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

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| TWO RIVERS PUBLIC CHARTER SCHOOL, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>ROBERT WEILER, JR., *et al.*,<br><br>Defendants. | Case No. 2015 CA 009512 B<br><br>Civil II, Calendar No. 7<br><br>Judge Jeanette J. Clark<br><br>Next Court Event:<br>Initial Conference<br>April 29, 2016; 9:30 a.m. |

**DEFENDANT RUBY NICDAO'S**
**REPLY IN SUPPORT OF HER SPECIAL MOTION**
**TO DISMISS PLAINTIFFS' COMPLAINT**

Defendant Ruby Nicdao ("Nicdao"), by and through counsel, submits this reply to Plaintiffs' response to Nicdao's Special Motion to Dismiss Plaintiffs' Complaint under the District of Columbia Anti-SLAPP Act, D.C. Code §16-5502 ("the Act"). As shown below, the Act plainly applies here because Nicdao's speech in opposition to the practice of abortion is universally recognized as being an issue of public concern, and Plaintiffs have failed to adduce either admissible evidence or persuasive legal authority to satisfy their high burden of showing that they are likely to prevail on the merits of their claims.[1] In addition, Plaintiffs' sole request for relief is for an injunction, which would constitute an impermissible prior restraint against Nicdao's protected speech. Nicdao's motion should therefore be granted, and Plaintiffs' Complaint against Nicdao should be dismissed.

[1] "[A] plaintiff cannot simply rely on his or her pleadings, even if verified; rather, the plaintiff must adduce competent, admissible evidence." *Payne v. District of Columbia*, No. 2012 CA 6163B, *5 (D.C. Super. Ct. May 28, 2013) (Pls.' Ex. 5). Plaintiffs have failed to adduce competent, admissible evidence to support their claims here. As a result, Nicdao's Special Motion to Dismiss should be granted.

## ARGUMENT

### I. Plaintiffs' Failure even to Respond to Nicdao's Authorities showing that Injunctive Relief is Improper here is a Tacit Admission that an Injunction does not lie under these Circumstances.

Plaintiffs' Consolidated Brief in Opposition to the Special Motions to Dismiss ("Br. in Opp.") consists of 35 pages of argument, unsupported factual assertions, and purported authorities they proffer in support of their claims. Yet for all that, they offer not a single word in rebuttal against Nicdao's argument that any injunction entered against Nicdao's expressive activities would constitute an unconstitutional prior restraint on speech. *See* Nicdao's Memorandum of Points and Authorities at 14-15 ("Memorandum") (citing authorities). As shown in Nicdao's Memorandum, "those seeking to justify a prior restraint must satisfy a heavy burden." *Hunt v. Nat'l Broad. Co.*, 872 F.2d 289, 293 (9th Cir. 1989). Plaintiffs do not even acknowledge, much less attempt to meet that "heavy burden" here.

In order to succeed in obtaining an injunction, Plaintiffs are not only required to show that they are likely to succeed on the merits in general but also that they are "*likely* to suffer *irreparable* harm in the absence of preliminary relief."[2] *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008) (emphasis added); *see also Alexander v. United States*, 509 U.S. 544, 550 (1993) (recognizing that "court orders that actually forbid speech activities — are classic examples of prior restraints"). Plaintiffs complain of demonstrations dating back to August 2015 – some seven months ago. *See* Compl., ¶¶33-35. During the entire period from August 2015 to the present, the uncontroverted evidence shows that Nicdao was present *only once*, on November 23, 2015, over four months ago. *Id.* at ¶57; Nicdao Decl., ¶3. She has never returned. Therefore,

[2] "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22. Accordingly, it would constitute reversible error to enter an injunction under these circumstances.

Plaintiffs cannot establish that they are *likely* to suffer *any* harm from Nicdao in the future, much less *irreparable* harm. In fact, Plaintiffs have conceded that they don't know *if* or *when* any of the Defendants might return to the premises, which utterly destroys any sound basis for entry of injunctive relief against anyone. *See* Plaintiffs' Response to Defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction at 5 ("Plaintiffs do not know if and when protestors will be present . . .").

Additionally, the likelihood of repetition – which Plaintiffs cannot show here – is also an element necessary for recovery under a nuisance theory. *See*, *e.g.*, *Ortberg v. Goldman Sachs Grp.*, 64 A.3d 158, 167 (D.C. 2013) (two essential elements to determine the existence of actionable nuisance are "'continuity' or 'substantial harm' (requiring 'some degree of permanence'), and 'continuousness or recurrence of the things . . . .") (quotation omitted). Plaintiffs wholly fail to show *either* continuity *or* continuousness. As a consequence, both their claim for injunctive relief and their claim for private nuisance fail as against Nicdao.

## II. The Anti-SLAPP Act Plainly Applies Here.

Plaintiffs argue that the Act does not apply here because Plaintiffs have not taken sides in the debate over abortion and Plaintiffs do not intend to "stifle" Defendants' free speech rights. Br. in Opp. at i, 1, 7-10. Tellingly, Plaintiffs repeatedly cite *only the legislative history* of the Act in making this argument, intentionally *omitting* the plain language of the statute itself.[3] Yet only a few pages earlier, when urging the Court to dismiss the motions of some of the other

[3] In fact, even the legislative history supports the conclusion that the Act applies here. For example, the ACLU representative (cited by Plaintiffs) testified that anti-SLAPP lawsuits typically involve claims against Defendants speaking out against an issue involving government action, they name John Does as Defendants, and often include claims of conspiracy. *See* Br. in Opp. at Ex. 1, pp. 1-2. Plaintiffs' claims include all of these elements. *Accord*, *Ctr. for Advanced Def. Studies v. Kaalbye Shipping Int'l*, No. 2014 CA 002273 B (D.C. Super. Ct. Apr. 7, 2015), Order at 7 (cited by Plaintiffs) ("the SLAPP Act reflects a legislative judgment by the D.C. Council to ensure that those engaged in public policy debates are not intimidated or prevented from doing so").

Defendants on grounds of untimeliness, Plaintiffs argued strenuously in favor of considering *only* the statutory language itself and *not* looking beyond the four corners of the statute. *See* Br. in Opp. at 5 (arguing that the 45-day deadline is "clear on its face" and citing *Butler v. Butler*, 496 A.2d 621, 622 (D.C. 1985), to the effect that "where a statute is clear on its face, there is no need to engage in an analysis of legislative intent").

The statute here is clear on its face that a party need only "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" in order for the Act to apply. D.C. Code §16-5502(b). Once that initial showing is made, "then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits." *Id.*; *see also Mann v. Nat'l Review*, Case No. 2012 CA 008263 B (D.C. Super. Ct.), Omnibus Ord. (Sept. 27, 2013) (Pls.' Ex. 3) (Anti-SLAPP Act applied "because it arises from an act in furtherance of the right of advocacy on issue (sic) of public interest"); *Payne v. Dist. of Columbia*, No. 2012 CA 6163B (D.C. Super. Ct. May 28, 2013) (Pls.' Ex. 5) (same). The motives and ideology of the plaintiffs are irrelevant. Here, Nicdao has easily shown that Plaintiffs' claims against her arise from Nicdao's acts in furtherance of the right of advocacy – speaking out and leafleting on the public ways – on an issue of public interest, as will be shown below. Under the plain language of the law, then, Nicdao has met her *prima facie* burden.

Moreover, Plaintiffs claim that their lawsuit is "not intended to stifle Defendants' free speech rights." But that claim is belied by their express statement of intent in the very first sentence of their Complaint, where they admit that their intent is to "limit Defendants' . . . attempts to halt the construction of a Planned Parenthood health center." Compl. at p. 1. In other words, Plaintiffs' true goal *is* to shut down Defendants' speech activities at that location – the

very result that Plaintiffs' Opposition professes they do *not* intend. In short, Plaintiffs' argument fails both on the law and on the facts, and the Act plainly applies here. Because Plaintiffs cannot meet their burden of showing they are likely to prevail on the merits, the case should be dismissed.

## III. Suggesting that Nicdao's Speech did not Involve an Issue of Public Interest "is as unsupportable as contending that the Earth is flat or the Sun Rises in the West and Sets in the East."

Plaintiffs next contend that Nicdao's message did not involve an issue of public interest. Br. in Opp. at 11-15. This argument is utterly baseless. As so well stated by the Supreme Court of Wyoming, "contending that the abortion issue is not one of great public interest and importance is as unsupportable as contending that the Earth is flat or the sun rises in the west and sets in the east." *Operation Save Am. v. City of Jackson*, 275 P.3d 438, 450 at ¶27 (Wyo. 2012). The Act defines an issue of public interest broadly. *See* Nicdao's Memorandum at 3-4. In addition, virtually every court in the country that has considered the issue has acknowledged that abortion is an issue of public interest. *See*, *e.g.*, *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (newspaper ad concerning abortion "contained factual material of clear 'public interest'"); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 804 (1986) (the subject of abortion "is a matter of considerable public interest and debate") (Rehnquist, J., dissenting); *Planned Parenthood Minn. v. Rounds*, 467 F.3d 716, 728 (8th Cir. 2006) ("the public interest is served by 'free expression on issues of public concern' like abortion"); *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, No. 3:15-cv-03522, 2016 U.S. Dist. LEXIS 14485 at *81 (N.D. Cal. Feb. 5, 2016) ("there is strong public interest on the issue of abortion on both sides of that debate").

Plaintiffs' attempt to imply from the plain language of the statute a requirement that the

public interest test includes a consideration of the *audience* is likewise without merit. The statute is clear that the public interest test does not concern itself with who the audience is. Instead, for purposes of the Anti-SLAPP Act, an issue of public interest is "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." D.C. Code §16-5501(3). Plaintiffs cite not a single case to support their novel position, no doubt because not a single case has ever so held. The public interest test turns *not* on the nature of the *audience* but, as the statute plainly states, on the *content* of the *speech*. In short, it is preposterous for Plaintiffs even to suggest that Nicdao's expressive activities do not involve an issue of public interest, and this argument should be rejected out of hand.[4]

## IV. Plaintiffs Have Failed to Adduce Sufficient Facts to Implicate Nicdao in a Conspiracy.

Plaintiffs contend that their threadbare allegations of conspiracy are sufficient to withstand Nicdao's Motion. Br. in Opp. at 29-31. As a threshold matter, as Plaintiffs concede, civil conspiracy is not independently actionable, but instead depends on proof of the underlying tort, here, intentional infliction of emotional distress. *Id.* at 29. Because Plaintiffs are unable to succeed on that tort claim, their conspiracy claim must also fail.

Additionally, however, Plaintiffs' conclusory allegations of conspiracy are insufficient as a matter of law. They argue that the mere fact that Nicdao happened to be present once – on the public sidewalk – at the same time and location as some of the other defendants, coupled with an

[4] Plaintiffs' naked assertion that their requested injunctive relief is "narrowly tailored," Br. in Opp. at 10, is also groundless. They ask this Court to remove Defendants out of range of the schools, which would move them out of range of the site of the new Planned Parenthood clinic as well. Such a request is the farthest thing from narrowly tailored. *E.g., Schneider v. State*, 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").

email sent by Defendant Darnel[5] (of which Plaintiffs do not allege, much less prove, that Nicdao was even aware), somehow magically transforms their bare bones allegations into a viable claim of conspiracy. They do not.

As noted in Nicdao's original Memorandum and in her unrefuted Declaration, she was present outside the Two Rivers schools *only once*, on November 23, 2015. *See* Compl., ¶¶57-58; Nicdao Decl., ¶¶2-3. Nicdao did not have a sign; instead, she merely sought to pass out leaflets to willing recipients. *See* Nicdao Decl., ¶¶4-5. Her only crime was being present at the same time as others, whose actions Plaintiffs apparently deemed unacceptable. Plaintiffs' theory, stripped of its gloss, is nothing more than guilt by association. But it is a cardinal principle under our Constitution that "[g]uilt by association alone . . . is an impermissible basis upon which to deny First Amendment rights." *Healy v. James*, 408 U.S. 169, 185-86 (1972) (internal quotation marks and citation omitted); *see also United States v. Robel*, 389 U.S. 258, 264-65 (1967) (finding that "guilt by association alone," even in the name of national defense, violates the First Amendment). "[T]he simple fact of 'coordination' alone cannot readily remove protection that the First Amendment would otherwise grant. That amendment, after all, also protects the freedom of association." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 43 (2010) (citing *NAACP v. Claiborne Hardware*, 458 U.S. 886, 911 (1982)). Nicdao's mere presence on a single occasion when others happened to be exercising their First Amendment rights at the same time does not and cannot equate to a conspiracy, even if the group had been coordinated.

[5] Even if Nicdao had been aware of Darnel's email, which she was not, and agreed with his stated intentions, which she did not, Plaintiffs' claim would still fail. Darnel's email threatens nothing more than that he would engage in acts of free expression on a matter of public interest while located on the public ways of the District of Columbia. Such representations are hardly the stuff of which conspiracies are made. The essence of conspiracy is an agreement to engage in *unlawful* conduct. What Darnel "threatened" was to engage in *lawful* conduct. Furthermore, the unrefuted evidence before this Court establishes that Nicdao had "no involvement" in the activities of the other defendants, and sought only to exercise her own right of advocacy on an issue of public interest. *See* Nicdao Decl. at ¶¶2, 3 & 4.

In any event, judging from the Complaint, Plaintiffs' primary concern is the display of "gruesome images" to very young children.[6] *See* Compl., p. 1 (complaining of "large signs and gruesome photos"); ¶¶8, 13, 33, 35, 40, 41, 42, 45, 54, 55, 57, 59, 60, 76, 79, 80, and the prayer for relief at A.(7) and A.(8).[7] Nicdao expressly disavowed any involvement with the activities of the other Defendants on any of the other three days of which Plaintiffs complain, and never displayed a sign. *See* Nicdao Decl., ¶2; *see also* Compl., ¶¶57-58. There is no evidence connecting Nicdao with the signs that others were displaying, and as shown already, Nicdao's mere presence cannot serve as evidence of a conspiracy. Whatever this Court may find regarding the activities of others, Nicdao cannot be held responsible for their actions. The conspiracy claim against Nicdao should therefore be dismissed.

## V. As a Matter of Law, Nicdao's Conduct does not Amount to Intentional Infliction of Emotional Distress.

Plaintiffs' allegations against Nicdao, when viewed apart from their improper efforts to attribute the actions of others to her, consist only of Nicdao's attempting to reach parents with her message as they went down an alley (¶57) and approaching cars in an effort to reach parents with her leaflets and telling students to tell their parents about the Planned Parenthood baby-killing business that was coming across the street. (¶58). There is no suggestion that Nicdao ever entered private property, and she testified unequivocally that she did not. Nicdao Decl., ¶¶3, 6.

[6] Plaintiffs' argue on p. 20, footnote 20 of their Brief in Opposition that they have a compelling interest in maintaining a safe environment for their students. However, the statutes they cite do not purport to restrict free speech rights on the public ways near the school, nor would they be constitutional if they did so. Moreover, the cases they rely upon are distinguishable. For example, *Beck v. F.C.C.*, 95 F.3d 75, 80 (D.C. Cir. 1996) did not involve the exercise of First Amendment rights in a traditional public forum, as this case does, but was instead a case brought under the Communications Act of 1934 involving a television ad. And *Olmer v. City of Lincoln*, 192 F.3d 1176, 1180 (8th Cir. 1999), actually upheld the right of demonstrators "to engage in peaceful pamphleteering and picketing on public property", just as Defendants seek to do here, and further observed that the district court found "there is no credible and unbiased evidence that the mere presence of a sign-carrying antiabortion protestor harms young children." *Id.* at 1180.

[7] In fact, even Plaintiffs' Response is peppered with photos of signs – none of which show or involve Nicdao. *See* Response at 26, 27, and 28. Obviously, Plaintiffs' main objection is to signs.

As a matter of law, these actions do not rise to the level of the "strict tests" for intentional infliction of emotional distress. *See Ortberg v. Goldman Sachs Grp.,* 64 A.3d 158, 163 (D.C. 2013). 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.* (quotation omitted). Nicdao's expressing core political speech for a matter of seconds on an issue of grave importance hardly qualifies. Plaintiffs cannot meet their substantial burden of demonstrating a likelihood of success on the merits against Nicdao. The motion to dismiss should be granted.

## VI. Plaintiffs' Unsupported Request for Broad Discovery Should be Denied.

Additionally, Plaintiffs make broad unsubstantiated claims concerning both the collective actions of Defendants and the factual underpinning of Plaintiffs' lawsuit, and then assert that they will find evidence to support their claims only *after* being allowed breathtakingly broad discovery. Br. in Opp. at 16, 31-35. This request is entirely inappropriate and should be denied.

The purpose of the Anti-SLAPP Act is to protect citizens not only against baseless lawsuits generally, but also against the invasive and harassing discovery that typically accompanies such lawsuits. Accordingly, the general rule is that "upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of." D.C. Code §16-5502(c)(1). Under rare circumstances not present here, "[w]hen it appears *likely* that targeted discovery will enable the plaintiff to defeat the motion *and that the discovery will not be unduly burdensome*, the court may order that specified discovery be conducted." *Id.* at subsection (c)(2) (emphasis added). The legislative history, on which Plaintiffs rely so heavily, attests to the rule that the presumption is overwhelmingly *against* allowing discovery, sometimes even at the expense of otherwise legitimate claims: "As the ACLU's

testimony illustrates, *the Act's discovery rules are designed to err on the side of protecting freedom of speech*, at the expense of some meritorious claims." *See* Pls.' Ex. 1 at 8 (emphasis added).

In this case, Plaintiffs have not made the requisite showing that their expansive discovery requests likely would enable them to defeat Nicdao's Motion, and it is certain that their discovery *will* be unduly burdensome. They do not seek merely to identify the John Does, for instance. Rather, they ask for everything but the kitchen sink: They seek "all documents and communications", including voicemails, by and between any Defendant and third parties that discuss the "protests" at Two Rivers, even after the "protests" had occurred; all documents with third parties "concerning efforts to protest . . . since this matter was filed", also including voicemails; copies of all social media posts made by Defendants concerning the "protests" *or in which they are mentioned*; and so on. *See* Br. in Opp. at 32-33. These broad requests are unnecessary to the determination of this motion, and they cannot be shown as *likely* to enable Plaintiffs to meet their burden. They are instead a classic example of a fishing expedition, calculated to burden Defendants – including Nicdao, who was there only once and who never even held a sign – and to intrude upon their private affairs for no good reason. Such expansive discovery requests are precisely what the Anti-SLAPP Act was meant to protect against. Plaintiffs' request should be summarily denied.

## CONCLUSION

For all of the foregoing reasons, as well as those set forth in Nicdao's principal memorandum, her Special Motion to Dismiss should be granted, and Plaintiffs' request for discovery should be denied. Plaintiffs' Complaint should be dismissed as against Nicdao.

Dated: March 24, 2016

Respectfully submitted,

**SHULMAN, ROGERS, GANDAL, PORDY & ECKER, P.A.**

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