No. 11-CV-125

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

ADAM ORTBERG,

Appellee,

v.

THE GOLDMAN SACHS GROUP, *et al.,*

Appellants.

On appeal from the Superior Court
of the District of Columbia
(No. 2010 CA 9043B)

BRIEF FOR THE METROPOLITAN WASHINGTON COUNCIL, AFL-CIO, THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, AND THE NATIONAL LAWYERS GUILD, D.C. CHAPTER, AS *AMICI CURIAE* SUPPORTING APPELLEE AND SEEKING REVERSAL

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April 18, 2011

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BRIEF FOR THE METROPOLITAN WASHINGTON COUNCIL, AFL-CIO, THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, AND THE NATIONAL LAWYERS GUILD, D.C. CHAPTER, AS *AMICI CURIAE*

INTEREST OF *AMICI*

The Metropolitan Washington Council, AFL-CIO, is the voice of working people the Washington area. Uniting nearly 200 union locals, representing more than 150,000 area union members in every line of work, together with community, religious, student and political allies, the Council promotes social justice for all working people. Among its many activities, the Council frequently organizes demonstrations on the public sidewalks of Washington, D.C., in support of workers' rights and social justice. Sometimes those demonstrations are at the homes of politicians or business leaders who cannot effectively be reached at other venues. Often, the targets of these demonstrations find them very annoying and feel that they are unfair and unjustified, just as Goldman Sachs and its Managing Director felt about the demonstrations involved in this case. If the preliminary injunction issued in this case is upheld, it will set a precedent that will undoubtedly be used against the Council's activities in the future.

The American Civil Liberties Union of the Nation's Capital ("ACLU") is the local affiliate of the American Civil Liberties Union, the nation's premier defender of individual rights under the First Amendment. The ACLU has been involved in many First Amendment cases in the federal and local courts in the District of Columbia and has been closely involved in the legislative process leading to the enactment of several recent District of Columbia statutes that bear directly on this case.

The National Lawyers Guild is a non-profit federation of lawyers, legal workers, and law students that works to maintain and protect civil liberties in the face of persistent attacks upon

them. The National Lawyers Guild, D.C. Chapter and its members have been involved in many First Amendment cases in the District of Columbia.

This appeal challenges an injunction that imposes truly extraordinary restrictions on speech about a controversial public issue, conducted on public sidewalks of the District of Columbia. The injunction restrains a small group of local activists at the behest of one of the nation's richest investment banking firms, which finds the activists' activities greatly annoying. *Amici* hope that their participation will assist the Court in its consideration of the important First Amendment issues presented in this appeal.

This brief is filed pursuant to Rule 29(a), all parties having consented to its filing.

ISSUES PRESENTED

In the view of *amici*, this appeal presents the following questions:

1. Must the complaint in this action be dismissed because the tort claims asserted by the plaintiffs cannot trump the First Amendment rights of the defendants?

2. Did the Superior Court abuse its discretion by issuing a preliminary injunction, where the plaintiffs (a) failed to demonstrate a likelihood of success on the merits, (b) failed to demonstrate that they would suffer irreparable injury in the absence of injunctive relief, (c) failed to demonstrate that the balance of harms tilted in their favor, and (d) failed to demonstrate that the public interest was consistent with the issuance of injunctive relief?

3. Did the Superior Court abuse its discretion by failing to apply the governing constitutional standard for injunctions restraining speech, as laid down by the Supreme Court?

4. Did the Superior Court abuse its discretion by failing to abide by the public policy of the District of Columbia, as laid down by the D.C. Council?

5. Even assuming (incorrectly) that any injunction was justified in this case, did the Superior Court abuse its discretion by issuing a draconian injunction that restrained defendants' conduct far more than necessary to prevent any actual harm of the sort alleged to have been committed by the defendants who were before the court?

STATEMENT OF THE CASE

This lawsuit was filed in November, 2010, by the Goldman Sachs Group, Inc., (Goldman Sachs) and Michael Paese, who heads the U.S. Government Relations "area" at its Washington, D.C., office. Complaint ¶ 12. There were five named defendants: Stop Huntingdon Animal Cruelty ("SHAC"), which was identified as a "voluntary unincorporated association based in the United Kingdom"; Defenders of Animal Rights Today and Tomorrow ("DARTT"), which was identified as a "voluntary unincorporated association that is based in the District of Columbia"; and Michael A. Weber, Aaron R. LaBow and Adam Ortberg, who were identified as members of DARTT and participants in the activities alleged in the complaint. Complaint ¶¶ 13-17.

The complaint alleged that the defendants had engaged in several "loud and obnoxious demonstrations" outside Goldman Sachs' Washington office and outside Mr. Paese's home, Complaint ¶¶ 9, 29-40, and on that basis asserted tort claims for private nuisance, *id*. ¶¶ 49-53, intentional infliction of emotional distress ("IIED") on behalf of Mr. Paese, *id*. ¶¶ 56-59, and conspiracy, *id*. ¶¶ 62-65. Plaintiffs moved for a preliminary injunction restraining defendants' demonstration activity; an evidentiary hearing on that motion was held on December 10, 2010.

On January 11, 2011, the Superior Court (Brian F. Holeman, J.) entered an "Omnibus Order" granting a preliminary injunction severely restricting the ability of the defendants – *and all of their "supporters"* – to conduct demonstrations aimed at the plaintiffs – *and thousands of other people* – on public sidewalks in the District of Columbia – *or anywhere else in the United*

States. The injunction contained extensive additional restrictions on defendants' expressive activity, wholly unrelated to any conduct shown, or even alleged, to have occurred in the District of Columbia or to have been engaged in by any of the defendants that were before the court.

On January 25, 2011, defendant Adam Ortberg timely filed this appeal.[1]

STATEMENT OF FACTS

The record before the Superior Court shows that its finding of a likelihood of success on the merits was an extreme example of guilt by association, and that the injunction it issued was an extreme example of swatting a fly with a sledgehammer.[2]

A. The Absence of Evidence of a Conspiracy Between DARTT and SHAC.

Both the complaint and the motion for preliminary injunction begin with long recitations of bad things done by SHAC (the British organization) between 1999 and 2009 in the United Kingdom, New York, New Jersey, California and Minnesota. *See* Complaint ¶¶ 2-8, 22-25; Memorandum in Support of Motion for Preliminary Injunction ("PI Memo") at 1-8. Plaintiffs

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[1] Defendant Michael Weber filed a separate notice of appeal on February 4, 2011, but the Clerk of the Superior Court failed to transmit that appeal to this Court until the lapse was called to his attention on April 7, 2011. Because the issues presented in Mr. Weber's appeal are identical to the issues presented in Mr. Ortberg's appeal, and because all parties to both appeals are represented, respectively, by the same counsel, *Amici* respectfully suggests that the briefing in Mr. Weber's case be expedited so that the cases can be heard together without delaying oral argument in Mr. Ortberg's appeal. Because the injunction issued in this case directly restrains speech in a traditional public forum, Mr. Ortberg is entitled to expedited appellate review – as is Mr. Weber. *See, e.g.*, *City of Littleton v. Z. J. Gifts D-4, L.L.C*, 541 U.S. 774, 781-82 (2004).

Regarding the other named defendants, at the time the preliminary injunction was entered SHAC had not appeared. DARTT had appeared but has not appealed; *amici* understand that it did not appeal because, as an association, it could not file a notice of appeal *in forma pauperis*. Its rights will nevertheless be governed by this Court's decision when the case is remanded for further proceedings. Finally, the docket reflects that the claims against defendant Aaron LaBow were voluntarily dismissed.

[2] As discussed below under "Standard of Review," in this case this Court must make an *independent* examination of the whole record. *Amici* therefore present the facts as they believe this Court should find them. This Statement of Facts is therefore necessarily more argumentative than a typical Statement of Facts.

assert that "[i]t cannot be disputed that SHAC and DARTT are closely related entities that plan and act as one." *Id*. at 4. Plaintiffs' arguments about the danger posed by the local defendants rests principally on that proposition, as the evidence about the actions of the local defendants themselves shows little more than a few short, annoying demonstrations, as discussed below.

But the record reflects a complete absence of *probative* evidence showing the alleged unity of SHAC and the local defendants. Plaintiffs summarized their own evidence as follows:

> According to the SHAC website, www.shac.net, DARTT is the "local SHAC campaign advocacy group" for this region. Crosno Decl., Exs. 5, 6. Reports and articles listed on SHAC's website automatically link to a DARTT website, www.dartonline.org.[3] *Id*. at Exs. 7-21. And information and videos documenting DARTT's activities on behalf of SHAC appear on the SHAC website. *See id*. at Exs. 9-21 & Ex. 22 at p. 5.

PI Memo at 4.[4] Plaintiffs also point out that SHAC refers to DARTT's activities in the second person: "we will keep demonstrating, we will come back." Transcript of hearing on motion for a preliminary injunction, December 10, 2010 ("Tr.") at 23.

This does not even qualify as guilt by association – it is guilt by Internet link. But any website can link to another. No permission is required. No association is required.

Undersigned counsel has created a link on the ACLU's website to the website of the National Rifle Association, with a statement that the NRA is an ACLU puppet and carries the ACLU's water in Congress and the courts. And it refers to actions of the NRA in the second person ("we will prevail"). *See* http://aclu-nca.org/docket/a-draconian-injunction-against-free-speech. It would be equally easy to post any number of items from the NRA's website on a page of the ACLU's website, which could be captioned "Actions by our Partners." Plaintiffs

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[3] That URL is incorrect and leads nowhere. The correct URL is www.dartt-online.org.

[4] Lest plaintiffs' confusing prose be misunderstood, both statements refer to SHAC posting materials on *its* website, as shown by the cited exhibits to plaintiffs' PI motion. Plaintiffs' statements do not assert that DARTT posts SHAC materials on *its* website.

apparently would conclude that it "cannot be disputed that the ACLU and the NRA are closely related entities that plan and act as one." *Compare* PI Memo at 4. One can only hope that the Goldman Sachs Group applies a more skeptical analysis to the facts relevant to its banking and investment activities than it does to the facts relevant to its litigation.

Plaintiffs may pooh-pooh this example on the ground that the ACLU and the NRA obviously do not share an agenda. They make much of the fact that DARTT and SHAC both oppose the Huntingdon Life Sciences company. *See, e.g.,* PI Memo at 4-5. But links could just as easily be made from the ACLU's website to the websites of organizations that share some of the ACLU's goals, while not using the same tactics. For example, NARAL Pro-Choice America shares the ACLU's position on reproductive freedom but engages directly in partisan politics, which the ACLU eschews. If NARAL's website listed the ACLU among other organizations on a page titled "Allies in Fighting for a Pro-Choice Majority in Congress," that would not make it true, any more than the fact that SHAC's website names DARTT, among many other organizations, on a page purporting to list "SHAC campaigns in numerous countries," makes that assertion true.[5] Likewise, if a terrorist group chose to post on its website some content that it liked from the Goldman Sachs website, that would not – or at least should not – cause a court to conclude that the Goldman Sachs Group is a terrorist organization.

Plaintiffs' evidence linking the local defendants to SHAC and SHAC's sometimes-violent and criminal activities amounts to nothing more than this.[6] As plaintiffs' own counsel

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[5] Plaintiffs also assert that in video recordings of DARTT'a actions, SHAC "tak[es] credit" for those actions. Tr. 23. But even if that proved anything as a logical matter (undersigned counsel hereby take credit for inventing the Internet), the specific video referred to by counsel shows no such thing. *See* http://www.youtube.com/DCAnimalRights#p/u/15/WfTzP_akBmg.

[6] Plaintiff Paese submitted a declaration in which he repeatedly characterizes the local defendants as "Members and/or affiliates of SHAC" and "SHAC demonstrators," Paese Decl. ¶¶ 4-7, but offers not a single fact to support that assertion. On the witness stand, he stated, "I know

correctly observed at the preliminary injunction hearing, "saying it doesn't make it so." Tr. 87.

Although plaintiffs' proof of conspiracy fails on its own terms, defendants' contrary evidence is far stronger, even though it is hard to prove a negative.

—The home page and most of the secondary pages of DARTT's website contain a disclaimer stating "DARTT is an independent group, not affiliated with SHAC, SHAC USA or any other organization and does not conduct or incite any illegal activity." *See* Tr. 73 (Weber); *and see* www.dartt-online.org (showing disclaimer at the bottom of the page). And DARTT's schedule of future activities, inviting people to participate, prominently states, "These are peaceful and legal demonstrations." *See* http://www.dartt-online.org/ events.html. Of course saying these things on DARTT's website does not make them true either, but the burden of proof here is on the plaintiffs.

—Defendant/Appellant Adam Ortberg, a founding member of DARTT, *see* Ortberg Decl. ¶ 31, testified under oath that DARTT has no affiliation with SHAC and no control over SHAC's website. *Id*. ¶ 4.

—Defendant Michael Weber, also a member of DARTT, Tr. 71, testified under oath that DARTT has no affiliation with SHAC. *Id*. 73.

It is hardly unusual for different organizations and individuals to share some of the same ends but pursue them through different means. To accept plaintiffs' claim of conspiracy between SHAC and the local defendants, a court would have to deny that truth.[7] On its independent

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DARTT's affiliated [with SHAC] from the website," Tr. 49, and that "I don't make any distinction between DARTT [and SHAC]. You know, I *assume* that these are affiliates and precisely the same entity." *Id*. 50 (emphasis added). A Goldman Sachs security official also refers to the local defendants as "members and affiliates" of SHAC, Skuletich Decl. ¶ 4, but he likewise says not a single word about *why* he thinks that is true.

[7] Plaintiffs did not even disguise their effort to impose an injunction on the local defendants based on the bad actions of others. After noting that SHAC had engaged in "violence and

review of the record, this Court should conclude that there is no adequate evidentiary basis on which to tar the local defendants with the SHAC brush.

B. The Weak Evidence Against the Local Defendants.

The evidence regarding the local defendants shows only that they engaged in a few brief, annoying demonstrations outside plaintiffs' home and office.

Plaintiff Michael Paese's declaration asserts that he is "competent to testify regarding the matters herein," ¶ 1, and goes on to describe the demonstrations outside his home in dramatic fashion, as if he had actually witnessed them, ¶¶ 7-11. But on the witness stand he conceded that *he had never once been in his home* during these demonstrations, Tr. 33-34, because Goldman Sachs knew when they would occur, as they were posted in advance on DARTT's website. *Id*. 34-35. Mostly they were on Saturday afternoons. *Id*. 35. He did observe one demonstration from across the street, standing anonymously with his dog. *Id*. 45. At that demonstration, he observed that the police were present, that no one was arrested, that no one's movement was restricted, and that some of his neighbors were "screaming *at them* [the demonstrators] and the police, so there was . . . a very high-pitched verbal altercation. I did not see physical violence." *Id*. 46 (emphasis added). He did not testify, either in his declaration or on the stand, either by first-hand knowledge or by hearsay, to a single instance of trespass or any touching of any person by any demonstrator, and he conceded that his home had suffered no physical damage at any of the demonstrations. *Id*. 34.

In his declaration, Mr. Paese purports to quote several things said to or about him by demonstrators, including "we know where you sleep." *See* Pease decl. ¶¶ 8, 11, 12. But it seems

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property destruction" in other places, plaintiffs' counsel stated, "thank God that has not yet happened here in the District of Columbia. If you let these people walk out of here today with no restraint on them, who knows what's going to happen here in the District of Columbia. This is highly relevant." Tr. 22.

plain that Mr. Paese did not actually hear these things, and he does not identify who allegedly did. Only one unidentified neighbor has stated that she heard that chant at his home. Declaration of [Anonymous] ¶ 7.

Plaintiffs relied heavily on a video recording showing a three-minute portion of one evening demonstration outside Mr. Paese's home, on October 31, 2010 (Halloween), which the court viewed, Tr. 5.[8] The video is dark and far from clear, but it plainly shows one demonstrator with a bullhorn engaged in what Mr. Paese agreed was a "shouting match," Tr. 47, with an angry neighbor, who repeatedly exclaims "shut the fuck up!" at a volume that seems just as loud as the bullhorn. Indeed, Mr. Paese testified that "one of my neighbors said they almost got arrested because they were so angry at the protesters." *Id*. The sound seems quite loud, but the camera and microphone are very close to the shouters; there is no way to estimate what the volume would have been inside Mr. Paese's home or down the block.[9] The shouting match ends after about a minute and the demonstrators' chanting continues.[10] This is apparently plaintiffs' strongest evidence of intolerable conduct at Mr. Paese's home.

The parties also presented evidence about demonstrations on the sidewalk outside Goldman Sachs' Washington office. According to a Goldman Sachs security official, these demonstrations began at about 8 a.m. and also employed bullhorns; they were "loud and

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[8] Plaintiffs filed 12 videos. The court watched only this one, which plaintiffs' counsel averred was their best one, Tr. 9 ("You've actually looked at the one we would have shown you if you'd asked us to show you something."). It can be viewed at http://www.youtube.com/DCAnimalRights#p/u/15/WfTzP_akBmg.

[9] However, the declaration of a neighbor states that the volume was "intolerable" and forced her to wear earphones. Kailian Decl. ¶ 5. She agrees with other witnesses that the demonstrations lasted about half an hour. *Id*. ¶ 4. *Accord* Paese, ¶ 8; Weber, Tr. 73.

[10] Defendant Weber testified that what this video showed was "not typical of a DARTT demonstration," and that "the majority [are] . . . relatively boring to watch . . . . It's just people chanting outside of a home." Tr. 72, 73.

obnoxious" and the demonstrators "harassed and screamed" at employees "as they try to enter the building." Skuletich Decl. ¶¶ 7-9. But Mr. Skuletich does not state that any person was physically impeded from entering, nor does he explain what the "harassment" consisted of, other than perhaps the "pictures showing dead or mutilated dogs" that were displayed. *Id*. ¶ 9.

Mr. Skuletich states that "[d]uring multiple protests," protestors have entered the lobby and "sounded an airhorn or yelled through a bullhorn, creating a disturbance." *Id*. ¶ 10. He says that on one occasion, "one of the protestors made a noise that sounded like a gunshot" and "building security placed the building on 'lockdown'" for some unspecified period of time. *Id*. ¶ 11. He also states that demonstrators outside the office building shouted slogans "such as 'Michael Paese, we know where you live,' 'Michael Paese, we know where you sleep,' and also indicating that they intended to go to Mr. Paese's home." *Id*. ¶ 12.

Mr. Paese testified that he was told in advance about these protests and therefore entered the building through the back door. Tr. 40. He was not aware that anyone was turned away from the building, *id*. 40-41, and could not hear the demonstrations from his office. *Id*. 41. He was aware of no violence at these protests, *id*. 49, but was "afraid . . . on their violent history that violence could occur," because, "as I understand it, they belong to a group called SHAC." *Id*.

Regarding the office demonstrations, Mr. Ortberg stated that "DARTT has never blocked anyone from entering," Ortberg Decl. ¶ 16, and that "building security puts out two sets of velvet ropes at the property line. A guard stands in the middle. Employees enter by going in between the velvet ropes and the security guard." *Id*. ¶ 20. He denies that the protestors ever made a noise that sounded like a gunshot, and says that after the demonstrators were searched and detained on the occasion of that noise for about an hour while the police "ran our names," they "said we were free to go and were more than welcome to continue protesting." *Id*. ¶¶ 18-19.

While denying other alleged chants, *see id*. ¶¶ 12, 14, he does not deny that demonstrators outside the Goldman Sachs office chanted about Mr. Paese, "we know where you live," or "we know where you sleep."

On an independent examination of this record, a reasonable factfinder would have to find that DARTT's demonstrations, both at Mr. Paese's home and at the Goldman Sachs office, were publicly announced in advance on DARTT's website, were held in the daytime or (on two instances) in the early evening, lasted about half an hour, and involved no blocking of passage, no unwanted touching of non-demonstrators, no property damage, no disobedience of any police order, and no violation of any District of Columbia law – with the possible exception of some brief trespasses into the lobby of the Goldman Sachs office building and the use of a bullhorn or airhorn there.[11] It is undisputed that the demonstrations were loud, but there was no evidence that they violated applicable District of Columbia noise regulations, which include a safe harbor for "noncommercial public speaking" in downtown areas. *See* 20 D.C.M.R. § 2799. There was also unrebutted evidence that demonstrators at the office building chanted slogans such as "Michael Paese, we know where you live," or "Michael Paese, we know where you sleep," and indicated that they intended to demonstrate at Mr. Paese's home.

C. The Superior Court's Findings.

The Superior Court delivered oral findings and conclusions at the end of the preliminary injunction hearing. Tr. 102-116. Relying on the testimony of Mr. Paese, his neighbor Ms.

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[11] Technically, it is not clear there was any trespass. Members of the public are free to enter the office building lobby, and there was no evidence that anyone remained after being directed to leave. Of course, using a bullhorn in the lobby is not protected by the First Amendment.

Mr. Paese stated that one unidentified woman told him that she had to push her way through demonstrators to enter the office building. Pease Decl. ¶ 6. But Mr. Skuletich, the Goldman Sachs security official who was present at every office demonstration, Skuletich Depo. ¶ 7, reported no such blocking.

Kailian, and the video, Tr. 105, the court found that plaintiffs were likely to prevail on their claims of nuisance and intentional infliction.[12] The court was "particularly concerned as a resident . . . having to endure at his place of residence chanting by way of sound amplification . . . right in front of his house." *Id*. 106. Regarding conspiracy, the court found a "concerted effort" between SHAC and DARTT, *id*. 105, but never identified what evidence on that point it found probative.

The court found irreparable injury to Mr. Paese in the harm to his "reputation, relationships . . . with his neighbors," Tr. 110, based on "the nature of the speech itself [having] to do with killing animals, doing it for purposes of profit and so there's this blood money language, dog torturing, puppy killing, we know where you sleep, all of this." *Id*. 109-110. And the court found irreparable injury to Goldman Sachs in the "interruption of business activity . . . if the defendants were allowed to come into the lobby of their place of business and set off air horns, that has an effect on their ability to do business, their reception of their customers, their -- the willingness of their employees to come to work." *Id*. 110.

The court made no finding that the local defendants had ever touched anyone, blocked anyone's passage, damaged anyone's property, or disobeyed any police order. *See* Tr. 102-116. It did find that "where one expresses that he or she may know where someone sleeps or where someone lives . . . [i]t's closer to a threat than a statement of fact and we treat it as such." *Id*. 107.

Referring to the First Amendment, the court viewed itself as imposing "reasonable time, place and manner restrictions," Tr. 110, under which "[t]he defendants would still be able to express themselves and their views, but it would be less intrusive to the plaintiffs." *Id*. 112.

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[12] Regarding the video, the judge stated, "The Court hasn't heard anything credibly stated in court that that disc was not representative of the activity that is being addressed here." Tr. 103. But Mr. Weber had testified that it was not representative, Tr. 72-73. It is unclear whether the judge found that testimony not credible or had simply forgotten it.

D. The Untethered and Draconian Scope of the Preliminary Injunction.

Based on these findings, the court issued a preliminary injunction of truly breathtaking scope, largely untethered from the court's findings, but closely tracking the proposed order submitted by the plaintiffs:

1. The injunction prohibits not only noisy protests on or near plaintiffs' property, or the use of threatening language, but also a wide swath of other protected First Amendment activity, including "publishing or delivering . . . in any form whatsoever any information concerning or describing" defendants' activities "against Plaintiffs." Thus, Mr. Ortberg may not e-mail a friend describing the facts of this lawsuit, or forward to a friend a copy of this *amicus* brief.

2. Nor may Mr. Ortberg "encourage" such conduct by others. "Please tell your friends about this case," or "please forward copies of the *amicus* brief," are prohibited.

3. The injunction applies not only to the defendants and their members, but also to their "supporters" (whatever that means). Thus, any DARTT "supporter" is prohibited from, *e.g.*, calling the *Washington Post* to urge it to cover the argument of this appeal, for that would be encouraging another to publish information concerning DARTT's activities against plaintiffs.[13]

4. Likewise, the injunction prohibits "communicating . . . in any manner . . . the names [or] addresses . . . [of] any current or former Goldman Sachs' [*sic*] employee," *for any reason*. Thus, Mr. Ortberg cannot ask his friends to write the CEO of Goldman Sachs (giving his name and office address) to urge him to drop this lawsuit. Nor can Mr. Ortberg's "supporters" ask *their* friends to do that.

5. Mr. Ortberg is also prohibited from "gathering" with others within 100 or 150 feet

[13] If by drafting this brief supporting appellant, undersigned counsel become "supporters" of appellant – or if they would be supporters of DARTT if they oppose research on live animals – then they would be prohibited from posting this brief on the ACLU website or sending it to a *Washington Post* reporter, or from encouraging anyone else to do so.

from "any real property . . . owned or leased by . . . any current or former Goldman Sachs' [*sic*] employee, officer or director or family member of any current or former Goldman Sachs' [*sic*] employee, officer or director," *for any purpose*. Thus, he may not meet a friend at a Starbucks for coffee, if it is down the block or across the street from any property owned or leased by any current or former Goldman Sachs employee or by the employee's or former employee's spouse, parent, child or sibling.[14] The same bar applies within 50 feet of any Goldman Sachs office. Nor may he encourage other people to gather at such places, *for any purpose*.

6. Even after prohibiting Mr. Ortberg from gathering with others within 100 or 150 feet of all the properties described above, or within 50 feet of any Goldman Sachs office, the injunction prohibits him (and them) from using *any* sound amplification, thus guaranteeing that their message cannot be transmitted to the desired audience.

7. Nor may Mr. Ortberg even stand *silently* with one or more others within 50 feet of any Goldman Sachs office, or within 100 or 150 feet of the property of any Goldman Sachs employee (or employee's family member, or former employee, or former employee's family member), holding signs or handing leaflets to willing recipients – *on any subject*.

8. The injunction runs *nationwide*, requiring Mr. Ortberg (and all other members and supporters of DARTT) to provide 72 hours advance written notice to the police department of any city or county of the date, time and location any gathering at any property owned or leased

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[14] Whether "family member" also includes grandparents, grandchildren and others is unspecified.

Goldman Sachs has more than 35,700 employees in the United States, *see* 2010 Annual Report at 46, *available at* http://www2.goldmansachs.com/our-firm/investors/financials/current/annual-reports/2010-ar-pdf-files/GS_AR10_Allpages.pdf. Undoubtedly former employees must number in six figures. Almost all of them will have multiple family members. And many of these people will own or lease multiple pieces of property. Because this injunction runs *nationwide*, There will be literally *millions* of properties from which defendants, and their members and supporters, must keep away under threat of criminal contempt.

by Goldman Sachs or by any current or former employee or family member, regardless of whether local laws or regulations require any such notice.

STANDARD OF REVIEW

A trial court's decision to issue a preliminary injunction requires the exercise of discretion, *District Unemployment Compensation Bd. v. Security Storage Co. of Washington*, 365 A.2d 785, 786-87 (D.C. 1976); accordingly appellate review of that decision is for abuse of discretion. *Id*.; *Feaster v. Vance*, 832 A.2d 1277, 1282 (D.C. 2003). But "the court's discretion must . . . be exercised in conformity with correct legal principles," *Schoonover v. Chavous*, 974 A.2d 876, 880 (D.C. 2009) (internal quotation marks omitted), and thus "a decision based on an erroneous view of the law . . . would constitute an abuse of discretion." *Kleiman v. Kleiman*, 633 A.2d 1378, 1383 (D.C. 1993).

In First Amendment cases, that principle requires this Court to "make an independent examination of the whole record in order to make sure that the [injunction] does not constitute a forbidden intrusion on the field of free expression." *Padou v. District of Columbia*, 998 A.2d 286, 292 (D.C. 2010). Thus, the usual deference to trial court findings of fact does not apply.

ARGUMENT

I. The First Amendment Requires Dismissal of this Lawsuit.

Amici show below (and appellant showed in his brief) that the Superior Court abused its discretion in issuing a preliminary injunction. But this Court need not reach that question, because a recent decision of the United States Supreme Court makes it clear that even if the plaintiffs had demonstrated a likelihood of success on the merits of their tort claims, those claims would have to be dismissed as a matter of law because tort claims cannot trump Mr. Ortberg's right to freedom of speech under the First Amendment.

In *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the father of a Marine who had been killed in Iraq brought claims of IIED, invasion of privacy and conspiracy against members of a group who protested at his son's funeral, holding signs saying, *e.g.,* "Thank God for Dead Soldiers," "Fags Doom Nations," and "You're Going to Hell." *Id*. at 1213. The Court recognized "the anguish [defendants' conduct] added to Mr. Snyder's already incalculable grief," *id*. at 1218. But reaffirming that the First Amendment "can serve as a defense in state tort suits," *id*. at 1215, the Court ruled that the First Amendment's protection of defendants' speech on a matter of public concern "cannot be overcome by a . . . finding that the picketing was 'outrageous' for purposes of applying the state law tort of intentional infliction of emotional distress," because "[t]hat would pose too great a danger" that defendants would be punished "for [their] views on matters of public concern." *Id*. at 1219. It held that the First Amendment trumped Mr. Snyder's invasion of privacy claim for the same reason. *Id*. at 1219-20. As the Fourth Circuit had explained below, a state cannot "attach[] tort liability to constitutionally protected speech." *Id*. at 1219 (quoting *Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009)). The Fourth Circuit's ruling that the defendants were entitled to judgment as a matter of law was affirmed.

The same result must follow here. Defendants' protected speech on a matter of public concern – whether Goldman Sachs should end its secondary support for animal torture – delivered from a public sidewalk, cannot be subjugated to District of Columbia tort law. Americans sometimes "must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.'" *Boos v. Barry,* 485 U. S. 312, 322 (1988) (quoting *Hustler Magazine, Inc.* v. *Falwell,* 485 U.S. 46, 56 (1988)). Indeed, "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-American Gay, Lesbian*

and Bisexual Group of Boston, 515 U. S. 557, 574 (1995). Not only must the preliminary injunction be vacated; plaintiffs' claims must be dismissed.[15]

II. The Superior Court Abused its Discretion in Issuing a Preliminary Injunction.

On the facts of this case and the applicable law, there were no adequate grounds for the issuance of a preliminary injunction.

A. The Superior Court Failed to Apply Proper Legal Standards in Finding that Plaintiffs had Demonstrated a Likelihood of Success on the Merits.

On the required independent review of the record, the evidence does not support the Superior Court's findings regarding plaintiffs' likelihood of success.

1. An Injunction Against the Local Plaintiffs Cannot be Sustained Based on the Unlawful Conduct of the British Group, SHAC.

Amici showed above that plaintiffs' evidence of conspiracy between SHAC and the local defendants was insubstantial. It follows that evidence about the unlawful acts of SHAC in other places cannot properly form grounds for an injunction against the local defendants. Not only would that be illogical, it would be an offense to fundamental principles of civil liberties, akin to enjoining the speech of a peaceful local Muslim group that urges withdrawal of U.S. military forces from Afghanistan because of the terrorist actions of the Taliban, which shares that goal. This Court should make clear that such guilt by association is unacceptable.

2. The Local Plaintiffs Did Not Create a Nuisance.

"A 'private nuisance' is a substantial and unreasonable interference with private use and enjoyment of one's land." *Tucci v. District of Columbia*, 956 A.2d 684, 696 (D.C. 2008)

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[15] Plaintiffs' conspiracy claim therefore must also be dismissed. *Snyder*, 131 S. Ct. at 1220. True threats can, of course, be enjoined – or prosecuted – but read in context, defendants' chants about knowing where Mr. Paese lives and sleeps cannot be viewed as true threats. *Obviously* they knew where he lived; they were demonstrating there. *See Watts v. United States*, 394 U.S. 705 (1969) (reversing conviction of man who said he wanted to get the President "in my sights" as political hyperbole, when viewed in context).

(internal quotations and alterations omitted). Plaintiffs argued, essentially, that because defendants' demonstrations were "loud and obnoxious," Complaint ¶ 9, they constituted a nuisance. The Superior Court apparently agreed. But that is inadequate analysis. To be a nuisance, the interference must be both substantial and unreasonable.[16]

The interference here was not substantial. Life in the big city is not pastoral; noise comes with the territory. *See, e.g., United States v. Doe*, 968 F.2d 86 (D.C. Cir. 1992) (reversing the excessive noise conviction of a Lafayette Park demonstrator). The evidence showed five demonstrations during two months at Mr. Paese's home, most on Saturday afternoons and two at 8 p.m., and eight demonstrations at the Goldman Sachs office, all at about 8 a.m. Each was brief, lasting only about half an hour. This pales in comparison to the all-day noise that can go on for months at construction sites, or labor union members noisily picketing a hotel from 7 a.m. to 7 p.m., seven days a week for two months. *See* Danielle Douglas, *Madison Hotel protests end with tentative union, management deal*, The Washington Post, March 31, 2011.

Nor was the interference here unreasonable. Perhaps the Superior Court thought defendants' quite occasional, quite brief noise was unreasonable because it was *unjustified*, but if so, that was legal error.[17] The exercise of First Amendment rights on public streets and

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[16] It may be that private nuisance is not an independent tort at all, or is a tort that can be committed only by a neighboring landowner. *See* Brief of Appellant at 28-32. This brief assumes the opposite, *arguendo*, for the purpose of addressing the issues addressed in the text.

[17] Plaintiffs made it entirely clear that they viewed defendants' activities as *unjustified*:

> It's very important – it strikes me – *our main point here – this is not our fight.* Whatever is going on between these people and Huntingdon Life Sciences – this is a nightmare for my client, and in particular for Mr. Paese. He is an innocent bystander here.

Tr. 10-11 (emphasis added). Of course it is not for an audience – or a court – to tell a speaker what his point is, or to tell the defendants with whom their fight is. Defendants demonstrated to pressure Goldman Sachs to divest a large stock holding in Fortress Investment Group, which in turn is a large creditor of Huntingdon Life Sciences, the object of defendants' ire. [Continued …

sidewalks stands on a plane no lower than other sources of noise; prohibiting expressive activity "while at the same time allowing conduct completely unrelated to the First Amendment, yet equally annoying, to continue unabated . . . stands the First Amendment on its head." *Pursley v. City of Fayetteville*, 820 F.2d 951, 956 (8th Cir. 1987). This Court has long recognized the importance of that proposition. *See Hasty v. United States*, 669 A.2d 127, 130-31 (D.C. 1995); *Wheelock v. United States*, 552 A.2d 503, 508 (D.C. 1988) (applying the "tourist standard" to demonstrations in the U.S. Capitol). If a jackhammer were at work for 30 minutes, once a week, in the afternoon, outside Mr. Paese's home, or at 8 a.m. outside the Goldman Sachs office, they would not seek injunctive relief, and if they did it would be denied. "[A]ny tenant in a large urban residential building must be aware that, among other things, the normal required upkeep, maintenance and improvement of the building will from time to time subject him to noise levels of unusual intensity." *Sobelsohn v. Am. Rental Mgmt. Co*., 926 A.2d 713, 717 (D.C. 2007).

Nor can the "shouting match" between a demonstrator and a neighbor prove that defendants' speech was a nuisance. The video of this shouting match was the keystone of plaintiffs' evidence against the local defendants, but to give it substantial weight would be to validate a heckler's veto. "Speech cannot be . . . punished or banned, simply because it might offend a hostile mob" – or an angry neighbor. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992). That proposition is true whether the mode of banning is denial of a permit (as in *Forsyth County*) or an injunction. That speech may provoke a shouting match is reason to protect it, not to ban it. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("free speech . . .

Divestment campaigns have become a political staple since the successful campaign against the apartheid government of South Africa, *see* http://en.wikipedia.org/wiki/Disinvestment_from_South_Africa. Several divestment campaigns are now underway; *see, e.g.,* www.endtheoccupation.org/article.php?list=type&type=203 (Israel); www.darfurdivestment.org (Darfur). The targets of such campaigns often find them unfair. They are entitled to their opinions, but they are not entitled to obtain judicial relief on that basis.

may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger"). Thus, "[plaintiffs] may have suffered a 'nuisance' in the colloquial sense of the word, but not in the legal sense." *Bernstein v. Fernandez*, 649 A.2d 1064, 1072 (D.C. 1991).

3. Plaintiff Paese Has No Claim for Intentional Infliction of Emotional Distress.

Mr. Paese has not made even a colorable showing of intentional infliction of emotional distress under this Court's precedents.

First, a defendants' conduct must be "extreme and outrageous." *Baltimore v. District of Columbia*, 10 A.3d 1141, 1155 (D.C. 2011). The evidence here shows that defendants' conduct involved thirteen noisy, but quite brief, demonstrations by quite small groups of people,[18] on public sidewalks between the hours of 8 a.m. and 9 p.m., over a ten-week period. This does not even arguably qualify as "extreme and outrageous" conduct. A pedestrian in the District of Columbia is likely to come upon such a demonstration on any given day. Such demonstrations require no permit and are conducted as a matter of right. D.C. Code § 5-331.05(a); (d).

It is true that the defendants said some nasty things about Mr. Paese, *e.g.,* that he is "a dog killer," Pease Decl. ¶ 8. But defendants' view – that Mr. Paese is to some extent responsible for the actions of the company of which he is a Managing Director, and that his company is responsible for the consequences of its investments – is not irrational, and expressing that view aloud to the public on a pubic sidewalk is neither extreme nor outrageous. That speech is protected by the First Amendment, like the speech of anti-choice protesters who shout "baby-killer" at doctors who perform abortions, or the speech of demonstrators who shout "murderer" at an executive of a company whose negligence allegedly resulted in a deadly mine collapse.

Second, the emotional distress suffered by a plaintiff must be "of so acute a nature that

[18] "Typically, there are anywhere from four to six demonstrators present; sometimes I believe there have been as many as eight, perhaps more." Pease Decl. ¶ 8.

harmful physical consequences might be not unlikely to result." *Kotsch v. District of Columbia*, 924 A.2d 1040, 1046 (D.C. 2007); *accord Sere v. Group Hospitalization, Inc*., 443 A.2d 33, 37 (D.C. 1982). Mr. Paese has not even hinted at such an acute level of distress, nor is there any evidence that could support such a claim. It is clear that he is outraged, not devastated.

4. Plaintiffs' Claim of Conspiracy Falls with their Substantive Claims.

Having shown no likelihood of success on their substantive claims, it follows that plaintiffs cannot have a likelihood of success on their conspiracy claim. *See* n. 15, *supra*.

B. The Superior Court Failed to Apply Proper Legal Standards in Finding that Plaintiffs Would Suffer Irreparable Injury, that the Balance of Harms Favored Plaintiffs, and that the Public Interest Favored Injunctive Relief

In finding irreparable injury, the Superior Court did not err in reasoning that the tortious harms it had identified could not fully be compensated by subsequent damages. But it did err, as explained above, in finding that those harms were cognizable *at all*. The "victim" of non-defamatory public speech on a public issue suffers no legal injury, much less irreparable injury.

The balance of harms necessarily favors the defendants for the same reason: plaintiffs suffered no legally cognizable harm to be weighed in the balance. Likewise, the public interest must favor the protection of constitutional rights as against an attempt to prevent their exercise.

Even putting aside the First Amendment, the Superior Court abused its discretion by failing to consider in its analysis of the public interest the public policy of the District of Columbia, as authoritatively articulated by the D.C. Council.

First, in the First Amendment Assemblies Act of 2004, the Council provided that:

> It is the declared public policy of the District of Columbia that persons and groups have a right to organize and participate in peaceful First Amendment assemblies on the streets, sidewalks, and other public ways, and in the parks of the District of Columbia, **and to engage in First Amendment assembly near the object of their protest so they may be seen and heard**, subject to reasonable restrictions designed to protect public safety, persons, and property, and to

> accommodate the interest of persons not participating in the assemblies to use the streets, sidewalks, and other public ways to travel to their intended destinations, and use the parks for recreational purposes.

D.C. Code § 5-331.03 (emphasis added). Plainly the Superior Court took no account of this explicit public policy when it issued an injunction making it *impossible* for the defendants, or any of their "supporters," to be seen or heard by the object of their protests.

Second, on December 7, 2010, the D.C. Council passed the Residential Tranquility Act of 2010, Bill 18-63, at final reading – three days before the preliminary injunction hearing in this case. A copy of the Enrolled Original is available at http://www.dccouncil.washington.dc.us/images/00001/20110105110532.pdf. That law was a direct response to "concern expressed by certain District residents who have been subjected to repeated and targeted protests by a small group of animal rights activists," Committee Report on Bill 18-63, *available at* http://www.dccouncil.washington.dc.us/images/00001/20110121164338.pdf. The product of nearly two years of hearings and meetings, it represented a compromise between the interests of free speech advocates and the interests of people desiring "tranquility." Although the new law restricts demonstration activity more than the free speech advocates could support, it draws a line that is far more permissive than the injunction issued in this case, for example, permitting targeted picketing of a residence between 7 a.m. and 10 p.m. (rather than at no time), with notice to the MPD two hours in advance (rather than the 72 hours required by the injunction).

It is understandable that the Superior Court was not aware of this nascent law when it ruled. On appeal, however – should the case not be dismissed on First Amendment grounds – this Court's assessment of the public interest would be bound by the Council's determination of where the public interest lies, *see, e.g., Allman v. Snyder*, 888 A. 2d 1161, 1169 (D.C. 2005) ("we have no license to substitute our views of public policy for those of the legislature").

III. Even if the Superior Court Could Properly Have Issued a Precisely Tailored Injunction, the Draconian Injunction it Did Issue was an Abuse of Discretion

Statutes or regulations restricting speech are deemed to be constitutional, "provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *In re T.L.,* 996 A.2d 805, 812 (D.C. 2010) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). But where, as here, the restrictions take the form of an injunction, a higher standard applies.

In *Madsen v. Women's Health Center, Inc*., 512 U.S. 753 (1994), the Supreme Court recognized that injunctions "carry greater risks of censorship and discriminatory application than do general ordinances." *Id*. at 764. It therefore concluded that the usual standard "is not sufficiently rigorous," and that injunctions must be subjected to a "more stringent application of general First Amendment principles." To pass constitutional muster, an injunction must "burden no more speech than necessary to serve a significant government interest." *Id.* at 765. In other words, "an injunction [must] be 'couched in the narrowest terms that will accomplish [its] pin-pointed objective.'" *Id*. at 767 (quoting *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968)); *see id*. ("We fail to see a difference between the two standards.").

Thus, in *Madsen*, the Court struck down provisions that barred anti-choice protesters from approaching women entering abortion clinics without the latter's consent. The Court acknowledged the patients' acute vulnerability and the duress caused by direct solicitation. *Id*. at 773. Nonetheless, the Court ruled that by prohibiting "*all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be," the injunction "burden[ed] more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id*. at 774 (emphasis in original). The Court held that a stay-away provision could be

sustained only where "the protesters' speech is independently proscribable (*i.e.*, 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm." *Id.* *See also Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997) (striking down an injunction preventing protesters from coming within 15 feet of abortion seekers).

As the Court noted in *Madsen*, the required "close attention to the fit between the objectives of an injunction and the restrictions it imposes on speech is consistent with the general rule, quite apart from First Amendment considerations, 'that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.'" *Id*. at 765 (quoting *Califano v. Yamasaki,* 442 U.S. 682, 702 (1979)). Thus, for both First Amendment and general jurisprudential reasons, injunctions that burden speech "must be tailored as precisely as possible to the exact needs of the case." *Carroll v. Princess Anne*, 393 U.S. at 184.

As the injunction in this case exposes defendants to contempt sanctions for speaking on public issues on public sidewalks, precision of tailoring is essential. But the Superior Court did not even recognize the existence of the heightened *Madsen* standard, and instead applied some pastiche of the usual "time, place and manner" standard, *see* Tr. 111 (citing *In re T.L.)* and the even lower standard for regulation of *commercial speech*. *See id.* (citing *Bergman v. District of Columbia*, 986 A.2d 1208).[19] The court's application of an incorrect legal standard necessarily resulted in an abuse of discretion, for discretion can be exercised soundly only within the proper legal framework. *Kleiman v. Kleiman*, 633 A.2d 1378, 1383 (D.C. 1993).

Even a cursory examination of the injunction issued in this case, *see* pp. 13-15, above, shows that it was not narrowly tailored to prevent the repetition of unlawful acts actually

[19] *Bergman* is a commercial speech case, *see* 986 A.2d at 1216-17. The court mentioned *Madsen* in passing, but its two-sentence reference to that case made clear its utter failure to recognize that *Madson* requires precise tailoring. Tr. 112.

committed by the local defendants against the plaintiffs, but broadly drafted to prevent the defendants from communicating with, or about, Goldman Sachs or anyone who is, or has ever been, connected with Goldman Sachs – by employment, blood or marriage – anywhere in the United States.[20] A law professor looking for an unmistakable example of an injunction that had never been to the tailor shop would be hard pressed to find a better example.

CONCLUSION

For the foregoing reasons, the Superior Court's order of January 11, 2011, should be reversed and the case remanded with instructions to dismiss the complaint.[21]

Respectfully submitted,

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[20] As the court below noted, the injunction was issued "in substantially the same form as presented in the proposed order submitted by the plaintiff[s]." Tr. 112.

[21] While this case deserves a published opinion and *amici* hope it receives one, they also respectfully urge the Court to vacate the preliminary injunction after argument without awaiting publication of an opinion, as if it had been stayed pending appeal.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Brief of *Amici Curiae* by first-class mail, postage prepaid, upon

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