No. 10-FM-1126

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DENNIS PHILLIP SOBIN,
Petitioner,

v.

DARRIN SOBIN,
Respondent.

On Appeal from the Superior Court
of the District of Columbia
(No. 02-CPO-3586)

BRIEF FOR THE PETITIONER

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March 14, 2011

* Arguing counsel. Mr. Pace is admitted in New York and, for the purposes of this appeal, is practicing under the supervision of Mr. Spitzer. He filed his Motion to Appear *Pro Bono Publico* on March 9, 2011, and his application to the District of Columbia bar is pending.

CERTIFICATE PURSUANT TO RULE 28(a)(2)

The parties before the Superior Court were Dennis Phillip Sobin, represented by Cynthia Butler, and Darrin Sobin, represented by Janese Bechtol of the D.C. Office of Attorney General.

The Petitioner in this Court is Dennis Phillip Sobin. He is represented by Joseph Pace of Sanford, Wittels, and Heisler, LLP, and Arthur B. Spitzer of the American Civil Liberties Union of the Nation's Capital. The Respondent here is Darrin Sobin, represented by Stacy Anderson of the D.C. Office of Attorney General.

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ISSUE PRESENTED

Whether the Civil Protection Order ("CPO") entered against Petitioner violates his First Amendment rights when it bars him from entering or coming within 100 feet of the John A. Wilson Building at any time or for any reason, simply because his son works there, when Petitioner has legitimate and constitutionally-protected reasons for going there.

STATEMENT OF THE CASE

In August 2010 the Superior Court (José M. López, J.) extended a Civil Protection Order ("CPO") that had previously been entered against the Petitioner here, Dennis Sobin, on the motion of his son, Darrin Sobin, who is the Respondent here.[1] Using standard language on a pre-printed form, the CPO ordered Petitioner not to "assault,

[1] Darrin Sobin, the son, was the petitioner in the Superior Court, and Dennis Sobin was the respondent there. In this brief, we use Petitioner and Respondent to refer to the parties' status in this Court. Counsel are aware of Rule 28(d) but believe that this usage is more clear than referring to the parties by their quite similar names.

threaten, harass, or stalk" his son, not to destroy his son's property, and to "stay at least 100 feet away from" his son's "person, home, workplace, vehicle, children's school/daycare, [and] church." J.A. 40-42.

This appeal challenges the CPO's application to Respondent's "workplace," which is the John A. Wilson Building—the District of Columbia's "City Hall."[2] In the Superior Court, Petitioner showed that he had legitimate business in the Wilson Building—specifically, that he testified regularly before D.C. Council committees on law enforcement matters, that he visited with Council members and staff, that he visited offices within the Wilson Building to obtain grants for his foundation, and that he frequented the Council's office to keep abreast of legislative developments. There was no showing that Petitioner had ever threatened, sought out, or committed any disorderly or violent act against his son or anyone else while in or near City Hall. Petitioner argued that the CPO's prohibition on approaching the Wilson Building was thus an overly broad restraint on his ability to exercise his First Amendment rights of speech and petition. The Superior Court acknowledged that Petitioner's conduct under the prior CPO was, by itself, insufficient grounds to extend the CPO. Nonetheless, it rejected Petitioner's First Amendment argument without comment and extended the CPO in its entirety.

We show in this brief that the Superior Court abused its discretion by predicating the extension of the CPO on Petitioner's protected First Amendment activity and then refusing to modify the CPO to accommodate Petitioner's constitutional right to access City Hall and its environs for legitimate activities unrelated to the purposes of the CPO.

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[2] In this brief, the Wilson Building is sometimes referred to as City Hall.

STATEMENT OF FACTS

The Statutory Scheme

This case arises under the District of Columbia Intrafamily Offenses Act, D.C. Code §§ 16-1001 to 16-1006, which was enacted "to protect victims of family abuse from acts and threats of violence." *Cruz-Foster v. Foster*, 597 A.2d 927, 929 (D.C. 1991). To serve that goal, the Act provides that "[i]f, after hearing, [a] judicial officer finds that there is good cause to believe the respondent has committed or threatened to commit a criminal offense against the petitioner, the judicial officer may issue a protection order that," *inter alia*, "[r]equires the respondent to stay away from or have no contact with the petitioner and any other protected persons or locations." D.C. Code § 16-1005(c)(2). Such an order may be effective for up to one year, *id*. at (d), and upon motion of any party may be extended, rescinded, or modifed "for good cause shown." *Id*.

The Prior History

In 2002, Respondent applied for a CPO against his father, citing their 30 year estrangement and a variety of non-violent conduct and threats of non-violent conduct that barely, if at all, met the statutory standard for "threaten[ing] to commit a criminal offense against" the son. J.A. 43-48. After a failed mediation, the Superior Court entered a CPO in March 2004 prohibiting Petitioner from making contact—directly or indirectly—with Respondent and barring him from approaching within 100 feet of Respondent's person, family, church, or workplace. J.A. 117.

During the same period, Petitioner filed several lawsuits against his son over an inheritance dispute. J.A. 31. The CPO was extended in April 2005 after Petitioner was held in criminal contempt for attempting to make contact with his son through a third

party—his son's lawyer in the inheritance lawsuits. *See In re Sobin,* 934 A.2d 372 (D.C. 2007). In April 2006, Respondent moved to revoke Petitioner's probation on the criminal contempt conviction and extend the CPO a second time after Petitioner filed suits alleging malpractice against several doctors who were friends and colleagues of Respondent's parents-in-law. J.A. 31. The court found that the suits were filed to harass Respondent and, in May 2006, the court extended the CPO and revoked Petitioner's probation. In April 2007, Respondent again moved to extend the CPO, alleging that Petitioner had disseminated postcards accusing the doctors he had previously sued of malpractice. The court granted Respondent's motion and extended the CPO to May 2008. J.A. 31.[3]

In May 2008, Respondent moved for a fourth extension, alleging that Petitioner had relocated his residence to within four blocks of Respondent's residence[4] and that Petitioner had entered Respondent's workplace—the Wilson Building—on November 19 and November 30, 2007, had testified at the Council's oversight hearings on the D.C. Office of Attorney General ("OAG") and had distributed copies of his testimony throughout the building.

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[3] The court did not find that Petitioner's postcards represented continuing harassment in violation of the CPO; rather, the court relied on the earlier violations to again extend the CPO. J.A. 51.

[4] Petitioner's new quarters were at 725 24th Street, NW, *see* Trans. June 3, 2010 at 20:7-8. That address is St. Mary's Court, a residential living facility for seniors 62 years of age or older or individuals with accessibility needs, sponsored by the Episcopal Diocese of Washington and financed by the U.S. Department of Housing and Urban Development. *See* www.stmaryscourt.org. Petitioner, who has long been indigent, was lucky to be able to find low-cost housing in this subsidized community. There was no evidence that he moved there—much more than 100 feet from Respondent's residence—to be near Respondent.

It was undisputed in the 2008 proceedings that, on both occasions, Petitioner was on the witness list to testify and that he had provided Council with advance copies of his testimony. JA 132-33, 195-96. In his November 19 testimony, Petitioner identified himself as "cofounder and managing director of the Prisons Foundation," which was "concerned about the imprisonment of too many people in the district, for too long, and for the wrong reason." He called on the D.C. Attorney General to "enforce the law . . . more humanely," criticized the OAG for "wasting taxpayer money and diverting valuable resources that could be used to deal with serious crime," and ended his testimony with a plea to "reevaluate the priorities of the Office." J.A. 65. In his November 30 testimony, he called on "each valuable member of the police force to focus on real crime, crime that results in actual and immediate victims." He faulted the OAG for "wasting resources prosecuting harmless law violators." J.A. 67. During both hearings, Petitioner made reference to his son, recounting how the son had been arrested for assisting his mother in running an escort service and distributing marijuana,[5] had subsequently attended law school, and had become "an Assistant DC Attorney General who does not prosecute law offenders, victimless or otherwise. Instead, he works here at City Hall helping to write new and better legislation." J.A. 65. Petitioner testified that his son's experience illustrated that the OAG was being "hypocritical" by continuing to prosecute "victimless offenders." J.A. 67. Respondent argued in his 2008 motion to extend the CPO that

[5] The details of Respondent's felony convictions are matters of public record, *see In re Sobin*, 649 A.2d 589 (D.C. 1994) (granting Darrin Sobin's application to the D.C. Bar in spite of his convictions), but Petitioner mentioned only Respondent's arrests—not his convictions—in his testimony. Respondent nowhere alleged that Petitioner's testimony was false or libelous.

Petitioner gave the above testimony "with the sole purpose of harassing" Respondent. J.A. 50-51.

On April 3, 2008, Petitioner returned to the Wilson Building to testify at another hearing. J.A. 133-32, 188. He was arrested at the door, was subsequently convicted for violating the CPO's prohibition on approaching within 100 feet of Respondent's workplace, and was sentenced to six months in jail. J.A. 31. Based on these three public appearances at City Hall, the CPO was extended to November 2009. J.A. 35.

The Current Extension

In October 2009, Respondent moved for an extension of the November 2008 CPO—effectively a fifth extension of the 2004 CPO—the extension at issue here. He recited Petitioner's violations of the earlier orders, but alleged no new violation since November 2008. J.A. 55-62. In February 2010, Respondent filed a Supplemental Motion in which he alleged that he had "discovered a stack of [Petitioner's] fliers he had posted outside one of the entrances to [Respondent's] workplace." J.A. 85. Those filers, captioned "Send Sobin to City Hall Without Fear Of His Being Arrested There Again," announced that Dennis Sobin was running for mayor, criticized "politically-minded judges for enforcing the laws unfairly" against "the poor, the powerless, and the politically unconnected," and called on readers to join his Election Committee. J.A. 155.

Petitioner opposed the extension. As relevant to this appeal, he argued that its provision ordering him to stay at least 100 feet away from Respondent's workplace violated his First Amendment "right to protest his government at City Hall, attend hearings, petition or visit city counsel [*sic*] members." J.A. 130. In his filings and at the hearing, Petitioner testified—and Respondent did not dispute—that he had been actively

involved in prisoner rehabilitation initiatives since 2003, that he is founder of the Prisons Foundation, which promotes the arts and education in prison and alternatives to incarceration, *see* J.A. 32-33, and which received a grant from the D.C. Commission on the Arts and Humanities in October 2009, J.A. 154 (*see also* http://www.prisons foundation.org), and that he has run for various public offices, including for D.C. Mayor in 2010, J.A. 32-33, 147. He testified that he had been going to City Hall "constantly" in the years before the CPO was issued, J.A. 213-14, for a variety of purposes, including because he was "opposed to the priorities of the Attorney General's Office." J.A. 185; that he also visited the Wilson building to get copies of draft legislation, J.A. 191, to keep abreast of the Council's activities, J.A. 201, to visit the grants office on behalf of the Prisons Foundation, J.A. 130, and to testify on the District's law enforcement policies, J.A. 185; that he had been repeatedly invited to events at City Hall that he had been forced to decline due to the CPO's bar. J.A. 191. Petitioner devoted a significant amount of his closing statement to reiterating his First Amendment objections to the provisions of the CPO that kept him away from City Hall. J.A. 219-24, 226-27.

Respondent never disputed any of these facts. Throughout the proceedings, Respondent's only response to Petitioner's constitutional argument was a clipped remark that "not to delve too much into . . . the First Arguments… there are time, place, and manner constraints that are allow. This is simply a place restraint." J.A. 233.

The Decision Below

On August 12, 2010, Judge López granted Respondent's motion to again extend the CPO. In his written decision, he acknowledged that Petitioner was "a community activist and a tireless volunteer," and that he "manages his Prison Art Foundation with

which he helps people coming out of jail." J.A. 34. The court further noted the absence of any recent conduct on Petitioner's part that would independently justify the extension of the CPO. J.A. 35. But the court found that "in the mosaic of the relationships" between the parties, the December 2009 distribution of fliers—like similar disseminations in 2007[6]—was "another instance of harassment and a predictor of future harassment." *Id*. The court also concluded that both parties' court filings evidenced a "continuous and volatile tension" between father and son, holding "it is upon such tension that this decision rests." J.A. 36.

The decision did not address the merits of Petitioner's First Amendment argument. Instead, the court viewed the very fact that Petitioner had "posted the flier and risked violating his CPO to assert his First Amendment rights," J.A. 36, as grounds to extend the CPO, noting "[T]hat [Petitioner] perceives [Respondent] as impeding his core legal rights only exacerbates the tension." *Id*. Upon issuing his decision, Judge López remarked:

> The Court did not comment about [the First Amendment claim] at all in the order for the simple reason that the argument just, in the Court's eyes, did not have merit. Mayoral campaigns are not fought in City Hall; they are fought out in the community and through the media.

J.A. 236-37.

SUMMARY OF ARGUMENT

The provision of the CPO barring Petitioner from coming within 100 feet of City Hall is an overly broad restriction of Petitioner's First Amendment rights of free speech

[6] In an apparent clerical error, the Superior Court mistakenly gave 2008 as the date of the flier distributions in City Hall on page 6 of the Order. J.A. 35. Elsewhere, the Order accurately states that Petitioner distributed fliers in 2007. J.A. 32.

and freedom to petition the government for a redress of grievances. Injunctions that burden expression are subject to a higher level of scrutiny than generally-applicable ordinances or regulations. The standard, supplied by *Madsen v. Women's Health Center, Inc*., 512 U.S. 753 (1994), as well as by general principles of equity jurisprudence, requires that an injunction "burden no more speech than necessary to serve a significant government interest." *Id.* at 764. The CPO's workplace stay-away provision, which prohibits a broad swath of protected speech unrelated to the evils addressed by the Intrafamily Offenses Act, does not satisfy this test.

By barring Petitioner from coming within 100 feet of City Hall, the CPO forbids him, under pain of a $1,000 fine and six months imprisonment, from standing on the wide public sidewalk in front of the Wilson Building and handing out campaign literature to willing recipients, or peacefully holding a placard addressing District policy, or attending an orderly demonstration on behalf of one of the many political causes with which he has aligned himself.

The CPO also tramples on Petitioner's First Amendment right to petition his government for redress. It prevents him from entering City Hall to observe the Council in action or to testify before one of its committees, from visiting a Council member in his or her office, from visiting the legislative services office to keep track of legislative developments. Those activities are at the core of the First Amendment's right to petition, a right the Supreme Court has deemed implicit in "the very idea of a government, republican in form." *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).

The CPO's ban on approaching City Hall does not further a significant government interest. The Intrafamily Offenses Act was enacted "to protect victims of

family abuse from acts and threats of violence." *Cruz-Foster v. Foster*, 597 A.2d 927, 929 (D.C. 1991). The court predicated the CPO's extension on Petitioner's distribution of fliers in City Hall in 2007 and 2009, which it found to be acts of harassment. But the record does not bear out that conclusion.[7] The record is devoid of any evidence that Petitioner threatened or stalked his son in City Hall or sought to communicate with him while on its premises. Rather, the record shows that every time Petitioner approached or entered City Hall since the imposition of the CPO, he has done so peacefully to advocate on behalf of political causes, such as changing the D.C. Attorney General's prosecutorial priorities. The First Amendment does not permit the government to prohibit an individual from engaging in such core political speech unless that prohibition is precisely tailored to serve a significant countervailing interest, which is not the case here.

Petitioner's son may be embarrassed or discomfited by Petitioner's testimony or by his mere presence in City Hall. But it is elemental that the right to engage in protected speech does not dissipate because its utterance may cause emotional distress. *See, e.g., Snyder v. Phelps*, 131 S. Ct. 1207 (2011). The Supreme Court has consistently safe-guarded from intrusion the right of individuals to engage in speech that inflicts greater emotional distress than Petitioner's activities in City Hall might cause here.

There are many ways in which the Superior Court could have crafted a narrower CPO to accommodate Petitioner's First Amendment rights while protecting his son from harm. That court's failure even to consider such alternatives, as well as its failure to give

[7] This Court has an "obligation . . . in a case raising First Amendment issues, 'to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Guilford Transportation Industries, Inc. v. Wilner*, 760 A.2d 580, 592 (D.C. 2000) (quoting *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 17 (1990)).

proper weight to Petitioner's First Amendment rights, warrant vacating the workplace stay-away provision of the CPO.

STANDARD OF REVIEW

In the Superior Court, the party seeking extension of a CPO (Respondent here) "had the burden of showing good cause [for the extension] by a preponderance of the evidence." *Cruz-Foster v. Foster*, 597 A.2d 927, 930 (D.C. 1991). "'[T]he moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.'" *Id*. (quoting *United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953)).

The court exercises discretion in deciding whether an extension should be issued; review in this Court is thus for abuse of discretion. *Id*. "However, 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) (citing *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405 (1990)); *Schoonover v. Chavous*, 974 A.2d 876, 881 (D.C. 2009) ("the court's 'discretion must . . . be exercised in conformity with correct legal principles'") (quoting *Thoubboron v. Ford Motor Co.,* 624 A.2d 1210, 1213 (D.C. 1993)) (alteration in the original).

Moreover, as this case presents serious issues regarding government suppression of Petitioner's political speech, this Court has explained that "[w]e must therefore remain mindful of our obligation as an appellate court, in a case raising First Amendment issues, 'to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.'"

Guilford Transportation Industries, Inc. v. Wilner, 760 A.2d 580, 592 (D.C. 2000) (quoting *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 17 (1990)); *accord Bloch v. District of Columbia*, 863 A.2d 845, 850 (D.C. 2004). The Superior Court's factual conclusions therefore do not receive the deference that they ordinarily would were First Amendment issues not involved.

ARGUMENT

The CPO's Provision Barring Petitioner From Approaching Within 100 Feet of City Hall is an Overly Broad Restriction on His First Amendment Rights

A. The CPO Is Subject to Heightened Scrutiny Insofar as it Burdens Petitioner's Exercise of Freedom of Speech and Freedom to Petition

It is indisputable that Petitioner was engaged in First Amendment activity when he visited the Wilson Building and that this activity was the basis for the 2010 extension of the CPO. Heightened scrutiny is therefore required.

As Judge López's written order made clear, the evidence supporting the 2010 extension of the CPO consisted principally, if not exclusively, of Petitioner's testimony to the D.C. Council mentioning his son, and his distribution of copies of that testimony (referred to by the court as "fliers") inside and outside the Wilson Building. There was no evidence of any other violations in recent years, and no evidence that since the original CPO was issued in 2004, Petitioner has ever come within 100 feet of Respondent's person or family, or has ever harmed or threatened to harm Respondent physically. It is therefore clear that the major purpose and effect of the 2010 CPO is to prevent Petitioner from coming to the Wilson Building for peaceful (if unwelcome) First Amendment purposes.

Restrictions on speech that take the form of content-neutral statutes or regulations 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, and 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. *See also Tory v. Cochran*, 544 U.S. 734 (2005) (striking down as "an overly broad prior restraint upon speech, lacking plausible justification," an injunction prohibiting the petitioner from "picketing" or "displaying signs, placards or other written or printed material" about the respondent); *United States v. Mahoney,* 247 F.3d 279, 286-87 (D.C. Cir. 2001) (applying the *Madsen* standard to strike down speech-burdening provisions of an injunction that were "unrelated to the [government's legitimate] interests in public order and unimpeded access to medical care" and that rendered the injunction "considerably overbroad.")

As the Supreme 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.'" 512 U.S. at 765 (quoting *Califano v. Yamasaki,* 442 U.S. 682, 702 (1979)); *accord Nebraska Dep't of Health and Human Services v. Dep't of Health and Human Services*, 435 F.3d 326, 330 (D.C. Cir. 2006) ("We have long held that '[a]n injunction must be narrowly tailored to remedy the specific harm shown.'") (quoting *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 108 (D.C. Cir. 1976) (alteration in original)). 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. President and Com'rs of Princess Anne*, 393 U.S. 175, 184 (1968).[8]

As the injunction in this case exposes Petitioner to criminal liability for exercising his First Amendment rights to meet with his elected representatives in City Hall, to testify on matters of public concern, and to use City Hall and its sidewalks for other legitimate purposes that have no connection to his son, narrow tailoring is essential here. *See NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (when sanctionable "conduct occurs in the context of constitutionally protected activity . . . 'precision of regulation' is demanded").

[8] A helpfully analogous situation has arisen in recent years in the context of conditions of probation prohibiting or severely limiting probationers from using the Internet. While probationers are subject to severe limitations on their activities because of their past criminal conduct, appellate courts have refused to uphold such restrictions where they are not reasonably tailored to protect the public. *See, e.g., United States v. Burroughs*, 613 F.3d 233, 242-45 (D.C. Cir. 2010) (striking down two of three conditions on the probationer's use of the Internet); *United States v. Perazza-Mercado*, 553 F.3d 65, 74-79 (1st Cir. 2009) (remanding for consideration of more narrowly-tailored conditions). *See also United States v. Stanfield,* 360 F.3d 1346, 1352-54 (D.C. Cir. 2004) (noting potential First Amendment issues in an overbroad restriction of communication via the Internet).

B. The CPO's Prohibition on Approaching or Entering City Hall Does Not Survive Heightened Scrutiny

By prohibiting Petitioner from approaching or entering City Hall—to attend a political rally or distribute a flier near its entrance, to visit the legislative records office, to meet with his elected representatives, or testify before Council committees—the CPO sweeps within its ambit a vast swath of protected speech that lies at the heart of the First Amendment. The suppression of this protected activity is entirely unrelated to the purpose of the Intrafamily Offenses Act, the goal of which is "to protect victims of family abuse from acts and threats of violence." *Cruz-Foster v. Foster*, 597 A.2d at 929. It therefore does not meet the heightened standard mandated by *Masden*.

The Superior Court easily could have issued a narrower CPO to accommodate Petitioner's First Amendment rights while protecting his son from "acts and threats of violence" or any other real harassment. For example, it could have required Petitioner stay 100 feet away from Respondent's actual office within the large Wilson Building, or to give advance notice before entering City Hall of his internal destination, to ensure that his path did not intersect with his son's. Other accommodations are no doubt possible. The court made no such effort.

1. The CPO Violates Petitioner's First Amendment Right to Engage in First Amendment Activity on the Public Sidewalks Surrounding City Hall

Under the CPO, Petitioner is subject to conviction, fine and imprisonment if he sets foot on the public sidewalks surrounding the Wilson Building for any reason, including, for example, standing with a placard, handing out leaflets, or attending a press conference or political rally. These acts are quintessential examples of protected speech, and public sidewalks are quintessential examples of traditional public fora. *See, e.g.,*

United States v. Grace, 461 U.S. 171, 177 (1983) ("streets, sidewalks, and parks, are considered, without more, to be 'public forums'"); *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997) ("[S]peech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum.").

The walkways around City Hall have an additional First Amendment significance because political expression undertaken there is most likely to reach its intended audience: District lawmakers and those who associate with them. Council members and staff may be able to see signs from their windows; they and their staffers may be offered leaflets or fliers when entering or exiting the building. As this Court explained in *Wheelock v. United States*, 552 A.2d 503, 506 (D.C. 1988), "'the general concepts of First Amendment freedom are given added impetus as to speech and peaceful demonstration in Washington, D.C., by the clause in the Constitution which assures citizens of their right to assemble peaceably at the seat of government and present grievances.'" (quoting *A Quaker Action Group v. Morton*, 516 F.2d 717, 724 (D.C. Cir. 1975)). *Wheelock* was referring to the seat of the federal government but the same is true of the seat of the District government. *See, e.g., Pouillon v. City of Owosso*, 206 F.3d 711, 716-717 (6th Cir. 2000) (City Hall steps are "in the highest degree linked, traditionally, with the expression of opinion."); *Housing Works, Inc. v. Safir*, 101 F. Supp. 2d 163, 167 (S.D.N.Y. 2000) ("The steps and plaza of City Hall are by their very nature, quintessential public forums.").

Petitioner's risk of being punished for engaging in political speech on the City Hall sidewalk is not at all hypothetical. Indeed, the Superior Court found that his

distribution of campaign literature "outside the Wilson Building on Dec. 9, 2009," qualified as a ground for extending the CPO in 2010. J.A. 35.

2. The CPO Violates Petitioner's First Amendment Right To Petition Inside City Hall

It is uncontested that Petitioner was a frequent visitor at the Wilson Building long before it became Respondent's workplace and afterwards as well, that Petitioner often testified—indeed, sometimes was invited to testify—before the Council on matters of public concern such as the District's prosecutorial priorities, and that Petitioner used building resources to keep abreast of legislative developments. J.A. 133-32, 188.[9] By criminalizing these activities, the CPO tramples on Petitioner's First Amendment right to petition his government for redress.

The right to petition "has been understood broadly to extend to all departments of the Government including executive departments, administrative agencies, and the judiciary, as well as legislatures." *Lex Tex, Ltd. v. Skillman*, 579 A.2d 244, 249 (D.C. 1990) (internal citations omitted); *see also Edwards v. South Carolina*, 372 U.S. 229, 236 (1963) (First and Fourteenth Amendment protect right to petition state assemblies); *Nebel v. Sulak*, 73 Cal. App. 4th 1363, 1370 (Cal. Ct. App. 1999) (striking down stay-away order as overbroad where it prevented petitioner from attending public proceeding). Indeed, the earliest affirmations of the right placed special emphasis on the ability to

[9] Petitioner testified that he does not even know what room or suite his son works in, J.A. 210, and that he had continued to visit the Wilson Building from 2004 when the initial CPO was entered until some time in 2007 when he first learned that his son worked there. *Id*.; *see also* J.A. 213 (noting that he had put on a Prison Art show in the Wilson Building in about 2005, after the CPO had issued, not knowing that his son worked there). Apparently Respondent did not know that his father was visiting the Wilson Building during those years, either, as nothing was made of it. *Id*.

One could hardly ask for stronger proof that Petitioner does no harm to his son simply by visiting the Wilson Building, as he is now prohibited from doing.

attend and address legislative assemblies. *See, e.g.,* A Coppie of the Liberties of the Massachusetts Collonie in New England of 1641, Art. 2 ("Every man whether Inhabitant or fforreiner, free or not free shall have libertie to come to any publique Court, Councell, or Towne meeting, and either by speech or writing to move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance, so it [can] be done in convenient time, due order, and respective manner.") (quoted in The Colonial Laws of Massachusetts 90 (William H. Whitmore ed., 1887)); Pennsylvania Declaration of Rights, 1776, Art. XVI (affirming the right of individuals to "instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance") (quoted in 1 Bernard Schwartz, The Bill of Rights: A Documentary History 263 (1971)); *see also McDonald v. Smith,* 472 U.S. 479, 482-483 (1985) (discussing the historical roots of the Petition Clause).

The Supreme Court has recognized the right to petition as "one of the most precious of the liberties safeguarded by the Bill of Rights," *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967), and has deemed the right implicit in "the very idea of a government, republican in form." *United States v. Cruikshank*, 92 U.S. 542, 552 (1876). The Court has explained that preserving the individual's right to petition the government is imperative "to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." *DeJonge v. Oregon*, 299 U.S. 353, 365 (1937). Where, by contrast, a "constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any

public measure, or upon the conduct of those who may advise or execute it," a "representative democracy ceases to exist." *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964) (Goldberg, J., concurring). *See also Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961) ("the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives").

Thus, "[e]xcept in *the most extreme circumstances* citizens cannot be punished for exercising [the] right [to petition] 'without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions.'" *McDonald v. Smith*, 472 U.S. 479, 486 (1985) (Brennan, J., concurring) (quoting *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937)) (emphasis added). Petitioner's conduct does not remotely present the sort of extreme circumstances that justify criminalizing his entry into City Hall for the purpose of exercising his right to petition. There is no evidence in the record that he harassed or threatened Respondent when he entered the Wilson Building to testify, that he attempted to make contact with him, or that he committed any act of disruption. Petitioner's only transgression at the Wilson Building was his presence in pursuit of his First Amendment rights.

Courts have struck down impediments to the right to petition that were substantially narrower than the one at issue in this case. In *United States Postal Service v. Hustler Magazine, Inc*., 630 F. Supp. 867 (D.D.C. 1986), the court invalidated a Postal Service order that prevented publishers of the pornographic magazine, *Hustler*, from sending its mailings to the offices of objecting Members of Congress, declaring it an invalid "prior restraint on defendants' expression of their views to Congress." *Id.* at 873.

In comparison to the CPO, the restraint on speech in *Hustler* was surgical: the challenged order only barred *Hustler* from sending its materials to the office mailboxes of (1) individual congresspersons who (2) lodged formal objections with the Post Office. The CPO, by contrast, bars Petitioner from engaging in *any* activity (including attending a meeting or distributing an informational brochure) in or near *any* legislator's office because his son might happen upon it or because the mere possibility of Petitioner's presence in the building might cost his son peace of mind. The right to petition "has a sanctity and a sanction not permitting [such] dubious intrusions." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

3. The CPO is Not Narrowly Tailored to Further a Significant Government Interest

The CPO's workplace provision is not narrowly tailored to further the purposes underlying the Intrafamily Offenses Act or any other significant government interest. As already noted, that Act's purpose is "to protect victims of family abuse from acts and threats of violence," *Cruz-Foster v. Foster*, 597 A.2d at 929. In order to extend a CPO issued under the Act, the applicant must show that "'there exists some cognizable danger of recurrent violation.'" *Id.* at 930 (quoting *United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953). The Superior Court committed errors of both fact and law in concluding that the CPO's workplace stay-away provision was necessary to prevent the type of "recurrent violation" contemplated by the Act.

In plain terms, the Superior Court barred Petitioner from exercising his First Amendment rights in City Hall on the basis of his prior, constitutionally protected expressive activities. There is no evidence in the record that Petitioner even attempted to make contact with his son at the Wilson Building, much less that he engaged in or

threatened violence.[10] Nor did the Superior Court make any such finding. Petitioner's only infraction in the two years preceding the 2010 extension was entering City Hall to testify and disseminating fliers criticizing District law enforcement policy in and around the building, and Judge López acknowledged that the latest distribution of fliers was not, by itself, adequate grounds to extend the CPO. J.A. 35. However, he concluded that, when viewed in concert with Petitioner's prior activities in City Hall, the 2009 fliers "qualf[ied] as yet another instance of harassment and a predictor of future harassment." J.A. 35.

On the independent examination of the record mandated by *Guilford Transportation* and the authorities there cited, that conclusion is constitutionally indefensible. However irksome Respondent found the fliers, they contained nothing that could be construed as a threat, but rather focused on criticism of District government policy and were directed to a general audience.[11] As such, they were squarely under the aegis of the First Amendment. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment."). The possibility that Petitioner may once again enter City Hall to engage in such protected speech cannot properly be deemed an "intrafamily offense," which is defined as "interpersonal, intimate partner, or intrafamily *violence*" under the Intrafamily Offenses Act. D.C. Code § 16-1001(8) (emphasis added).

[10] Judge López stated that "each party perceiv[es] the other as a threat to their very lives." J.A. 36. However, there is not a scintilla of evidence to support the conclusion that either party poses any threat of physical harm to the other, much less any threat of homicidal harm. There is nothing wrong with metaphorical hyperbole, but it is not a proper basis for the entry of an injunction.

[11] The November 19, 2007, November 30, 2007, and December 2009 fliers are at J.A. 65, 67, and 155, respectively.

Since the entry of the original CPO in 2004, Petitioner has approached or entered City Hall four times that are matters of record[12]: twice in November 2007 to testify and distribute leaflets criticizing the District's law enforcement priorities; once in April 2008 as an invitee of the City Council to testify on law enforcement policy (an attempt which led to his arrest); and once in December 2009 to distribute campaign literature in front of City Hall. J.A. 32. On each occasion, Petitioner was engaged in "speech on 'matters of public concern,'" which the Court has located "at the heart of the First Amendment's protection." *Snyder v. Phelps*, 131 S. Ct. 1207, ____ (No. 09-751, March 2, 2011) (Slip. Op. at 5) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc*., 472 U. S. 749, 758–759 (1985)). For example, in his November 19, 2007, testimony, Petitioner called on the D.C. Attorney General to "enforce the law . . . more humanely," criticized the Attorney General's office for "wasting taxpayer money and diverting valuable resources that could be used to deal with serious crime," and ended his testimony with a plea to "reevaluate the priorities of the Office." J.A. 65. On November 30, 2007, he testified in his capacity as "cofounder and managing director of the Prison Art Gallery" and called on "each valuable member of the police force to focus on real crime, crime that results in actual and immediate victims." He faulted the AG's Office for "wasting resources prosecuting harmless law violators." J.A. 67. Likewise, his December 2009 fliers criticized "politically-minded judges for enforcing the laws unfairly" against "the poor, the powerless, and the politically unconnected," and called on readers to support his bid for public office. J.A. 155.

[12] As noted above, Petitioner continued to visit the Wilson Building between 2004 and sometime in 2007 when he first learned that his son worked there, with no harm to his son. J.A. 210, 212-13.

To be sure, Petitioner's speech included references to his son that could be viewed as embarrassing or hostile. But, as the Supreme Court recently affirmed in *Snyder v. Phelps*, speech addressing matters of public concern does not shed its protected status simply because it includes personal attacks—even attacks that cause extreme emotional distress. In *Snyder*, protesters picketed a Marine's funeral, carrying signs (*e.g.,* "God Hates You" and "You're Going to Hell") that directed personal attacks against the deceased and his family. *See* Slip Op. at 8. But because the protesters also carried signs conveying criticisms relating to social mores and U.S. policy (*e.g.,* "God Hates Fags" and "Thank God for Dead Soldiers"), and had spoken on those themes on other occasions, the Court concluded that the protest's "dominant theme . . . spoke to broader public issues" and was thus entitled to full protection as speech on a matter of public concern. *Id.*

Nor is it relevant to the First Amendment inquiry whether Petitioner's expressive activities were motivated by animus toward his son; a speaker's motives when discussing public issues are irrelevant. *See Garrison v. Louisiana*, 379 U.S. 64, 73 (1964) ("Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred"); *accord Snyder v. Phelps, supra*.

The Superior Court also based its extension of the CPO on its assessment that the "psychological atmosphere between the parties" was marked by "continuous and volatile tension." J.A. 34-35. The court invoked *Robinson v. Robinson*, 886 A.2d 78 (D.C. 2005) for the proposition that "a lot of tension" between disputants is grounds to extend a stay-away order. But the tension in *Robinson* manifested in the form of repeated physical attacks, destruction of personal property, drug abuse, and explicit threats of violence, *id.* at 78-82, paradigmatic examples of the transgressions contemplated by the Intrafamily

Offenses Act. The tension that the *Robinson* court spoke of was a far cry from Petitioner's peaceful dissemination of fliers criticizing prosecutorial priorities and mentioning his son's history.

It may well be true that Respondent finds the very thought of his father's presence in the Wilson Building troubling. But Petitioner's right to engage in protected, expressive activities at the seat of the District's governing body does not yield to Respondent's desire for peace of mind. 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). Speech often has "profound unsettling effects," but it is nonetheless "protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view." *Edwards v. South Carolina*, 372 U.S. 229, 237-238 (1963) (quoting *Terminiello* v. *Chicago*, 337 U.S. 1, 4-5 (1949)). 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, Inc*., 515 U. S. 557, 574 (1995).

Mindful of this principle, the Supreme Court has invalidated restrictions targeting speech that inflicted distress far greater than that occasioned by Petitioner's actions here. For example, in upholding the right of protesters to picket the funeral of a fallen Marine with signs reading "Thank God for Dead Soldiers" and "You're Going to Hell," the *Snyder* Court noted: "[t]he record makes clear that the applicable legal term—'emotional distress'—fails to capture fully the anguish [the protesters'] choice added to Mr. Snyder's

already incalculable grief." Slip Op. at 10. Nonetheless, the Court ruled that "[s]uch speech cannot be restricted simply because it is upsetting." *Id.* at 12. Similarly in *Madsen*, the Court struck down injunctions that barred anti-abortion 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. 512 U.S. at 773. Nonetheless, the Court ruled found 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 *Madsen* Court concluded that the 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 injunction preventing protesters from coming within 15 feet of abortion seekers). As Petitioner's expressive activities in City Hall are plainly neither, the CPO's workplace stay-away provision cannot survive.[13]

[13] The Supreme Court's decision in *Hill v. Colorado*, 530 U.S. 703 (2000), which upheld a provision preventing protesters from approaching within 8 feet of abortion seekers, is not to the contrary. That case did not establish a "'right' to avoid unwelcome expression." *Id.* at 718, n.25. The emotional and physical harm at issue in *Hill* did not result from the perceived offensiveness of protestors' messages, but rather from the potentially harassing and intimidating nature of the protestors' physical intrusion into a patient's personal space. Indeed, the Court emphasized that "the 8-foot restriction on an unwanted physical approach leaves ample room to communicate a message through speech. Signs, pictures, and voice itself can cross an 8-foot gap with ease." *Id.* at 729.

4. The Superior Court Erred in Implying That the CPO Left Petitioner With Adequate Alternatives to Communicating in City Hall

While the Superior Court's order nowhere addressed Petitioner's First Amendment claim, Judge López implied at the August 12, 2010 hearing that any restrictions on Petitioner's free expression were legally insignificant "because Mayoral campaigns are not fought in City Hall; they are fought out in the community and through the media." J.A. 236-37. The error in this reasoning is three-fold.

First, it reflects a misapplication of the applicable legal standard. To pass constitutional muster, an injunction must "burden no more speech than necessary to serve a significant government interest." *Madsen,* 512 U.S. at 764. Where, as here, the injunction fails that requirement, it cannot be salvaged because it leaves alternative channels of communication: "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)). The First Amendment "protects [citizens'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer* v. *Grant,* 486 U.S. 414, 424 (1988). *See also Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757 n.15 (1976) ("[W]e are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is.").

Second, it is simply not true that the CPO leaves Petitioner with ample alternatives. As Petitioner's uncontradicted testimony made clear, he does more in the Wilson Building than run for mayor—indeed, the Sobin for Mayor campaign flier was

distributed *outside* the building. Petitioner has, for many years, participated in the legislative process by monitoring legislation, speaking with Council Members and staff, and testifying at hearings. Those things cannot effectively be done "out in the community and through the media." He has used the Grants Office and meetings with Council Members to seek and obtain grants for his Prisons Foundation. J.A. 130. Those things cannot effectively be done "out in the community and through the media." He has held a display of prison art in the Wilson Building and been invited to do so again. J.A. 212. This cannot be done easily, if at all, "out in the community and through the media." The Superior Court's casual assertion that Petitioner can adequately exercise his First Amendment rights elsewhere is simply incorrect. *Cf. City of Ladue v. Gilleo*, 512 U.S. 43, 56-57 (1994) (striking down ordinance banning yard signs on the grounds that the asserted "adequate alternatives" of "letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings" were not adequate).

Third, the Superior Court's failure to take seriously Petitioner's desire to exercise First Amendment rights at the Wilson Building demonstrates that the decision below was an abuse of discretion, for "in light of the remedial character of the Intrafamily Offenses Act, it is necessary to consider whether the 'balance of harms' favors the grant" of an application for extension of a CPO. *Cruz-Foster v. Foster*, 597 A.2d at 930. By considering only one side of that balance, the Superior Court failed adequately or properly to exercise its discretion.

CONCLUSION

For the foregoing reasons, the provision of the 2010 CPO barring Petitioner from coming within 100 feet of the Wilson Building should be vacated and the case should be remanded to the Superior Court for such further proceedings, if any, as may be necessary.

Respectfully submitted,

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March 14, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I served one copy of the foregoing Brief for the Petitioner by first-class mail, postage prepaid, upon

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this 14th day of March, 2011.

_____
Joseph Pace