question of law, the court held that the trial court had "abused its discretion" in entering the injunction. *Id.* at 164.

Again, regarding the element of "severe emotional distress," the *Ortberg* court held that a sufficient showing to justify entry of a preliminary injunction had not been made. *Id.* The Court of Appeals explained that the governing case law "sets a high standard," requiring allegations and proof of emotional distress of "so acute a nature that harmful physical consequences might be not unlikely to result." *Id.* (citation and quotation marks omitted). The mere fact that the conduct causes *some* emotional distress, or that conduct is "offensive," is not enough. *Crowley v. North Am. Telecom. Ass'n*, 691 A.2d 1169, 1172 (D.C. 1997). In fact, one may "'*intentionally* inflict some worry and concern,'" so long as he or she refrains from "'conduct intended or likely to cause physical illness.'" *Ortberg*, 64 A.3d at 165 (quoting *Clark v. Associated Retail Credit Men of Wash. D.C*., 105 F.2d 62, 66–67 (D.C. 1939)) (emphasis added). Moreover, Plaintiffs are unable to demonstrate any special relationship between the students and Darnel. *See Waldon v. Covington*, 415 A.2d 1070, 1076 n.21 (D.C. 1980) ("Insults amounting to less than extreme outrage are actionable only when the defendant enjoys a special relationship to the plaintiff that compels a higher than normal duty of care, as when the defendant is a common carrier, innkeeper, or public utility, or when there is a debtor-creditor relationship . . . .") And the Complaint offers no allegations that Darnel intentionally or recklessly caused severe emotional

distress to these individuals. *See, e.g.*, *Waldon*, 415 A.2d at 1077 (common elements in establishing requisite intent are "deceit or falsity, a total lack of privilege, and such wantonness that it can be presumed that the defendant would foresee severe consequences").

As a matter of law, Plaintiffs' allegations in the case at bar are insufficient to sustain a cause of action for IIED. The first substantive allegation against Darnel is not until ¶57, where Plaintiffs allege that after they had directed students into a side entrance to the middle school, Darnel "followed the students into the alley and continued shouting at them, making parents and students feel threatened and unsafe." (Compl. ¶57.) These actions in a traditional public forum do not amount to extreme and outrageous conduct.[3] There is not even a hint that the feelings of these middle school students and their parents were *likely* to cause *physical illness*, as the law requires. *See Ortberg*, 64 A.3d at 164. Moreover, the Complaint does not allege which parents and children allegedly felt threatened and unsafe, or that any of them were in fragile emotional states. Not only is there no allegation that ***Darnel*** specifically intended to cause "a disturbance of another's mental or emotional tranquility of so acute a nature that harmful physical consequences might be not unlikely to result," *Clark v. Associated Retail Credit Men of Wash., D.C.*, 105 F.2d 62, 65 (D.C. 1939), there also is no averment that Darnel used any "disturbing poster" or threatened any student or parent.[4]

To be sure, Plaintiffs allege that Darnel approached cars and "yelled at students" while attempting to hand them pamphlets. (Compl. ¶58.) But Plaintiffs do not even claim that any of

[3] The allegations concerning the feelings of parents and students are hearsay and should be disregarded because Plaintiffs concede that they lack personal knowledge of these matters. (*See* Compl. at 29, averring personal knowledge only of the allegations concerning "Two Rivers Public Charter School and its activities.")

[4] There is an important difference between alleging that a person to whom certain conduct was directed subjectively felt threatened and alleging that the actor herself objectively made a specific threat.

Darnel's actions caused *any* emotional distress, let alone such severe or extreme distress as would likely cause physical illness.[5] Furthermore, her actions are well within the bounds of normal, everyday advocacy on issues of public concern; they are "part and parcel of the frictions and irritations and clashing of temperaments incident to participation in a community life, especially life in a society that recognizes a right to public political protest." *Ortberg*, 64 A.3d at 163-64 (internal quotation marks and citation omitted). They occurred on the public ways, where speech "is at its most protected . . . , a prototypical example of a traditional public forum." *Schenck*, 519 U.S. 357, 377. Because such conduct is constitutionally privileged, it cannot be deemed "so outrageous that harmful intent can be presumed." *Cf. Waldon*, 415 A.2d at 1077.

Plaintiffs ask this Court to censor Darnel's advocacy on an issue of great public concern even though she has studiously remained on the public ways, has never employed violence or fighting words, and did not address elementary school students (even though such speech would be protected as well). They urge the Court to enjoin her from expressive activity "within a reasonable distance" of the school buildings, from "whistling, shouting, yelling" and the use of sound amplification devices, and from being near her intended audience – the parents and students of the middle school – when that audience is most likely to be present, namely, when students are arriving and departing. (*See* Compl., Prayer for Relief, at 25-28). As Plaintiffs would have it, Darnel should be prohibited entirely from reaching her intended audience – prohibited from coming near enough to speak to it and barred from using any amplification (either unaided or aided by mechanical devices).[6]

[5] At best, Plaintiffs only manage to allege that "Parents reported feeling extremely upset *by the gruesome poster*" and the "*gruesome images*" and that one student "was so upset by this incident that he began to feel sick and had to go home." (Compl. ¶¶60 & 61.) But Darnel is not alleged to have displayed any posters, nor is she alleged to have made any "threats" of future demonstrations.

[6] In fact, Plaintiffs seek relief from actions that they have not even alleged Darnel to have committed, such as trespassing on their property or using sound amplification devices. For this reason alone, the

In sum, Count I of the Complaint should be dismissed because Darnel's expressive activities do not constitute the kind of extreme and outrageous conduct required to support a claim of intentional infliction of emotional distress.

2. Darnel's activities do not constitute a private nuisance.

Ortberg v. Goldman Sachs Group, 64 A.3d 158 (D.C. 2013), is instructive on the issue of private nuisance as well as IIED. In *Ortberg*, the District of Columbia Court of Appeals reiterated that nuisance is a "field of tort liability, rather than a type of tortious conduct." *Id.* at 166 (quotation omitted). Thus, "where a plaintiff alleges both nuisance and intentional infliction of emotional distress," as Plaintiffs have done here, the appellate courts "have explained that 'nuisance is a type of damage and not a theory of recovery in and of itself,' so the elements of a theory of recovery must be established with reference to the elements of 'the intentional infliction of emotional distress claim.'" *Id.* at 167 (quoting *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 934 (D.C. 1995)). In other words, Plaintiffs' entire case collapses if their IIED claim fails. Because that claim fails, as discussed above, so too the private nuisance claim fails.

Additionally, even if the nuisance claim otherwise could stand on its own, Plaintiffs are unable to meet their burden of showing a likelihood of success on the merits. The District of Columbia's earlier cases emphasize that in order to prevail on a nuisance claim two factors must be shown: (1) "continuity" or "substantial harm," (*i.e.*, conduct requiring "some degree of permanence"); and (2) a "continuousness or recurrence of the things, facts or acts which

---

injunction should be denied and the Complaint dismissed. In addition, the terms of the requested relief are breathtakingly overbroad in that they would prohibit Ms. Darnel from blocking or "in any manner obstructing or interfering with . . . ingress into and egress from any building, public space, or parking area owned *or used* by Two Rivers Public Charter School." (Compl. at 26; emphasis added.) Under this provision, Darnel could be found in contempt merely for standing between a parking space *used* by Plaintiffs and the school. Such an overbroad and ambiguous injunction would be in clear violation of the First and Fourteenth Amendments to the U.S. Constitution. *See, e.g.*, *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 916 (1982) (when sanctionable "conduct occurs in the context of constitutionally protected activity . . . 'precision of regulation' is demanded" (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

constitute the nuisance deriving from the notion of unreasonable use." *Id.* at 167 (quoting *Reese v. Wells*, 73 A.2d 899, 902 (D.C. 1950)). In order to obtain injunctive relief, "a plaintiff must demonstrate a likelihood of repeated injury or future harm to the plaintiff in the absence of the injunction." *Am. Fed'n of Labor v. Chertoff*, 552 F. Supp. 2d 999, 1014 (N.D. Cal. 2007) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1982) (threat of future injury be "sufficiently real and immediate")). Plaintiffs cannot satisfy these criteria.

First, because Darnel is alleged to have been in close proximity to the School on only a single occasion, the required continuousness or recurrence of alleged harm is lacking. The nuisance claim therefore is unlikely to succeed for that reason alone. But there is more: Plaintiffs have alleged *no* specific harm proximately caused by Darnel's constitutionally protected conduct, and they therefore fall far short of showing the requisite *substantial* harm. There are no allegations that Darnel's conduct caused physical damage to School property, caused the School to close, caused any students to withdraw, or made it impossible for any students to attend the School. Indeed, even when combined with the actions of the other Defendants, which would not be appropriate, Plaintiffs allege only four (4) dates on which any protest activity occurred – spread out over a period of some three and a half (3½) months! But Darnel was present *on only one of these occasions*. (*See* Ex. 1 at ¶¶2 & 3.) Moreover, Plaintiffs have the burden of proving that Darnel is likely to cause them *repeated* injury. In fact, Darnel has testified that she has no present intention to regularly return to the site of this new Planned Parenthood facility, since she lives in Virginia. (*Id.* at ¶ 7.) As in *Ortberg*, where the plaintiffs showed *five* demonstrations over several weeks but were still deemed not entitled to an injunction, 64 A.3d at 168, Plaintiffs here cannot meet the requirements for a private nuisance action, and Darnel's Motion therefore should be granted.

C. An Injunction Against Darnel's Expressive Conduct Would Amount to an Unconstitutional Prior Restraint on Speech.

Plaintiffs seek only injunctive relief. But what they seek to enjoin is Darnel's speech and expressive conduct. The Supreme Court has emphasized that a preliminary injunction is an "extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Moreover, "court orders that actually forbid speech activities — are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993). Furthermore, prior restraints on speech and publication are "the 'most serious and the least tolerable infringement on First Amendment rights.'" *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Consequently, "those seeking to justify a prior restraint must satisfy a heavy burden." *Hunt v. National Broadcasting Co.*, 872 F.2d 289, 293 (9th Cir. 1989).

As the Supreme Court has explained, the reason for this high burden is that unfettered censorship poses serious and unacceptable risks to a free society:

> The presumption against prior restraint is heavier – and the degree of protection broader – than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: *a free society prefers to punish the few who abuse rights of speech* after *they break the law than to throttle them and all others beforehand*. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975) (emphasis added).

Of equal concern when considering a request to enjoin First Amendment activity is the lack of narrow limits on such restraints. For example, the Third Circuit refused to enter an injunction against plainly obscene films under a nuisance theory because the standards defining the offensive conduct were not "sufficiently narrow or precise to pass constitutional muster." *Grove Press Inc. v. City of Phila.*, 418 F.2d 82, 88 (3d Cir. 1969). An injunction entered on the

slender reed of a private nuisance theory presents a serious risk of overbreadth and constitutional invalidity. *See, e.g.*, *General Corp. v. State*, 320 So. 2d 668, 675 (Ala. 1975) (holding unconstitutional as prior restraint an injunction against showing obscene movies; "[e]vidence of obscene conduct in the past does not justify enjoining future conduct which is protected by the First Amendment"); *Black Rock City LLC v. Pershing Cnty. Bd. of Comm'rs*, 2013 U.S. Dist. LEXIS 60072, 3:12-cv-00435-RCJ-VPC, *22-25, 2013 WL 1795760 (D. Nev. 2013) (expressing concern that a "significant amount of protected speech may be prohibited . . . in relation to unprotected speech").

This logic applies with equal if not greater force here. Plaintiffs seek an amorphous and ungainly prior restraint on speech on the basis of alleged conduct that Plaintiffs do not even attribute to Darnel and with no clear limits on its reach. Even if Plaintiffs could show a likelihood of prevailing on the merits, which they cannot, the more prudent course would be to punish discrete illegal acts after the fact rather than to enter a broad injunction before the fact when Plaintiffs have failed to show that improper acts that may be enjoined are likely to recur. After all, "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963) (internal citations omitted).

CONCLUSION

For all of the foregoing reasons, Darnel's motion to dismiss should be granted. Plaintiff's lawsuit is an unwarranted and meritless attempt to censor and silence Darnel's expressive activities on a matter of public concern. Because Darnel's activities are constitutionally protected and Plaintiffs' claims are without merit, the case should be dismissed.

Dated: February 16, 2016

Garza Law Firm, P.A.

By: /s/ John R. Garza

John R. Garza D.C. Bar 398728
17 W Jefferson Street, Suite 100
Rockville, Md 20850
jgarza@garzanet.com
- and -

Alexandra Snyder
Life Legal Defense Fund

Counsel for Defendant Johnathan Darnel