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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

TWO RIVERS PUBLIC CHARTER SCHOOL, Plaintiffs, v. ROBERT WEILER, JR., et. al. Defendants.	Civil Action No. 2015 CA 009512 B Calendar 7 Judge Jeanette Clark Next Event: Mediation November 9 – December 9, 2016

PLAINTIFF TWO RIVERS PUBLIC CHARTER SCHOOL'S REPLY IN FUTHER SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION AGAINST DEFENDANT LARRY CIRIGNANO

As Two Rivers Public Charter School has made clear throughout these proceedings, this case is about nothing more than plaintiff fulfilling its obligation to maintain a safe environment for its students. Defendant's attempt to link plaintiff to conspiracies about the moon landing and the fate of Elvis Presley do nothing to detract from that fundamental point.

It is clear from the evidence that plaintiff presented with its motion for a preliminary injunction against Larry Cirignano, and subsequent praecipes, that he remains willing to personally, and with the coordinated help of others, to subject school children to grotesque images and impede their safe passage to school. This is precisely the type of continuing harm that makes an injunction appropriate in this matter.

Defendant Cirignano, and his colleague Ethel Borel-Donohue, need not stand together at every moment to be a part of a conspiracy to target students arriving at Two Rivers in the morning. It is enough that they have coordinated their presence at the school, they have agreed on a time that most endangers the students' safe passage, and they have brought with them signs that both block large portions of the sidewalk and display an image of a bloody aborted fetus. Contrary to Defendant's unsupportable view that he possesses unlimited free-speech rights, what he and others who join him are really doing is terrorizing children. The First Amendment knows bounds and it does not protect this type of activity.

In its motion for a preliminary injunction against defendant Cirignano, plaintiff has set forth allegations sufficient to show that his protests with Ms. Borel-Donohue should be enjoined in the narrow fashion that plaintiff proposes in its request for injunctive relief. Without the court's intervention, the school and its students will continue to suffer each time Defendant Cirigano shows up with his fellow protestors and insists on targeting school children with large banners displaying the image of an aborted fetus as those children are arriving at for the school day. While this school year has wound down, there can be little doubt he has August 25, 2015 marked on his calendar as the day that students return. Accordingly, plaintiff asks that this court grant its request for preliminary relief.

I. First Amendment rights are not limitless.

As plaintiff has made clear throughout these proceedings – this case is about the safety of school children, some as young as three years old, and plaintiff's duty

to provide a safe environment for the students of Two Rivers. Ignoring the foundation of this litigation, defendant argues that his message alone gives him the right to target children outside of their elementary and middle schools – or to work in conjunction with others in doing so – and therefore the court should not issue a preliminary injunction. Such an argument, however, ignores that the First Amendment is not limitless. Even if the court were to find that his was constitutionally-protected speech, it does not mean that such speech is automatically immune from restrictions. *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (*quoting Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 799 (1985) ("Of course, '[e]ven protected speech is not equally permissible in all places and at all times.'"))

The United States Supreme Court has held that restrictions may be placed on speech, even in public forums, if the restriction is "independent of its content." *Saint John's Church in Wilderness v. Scott*, 194 P.3d 475, 482 (Colo. App. 2008). As plaintiff made clear at the Court's April 29, 2016 hearing, regardless of the message, if there is a person blocking the ingress or egress of the students "we would be right here." Apr. 29 Tr. at 52:11-53:2. Such content-neutral restrictions, when imposed by an injunction, must "burden no more speech than is necessary to serve a significant government interest." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Through its request for a preliminary injunction, plaintiff seeks narrowly-tailored restrictions on defendant's speech – focused specifically on times when the students filter in and out of their tiny campus. Throughout these

proceedings, defendant Cirignano has conducted repeated protests at Two Rivers and demonstrated his general conformance with these requested restrictions is indisputable evidence that they leave open alternative channels of communications and burden no more speech than is necessary to ensure Two Rivers students' safe passage to school.

A. Plaintiff seeks content-neutral restrictions on Defendant's speech.

The test for whether or not a restriction on speech is content-neutral is whether a party seeks to restrict it due to the message it conveys. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."); *Hill v. Colorado*, 530 U.S. 703, 719 (2000) (Restriction is content-neutral where "restrictions apply equally to all demonstrators, regardless of viewpoint…"). As plaintiff has made clear, the school does not take a side in the larger debate at issue. Two Rivers would take the same actions against anyone who repeatedly came to the school, intentionally yelled at students or otherwise obstructed the cramped entrance to the school with large banners – some on long metal poles - making it difficult to get past them. Defendant's message is not the issue. Instead it is the location, the timing and that young children are the target audience.

Restrictions on *where* speech can occur is content-neutral. *Hill v. Colorado*, 530 U.S. 703, 719 (2000) (holding that restricting speech outside of health clinic is a restriction on where the speech takes place, not the content of the speech).

Restrictions imposed due to concerns related to safe ingress and egress have been found to be content neutral. *McCullen v. Coakley*, 134 S.Ct. 2518 (2014) (citing *Boos v. Barry*, 485 U.S. 312 (1988) where "congestion," interference with ingress and egress" and the need to protect…security" were held to be content-neutral concerns). Here, plaintiff has proposed very moderate restrictions on defendant's speech asking that defendant and others who participate in protests at Two Rivers with him respect the students' ability to arrive and leave from school unimpeded. Plaintiff ask that protesters carry smaller posters, regardless of the content, and stay off the sidewalks adjacent to the school buildings during very narrow timeframes associated with the school day regardless of what message protesters bring. Such time and location restrictions are content-neutral.

B. The government has an interest in protecting children.

Courts have long held that protecting young children from seeing gruesome and frightening images is a government interest upon which it can base restrictions on speech. In *Becker v. F.C.C.,* 95 F.3d 75, 80 (D.C.Cir.1996), the court recognized a government interest in protecting children from images of aborted fetuses on broadcast television, finding that the images "are not indecent but may nevertheless prove harmful." In *Saint John's Church in Wilderness v. Scott*, 194 P.3d 475, 484 (Colo. App. 2008), where the court directly addressed First Amendment protection of protests that included "[f]rightening and gruesome images of dead bodies" the court held that the protection of children from seeing these images was a legitimate purpose to restrict their use:

> Frightening and gruesome images of dead bodies are a *method* of communicating a viewpoint. Consequently, restriction of such methods to protect children does not restrict the communication of the viewpoint itself. Therefore, we conclude that protection of children from the undeniably gruesome pictures at issue here is a proper content-neutral purpose.

Saint John's Church in Wilderness, 194 P.3d at 484 (Colo. App. 2008). The court upheld the injunction preventing protesters from using gruesome images "in a manner reasonably likely to be viewed by children under 12 years of age attending worship services and/or worship-related events at plaintiff church." *Id.*; *see also Saint John's Church in Wilderness v. Scott,* 2012 COA 72, ¶ 51, 296 P.3d 273, 284 ("[W]e also conclude that the government's compelling interest in protecting children from exposure to certain images of aborted fetuses and dead bodies supports this part of the injunction."); *Olmer v. City of Lincoln*, 192 F.3d 1176, 1180 (8th Cir. 1999) (finding the government has a compelling interest to protect young children from gruesome images); *Bering v. SHARE*, 721 P.2d 918, 935 (Wash. 1986) (upholding permanent injunction forbidding anti-abortion protesters from using violent terms on their signs because of state's "compelling interest in avoiding subjection of children to the physical and psychological abuse inflicted by the picketers' speech."). The narrowly-tailored relief that Two Rivers seeks is clearly supported by a compelling interest that has been reaffirmed time and again—protecting children from violent terms and images such as those on the signs displayed by Mr. Cirignano and then Ms. Borel-Donohue in front of the school on multiple occasions.

C. The government has an interest in protecting the free flow of traffic on sidewalks.

In addition to holding that the government has a compelling interest in protecting young children from gruesome images, courts have also affirmed that the government has a compelling interest in ensuring the public's safe passage past protestors, even if those protestors position themselves on a public sidewalk. *See Defending Animal Rights Today & Tomorrow v. Wash. Sports & Entm't, LP*, 821 F. Supp. 2d 97, 106 (D.D.C. 2011).

In *Defending Animal Rights*, protestors located themselves at the exits to the Verizon Center stadium to hand leaflets to circus-goers leaving the show. Stadium employees told the protestors they had to move further down the sidewalk and away from the exits. The protestors brought claims against the stadium based on alleged violations of their First Amendment rights. Ultimately, the court found that although the protesters' speech was protected and that the sidewalk in question was the quintessential public forum, the government had a substantial interest in maintaining pedestrian safety on the sidewalks:

> The Supreme Court has determined that the government's interest in "avoiding congestion and maintaining the orderly movement of [ ] patrons" is "sufficient to satisfy the requirement that a place or manner restriction must serve a substantial state interest." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640, 652, 654, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981); *see also Schenck,* 519 U.S. at 376, 117 S.Ct. 855 (finding that the government has a valid interest in "promoting the free flow of traffic on streets and sidewalks")… Plaintiff argues that the government must establish that the leafleters actually impeded the flow of people and that there was a demonstrated need for the restriction before it was imposed. Pl.'s Opp. D.C.'s Am. Mot. to Dismiss at 11, quoting *Kuba v. Marine World Joint Powers Auth.,* No. S–05–0794 WBS JFM, 2006 WL 1376837, at *5, 2006 U.S. Dist. LEXIS

> 33566, at *15–16 (E.D.Cal. May 17, 2006). But there is no such prerequisite; the Supreme Court has explained that simply reducing a risk can suffice as a governmental interest. *Clark v. Cmty. for Creative Non–Violence,* 468 U.S. 288, 296–97, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

Id. at 106; *see also McCullen v. Coakley*, 134 S. Ct. at 2535 (*quoting Schenck v. Pro–Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997) ("We have, moreover, previously recognized the legitimacy of the government's interests in 'ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights…'")).

Here, plaintiff is asking the court to assist it in ensuring that Two Rivers' students can get to school each day unimpeded by protestors with large banners that block portions of the sidewalks making it harder to enter the school. Both ensuring a safe passage to school and protecting these students from the images of bloody parts are compelling interests that support the issuance of a preliminary injunction.

D. Plaintiffs proposed restrictions burden no more speech than is necessary.

As defendant himself had shown, by modifying his signs to more text-based (albeit potentially defamatory in the case of his sign stating "Two Rivers Supports Abortion") rather than containing gruesome image and moving to an adjacent corner, compliance with plaintiff's requested injunctive relief places minimal burden on defendant's speech. On at least four separate occasions since this matter was commenced defendant Cirignano has typically stood on the corner of Florida Avenue and 4th Street across the street from the elementary school and has been able to

freely exercise his First Amendment rights without targeting or endangering students arriving at school. That was, however, until the precipitating event when defendant Cirignano showed up first thing on the Monday morning after this Court denied his motions to dismiss along with Ethel Borel-Donohue who paraded in front of the elementary school while students arrived with a six-foot long picture what purports to be an aborted fetus. This behavior demonstrates defendant's willingness to engage in the type of systematic and repeated activities that pose a potential danger to students.

Through this preliminary injunction, plaintiff asks that defendant and anyone who joins him in his protesting adhere to these restrictions. Such requests, that protestors move further down the sidewalk, have been held to be reasonable in similar circumstances. *See Defending Animal Rights*, 821 F. Supp at 108 (holding that request for protestors to move down the sidewalk away from the exits of the stadium was narrowly tailored to serve interest of allowing free flow of pedestrian traffic); *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 380, 117 S. Ct. 855, 868 (1997) (upholding as narrowly tailored fixed buffer zones to ensure free flow of pedestrian traffic entering and exiting health clinic).

E. Mandatory attendance at school makes students a captive audience and thereby deserving of greater protection from protesters.

The courts have upheld restrictions on speech in a public forum where the listener may be unable to exercise his right to avoid the speech at issue. *Hill v. Colorado*, 530 U.S. 703, 718 (2000) (*quoting Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) ("[O]ur cases have repeatedly recognized the interests of

unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'")). Where the audience cannot avoid the message, restrictions may be imposed:

> The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience. But the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it. *Frisby v. Schultz,* 487 U.S. 474, 487, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). Indeed, "[i]t may not be the content of the speech, as much as the deliberate 'verbal or visual assault,' that justifies proscription." *Erznoznik v. Jacksonville,* 422 U.S. 205, 210–211, n. 6, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) (citation and brackets omitted). Even in a public forum, one of the reasons we tolerate a protester's right to wear a jacket expressing his opposition to government policy in vulgar language is because offended viewers can "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen v. California,* 403 U.S. 15, 21, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).

Hill v. Colorado, 530 U.S. 703, 716 (2000). The students of Two Rivers are required by law to attend school. They must arrive at school at the designated time and the protestors have fully exploited this. This is evident by defendant's directing others seeking the "most effective" time to protest against the students of Two Rivers by noting that "school starts at 7:30 am through rush hour at 8:30 am. Then school and workers get out 2-3:30 pm." Praecipe (May 24, 2016).

Defendant and others set up their signs as students are arriving and leave shortly after arrival time is over. With her huge banner showing a gruesome depiction of an aborted fetus, Ms. Borel-Donohue walked up and down the sidewalk in front of the elementary school drop off lane to ensure that students could not avoid her, her message or her banners. This is the very essence of a captive

audience and plaintiff asks that the court grant its preliminary injunction to protect the students who are unable to avoid the protestors' message.

F. Defendant Cirignano and Ms. Borel-Donohue conspired to continue the unlawful protests in front of Two Rivers.

Defendant Cirignano and Ms. Borel-Donohue, throughout their declarations, admit to being in contact and discussing times and dates to protest at Two Rivers. They both admit that they communicated about protesting at the school on May 2, 2016 at the time that children would be arriving at school. On May 2, 2016, they both arrived at the agreed location at the agreed time and then proceeded to protest in front of Two Rivers. Ms. Borel-Donohue's manner of protesting continued it the vein of the defendants in this case as she held her large banner depicting a gruesome image as students entered the elementary school. As she admits, in order to ensure that her banner was visible to her audience, the majority of whom at that hour would be children between the ages of 3 and 11, she walked up and down in front of the elementary school. Borel-Donohue Decl. ¶ 6. Plaintiff has already plausibly established, as a matter of law, that defendants coordinated their protest activities and defeated their motions to dismiss. Again, defendant Cirignano argues that despite showing up at same time and place there was no coordination between him and Ms. Borel-Donohue. Defendant Cirignano has shown what lengths he is willing to go to – by coordinating with and ratifying the actions of others willing to subject the students of Two Rivers to the harms associated with their actions. *See* Decls. of T. Lovelace, C. Lalik and M. Shinberg, attached as Exhibits 3-5 of Pl.'s Mem. in Support of Preliminary Injunction (May 9, 2016).

II. Conclusion

Without the entry of the preliminary injunction, plaintiff Two Rivers Public Charter School and its students will continue to suffer the harm imposed by defendant's conduct. Accordingly, plaintiff asks that this court grant the injunctive relief requested.

June 20, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *PLAINTIFF TWO RIVERS PUBLIC CHARTER SCHOOL'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION AGAINST DEFENDANT LARRY CIRIGNANO* was served upon the following:

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by e-mail via the Court's electronic filing system, this 20th day of June, 2016.

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