SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
DOMESTIC VIOLENCE UNIT

STEPHANIE GRAY,	:	
	:	
Petitioner,	:	**Case No. 2013 CPO 3690**
	:	**Judge Todd E. Edelman**
v.	:	
	:	
DENNIS SOBIN,	:	
	:	
Respondent.	:	

MEMORANDUM OPINION

On September 26, 2013, Petitioner Stephanie Gray (hereinafter "Petitioner"), an employee of the Court Services and Offender Supervision Agency (hereinafter "CSOSA"), filed a Petition for Civil Protection Order against Respondent Dennis Sobin (hereinafter "Respondent"). Broadly read, the Petition claimed that Respondent had stalked Petitioner in violation of D.C. Code § 22-3133 (2013)[1] by "throw[ing] documents with [Petitioner's] picture" around the CSOSA office, posting pictures of her on Respondent's website, and "writ[ing] derogatory information about [Petitioner]." *CPO Petition* at 1. The Petition asked the Court to issue a Civil Protection Order (hereinafter "CPO") ordering that Respondent stay away from Petitioner, her work, and her home, and "[r]emove the website with [Petitioner's] information [and] stop making copies of this negative/degrading information about [Petitioner]." *CPO Pet.* at 1.

After a continuance to permit Petitioner to serve process upon Respondent, this matter came before the Court for a trial on November 1, 2013. Petitioner, who had filed the Petition *pro se,* was represented by counsel at trial; Respondent represented himself. After the Court heard the evidence at trial (which, as to virtually all essential factual matters, was undisputed) and

[1] The Petition indicates that she filed the CPO due to "harass/hostile work environment." *CPO Pet.* at 1.

expressed skepticism as to the viability of Petitioner's claim, it took the matter under advisement in order to allow the parties to submit briefs both as to the sufficiency of the evidence supporting Petitioner's request and the constitutionality of issuing a CPO in this case.

Petitioner filed a Post-Hearing Brief on November 15, 2013. Respondent, *pro se*, filed a Brief in Opposition to Petitioner's Request for a Civil Protection Order on December 23, 2013. After requesting and being granted leave of court to file an *amicus* brief, the American Civil Liberties Union of the Nation's Capital (hereinafter "ACLU") filed a Brief as *amicus curiae* on December 27, 2013. The Petitioner filed a Reply Brief in Support of Petition for a CPO on January 10, 2014.

On January 28, 2014, the Court heard further oral argument from the parties and from *amicus,* and denied the Petition. The Court issues this Memorandum Opinion to set forth in further detail the basis of its ruling.

I. FACTUAL FINDINGS

As stated above, the evidence presented at trial did not produce any significant factual disputes between the parties. Petitioner is an employee of CSOSA, formerly designated as a Sex Offender Registry Specialist. In that role, Petitioner fingerprinted, photographed, and entered and updated information about sex offenders required to register under the District of Columbia's Sex Offender Registration Act. *See* D.C. Code § 22-4007(a)(1-9) (2000) (tasking CSOSA with, among other duties, "obtain[ing] the information required for registration . . . [such as] a photograph and set of fingerprints of the sex offender. . . ."). The evidence at trial established that Respondent is a registered sex offender, and as such is required to report to CSOSA to update his information for the registry. *See* D.C. Code § 22-4014 ("During the

registration period, a sex offender shall . . . [*inter alia*] register with the Agency [(CSOSA)] as a sex offender[,] provide information required for registration, and cooperate in photographing and fingerprinting[,] . . . [and] [m]eet with responsible officers and officials for the purpose of carrying out any requirement adopted by the Agency under this chapter."). The evidence also established that Respondent created a website — titled "The Idiots Registry" — and created and distributed flyers using text and photographs from the "Idiots Registry" website at CSOSA's office. In December 2012, Petitioner's supervisor, Emmanuel Lawton, brought Petitioner a flyer that had been found on top of a recycling bin in a hallway of CSOSA's office building. Around this time, Petitioner discovered Respondent's website. More flyers were found in CSOSA's office building and brought to Petitioner's attention in September and October 2013. On at least one of those occasions, the flyers were discovered on a drinking fountain by the women's restroom. Respondent admitted responsibility for the creation and distribution of the flyers and for the creation of the website.

Petitioner introduced the flyers and a printout from the web site into evidence as Exhibits 1 through 3. Exhibits 1 and 3 are copies of the nearly-identical flyers found at CSOSA; Exhibit 2 is a printout, produced by Petitioner, from Respondent's "Idiots Registry" website. Exhibit 1 and 3 explain that Respondent's website, "The Idiots Registry", "has been created to combat the evils of sex offender registries." *Exs.* 1, 3. According to the flyers, at the website, viewers will "find the names of politicians and public figures who have encouraged the creation of, or have refused to denounce, government registration websites that target citizens for harassment." *Id.* The flyers' text proceeds to describe government registries as "unfair and un-American" and compares them to the "Nazi registration of Jews and the Salem lists of alleged witches. . . ." *Id.* The flyers conclude by urging readers to alert those maintaining the "Idiots Registry" of persons

whom, they believe, should be added. *Id.* In addition to this text and a web address for the "Idiots Registry," the flyers include a photograph of Petitioner at the CSOSA office that is captioned, "Face of Evil: 'Registry Specialist' Stephanie Gray of CSOSA." *Id.*

The text in Exhibit 2, the print-out from what appears to be the opening page of IdiotsRegistry.info, is largely the same as that on the flyers, but the website contains two more photographs of Petitioner at CSOSA, one with the caption, "Path of Destruction: Gray leads her victim to cubicle", and the second with the caption, "Information to Destroy: Gray Interrogates her victim." *Ex.* 2. All three photographs appear to show Petitioner standing, walking, or talking in her office at CSOSA. *See Ex.* 1-3.

Petitioner testified that she believed Respondent or his "companion" took the photographs of her during one of Respondent's office visits. While Petitioner was not aware of being photographed and did not see Respondent or anyone else take the photographs that appear on the flyers and website, Petitioner stated that she believed that either Respondent or his "companion" took the photographs of her based on a conversation Petitioner had with Respondent when he reported to CSOSA in September 2012.[2]

II. ANALYSIS

Because the Court may only issue a CPO based upon a finding that a respondent has committed a criminal offense against a petitioner, D.C. Code § 16-1005(c) (2013), Petitioner's request for a CPO turned on whether Respondent had violated the District of Columbia's stalking

[2] According to Petitioner, during that office visit, Respondent asked Petitioner how she would like to have her photograph published online.

statute by creating and distributing the flyers and maintaining the website.[3] In the District of Columbia, stalking is defined as "purposefully engag[ing] in a course of conduct[4] directed at a specific individual . . . (1) "[w]ith the intent to cause that individual to . . . [,] (2) [t]hat the person knows would cause that individual reasonably to . . . [,] or (3) "[t]hat the person should have known would cause a reasonable person in the individual's circumstances to . . . [f]ear for his or her safety or the safety of another person; . . . [f]eel seriously alarmed, disturbed, or frightened; or . . . [s]uffer emotional distress." D.C. Code § 22-3133(a). The statute plainly states that it "does not apply to constitutionally protected activity." D.C. Code § 22-3133(b). Thus, while the Court, the parties, and *amicus* have devoted considerable energy to questions surrounding the constitutionality of enjoining Respondent's conduct, the ultimate question before the Court was not whether the stalking statute is unconstitutional, or whether applying the statute to Respondent would violate his constitutional rights; if the conduct engaged in by Respondent qualified as "constitutionally protected activity," he simply did not commit the offense of stalking under District law.

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[3] The facts of this case posed no issue regarding the Court's personal jurisdiction over Respondent or its subject matter jurisdiction over this dispute. The Court could exercise personal jurisdiction over Respondent based on his residence in the District of Columbia. D.C. Code § 13-422 (2013) ("A District of Columbia court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, or maintaining his or its principal place of business in, the District of Columbia as to any claim for relief."). The Intrafamily Offense Act, D.C. Code § 16-1001 *et seq.*, supplied the Court with subject matter jurisdiction over this case, authorizing a petitioner to "file a petition for civil protection . . . against a respondent who has allegedly committed or threatened to commit one or more criminal offenses against the petitioner . . . ," D.C. Code §16-1003(a), and defining "petitioner" as "any person who alleges, or for whom is alleged, that he or she is the victim of interpersonal, intimate partner, or intrafamily violence, stalking, sexual assault, or sexual abuse." D.C. Code 16-1001(12). The D.C. Court of Appeals clarified in *A.R. v. F.C.*, 33 A.3d 403 (D.C. 2011), that a person who is an alleged victim of stalking may seek a civil protection order "regardless of [her] relationship to the respondent." *Id.* at 405.

[4] Section 22-3132 of the D.C. Code defines a "course of conduct" as engaging in acts "directly or indirectly, or through one or more third persons, in person or by any means, on 2 or more occasions, to: follow, monitor, place under surveillance, threaten, or communicate to or about another individual . . . [or] to use another individual's personal identifying information." D.C. Code § 22-3132(8)(A), (C) (2013). This "course of conduct" may be completed by "any means," including "the use of telephones, mail, delivery service, e-mail, website, or other method of communication or any device." D.C. Code § 22-3132 (2).

Here, Petitioner advanced two theories as to how Respondent's conduct in distributing the flyers and creating the "Idiots Registry" website amounted to criminal stalking of Petitioner. First, Petitioner contended that the distribution Petitioner's photograph through the flyers and website constituted stalking, because Respondent undertook these acts — "communicat[ing] . . . about" Petitioner, *see* D.C. Code § 22-3132(8)(A) — in order to inflict emotional distress upon Petitioner and thus, ultimately, to convince her to stop participating in the maintenance of the sex offender registry. This theory of stalking animated portions of the Petition itself and Petitioner's testimony at trial; it was further explicated in Petitioner's Post-Hearing Brief. As Petitioner's arguments developed in the post-trial period, she increasingly emphasized a second theory of liability based not on Respondent's communications *about* Petitioner, but on his efforts to communicate *to* her. *See* D.C. Code § 22-3132(8)(A) (defining a course of conduct under the stalking statute as, *inter alia*, "communicat[ing] to . . . another individual"). As argued in Petitioner's Reply, under this theory, "Petitioner [did] not fil[e] [for a CPO] based on the speech in Respondent's fliers but, rather, his repeated conduct of [sic] depositing fliers around her office with photographs of her with the specific intent to cause her distress by leaving the fliers in places where Petitioner would be exposed to them." *Pet. Reply Br.* at 4.

As stated in rendering the verdict on January 28, 2014, and as further delineated *infra*, the Court found that the first of these theories has no valid legal basis, and that the second lacks evidentiary support in the record.

A. Communication *about* Petitioner, through distribution of photographs on the flyers and website, as stalking

As offensive as Petitioner found the "Idiots Registry" and the flyers disseminated by Respondent, the First Amendment to the United States Constitution protects Respondent's right

to engage in this type of speech. "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988). Speech on "public issues should be uninhibited, robust, and wide-open . . . [because such] speech occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (citing to *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) and *Connick v. Myers*, 461 U.S. 138, 145 (1983)) (internal quotation marks omitted). However, "not all speech is of equal First Amendment importance[;] . . . where matters of purely private significance are at issue, First Amendment protections are less rigorous." *Snyder*, 131 S. Ct. at 1215 (internal quotations and citations omitted). When speech relates to private matters, "there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas; and the threat of liability does not pose the risk of a reaction of self-censorship on matters of public import." *Id.* at 1215-16 (quoting *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)). Here, the question whether the First Amendment protects Respondent's conduct (and, hence, whether it falls outside of the scope of the District's stalking statute) thus hinged on whether the message conveyed on his flyers and website constituted speech on matters of "public concern."

The Supreme Court has defined speech on a matter of public concern as speech that either can be "fairly considered as relating to any matter of political, social, or other concern to the community" or is on "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder*, 131 S. Ct. at 1211 (quoting *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004)). In *Snyder*, the Supreme Court made clear that "all circumstances of the case" except "a statement's arguably 'inappropriate or controversial

character'" must be considered in evaluating whether particular speech touches on a matter of public or private concern. *See id.* at 1207 (quoting *Rankin v. McPherson*, 483 U.S. 77, 83-84 (2004)). The Court must consider the "content, form, and context" of the speech "as revealed by the whole record." *Id.* at 1216. That is, "it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said." *Id*. at 1216.

Respondent's flyers and websites were safely described as speech on matters of public concern; and indeed, Petitioner did not dispute this key point. The "content, form, and context" of Respondent's message amply supported the conclusion that it spoke to matters of public concern. *See Snyder*, 131 S. Ct. at 1216. Respondent's flyers and websites characterized sex offender registries — which were created by legislation and which are maintained by government agencies — as unfair, un-American, and analogous to lists of citizens created by repressive regimes. Respondent criticized those who have supported the creation and maintenance of offender registries, including politicians, legislators, and the bureaucrats (e.g., CSOSA employees) responsible for the day-to-day administration of the registries; he identified Petitioner as one such person. He distributed these flyers at CSOSA, the very place where sex offender registration occurs in the District of Columbia, and where it is fair to infer that the CSOSA workers responsible for the registry as well as registrants who may agree with Respondent frequent. Respondent did this peacefully; the flyers and website contained no threatening language, and there is no evidence in the record that Respondent threatened or even approached Petitioner when delivering his flyers.[5] *See Snyder*, 131 S. Ct. at 1215-17 (noting that protesters from the Westboro Baptist Church "did not yell or use profanity, and there was no

[5] Petitioner maintained that Respondent distributed his message in an allegedly non-public forum when he distributed the flyers around CSOSA and that this fact changes the First Amendment analysis. While this could have provided a point of contrast to the protests on public property in *Snyder*, the Court found Petitioner's argument unpersuasive for the reasons set forth *infra*. *See Snyder*, 131 S. Ct. at 1215-17.

violence associated with the picketing"). The photographs of Petitioner that appeared on the flyers and website were a part of Respondent's argument, and might have even been integral to it. The flyers analogized the "Idiots Registry" to offender registries, particularly the Sex Offender Registry; that is, the "Idiots Registry" purported to identify the names and faces of those behind a supposedly evil law in the same way sex offender registries identify sex offenders. The inclusion of Petitioner's photograph and name related directly to the quintessentially political commentary Respondent sought to make about an issue of public concern; Respondent's use of her name and photograph thus did not indicate that the flyers and website concerned a private matter.

Although the *pro se* Petition itself complained of the messages written on the flyers and website, once counsel entered their appearance on Petitioner's behalf, the emphasis of the request for relief primarily focused on Respondent's use of Petitioner's photograph; Petitioner's counsel asked that the Court separate the text of Respondent's website and flyers from the use of her photograph, and to enjoin only the latter.[6] As noted *supra*, however, the use of Petitioner's photograph represented an important part of Respondent's message and could itself be protected speech.[7] *See Kaplan v. California*, 413 U.S. 115, 119-20 (1973) (pictures are entitled to First

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[6] Petitioner's Post-Hearing Brief maintained that

> Petitioner is not addressing the textual aspects of Respondent's fliers that express Respondent's displeasure about his status as a sex-offender or the sex offender registry in general. Petitioner does address, however, the distribution of the portion of the flyer containing Petitioner's photograph. The inclusion of Petitioner's photograph . . . is not protected under the First Amendment.

Pet. Post-Hrg. Br. at 8. Likewise, Petitioner narrowed the request for relief related to the website. *Compare CPO Pet.* at 1 (asking that the Court order Respondent to "[r]emove the website with [Petitioner's] information . . . .") *with Pet. Post-Hrg. Br.* at 14 ("This Court should order Respondent to remove Petitioner's photograph from his website and enjoin Respondent from any further postings or distribution of Petitioner's photograph and personal identifying information.").

[7] Respondent's use of Petitioner's photographs seemed similar to the posting of Social Security numbers on a website by the appellant in *Ostergren v. Cuccinelli*, 615 F.3d 263 (4th Cir. 2010). In *Ostergren*, a Virginia citizen created a website using information from a separate Virginia government website that made available online land records, including unredacted social security numbers. 615 F.3d at 266. Ostergren created a website that posted copies of these public records with the unredacted social security numbers "to publicize her message that

Amendment protection "until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution"). Moreover, the First Amendment does not permit the Court to engage in the segmented inquiry Petitioner requested.[8] The Supreme Court has explicitly held that where "the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical." *Riley v. Nat'l Fed'n of the Blind,* 487 U.S. 781, 795-96 (1988); *see also Snyder,* 131 S. Ct. at 1217 (noting that even if a few of the signs used in a funeral demonstration addressed the deceased and his family personally, because "overall thrust and dominant theme" of demonstration . . . spoke to broader public issues," the First Amendment shielded protesters from civil liability). The Court thus could not dissect the Respondent's flyers and website in the manner suggested by Petitioner's counsel.

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governments are mishandling SSNs and generate pressure for reform." *Id.* at 269. "She explained that 'seeing a document containing a SSN posted on my website makes a viewer understand instantly, at a gut level, why it is so important to prevent the government from making this information available on line [sic].'" *Id.* The Fourth Circuit deemed Ostregren's message, including the social security numbers, "political speech . . . [that] lies at the very center of the First Amendment," *id.* at 272 (quoting *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991)), and so found the law Ostergren allegedly violated by posting SSNs of others unconstitutional as it applied to her. Here, Respondent's overall message also struck the Court as a political one that he chose to make through the use of Petitioner's photograph, to, presumably, "make[] a viewer understand [his message] . . . at a gut level." *See id.* at 269.

[8] Petitioner's Reply cited two cases to attempt to bolster her position that Respondent's use of Petitioner's photographs may be evaluated separately from his overall message. Petitioner cited *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) to support her argument that "the Supreme Court . . . does not require that each piece of speech be indivisible from others, making the totality of the speech either permissible or not." *Pet. Reply Br.* at 4. This precedent is inapposite, however, as *NAACP v. Claiborne Hardware* involved the separation of an individual boycotter's actions and words from those of others, not parsing words or conduct in the message of one individual or communication. Petitioner also cited *United States v. Syring*, 522 F. Supp. 2d 125, 130 (D.D.C. 2007), a case in which the United States District Court evaluated phone calls both "in context" and separately to identify which ones constituted true threats. This case also does not provide support for Petitioner's position; the District Court held that a jury could answer the factual question whether any of the phone calls or emails sent by the criminal defendant constituted a true threat under a criminal threats statute. The case does not suggest a jury should evaluate an individual phone call or email sentence by sentence, for example, to separate and treat differently protected versus unprotected content.

Nor did the Court find persuasive Petitioner's other arguments that Respondent's message did not constitute protected speech. In her post-trial brief, Petitioner argued first that Respondent obtained Petitioner's photograph[9] in violation of a regulation prohibiting photography in General Service Administration (GSA)-controlled property, and that the use of the photograph therefore did not constitute protected speech. The Court did not have to analyze whether this regulation, even if it did apply to the CSOSA building, would control the disposition of the constitutional and statutory issues. First, Petitioner's argument relied on facts and evidence — i.e., the lease for the building that CSOSA occupies and the alleged fact that the building is controlled by the GSA — that simply were not part of the record at trial. Instead, Petitioner attempted to provide this evidence in a footnote in her Post-Hearing Brief; therefore, these factual assertions were never subject to the rules of evidence and cross-examination. In addition, as *amicus* pointed out, if the Court did consider evidence outside the record, publicly-available information suggests that GSA does not control this space, and that the regulations thus do not apply to CSOSA's office. In any event, even assuming the regulations do apply to the CSOSA building, Respondent's alleged photography in violation of the regulations did not alter the nature of his speech; i.e., stating that the photograph was taken in violation of the federal regulation does not mean that a communication on an issue of public concern that contained the photograph would be the type of constitutionally unprotected activity that falls within the scope of the stalking statute.[10]

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[9] As explained *infra*, Petitioner did not present sufficient evidence from which the Court could conclude that Respondent took the photographs.

[10] Speech violative of federal regulations is not one of the narrow classes of speech unprotected by the First Amendment. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (noting "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem . . . [these are the] lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

Petitioner also argued that the photographs were improperly obtained because the taking of them violated Petitioner's reasonable expectation of privacy. However, this argument, again, was premised on facts not developed in the record. Specifically, Petitioner submitted no evidence at trial about where in the office the photographs were taken, the privacy of this area, or who had access to it. Without the presentation at trial of any proof regarding the alleged privacy of the area in which the photographs were taken, the Court could not conclude that this was a private area in any sense and could not accept Petitioner's invasion of privacy argument. Even accepting the representations in Petitioner's Post-Hearing Brief as true, the photographing of Petitioner could not constitute an invasion of a reasonable expectation of privacy. As *amicus* pointed out, Petitioner had no expectation of privacy in what she exposed to plain view, such as her physical appearance when interacting with the public in her workplace on the day the photographs were taken, *see Horton v. California*, 496 U.S. 128, 134-37 (1990), and observations made in plain view can be recorded or photographed without violating a reasonable expectation of privacy, *see United States v. Cacerres*, 440 U.S. 741, 751 (1979) (stating that recording of conversations did not violate the speaker's reasonable expectation of privacy since the "conduct and revelations of an agent operating without electronic equipment do not invade . . . [a] constitutionally justifiable expectation[] of privacy . . . . "). In addition, as recognized by the Supreme Court in *O'Connor v. Ortega,* 480 U.S. 709 (1987), and by the District of Columbia Court of Appeals in *Gatlin v United States*, 833 A.2d. 995, 1005 (2003), an employee has a reduced expectation of privacy in the workplace. The photographs of Petitioner that appear on the flyer and website did not raise privacy concerns; they simply show her face, a portion of her body, and her clothing—all aspects of her appearance that she exposed to the public and to other employees when she went to work that day. Even assuming, *arguendo*, that the photographs

were taken in a private portion of the office, the photographs here show only Petitioner's physical appearance and parts of government-owned furniture and fixtures — in other words, nothing that implicated Petitioner's privacy interests.

Finally, to the extent that Petitioner argued that the distribution of flyers to others does not deserve First Amendment protection because it caused Petitioner a great deal of emotional distress, the First Amendment required the Court to reject that argument as well. To be sure, an argument can be made that Respondent's website and flyers are quite offensive and contribute little to civil discourse on these issues. While the Court credited Petitioner's testimony that the flyers and website distressed and upset her, the First Amendment protects even offensive and inflammatory speech. First Amendment jurisprudence is, of course, replete with cases in which speech even more offensive than that engaged in here was found protected under the First Amendment despite the effects of the speech on the listener. Recently, in *Snyder v. Phelps*, discussed *supra*, the Supreme Court held that the First Amendment protects even more outrageous speech delivered in a peaceful, legal manner, 131 S. Ct. at 1217-18, and in *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992), the Supreme Court plainly stated that "[l]isteners' reaction to speech is not a content-neutral basis for regulation."

Given the language of the District's stalking statute, the Court's conclusion that the Respondent's message, delivered through the flyers deposited at CSOSA and the website, addressed matters of public concern and so merited First Amendment protection largely resolved the case. The District's stalking statute exempts "constitutionally protected activity" from its scope. *See* D.C. Code § 22-3133(b). The Supreme Court has made clear in a number of cases, including *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), that only a few categories of speech are not afforded any First Amendment protection. *Chaplinsky*, 315 U.S. at 571-72

("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."). These categories include the "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* Respondent's speech did not fall into any of these unprotected categories, and Petitioner did not argue that it did. Therefore, as political speech or speech on matters of public concern (delivered in the manner Respondent has done so here), Respondent's flyers and website qualified as "constitutionally protected activity" exempt from the District's stalking statute.[11] D.C. Code § 22-3133(b). For this reason, the Court could not find Respondent stalked Petitioner under Petitioner's first theory.

B. Communication *to* Petitioner, through distribution of photographs on the flyers and website, as stalking

Alternatively, Petitioner maintained that Respondent's actions in surreptitiously photographing her and then distributing the flyers with her photograph in places where she was likely to be exposed to them amounted to a course of conduct that fell within the scope of the stalking statute. Conceivably, such conduct could provide the basis for a stalking claim; someone who creates written messages and then delivers them directly to another person against the listener's wishes in order to, or in a manner he knew would, upset the listener could be found guilty of stalking. This could be so even if the content of the speaker's message and methods of

[11] At the post-hearing oral argument, Petitioner's counsel also had trouble squaring this first theory of liability with the sharp limitations the Court of Appeals has placed on the circumstances under which communications about others can constitute stalking or provide the basis for the issuance of a CPO. In *Richardson v. Easterling*, 878 A.2d 1212 (D.C. 2005), the Court of Appeals held that even the distribution of defamatory materials (which, notably, are unprotected by the First Amendment) to persons other than the petitioner could not amount to stalking or justify the issuance of a CPO; it is difficult to see how the political speech here — provocative and perhaps even offensive, but not defamatory — could, consistent with that opinion, logically serve as the basis for the requested CPO.

communication resemble traditionally protected speech. For example, in *R.D. v. P.M.*, 135 Cal. Rptr. 3d 791, 801 (Ct. App. 2011), the Court of Appeal of California upheld an injunction that prohibited a former patient from distributing flyers about her former therapist near the therapist's workplace. The patient had allegedly distributed the flyers at the therapist's office building "to inform consumers about her negative experience with [the therapist] as a clinical social worker." *Id.* But the trial court believed, and the Court of Appeal agreed, that the former patient's intention was not to "address an issue of public importance" but to "harass" the therapist. *Id.* Significantly, however, the distribution of the flyers alone did not form the basis for the injunction. The former patient's conduct directly threatened the therapist; "the evidence showed that P.M. had come to the market at which R.D. regularly shopped in order to confront R.D. in a threatening manner; that she had come to R.D.'s son's school to distribute flyers in order to continue her harassment and stalking of R.D. and her family; and that she had on many occasions come in and around R.D.'s office building in a successful effort to alarm R.D. and to put her in fear for her safety." *Id.* at 789.

The evidence presented at trial contained not nearly enough proof that Respondent engaged in such a course of conduct to support a finding that he violated the District's criminal stalking statute. Petitioner's contention that Respondent created and distributed the flyers in order to expose Petitioner to them[12] was largely undermined by the fact that Respondent did not attempt to deliver them directly to Petitioner in her office (where, in fact, he is legally obligated

[12] Petitioner argued that Respondent's use of Petitioner's photograph indicated that Respondent purposefully directed the flyers at Petitioner. For the reasons described in Part II.A., *supra*, Respondent's use of Petitioner's photograph could not be separated from his message as a whole, and his use of her photograph did not convert the political nature of his speech to communication addressing a private concern.

to go on a regular basis[13]); rather, Respondent left the flyers in locations where others, not Petitioner herself, found them.[14] Moreover, there was no evidence that Respondent's conduct in delivering the flyers "to Petitioner" at her workplace was what caused emotional distress to Petitioner; rather, Petitioner made clear in her testimony at trial that her goal was not to halt distribution of materials to her, but to prevent *any* distribution of the flyers by Respondent (even outside of CSOSA's office building) and to require Respondent to take down the website.

Petitioner made much of Respondent's statement in his post-trial brief regarding his reasons for "target[ing]" and "choos[ing] for placement on the Idiots Registry . . . low level government functionaries like Petitioner. . . . " *Resp. Br. in Opp.* at 3-4. In this filing, Respondent also expressed his belief that government employees like Petitioner implement this supposedly "evil" law, and that exposing them and their actions could lead to a mass refusal by bureaucrats to participate in the maintenance of the registries. *See id.* at 4-6. Again, when evaluating Respondent's message as a whole and in context, *see Part II.A., supra*, it is properly characterized not as one that relates only to Petitioner personally, but rather as a quintessentially political argument that focused on Petitioner's job and public function, and was directed to others in similar positions and at the public generally. To find that this conduct amounted to stalking — in other words, to equate this type of advocacy to a course of conduct that illegally communicates a message to an unwilling listener — would criminalize much political speech intended to put pressure on an official to change a policy, from political attack ads to acts at

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[13] *See* D.C. Code § 22-4014 ("During the registration period, a sex offender shall . . . [*inter alia*] . . . [m]eet with responsible officers and officials for the purpose of carrying out any requirement adopted by the Agency [(CSOSA)] under this chapter.").

[14] To the extent Petitioner's theory depended on a finding that Respondent photographed Petitioner, the record simply did not contain enough evidence to support a factual finding that he did so. Petitioner acknowledged that her conclusion that the picture was taken during one of Respondent's visits to CSOSA was speculation; even her speculation was not particularly conclusive, as she testified that she assumed that either Respondent *or his "companion"* took the picture.

demonstrations such as burning a public figure in effigy. Such a conclusion would run counter to First Amendment case law that has protected, for example, anti-abortion protesters who make public the names and addresses of doctors in order to pressure them to cease performing abortions. *E.g.*, *Planned Parenthood of the Columbia/Williamette, Inc*., 244 F. 3d 1007, 1019 (9th Cir. 2001) (holding that the use of posters and dissemination of information about abortion services providers constituted speech that did not amount to a threat to the abortion providers, request others to harm the abortion providers, or incite imminent lawless action, and so was protected by the First Amendment as messages made "in the context of public discourse, not in direct personal communications"). Petitioner did not provide sufficient evidence that Respondent directed his message at her specifically rather than spoke "in the context of public discourse[,]" *id.* at 1018, let alone that Respondent directed his message at Petitioner in a manner that constituted criminal stalking.

C. Denial of the request for a Civil Protection Order

Having found that Respondent did not stalk Petitioner within the meaning of the District's stalking statute, the Court was required to deny the Petition. *See* D.C. Code § 16-1005(c). However, as the Court stated during the January 28, 2014 hearing, even if the Court accepted Petitioner's arguments as to how Respondent's conduct could technically be construed as violating the stalking statute, the Court still would not have issued a CPO in this case. Even after finding that one of the requisite types of offenses has been committed, the Court retains discretion to determine whether a civil protection order should issue. D.C. Code § 16-1005(c) ("If, after hearing, the judicial officer finds that there is good cause to believe the respondent has committed or threatened to commit a criminal offense against the petitioner or against

petitioner's animal or an animal in petitioner's household, the judicial officer *may* issue a protection order . . . .") (emphasis added); *see also Murphy v. Okeke*, 951 A.2d 783, 786 (D.C. 2008) ("[T]he trial court, in the exercise of its discretion, should only enter a CPO against a party for reasons consistent with the underlying purpose of the Intrafamily Offense Act."). In this case, the Court, even if it had good cause to believe Respondent violated the stalking statute, would not have issued the requested Order. The type of Order requested in this *sui generis* case hardly seems consistent with the underlying purposes of the Intrafamily Offense Act. *See Murphy v. Okeke*, 951 A.2d at 786; *see also* D.C. Code §§ 16-1001 *et seq.* In addition, in the undersigned's opinion, the benefits to Petitioner from the issuance of the CPO would be far outweighed by the chilling effect on speech that would stem from the requested restraint. Finally, the potential availability of other remedies to address the Petitioner's concerns — in particular, the issuance of truly content-neutral rules by CSOSA regarding photography and the distribution of flyers in its offices — militated against enjoining Respondent's speech based purely on it content.

III. CONCLUSION

The Court's denial of the Petition cannot, of course, be taken as an endorsement of Respondent's views on offender registries or his methods of seeking reform. While Respondent offered cogent criticisms of the sex offender registry and a historically-based justification as to why those who administer this policy on a day-to-day basis are the only individuals who can be lobbied to change it, it can also be fairly argued by others that his rhetoric and methods are both highly offensive and unlikely to succeed. Whether the Court agreed with Respondent on those topics was simply irrelevant to the decision necessary to the resolution of this case; that is, to

whether District law criminalizes Respondent's method of expressing his strongly-held political views on these subjects and permits Petitioner to obtain an injunction to limit how he does so. Finding that it did not, the Court denied the Petition.

Todd E. Edelman
Associate Judge
(Signed in Chambers)

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Copies to:

Kristin Eliason, Esq.
Kristin@nvrdc.org

Kfir B. Levy, Esq.
klevy@steptoe.com

Arthur B. Spitzer, Esq.
artspitzer@aclu-nca.org

Dennis Sobin
dennis@prisonsfoundation.org