SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

TWO RIVERS PUBLIC CHARTER, SCHOOL, INC., ET AL., Plaintiffs,	:	Docket Number: 2015 CAB 9512
vs.	:	
ROBERT WEILER, JR. ET AL. Defendants.	:	Friday, April 29, 2016
	:	Washington, D.C.

The above-entitled action came on for a hearing before the Honorable JEANETTE JACKSON CLARK, Associate Judge, in Courtroom Number 221.

APPEARANCES:

On Behalf of the Plaintiff:

MICHAEL MURPHY, Esquire
CARY JOSHI, Esquire
Washington, D.C.

On Behalf of Defendant Ruby Nicado:

ALEXANDER VINCENT, Esquire
STEPHEN CRAMPTON, Esquire
Washington, D.C.

On Behalf of Defendant Larry Cirigano:

ROGER GANNAM, Esquire
MATTHEW STARVER, Esquire
Washington, D.C.

On Behalf of Defendant Jonathan Darnell:

JOHN GARZA, Esquire
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APPEARANCES CONTINUED:

On Behalf of Defendant Paul Weiler:

Pro se

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P R O C E E D I N G S

THE DEPUTY CLERK: Your Honor, calling the case of Two Rivers Public Charter School, Inc., et al. versus Robert Weiler, Weiler, Jr., et al., 2015 CA 9512. Parties please stand and state your names for the record.

MR. MURPHY: Your Honor, Michael Murphy, Bailey & Glasser, on behalf of the plaintiffs.

THE COURT: Good afternoon.

MS. JOSHI: Cary Joshi of Bailey & Glasser on behalf of the plaintiffs as well.

THE COURT: Good afternoon.

MR. MURPHY: Good afternoon.

MS. JOSHI: Good afternoon.

MR. VINCENT: Good morning, Your Honor. Alexander Vincent of Shulman Rogers on behalf of defendant Nicdao. With me is my co-counsel, Mr. Stephen Crampton.

THE COURT: Good afternoon.

MR. VINCENT: And our client, Ms. Nicdao, is in the front row here.

THE COURT: Okay. Good afternoon.

MR. CRAMPTON: Good afternoon.

MR. GANNAM: Your Honor, I'm Roger Gannam from Liberty Counsel for defendant, Cirigano, Larry Cirigano.

THE COURT: Okay.

MR. GARZA: Good morning, Your Honor. John

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Garza on behalf of the defendant, Jonathan Darnel, who is also in the courtroom.

THE COURT: Good afternoon.

MR. WEILER: Good morning, Your Honor. Robert Weiler on my own behalf.

THE COURT: Okay. Good afternoon.

MR. DARNEL: Jonathan Darnel.

THE COURT: Okay. Good afternoon. Thank you. We're here today for a motions hearing. I believe I issued an order setting for the procedure that we were going to use and the time allotments. So can you tell me, are there any parties sharing any time?

MR. GANNAM: Yes, Your Honor. Defendant Cirigano will give five minutes of his 15 minute of principle argument to counsel for defendant Nicdao.

THE COURT: Thank you.

MR. GANNAM: And we, we intend, Your Honor, to split it up 10 minutes, 10 minutes and 10 minutes between Nicdao's two, two attorneys and myself.

THE COURT: Okay. Thank you.

MR. MURPHY: Your Honor, on behalf of plaintiffs, we're a little confused. It said both plaintiffs will have 15 minutes and didn't know if that was a cue in on 30 minutes?

THE COURT: It is 30 minutes.

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MR. MURPHY: Okay. All right. Thank you.

THE COURT: At this point.

MR. MURPHY: We'll try to make --

THE COURT: And throughout the hearing.

MR. MURPHY: We'll try to make it last.

THE COURT: Okay. We're ready to start. It's noon.

MR. STARVER: Excuse, me, Your Honor.

THE COURT: Yes.

MR. VINCENT: We have a preliminary matter that certainly defendant Nicdao would like to raise for the Court.

THE COURT: Yes.

MR. VINCENT: And I think a number of the other defendants probably share that. This morning we understand that Mr. Murphy filed or gave his intent to introduce about 20 documentary and video exhibits into evidence. We have not seen those before. We think under Rule 6(d) of the Superior Court Rules that any evidence, especially affidavits in opposition to a motion, are required to be served with the opposition. And, you know, frankly, this is kind of trial by ambush and surprise. We have had almost --

THE COURT: Well, there's not supposed to be a trial today. It is a motions --

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MR. VINCENT: Right.

THE COURT: -- hearing and the exhibits that are used should be ones that have already been shared with the parties. So if there are other exhibits, they can't be used.

MR. VINCENT: All right. Thank you, Your Honor. That's good to get that clarified. So I, I, I think then our understanding is that of the 20 exhibits that have not been previously shared or attached to the pleadings and the motions, those, those cannot be used today.

THE COURT: That's right.

MR. VINCENT: Thank you.

THE COURT: Thank you. You haven't had an opportunity to respond to them in any way. If they were attached to the complaint or incorporated in the complaint, you had an opportunity to respond to them when you filed your motions, okay? So what order are we going to go in please?

MR. STARVER: Your Honor, I suggest we address the standing motion first. I'm prepared to speak on that.

THE COURT: Well, I meant parties.

MR. VINCENT: Oh, parties? Well, I think the way we thought it might work is defendant Nicdao would, would go first and then Mr. Gannam will speak on, on behalf of defendant Cirigano. We have not coordinated

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with Mr. Garza about Mr. Weiler's argument, so certainly we'll need to fit that in. But I'm prepared to address the standing motion on behalf of defendant Nicdao at this, at this point, Your Honor.

THE COURT: Is that the order that you want to proceed, gentlemen?

MR. GARZA: Your Honor, I'm more than happy to go last amongst the defendants.

THE COURT: And you're representing?

MR. GARZA: Mr. Darnel.

THE COURT: Mr. Darnel? Okay.

MR. GANNAM: Your Honor, we thought because there are, there is so much overlap between several of the defendants' positions --

THE COURT: Right.

MR. GANNAM: -- we would try to make it more efficient for everyone involved by splitting some of the issues between defendant Nicdao and defendant Cirigano. So what we contemplated was Mr. Vincent would, would begin arguing with certain issues that we would then adopt for Mr. Cirigano. I would go next and argue some additional issues and then --

THE COURT: Okay.

MR. GANNAM: -- Mr. Crampton would, would conclude, you know, the, at least our presentation on

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those overlapping issues and just try to present them once instead of each of us repeating each other.

THE COURT: Okay. That sounds good. Thank you.

MR. GANNAM: I have not had a chance to discuss this with Mr. Weiler, who is representing himself, so I, I don’t know, you know, how he feels about all this or what his --

THE COURT: Okay. Mr. Weiler --

MR. GANNAM: -- what his plans are.

THE COURT: -- what's your position?

MR. WEILER: That's fine with me, Your Honor. I don't mind going last or second to last, either way, because I'll be incorporating the legal arguments --

THE COURT: Okay. I need to know --

MR. WEILER: -- for you by the attorneys.

THE COURT: -- who is going to be last? Are you going to be last, Mr. Weiler?

MR. WEILER: I can be last or Mr. Garza can be last, either way.

THE COURT: Or counsel for Darnel?

MR. GARZA: I'm happy to let Mr. Weiler go last.

THE COURT: Okay --

MR. WEILER: Thank you, Mr. Garza.

THE COURT: -- Mr. Weiler. Thank you. You can proceed now. Thank you. The standing, of course, is the

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threshold issue.

MR. STARVER: Yes, indeed, Your Honor. Standing is a threshold issue that under the applicable law of the District of Columbia needs to be addressed and resolved prior to and independent of the merits of the parties' claims and that's the Grayson case.

Now just to kind of give you a quick overview of the legal principles we're dealing with, we've got sort of the Constitutional requirement standing and a prudential requirement. And as far as the Constitutional requirement, Two Rivers needs to show that it has a case or controversy. And so the basic underlying principle of standing is that there has to be actual or imminent threatened injury that is attributable to the defendant and capable of redress by the Court.

And when we say that it's attributable to the defendant, it's important to remember, Your Honor, that the plaintiffs have to make a showing, which they have not done in this case, that the injuries that they are supposedly complaining about are attributable to my client, Ms. Nicdao, to her activities. They can't lump all the defendants together as one and say that somehow in some combination or mix they caused the plaintiffs' injuries. They, each defendant has to be judged on the merits of what he or she actually did on the various days

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in question.

Because as Your Honor will note from the complaint, Ms. Nicdao was only present on one of the, the incidents and the days mentioned in the complaint. That was the November 23rd incident. She was not present in the August, November 16th or December 7th incident.

So when we talk about standing, Your Honor, what do we mean by injury in fact? That's the, the, the first element. It has to be injury in fact of a legally protected interest which is concrete and particularized and factual or imminent it can't be conjectural or hypothetical. And, again, as I mentioned, it has to be fairly traceable to the challenged action of defendant Nicdao specifically.

Now there's also a prudential requirement of standing and we're going to get into that today in a bit more detail. But the Supreme Court has said that generally a party must assert his or her own legal rights, not the legal rights and interests of others.

Now we have proceeded in this case, Your Honor, under the assumption that Two Rivers has been claiming associational standing to represent really what are the interests of the parents and the students. They did not really make a, any kind of allegations to support direct standing, although in their opposition brief they had now

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argued supposedly we have misconstrued their position and that, in fact, they do have correct standing. So perhaps, although it's not entirely clear, they are claiming that they have both direct standing and associational standing. But I think that the support in the complaint is almost non-existent for direct standing, but I will address that at the end of my remarks on standing. I think associational standing is really what they have asserted in this case.

So there is a test for that, Your Honor, and generally the test is that when you're dealing with an association, it's, first of all you have to have an association. These associational standing cases, Your Honor, typically involved a voluntary membership, association or a fraternal benefit society. It's an, it has to be an organization through which individual members voluntarily associate with one another to pursue common goals and interests.

Now the Two Rivers Public Charter School is not an association. It's not that kind of an organization. It provides a service, education, which students are required by law who live here to obtain. They don't necessarily have to obtain it from Two Rivers, but they have to obtain it from somewhere, public school or schooling up to age 18 is compulsory in the District of

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Columbia like it is in every other state. So you can't say that the school is really a voluntary association. So if it's not an association, our position is that associational standing, they can never satisfy that because they're not an association to begin with.

Now, Your Honor, let's assume for the moment that Two Rivers could otherwise qualify as an association. Then you've got to get to this three-part test that the cases have talked about. First, you have to show that the members have standing to sue in their own right. Well, again, it's possible and, indeed, we think it's quite likely and there's no obstacle that the parents or the students themselves bringing suit in their own right for the injuries that have happened to them. But what you have to remember, Your Honor, is that the parents and the students are not members of the school. They pay the school for a service, but they're not members of the school.

So in that sense, there, you know, there, you can't look at it as having standing to sue in their own right as members because they're not members. The parents and the students are not members of the school. Again, the school is not an association.

As we mentioned in our briefs, the Two Rivers' tax return has declared that it has no members. And, in

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fact, Two Rivers doesn't even have what the cases have called a de factor membership relationship with its students or their parents because these students and parents don't constitute a specialized segment of the community or discreet group of persons with a definable set of common interests. The parents and students have many differing interests. Perhaps the only common interest is the interest in pursuing an education, which they're required by law to obtain.

And, finally, on this element of members having abstained and sue in their own right, and this will come in when we talk about some of the other prudential considerations. Two Rivers has not made any showing that the parents and the students have any obstacle to suing in their own right. Now apart from standing and suing in their own right, the second element of the test, associational standing, Your Honor, the interest that the association seeks to protect have to be germane to its purpose. And when we look at that, Your Honor, you've got to look at the underlying claims that they're asserting in the complaint. The only real claim that is a cognizable cause of action under the District of Columbia law is intentional infliction of emotional distress.

Two Rivers is pursuing that claim not because it itself has been subject to emotional distress, but somehow

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certain parents and students whom they never identify or name have, have allegedly suffered that emotional distress. But that kind of a claim is not really germane to the school's interest. The school is not in the business of protecting the rights of the parents and the students for activities that happened outside of the school's property. So our contention is that the claims they're raising in this case are not germane to the school's purpose and so that, that is why the second element of the test cannot be met.

And, in fact, if you think about it, the lawsuit really is antithetical to the purposes of the Two Rivers Public Charter School because it seeks to sensor our client, Defendant Nicdao, and prevent the students and the parents from being educated about Planned Parenthood and the things that are going on in the neighborhood. In fact, if you think about it, Your Honor, the students and the parents actually have a First Amendment Constitutional right to receive information that people are giving them in the public square, on the public ways.

Two Rivers here has kind of unilaterally decided that none of the parents, none of the students should have access to any of that information and they claim to represent the interest of all the students and the parents, and they have decided on their own that none of

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them should have this information. In fact, if you look at the declaration that was belatedly submitted this morning on behalf of, or by Jessica Wodash (phonetic sp.), who is the --

MR. MURPHY: Your Honor, I'm going to, I'm going to ask that this -- it's not in evidence and it shouldn't be read now. If he wants to deal with our exhibits, then he's opening the door, I think, so --

MR. STARVER: All right. Well, here's the thing. The affidavit --

THE COURT: Thank you. You're right.

MR. STARVER: The declaration actually parrots the complaint. This is mentioned in the complaint if you read the complaint It says that the school's mission is a diverse, is to nurture a diverse group of students to become lifelong active participants in their own education, develop a sense of self and community and become responsible and compassionate members of society. That is actually alleged in the complaint. So that interest is not consistent with this interest in shutting down speech and preventing students from pursuing their own education by understanding and receiving information that is being offered to them in the public square.

Now the third element, it has to be something that, for Two Rivers to have this associational standing,

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the school, the claim is asserted and there is really only one cognizable claim that's asserted, intentional infliction of emotional distress. That claim and the relief requested would not require the participation of individual members and individualized proof. And here this is where this third element really fails because they can't assume, even though they've asked us to assume, that all the parents and all the students were equally distressed, equally injured by all the defendants' activities. You had a whole collection, different people occurring on different days doing different things. Some of them were holding signs, some of them were holding images, some of them were passing out leaflets. Not all of them were there on the same day for every single incident.

So there's been no showing, made no, even allegation in the complaint that a particular group, identifiable parents and students, suffered emotional distress as a result of what my client, defendant Nicdao, or for that matter what any of the other defendants specifically did on the days where they were.

So really to establish this emotional distress, you're going to have to have specifically identifiable parents and students come forward and say how they were injured and who was responsible, who was the proximate

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cause of that injury. I beg Your Honor's indulgence for just a moment.

All right. Finally, Your Honor, let me conclude by saying that associational standing doesn't exist for Two Rivers in this case for a number of other important reasons, but one of them is that there is no, there are no rights that, that school, that has tried to protect any rights of the students that are to, to have a relationship with the school that the school is trying to protect here. There has been no disruption of the schooling or education by what defendant Nicdao did on the public ways. And certainly she had no intention of disrupting the classroom, no intention of preventing children from entering the school and getting their education. And whatever harm there may have been to Two Rivers' financial interest was simply incidental consequence of defendant Nicdao engaging in Constitutional protected activity.

So for these and all the other reasons that we've articulated and discussed in our briefs, Your Honor, we think that standing is lacking and, therefore, there is no subject matter jurisdiction as to any of the defendants in this case. I'd be happy to answer any of your questions should Your Honor have them at this time.

THE COURT: Thank you.

MR. GANNAM: Your Honor, Roger Gannam, again,

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Liberty counsel for defendant, Larry Cirigano. We adopt the standing argument of defendant Nicdao and we'll proceed to cover two items that relate to this matter. First of all, the applicability of the D.C. Anti-SLAPP Act to the claims in this case, and then what standards the plaintiffs are required to meet, what evidentiary standard or burden they have to meet in order to satisfy the requirements of the D.C. Anti-SLAPP Act.

First of all, Your Honor, the act applies in this case because its plain language says it does. As we cited in our briefs, it's a fundamental rule of statutory construction that the plain language of a statute controls. By the plain language of D.C.'s Anti-SLAPP Statute, it covers all claims that arise out of advocacy on an issue of public interest. And that language is important because it tells us what claims the act applies to, not what plaintiffs making those claims the act applies to. So, in other words, the viewpoint, the motives, the identity of the plaintiff bringing the claims is irrelevant under the plain language of the statute because it's worded so that it covers claims based on their subject matter. The subject matter has to be advocacy of issues of public interest.

Now in this case, the advocacy, I don't think it's in dispute that all of the defendants are alleged to

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have been engaged in advocacy regarding abortion, abortion in general and specifically the, the contemplated abortions to be performed by the new Planned Parenthood facility being constructed between the school buildings.

There is no question, Your Honor, that the issue of abortion is an issue of public interest or concern. If I could steal from defendant Nicdao's reply brief in support of her special motion to dismiss, a court from Wyoming said 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. Since 1973's Roe v. Wade decision, abortion has been a matter of public interest and concern even before that.

So when we put those together, Your Honor, it's clear that the D.C. Anti-SLAPP Act covers claims regarding advocacy, or arising out of advocacy on issues of public interest. All of the advocacies alleged in this case deals with the subject of abortion, which is a public interest and the claims obviously aroused, arise out of that advocacy. So the D.C. Anti-SLAPP Act applies by its plain language.

Again, it doesn't matter that the plaintiffs aren't regular players in the abortion debate or it doesn't matter whether plaintiffs have any connection or

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viewpoint at all with respect to abortion because the act covers claims.

Now given that the act applies, the question is what standard must the plaintiff meet in order to overcome these special motions to dismiss filed by defendant Cirigano and other defendants in this case? Well, again, the plain language of the statute must control here. And what the statute says is that when the special motion to dismiss shows that the act applies, the plaintiff has to show they are likely to succeed on the merits of their claims. Now that standard, again, by its plain language is much higher than the standard that would be required to pass muster under a motion to dismiss or a summary judgment. There has to be more than simply a prima facie case or a showing that the plaintiffs might under some circumstances succeed.

Likely to succeed means that it's more likely than not. Or as a court, or Judge Motley of this court ruled in the Center for Advanced Defense Studies v. Colby Shipping International case, the most recent case to analyze this particular requirement from 2015, in that case Judge Motley analyzed some early decisions on the statute by this Court and concluded that any reference to what other states have done in their Anti-SLAPP statutes, specifically California, which apparently was a model for

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the development of the D.C. Act, to the extent the D.C. Council picked different words from what California picked in its SLAPP Statute, we must presume that the D.C. Council knew what it was doing and did so intentionally.

And so rather than talk about a simple likelihood of success, the D.C. Council used the words likely to succeed on the merits. And based on a plain understanding of that term of art, Judge Motley concluded we should look to the substantial likelihood of success on the merit standard that is required for preliminary injunctions.

Judge Motley also concluded that it wouldn't make sense, even if the statute were ambiguous, it wouldn't make sense to jump over to the California prima facie standard because before the D.C. Anti-SLAPP Act was passed, we already had a requirement for a motion to dismiss under 12(b)(6). We already had requirements for summary judgment under Rule 56. It wouldn't make any sense for the D.C. Anti-SLAPP Act to, whose purpose is to protect people engaged in protected activity from having to even defend a lawsuit. It wouldn't make sense to simply pass a statute that adopts defensive tools that are already available to a defendant such as motion to dismiss or motion for summary judgment. It was necessary for the D.C. Anti-SLAPP Act to create a higher standard to protect

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the particular right that's, that's at issue here.

So Judge Motley said even if the statute weren't clear, if you look at the legislative history, if you look at the, the, the statements made in testimony before the D.C. Council prior to the adoption of the statute, it's clear that the goal was to protect people from having to even stand trial, from even having to participate in a lawsuit when all they're doing is engaging in protected activity. And for that reason, the standard that a plaintiff must overcome in order to advance claims that the Act covers has to be a high standard.

They went so far in testimony before the D.C. Council, the ACLU made the, the point that it would be better in the name of protection of free speech for even some meritorious claims to be kicked out of court if they can't meet the high standard set out by the act because in balancing the interest of freedom of speech and the interest of, of some plaintiffs who may have a marginally meritorious claim, it would be better to stick to the high standard and require that standard be met before claims can proceed forward. This requirement of the plaintiffs to show that they are likely to succeed on the merits must be met by actual evidence adduced or presented to the court to overcome any declarations or any evidence raised by the defendants.

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Now in this case, Your Honor, the plaintiffs in their own briefing on this issue admitted that more than a verified complaint is required for them to meet their standard, whatever that standard is. We also know based on the Court's ruling this morning about the, the affidavits and other evidence first filed this morning. The plaintiffs haven't adduced any evidence at all beyond their verified complaint to overcome the various special motions to dismiss under the Anti-SLAPP Statute. They haven't overcome defendant Cirigano's declaration regarding his conduct on the one day that he was alleged to be outside the school, they haven't adduced any evidence to overcome anyone's declarations in this case. And, therefore, whatever the standard is, Your Honor, here we are on the day of the hearing on these motions, the plaintiffs have adduced no evidence whatsoever to overcome the Anti-SLAPP motions filed in this case and for that reason alone the motions would be due to be granted and the claims dismissed.

Your Honor, I will reserve the remaining two minutes of my time for rebuttal or to answer any questions the Court has.

THE COURT: Thank you.

MR. CRAMPTON: Good afternoon, Your Honor, Steve Crampton, together with Mr. Vincent. We represent the

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defendant, Ruby Nicdao. I want to step back just for a moment in the context of this argument and look at the big picture. The actions of all the defendants here constitute quintessential free speech on a matter of public concern and it's all taking place in a traditional public forum, on the public sidewalks and public ways of the District.

What plaintiffs are asking this Court to do is, in effect, to set entirely new precedent right here in our Nation's Capital, a nation born of freedom, by censoring this free speech on the public ways via entry of a content-based prior restraint on speech on the flimsy basis of hearsay allegations, of the alleged occurrence of the tort of intentional infliction of emotional distress. We urge this Court not to take that bait, but instead to honor our nation's rich history of free speech by dismissing this case in toto.

I want to now zero in, though, on what exactly are the elements of that one seminal tort, intentional infliction of emotional distress and whether plaintiffs have met the required showing of just the elements of, of that tort alone and submit to the Court that they have not as to any defendants, but in particular as to defendant Nicdao, who, as my co-counsel indicated, was only there on a single occasion. And I would note for the Court that we

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are now here eight months after that initial occurrence, I think it was August 27, 2015, and to date, again, defendant Nicdao, it is undisputed, was out there only on one occasion, November 23, 2015, and yet we remain in this case, plaintiff seeking only an injunction as relief. They don't seek damages here. It's only injunctive relief.

And, of course, one of the fundamental requirements to obtain injunctive relief is a showing of the potential of imminent harm in the future. Well, plaintiffs surely cannot show that Ms. Nicdao will ever return to the premises, let alone imminently return. So, again, on that basis alone, they, they cannot succeed against defendant Nicdao.

But with respect to the tort of intentional infliction of emotional distress, the elements are well-settled here. They include a showing of extreme and outrageous conduct on the part of the defendants which intentionally or recklessly cause the plaintiffs to suffer severe emotional distress, not just hurt feelings, not just being offended, but severe emotional distress.

As my co-counsel has indicated, the plaintiffs in this case are the school itself and their trustees. They haven't even alleged not a shred of allegation in the complaint that they themselves have suffered any emotional

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distress, instead, the allegation of any harm pertains only to the parents and students from whom, again, despite the passage of at least now five months since the filing of this action, we have not heard a peep. There is not one allegation, there is not one bit of admissible evidence from the parent or a student. In fact, we don't even have parents or students identified regarding any alleged harm that they have suffered. So, again, as a matter of law, we would suggest plaintiffs have failed to meet their burden even to establish the existence of the tort of intentional infliction of emotional distress and that under the standard of indulging all the allegations in the complaint as, as true for purposes of this motion, at least all the allegations that are well-pled and supported.

But I want to also emphasize that the conduct that we're talking about here is not just conduct, again, that offends, that may disturb folks, we're talking conduct that is so outrageous in character, so extreme in degree, and I'm quoting directly now from the Ortberg case cited in our brief, as to go beyond all possible balance of decency and to be regarded as atrocious and utterly intolerable in a civilized society. What is that conduct here that we're looking at? We're looking at quintessential First Amendment expressive conduct. We're

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looking at signs, we're looking at speech, we're looking at the handing out of leaflets, Your Honor. These are at the very core of the First Amendment to the Constitution and, therefore, cannot, I would suggest, constitute somehow outrageous and extreme conduct that would meet the requirements of the elements of intentional infliction here.

In fact, the only paragraph, I would submit, plaintiffs may want to point elsewhere in their complaint that addresses this element of intentional infliction is in Paragraph 79 in which they say, quote, "Defendants were shouting things," once again, by the way, I would pause just to note that they are, again, painting with a broad brush all defendants as opposed to just defendant Nicdao or naming which defendant shouted this -- clearly, Ms. Nicdao did not engage in most of this behavior, if any -- shouting things like babies are being killed next door to the school and that there will be, quote, "Problems at the school if they don't do something about it." Well, clearly, that's not emotional distress damage, as well as, according to plaintiffs' targeting the students with posters.

Your Honor, we would submit, again, that as a matter of law, this is not enough to meet the minimal requirements of stating a cause of action for emotional

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distress and intentional infliction at that. The intent, as my co-counsel indicated, was to educate, was to persuade, was to reach the parents and the students and the community with regard to what our clients believe in, in sincere, sincerely held religious belief no less, constitutes a grave threat to those very students. Tellingly, again, we have no evidence, not even identification of a student or a parent here.

What our client in particular was distributing constituted true and well-documented information regarding the activities of Planned Parenthood. Once again, Your Honor, I would submit that as a matter of law this cannot constitute the tort of intentional infliction.

A second related issue, though, is that the conduct must cause not just emotional distress, but severe emotional distress, Your Honor, such that it is so acute that it is likely to actually cause harmful physical consequences, physical consequences, again, citing to the Ortberg case. Where is the evidence, Your Honor? There is zero evidence, zero admissible evidence of any such harm, any such severe emotional distress by anyone, certainly not by anybody in the administration of the plaintiffs themselves. So, again, plaintiffs fail to state a claim for intentional infliction of emotional distress.

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What they say in Paragraph 81 is, instead, that some defendants have caused some unidentified parents and students to, and I'm quoting, feel afraid, threatened, helpless, unsafe. Your Honor, that is not severe emotional distress so acute as to cause harmful physical consequences. Feeling a little subjective fear is simply not what the cause of action contemplates what the case law contemplates as stating a claim for emotional distress.

In particular, with respect to defendant Nicdao, there is zero allegation. Again, look at every word of that complaint. Ms. Nicdao is mentioned in only two paragraphs, Paragraphs 57 and 58. And in neither of those paragraphs is there any mention of any emotional distress caused to anyone, parent, student, administration, you name it, none. So, again, as a matter of law, at least as to defendant Nicdao, she should be dismissed here.

I want to mention just briefly here what I anticipate the plaintiffs will focus on here that somehow transforms this case into something other than a classic First Amendment case and that is the presence of children out there. Your Honor, there is no precedent in this jurisdiction, not one case establishing some sort of exception to the general First Amendment rule that free speech must be robust, wide open on the public ways.

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That's what is a core value of our entire nation here, somehow that that rule changes though because there are children around.

In fact, I would cite the Court to the statement of the Ninth Circuit Federal Court of Appeals in a case cited in our brief, I belief, in 2008, the Center for Bioethics Reform against Los Angeles County Sheriff's Department. What this would constitute is, quote, "An unprecedented departure from bedrock First Amendment principles to allow the Government to restrict speech," that's what they want to do, "Based on listener reaction simply because the listeners are children." I urge this Court not to take that bait again, not to try to set new, new precedent here. It would be a disaster for the First Amendment and a disaster for the District.

Finally, with regard to the relief sought here, again, plaintiffs seek only injunctive relief. That, as the Court knows, is an extraordinary remedy not routinely granted. Moreover, in a case like this where the targeted activity consists in free speech and expressive conduct, such an injunction would constitute what the U.S. Supreme Court has called a classic example of a prior restraint against speech.

For a prior restraint, the normally high burden imposed on plaintiffs to succeed in the first instance

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comes an almost insurmountable burden, heavily presumed against the grant of an injunction of that nature. And, again, with respect to what we have here, speech that is neither, and I'm quoting again, Your Honor, this is from the Ninth Circuit, speech that is neither obscene as to use nor subject to some other legitimate prescription cannot be suppressed solely to protect the young from ideas or images the legislative body thinks unsuitable for them.

In that case, Your Honor, it was violent video games they were dealing with that kids were receiving in their very living room. How much less is the harm from passing by in a matter of seconds images of the victims of abortion, for example? And, again, I would underscore that our client, Ms. Nicdao, on the single occasion she was out there, she didn't even have a sign. All she was doing was passing out leaflets, Your Honor. As a matter of law, we would urge this Court the action as against Ms. Nicdao, Ms. Nicdao, must be dismissed, and as to the other defendants should be dismissed. Thank you.

THE COURT: Thank you.

MR. GARZA: Good afternoon, Your Honor. My name is John Garza. I represent Jonathan Darnel. Your Honor, I don't have a lot more to say. My, the co-defendants have stated the, the arguments quite well. I would just

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like to point out briefly that Two Rivers School is not an association and they don't have any rights under the law to come in and bring this action on behalf of their students. It's, the case law has been set forth in all the briefs and is pretty obvious.

Now the Two Rivers, their primary concern is that what my client is doing out on the public street, exercising free speech, classic free speech, is somehow causing emotional distress and, but my first reaction to that is, is welcome to America, Your Honor. This is one country where that's what happens. My daughter lived in China for two years. This wouldn't happen there. If you were protesting the Government, you would be hauled away. But in America there is free speech. People have emotional distress when people are out there protesting the war, when Nazis are marching through Skokie, when abolitionists were protesting slavery in the south, when, when people are protesting against Wall Street. There are going to be people who have emotional distress. Welcome to America. This is what free speech is all about.

The type of emotional distress that some people may or may not be having, because we don't know who they are, we just say that they're there, they won't tell us who, is the type of emotional distress that occurs all the time, all, every day. You can turn on the TV and you

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might see a political candidate that gives you emotional distress. This is America. We, we have to deal with emotional distress when it comes to free speech, Your Honor.

So there is no child exception and Mr. Crampton pointed that out. The, the display of embryos is to some a cherished Constitutional right. So I don't know how it would be an emotional distress to see the product of a Constitutional right. But even if it is, Your Honor, when we exercise free speech, some people are not going to like it. That's why you're here to protect those from these kinds of lawsuits, Your Honor, and I ask you to move, grant the motions.

THE COURT: Thank you. Mr. Weiler?

MR. WEILER: Good morning, Your Honor. Robert Weiler on my own behalf. I've been involved in pro-life advocacy for a long time. First, I would like to say I would like to incorporate the legal arguments made by the other attorneys here as mine also as far as the application of SLAPP and the subject matter jurisdiction.

I know that protesting leads to a lot of emotion, a lot of hurt feelings. As a protester, I've been punched, kicked, assaulted by a police officer, robbed, but to this day, until this case, nobody has ever tried to use the civil courts to shut me up. That can't

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happen here.

The SLAPP Law was intended to create a buffer against these kind of lawsuits to protect people who are exercising classic free speech. In the complaint, I'm accused only of holding a sign on a public sidewalk one day, that's all. And the plaintiffs have decided to use that as a way to silence a whole group of people because they're not just suing us, they're suing numerous John and Jane Does trying to stifle any protest at that location. And because of that, this case is simply an attack on the free speech of the defendants and for that reason I urge the Court to grant the motions and I'll reserve any time I have left for rebuttal if necessary.

THE COURT: Thank you.

MR. MURPHY: Your Honor, we have one housekeeping matter and I'd like to do this on the front end, but Ms. Joshi's pro hac motion is pending. It's a consent motion. There was a problem with the payment of it this week. So I would ask that she be admitted pro hac because she's going to argue the standing.

MR. VINCENT: No objection, Your Honor.

MR. STARVER: No objection, Your Honor.

MR. GANNAN: No objection, Your Honor.

THE COURT: I'll have to see if it's been filed.

MR. MURPHY: It was filed. It was, it was

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kicked back by the, even though we, we had paid it to the clerk, I have the papers here.

THE COURT: Okay. Let me see the papers please. You made the payment and the affidavit is provided?

MR. MURPHY: That's my understanding, Your Honor.

THE COURT: Thank you. Where is the proof of the payment?

MR. MURPHY: It went through. It's, is that the stamped copy on the upper right?

THE COURT: There's a file --

MR. MURPHY: That was --

MS. JOSHI: It isn't, I never received that.

MR. MURPHY: You don't have the receipt? I can go down to the clerk's office after this and I assure you it's been paid.

THE COURT: I have the application as being received and --

MR. MURPHY: We, we re-filed it again yesterday. Court's indulgence, I, Ms. Joshi is more equipped at this time to argue the standing motion.

THE COURT: Okay. We do have a receipt here from the Committee --

MR. MURPHY: Is that right? Okay.

THE COURT: That's fine.

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MR. MURPHY: All right. Thank you, Your Honor.

THE COURT: Motion is granted. Thank you.

MS. JOSHI: Thank you, Your Honor. Your Honor, defendants have challenged plaintiff's standing to bring this suit for injunctive relief on behalf of the students of the Two Rivers Public Charter School. However, plaintiffs possess the necessary personal stake in the outcome of this controversy to justify exercise of the Court's remedial powers on its behalf, which is the standard as articulated by the court in Grayson v. AT&T.

While the primary goal of this suit is to seek to protect the safety and well-being of the students of the school, plaintiffs also seek redress of the injury to the school that has resulted from the defendants' targeted protesting of the students and families. As Mr. Crampton did, I would also like to just take a step back and give you a sense of not just the big picture, but the real picture in this case.

The Two Rivers Elementary and Middle Schools sit between Florida Avenue and 4th Street in the Northeast quadrant of the city. It is not out on a beaucolic suburban campus where there's a nice, long driveway that leads to a cul-de-sac where children run out of the cars and can go play on the playground until it's time to come inside. The only thing between the, the building and the

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busy roads are the sidewalk. This is an urban school in one of the most industrial parts of the city.

And defendants have come to this sidewalk and what is absolutely the busiest time of the day and the most crucial to preparing students for a day of learning. They've come during the arrival of students at school in the morning. This is a time when parents are dropping off students in cars, walking them to school, bringing them on bikes, making sure they have their homework and their backpacks and their permission slips. It is a precarious moment when parents are handing off their students to the school and the school assumes legal responsibility for their safety.

Defendants have deliberately chosen this critical time and inserted into it fear, anxiety, chaos, and as a result dangerous to the students. They came to Two Rivers with large signs and posters showing bloody body parts purportedly of aborted fetuses and banners that declare that babies would be killed next door and told the students to tell their parents to do something about it.

The defendants blocked part of the sidewalk with their signs. They stood in the way of families trying to get into the school on time and they relentlessly handed out fliers to unwilling recipients. They followed and shouted things directly at students and said scary things

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like, babies will be killed next door if your parents don't do something about it. They warned of a blood bath coming to the neighborhood and told students that they would see maimed and hurt women outside and that there would be fights in front of the school. Most of the intended audience for these messages and these signs were under the age of 12.

As defendants have said, to establish standing in this case, Two Rivers has to show an injury, in fact, to the school. As an initial matter, defendants claim that plaintiffs have not provided any evidence of this harm to the school. However, as stated in the defendants' own motion, the Court must accept as true all factual allegations in the complaint and they also consider facts outside of the complaint if undisputed by the plaintiffs.

If the Court does determine that there isn't enough evidence presented today that plaintiffs, in plaintiffs' complaint and their opposition to the motion to dismiss, the, the plaintiffs are ready to offer additional evidence in the form of video evidence and declarations from both experts and parents. But we contend that at this point there's enough evidence in the, in the allegations of the complaint, as well as the opposition to the motion to dismiss to establish standing.

First, injury to the school. The school has a

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legal obligation to maintain the safety, to maintain the safety and ensure the well-being of its students so says D.C. v. Doe. And where a special dangerous situation exists, and the school has knowledge of its existence, as the school does here, greater supervision is required to ensure the safety of the students.

The school's duty unquestionably includes protecting students from the danger posed by defendants and their outrageous conduct in targeting students and families on their way into school in the morning. Defendants have put at risk both the children's physical and emotional well-being, and the school in their effort to fulfill their duty to protect students have also suffered harm.

First, the school had to institute a new policy where administrators and staff have to come in a half an hour early and then escort students into the building if the defendants are present. This necessarily means that they are not spending time as they normally would preparing for class or meeting with parents. The school has also had to spend its limited resources to hire a private security guard to make sure that one individual is constantly monitoring threats inside and outside of the school.

This suit for injunctive relief alone has cost

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the administration and staff hours of time. But all of these resources must be spent to ensure the safety of students, especially given the special, dangerous situation that defendants' presence outside poses. But it necessarily takes resources away from the main mission of the school, which is actually educating children.

In addition to having to divert very limited resources from the educational mission of the school, the defendants' targeted protesting has also resulted in reputational harm to the school. As a public charter school, Two Rivers relies on reputation as both a safe place and a place for children to learn and achieve. Since the defendants began their targeted protesting, record numbers of parents have asked to be transferred from the 4th Street campus to the campus on 26th Street known as the Young campus.

A record number of families have put themselves back in the city-wide lottery in hopes that they might be able to transfer to a different school next year. Two Rivers has also seen a 5 percent drop in the application sin the city-wide lottery of students applying to come to Two Rivers and that may not seem like a big number, but considering that almost every year since the inception of the school that number of applications has increased, it's actually a dramatic change.

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MR. VINCENT: Your Honor, I just want to object to this discussion of evidence. It is outside the complaint. Any evidence or suggestion that there has been a drop in enrollment or a drop in the number of students interested in coming to this school or any increase in the number of students who desire to leave the school was not present in the complaint and we saw it for the first time in the affidavits that the Court has already ruled are not admissible today.

MS. JOSHI: That information was in our opposition to the motion to dismiss, which we submit the Court can --

THE COURT: Yes, it was.

MS. JOSHI: -- consider.

THE COURT: Thank you.

MR. VINCENT: But, Your Honor, that, that information was --

THE COURT: The objection is overruled.

MR. VINCENT: -- not in the form of evidence, it was, it was unsworn allegations or unsworn statements in an opposition brief, not supposed by affidavits.

THE COURT: Well, the Court would consider that. Thank you.

MR. VINCENT: Thank you, Your Honor.

MS. JOSHI: These are the real harms suffered by

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plaintiffs. They're not speculative or hypothetical. They're happening right now. And there's no question that these harms are the direct result of defendants' outrageous conduct outside of the school.

Some of the defendants argue that the individuals' actions alone do not rise to the level of outrageous and, therefore, did not cause any harm. That assertion is flatly contradicted in both the complaint, as well as the opposition to the motion to dismiss. Each defendant named in the complaint individually engaged in the outrageous behavior that is the basis of plaintiff's claim. Whether it was the display of a gruesome image, shouting directly at students or getting in their way on their way into school, each of the defendants engaged in this conduct. But when viewed together as a coordinated plan among the defendants, their conduct is even more egregious and the actions of any one of them can be imputed to the rest.

At the motion to dismiss stage, plaintiffs need only make plausible allegations that the defendants were engaged in a conspiracy. Circumstances tending to show a conspiracy include, and I quote, where joint tortfeasors are pursuing the same goal, although performing different functions on, and are in contact with one another, the easiest situation in which to draw this inference of

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agreement is where the parties are on the scene together at the same time and perform acts that support one another. So said the court in Haversand v. Welch.

The evidence of conspiracy here is clear. The defendants were at the school together in the same 10 feet of sidewalk at the very same time with signs and coordinating their movements to ensure that they could be as disruptive as possible. And then they showed up the very next week on a Monday at the same time, at the same place, although this time in front of the middle school, with some of the same signs. So while the individual defendants each engaged in outrageous conduct, the existence of a conspiracy among them further cements plaintiff's contention that the defendant's actions were the cause of the harm that Two Rivers seeks to remedy.

And the final requirement for standing is that the harms can be redressed by the remedy that plaintiffs seek. And here plaintiffs seek only injunctive relief. The proposed injunction is very limited in scope and seeks only to target the greatest concern of the school, which is the safety of the students.

The terms of the injunction limit the protesters' activities during times of day that pose the greatest risk to students, which are when they're entering the school, when they're leaving the school and when

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they're outside of the school engaged in other educational activities during the day. The grant of this injunction will relieve the conditions that are currently and continually harming the school and the students at Two Rivers.

And, Your Honor, beyond having standing in their own right to bring these claims, plaintiffs contend that they also have third-party standing to bring these claims. A party can bring claims on behalf of others if they can demonstrate a close relationship to the absent party, which in this case are the students, as well as an impediment or obstacle to the party in interest bringing claims.

Here the close relationship is clear and is established by the law where the school is in charge of the students' safety. It's the very type of relationship that the Court in Al-Aulaqi v. Obama cites as establishing third-party standing. The Court there held that third-party standing exists where the defendant intentionally disrupts of burdens a special relationship between the litigant and the third party.

The legal duty that the school owes to the students, especially where a special danger exists in the school setting, epitomizes the close relationship that justifies third-party standing. And plaintiffs have

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certainly shown that that relationship has burdened, been burdened by defendants' outrageous conduct.

And as for the impediment facing parents in bringing this suit on behalf of their children, plaintiffs have provided more than sufficient evidence. An impediment to bringing a suit can exist where a party will suffer some sanction or if some practical obstacle prevents or deters the third party from asserting their own interest. This can include a threat to personal privacy.

The aspect, this aspect of third-party standing is critical in this case. The parents are afraid. They're afraid for their children being maimed in this case or even being mentioned by grade level or gender in any declaration. They're afraid of their own --

MR. VINCENT: Your Honor --

MS. JOSHI: -- names appearing in the record.

MR. VINCENT: Your Honor, I just want to make the same objection. We're now, again, getting into matters that are not supported by evidence or any sworn declaration that's before the Court. To the extent it's in the opposition brief alone, our objection would be that it's not proper to consider it as evidence at this point.

THE COURT: Is it in the complaint?

MR. VINCENT: It's not in the complaint, Your

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Honor.

THE COURT: The objection is sustained.

MS. JOSHI: For these reasons, the school and the Board of Trustees has brought this case on behalf of the students and the parents to address the harms both to the school and to the students. And I will now turn it over to my colleague, Mr. Murphy, who will address the special motion to dismiss on the Anti-SLAPP Statute.

THE COURT: Thank you.

MR. MURPHY: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. MURPHY: So the defendants are assuming here that we're already operating under a SLAPP regime, but Your Honor has not ruled on whether that motion applies and whether the burden has, indeed, shifted to the plaintiffs to show success on the merits. And they're, they're jumping sort of way ahead over many threshold issues that I want to sort of address now and that we've addressed through our motions, or through our opposition.

Is, one is who, I mean one is whether the SLAPP is going to apply. And as we've stated, we don't, we think that them seeking private action by these students to participate, as young as three to participate in this process, to thwart Planned Parenthood's move, is not a public concern. But setting that aside, the question is

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what we have raised is who will it apply to, who will the SLAPP regime apply to? And we've, we can see that Ms. Nicdao's SLAPP motion was timely and we subsequently said that Mr. Cirigano, Cirigano --

MR. STARVER: Cirigano.

MR. MURPHY: -- Cirigano was also timely. But we stand on our argument that Mr. Wheeler's motion is not timely. It was filed as of the 47th day. He's contested service as December 22nd versus December 19th. The rule, the service rule says if the complaint summons and initial order left with a suitable person of age, which was his father at his residence, which it was as of December 19th, that's the effective date he was served.

Just as a circumstantial evidence of what we were arguing under or what he was perceiving was that he filed his answer 20 days after on January 8th. So he pegged, seemingly, his answer date to that initial date of December 19th. If that's the case, then his SLAPP motion is late and should be denied.

We've also raised the issue of Mr. Darnel's SLAPP motion which we said was an exact replica of Mr. Nicdao's motion, except where it said Nicdao before, now it said Darnel. So you had these sort of oddball sentences in Mr. Darnel's motion where he says Darnel never directed her comments toward elementary-age

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students, but instead addressed, you know, then he makes claims of he was not even present on August 27th, November 16th or December 2nd. Well, we have, actually have alleged that Mr. Darnel was present on November 2nd, or 16th, I'm sorry. So you can't possibly meet your prima facie case when you're responding to allegations to another defendant. And I think it falls shorts of Rule 11 and Rule 12 and, certainly, I don't think would be sufficient to trigger the SLAPP here.

Now we have the issue of Ms. Handy. So we have a fractured procedural posture where we have, assuming Your Honor rules, for purposes of this motion will assume that SLAPP applies to Cirigano and Nicdao. We don't think it applies to Wheeler. We don't think it applies to Mr. Darnel or to Ms. Handy.

So then you, you get into this weird world where you're successful on the merits on one hand and successful on the merits in a 12(b)(6) standard on the other. So those are threshold issues I think the Court has to address with its initial ruling of SLAPP. And I don't think, found no case where it says if SLAPP applies to one defendant, it applies to all, that statute specifically requires you to invoke it within 45 days.

Then there's the issue of what standard applies.

THE COURT: So you're saying then that only Mr.

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Weiler's SLAPP motion was late?

MR. MURPHY: No, Mr., well, I think Mr. Darnel's was filed timely, but inadequate in substance to meet his prima facie --

THE COURT: I understand.

MR. MURPHY: -- case. And Ms., Ms. Handy's was not, not filed. She's not appeared. So then the issue, the other threshold issue is what, if the SLAPP regime does apply, what would be the plaintiff's standard to demonstrate success on the merits? And again here the cases have been all over the place and I think Your Honor has to provide some guidance if we are under a SLAPP regime, of whether the pain standard of minimal merit to avoid being stricken is a SLAPP, is, one, the defendants rely on the Cowby (phonetic sp.) decision with, from, from Judge Motley.

But of interest in the Cowby case, the Judge Motley case, procedurally how that, from the date the SLAPP was triggered to the date that his SLAPP decision was rendered was a period of 307 days, almost 10, or 10 months, give or take. And in that case he's quoted in saying, I think this is a second or third page of the opinion, that the court held hearings on the nature of the case, the proper interpretation of the SLAPP statute and the necessity of an evidentiary hearing. And he held

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those over roughly 120-day period. I think he held four or five preliminary hearings up until, then he held formal evidentiary hearings, four of them, between January 20th and March 2, 2015, over a, you know, yeah, I think he helped three days in a row and then a fourth day about a month later and then finally rendered just the SLAPP decision, granting the SLAPP decision after 307 days.

So I think, as defendants sit here, it's sort of putting the cart before the horse. If, if the burden is in this case going to reside on plaintiffs to at least some of these, I think we need to figure out what the process is. I think we engaged in that process a little bit this morning. We had a number of videos responding to the Judge's order yesterday about pre-marked exhibits, so we pre-marked these. The videos I, that we think, I don't think should be a surprise because they're videos of the defendants, the videos animating the allegations in the complaint. So if there's a proper time to demonstrate those, we would certainly love to show those to Your Honor at some point if it's not today. We're a little disappointed that it's not today.

We also submitted a number of expert declarations this morning as well that we'll be relying on. So to the extent that Your Honor is going to find that SLAPP applies, I think you need to find who it

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applies to and sort of what the process is for what we would then have to establish.

And that is, you know, success on the merits, sort of just touching on it here, you have as far as the intentional infliction of emotional distress, whether it was outrageous, I think the videos will demonstrate that there is even some self-awareness by the protestors that screaming at 3-year-old kids is probably over the line. You also have, in our opposition, we cite the National Catholic Register article by Monsignor Charles Pope who said targeting kids is, is the wrong thing to do and I've asked my, my parishioners not to do it.

Conspiracy, Ms. Joshi touched on that and what we have to allege. We've certainly alleged a plausible conspiracy. And if you see the videos, you, you see coordination among, real time coordination among where to go, how to position your sign, what's going on. And then as far as First Amendment, this isn't really, not all that, all that spectacular. The case they cite, the Center for Bioethical Reform case cites, specifically says the Government may, however, impose reasonable time, place and manner regulations on speech and public for -- so this is pretty garden variety First Amendment stuff here.

This is on, we've cited the St. John and the Church in the Wilderness case, which is a case that

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defendants' counsel was, was on, a case in Colorado where a similar injunction was entered, actually a more stringent injunction than what we're asking for. We don't, we don't ask them to completely take away their signs. We don't say don't use your pictures. We say shrink them, make it safe and keep a reasonable distance. You can still get your audience and be safe for the kids. That's all we're asking for, so this complete gagging argument is, is just sort of a false, false premise to start from.

And then it's, the last point I would say, that what we're asking for is clearly content neutral. And you need to know, look no further than Justice Roberts' recent statement in Snyder v. Phelps, and the issue is whether we would be here if the, if the message was different. And if, yes, if there were people blocking the streets in front of the school and no matter what their message was, there's a Burger King across the street. Somebody was protesting their processes for the way they get their meat or whatever. They were standing out there with their signs. We would be right here. If somebody was standing there with a pro Planned Parenthood and doing the same things and chasing after children and yelling at them, we would be right back here.

So to characterize this sort of nakedly as a

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content-based restriction is, is just not, not going to fly here. So that's all we have, Your Honor. Thank you.

THE COURT: Thank you.

MR. STARVER: Your Honor, if I may, I wanted to take a few minutes to address some of Ms. Joshi's arguments on standing. I'll try to be as brief as I can.

I think overall, I think what was striking about Ms. Joshi's argument in her presentation was I think that plaintiffs had essentially abandoned any contention what they have, associational standing. The focus of her remarks were on original standing, a direct standing if you will, which is kind of interesting because that's not really how they pled the complaint.

You know, Ms. Joshi talked about reputational harm, request to transfer to other schools, dropping enrollment and as, as Mr. Gannam noted in some of his objections, there are no allegations in the complaint whatsoever to support those facts, no allegations, and certainly no evidence attached to the opposition to the motion.

Now we heard much talk about conspiracy, Your Honor. The only allegation of conspiracy that you'll find in the complaint is in Paragraph 86, which reads:

> "Commencing on or before August 27, 2015, and for the purpose of creating

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a nuisance, defendants individually and collectively, knowingly entered into a conspiracy to create a private nuisance as outlined herein."

That is outlined herein. It's kind of interesting language, Your Honor, because what it basically means is take everything we've alleged in the complaint about what each defendant did on their own and, by the way, there was a conspiracy. They all conspired to do it.

Your Honor, under the pleading standards in the District of Columbia, that's not sufficient. That is not a plausible allegation of conspiracy. There is no other allegation of conspiracy. That is entirely missing from the complaint.

Now another point about defendant Nicdao that I think bears emphasis here, she was positioned and is alleged in the complaint to have been positioned outside the middle school. She wasn't anywhere near 3-year-olds. People who go to middle school are generally 12 to 15 years old. Those are the people that were in the vicinity of where she was on November 23, 2015.

Now Ms. Joshi also talked to you about the injury that the school has suffered. She talked about injury in fact. And, again, as we see, there are a lot of

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these facts about these injuries that are mentioned in the opposition brief, but are not alleged in the complaint. Now what --

THE COURT: Isn't it true that in Paragraph 72, 76, many of the arguments made by plaintiffs' counsel were not only in the opposition, but also in the complaint, fear of protestors threatening and scaring students with shouting and graphic posters could result in parents withdrawing their students from school and even Paragraph 77. So it's not true that this is the first time in the opposition that the alleged injuries to the school have been articulated by the plaintiff and weren't included in the complaint, because they were.

MR. STARVER: Well, Your Honor, I think there's a distinction that we, we should be mindful of. Note Paragraph 76 talks about the fear of protestors could result in parent, could result in parents withdrawing their students. Now we see in the opposition that they're saying that it actually has resulted in withdrawals and a drop in enrollment. Of course, there hasn't been any allegation that this, that's plausible on its face that shows that any purported drop in enrollment or request to transfer out of the school was caused specifically by what defendant Ruby Nicdao did on the public ways. There could have been other reasons. They, they need to allege facts

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that plausibly foreclose those other causal connections.

But it's a very different thing to in the complaint say it could result in this and then in the opposition to say, oh, now that it has resulted.

THE COURT: Well, look at Paragraph 72, because there's some very concrete allegations with respect to alleged injuries to the school and the children.

MR. STARVER: Well, let's see, Your Honor, okay. If we look at Paragraph 72, I can read what it says there. Let's assume for the moment that, you know, that is a sufficient allegation. You know, there hasn't been any evidence of that in the opposition to the motion. So you've got, you've got to reach that threshold of likelihood of success on the merits. But even if you get beyond that, where is the legal authority that supports the notion that these are injuries of legally protected interests. Where is there a legal right not to have the school day, the ability to plan for it somewhat compromised? Extraordinary efforts to shield students, well, what efforts are those? But, you know, these, these are not legally protected interests. These are the results of perhaps the, the inconvenience or the objection or the, perhaps the effect of the speech itself, but there is, there's no legal authority that says that there., you know, there's some legally protected interest in, in being

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able to avoid these, these inconveniences at the expense of the First Amendment. There just isn't any authority for that.

And, again, as I mentioned, there has to be a causal connection here. These have to be fairly traceable to defendant Nicdao. They can't just lump you into all the other defendants when there's no real plausible allegation of a conspiracy. You have to judge each defendant based on the merits of what he or she has alleged to have done.

Now the thing about the fear, again, there, there, there may be some things in here in Paragraph 72 and 73, students feeling upset, what have you, but there's nothing in the complaint that says parents are afraid to come forward to litigate the rights of the students. That is not in the complaint and that's what, what is one of the key tests and standing, that there has to be some impediment, some real impediment to the ability of the parents to litigate or the students to litigate their rights, their interests and what happened to them.

So I think for all these additional reasons, we would say that standing is lacking and the plaintiffs have failed to make a requisite showing.

THE COURT: Thank you.

MR. GANNAM: Your Honor, I'd like to begin

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rebuttal for defendant, Larry Cirigano, by once again referring to the plain language of the Anti-SLAPP Act. This is specifically in 16-5502 of the D.C. Code. This has to do with what kind of hearing and the process are involved. It says in Part B that if a party filing a special motion to dismiss under this section 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, which I will submit has been accomplished, then the motion 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.

This is the hearing on the motion, Your Honor, and if we made the prima facie case, the motion is due to be granted unless the responding party demonstrates that they are likely to succeed on the merits. And as we've already presented to the Court, that has to be accomplished with evidence. But that's not all the statute says. In Part D, this gets even more specific about how this process should occur.

It says that the court shall hold an expedited hearing on the special motion to dismiss, that's an expedited hearing, and issue a ruling as soon as practicable after the hearing. In other words, Your

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Honor, the statute contemplates a hearing on the motion. This is the hearing on the motion and, therefore, the, the plaintiffs must be prepared to present their evidence in a proper way in order to overcome the motion.

The statute simply doesn't contemplate regardless of how Judge Motley procedurally may have handled his case. Those matters are not before us. The only thing from that order there before us are the legal conclusions that were reached in that motion. We can't presume to know why Judge Motley handled the process in one particular way or another. But the statute by its plain language contemplates one hearing on the motion and we submit that this is that hearing and it's the plaintiff's burden to be ready with their evidence for the hearing.

Now, Your Honor, I want to move into the, the issue of, of conspiracy, particularly as it relates to the Anti-SLAPP procedure versus a regular 12(b)(6) motion to dismiss procedure. Under the Anti-SLAPP Statute, it contemplates the plaintiffs must show that they are likely to succeed on the merits and that encompasses every aspect of their claim. And because their, their claim requires a conspiracy in order to reach each defendant, that means they have to show they're likely to succeed on the merits of that aspect of their claim as well under the SLAPP Act.

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That means that they can't simply show that there was an agreement to do something. As the plaintiffs cited in their own briefing on this matter, the quintessential element of an actionable conspiracy is an agreement to do something wrong. An agreement to do something is not enough. And so it may be plausible, as the plaintiffs argue, that certain defendants may be agreed to be at the Two Rivers facility on the same day, maybe even at the same time, but that offers no evidence whatsoever of an agreement to do something wrongful. And in this case the declarations that have been filed, particularly defendant Larry Cirigano's declaration, shows that he made no agreement with anyone as to what he did when he got there. He made no agreement with anyone to do something wrongful. And when you base, look at his declaration, coupled with the only allegation in the complaint about any activity by defendant Cirigano, it was one allegation that he stood near the middle school entrance with a sign. Well, that's not wrongful on its face.

And then there's no evidence adduced by the plaintiffs that he agreed to do something wrongful or that he agreed to help another defendant do something wrongful, in other words, that conspiracy allegation utterly fails as to defendant Cirigano and the plaintiffs' burden is to

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prove an actionable conspiracy with respect to each defendant. Proving that one defendant had an intent to do something wrongful does not in and of itself prove that another defendant agreed to do something wrongful, even if they happen to be there at the same time and at the same place.

Finally, Your Honor, I want to point out this critical issue here and that is this idea that the school has alleged in jury that is legally recognizable by having to adjust its school day, adjust its personnel, even hire additional people or, or just the hours that the people have to get to work. If the conduct occurring outside the school is protected conduct under the First Amendment, then any response or adjustment that the school has to make in response to that protected conduct is not a matter of injury. It's simply a matter of location.

We, we've heard that this school is situated in a unique place where the school has to rely on the public ways and public sidewalks to gain entry and exit. That's simply a function of where the school is located. So if the conduct is going on outside that school is protected conduct, the school cannot be heard to complain that they have to adjust their day or adjust their personnel in response to that Protected conduct is protected conduct and it's, can't be called an injury when the school simply

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has to deal with protected conduct that's going on outside the school.

For all of these reasons, Your Honor, and all those presented by, by other counsel, we submit that the motion, the Anti-SLAPP motion of defendant Cirigano should be granted the plaintiffs' claim dismissed with prejudice as to defendant Larry Cirigano. And, further, that the motion to dismiss under 12(b)(6) specifically on jurisdiction on the ground of standing likewise should be granted as a matter of law because the school cannot assert intentional infliction of emotional distress of claims on behalf of its students or the students' parents, and as it's, stated any legally recognizable claim for intentional infliction of emotional distress on its own behalf. Thank you, Your Honor.

THE COURT: Thank you.

MR. CRAMPTON: Your Honor, briefly, I would like to also weigh in and address the claims on behalf of Ms. Nicdao with regard to intentional infliction in particular. But in that very context, I would note just as a preliminary matter, concurring with counsel for Mr. Cirigano, that the conspiracy allegation here is preposterous. To say, well, all the defendants happen to be in the same location on the public ways, engaged in similar conduct, namely First Amendment protected speech,

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automatically somehow rises to the level of a conspiracy. If there were any agreement, and I'm not sure there's any evidence that there was, an agreement to engage in Constitutionally-protected conduct cannot be transmuted into a conspiracy because plaintiffs attribute some sort of secret ill will and fail to adduce a shred of evidence to support it.

Secondly, Mr. Murphy, on behalf of the plaintiffs, alluded to so-called evidence in his response, citing to the statement of Monsignor Pope. Well, that looks, again, like the classic case of hearsay to which we would strenuously object and move the Court to disregard. Because he includes it in the response brief doesn't somehow make it admissible.

Third, and importantly here, I think the plaintiffs want to go, this is the lone case supporting their extraordinary theory of liability here. The St. John's Church in the Wilderness case. Your Honor, that was a case by a Colorado court of appeals from 2012 which has never been cited by any reported decision for the proposition which plaintiffs want to persuade the court to follow here. Moreover, reference to a time, place and manner restriction, we would note, is basically misplaced. We're before the Court. They're seeking injunctive relief. Time, place and manner regulations are for the

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legislature, not the court.

Moreover, the notion that their requested relief is somehow reasonable here because, for instance, they want defendants to remain a, quote, reasonable distance, from the children, A, is unconstitutionally vague; B, what they really seek here, if you look at the full panoply of requested relief in their litany of items to be included in the injunction is to render the defendants absolutely unable to reach their intended audience. They are prohibited under defendants' requested relief from raising their voices and, similarly, they're prohibited from being in a, within reasonable distance where they can engage in conversation or express themselves in a normal tone of voice. So, again, what they're really seeking here is an absolute censorship and silencing of the message that Ms. Nicdao in particular wants to promulgate.

Finally, with regard to the notion of content-based versus content neutral, plaintiffs urge the Court that really the request they seek here is a content neutral set of conditions. In fact, as the U.S. Supreme Court ruled just last year in Reed v. The Town of Gilbert, it's found at 135 S. Ct. 2000, 2218, a 2015 case, quote, "Speech regulation targeted at specific subject matter is content based regulation." What do they target here? They seek in Paragraph 3 of their prayer for relief to ban

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focused picketing, quote, with the purpose of directly engaging the students. That term is repeated in Paragraph 4. In Paragraph 7, they seek to prohibit posters, quote, depicting gruesome images. That's a content-based review, Your Honor. They're not asking you, as he stood up here and said, to ban all posters, only the particular posters that plaintiffs have deemed inappropriate.

Again, in Paragraph 8 of their prayer for relief, they want to ban posters utilizing such terms as kill or murder and so forth. You cannot ban such posters without engaging in a content based analysis. So, Your Honor, it is a classic content based restriction that they seek.

For all of the reasons in our briefs, and as argued here, we urge this Court, A, to dismiss this case on basis of lack of, of subject matter jurisdiction; and, B, as well to dismiss certainly as to defendant Nicdao on the basis of failure to show intentional infliction of emotional distress. Thank you, Your Honor.

THE COURT: Thank you.

MR. GARZA: Good afternoon, Your Honor. John Garza on behalf of Mr. Darnel. Your Honor, the plaintiff is here trying to make their case viable by trotting out the already born children at Two Rivers School. They seem to think that by trotting these already born children that

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this should cause you to, to rule in a way that would go against all of the precedent that's been cited in the briefs. And, Your Honor, that just doesn't, that can't fly because, Your Honor, it would be too easy for anyone who wants to shut down free speech to just trot out some children. I mean if Two Rivers can do that, anybody else can do that.

So they're trying to create a new exceptional to the, all of the long, hundreds of years of free speech law in this country that, you know, if I bring a child along that someone is offended by what's being said, that now there's an exception to the free speech statutes and free speech laws that are in this country. So that just is a, it's a, it's an ingenious argument and it makes you think that, he makes me wonder why Planned Parenthood might not want to move in at all, next to all schools from now on in the future.

Now the school has decided not to stay neutral on the abortion issue, Your Honor. They've gotten involved here in this Court and then they complain that parents are leaving the school. Well, you know, we don't know today, but it's certainly a good thing that we could surmise that a lot of the parents that are leaving are pro-life and that's why they're leaving.

MR. MURPHY: Objection. There's no basis for

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that statement.

MR. GARZA: We don't know why they're leaving. They just said people are leaving. So I think you can make a summation, just like anybody else, and maybe the reason they're leaving is they don't like the non-neutrality of this school getting involved in this political issue. Thank you, Your Honor.

THE COURT: Thank you.

MR. WEILER: Thank you, Your Honor. Robert Weiler on my own behalf. First, I'd like to address the timeliness issue brought by Mr. Murphy. The complaint was mailed to my house and was received on December 19th by my father. I was not in the state of Maryland. I was actually somewhere between Minnesota and Oklahoma. At the time I was running my own small shipping business and I just dropped off a motorcycle in Minnesota, on my way down to Oklahoma to drop off a vanity.

Saying that the clock starts before I've even received the papers doesn't comport with basic fairness.

THE COURT: But that's not what the law states, sir.

MR. WEILER: But the civil rules --

THE COURT: Once you are served --

MR. WEILER: -- do state that all motions should be construed in the way to do substantial justice. It

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doesn't do substantial justice to have the clock start before I even had an opportunity to --

THE COURT: That's not what the --

MR. WEILER: -- see the paperwork.

THE COURT: -- law is in the District of Columbia, sir.

MR. WEILER: Okay. I know the Court does have the discretion to accept the motion, to comport with basic fairness and to render substantial justice to allow me a chance to argue my case as I did file it within 45 days of actually receiving the paper. In no way does my filing an answer within 20 days of the, of the, of the arrival of the papers denote that I acknowledge that it was served at that time. I was simply filing an answer. It doesn't say I have to wait until the last day.

Secondly, I'd like to address Ms. Joshi's allegation that all the defendants engaged in the outrageous conduct complained of, but the complaint doesn't support that. The complaint alleges that I held a sign on a public sidewalk. It doesn't allege that I yelled at anybody, not, not kids, not adults, not anybody. It does not allege that I followed anybody, much less kids. It doesn't allege that I held a gruesome image.

There's a lot of allegations that have been made against other defendants that they wish to impute on all

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the defendants and defendants that I have never met, that somehow I've been involved with a conspiracy with, on or before August. For that reason, Your Honor, the motion should be granted. I also adopt the arguments of the other attorneys here. Thank you.

THE COURT: Thank you. Okay. The Court is ready to make its ruling.

See, we have Two Rivers Public Charter School, which opened in 2006. It's an elementary and a middle school for students in pre-K through 8th grade, three years old to about 14 years old, and it provides services and that service is to provide education to students who are able to enroll in their charter school.

Now the school is located certainly very close to the Planned Parenthood building that is now being constructed or renovated. And the plaintiffs are seeking injunctive relief and want the defendants pattern and protest, I quote, defendants' pattern and protest to be moved to a reasonable and safe distance from the location of the Two Rivers buildings. That's on page 23 and 26 of the complaint.

They've also alleged Count 1, intentional infliction of emotional distress; Count 2, private nuisance, conspiracy to create a private nuisance. There were five named defendants, a defendant Weiler, defendant

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Darnel, defendant Handy, defendant McDowell, defendant Cirigano and then there are John Does and Jane Does.

Also on the face of the complaint we have several pictures of protesters. Some of those individuals are named and others are John Doe and Jane Does. So going back to the location of the two buildings, one building is at 1227 4th Street, N.E., and the, that's the elementary school; and the middle school is at 1234 4th Street, N.E. The address for the Planned Parenthood of Metropolitan D.C. is at 1225 4th Street, N.E., but it's not expected to open until May of 2016.

As I stated earlier, the threshold issue is standing and I quote, "Standing is a threshold jurisdictional question which the Court must address prior to an independent of a merits of a party's claims." Grayson at 229 and that's Grayson, 15 A.3d 219 at 229, D.C. Court of Appeals 2011 case.

Now the Supreme Court has informed in Smith v. Jefferson City Board of School Commissioners, quoting, sorry, I strike that. Actually that's the 6th Circuit. It's at 641 F.3d 197, page 206, 2011 opinion. And I quote:

> "To meet the minimum Constitutional standards for individual standing under Article 3, a plaintiff must

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show, one, it has suffered an injury, in fact, that is, A, concrete and particularized and, B, actual or imminent, not conjectural or hypothetical; two, the injury is fairly traceable to the challenged action of the defendant; three, it is likely as opposed to merely speculative that the injury will be redressed by a favorable decision."

UMC Development, LLC at 42 through 43. That's at 120 A.3d 37, a 2015 D.C. Court of Appeals case.

Now in Tilden v., Tilden Park v. D.C. at 806 A.2d, 1201, pages 1206 through 7, D.C. Court of Appeals 2002 court. Tilden stated that although D.C. courts are not Article 3 constitutional, they're not Article 3 courts, the constitutional requirement of a case of controversy is applied to every case. D.C. looks to Federal jurisprudence and the sine qua non of constitutional standing is an actual or imminently threatened injury attributable to the defendant and capable of redress by the court. A concrete, demonstrable injury to the organization's activities is enough for a standing. That's at page 1207.

In Grayson v. AT&T, that I cited to earlier at

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page 224, the actual or threatened injury required by the Article 3 may exist solely by virtue of statutes creating legal rights, the evasion of which creates standing. Here, the enabling statute for public charter schools in Sections 38-1802.04(b)(8) provides that a public charter school has the power to sue and be sued in the public charter school's name. The statute goes on to state in D.C. Code 38-1802.04(c)(4)(A) that, quote, "A public charter school shall maintain the health and safety of all students attending such school."

In D.C. v. Doe, which is also cited to by plaintiff, 524 A.2d 30 at page 32, there you had a case where a student was raped, the court stated that, and I quote, While the District of Columbia is not an insurer of the complete safety of school children, nor is it strictly liable for any injuries which may occur to them, it has an obligation to exercise reasonable and ordinary care for the protection of pupils to whom it provides an education. See also Ballard v. Polly, 387 F. Supp., United States District Court of the District of Columbia (1975) case. The school has a duty to protect students and breached it when the playground fence was not repaired.

The Court is ruling the following. The Court has subject matter jurisdiction over this case because Two Rivers Public Charter School has standing, but Two Rivers'

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Board of Trustees does not and the motion to dismiss the Board is granted, but the motion is denied on the grounds of standing as to the school because at this stage of the litigation, the Court is required to accept the allegations in the complaint and construe them in a light most favorable to plaintiff, the non-moving party, and the Court finds that plaintiffs have shown in the complaint that it suffered injuries and is likely to suffer injuries in the future based on the specific allegations against each of the defendants.

Those allegations included on, and I won't address Ms. Handy who is not here, but I will address it because I don't know if you'll locate her later or not, but on August 22, 2015, defendant Handy held signs and shouted at two students trying to enter school and the sign said, and I quote, "Ten week abortion sign, it showed body parts," on page 15 on the complaint. On 8/27/15, on the sidewalk in front of the middle school, defendant Handy had a large poster, a 2-feet by 4-feet depicting dismembered fetuses and pictures and yells, and she yelled, "Tell your parents you don't want to go to school next to a baby killing center." And those yellings were directed to 3-year-olds.

Then on November 16, 2015, at approximately 7:30 a.m., defendants Darnel, Weiler, Handy and John Doe were

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on the sidewalk outside of the school, in front of the elementary school next to the drop-off lane on page 14 and the sign and banner was 8-feet by 3-feet and it read, "They kill babies. Tell your parents to stop them." Drop-off lane was in front of the school on 4th Street entrance. They shouted at the children, followed them from sidewalk onto Two Rivers' property, interfered with students and parents and guardians entering the school. Defendant Darnel handed brochures and said:

> "Tell your parents they're going to kill kids next door. The school will have a lot of problems if you ignore the problem. It's a murder facility next door. Ask your parents why they kill kids next door and how they can stop it. Back next week until you rise up against them, against this."

Now defendant John Doe on page 16 of the complaint shouted, "Tell your parents they're going to kill kids next door. The school will have a lot of problems if you," I'm sorry, that was Darnel. John Doe,

> "Kids, kids, they're going to kill babies next door. Parents don't protect your kids from the truth. How can you tell this be built next to

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your school? They're going to kill kids and your principals are deceiving you. The principal has no conscience, she doesn't."

Next on 11/23, I note, I did state that that was a defendant John Doe. He had on a red shirt when he was shouting at the students and parents the statements I just made and these are all allegations in the complaint.

And then on November 23, 2015, defendant Darnel, Handy, McDowell and Cirigano were present and defendant Cirigano held a sign near the entrance to the school, a 4 by 5, not for sale, and that's on page 17. Aborted fetus and various body parts were depicted. And there is, those photographs are on page 17 in the complaint, with defendant Cirigano standing in the picture.

Defendant Darnel held the sign, "They kill babies. Tell your parents to stop them," and shouted at students. That's on page 18. He stated,

"They are going to murder kids right next door if your parents don't so something about it. It is worse to have them here trying to sell sex to your kids every day."

That, again, is on page 18 of the complaint.

Now defendant Nicdao followed students into the

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alley who were directed to a different entrance and approached cars as they were dropped off and yelled at them as she handed out pamphlets and shouted to two middle school students, "Tell the parents to stop this blood bath that's coming across the street. The little babies need your voice." But her counsel never mentioned that conduct on the part of her doing, arguments. That's on page 19 of the complaint.

On page 20 of the complaint, defendant Darnel and John Doe and Jane Doe handed out leaflets. Defendant Darnel followed a parent and 5-year-old student to NoMa Gallaudet U Street Metro on or around 4:30. He jogged after a group of middle school students who, according to the complaint, had tried to ignore him and he forced copies of a flyer into their hands.

Furthermore, the school has business and property for which they claim protection and are threatened by defendants' conduct alleged in the complaint. Oregon v. Society of Sisters, 268 U.S. 1510 at page 535 (1925) case, requiring all children to attend public schools is illegal. Prevention of impending injury by unlawful action is a well-recognized function of courts of equity. Here emails were threatening to continue the demonstration and disruptions and also the court cited to one of the protestors saying that they would be coming

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back.

Now moving on to the Anti-SLAPP Statute, special motion to dismiss, I'm going to assume that, and by our calculation, Mr. Weiler was one day late, but we'll assume he was timely in his filing of his motion. But, and I quote:

> "To establish the grounds for either of the two procedural protections of the Anti-SLAPP Statute avoids dismissal of a suit or quashing of a subpoena. 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 and furtherance of the right of advocacy on issues of public interest." D.C. Code Section 16-5502(b). See also D.C. Code Section 5503(b).

Upon a showing, the motion will be granted unless the opposing party demonstrates a likelihood of success on the merits of his or her underlying claim. John Doe v. Susan Burke at 91 A.3d 1031 at 1036, the D.C.

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Court of Appeals, 2014 case. Clearly, the abortion rights issue is an issue of great importance and defendants are advocating their position. However, the underlying claim of the plaintiff is not the advocacy of abortion rights. Furthermore, the school is not taking any side on a political or public policy debate. Rather, the school is seeking injunctive relief or reasonable restrictions on the tactics utilized by defendants during their protest near and on school property. And, certainly, the protest is a matter of not only public interest, but it's a Constitutional right in terms of speech, but that doesn't mean that all speech would be permitted in all forums.

Now they argue that the lawsuit's objective is not used as a weapon, this is the plaintiffs, it's not used as a weapon to chill or silence defendant's speech. There is no record of evidence that the school has taken any position on abortion rights issues. Although defendants made a prima facie showing that the plaintiffs' claim arises from their anti-abortion protests, which is an issue of public interest, plaintiff has demonstrated at this time a likelihood of success on the merits of its claim that the defendants' protests should be reasonably restricted given its statutory duty and responsibility to protect the children who attend this school, as well as protect school property.

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The school has a compelling interest in having undisputed school, I'm sorry, uninterrupted school sessions conducive to an atmosphere for learning. The school does not desire to have normal school activities disrupted or students harassed as alleged in the complaint when defendants allegedly were shouting at the children, displaying disturbing fetus and body parts right near the entrances of one's school door and, lastly, telling the children to recruit their parents to protect the building of a Planned Parenthood facility.

The Court's ruling is, therefore, the case is not dismissed on the grounds that it violates the Anti-SLAPP Act. The statute is not applicable because the plaintiffs have demonstrated a likelihood of success on the merits whether you want to look at it in terms of that burden of proof in a preliminary injunction or permanent injunction.

Rule 12(b) motion with respect to the intentional infliction of emotional distress claim. To establish a prima facie case of intentional infliction of emotional distress, plaintiff just show, one, extreme and outrageous conduct on the part of the defendant, with either intentionally or recklessly caused her severe emotion distress. Larijani v. Georgetown University, 791 A.2d 41 at page 44, D.C. Court of Appeals 2002 case.

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Plaintiff argues a third-party claim for intentional affliction of emotional distress. However, the Supreme Court outlined three criteria which must be satisfied before a litigant can bring an action on behalf of a third party: One, the litigant must have suffered an injury, in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute; two, the litigant must have a close relationship to the third party; and, three, the litigant must demonstrate some hindrance to the third party's ability to protect his or her interest.

Now, thus, third party standing focuses not on the nature of the claim asserted, but rather on who is asserting the claim and why the holder of the asserted right is not before the court. Now here the plaintiff has satisfied third party standing on behalf of his students and parents of this school who plaintiff argues could not financially afford to litigate the case that they were fearful and that was not in the, on the face of the complaint, but they made that in their argument.

Therefore, a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would enable him to relief. In addition, the Court must construe the complaint again in the light most favorable

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to the plaintiff and must accept as true all reasonable factual inferences drawn from well-pled factual allegations. Also, with respect to this count, the discovery period would be the opportunity to explore further any additional facts to support the claim.

Private nuisance. And I quote:

> "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 -- let me go back to the intentional infliction of emotional distress so that it's clear. The Court denies the motion to dismiss that count, which is Count 1."

Now moving on to Count 2, again, private nuisance. I quote:

> "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'

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occupants or threatening future injury or disturbance."

And I'm citing from Tucci v. District of Columbia, 956 A.2d 684 at 696, a 2008 case. Here the underlying tortious conduct would be the allegation and claim for intentional affliction of emotional distress. Assuming arguendo there is no underlying tort, a private nuisance claim may stand alone and not require separate tort. Indeed, private nuisance claims have been recognized in the context of abortion protest cases. St. John's Church in the Wilderness v. Scott, 194 P.3d 475, Colorado Court of Appeals 2008 case.

It was affirming the court's grant of injunctive relief prohibiting defendants from entering the church property and obstructing access to the church and the trial court was affirmed on its finding that defendants created a private nuisance and that they conspired to create a private nuisance at the church. Defendant Powell interfered with worship at the church and his conduct was intentional, offensive and annoying, and they caused people attending the service to be visibly upset and Powell's voice was loud. Scott's voice was unusually and substantially interfered with services. Likewise, in taking the allegations and the complaint in this case, as true, defendants' conduct was similar to the defendants in

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the St. John's Church case.

And the claim that is, that it was a substantial and unreasonable interference with private use of the school's land and the school, there are allegations that the, some of the defendants did come upon the actual school property. It also interfered with the children's and parent's enjoyment of the school and that the defendants' conduct was offense and annoying according to the allegations in the complaint. Accordingly, the motion to dismiss Count 2, private nuisance, is denied.

So our next step is to put the case on a track so that you can conduct discovery and we would have a trial on the merits for the injunctive relief that the plaintiff is seeking, and the Court agrees that the plaintiff didn't ask that all conduct be stopped, but, and I understand defendants disagree with any restriction at all on the speech, but the complaint did focus specifically on what it considered, the plaintiff considered to be restrictions on speech and not in violation of the Constitutional rights of the defendants.

And they set forth those restrictions in terms of what should be placed in an injunction on page 27 and 28. So which track would you like to be placed on? The track pages are to the left on each of the tables for counsel.

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MR. VINCENT: Your Honor --

THE COURT: Track 1 or track 2.

MR. VINCENT: -- it's defendant Nicdao's position that track 2 is appropriate for this case.

THE COURT: Track 2? Okay. Any objection from plaintiff?

MR. MURPHY: No objection, Your Honor.

THE COURT: Okay. Track 2. So we can at this time, if you want, but this is really going to, this was supposed to be the initial scheduling conference anyway, and I do need to ask Mr. Weiler to look at the two booklets we have there for, and one is in English and one is in Spanish, and it will give you some general information about the civil division. The Court encourages individuals like yourself who are self-represented to try to obtain counsel because the civil rules and civil law are very complicated.

MR. WEILER: Yes, Your Honor.

THE COURT: There are a number of agencies listed. You might qualify. So you should try to seek help, okay?

MR. WEILER: Thank you, Your Honor.

THE COURT: And we can set a pretrial date and trial date today if you wish. Plaintiff, what's your position?

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MR. MURPHY: Given the number of parties, Your Honor, I think we can confer quickly and probably submit something jointly just based on the --

THE COURT: Well, if you don't know what the Court's availability is, so --

MR. MURPHY: Okay.

THE COURT: I'll look at the --

MR. VINCENT: Your Honor --

THE COURT: -- track 2 schedule. Yes.

MR. VINCENT: Defendant Cirigano and I believe defendant Darnel both said that track 3 would be preferable here and I believe that defendant Nicdao does not object to that.

THE COURT: Okay. What about plaintiffs? Track 3?

MR. MURPHY: Given the need to resolve this issue, I think, quickly, we would prefer to stay on track 2.

THE COURT: Okay. We'll keep it on track 2. I don't know that there's a lot of discovery, but if you feel that there's a need to extend discovery, then you can always file a motion. And so we're looking at a pretrial period of next year in 2017. Is that correct?

MR. MURPHY: Yes, Your Honor.

THE COURT: Pretrial date, rather. And I think

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everyone should check their calendars now please. See if we could have pretrial --

MR. MURPHY: Your Honor, our preference would be to schedule something as soon after the pretrial period as possible.

THE COURT: Okay. Well, we'll, let's set the pretrial date first and that's going to be in March of 2017.

MR. MURPHY: Track 2 looks like January through February?

THE COURT: I'm doing that just in case we have to extend discovery because I don't want to have to change pretrial or the trial date.

MR. MURPHY: Yeah, I know.

THE COURT: So let's look at pretrial on March 13th, I'm sorry, let's go to March 16th at 9:30. Is that a good date for everyone?

MR. GARZA: It works for my client, for me, Your Honor.

MR. STARVER: Yes for Cirigano, Your Honor.

THE COURT: And trial would then be -- how long do you think trial would take?

MR. VINCENT: If all these parents are going to be brought in here, Your Honor, I think it's going to be at least a week or two.

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THE COURT: So we should allot two weeks, okay? So let's have trial April 17th through the 28th.

MR. MURPHY: Your Honor, I'd like to clarify that to the extent that we've establish success on the merits, will Your Honor be entering the preliminary injunction or permanent injunction during this intervening period?

THE COURT: No, you didn't establish that you had a sufficient showing.

MR. VINCENT: Thank you, Your Honor. They haven't formally moved for a preliminary injunction either.

MR. MURPHY: We will be, Your Honor, because I, we need some resolution to this, to this issue during the school year.

THE COURT: Well, in the complaint there was a request for a preliminary injunction and permanent injunction. So they have --

MR. VINCENT: Your Honor, we, we would --

THE COURT: -- made that request.

MR. VINCENT: -- object to that. There has to be a motion for such relief and after so much time has passed, the real question of whether harm could ever be shown to be irreparable if an injunction is not issued immediately is questionable.

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THE COURT: Yes, that is absolutely true and so right now the Court was looking at resolving the injunctive issue on the case in the merits at the trial.

MR. MURPHY: Okay. Your Honor --

THE COURT: And then if there are some issues --

MR. MURPHY: There have been continuing protests at the, at the site. There's been unfounded statements such as Three Rivers supports abortion, which are potentially defamatory.

THE COURT: Well, that's another issue. That's not --

MR. MURPHY: That is another issue and we're actually --

THE COURT: -- and it's not a part of the --

MR. MURPHY: -- considering amending our complaint and if we do, maybe we would move at that time for a preliminary injunction to have that issue heard to air out some of the stuff that's, the intervening events and the need to sort of get some resolution around --

THE COURT: Well, I haven't heard you state anything that was an imminent danger warranting. If you had said there were individuals attacking the students or something like that, but if they are making false statements, that is a damages issue that can be resolved at trial if you amend it, the complaint.

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MR. MURPHY: Okay.

THE COURT: But not anything warranting an equitable remedy. Okay. Anything further?

MR. VINCENT: Your Honor, just a, a point of housekeeping. The trial dates the Court proposed of April 17th to the 28th, that would begin on the Monday following Easter Sunday, which would require travel on Easter Sunday for at least some of the counsel involved. I would just request Your Honor, perhaps a one day shift to start the trial on the 18th and conclude it --

THE COURT: Okay.

MR. VINCENT: -- one day later --

THE COURT: That's fine.

MR. VINCENT: -- if necessary?

THE COURT: We'll say the 18th, okay?

MR. VINCENT: Thank you, Your Honor.

THE COURT: Tuesday the 18th. Just so the record is clear, put it on the docket that the parties, the defendants requested trial start on Tuesday, December 18th.

MR. MURPHY: No objection here.

THE COURT: Thank you. And that it's not an error, instead, because usually we start civil trials on Mondays. Anything further?

Well, it might be helpful if the parties somehow

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could try to work on developing some consensus on what type of protests each party could live with. If you need assistance and need mediation, early mediation, our multi-door dispute resolution division is available to you. Thereby, you do spare the children, parents from having to come to court to litigate this issue. So I'd like you to think about that.

MR. MURPHY: Yes, Your Honor.

MS. JOSHI: Thank you, Your Honor.

THE COURT: And what would be fair, reasonable and in the interest of everyone, okay? Parties are excused. Have a good day. Thank you.

MR. MURPHY: Thank you, Your Honor.

MR. VINCENT; Thank you, Your Honor.

THE COURT: I just as a one matter, there was a pending motion and I've denied that as moot.

MR. VINCENT: As to pending discovery?

THE COURT: Yes.

MR. VINCENT: Okay. Thank you, Your Honor.

THE COURT: Thank you.

(Thereupon, the hearing was concluded.)

√ Digitally signed by Tracy Hahn

ELECTRONIC CERTIFICATE

I, Tracy Hahn, transcriber, do hereby certify that I have transcribed the proceedings had and the testimony adduced in the case of TWO RIVERS PUBLIC CHARTER SCHOOL V. ROBERT WEILER, JR. Case No. 2015 CAB 9512 in said Court, on the 29th day of April 2016.

I further certify that the foregoing 90 pages constitute the official transcript of said proceedings as transcribed from audio recording to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 19th day of May 2016.

Transcriber