Received 3/6/2023 5:59:36 PM Supreme Court Middle District
Filed 3/6/2023 Supreme Court Middle District

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 104 MAP 2022

FREDERICK E. OBERHOLZER, JR.
AND DENISE L. OBERHOLZER

Appellees,

v.

SIMON GALAPO AND TOBY GALAPO

Appellants.

BRIEF OF APPELLEES, FREDERICK E. OBERHOLZER, JR. and DENISE OBERHOLZER

On appeal from the Order of the Superior Court at No. 794 EDA 2020 dated April 18, 2022, Vacating the judgment of the Montgomery County Court of Common Pleas, Civil Division, entered April 1, 2020, at No. 2016-11267 and Remanding. The order of the Superior Court dated April 5, 2022, withdrew the March 7, 2022, memorandum.

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DATED: March 6, 2023

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I. COUNTER-STATEMENT OF THE CASE

Frederick and Denise Oberholzer (812 Suffolk Road, Rydal)(R.012a) are adjacent property owners to Simon and Toby Galapo (803 Delene Road, Rydal). (012a-013a). Simon Galapo is a medical doctor in active anesthesiology practice. (R.231a; 233a). Both parties reside in single family homes. (R.013a). The back yards of Oberholzers' and Galapos' properties abutt each other and are separated by a creek, and (on Galapos' property) low lying shrubs and several tall trees. (R.013a). The backyard of the properties are visible to each other from their respective houses and yards. (R.013a).

Beginning in 2014, tensions arose between the parties. (R.013a-014a). On November 22, 2014, when Simon Galapo saw the Oberholzers in their back yard, he confronted them about his re-surveyed property line. (R.013a). Tensions that day were high (173a-175a), and Denise Oberholzer called Simon Galapo a "f"*king Jew." (R.175A). An argument involving only Simon Galapo and Rick and Denise Oberholzer ensued in their back yards, as Simon Galapo claimed he was Jewish. (R.174a-175a).

In June, 2015, *seven months* after the November 22, 2014 incident, Simon Galapo began placing signs along his rear property line at the creek; all of the signs directly faced Oberholzers' house and property. (R.014a; R.002b-004b). The signs

contained words, names and innuendo directed towards the Oberholzers and their home:

No Place 4 Racism;

Hitler Eichmann Rascists;

Racists: the true enemies of FREEDOM;

No Trespassing - Violators Will Be Prosecuted;

Warning! Audio & Video Surveillance On Duty At All Times.

(R.014a; R.005b-R.008b).

In February and March, 2016, Galapos posted additional signs: **Racism= Ignorant**; **[Star of David symbol]**; **Never Again; WWII: 1,500,000 children butchered: Racism.** (R.016a-017a; R.010b-R.012b). Simon Galapo posted the sign about butchered children in WWII on Easter Sunday. (R.017a-018a; R.012b).

On May 16, 2016, Galapos posted the sign: "**Look Down on Racism.**" (R.0471a; R.013b). On May 22, 2016, Simon Galapos was in his back yard and yelled to Rick Oberholzer "more signs, more signs". Galapo put up a new sign: "**Racist Acts will be met with Signs of Defiance**". (R.0471a; R.012b).

On June 5, 2016, adding to the string of signs along his back property, Galapos posted a new sign: "**Racism Against Kids Is Not Strength, It's Predatory**". (R.018a; R.011b). The evening of June 6, 2016, Galapos posted another sign in block letters: "**Woe to the Racists. Woe to the Neighbors**".

(R.019a). On June 8, 2016, Galapos posted: "**Got Racism**?" (R.019a; R.004b, R.015b).

On June 10 and 11, 2016 (after Galapos were served with the complaint), Galapos posted the sign: "**Every Racist Action Must be Met With a Sign of Defiance**". (R.019a; R.002b, R.003b). On June 13, 2016, Oberholzers awoke to yet another new sign facing their property: "**Racism - Ignore It and It Won't Go Away**". (R.019a). On June 21, 2016, Denise Oberholzer was in her back yard with her neighbor and the neighbor's two-year old grandson. Simon Galapo confronted them at the creek and posted another new sign: "**Racism -The Maximum of Hatred for the Minimum of Reason**". (R.019a; R.017b).

In March, 2016, Galapos posted "**Warning! Audio & Video Surveillance On Duty At All Times**". (R.017a; R.0472a; R.046b; R047b). On July 12, 2016, Galapos posted a new sign: "**RACISM: It's Like a Virus, It Destroys Societies**". (R.0472a; R.002b; R.003b). The parties reached an interim consent order in August, 2016, and the signs were taken down for period of time until April, 2017. (R.0472a; R.047b).

Beginning May, 2017 Simon Galapo re-posted three of the same signs that were posted before the consent order, and two new ones:

Racism - Ignore It and It Won't Go Away;

Racism - The Maximum of Hatred for the Minimum of Reason;

No Place 4 Racism;

Racists Don't Discriminate Whom They Hate [new];

Hate Has No Home Here [new]

(R.0472a-0473a; R.004b; R.008b; R.017b; R.025b). Galapos continued posting signs into 2018, some old and some new:

Racism = Ignorant;

Racism: It's Like a Virus, It Destroys Societies;

Every Racist Action Must be met with a Sign of Defiance;

Every Racist Action Must Have an Opposite and Stronger Reaction;

Quarantine Racism and Society Has a Chance.

(R.0473a; R.047b-048b; R.002b-004b; R.040b).

The evening of June 8, 2019, three days after the Galapos signed the settlement agreement and appeared in court, Galapos moved the signs around. (R.0711a). The signs spread across Galapos' back property prior to June 5, 2019 were now grouped together in a row, directly facing the Oberholzers' Florida room and back door. (R.0711a). The signs re-positioned directly behind the Florida room, were:

Racism - The Maximum of Hatred for the Minimum of Reason;

Racists Don't Discriminate Whom They Hate;

RACISM: It's Like a Virus, It Destroys Societies;

Every Racist Action Must Have an Opposite and Stronger Reaction;

Racism= Ignorant; Racists Don't Discriminate Whom They Hate;

Hate Has No Home Here;

No Place 4 Racism;

Racism is Self-Hating;

Love thy Neighbor as Thyself.

(R.0711a).

On June 15, 2019, Simon Galapo marched down to the property line and in front of Denise, re-posted the sign "**Got Racism**?" (R.0712a). The same day, Simon Galapo moved the re-posted signs "**Racists Don't Discriminate Whom They Hate**" and "**Hate Has No Home Here**" in his back yard directly facing the Oberholzers' driveway alongside their house. (R.0712a). The morning of July 1, 2019, Galapo re-posted another sign: "**Look Down on Racism**". (R.712a).

On July 21, 2019, upon motion of the Oberholzers to supplement the lower court record prior to final adjudication (to add signs re-posted by Galapos to directly face Oberholzers' Florida room)(R.0709a), the court (Tolliver, Sr., J.) entered an order supplementing the record with color photographs depicting the placement. R.0736a).

Trial on the Oberholzers' petition for permanent injunctive relief was held before the Montgomery County Court of Common Pleas on August 13, 2019 on a

stipulated record, briefs and oral argument in the courtroom. (R.445a-467a; 493a-503a).

There are two operative orders for injunctive relief in favor of the Oberholzers and against Galapos. Under the order of September 12, 2019 (and memorandum), "the signs posted on Galapos property were allowed to remain. The signs "previously posted"[1] on Galapos' property shall be positioned in such a way that they do not directly face and target Plaintiffs' property; the fronts of the signs (lettering, etc.) are not to be visible to the Plaintiffs nor face in the direction of Plaintiffs' home." (R.0694a-0706a; Appendix A at 1).[2]

Galapos filed their motion for post-trial relief on September 18, 2019. (R.632a-658a). Oberholzers filed their verified petition to hold Galapos in civil contempt, alleging non-compliance with the September 12, 2019 order when Galapos simply turned their signs around exactly where they were posted, but the words and symbols on the signs were still visible to Oberholzers in their reversed state. (R.0761a-0771a).

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[1] The "previously posted" signs were enumerated in the parties' settlement agreement and release (¶5)(R.434a) signed shortly after the settlement conference on May 30, 2019 with the trial court (Tolliver, Sr., J.) participating. Over a four-year period, Galapos put up signs, took some of them down, put up new signs and re-posted signs previously taken down, and also moved the signs around all along the back property line bordering Oberholzers yard and house.

[2] Herein, for brevity and ease of reference, "Appendix [____]" shall refer to the Appendix attached to Galapos' briefing, marked A-G inclusive.

The second order was entered on October 11, 2019 as an amended order, adding a provision at the end of subpart B of the September 2, 2019 order: "In order to ensure that none of the signs are visible regardless of their positioning, these signs shall be constructed of opaque material." (R.0693a; Appendix B).

Galapos filed for post-trial relief. Oral argument was heard on November 26, 2019 (R.10a-011a). A final order denying the motion was entered on January 20, 2020. (R.659a). The motion for post-trial relief was denied on January 3, 2020. (R.659a). Galapos filed a notice of appeal on January 9, 2020. (R.011a).

Following briefing and oral argument, the Superior Court issued its opinion reversing the lower court and remanding for further consideration on the question of the applicable standard to review content-neutral speech under constitutional concerns. On April 18, 2022, the opinion was converted to a published opinion on motion of Oberholzers to the Superior Court, at 274 A.3d 738 (Pa.Super. 2022). (Appendix F).

Galapos filed their petition for allowance of appeal on April 4, 2022, which the Supreme Court granted. Oberholzers filed opposition to the petition. The petition was granted on October 24, 2022 and the issues before this Supreme Court have attached. (Appendix. G).

II. SUMMARY OF THE ARGUMENT

The trial court fashioned the correct remedy to enjoin Simon and Toby Galapos' protest of picketing Oberholzers' private residence and property with signs containing words, symbols and letters. The aspect of first impression of this case lies only in the *fora* of the speech – two residential homeowners and their private property abutting each other – not in the questions of whether the injunction failed, or exceeded, constitutional limits or standards on speech under controlling law.

The lower court considered the fulsome record including the nature of Galapos' expressive protest in the placement of their signs, and restricted Galapos' signs with two injunctive orders. The first order allowed the signs to remain, but ordered the "fronts of the signs (lettering, etc.)" shall not face and target plaintiffs' property and are not to be visible to plaintiffs nor face in the direction of their home. When Galapos struggled to comply with this order, the trial court amended the injunctive order to ensure that none of the signs were visible regardless of their positioning, and the signs shall be constructed with opaque material. In other words, if medals were given for persistence in picketing a residential neighbor, Galapos would win the Gold.

There is no error in the standard applied by the Superior Court on whether the injunction re-directing Galapos' signs at Oberholzer's backyard property line

was a prior restraint under the Article I, Section 7 or the federal Constitution. Appellants and *Amicus* have not pointed out any error of the appellate court on this question. On the applicable standards, and under *Madsen v. Women's Health Center* discussed *infra*, there no basis for reversal or remand.

Nor is there any error in the Superior Court's analysis of prior restraint under the injunction ordering the re-direction the fronts of Galapos' signs at the area of placement in Galapos' backyard. Again, appellants and A*micus* have not pointed out any error of the appellate court or lower court on the applicable standards, but instead argue strict scrutiny is the correct standard to enjoin Galapos' expressive protest. There is no evidence anywhere in the record any of these signs had a "pure speech" component, and both lower courts studied the question assiduously. There is no basis for reversal or remand.

To this appeal, Galapos did not publish their targeting signs by any medium of expression to anyone other than the Oberholzers at their private property. Galapos did not target any individual with their signs at any *fora* other than Oberholzers' backyard property line. Akin to straight picketing (*Frisby v. Schultz)*, Galapos publication of opinions, ideas or messages to anyone in the community or world other than the Obeholzers' private home was not restrained. The trial court left Galapos "free to continue to post signs on his property with any message they

deemed appropriate so long as they do not target or face Plaintiffs' Oberholzers' property."

To prior restraint, appellants attempt a theoretical argument that targeted picketing of a private residence deserves equivalent protection as libelous published speech. Stated in the obverse, Galapos ask this Supreme Court to find publication of a single article in a one-time journal is the same speech as picketing a private residence with several dozen fixed signs 24 hours a day, seven days a week, *for over four years* and until the end of the world, solely to protest and force Oberholzers to suffer unwanted invasive speech. The comparison is an absurd proposition under any constitutional measure.

Whether "the Courts in *Willing* and its progeny do not suggest the protection afforded to speech is based on the tort claim arising from the speech" is a wholesale guess, as *Willing* and the federal decisions did not involve tort claims other than libel and defamation and the lower court here did not adjudicate the injunction on defamation or any other tort claim. Appellants and *Amicus* have cited no controlling law, and no compelling rationale under any decisional law, ("*Willing* and its progency" included) that refusal to enjoin defamatory speech is applicable to enjoin speech under *all torts claims* that could conceivably be brought simply because speech was involved in the first instance.

To the larger question, Galapos propose to overturn the injunction on its "tort claim hypothetical" with no consideration for the *fora* of Galapos' speech, the invasive nature of the speech targeting private property, the expressive protest of the speech, the balancing of Oberholzers' privacy interests against the invasive protest, and no prior restraint in re-directing the fronts of the signs under the narrow injunction. Galapos ask this Supreme Court to reverse the trial court's injunction without discussing the controlling law that justified the injunction in the first place.

Courts have rejected Galapos' argument that the injunction is not content-neutral where the restriction on the placement of the signs (away from Oberholzers' property) prohibits Galapos from communicating specific messages to the Oberholzers. The restriction that re-directed the fronts of the signs (lettering etc.) to protect the Oberholzers' privacy rights was unrelated to the content of the signs, fashioned narrowly to protect Oberholzers from the unrelenting, excessive tactics of Galapos. Because the injunctive order does not single out any sign against any other sign, the injunction could never be a "ban masquerading as a limitation" or motivated by selective content.

Addressing *Amicus* on the *Commonwealth v. Edmunds* standard, "that day has [*not*] come" for this Supreme Court to review the Superior Court's lengthy analysis of the injunctive order under Article I, Section 7 and our Declaration of

Rights, discard and overrule decades of controlling jurisprudence on the questions, and reverse the injunction.

Under the *Edmunds* framework, the Superior Court (and trial court) undertook their own independent analysis of the *fora* of Galapos' speech, the invasive nature of the targeting signs, the expressive protest of the speech, balancing Oberholzers' private property interests against Galopos' invasive protest, all under the applicable standards for prior restraint and content-neutrality. *Edmunds* considerations are discussed *in seriatim* throughout appellees' legal argument.

The Superior Court reached the correct decision in this case. As guided by the concurrence/dissent (Stabile, J.), discussed above, this Supreme Court should similarly find that "[it] cannot fathom a more narrowly tailored remedy under the more stringent standard than that ordered by the trial court", find harmless error in the lower court's standard, and uphold the injunction as ordered by the trial court.

III. LEGAL ARGUMENT

A. The injunction that the front of Galapos' signs (lettering, etc.) shall not be visible to the Oberholzers nor face in the direction of Oberholzers' home is not an impermissible prior restraint under Article I, section 7 of the Pennsylvania Constitution

1. Standard on Constitutional question of prior restraint

Article I, Section 7 of the Pennsylvania Constitution prohibits prior restraint on the exercise of an individual's right to freely communication thoughts and opinions, stating in relevant part: "[t]he free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty..." Pa.Const. Art. I, §7. As a general rule, the Pennsylvania Constitution is designed to "...to prohibit the imposition of prior restraints upon communication of thoughts and opinions, *leaving the utterer liable only for an abuse of that privilege.*" *Goldman Theatres v. Dana*, 405 Pa. 83, 88, 173 A.2d 59, 62, *cert denied*, 368 U.S. 897 (1961)(emphasis supplied).

Willing v. Mazzocone, 482 Pa. 377, 393 A.2d 1155 (1978) holds that "history supports the view that the framers of our state constitution intended to prohibit prior restraint on Pennsylvanians' right to speak, in the following discussion:

> Blackstone so recognized [this principle] (circa 1767) when he wrote: "[t]he liberty of the press is indeed to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published. Every freeman

> had an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but *if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own territory*."

Id., 393 A.2d at 1157-58; citing *Goldman Theatres v. Dana*, 405 Pa. at 88 (emphasis supplied).

It is well-settled that a state may provide through its constitution a basis for the rights and liberties of its citizens independent from that provided by the Federal Constitution, and that the rights so guaranteed may be more expansive that their federal counterparts. *Commonwealth v. Tate*, 495 Pa. 158, 169, 432 A.2d 1382, 1387-88 (1981). The Pennsylvania Supreme Court has recognized the Pennsylvania Constitution to be an alternative and independent source of individual rights. *Id.*, 495 Pa. at 169-70 (citations omitted). Article I, Section 7 of the Pennsylvania Constitution "provides protection for freedom of expression that is broader than the federal constitutional guarantee." *Pap's A.M. v. City of Erie*, 812 A.2d 591, 605 (Pa.2002).

"Of course, on this record, these invaluable rights [under Article I, Section 7] are not the sole constitutional guarantees we must consider." *Commonwealth v. Tate*, 495 Pa. at 171. The Pennsylvania Supreme Court has recognized the rights to possess and use property, along with rights of freedom of speech, religion, and the press, as one of "the Hallmarks of Western Civilization" (*Andress v. Zoning Brd of Adjustmnt of Phila.*, 410 Pa. 77, 86, 188 A.2d 709, 713-14 (1963), are not

absolute rights. *Id.* Rather, such Constitutional rights are "subject to the paramount right of the Government to reasonably regulate and restrict, under a reasonable and non-discriminatory exercise of police power, the use of property whenever necessary for the public health, safety, morals and general welfare. *Commonwealth v. Tate*, 495 Pa. at 171-72, citing *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926); *Medinger Appeal*, 377 Pa. 217, 221, 104 A.2d 118 (1965). This is further embedded in the established principle that government may, when necessary, protect personal liberties even when that protection, to a limited extent, subordinates the constitutional interests of others. *Commonwealth v. Tate*, 495 Pa. at 172, citing *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

Not all restrictions on speech constitute a prior restraint of that speech. In *Philadelphia Newspapers, Inc. v. Jerome*, 478 Pa. 484, 387 A.2d 425 (1978), our Supreme Court defined a prior restraint as a court order that "prevents publication of information or material in possession of the press. *Id.,* 387 A.2d at 432. A court order that does "not prevent [petitioners] from publishing any information in their possession or from writing whatever they pleased" does not constitute a prior restraint upon publication." *Id.,* 387 A.2d at 433.

The Supreme Court of the United States has held that restrictions may be placed upon access of the public and the press to certain information when the restrictions protect constitutional interests. *McMullan v. Wohlgemuth*, 415 U.S.

970, 94 S.Ct. 1547 (1974)(press access properly restricted by state regulators protecting privacy interests of welfare recipients). "The rule applies the principal that government may, when necessary, protect personal liberties even where enforcement of those liberties may subordinate in limited instances the constitutional interests of others." *Philadelphia Newspapers, Inc. v. Jerome*, 387 A.2d at 434.

Kingsley Books v. Brown, 354 U.S. 436, 77 S.Ct. 1325 (1957)(Frankfurter, J.) is controlling here: "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of close analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties." "What is needed, writes Professor Paul A. Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis." *Id.*, 354 U.S. at 441 (citing *The Supreme Court and Civil Liberties*, 4 Vand.L.Rev. 533, 539).

There is no error in the standard applied by the Superior Court on whether the injunction re-directing Galapos' signs at Oberholzer's backyard property line was a prior restraint under the Article I, Section 7 or the federal Constitution. (Appendix F, at 14-19) Appellants and *Amicus* have not pointed out any error of

the appellate court on this question. On the applicable standards, and under *Madsen v. Women's Health Center* discussed *infra*, there is no error of law and no basis for reversal or remand.

2. ***Where the injunction restricted only the direction of Galapos' invasive signs but not the content of any sign, the restriction on the direction of the preexisting signs does not restrain Galapos's first amendment rights in their signs***

a. Analytical framework for First Amendment speech

"Courts have long recognized that each medium of expression presents First Amendment problems." *F.C.C. v. Pacifica Foundation,* 438 U.S. 726, 748 (1978). "Each method of communicating ideas is a law unto itself and that law must reflect the differing natures, values, abuses and dangers of each method." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981)(footnote omitted). *Compare Id.,* with *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994)(physical characteristics of signs may be regulated absent censorial purpose); *S.B. v. S.S.*, 243 A.3d 90, 104 (Pa.2020)(gag order protecting psychological and privacy of child in custody proceeding regulated the manner of public speech, not views or opinions).

The subject matter of the speech may modify the analytical framework. "Speech on matters of public concern is at the heart of First Amendment protection. *Snyder v. Phelps*, 562 U.S. 443 (2011) (holding, ability of the government consonant with the Constitution to shut off discourse solely to protect others from hearing it is dependent on a showing that substantial privacy interests

are being invaded in an essentially intolerable manner). Speech on matters of private concern, in contrast, are afforded lesser protections. *Snyder v. Phelps*, 562 U.S. at 452.

In addition to the subject matter of the speech, the nature of the forum at issue may alter the analytical framework. *S.B. v. S.S.*, 243 A.3d at 104 (First Amendment freedoms must be applied in light of the special characteristics of the relevant environment); *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 189 (2007)(holding, it is "black-letter law that, when the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter"); *Klebanoff v. McMonagle*, 380 Pa.Super. 545, 548-49, 552 A.2d 677 (1989)("[t]he standards by which limitations on speech must be evaluated differ depending on the character of the property at issue", and include the individual's right to reside at his/her private property free from intrusion upon one's solitude or seclusion); *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495 (1988) (picketing that specifically targets an individual's private residence is a form of expressive speech that can regulated or banned).

Cornelius v. NAACP, 473 U.S. 788 (1985) supports the lower court's injunction under the proposition "[t]he Government, 'no less than a *private owner of property*', has the power to preserve the property under its control for the use for which it is lawfully dedicated." *Id.*, 473 U.S. at 799-800 (emphasis supplied). The

United States Supreme Court has adopted a forum analysis as a means of determining when the Government [no less than a private owner of property] interest in limiting the use of the property to its intended purpose outweighs the interests of those wishing to use the property for other purposes. *Id.*, 473 U.S. at 800. The forum analysis is defined by the access sought by the speaker. *Id.*, 473 U.S. at 807. While *Cornelius* was a study in the Government's right to control public access to its non-public property (an internet site), the "First Amendment does not forbid a viewpoint neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." *Id.* at 811.

The Superior Court, citing *Madsen v. Women's Health Center*, 512 U.S. 753, 114 S.Ct. 2516 (1994) and *City of Ladue v. Gilleo*, 512 U.S. 43, 50-51, held the trial court's order granting a permanent injunction may change the analytical framework in that the analysis of constitutional scrutiny for a municipal ordinance is different than the analysis for a court injunction as regards signs on a private property. (Appendix F at 26).

In assessing a First Amendment challenge, the court must look not only at the private claims asserted in the complaint, but also inquire into the governmental interests that are protected by the injunction, which may include an interest in public safety and order. *Schenck v. Pro-Choice Network W. New York*, 519 U.S.

357, 117 S.Ct. 855 (1997), *citing Madsen v. Women's Health Center*, 512 U.S. at 767-768.

There is no error in the Superior Court's analysis of prior restraint ordering the re-direction the fronts of Galapos' signs at the area of placement in Galapos' backyard. Appellants and A*micus* have not pointed out any error of the appellate court or lower court on the applicable standard. There is no basis for reversal or remand.

b. Galapos posted their signs solely to "teach the Oberholzers a lesson," to protest what Simon Galapo perceived as anti-Semitic racism

Simon Galapo posted (re-posted) his signs not as content-driven speech, but solely to torment and invade the privacy and seclusion of the Oberholzers in their private home. The signs were a blunt form of protest and picketing, irrespective of actual content, rank as the content is. The lower court properly enjoined Galapos' expressive conduct in the signs "as presently positioned" targeting Oberholzers' property and home. (Appendix A, Memo Op. Sept. 12, 2019 at 8), finding the testimony and record supported the injunction.

Simon Galapos' own testimony proves the point: All of the signs are directed to the Oberholzers and their property. (R.257a; R.262a). The signs were spread across the entire rear boundary lines of both properties (R.266a) and were purposely placed so Oberholzers could clearly see [and not avoid] the signs

directly from their home and yard. (R.263a; R.266a; R.267a). Anyone driving by Oberhozers' house, the neighbors, and anybody walking on the sidewalk (R.239a; R.247a) would know the signs were directed at the Oberholzers. (R.238a; R.244a).

While Simon Galapo perceives the Oberholzers as "rascist" (R.248a), he posted the signs "to protest behavior which we [Galapos] perceive as being rascist towards myself, my wife, and my family." (R.244a). Galapos protest a racism that could affect the neighbors, on "both a community level, on an individual level as well as a worldwide level... anybody who acts in a racist manner". (R.246a-247a).

Simon Galapo explains his protest: "What [the signs] are saying is that they are protesting behavior which is perceived by myself as being racist [or racist behavior, R.260a] and, therefore, I am using my First Amendment right to then protest that." (R.249a; R.260a; R.261a).

Whatever Galapo claims about his First Amendment rights, his testimony proves he used the signs as retaliatory means of expression: "What I want is the Oberholzers to stop their behavior of racism as we perceive it, and then the signs will come down." (R.250a). Simon Galapo repeats himself: "The intent of the signs were for the Oberholzers to change a behavior which we perceived as being racist towards my kids, my wife, and me." (R.261a; R.272a). "The purpose of the

signs is my *protesting this behavior* [sic]." (emphasis supplied). (R.293a; R.295a).

"When [Oberholzers] don't behave, I want to retain my right to protest racist behavior." (R.293a). In other words, if Oberholzers "misbehave", Galapos will teach them a lesson and post the signs. Even Galapos' counsel at final argument on August 13, 2019 did not disagree on this point. The lower court opined: "[t]hese beliefs were further cemented ... [when Galapos' counsel] indicated this was a *personal protest* for Defendant Simon Galapo against his backdoor neighbors, the Plaintiffs." (Appendix A, Memo. Op. Sept. 12, 2019 at 9)(emphasis supplied).

c. Galapos' signs have virtually nothing to do with protected speech speech; Simon Galapo admits the signs are a campaign of pure protest and expressive conduct

The lettering and symbols on Galapos' signs have nothing to do with content-driven speech directed to the Oberholzers. The signs are devoid of meaningful content. Simon Galapo's testimony at the hearing on preliminary injunction proves the point:

> BY MR. WOODSIDE: If I was going to pick one sign that you wanted to post to describe what you believe the Oberholzers were and put it alongside the boundary line, *just one,* go through my [evidence] notebook and show me which one you would pick.
>
> MR. GALAPO: *None.* [emphasis supplied].

BY MR. WOODSIDE: Pick one [sign] that you would want to post to describe the Oberholzers to me.

MR. GALAPO: I told you, that's not the purpose of the signs.

[MR. GALAPO]: The purpose [of the signs] is to protest the behavior of what the Oberholzers have been doing in a racist fashion to me and my family.

(R.293a, NT 90:8-16; R.295a, NT 92:2-5).

* * *

BY MR. WOODSIDE: Sir, let me ask you this then. You haven't been able to identify a single sign you would want to put up there, and now you said you are not going to put up any signs, right?

> MR. GALAPO: *The sign is not the issue* (emphasis supplied) ....The issue is getting somebody to stop behavior we perceive as being racist. *These signs, it could be any sign. It doesn't matter.* [emphasis supplied].

MR. WOODSIDE: Sir --

MR. GALAPO: The idea behind the signs is my *protest against racism. Thats it.* (emphasis supplied).

(R.306a; NT 103:9-13, 21-23).

Simon Galapo could not identify one single posted sign to describe his beliefs about the Oberholzers. And while "[t]he Court did not label the conduct of the Galapos to be pure expressive conduct", "[Galapos'] exercise of their state and federal constitutional rights to freedom of speech ***morphed*** beyond the category of pure speech when they targeted the Oberholzers and engaged in a

personal feud." (Appendix C, Memo Op. filed Jan. 3, 2020 at 4, *citing Rouse*, 417 A.2d at 1254)(emphasis supplied).

Rouse Philadelphia, Inc. v. Ad Hoc '78, 274 Pa.Super. 54, 64, 417 A.2d 248 (1079) is controlling of this injunction: "[a]s a person's activities move away from pure speech to the commission of public acts the scope of permissible regulation of such expression increases" (holding picketing, a form of expressive speech, may be subject to reasonable time, place and manner restrictions); *accord*, *Klebanoff v. McMonagle*, 555 A.2d at 681 (picketing in front of residential property enjoined; "[t]he permissible scope of the restriction also depends on where, in the spectrum from conduct to pure speech, the speech question lies").

3. There is no prior restraint in the injunction under Article I, Section 7, or under the First Amendment, and the injunction does not enjoin libel or defamation

The parties expressly avoided prior restraint under the Pennsylvania constitution by enumerating the signs Galapos agreed Oberholzer reserved the injunctive right to remove. (R.433a-435a). The court did not enjoin publication of any defamatory or libelous matter in restricting the placement of the content of the signs. (Appendix A, Memo. Op. Sept. 16, 2019 at 12). The injunction did not impose prior restraint in re-directing "the fronts of the signs (lettering etc.)" away from the Oberholzers' private property and home. Because the medium of

expression – the *fora* of the invasive expressive speech – involves only the private residential property of Oberholzers and Galapos, the cases cited by appellants and *Amicus* merit discussion.

Willing v. Mazzacone, 393 A.2d 1155 (Pa. 1978) falls outside the analytical framework for prior restraint under the trial court's injunction. The complaint in *Willing v. Mazzacone* sought a permanent injunction on a claim in defamation filed by a law firm against a client who launched an expressive protest using a sandwich board, a cow bell and whistle, on the public sidewalk outside the courthouse at 15th and Market Streets, Center City Philadelphia.

Willing v. Mazzacone did not overturn the injunction under the hypothetical argument the speech on the public sidewalk outside the courthouse would have continued into the future and therefore should not have been enjoined. *Willing* held the injunction unconstitutional on principle that equity will not enjoin defamation. Private property interests and targeting speech invading private residential property were not at issue in *Willing.* Nothing about the complaint or the facts in *Willing* are "strikingly similar" to the Oberholzer's complaint or the narrowly drawn injunction by the trial court here. (Appellants' brief at 19).

In *Graboff v. Am. Ass'n of Orthopedic Surgs.,* 2013, U.S. Dist.LEXIS 63282 (E.D.Pa.2013), the plaintiff doctor sued the same AOSS entity he won a damage verdict against for false light defamation, seeking to enjoin continuing electronic

and hard copy publications of an article critical of the plaintiff on the same facts at issue in the false light damages claim. *Graboff v. Am. Ass'n of Orthopedic Surgs.* is not controlling here. Like the central facts in *Willing*, *Graboff* adhered to the traditional rule that equity will not enjoin a defamation, and courts in Pennsylvania will not accord injunctive relief to proscribe publication of libelous materials. *Id.*, citing *Angelico v. Lehigh Valley Hosp., Inc.*, 2005 WL 5163656 (Pa.C.Com.Pl. Jan.1, 2005).

Galapos did not publish their targeting signs by any medium of expression to anyone other than the Oberholzers at their private property. Galapos did not target any individual with their signs at any *fora* other than Oberholzers' backyard property line. Akin to straight picketing (*Frisby v Schultz)*, Galapos' publication of opinions, ideas or messages to anyone in the community or world other than the Obeholzers' private home was not restrained. The trial court did not restrict or interfere with Galapos' messages or speech, leaving Galapo "free to continue to post signs on his property with any message he deems appropriate so long as they do not target or face Plaintiffs' Oberholzers' property." Appendix A, memo op. Sept. 12, 2019 at 11).

Galapos cite *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) for the holding that content discrimination regulating the speech of private citizens on private property is presumptively impermissible, and this holding should apply to overturn the

injunction here. In *Gilleo,* a resident homeowner posted an 8½ by 11 inch sign ("Peace in the Gulf') in the second story window of her home, violating an ordinance prohibiting homeowners from displaying signs on their property unless the sign met a non-content neutral exemption in the ordinance. The ordinance was attacked on the basis it violated a Ladue resident's right of free speech. The Supreme Court held the ordinance unconstitutional as suppressing too much speech by completely eliminating a common means of speaking. *Id.*

In *Gilleo*, no homeowner resident complained his/her private property was targeted or invaded by a sign posted on an adjacent property, or the peace or well-being of a private property owner was severely impacted by any posted sign. Invasion of residential privacy interests were at not issue in *Gilleo*. The ordinance was not content neutral because it restricted too little speech because it discriminated in the messages, treating commercial speech more favorably than non-commercial speech; it restricted too much speech in prohibiting one entire form of medium of expression in the entire city. *Id.*

Unlike any *Gilleo* resident, Galapos never used a generally directed means of communication when he posting signs specifically targeting Oberholzers' home. Galapos had no goal of free flow of information to anyone other than to target the Oberholzers and their private residence, as the lower court correctly determined.

In *Taragu v. Journal of Biological Chemistry*, 478 F.Supp.3d 552 (W.D.Pa. 2020), plaintiff filed suit in defamation seeking to enjoin alleged false and defamatory statements in defendant's published retraction of an earlier article written about plaintiff in defendant's scientific journal. The equity claim seeking to enjoin defamation was dismissed, citing *Willing v. Mazzacone* that equity would not enjoin future libels against the plaintiff, nor would equity compel withdrawal of the libelous retraction from "*all publicly available sources*" including defendant's website. *Id.*, 478 F.Supp.3d at 559-560, *citing Kramer v. Thompson*, 947 F.2d 666 (3rd Cir.1991)(District Court injunction "which enjoined Thompson from repeating the statements deemed libelous and from communicating with anyone doing business with Kramer" was reversed as violating Article I, Section 7).

Like *Willing* and *Graboff*, refusal to enjoin published speech in *Taragu v. Journal of Biological Chemistry* did not involve the Constitutional rights of a homeowner in the peace and tranquility of his/her private property and home. The argument that *placement* of Galapos' invasive signs involved the same (or similar) future intended publication of words and symbols in the same manner as the alleged defamatory speech in *Willing, Graboff, Taragu* fails the analytical framework for enjoining prior restraint under Article I, Section 7. *Gilleo* is distinguished on other grounds, and appellants and *Amicus* rely on *Gilleo* for a

proposition grounded on facts not controlling this appeal. (*Amicus* brief at 27; Appellants' brief at 21). As a matter of common sense, all speech at the moment of time published in a book or posted on a sign would be deemed to have a future shelf life by the speaker unless and until it was lawfully enjoined.

Appellants through inapposite authority attempt a theoretical argument that targeted picketing of a private residence deserves equivalent protection as libelous published speech. Stated in the obverse, Galapos ask this Supreme Court to find publication of a single article in a one-time journal is the same speech as picketing a private residence with several dozen fixed signs 24 hours a day, seven days a week, *for over four years* solely to force Oberholzers to suffer unwanted speech. The comparison is an absurd proposition under any constitutional measure.

The injunction imposes no prior restraint in re-directing the placement of the "fronts of Galapos' signs (lettering, etc.)" at the back property line so they are not visible to plaintiff nor facing plaintiff's home. (Appendix A and B). When confronted with the signs, on the entire record, the trial court had no other option but to enjoin the signs in the manner it did. *Madsen*, 512 U.S. at 769-770 ("deference must be given to the [lower court's] familiarity with the facts and the background of the dispute even under the heightened scrutiny standard"); A*nd see*, Appendix F, concur/dissent by Stabile, J., at 4-5 (writing "I cannot fathom a more narrowly tailored remedy under the more stringent standard than that ordered by

the trial court", finding harmless error in the lower court not applying the heightened scrutiny standard to enjoin Galapos' expressive protest).

There is no error in the Superior Court's holding there is no prior restraint of speech, or future speech, in the injunctive orders. Appellants and *Amicus* have presented no justiciable basis or decisional law to reverse the injunctive orders.

B. The injunctive orders do not attach the question of whether Galapos' signs as posted cannot be enjoined under tort claims other than defamation under Article I, Section 7

This issue is an unnecessary replay of the decisional law already discussed and distinguished under subpart III.A. *Willing v. Mazzacone*, *Graboff v. Am. Ass'n of Orthopedic Surgs.*, and *Kramer v. Thompson*, 937 F.2d 666 (3rd Cir.1991) all involve suits to enjoin speech under claims of defamation and libel and, in *Graboff,* libel bottomed on a false light claim. Under the settlement agreement, bargained-for between the parties their counsel, the lower court had no reason to address the defamation claim, other than to not enjoin it, finding no reason to diverge from "the traditional rule followed in Pennsylvania on this topic." (Appendix A, Memo. Op. Sept. 12, 2019 at 12).

Whether "the Courts in *Willing* and its progeny do not suggest the protection afforded to speech is based on the tort claim arising from the speech" is a wholesale guess, as *Willing* and the federal decisions did not involve tort claims other than libel and defamation and the lower court here did not adjudicate the

injunction on defamation or any other tort claim.[3] Galapos have cited no authority directing this Supreme Court to hold an injunction resting on a claim of invasion or intrusion of private property, *or any tort*, with targeting speech would never pass constitutional scrutiny for restraint simply because speech was involved. Nothing in *Willing* intimates such a proposition.

To the larger question, Galapos propose to overturn the injunction on its "tort claim hypothetical" with no consideration for the *fora* of Galapos speech, the invasive nature of the speech targeting private property, the expressive protest of the speech, the balancing of Oberholzers' privacy interests against the invasive protest, and no prior restraint in re-directing the fronts of the signs under the narrow injunction. (Appellants' brief at 21). Galapos ask this Supreme Court to reverse the trial court's injunction without discussing the controlling law that justified the injunction in the first place. *Ibid.*

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[3] The settlement agreement bars a defense to the legal claims and a meritorious defense to the permanent injunction. (Appendix F at 14). The claim for common law nuisance constitutes the legal grounds for injunctive relief on this record, both under the Restatement of Torts 2nd §822 (private nuisance), followed in *Kembel v. Schlegel*, 329 Pa.Super. 159, 478 A.2d 11 (1984)(holding private nuisance includes the elements of the claim for intrusion upon seclusion under Restatement of Torts 2nd §652B. Galapos did not challenge the injunction on this underlying claim other than to argue (with no authority) no tort claim should allow for enjoinment of published speech under Article I, Section 7, and the Superior Court did not address this point.

Appellants and *Amicus* have cited no controlling law, and no compelling rationale under any decisional law, that reversal is mandated under "*Willing* and its progency" that refusal to enjoin defamatory speech is applicable to enjoin speech under *all torts claims* that could conceivably be brought.

C. The lower court injunction is not content based, and because it is not subject to the test under strict scrutiny, it is not unconstitutional in re-directing the fronts of Galapos' signs

1. Standard on content-neutrality enjoining First Amendment speech

Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed; *i.e.*, a regulation of speech because of disagreement with the message it conveys. *See, e.g., S.B. v. S.S.*, 243 A.3d AT 104-106 (2020). Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech, and even if the speech restriction may have an incidental effect on some speakers or messages, but not others. *Id.*, 243 A.3d at 106; *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

In *SmithKline Beecham Corp. v. Shac*, 959 A.2d 352, 356-57 (Pa.Super.Ct. 2008) an injunction that banned defendants from distributing *all* leaflets, picketing and protesting at plaintiff's homes was upheld as content neutral, even though it affected some speakers or messages and not others, holding the "purpose of

enacting the restrictions is to prevent excessive tactics used by the protesters, not to stifle the message itself".

Courts have rejected the argument that because the injunction restricts the expression of a speaker or message, the restriction must be content based. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 762, 114 S.Ct. 2516 (1994) held: "[a]n injunction, by its very nature, applies only to a particular group (or individuals) and regulates activities, ***and perhaps speech***, of that group...[t]he parties seeking the injunction assert a violation of their rights; the court hearing the action is charged with fashioning a remedy for the specific deprivation, not with drafting a statute addressed to the general public." *Id.*, 512 U.S. at 762 (emphasis supplied); *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. at 384 (1997)(where protesters argued a First Amendment challenge to a cease and desist order outside an abortion clinic; held, allowing a patient to terminate the protester's right to speak where the patient disagreed with the message of the protester was not a content-based injunction).

Generally, government regulations of speech "that are unrelated to the content of the speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *S.B. v. S.S.*, 243 A.3d at 105. For example, a gag order

may be constitutional if it complies with the well-settled *O'Brien* test.[4] A court injunction requires more stringent application of general First Amendment principals than the *O'Brien* test. An injunction is subject to greater scrutiny than a legislative ordinance, and in restricting speech, no broader than necessary to achieve its desired goals, as held under *Madsen v. Women's Health,* 512 U.S. at 764-65:

> "Our 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 plaintiffs...We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."

Accord, *SmithKline Beecham Corp. v. Shac*, 959 A.2d at 356-57.

As a general rule, "[t]he primary concern of content-neutrality is that no speech or expression of a 'particular content' is 'singled out' by the government [or courts] for better or worse treatment. *Northeast Women's Center v. McMonagle*, 745 F.Supp. 1082 (E.D.Pa.1990), quoting (in part) *Virginia State Bd.*

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[4] A content-neutral regulation of speech passes constitutional muster if it satisfies the four-part standard set forth by the U.S. Supreme Court in *United States v. O'Brien*, 391 U.S. 367 (1968): (1) the regulation was promulgated within the constitutional power of government; (2) the regulation furthers an important or substantial government interest; (3) the government interest is unrelated to the suppression of free expression; (4) the incidental restriction on alleged First Amendment freedoms is no greater than essential in furtherance of that interest. *S.B. v. S.S.*, 243 A.3d at 105.

Of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771, 96 S.Ct. 1817 (1976).

2. Standard on governmental interest in residential privacy

The constitutional question on free speech – *i.e.*, what constitutes a reasonable restriction on the exercise of First Amendment rights – requires "balancing First Amendment rights and their elevated position in the hierarchy of protected values with the legitimate interests of governmental or individual civil rights. *Klebanoff v. McMonagle*, 552 A.2d at 678.

A case of first impression, the *Klebanoff* court enjoined picketing of private property on a public street in front of abortion-doctor Klebanoff's home in Montgomery County, Pennsylvania. Enjoinment was necessary to protect residential privacy, more aptly stated as the "right to left alone" in one's property. *Id.*, 552 A.2d at 678, *citing*, *McMullan v. Wohlgemuth*, 453 Pa. 147, 308 A.2d 888 (1973). *Klebanoff* relied on the [then-recent]-precedent *Frisby v. Schultz*, 487 U.S. 474, discussed *infra.* "This injunction serves to protect a substantial interest recognized in both Pennsylvania law and in the United States Constitution...what has been variously called the individual's right of privacy." *Klebanoff*, 552 A.2d at 679.

"The State's interest in protecting the well-being, tranquility and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v.*

Brown, 447 U.S. at 471. Supreme Court decisions have described the unique nature of the home as "the last citadel of the tired, the weary, and the sick" (*Gregory v. Chicago*, 394 U.S. 111, 125 (1969)(Black, J. concurring)), and have recognized that "[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important one." *Carey v. Brown*, 447 U.S. 455, 471 (1980); *Frisby v. Schultz*, 487 U.S. at 484.

Frisby v. Schultz held a core aspect of residential privacy is protection of the unwilling listener. "Although in many locations, we expect individuals simply to avoid speech they do not want to hear [*cf. Cohen v. California*, 403 U.S. 15, 21-22 (1971)], the home is different." "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech...does not mean we must be captives everywhere." *Rowan v. Post Office Dept.*, 397 U.S. 728, 738, 90 S.Ct. 1484, 1491 (1970). Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. *Frisby v. Schultz*, 487 U.S. at 484-85.[5] Targeted speech in the

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[5] The *Frisby* Court held: "The First Amendment permits the government to prohibit offensive speech as intrusive when the captive audience cannot avoid the objectionable speech. The target of the focused picketing banned by the Brookfield ordinance is just such a captive. The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech. Thus, the

form of picketing and protesting a private residence may be lawfully enjoined by the courts. *Id.; SmithKline*, 959 A.2d at 357-359; *Klebanoff*, 552 A.2d at 678-80.

The Supreme Court has repeatedly held individuals are not required to welcome unwanted speech into their homes and that the government may protect this freedom. *See, e.g., FCC v. Pacifica Foundation*, 438 U.S. at 48-49, 98 S.Ct. at 3045-47 (offensive radio broadcasts); *Rowan v. Post Office Dept.* (offensive mailings); *Kovacs v. Cooper*, 336 U.S. 77, 86-87, 69 S.Ct. 448, 453-54 (1949)(sound tracks); *Martin v. Struthers*, 319 U.S. 141 (1943)(a homeowner could protect himself from intrusion by an appropriate sign that he is unwilling to be disturbed). "We have never intimated that the visitor could insert a foot in the door and insist on a hearing. There is simply no right to force speech into the home of an unwilling listener." *Frisby v. Schultz*, 487 U.S. at 486.

3. Standard on scrutiny under Madsen v. Women's Health

In *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, the Supreme Court addressed a similar state court injunction involving targeted speech and government interest in residential property. There, pro-life activists picketed and

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evil of targeted residential picketing, the very presence of the unwelcome visitor at the home, is created by the *medium of expression itself.* Accordingly, the Brookfield ordinance's complete ban of that *particular medium of expression* is narrowly tailored. *Id.*, 487 U.S. at 487-88 (citations omitted).

demonstrated on the public street accessing a Florida abortion clinic. *Id.* at 758. The Florida state court permanently enjoined the activists from "blocking or interfering with public access to the clinic, and physically abusing persons entering or leaving the clinic." *Id.* The clinic then sought a broader injunction because the activists continued to impede access to the clinic and escalated the picketing to the employees' private residences. *Id.* at 758-59.

The trial court enjoined the activists from entering a 36 foot buffer zone surrounding the clinic, which included the public access street and private property surrounding the clinic. *Id.* at 769. The amended injunction enjoined the activists from "picketing, demonstrating or using sound amplification equipment within 300 feet of the [private] residences of clinic staff." *Id.* at 774. The *Madsen* court held the injunction was content neutral, applying the standard of whether the injunction's challenged provisions burden no more speech than necessary to serve a significant governmental interest". "Thus, the injunction must be couched in the narrowest terms that will accomplish its pin-pointed objectives." *Id.*, *citing Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183, 89 S.Ct. 347 (1968).

The *Madsen* court invalidated the 36 foot buffer zone applicable to private property surrounding the clinic, finding no evidence the activists standing on clinic private property obstructed access to the clinic or interfered with the clinic's

operation. *Id.* at 771. The 36-foot buffer zone burdened more speech than necessary to protect access to the clinic. *Id.* The *Madsen* court also overturned the portion of the injunction that prohibited the activists from using "images observable" to any patients inside the clinic, finding "images observable" burdened more speech than necessary to achieve the purpose of limiting threats to clinic patients and their families. *Id.* at 773. Under the Florida court record, there was no evidence any patient owned the clinic or the clinic's property or used or resided at the abortion clinic as his/her permanent residence. Residential privacy interests of any patient inside the clinic, or the clinic owners themselves, were not at issue on this portion of the injunction.

With respect to the portion of the injunction that prohibited the anti-abortion activists from picketing within a 300 foot zone of the clinic employees' private homes, the *Madsen* court held the zone too large: "the 300-foot zone would ban general marching through residential neighborhoods, or even walking a route in front of an entire block of houses. The record before us does not contain sufficient justification for this broad a ban on picketing..." *Id.* The 300-foot buffer zone around the clinic employees' private residences swept more broadly than was necessary to accomplish the permissible goals of the injunction. *Id.* at 776; *compare*, *Gilleo v. City of Ladue,* 512 U.S. at 55, for an analysis of untargeted signs

simply appearing in a residential window, as opposed to picketing enjoined in *Frisby v. Schultz* that focused on a specific individual residence.

Because an injunction could further the significant governmental interest in Appellee's right to residential privacy, the Superior Court here followed the standard under *Madsen* and held the trial court should have applied the heightened, more rigorous standard under *Madsen* in tailoring the injunction. The "standard time, place, and manner analysis is not sufficiently rigorous." (Appendix F at 50; *and see*, Stabile, J., concurrence/dissent at 1-9).

4. ***The injunction re-directing the fronts of Galapos' signs away from the Oberholzers' residence and property burdened no more speech than necessary to protect Oberholzers' right of privacy free from unwanted speech***

Galapos argue the appellate court erred when it applied the heightened standard to the injunction, as opposed to a standard of strict scrutiny. Boiled to the basics, appellants argue *Madsen* and its connected cases (Appellants' brief at 26-27, 34-37) involved restrictions on the *manner* of communication, not the communication itself. The injunctions in [*Madsen, Schenck, Klebanoff and SmithKline*] "prohibited or limited protestors from expressing *any message* via time, place and manner restrictions." (emphasis Galapos). "The speech activities in [these decisions] are classic examples of expressive conduct." (Appellants' brief at 38). Galapos then argue the signs are "pure speech", and the injunction must receive strict scrutiny. (Appellants' brief at 38).

In other words, with no evidence in record that Galapos signs could ever be viewed as "pure speech", Galapos argue the Pennsylvania Supreme Court should overturn the entire line of decisional law in both the Pennsylvania and United States Supreme Courts to sustain their appeal. This is a futile proposition under all decisional law controlling the question and lower court record.

Second, Galapos argue the injunction is not content neutral in its purpose or on its face, "as it seeks only to prohibit defendants' from communicating specific messages to plaintiffs because plaintiffs find those messages offensive", citing the injunction stuck down in *Franklin Chalfont v. Kalikow*, 573 A.2d 550. Galapos further argue the injunction re-directing the specified signs in the settlement agreement restricted "pure speech", "not the manner of communication. Because the injunction itself only "relates to the manner of the restriction, not the basis for such restriction", the injunction therefore fails strict scrutiny. (Appellants' brief at 38, 41, 42).

Finally, Galapos argue Oberholzers' residential privacy has not been invaded by defendants' signs, and Galapos have not engaged in other expressive behavior. "Oberholzers "are able to come and go as they please and are undisturbed by the signs when inside their home." (Appellants' brief at 45-46). Decisional law and the lower court record belie any merit to these positions.

a. Galapos' signs are an intolerable unwanted invasion of Oberholzers' private property and residence

The Oberholzers have lived in their home on Suffolk Road, Rydal PA since March, 2006. They raised two children in their house. (R.311a-312a). This is an affluent residential neighborhood of single-family homes. (R.230a). Galapos also enjoy living in their home and community, as do their neighbors. (R.231a). The Oberholzers are friendly with their neighbors, who work or are retired. (R.312a-313a). The neighborhood is a good place to live and a good community to live in. (R.257a-258a).

The Oberholzers have a three season Florida room in the back of their house. When they look outside, or step outside their home in the fenced backyard, all they see are signs – *nothing but signs, 16 of them* – spread across the back property line. (R.353a; R.346a)(emphasis supplied). The signs are pointed directly at their house and can be seen anywhere you look outside their back windows, and from the backyard, the porch, the Florida room and the street. (R.090b-091b; R.097b; R.129b-130b).

The Oberholzers stopped using their backyard and are afraid to come outside fearing a confrontation with Simon Galapo and his signs. On June 15, 2019, when Simon Galapo saw Denise Oberholzer in her backyard, he marched down to where his signs were posted and hammered the re-positioned signs into the ground. In front of Denise, he re-posted the sign "**Got Racism**?" (R.723a). Denise

Oberholzer is held captive inside her own home, and cannot sit in her own backyard even for a picnic. (R.097b).

Oberholzers are not free to come and go as they please without an unbearable invasion of their private property and home by signs. The Oberholzers are not "undisturbed by the signs when inside their home". *Ibid.* Galapos' argument ignores the trial court record and decision: "[t]he Court is impressed with the deposition testimony of the [Oberholzers], corroborated in part, by that of [witnesses] Christopher Tinsley and Geraline Smith concerning the impact of the posted signs on the Plaintiff's residential property". (Appendix A, Memo. Op. Sept. 12, 2019 at 7; statement of facts, *supra* at §I.).

Nothing about this expressive protest is "pure speech" and Galapos admit as much. The trial court held similarly in determining from the record Galapos' signs were a "personal protest" against Oberholzers: "The *placement* of the signs indicates that Defendant Simon Galapo is targeting specific individuals with the signs that decry their perceived racist behavior [citing *Klebanoff*]." (Appendix A, Memo. Op. Sept. 12, 2019 at 8-9)(emphasis supplied). Galapos are afforded no First Amendment protection in forcing unwanted speech on Oberholzers' property and home. No case holds enjoining targeted picketing of private property with signs also containing speech receives strict scrutiny under Article I Section 7.

Ordering the fronts of the signs (lettering etc.) to turned away so they are not visible to the Plaintiff's nor face in the direction of Plaintiff's home is not prior restraint, and restrains no more speech than necessary to protect Oberholzers' right to live peaceably and without invasion of their home. The imposition of a speech-restrictive injunction here is amply supported by the record that discloses the evidentiary basis of that carefully identifies the impact of the Galapos' unlawful conduct. *Schenck v. Pro-Choice* Network, 519 U.S. 357. The lower court injunction sustains the *Madsen* test.

b. Where the injunction regulates Galapos' expressive protest of his signs without reference to the fronts of the signs (lettering etc.), the injuction is content-neutral

Courts have rejected Galapos' argument that the injunction is not content-neutral where the restriction on the placement of the signs (away from Oberholzers's property) prohibits Galapos from communicating specific messages to the Oberholzers. *Madsen v. Women's Health Center; SmithKline Beecham Corp. v. Shac*. The restriction that re-directed the fronts of the signs (lettering etc.) to protect the Oberholzers' privacy rights was unrelated to the content of the signs, fashioned narrowly to protect Oberholzers from the unrelenting, excessive tactics of Galapos. *SmithKline Beecham,* 959 A.2d at 356-57; *S.B. v. S.S.*, 243 A.3d at 104-106.

The injunction fashioned a narrow remedy for a specific deprivation, and the impact on the speech component (as opposed to the expressive component) of the signs is incidental. The lower court is clear the fronts (lettering etc.) of the signs has nothing to do with the enjoinment: "[T]he court is being clear that all signs, not matter what language or images depicted, may remain but may not face or target the Plaintiffs' Oberholzers' property." (Appendix A, Memo. Op. Sept. 12, 2019 at 12). Because the injunctive order does not single out any sign against any other sign, the injunction could never be a "ban masquerading as a limitation" or motivated by selective content. *Northeast Women's Center v. McMonagle*, 745 F.Supp. at 1089.

Finally, addressing *Amicus* on the *Commonwealth v. Edmunds* standard, "that day has [*not*] come" for this Supreme Court to review the lengthy analysis of the injunctive order under Article I, Section 7 and our Declaration of Rights, discard and overrule decades of controlling jurisprudence on the questions, and reverse the injunction. The Superior Court assiduously evaluated the injunction of the lower court re-directing the fronts of Galapos' signs under all relevant federal and state decisional law and constitutions, applying a standard of heightened scrutiny under *Madsen*.

Under the *Edmunds* framework, both courts below undertook their own independent analysis of the *fora* of Galapos speech, the invasive nature of the

targeting signs, the expressive protest of the speech, balancing Oberholzers' private property interests against Galopos' invasive protest, all under the applicable standards for prior restraint and content-neutrality. *Commonwealth v. Edmunds*, 526 Pa. 374, 390-91 (1991). *Amicus'* argument Oberholzers' can "plant trees, build a fence to block the view of their neighbors' yard" and simply not look at the signs places an extreme disproportionate burden on the Obeholzers' to emasculate their private property to oblige Galapos' targeted invasive picketing. No law supports such a ridiculous proposition where the balancing test under decisional law addressing restraint of speech and non-speech elements is openly violated. *Golden Triangle News v. Corbett*, 689 A.2d at 980.

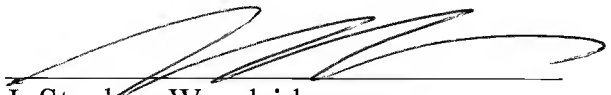
The Superior Court reached the correct decision. As guided by the concurrence/dissent (Stabile, J.), discussed above, this Supreme Court should similarly find that "[it] cannot fathom a more narrowly tailored remedy under the more stringent standard than that ordered by the trial court", find harmless error in the lower court's standard, and uphold the injunction as ordered by the trial court.

IV. CONCLUSION

For all the foregoing reasons, the orders of September 12, 2019 and October 11, 2019 of the Court of Common Pleas of Montgomery County (Tolliver, Sr., J.) should sustain and not be reversed. The judgment and decision of the Superior Court entered April 18, 2022 to the extent of remand on the question of heightened

scrutiny should be reversed and final judgment should be entered on the injunctive orders in favor of the Oberholzers and against the Galapos in this Supreme Court.

Respectfully submitted:



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CERTIFICATE OF WORD COUNT COMPLIANCE

J. Stephen Woodside hereby certifies this brief does not exceed 14,000 words as established by the word count of the word processing program, Word, used in the preparation of this brief.

J. Stephen Woodside, Esquire

DATED: March 6, 2023

CERTIFICATE OF ACCURATE AND COMPLETE REPRESENTATION

Pursuant to the appellate rules setting forth requirements for electronic filings, the undersigned avers the material included electronically is an accurate and complete representation of the paper version of the filing.

J. Stephen Woodside, Esquire

DATED: March 6, 2023

CERTIFICATE OF SERVICE

The undersigned hereby certifies on March 6, 2023 he served a true and correct copy of appellees' brief and supplemental reproduced record upon the following by email PDF attachment and PACFile on the date set forth below, which notice satisfies the requirements of Pa.R.A.P. 121:

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