

At a Term of the Supreme Court of the State of
New York, held in and for the County of Onondaga,
on the _____ day of _____, 2012.

PRESENT: Hon. _____,

Justice Presiding

STATE OF NEW YORK *(Justice Tormey)*
SUPREME COURT : COUNTY OF ONONDAGA

In the Matter of

MARK SCIBILIA-CARVER,
✓ CLAI^RE GRADY, MARY ANNE GRADY FLORES,
and DANIEL BURGEVIN,

Petitioners,

-vs

DONALD M. BENACK, JR., DeWitt Town
Court Justice, and ROBERT JOKL, JR.,
DeWitt Town Court Justice,

Respondents.

**ORDER TO
SHOW CAUSE**
(CPLR Article 78)

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Justice Assigned:

In a Proceeding Pursuant to CPLR Article 78

Upon the annexed Petition of Mark Scibilia-Carver, Claire Grady, Mary Anne Grady Flores, and Daniel Burgevin, the Petitioners herein, duly verified this

_____th day of February, 2013,

Let the Respondents Donald M. Benack, Jr. and Robert Jokl, Jr., as Justices of the DeWitt Town Court, show cause at a Term of this Court, to be held on the _____th day of _____, 2013 at _____o'clock in the _____ noon of that day, or as soon thereafter as counsel can be heard, at the Supreme Court Courthouse, 401 Montgomery Street, Syracuse, New York 13202, why an order pursuant to CPLR Article 78 should not be granted to review the Orders of Protection issued by each Respondent, dated October 25, 2012, and upon such review, prohibiting the enforcement of such Orders to the extent the same direct the Petitioners to stay away from the business of Earl A. Evans and the place of employment of Earl A. Evans and directing the Respondents to modify the within Orders of Protection and to refrain from issuing such Orders in the futures, and directing such other and further relief which to the Court is just and proper, including costs.

Sufficient cause appearing therefor, it is

ORDERED that service of a copy of this Order and a copy of the papers on which it is based, by certified mail, return receipt requested, on Respondents at their respective offices at the DeWitt Town Court on or before the _____ day of _____ 2013, be deemed good and sufficient service; and it is further

ORDERED, that any papers in support of or in opposition to this application, on behalf of any party, shall be served on any appearing party and filed with the Clerk of this Court on or before the _____th day of _____, 2013.

DATED: Ithaca, New York
February____, 2013

SCHLATHER, STUMBAR, PARKS & SALK, LLP
RAYMOND M. SCHLATHER, ESQ.
Attorneys for Petitioners
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ONONDAGA

In the Matter of

✓ MARK SCIBILIA-CARVER,
CLAIRE GRADY, MARY ANNE GRADY FLORES,
and DANIEL BURGEVIN,

Petitioners,

-vs

DONALD M. BENACK, JR., DeWitt Town
Court Justice, and ROBERT JOKL, JR.,
DeWitt Town Court Justice,

Respondents.

VERIFIED PETITION

(CPLR Article 78)

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Justice Assigned:

In a Proceeding Pursuant to CPLR Article 78

Petitioners, Mark Scibilia-Carver, Claire Grady, Mary Anne Grady Flores and
Daniel Burgevin, petition the court as follows:

1. Your petitioners are:

Mark Scibilia-Carver
5065 Cold Springs Road
Trumansburg, New York 14886

✓ Claire Grady
514 N. Plain Street *701 Elm St*
Ithaca, New York 14850

Mary Anne Grady Flores
514 N. Plain Street
Ithaca, New York 14850

Daniel Burgevin
8 McLallen Street
Trumansburg, New York 14886

Your petitioners all are residents of Tompkins County, New York.

2. Upon information and belief, the respondents are Donald M. Benack, Jr., a Town Justice of the Town of DeWitt, County of Onondaga, State of New York, and Robert Jokl, Jr., a Town Justice of the Town of DeWitt, County of Onondaga, State of New York. The judicial address for both respondents is : Town of DeWitt Court, 5400 Butternut Drive, East Syracuse, New York, 13057.

3. This special proceeding is brought pursuant to Article 78 of New York State's Civil Practice Law and Rules and related provisions of law. It seeks relief in the nature of review, mandamus and prohibition with respect to Temporary Orders of Protection issued by each respondent in his capacity as Town Justice against the individual petitioners, all on or about October 25, 2012. The grounds for the requested relief are:

(a) That the respondents proceeded in issuing these Orders of Protection, and are proceeding in the continuation thereof, without or in excess of their jurisdiction under state and federal constitutions; and

(b) Such orders were made in violation of lawful procedure, or were affected by an error of law, under New York State law, including its statutes and constitution.

4. Although these Orders of Protection are referred to as "Temporary Order(s) of Protection", their current and ongoing effect, including impermissible violation of petitioners' constitutional rights, are "final" within the meaning of Article 78 of the CPLR.

5. Although these Temporary Orders of Protection were made in the context of a criminal matter, the actions of respondents at issue herein in the

issuance of these Orders of Protection violate the constitutional rights of the petitioners and therefore are subject to review in a special proceeding under CPLR Article 78.

6. By separate Informations dated on or about October 25, 2012, each of your petitioners was separately charged with disorderly conduct and trespass, both as violations under New York State's Penal Law, arising out of public protests that occurred outside of entry gates to the 174th Air Guard Base in the Town of DeWitt, County of Onondaga, State of New York on October 25, 2012. Upon arraignment in the DeWitt Town Court, the respondents issued the Temporary Orders of Protection at issue herein.

7. Attached hereto collectively and incorporated herein by reference as Exhibit A are copies of the respective accusatory instruments for each of the petitioners, including an Information and the identical supporting deposition of Colonel Earl A. Evans, Group Commander for the Air National Guard.

8. Attached hereto collectively and incorporated herein by reference as Exhibit B are the separate Orders of Protection that were issued by the respondents and that are at issue herein.

9. It is respectfully submitted that the respondents violated the petitioners' constitutional rights, including their rights under the First Amendment of the United States Constitution, and Article I, Section 9 of the New York State Constitution, and related constitutional provisions, in ordering your petitioners to stay away from the business of Earl A. Evans and the place of employment of Earl A. Evans (hereinafter "the restrictive terms of the Order of Protection").

10. The petitioners do not know Earl A. Evans. They have never had any contact with Earl A. Evans. They did not have any contact with Earl A. Evans during the events giving rise to the accusatory instruments that subsequently were filed against them in the Dewitt Town Court. There is not one scintilla of evidence in any of the information or materials provided to the respondent that supports any animus on the part of the petitioners directed against Earl A. Evans. Accordingly, Earl A. Evans does not qualify as either a victim or a witness to the offenses with which the petitioners are charged.

11. Upon information and belief, the Hancock Air National Guard base consists of an area of 350 acres, bounded in part by East Malloy Road, Thompson Road, and Townline Road, public highways located in the Town of DeWitt.

12. It is respectfully submitted that the petitioners have constitutional rights to lawfully assemble, to petition their government, and otherwise to use public highways and byways, as guaranteed by the First Amendment of the United States Constitution and the related provisions of the New York State Constitution. The overly restrictive terms of the Order of Protection violate such constitutional rights.

13. As a result of the foregoing, it is respectfully submitted that the respondents acted in excess of their jurisdiction under state and federal constitutions, and such orders were made in violation of lawful procedure, or were affected by an error of law, under New York State law, including its statutes and constitution.

14. No previous application for the relief requested herein has been made to this court or any other court.

15. Your petitioners are proceeding by Order to Show Cause because time is of the essence and because the violation of their constitutional rights is an ongoing irreparable offense without other remedy.

WHEREFORE, your petitioners respectfully pray that this court review the Orders of Protection at issue herein, and upon such review prohibit the enforcement of such Orders to the extent the same direct the petitioners to stay away from the business of Earl A. Evans and the place of employment of Earl A. Evans, and direct the respondents to modify the within Orders of Protection accordingly and to refrain from issuing such Orders in the future, and to grant such other and further relief which to the court is just and proper, including costs.

DATED: Ithaca, New York

February ____, 2013

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Mark Scibilia-Carver

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