SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

TWO RIVERS PUBLIC CHARTER SCHOOL; & **TWO RIVERS BOARD OF TRUSTEES,** Plaintiffs, v. **ROBERT WEILER, JR., JONATHAN DARNEL, LAUREN HANDY, RUBY NICDAO, LARRY CIRIGANO, JOHN DOE 1, JOHN DOES, & JANE DOES,** Defendants.	**Civil Action No. 2015 CA 009512 B** **Calendar 7** **Judge Jeanette Clark** **Next Event:** **Initial Scheduling Conference** **April 29, 2016 at 9:30 a.m.** **PLAINTIFFS' CONSOLIDATED BRIEF IN OPPOSITION TO THE SPECIAL MOTIONS TO DISMISS OF DEFENDANTS ROBERT WEILER, JR., RUBY NICDAO, LARRY CIRIGNANO, & JONATHAN DARNEL**[1]

[1] Plaintiffs incorporate, as if fully set forth herein, the arguments contained in their Consolidated Brief in Opposition to the Motions to Dismiss of Defendants Robert Weiler, Jr., Ruby Nicdao, Larry Cirignano, & Jonathan Darnel, filed on February 26, 2016.

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By invoking the Anti-SLAPP Act of 2010, D.C. Code § 16-5502, Defendants argue this matter is "masquerading as an ordinary lawsuit."[2] Defendants' cynical attempts to recast this lawsuit as a SLAPP, however, are unavailing. A cursory review of the allegations in Plaintiffs' verified complaint establishes this is an ordinary lawsuit; a typical tort case seeking redress for the harms caused by Defendants' extreme and outrageous conduct.

The case before this Court does not involve one side of a public debate conjuring up a lawsuit solely to silence or intimidate their opposition. Instead, as is clear from Plaintiffs' verified complaint seeking injunctive relief, the Two Rivers Public Charter School and its Board of Trustees (together "Plaintiffs") take neither side in the larger cultural debate that is the focus of Defendants' protests. Instead, to fulfill their duties, Plaintiffs bring this action *solely* to protect Two Rivers Public Charter School and its students who attend the school and to prevent further harm to both.

The protestors have taken over the sidewalks outside of the elementary and middle schools on multiple occasions, holding gruesome signs, shouting directly at the students entering the schools, and demanding those students take action to halt construction of the Planned Parenthood health clinic next door. Defendants' collective plan to stop the building of the Planned Parenthood health facility was clearly spelled out in Defendant Darnel's November 2015 email to school administrators:

[2] Nicdao Special Mot. at 3 (citing *Doe No. 1 v. Burke*, 91 A.3d 1031, 1033 (D.C. 2014)). *See also* Council of the District of Columbia Committee Report on Public Safety and the Judiciary Committee Report ("Comm. Report") at 2 ("The study of 228 SLAPPs found that, despite constitutional, federal and state statute, and court decisions that expressly protect the actions of defendants, these lawsuits have been allowed to flourish because they appear, or are camouflaged by those bringing the suit, as a typical tort case."), attached hereto as **Ex. 1**.

> Nevertheless, if you are failing to challenge Planned Parenthood, I feel a moral obligation to alert the community (including the parents of your students) myself. I know a number of people who feel the same way. It really doesn't matter how each of you feels about abortion. **I'm sure you don't want to see me, my anti-abortion friends and our graphic images any more than we want to be in your neighborhood.**

Compl. ¶ 36 (emphasis and highlighting in original), attached hereto as **Ex. 2**.

Defendants' gamesmanship should not distract the court from the real focus of this request for an injunction—a simple and narrowly-tailored request to allow the students of the Two Rivers Charter School to enter, exit and utilize their school space without confrontation from a group of adults yelling at them and creating an unsafe environment for the operation of the school and for its students.

Plaintiffs respectfully submit this consolidated brief in opposition to the special motions to dismiss of protestor Defendants Robert Weiler, Jr.[3] Ruby Nicdao[4], Larry Cirignano,[5] and Jonathan Darnel[6] under the Anti-SLAPP Act, D.C. Code § 16-5502. Although each Defendant filed individual motions and memoranda, each raises the same issues and shares the same fundamental defects that warrant denial.[7]

Additionally, the Darnel special motion contains a number of misstatements concerning what Plaintiffs have actually alleged against him individually. For example, in his Special Motion, Defendant Darnel states "Darnel was present only one of those four days, November 23, 2015, and *she* is substantively mentioned only twice in the entire Complaint." Darnel Special Mot. at 2 (emphasis added). Yet, the verified complaint actually alleges Mr. Darnel was present

[3] Filed on Feb. 4, 2015.
[4] Filed on Jan. 29, 2016.
[5] Filed on Feb. 1, 2016.
[6] Filed on Feb. 23, 2016.
[7] The Weiler and Cirignano special motions expressly incorporate the special motion of Defendant Nicdao. While the Darnel special motion does not expressly incorporate the Nicdao special motion, it is apparent that it was used as a template for Mr. Darnel's motion. In addition to the issues identified in this brief, the Weiler and Cirignano special motions also suffer procedural defects that warrant denial without consideration of the merits. *See* Section II *infra*.

on November 16 *and* November 23. Compl. ¶¶ 38, 52. In Defendant Darnel's special motion he writes that Plaintiffs complaint alleges that Darnel "approached cars as they came to drop off children and yelled at students *while attempting to hand them pamphlets*." Darnel Special Mot. at 2. However, the verified complaint makes these allegations against Ms. Nicdao, not Mr. Darnel. *see* Compl. ¶¶ 57, 58. Darnel also attempts to minimize his role by asserting that the first substantive allegations against him did not appear until ¶ 57. The first allegation against Defendant Darnel, however, appears in ¶ 36 and relates to the email he sent to school administrators; further allegations appear in ¶¶ 38, 46, 49, 51-52, 55-56, & 63-65. Darnel does not address any of these allegations. Although Darnel's special motion is nothing more than a thinly-disguised version of Nicdao's special motion, Plaintiffs will address the substantive legal issues contained in Defendant Darnel's special motion.

I. Procedural History

Plaintiffs brought this action on December 9, 2015, seeking to enjoin Defendants and others from, *inter alia*, entering school property, blocking the students' safe passage to school, focused picketing of Two Rivers' students, and using signs larger than 11" x 17" in the presence of students under twelve years of age. Verified Compl. ("Compl.") at pp. 25-28.

Defendants Weiler, Cirignano, and Nicdao were properly served between December 17 and 19, 2015.[8] Defendant Darnel was served on February 3, 2015. On January 8, 2016, prior to filing his motions, Defendant Robert Weiler, Jr. filed an Answer. The following motions are pending before this Court:

a. Defendant Ruby Nicdao's Special Motion to Dismiss Under 12(b)(1) and DC Anti-SLAPP, filed January 29, 2016;

[8] Defendant Lauren Handy was served with a copy of the Summons and Verified Complaint on February 13, 2016. *See* Affidavit of Service by Certified/Registered Mail (Feb. 22, 2016). Although she has not filed a response, Plaintiffs anticipate that Defendant Handy will file similar motions to dismiss.

b. Defendant Ruby Nicdao's Motion to Dismiss Under 12(b)(1) and (6), filed January 29, 2016;

c. Defendant Larry Cirignano's Special Motion to Dismiss Under 12(b)(1) and DC Anti-SLAPP, filed February 1, 2016;

d. Defendant Robert Weiler, Jr.'s Special Motion to Dismiss Under 12(b)(1) and DC Anti-SLAPP, filed February 5, 2016;

e. Defendant Larry Cirignano's Motion to Dismiss Under 12(b)(1) and (6), filed February 5, 2016;

f. Defendant Robert Weiler, Jr.'s Special Motion to Dismiss 12(b)(1) and DC Anti-SLAPP, filed February 6, 2016;

g. Defendant Jonathan Darnel's Motion to Dismiss Under 12(b)(1), filed February 23, 2016; and

h. Defendant Jonathan Darnel's Special Motion to Dismiss Under 12(b)(6) and DC Anti-SLAPP, filed February 23, 2016.

Plaintiff submits this brief in opposition to the Special Motions to Dismiss under 12(b)(1) and the Anti-SLAPP Act. Plaintiffs have concurrently filed a separate opposition to Defendants' Motions to Dismiss under 12(b)(1) and (6).

II. The Court should dismiss Defendants Cirignano's and Weiler's special motions pursuant to the Anti-SLAPP Act because they were not timely filed.

A. The Anti-SLAPP Act requires a defendant to file the special motion to dismiss within 45 days.

To prevail on an Anti-SLAPP Act motion, Defendants must make 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." D.C. Code § 16-5502(b). If Defendants make a prima facie showing, Plaintiffs must then show that they are likely to succeed on the merits of their claims. *Id.* Section 16-5502 permits a party to "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 § 16-5502(a). Courts have the discretion to deny a late filing without reaching the merits. *See, e.g., Morin v. Rosenthal*, 122 Cal.App.4th 673, 683 (Cal. App. 2 Dist. 2004); *Lam v. Ngo*,

91 Cal.App.4th 832, 840 (Cal. App. 4 Dist. 2001).[9] Courts in the District of Columbia routinely enforce the 45-day time limit.[10] Plaintiffs are not required to establish prejudice arising from Defendants' untimely filing. *See, e.g., Olsen v. Harbison*, 3134 Cal. App. 4th 278, 283 (Cal. App. 3 Dist. 2005).

B. Defendants Cirignano's and Weiler's special motions to dismiss were not filed within the mandatory 45-day time limit after Defendants were served a copy of the summons and verified complaint and should therefore be dismissed.

The 45-day filing deadline imposed in the Anti-SLAPP Act is clear on its face. *See Butler v. Butler*, 496 A.2d 621, 622 (D.C. 1985) ("[W]here a statute is clear on its face, there is no need to engage in an analysis of legislative intent."). Here, under Rule 4, Plaintiffs served Defendant Larry Cirignano with a copy of the summons and complaint on December 17, 2015. *See* Affidavit of Service by Certified/Registered Mail (Jan. 15, 2016). On February 1, 2016, *46 days* after being served, Defendant Larry Cirignano, through counsel, filed his special motion to dismiss under D.C. Code § 16-5502. *See* Def. Larry Cirignano's Special Mot. to Dismiss Pls.'

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[9] *Mann v. Nat'l Review*, Case No. 2012 CA 008263 B (D.C. Super. Ct.), Omnibus Order at 10 (Sept. 27, 2013) ("The legislative history of the Anti-SLAPP Act, an almost identical act to the California act, indicates that the California act served as the model for the District of Columbia Anti-SLAPP Act."), attached hereto as **Ex. 3**; *Abbas v. Foreign Policy Grp.*, LLC, 975 F. Supp. 2d 1, 9 (D.D.C. 2013) aff'd, 783 F.3d 1328 (D.C. Cir. 2015) ("Therefore, where necessary and appropriate, the Court will look to decisions from other jurisdictions (particularly California, which has a well-developed body of case law interpreting a similar California statute) for guidance in predicting how the D.C. Court of appeals would interpret the District's Anti–SLAPP statute.").

[10] *See Sherrod v. Breitbart*, 720 F.3d 932, 938 (D.C. Cir. 2013) ("Rule 6(b) gives the district court wide discretion to modify the limits set forth in the rules. Statutory time limits are different. Whether a statute of limitations may be tolled requires the court to engage in statutory interpretation. This is not a matter of the court's discretion. The intent of the legislature is controlling.") (citing *3M Co. v. Browner*, 17 F.3d 1453, 1460-63 (D.C. Cir. 1994)); *Newmyer v. Sidwell Friends School*, Case Nos. 13-cv-1262, 14-cv-0186, 14-cv-0187, __ A.3d __, 2015 WL 9433482 (D.C. 2015) (affirming superior court's dismissal because Defendant did not file special motion to dismiss under Anti-SLAPP Act within the 45-day period); *Newmyer v. Sidwell Friends School*, Case No. 2011 CA 003727 M (May 22, 2012), Order at 2 ("The court agrees that this special motion to dismiss is untimely filed and can be denied for that reason alone. In light of the purpose of the Act—to protect citizens against strategic lawsuits that are designed to have a chilling effect on the exercise of political rights, including freedom of speech on matters important to the public—one who feels victimized by such a strategic lawsuit has the burden of complying with its time frame. Nevertheless, if the court viewed Dr. Huntington's counter-suit as a purely strategic effort to silence Mr. Newmyer, or to punish him for exercising his right to bring his lawsuit, the court might very well conclude that the ameliorative purpose of the Act requires a more flexible interpretation of the forty-five day framework."), attached hereto as **Ex. 4**.

Compl. (Feb. 1, 2016). Thus, Defendant Cirignano's special motion was filed out of time and should not be considered.

Likewise, Plaintiffs served Defendant Robert Weiler, Jr. on December 19, 2015. *See* Affidavit of Service by Certified/Registered Mail (Jan. 15, 2016). On February 4, 2016, *47 days* after being served, Defendant Robert Weiler, Jr., *pro se*, filed his special motion to dismiss. *See* Def. Robert Weiler, Jr.'s Special Mot. to Dismiss Pls.' Compl. (Feb. 4, 2016). As a result, Defendant Weiler's motion was also filed out of time. As noted in Plaintiffs' separate opposition to Defendants' motions to dismiss, because Defendant Weiler filed a responsive pleading prior to moving this Court under Rule 12(b), his asserted defenses are deemed waived. *See* SCR Civil 12(b) ("A motion making any of these defenses shall be made before pleading if a further pleading is permitted.").[11]

Plaintiffs are not required to establish prejudice arising from Defendants' untimely filing. *See, e.g., Olsen v. Harbison*, 3134 Cal. App. 4th 278, 283 (Cal. App. 3 Dist. 2005) ("We therefore conclude a plaintiff opposing a late anti-SLAPP motion need not demonstrate prejudice."). As neither Defendant Cirignano, through counsel, nor Defendant Weiler, *pro se*, filed their respective Anti-SLAPP motions within the statutory time permitted, their special motions should be dismissed as a matter of law.

III. Defendant Darnel's special motion is improper and should be denied.

To prevail on an Anti-SLAPP Act motion, Defendants must make a "prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of

[11] *See* Wright & Miller, Federal Practice & Procedure: Civil 2d § 1361 ("[I]f a party decides to raise any of the seven enumerated defenses [in Rule 12] by motion, it 'shall be made before pleading if a further pleading is permitted."') (quoting Fed. R. Civ. Pro. 12(b)); *see also Hercules & Co., Ltd. v. Beltway Carpet Serv., Inc.*, 592 A.2d 1069, 1071 (D.C. 1991) (noting that defendant "had preserved its jurisdictional defense by filing the motion to dismiss contemporaneously with its answer.") (citation omitted).

public interest." D.C. Code § 16-5502(b). In his special motion, Darnel does not respond to the allegations Plaintiffs made against him but responds instead to the allegations against Defendant Nicdao. *See, e.g.*, Darnel Special Mot. at 2 (Mr. Darnel repeatedly referring to himself as "she" and "her" when describing his actions); *see also supra* at p. 3 (providing specific examples of the incongruous similarities between the special motions of Defendant Nicdao and Defendant Darnel). Moreover, throughout his special motion, Darnel refers to a "Darnel Decl." that was not filed in support of his special motion. *See* Darnel Special Mot. *passim*. Because Mr. Darnel's special motion is merely the byproduct of slapdash "cutting and pasting" using Defendant Nicdao's special motion and makes no effort to respond to the substantive allegations made against him, he has not met his burden of establishing a prima facie case and his special motion should be denied.[12]

IV. The Anti-SLAPP Act does not apply here because this is not a retaliatory lawsuit intended to stifle Defendants' free speech rights.

Given the scope and nature of the allegations contained in Plaintiffs' verified complaint, it is abundantly clear that the Anti-SLAPP Act has no place in this case. As recognized by the Act's legislative history, the Anti-SLAPP Act of 2010 was passed in response to a trend in lawsuits utilized "as a means to muzzle speech or efforts to petition the government on issues of public interest" that are "often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on *the exercise of constitutionally protected rights*." Comm. on Pub. Safety & the Judiciary, Council of D.C. Rep.

[12] *See* SCR Civil 11(b) ("Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other filing, including an electronic filing, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . . (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief."); SCR Civil 12-I(a) (although counsel certified that "despite diligent efforts, he was unable to obtain Plaintiffs' consent to Darnel's Special Motion to Dismiss," neither Plaintiffs nor their counsel have a record of any attempts by either Mr. Darnel or his counsel to seek consent for his motion.

on Bill 18-893, "Anti-SLAPP Act of 2010," at 1 (2010) ("Comm. Report."). The Anti-SLAPP Act "incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed by *one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view*." *Id.* (emphasis added). In cases where the Anti-SLAPP Act would apply, it is widely believed that the "goal of the litigation is not to win the lawsuit but punish the opponent and intimidate them into silence." *Id*. at 4.

This action is not a stalking horse for any political or policy debate. Defendants' speech cannot fairly be said to involve the same type of speech as has been given protection under the Anti-SLAPP Act such as attempts by public figures to silence the media for speech criticizing their actions related to their reporting or by commercial enterprises aiming to hinder community activists.[13]

When it passed the Anti-SLAPP Act, the City Council's Committee Report contained testimony from Arthur B. Spitzer, Legal Director for the ACLU of the Nation's Capital, in which he described two cases that exemplified why the Act was necessary in the District of Columbia, neither of which resemble the case at bar:

> In the first case, a developer that had been frustrated by its inability promptly to obtain a building permit sued a community organization (Southeast Citizens for Smart Development) and two Capitol Hill activists (Wilbert Hill and Ellen Opper-Weiner) who had opposed its efforts. The lawsuit claimed that the defendants had violated the developer's rights when they 'conducted meetings, prepared petition drives, wrote letters and made calls and visits to government officials, organized

[13] *See, e.g., Lehan v. Fox Television Stations, Inc.*, No. 2011-CA-004592-B, 2011 D.C. Super. LEXIS 14 (D.C. Super. Ct. Nov. 30, 2011) (granting defendants' Anti-SLAPP motion to dismiss where plaintiff D.C. firefighter brought a defamation suit in the wake of a Fox News report concerning excessive overtime by District of Columbia employees, including the plaintiff); *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29 (D.D.C. 2012), appeal docketed, No. 12-7055 (D.C. Cir. June 15, 2012) (granting defendants' motion to dismiss where plaintiff sued magazine after it ran a satirical blog post about the plaintiffs' book related to questions about President Obama's birth certificate); *Abbas v. Foreign Policy Group, LLC*, 975 F. Supp. 2d 1 (D.D.C. Sept. 27, 2013), *aff'd* 783 F.3d 1328 (D.C. Cir. 2015) (granting defendants' motion to dismiss where plaintiff, son of Palestinian Authority President Mahmoud Abbas, sued magazine for defamation for an opinion piece it ran discussing whether President Abbas's sons were improperly benefiting from their father's political influence).

> protests, organized the preparation and distribution of . . . signs, and gave statements and interviews to various media,' and when they created a web site that urged people to 'call, write or e-mail the mayor' to ask him to stop the project. The defendants' activities exemplified the kind of grassroots activism that should be hailed in a democracy, and the lawsuit was a classic SLAPP. The case was eventually dismissed, and the dismissal affirmed on appeal. But the litigation took several years, and during all that time the defendants and their neighbors were worried about whether they might face liability. Because the ACLU represented the citizens and their organization at no charge, they were not financially harmed. But had they been required to retain paid counsel, the cost would have been substantial, and intimidating.
>
> In the second case we represented Dorothy Brizill, who needs no introduction to this Committee. She was sued in Guam for defamation, invasion of privacy, and 'interference with prospective business advantage,' based on statements she made in a radio interview broadcast there about the activities of the gambling entrepreneur who backed the proposed 2004 initiative to legalize slot machines in the District of Columbia. This lawsuit was also a classic SLAPP, filed against her in the midst of the same entrepreneur's efforts to legalize slot machines in Guam, in an effort to silence her. And to intimidate his opponents, twenty 'John Does' were also named as defendants. With the help of Guam's strong anti-SLAPP statute, the case was dismissed, and the dismissal was affirmed by the Supreme Court of Guam. But once again, the litigation lasted more than two years, and had Ms. Brizill been required to retain paid counsel to defend herself, it would have cost her hundreds of thousands of dollars.

Comm. Report, Spitzer Letter at 2-3. The instant case fits into neither mold.

Here there is no public issue on which the Plaintiffs and Defendants have taken opposite sides, there is no one on Plaintiffs' side who claims to either support or oppose Defendants' views against the Planned Parenthood facility. Plaintiffs have no ulterior motives as they do not have a side in the cultural debate that landed on their doorstep because of Planned Parenthood's decision, independent and without the knowledge of Plaintiffs, to locate next door to the school. Compl. ¶ 32. Plaintiffs object only to Defendants' methods of expressing their views, and would have the same opposition irrespective of the message carried by a group of strangers to the school who interfere with the operation of the school and its students and pose a safety risk.

To be certain, Plaintiffs' real goal in this lawsuit is to prevail and to maintain a safe environment for the school and the students. It is not to "punish [our] opponents and intimidate

them and others into silence." Comm. Report, Spitzer Letter at 3. As judged by Plaintiffs' request for equitable relief, which is "narrowly tailored," Plaintiffs' goal is not to simply silence Defendants. Notably, Plaintiffs' *do not* seek to entirely prevent Defendants from using their gruesome images. Plaintiffs *do not* seek to prevent them from using signs containing words such as "Kill" or "Murder." Likewise, Plaintiffs *do not* seek to prevent Defendants from protesting near the school. Rather, Plaintiffs seek only to keep the protesters and others like them, regardless of their cause, a safe distance from the school during certain key times of the school day so the students have a safe and non-traumatic passage to school.

This case is exclusively about Plaintiffs fulfilling their statutory and common law duties and nothing else. Public schools in the District have a duty "to exercise reasonable and ordinary care for protection of pupils to whom it provides an education." *D.C. v Doe*, 524 A.2d 30, 32 (D.C. 1987). And should a special dangerous situation "greater supervision is required to insure the safety of the students." *Ballard v. Po*lly, 387 F. Supp. 895 (D.C. 1975). Thus the real issues before this court are whether Defendants' harassment of Two Rivers' students is even protected speech and, if it is, whether it is subject to the imposition of reasonable time, place, and manner limitations.[14] Plaintiffs assert that the limitations they have requested are reasonable in light of the particular circumstances present here. However, this analysis is appropriately addressed after the court has ruled on Defendants' motions to dismiss.[15]

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[14] Courts have affirmed that the government has a compelling interest in ensuring the public's safe passage past protestors, even if those protestors position themselves on a public sidewalk. *See Defending Animal Rights Today & Tomorrow v. Wash. Sports & Entm't, LP*, 821 F. Supp. 2d 97, 106 (D.D.C. 2011) ("Plaintiff argues that the government must establish that the leafleters actually impeded the flow of people and that there was a demonstrated need for the restriction before it was imposed. But there is no such prerequisite; the Supreme Court has explained that simply reducing a risk can suffice as a governmental interest.") (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296-97 (1984) (other internal citations omitted).

[15] *See Snyder*, 562 U.S. at 462 (Breyer, J., concurring) (citing *Frisby v. Schultz*, 487 U.S. 474 (1988)) ("While I agree with the Court's conclusion that the picketing addressed matters of public concern, I do not believe that our First Amendment analysis can stop at that point. A state can sometimes regulate picketing, even picketing on matters of public concern."); *Id.* ("Does our decision leave the State powerless to protect the individual against invasions of,

V. If the Court applies the Anti-SLAPP Act, then Defendants cannot establish that their frightening messages aimed at school children involve "an issue of public interest."

To gain the protection of the Anti-SLAPP Act, the moving party must show that his speech is of the sort that the statute is designed to protect. Specifically, the moving party must "make[ ] a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16–5502(b); *see also* D.C. Code § 16-5503(b).

In conclusory fashion, Defendants assert their "activities were constitutionally protected speech," Nicdao Special Mot. at 2, and that they involve a matter of "public interest." Nicdao Special Mot. at 3. However, "the boundaries of the public concern test are not well defined." *Synder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *San Diego v. Roe*, 543 U.S. 77, 83 (2004) (per curiam)).

In *Snyder*, the Supreme Court wrestled with whether a church's picketing of a dead soldier's funeral was of public concern and deserved First Amendment protection. The signs that the Westboro Church protestors used at Matthew Snyder's funeral predominantly related to the broader issue of whether God hates homosexuals while only a few were arguably directed at Mr. Snyder individually. *Snyder*, 562 U.S. at 454. The Court noted the latter "would not change the fact that the *overall thrust* and *dominant theme* of Westboro's demonstration spoke to broader public issues." *Id*. (emphasis added). Here, contrary to Defendants' assertions, the Two Rivers protesters directed their speech primarily at the children – with words and signs specifically

e.g., personal privacy, even in the most horrendous of such circumstances? . . . it does not hold or imply that the State is always powerless to provide private individuals with necessary protection.").

asking them and their parents to privately intervene in the political process to stop Planned Parenthood – with a few of the signs relating to broader social issues.[16]

Speech involves "matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest . . . ." *Id*. at 453 (citations and internal quotations omitted). The *Snyder* Court stated that to determine "whether speech is of public or private concern" it is necessary to "examine the 'content, form, and context' of that speech, 'as revealed by the whole record.'" *Id*. (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (a case involving defamation). The Court clarified that "no factor is dispositive and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said." *Id*. at 454.

[16] *Compare, e.g.*, Compl. ¶ 46(a) ("Tell your parents they're going to kill kids next door."); ¶ 47(b) ("They're going to kill kids . . . and your principals are deceiving you."); and ¶ 55 (sign stating THEY KILL BABIES NEARBY! Tell your parents to stop them) *with* ¶ 42 (sign stating "'Choice' 10 Week Abortion") and ¶ 54 (sign stating "Abortion, Not 4 Sale" and depicting what purports to be an aborted fetus).

Here, the facts are readily distinguishable from those in *Snyder*:

	Snyder Protesters	Two Rivers Protesters
Content	"The 'content' of Westboro's signs plainly relates to broad issues of interest to society at large, rather than matters of 'purely private concern.' *Dun & Bradstreet*, *supra*, at 759. The placards read 'God Hates the USA/Thank God for 9/11,' 'America is Doomed,' 'Don't Pray for the USA,' 'Thank God for IEDs,' 'Fag Troops,' 'Semper Fi Fags,' 'God Hates Fags,' 'Maryland Taliban,' 'Fags Doom Nations,' 'Not Blessed Just Cursed,' 'Thank God for Dead Soldiers,' 'Pope in Hell,' 'Priests Rape Boys,' 'You're Going to Hell,' and 'God Hates You.' App. 3781-3787. While these messages may fall short of refined social or political commentary, the issues they highlight — the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy — are matters of public import. The signs certainly convey Westboro's position on those issues, in a manner designed, unlike the private speech in *Dun & Bradstreet*, to reach as broad a public audience as possible. And even if a few of the signs — such as 'You're Going to Hell' and 'God Hates You' — were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues." 562 U.S. at 454.[17]	Here, Defendants' primary message was intended for the children who attend Two Rivers, some as young as three years old, and the need for them to take private action. *See*, *e.g.*, Compl. ¶ 46(a) ("Tell your parents they're going to kill kids next door."), ¶ 47(b) ("They're going to kill kids . . . and your principals are deceiving you."), and ¶ 55 (sign stating THEY KILL BABIES NEARBY! Tell your parents to stop them). Although Defendants used some signs with the broader issues of abortion, the "overall thrust" was that the students take action by talking to their parents.

[17] In his dissent, Justice Alito argued that actionable speech should not be immunized because it is commingled with protected speech:

> First – and most important – the Court finds that 'the overall thrust and dominant theme of [their] demonstration spoke to' broad public issues. Ante, at 8. As I have attempted to show, this portrayal is quite inaccurate; respondents' attack on Matthew was of central importance. But in any event, I fail to see why actionable speech

	Snyder Protesters	Two Rivers Protesters
Form	"The Westboro picketers displayed their signs for about 30 minutes before the funeral began and sang hymns and recited Bible verses. None of the picketers entered church property or went to the cemetery. They did not yell or use profanity, and there was no violence associated with the picketing. *Id.*, at 2168, 2371, 2286, 2293." 562 U.S. at 449.	Defendants intentionally targeted school children with posters depicting gruesome images, banners telling them to stop the baby killing, shouting of violent messages directly at the children and handing them flyers (even if they did not want them) as they attempted to enter the school. *See* Compl. ¶¶ 33, 34, 40, 45-49, 54-58.
Context	"The church had notified the authorities in advance of its intent to picket at the time of the funeral, and the picketers complied with police instructions in staging their demonstration. The picketing took place within a 10- by 25-foot plot of public land adjacent to a public street, behind a temporary fence. App. to Brief for Appellants in No. 08-1026 (CA4), pp. 2282-2285 (hereinafter App.). That plot was ***approximately 1,000 feet from the church*** where the funeral was held. Several buildings separated the picket site from the church. Id., at 3758." 562 U.S. at 448-49 (emphasis added).[18] "The funeral procession ***passed within 200 to 300 feet of the picket site***. Although Snyder testified that he could see the tops of the picket signs as he drove to the funeral, he did not see what was written on the signs until later that	Defendants protested in front of the elementary and middle schools at times they knew students would be trying to enter the building, they did not provide the school any notice, and they positioned themselves on the sidewalks immediately in front of the school between the drop-off lanes and the entrance to the school to ensure that the students could not avoid them. *See* Compl. ¶¶ 33, 37, 39, 43-45, 52-53.

should be immunized simply because it is interspersed with speech that is protected. The First Amendment allows recovery for defamatory statements that are interspersed with nondefamatory statements on matters of public concern, and there is no good reason why respondents' attack on Matthew Snyder and his family should be treated differently.

Snyder, 456 U.S. at 471 (Alito, J. dissenting).

[18] In *Snyder*, the majority noted that if the parishioners were holding "God Bless America" signs that would have been fine. 562 U.S. at 457. That is not the case here as the gravamen of this action is maintaining a safe environment for school and its students in light of Defendants' actions and not the content of their speech. *See Defending Animal Rights Today & Tomorrow v. Wash. Sports & Entm't, LP*, 821 F. Supp. 2d 97, 105 (D.D.C. 2011) ("It is important to emphasize that there is no evidence in the case suggesting that the instructions plaintiff's members received had anything to do with what they had to say. The parties agreed at oral argument that the restriction at issue in this case was content-neutral.")

	Snyder Protesters	Two Rivers Protesters
	night, while watching a news broadcast covering the event. *Id.*, at 2084-2086." 562 U.S. at 449 (emphasis added).	

When evaluating all three factors, Defendants' naked assertion that the circumstances in *Snyder* are "far worse" than those involved here are, at least, a comparison properly evaluated by the trier of fact. *See* Nicdao Special Mot. at 5. Here, by choice, Defendants aimed their message primarily at the students of Two Rivers and, in doing so, created an unsafe environment for the school, the students, and their parents. For example, Defendants aimed their shouting and signs at the children, asking these children to "[t]ell your parents they're going to kill kids next door!" and "[t]ell your parents to stop this bloodbath that's coming across the street . . . the little babies need your voice." Compl. ¶¶ 46, 58. Their actions resulted in school administrators being forced to direct students to alternative entrances in an attempt to avoid the protestors and their gruesome images and shouting. Such speech differs markedly in "content, form, and context" from the speech in *Snyder*. Most significantly, Defendants primarily targeted the students and the school rather than addressing a broader audience about society's perceived ills, as in *Snyder*. Defendants' speech should not be given the protection of the Anti-SLAPP Act for being a matter of public interest.

VI. Even if the Anti-SLAPP Act applies in this case, Plaintiffs can show that they are likely to succeed on the merits of their claims.

In *Payne v. District of Columbia*, No. 2012 CA 6163B (D.C. Super. Ct. May 28, 2013), the court likened the success on the merits standard under the Anti-SLAPP Act to the "probability of prevailing" standard and noted "'the plaintiff need only have stated and substantiated a legally sufficient claim.'" *Payne*, Order at 4-5 (quoting *Navellier v. Sletten*, 29 Cal. 4th 82, 88 (Cal. 2002)), attached hereto as **Ex. 5**. The court elaborated that "[t]he plaintiff

need only establish that his or her claim has minimal merit to avoid being stricken as a SLAPP." *Payne*, Order at 5 (citing *Soukup v. Law Offices of Herbert Hafif*, 39 Cal.4th 260, 291 (Cal. 2006)). Finally, the court recognized "a plaintiff cannot simply rely on his or her pleadings, even if verified; rather, the plaintiff must adduce competent, admissible evidence." *Payne*, Order at 5 (quoting *Roberts v. L.A. County Bar Ass'n*, 105 Cal.App.4th 604, 614 (Cal. 2003)).

Through their verified complaint, in addition to the evidence they will be able to adduce at an evidentiary hearing,[19] Plaintiffs will further demonstrate the requisite likelihood of success on the merits to fend off Defendants' special motion to dismiss their claims for intentional infliction of emotional distress and the attendant claim of private nuisance and conspiracy to commit a private nuisance. Yet, given the early burden shifting that takes place under the Anti-SLAPP Act, Plaintiffs further request that the Court allow them the limited initial discovery identified below and then conduct a hearing on these special motions to dismiss to permit Plaintiffs to "adduce competent, admissible evidence," *Payne*, slip op. at 5, and to have their claims fully and fairly aired by the court. The Court's job, however, is not to weigh the evidence but simply to determine whether plaintiff provided "sufficient evidence to prove the probability of prevailing on the claim (outside of the allegations made in the complaint)." *Mann v. Nat'l Review*, Case No. 2012 CA 008263 B (D.C. Super. Ct. Sept. 27, 2013), Omnibus Order at 10, attached hereto as **Ex. 3**.

A. Defendants' extreme and outrageous conduct rises to the level of being actionable as an intentional infliction of emotional distress.

Under District of Columbia law, "[i]n 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

[19] *See Ctr. for Advanced Def. Studies v. Kaalbye Shipping Int'l*, Case No. 2014 CA 002273 B (D.C. Super. Ct. Apr. 7, 2015), Order at 6 (adopting view that court should "conduct an evidentiary hearing, which appears to be similar to a preliminary injunction under Super. Ct. R. P. 65."), attached hereto as **Ex. 6**.

defendant which (2) intentionally or recklessly (3) causes the plaintiff [to suffer] severe emotional distress.'" *Ortberg v. Goldman Sachs Group*, 64 A.3d 158, 163 (D.C. 2013) (quoting *Baltimore v. District of Columbia*, 10 A.3d 1141, 1155 (D.C. 2011) (internal quotation marks and citations omitted)). The courts will impose liability for "'conduct 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.'" *Ortberg v. Goldman Sachs Group*, 64 A.3d at 163 (quoting *Homan v. Goyal*, 711 A.2d 812, 818 (D.C. 1998); *accord Wood v. Neuman*, 979 A.2d 64, 77 (D.C. 2009)).

In evaluating whether Defendants' conduct is "extreme and outrageous," courts "must consider 'the specific context in which the conduct took place.'" *Ortberg v. Goldman Sachs Group*, 64 A.3d at 163 (quoting *Estate of Underwood v. Nat'l Credit Union Admin.*, 665 A.2d 621, 641 (D.C. 1995) (citation omitted)). In evaluating the specific context, it is necessary to evaluate the "nature of the activity at issue" and "the particular environment in which the conduct took place." *Ortberg v. Goldman Sachs Group*, 64 A.3d at 163 (quoting *Estate of Underwood v. Nat'l Credit Union Admin.*, 665 A.2d 621, 641 (D.C. 1995)).

B. Defendants' conduct rises to the level of extreme and outrageous.

As demonstrated in their verified complaint, the Two Rivers students present for the Defendants' protests experienced these highly upsetting emotions because of the Defendants' collective actions in front of the schools.

Defendants rely heavily on *Ortberg* to justify their conduct, referring to *Ortberg* as "directly on point." Nicdao Special Mot. at 8. Yet when considering the "nature of the activity at issue" and "the particular environment in which the conduct took place" *Ortberg* merely

provides a useful recitation of the law in the District of Columbia. The case is readily distinguishable from the facts presented here.

Ortberg involved a group of animal rights protesters focused on "Goldman Sachs' *business dealings with* an investment group (Fortress) that did business with a third company: Huntingdon Life Sciences ('HLS')." *Ortberg*, 64 A.3d at 161 (emphasis added). At first, the group of protesters began at the corporate offices of Goldman Sachs and eventually wound up at the home of Michael Paese, a managing director at Goldman Sachs. *Id*. In reversing the trial court's finding, the Court of Appeals noted that although the protests were "loud and disturbing," "Mr. Paese did not complain of any symptoms of emotional distress, like loss of sleep or an inability to concentrate." *Id*. at 164. *Ortberg* involved protests against one of the world's leading investment banks and one of its managing directors for their business dealings with a company whose record on animal rights had been targeted by "animal-rights activists in the United States and Europe." *Id*. at 161.

Conversely, Defendants here specifically targeted Two Rivers School and the students only because of their geographic proximity to a Planned Parenthood health clinic under construction. Plaintiffs have no business dealings with Planned Parenthood, no ability to alter or influence the construction or practices of the health clinic and no relationship of any sort that would make foreseeable that Plaintiffs would be the target of Defendants' protests. As explained, Plaintiffs were not aware of Planned Parenthood's plan to relocate its flagship facility until *after* the plan had been approved by the District of Columbia. Compl. ¶ 32 (emphasis added). As spelled out explicitly in Defendant Darnel's November 2015 email, Defendants have targeted Plaintiffs for their perceived complicity in allowing the relocation of Planned Parenthood next door to the school:

> Knowing what you now know, **how do you plan to act?** Are you taking adequate action to protect your students and the reputation of your school? Do not underestimate the powerful voice that an institution like your's (sic) has to **prevent Planned Parenthood from taking up residency there**. You are perhaps the only voice the district and ward governments may listen to. Believe me, you do NOT want to let this slide.
>
> Please take a moment to respond. As I mentioned at the beginning of this message, I am not anyone important and hold no official position. I am not threatening you. Nevertheless, if you are failing to challenge Planned Parenthood, I feel a moral obligation to alert the community (including the parents of your students) myself. I know a number of people who feel the same way. It really doesn't matter how each of you feels about abortion. **I'm sure you don't want to see me, my anti-abortion friends and our graphic images any more than we want to be in your neighborhood.**
>
> Please give me at least a hint that you are actively trying to prevent Planned Parenthood from opening their dirty business next door to your wonderful school. Even a short response would be appreciated and help me know how I should proceed.
>
> Thank you and God bless. I look forward to hearing from you, the sooner the better.

Compl. ¶ 36 (emphasis in original).

As Defendant Darnel sets forth in his email to the school, the "specific context" of these protests differs greatly from those in *Ortberg*. Unlike Goldman Sachs and one of its managing directors, Two Rivers and its students have no ability to influence the real target of the protestors, Planned Parenthood. Unlike the direct linkage that exists between Goldman Sachs and Fortress and HLA, Two Rivers has *no current or prior business dealings* with Planned Parenthood. The only relationship is one of happenstance and geographic proximity. Two Rivers is in the business of educating children not in the business of lobbying, influencing, or pressuring various stakeholders to halt the construction of a health clinic or any other business that arises as a "matter-of-right development."

And perhaps the most obvious and important distinction between the protests that took place in *Ortberg* and those in front of Two Rivers School is that rather than shouting and waving

signs in front of adults, the Defendants here have explicitly targeted children. With their approximately six foot long sign stating that the children should "tell your parents they are killing babies next door" and their shouts of "the principal has no conscience – she doesn't care" and "the school will have a lot of problems if you ignore the problem," Defendants took their protests from the realm of First Amendment speech on the public sidewalk to harassing and frightening children as they tried to get to school. Because of Defendants' actions, Plaintiffs have been harmed separate and apart from the harms visited upon the students and their parents. *See* Pls.' Consolidated Brief in Opposition to the Mots. to Dismiss of Defs.' Robert Weiler, Jr., Ruby Nicdao, Larry Cirignano, and Jonathan Darnel (Feb. 26, 2016), filed concurrently with this consolidated brief.

The issue here is whether, given the special place that schools[20] and children[21] have in our society, Defendants' conduct can fairly be said to be just "part and parcel 'of the frictions and irritations and clashing of temperaments incident to participation in a community life,'

[20] *See* Compl. ¶ 70. Plaintiffs cited several statutes in the District of Columbia that make it abundantly clear that there is a substantial and compelling interest in maintaining a safe environment for students to pursue their education. *See, e.g.*, D.C. Code § 2-1535.01, *et seq.* (defining "bullying" as "any severe, pervasive, or persistent act or conduct, whether physical, electronic, or verbal that: (i) May be based on a youth's actual or perceived race, color, ethnicity, religion, national origin, sex, age . . . (ii) Can be reasonably predicted to: (I) Place the youth in reasonable fear of physical harm to his or her person or property; (II) Cause a substantial detrimental effect on the youth's physical or mental health; (III) Substantially interfere with the youth's academic performance or attendance; or (IV) Substantially interfere with the youth's ability to participate in or benefit from the services, activities, or privileges provided by an agency, educational institution, or grantee); D.C. Code § 7-2509.07(a)(2) (prohibiting a "person holding a license" from carrying a pistol at in or on "[t]he building and grounds, including any adjacent parking lot, of . . . [a] public or private elementary or secondary school"); D.C. Code § 22-4502.01 (creating a "gun free zone" within 1000' of schools and enhancing the criminal penalties "up to twice that otherwise authorized).

[21] *See, e.g.*, *Olmer v. City of Lincoln*, 192 F.3d 1176, 1180 (8th Cir. 1999) (finding the government has a compelling interest to protect young children from gruesome images); *Beck v. F.C.C.*, 95 F.3d 75, 80 (D.C. Cir. 1996) (recognizing a governmental interest in protecting children from images of aborted fetuses on public television even though they "are not indecent but may nevertheless prove harmful."); *Saint John's Church in the Wilderness v. Scott*, 296 P.3d 273, 284 (Colo. Ct. App. 2012) (upholding injunction preventing protesters from using gruesome images "in a manner reasonably likely to be viewed by children under 12 years of age attending worship services and/or worship-related events at plaintiff church"); *Saint John's Church in the Wilderness v. Scott*, 194 P.3d 475, 484 (Colo. Ct. App. 2008) (holding "that protection of children from undeniably gruesome pictures at issue here is a proper content neutral."); *Bering v. SHARE*, 721 P.2d 918, 935 (Wash. 1986) (upholding permanent injunction forbidding ant-abortion protesters from using violent terms on their signs because of state's "compelling interest in avoiding subjection of children to the physical and psychological abuse inflicted by the picketers' speech.").

especially life in a society that recognizes a right to public political protest." *Ortberg*, 64 A.3d at 161 (quoting *Homan v. Goyal*, 711 A.2d 812, 818 (internal quotation marks and citation omitted)). Or whether the "the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Ortberg*, 64 A.3d at 161 (citation omitted).

Would the recitation of the facts in this case—a gathering of adult strangers outside of an elementary and middle school, holding signs that depict dismembered fetuses and speak of baby killing, those same adults shouting at the children and chasing them into alternate entrances of the school in a futile attempt to get those children to somehow halt the construction of a health clinic next door—would these facts when heard by an average member of the community arouse his resentment against the protestors, and lead him to exclaim, 'Outrageous!'? Plaintiffs have undoubtedly presented evidence that could convince the trier of fact this was and would be the precise the reaction of a reasonable member of the community when presented with the Defendants' conduct.[22] This is an issue appropriately decided by the trier of fact and not as a matter of law on a special motion to dismiss.

C. Defendants' outrageous conduct was unquestionably intentional.

When considering a claim for intentional infliction of emotional distress, intent or recklessness can be inferred from the outrageousness of the acts. *Sere v. Group Hospitalization, Inc*., 443 A.2d 33, 37 (D.C. 1982); *see also Anderson v. Prease,* 445 A.2d 612, 613 (D.C. 1982).

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[22] In the National Catholic Register, Msgr. Charles Pope recently posted the following:

> **In yet another twist, a formal complaint has been lodged against two protestors (not of our group) who displayed signs with pictures of aborted babies**. The complaint holds that such pictures disturb the school children nearby. Indeed they do. For this reason I, and others of our core group described above who protest at the construction site, have requested that members of our group not carry such pictures.

See Nat'l Catholic Register, MSGR. CHARLES POPE, Protesting Planned Parenthood in Washington, DC (Feb. 2, 2016), http://www.ncregister.com/blog/msgr-pope/protesting-planned-parenthood-in-washington-dc (last visited Feb. 25, 2016), attached hereto as **Ex. 7** (emphasis in original). Based on Plaintiffs' investigation, Msgr. Charles Pope was present at the February 25, 2016 protest in front of Two Rivers' middle school campus.

Here, Defendants intended their conduct to be outrageous. This was the purpose of putting school children in the crosshairs. They could have contained their protest to the area in front of the true aim of their opposition, the Planned Parenthood health clinic.[23] They could have calmly passed out flyers to willing recipients, as they have done on multiple occasions since this matter was filed.[24] They could have brought signs that did not show images that could frighten young children.

Instead, they twice showed up at the school during the already hectic time when children would arrive at school, they aggressively targeted their messages at the students, they yelled to the children that they should tell their parents about the "baby killing factory next door." The Defendants carried out the precise plan that Defendant Darnel painstakingly spelled out in his November 1, 2015 email to school administrators. Compl. ¶ 36. When the school attempted to bring the children into the school by a less hostile path, the protestors coordinated and chased the children into these other entrances. Defendants attempt to rationalize their actions by stating that they did not cause a sufficient amount of emotional distress to the students and the school to be deemed, as a matter of law, "offensive." *See* Nicdao Special Mot. at 9. The two hallmarks of the

[23] In a number of public accounts Defendants have been referred to as "sidewalk counselors." Defendants are "protestors," not "sidewalk counselors." *See McCullen v. Coakley*, 573 U.S. __, 134 S.Ct. 2518 (2014) ("While the Act may allow petitioners to 'protest' outside the buffer zones, petitioners are not protestors; *they seek not merely to express their opposition to abortion, but to engage in personal, caring, consensual conversations with women* about various alternatives.") (emphasis added). The Planned Parenthood facility is under construction and not operational and the overall thrust of Defendants' message was aimed at Plaintiffs and the students of Two Rivers who are required to attend school. Defendants' actions here stand in stark contrast to those at issue in *McCullen.*

[24] In declining to extend the captive audience doctrine in *Snyder*, the Court noted: "Here, Westboro *stayed well away* from the memorial service. [Mr.] Snyder *could see no more than the tops of the signs* when driving to the funeral. And there is *no indication that the picketing in any way interfered with the funeral service itself*. We decline to expand the captive audience doctrine to the circumstances presented here." 562 U.S. at 460 (emphasis added). Here, given Defendants' aggressive tactics and willingness to interfere with the school and the students coupled with the fact children are required to attend school in the District of Columbia, this matter is ripe for application of the captive audience doctrine. *See Snyder*, 562 U.S. at 459-60 (citing *Rowan v. Post Office Dept.*, 397 U. S. 728, 736-38 (1970) ("upheld a statute allowing a homeowner to restrict the delivery of offensive mail to his home); *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988) (upholding an ordinance prohibiting picketing "before or about" any individual's residence)).

protestors' outrageous conduct—the targeting of children and the aggressiveness of their manner and message— cannot be said to be anything but intentional.

D. Plaintiffs have been harmed by Defendants outrageous conduct.

While the plaintiff must show that the defendant caused severe emotional distress he need not prove actual physical injury. *Waldon v. Covington,* 415 A.2d 1070, 1076 (D.C. 1980). An action for intentional infliction may be made out even in the absence of physical injury or impact. *Id.* (citing *District of Columbia, Perry v. Capital Traction Co*., 32 F.2d 938, *cert. denied* 280 U.S. 577 (1929)). Instead, plaintiff must "establish that the defendant proximately caused an emotional disturbance 'of so acute a nature that harmful physical consequences might not be unlikely to result.'" *Ridgewells Caterer, Inc. v. Nelson,* 688 F. Supp. 760, 764 (D.D.C. 1988) (citations omitted). Courts applying D.C. law have determined that various emotional conditions can support an award of compensatory damages for intentional infliction of emotional distress including depression and stress (*Estate of Underwood v. Nat'l Credit Union Admin*., 665 A.2d 621, 642 (D.C. 1995)), feelings of violation, anxiety, and helplessness (*Robinson v. Sarisky*, 535 A.2d 901, 906 (D.C. 1988)), and "highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea." *Morton v. D.C. Hous. Auth.*, 720 F. Supp. 2d 1, 10 (D.D.C. 2010) (citing Restatement (Second) of Torts, § 46 cmt. j (1965)).

In this case, the harm caused to Plaintiffs by Defendants is several-fold. First, Defendants' actions have directly harmed the Two Rivers Public Charter School's reputation and made it a less safe place to attend school. Second, Defendant's actions have diverted the Board's resources to deal with circumstances that are not directly tied to its core mission of providing an education to elementary- and middle school-aged children. Third, and certainly not least,

students have reported anxiety and fear about the possibility of arriving at school to a scene of chaos, shouting and scary signs. Compl. ¶ 61. This final category relates directly to the school's duty "to exercise reasonable and ordinary care for protection of pupils to whom it provides an education." *D.C. v Doe*, 524 A.2d 30, 32 (D.C. 1987).[25]

Plaintiffs have presented sufficient evidence to show a likelihood of success on their claims for intentional infliction of emotional distress thereby warranting dismissal of Defendants' special motion to dismiss. Similarly, Plaintiffs can make the requisite showing for their attendant claim for private nuisance and conspiracy to commit a private nuisance.

VII. Defendants' extreme and outrageous conduct has unreasonably interfered with the use by Plaintiffs of the school and its grounds.

A private nuisance is "a substantial and unreasonable interference with private use and enjoyment of one's land . . . for example, by interfering with the physical condition of the land, disturbing the comfort of its occupants, or threatening future injury or disturbance." *B & W Mgmt., Inc. v. Tasea Inv. Co.*, 451 A.2d 879, 882 (D.C. 1982) (citing Restatement (Second) of Torts § 821D (1979) (other internal citations omitted)). As Defendants have pointed out, nuisance law is a "'a field of tort liability, rather than a type of tortious conduct." *District of Columbia v. Fowler*, 497 A.2d 456, 461 (D.C. 1985) (quoting W. Prosser, Handbook of the Law of Torts § 87, at 573-74, 577 (4th ed. 1971)). Liability must be based on some underlying tortious conduct, in this case intentional infliction of emotional distress. *Tucci v. D.C.*, 956 A.2d 684, 696-97 (D.C. 2008). As reflected in the Plaintiffs' Complaint, the same behavior that serves

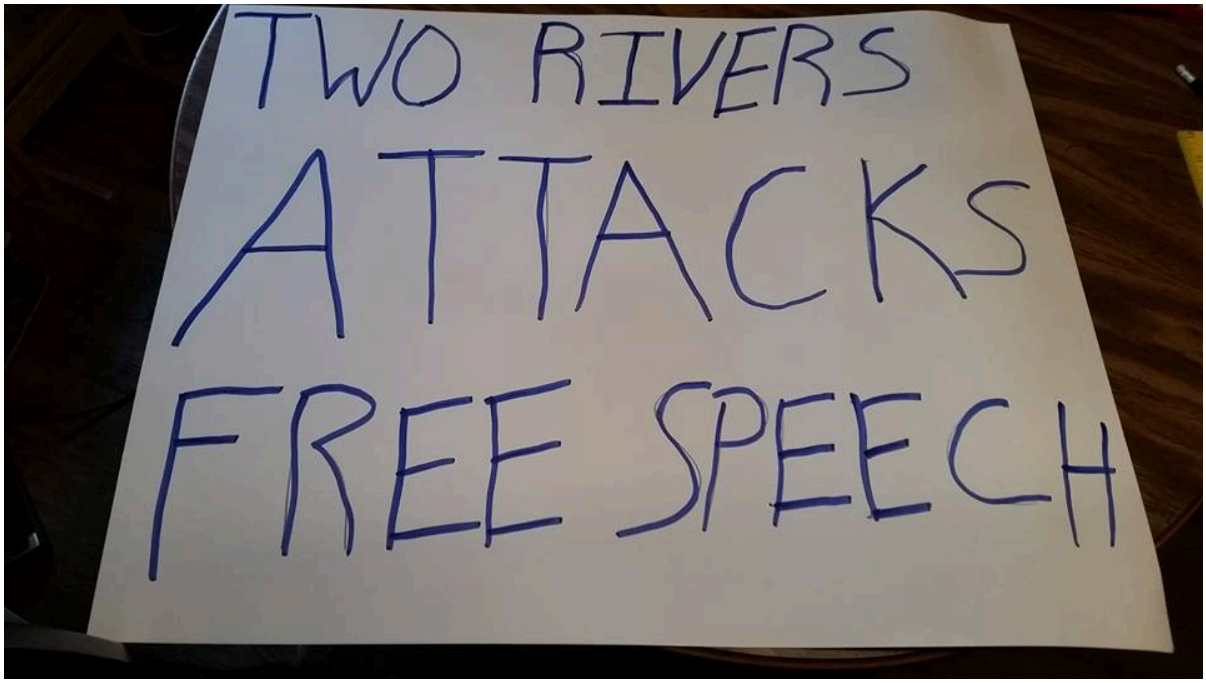
[25] This claim is distinct from any potential tort liability that has accrued to the students and their parents. *See* Pls.' Consolidated Brief in Opp'n to the Mots. to Dismiss of Defs.' Robert Weiler, Ruby Nicdao, Larry Cirignano, and Jonathan Darnel, § III ("The claims and remedies being pursued by Plaintiffs are their own. Individual students and their parents could pursue individual tort actions against one or more of the Defendants.").

as the basis of Plaintiffs' claim for intentional infliction of emotional distress also serves as the basis for the attendant claim of private nuisance.

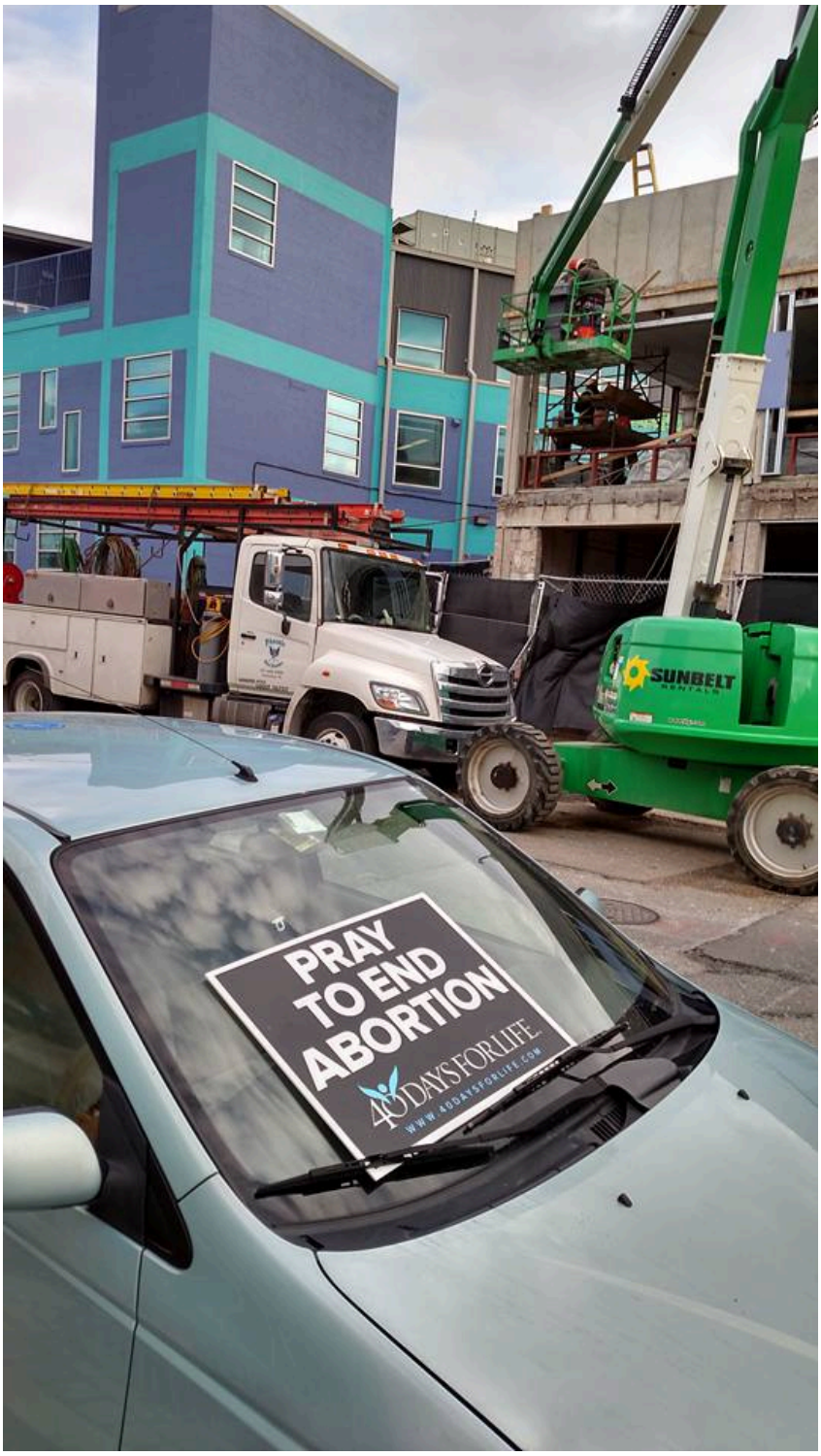
Defendants' conduct in front of Two Rivers School has served to physically interfere with the school, has disturbed the regular procedures and use of the school grounds for educating students and has, without question, threatened future injury and disturbance. Defendants' targeting of students at Two Rivers, their shouting at families and children as they attempt to enter the school through both regular and emergency entrances, and their holding signs that are upsetting, at the very least, to elementary school students have all interfered with the Plaintiffs' use of the school.

On both November 16 and 23, 2015, Defendants stood on the sidewalks in the areas where students crossed to get into the school building, intentionally making it more difficult for them to enter the building. Compl. ¶ 45. In particular, Defendant Nicdao followed students down a narrow alley as the administration attempted to find safer passage for the students arriving at school to such chaos. *Id*. ¶ 45. The school remains on high alert to prevent future similar incidents targeting students and also hired a security guard for a period of time, diverting scarce funds that would have otherwise been used to carry out Plaintiffs' mission of educating children The school has implemented a new schedule where if any protestors are present on school grounds, the students must stay inside for recess instead of being subjected to possible shouting and gruesome images. Defendant Darnel and other protestors promised in no uncertain terms they would be back "until the school rises up." Compl. ¶ 36, an original copy of the Darnel email is attached hereto as **Ex. 2**; ¶ 50 ("John Doe 1 stated that they would 'be back every week.'"). And various protestors, including both Defendants Cirignano and Weiler, have returned to

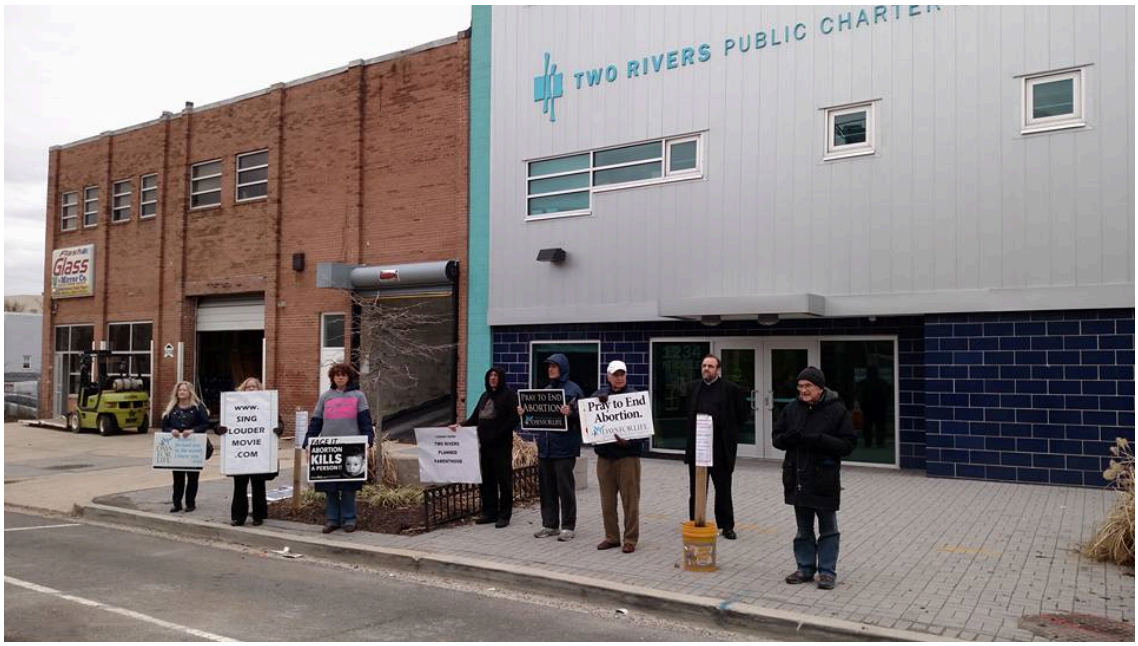
protest in and around the school during school hours confining much of their activity to the boundaries of the requested injunctive relief:

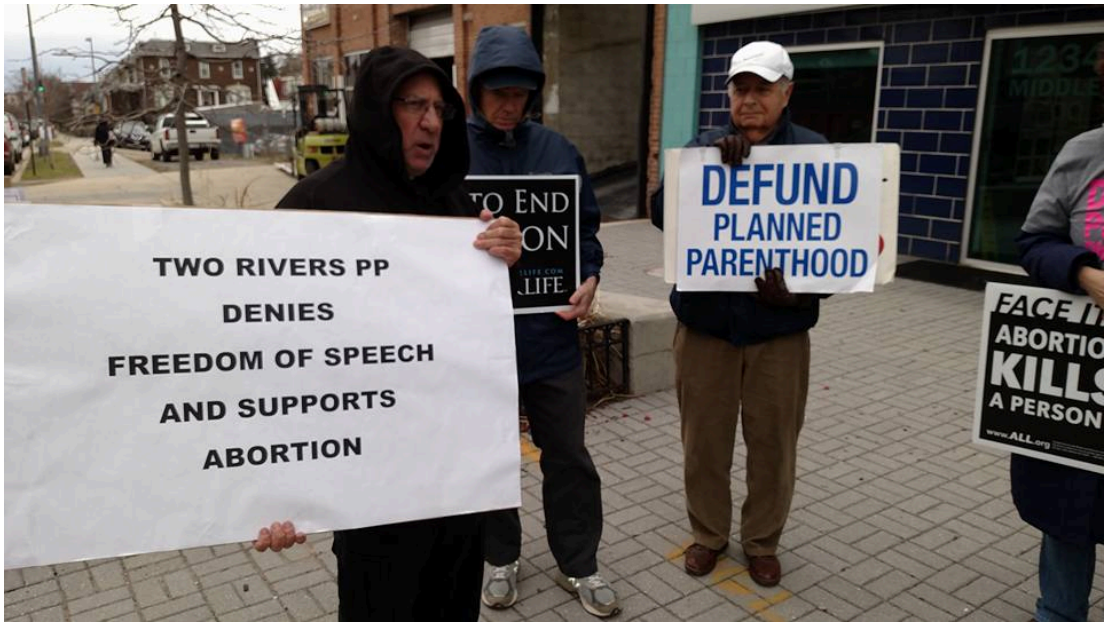


(Robert Weiler, Dec. 14, 2015)



(Larry Cirignano, Feb. 10, 2016).





(Larry Cirignano & John and Jane Does, Feb. 25, 2016)

These actions demonstrate that channels of communications remain open for conveying their message and serve as a tacit acknowledgement that the narrowly-tailored relief sought is reasonable.

As a direct result of Defendants' collective action focusing on the school and its students, Two Rivers must exist in a world where each day they come to school with a sense of dread, wondering if they will have to rush their students in side doors and shield them from the shouting and images that besiege them in front the one of the places in their students' lives that should definitely feel welcoming and safe. This evidence of interference with Plaintiffs' use of the school and the school property easily meets the requirements to survive a special motion to dismiss under the Anti-SLAPP Act and accordingly Defendants' special motion should be dismissed.

VIII. Plaintiffs have sufficiently plead a civil conspiracy making Defendants vicariously liable for one another's activities.

In the District of Columbia, "[t]o establish a prima facie case of civil conspiracy, [a plaintiff] ha[s] to prove (1) an agreement between two or more persons (2) to participate in an unlawful act, and (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement pursuant to, and in furtherance of, the common scheme. *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 446 (D.C. 2013) (citations and internal quotations omitted). " '[L]iability for civil conspiracy depends on performance of some underlying tortious act'; '[civil] conspiracy is not independently actionable; rather it is a means for establishing vicarious liability for the underlying tort.'" *Id.* (quoting *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)).

Plaintiffs' have alleged in their Complaint that Defendants acted in concert when they protested the Two Rivers community about the Planned Parenthood clinic under construction next door. As support for their allegations, Plaintiffs pointed to, among others, the following incidents:

1. On November 1, 2015, Defendant Jonathan Darnel sent an email containing a myriad of hyperlinks and a bizarre array of highlighted and bolded text targeted directly to the school's administration portending the protests that followed: **"I'm sure you don't want to see me, my anti-abortion friends and our graphic**

images any more than we want to be in your neighborhood." Compl. ¶ 36 (emphasis in original).

2. On November 16, 2015, a protest where four of the defendants stood in front of the elementary school, which contains classrooms for children ages three (pre-school) through fifth grade, and directed their protest directly at children with signs stating "They kill babies nearby! Tell your parents to stop them" and shouting such things as "the principal has no conscience – she doesn't care." Compl. ¶¶ 37-51.

3. On November 23, 2015, a protest where four of the defendants stood in front of the middle school, which contains classrooms for children in the sixth through eighth grades, with the same large sign from November 16 declaring "They kill babies nearby! Tell your parents to stop them" as well as large signs depicting aborted fetuses and again shouting such things as "they are going to murder kids right next door if your parents don't do something about it." Compl. ¶¶ 52-62.

Defendant Darnel was directly involved in each of the three incidents described above while Defendant Handy was present at both protests. Compl. ¶¶ 38, 52.

In response, Defendants argue that there was no "agreement or other coordination by which any alleged conduct by any other Defendant can be imputed." Cirignano Special Mot. at 3. To credit this testimony, it would be necessary to disregard Darnel's "call-to-arms" email he sent to Two Rivers administrators in which he portended things to come. Additionally, it would be necessary to believe that nearly two weeks later, on successive Mondays in November, a group of four protesters showed up on the Two Rivers Campus with same poster targeting students, the same leaflets, gruesome images, and with the same agenda coincidentally just as students were scheduled to arrive for school.

While Defendants would lead you to believe this was all just a happy coincidence, assuming the facts alleged as true along with any reasonable inferences, it is highly plausible that there was an agreement. None of the Defendants live in the District of Columbia nor, based upon Plaintiffs' investigation, is it believed that any work in the NoMa-Gallaudet neighborhood that would put them near the school regularly. Whether all the protestors knew of one another's

precise plans or the exact nature of their wrongful activities is irrelevant given Plaintiffs' plausible allegations of conspiracy. *Hill v. Medlantic Health Care Group*, 933 A.2d 314, 334 (D.C. 2007) (noting civil conspiracy is "a means for establishing vicarious liability for an underlying tort."). Therefore, any actions taken by one protestor should be imputed to all of the Defendants, all of whom were a part of the conspiracy.

IX. Under the Anti-SLAPP Act, Plaintiffs should be permitted to gather evidence in further support of their claims and be given the opportunity to be heard before the Court.

Even at this preliminary stage, through their verified complaint, Plaintiffs can demonstrate facts sufficient to show they are likely to succeed on the merits of their underlying claims. But given the unusual burden shifting that occurs under the Anti-SLAPP Act requiring Plaintiff to show the likelihood of success on the merits of their claims at the outset of their case, Plaintiffs ask that the Court grant them preliminary discovery and a hearing on Defendants' special motion to dismiss. This is critical in light of the issues presented and especially important given the competing standards between injunctive relief and the Anti-SLAPP Act. In a request for a preliminary injunction, if the plaintiff does not meet the "likelihood of success on the merits" standard then the case simply proceeds without an injunction in place. In contrast, under the Anti-SLAPP regime, if the plaintiff does not meet the standard that is the death knell for the case. D.C. Code § 16-5502(b) ("then the motion [to dismiss] shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied."). In a matter that otherwise satisfies *Twombly* and other threshold pleading requirements, it is necessary to conduct an evidentiary hearing. *See, e.g.*, *Ctr. for Advanced Def. Studies v. Kaalbye Shipping Int'l*, Case No. 2014 CA 002273 B (D.C. Super. Ct. Apr. 7, 2015), Order at 3 (conducting an evidentiary hearing after initially conducting a multi-

day oral argument "concerning the nature of this case, the proper interpretation of the SLAPP statute, and the necessity of an evidentiary hearing.").

As the court in *Payne v. District of Columbia*, No. 2012 CA 6163B (D.C. Super. Ct. May 28, 2013), reminds us, under the Anti-SLAPP Act "a plaintiffs cannot simply rely on his or her pleadings, even if verified; rather, the plaintiff must adduce competent, admissible evidence." *Payne*, slip op. at 5 (quoting *Roberts v. L.A. County Bar Ass'n*, 105 Cal.App.4th 604, 614 (Cal. 2003)). Under the Anti-SLAPP Act, "[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. D.C. Code § 16-5502(c)(2).

A. Plaintiffs are prepared to establish they are able to adduce competent, admissible evidence to demonstrate they are likely to succeed on the merits.

The burden-shifting regime in the Anti-SLAPP, Plaintiffs respectfully submit, makes it necessary for this Court to conduct an evidentiary hearing to permit Plaintiffs to introduce evidence to support their claims. *See, e.g.*, *Kaalbye Shipping*, *supra* n.16. Each of the Defendants has expressly asked this Court to conduct an "oral hearing on [their] motion to dismiss" so such a result would be entirely consistent with their expectations. At such a hearing, Plaintiffs may present, *inter alia*, the following types of evidence:

1. Pictures and videos showing Defendants' conduct at Two Rivers School on the days in question.

2. Testimony related to the policy changes the school has had to make due to the threat of repeated protests by Defendants.

3. Testimony of school administrators about the specific harms to the Two Rivers Public Charter School.

4. Testimony from parents about their recent decision to re-enter the school lottery or transfer out of Two Rivers because of Defendants' conduct.

5. Testimony from city officials about the scope and nature of a school's duty to maintain a safe environment.

6. Testimony from city officials related to the propriety of having students enter a school through alternative and emergency exit doors.

7. Testimony from city officials about how charter school funding works.

8. Testimony from city and ANC officials concerning Defendants' efforts to prevent Planned Parenthood from relocating to Fourth Street NE.

9. Testimony from a school counselor/social worker about how defendants' behavior affected the children at Two Rivers.

10. Testimony from DC Charter School Board officials concerning the specific harms to the Two Rivers Public Charter School.

11. Testimony concerning the criminal backgrounds of the Defendants and others who have been present at Two Rivers since these targeted protests began.

As noted in *Mann*, the Court's task is limited to determining whether there is "sufficient evidence to prove the probability of prevailing on the claim (outside of the allegations made in the complaint)" and not to weigh the evidence. *Mann v. Nat'l Review*, Case No. 2012 CA 008263 B (D.C. Super. Ct. July 19, 2013), Omnibus Order at 10.

B. Plaintiffs request that this Court permit targeted discovery of Defendants consistent with the provisions in the Anti-SLAPP Act.

Under the Anti-SLAPP Act, "[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." D.C. Code § 16-5502(c)(2). Through this consolidated brief in opposition to Defendants' special motions to dismiss, Plaintiffs specifically request that the Court permit the following targeted discovery of non-privileged information:[26]

1. All Defendants produce copies or permit inspection of the actual signs they used to protest at Two Rivers Public Charter School on the days that are the subject of this case.

[26] Plaintiffs respectfully reserve the right to seek additional targeted discovery from Defendants and from third parties.

2. All Defendants produce copies or permit inspection of the flyers they used to protest at Two Rivers Public Charter School on the days that are the subject of this case.

3. All Defendants answer, under oath, the following interrogatory: "Please identify all people who are or were aware that you intended to conduct a protest at Two Rivers Public Charter School."

4. All Defendants produce copies of all documents[27] and communications[28] sent between and among themselves (whether electronic or hard copy) discussing the protests at Two Rivers Public Charter School, including any exchanges that occurred before or after the protests.

5. All Defendants produce copies of all voicemail messages sent between and among themselves (whether electronic or hard copy) discussing the protests at Two Rivers Public Charter School, including any voicemail messages left before or after the protests.

6. All Defendants produce copies of all documents and communications sent between and among himself or herself (whether electronic or hard copy) and any third party discussing the protests at Two Rivers Public Charter School, including any exchanges that occurred before or after the protests.

7. All Defendants produce copies of all voicemail message sent between and among himself or herself (whether electronic or hard copy) and any third party discussing the protests at Two Rivers Public Charter School, including any voicemail message left before or after the protests.

8. All Defendants produce copies of all documents and communications sent between and among himself or herself (whether electronic or hard copy) and any third party concerning efforts to protest at Two Rivers Public Charter School since this matter was filed.

9. All Defendants produce copies of all voicemail message sent between and among himself or herself (whether electronic or hard copy) and any third party concerning efforts to protest at Two Rivers Public Charter School since this matter was filed.

10. All Defendants produce copies of all photos, videos, or voice recording he or she is in possession of concerning the protests at Two Rivers Public Charter School.

[27] The term "documents" is synonymous in meaning and equal in scope to the usage of this term in the D.C. Superior Court Rules of Civil Procedure and the applicable case law. *See* SCR Civil 26, 34(a).
[28] The term "communications" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise) and should be interpreted consistent with the D.C. Superior Court Rules of Civil Procedure and the applicable case law.

11. All Defendants produce copies of all social media posts they made or are mentioned in concerning the protests at Two Rivers Public Charter School.

12. Defendant Weiler answer, under oath, the following interrogatory: "Please identify John Doe 1, as identified in the Verified Complaint, including John Doe 1's full name, and last known address, and telephone number."

13. Defendant Cirignano answer, under oath, the following interrogatory: "Please identify the John and Jane Does who joined you in protesting Two Rivers and Planned Parenthood directly in front of the Two Rivers middle school campus on Thursday, February 25, 2016."

Plaintiffs are prepared to reimburse Defendants for the costs of securing this information, as required by the Anti-SLAPP Act, DC Code § 16-5502(c)(2). However, these requests have been intentionally narrowed to information, documents, and communications in the possession of Defendants and the related costs associated with these requests should be *de minimus*.

X. Conclusion

This is not a case of Plaintiffs opposing Defendants' viewpoint and attempting to use the legal system to silence them. Two Rivers Charter School and its Board of Trustees have made it clear that they seek only to ensure that their students can attend school feeling they are safe and learn an in an environment that will allow them to succeed. Based on Plaintiffs' opposition to Defendants' Special Motions to Dismiss, Plaintiffs respectfully request that the court deny Defendants' motion and allow the case to proceed to a hearing for a preliminary injunction. Alternatively, Plaintiff respectfully submits that this Court schedule and conduct a full evidentiary hearing to determine whether there is "sufficient evidence to prove the probability of prevailing on the claim."

February 26, 2016

Respectfully submitted,

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