

At a Term of the Supreme Court of the State of  
New York, held in and for the County of Onondaga,  
on the 25<sup>th</sup> day of February, 2013.

PRESENT: Hon. John C. Cherundolo,  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ONONDAGA

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In the Matter of

MARK SCIBILIA-CARVER,  
CLARE 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.

In a Proceeding Pursuant to CPLR Article 78  
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2013 FEB 25 PM 3:35  
CLERK OF COURT  
**ORDER TO  
SHOW CAUSE**  
(CPLR Article 78)

Index # 2013-1102

Justice Assigned:

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

22<sup>nd</sup> day of February, 2013,

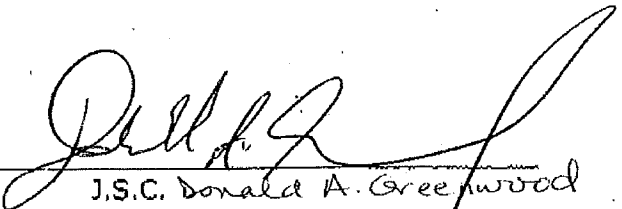
Let the Respondents Donald M. Benack, Jr. and Robert Jokl, Jr., as Justices of the DeWitt Town Court, show cause at a Term of this Court, to be held on the 21<sup>st</sup> day of March, 2013 at 10:00 o'clock in the fore noon of that day, or as soon thereafter as counsel can be heard, at the Supreme Court 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 1<sup>st</sup> day of March 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 15th day of March, 2013.

DATED: February 25, 2013

  
J.S.C. Donald A. Greenwood  
for Hon. John C. Cherrindolo

15:55 02/25/13 ONONDAGA COUNTY CLERK RS

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ONONDAGA

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In the Matter of

MARK SCIBILIA-CARVER,  
CLARE 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)

Index #

Justice Assigned:

In a Proceeding Pursuant to CPLR Article 78

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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

Clare Grady  
201 Elm Street Street  
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.

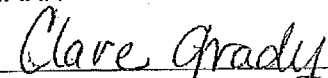
15. Your petitioners are proceeding by Order to Show Cause because time is of the essence and because the violation of their constitutional rights is an ongoing irreparable offense without other remedy.

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.

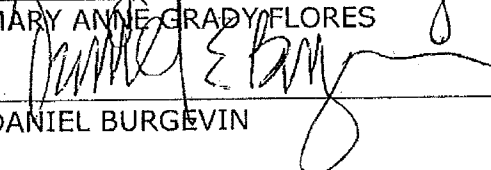
DATED: Ithaca, New York  
February 23, 2013

  
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SCHLATHER, STUMBAR, PARKS & SALK, LLP  
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P. O. Box 353  
Ithaca, New York 14851-0353

  
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MARK SCIBILIA-CARVER

  
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CLARE GRADY

  
\_\_\_\_\_  
MARY ANNE GRADY FLORES

  
\_\_\_\_\_  
DANIEL BURGEVIN





STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ONONDAGA

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**MEMORANDUM  
OF LAW**

Index #

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CLERK OF COURT

As a threshold matter, the Orders of Protection at issue here are final orders within the meaning of Article 78. Although each is denominated a "Temporary" Order of Protection, this terminology is employed to describe a specific type of Order of Protection – one issued during the pendency of a criminal action, in connection with a securing order or as a condition of bail or recognizance.<sup>1</sup> It remains in effect during the pendency of the criminal action and terminates when the criminal action is concluded, becoming at that point a nullity even if the order itself states that it is in effect until a later date. See CPL § 530.13 [1]; *People v Bleau* (276 AD2d 131, 133 [3<sup>rd</sup> Dept 2001]); *People v Lewis* (184 Misc 2d 399, 401

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<sup>1</sup> A second, separate type of Order of Protection, the "Permanent " Order of Protection, may be issued upon the defendant's conviction of an offense, for a period of time specified in the statute. See CPL § 530.13[4].

[Monroe County Court 2000]). A Temporary Order of Protection becomes final and binding on its date of issue. See *Weiner v State of New York* (27 Misc 3d 1203[A], 2010 WL 1267343 [Supreme Ct Suffolk County 2010]). Accordingly, Petitioners may seek relief judicial review, mandamus and prohibition pursuant to Article 78 with respect to the Temporary Orders of Protection issued against each of them.

The Temporary Orders of Protection at issue here are unenforceable for both statutory and constitutional reasons.

First, the Orders do not fall within the scope of CPL § 530.13. That statutory scheme was enacted to protect victims of, and witnesses to, an alleged criminal offense who are in danger of being intimidated or injured by the defendant. CPL § 530.13[1] provides that a temporary order of protection may be issued in favor of the victims of, or designated witnesses to, the alleged offense, as well as such members of their families or households that are specifically named by the court in its order. See *People v Purpura* (12 Misc 3d 933, 934-935 [Crim Ct of the City of New York, Kings County 2006]); *People v Bleau, supra*; *People v O'Connor* (242 AD2d908 [4<sup>th</sup> Dept 1997]). Individuals who do not fall within the statutory categories are not proper beneficiaries of an Order of Protection.

The Temporary Orders of Protection at issue here (attached collectively a Exhibit B to the Petition) have all been issued to direct the individual Petitioners to stay away from one Earl A. Evans, and his home, school, business and place of employment. In the supporting depositions included in Exhibit A to the Petition, Earl A. Evans describes as a colonel in the Air National Guard, the Mission Support Group Commander, and "an authorized representative of Hancock Field." Nothing

in the Orders or any supporting papers describe Earl A. Evans as either a witness to or a victim of the offenses of trespass and disorderly conduct with which Petitioners are charged. The Verified Petition asserts that Petitioners have never had any contact with Earl A. Evans at any time, and particularly not during the events underlying the accusatory instruments filed against them in the Town of DeWitt Court. Although the supporting deposition refers to the Petitioners having "blocked our gates" on three occasions, it does not state that Earl A. Evans himself witnessed these events and, in order to qualify for a witness order of protection, the individual must be someone who actually witnessed the offense being committed. *People v Somerville* (72 AD3d 1285, 1288 [3<sup>rd</sup> Dept 2010]). Finally, there is nothing in any of the informations or materials supplied to that court that suggests that Petitioners have any animus directed towards Earl A. Evans. Accordingly, he is not a proper object of the Orders of Protection.

Moreover, the supporting depositions make clear that their object is to direct Petitioners "that they are to stay away from Hancock Field." As reflected in the statutory history, the statute is for the protection of victims and designated witnesses and there is no statutory provision authorizing the issuance of an order of protection in favor of a place. See *People v Smith* (4 Misc 3d 909, 911-912 [Crim Ct of the City of New York, New York County [2004]).

Finally, even if these Orders of Protection were found to fall within the permissible scope of CPL § 530.13[1], they are nevertheless unenforceable, as they violate Petitioners' rights under the First Amendment to the United States Constitution and Article I, Section 9 of the New York State Constitution to lawfully assemble and to petition their government. The Supreme Court has explicitly

recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, and petitioning for the redress of grievances. *Roberts v United States Jaycees*, 468 US 609, 617-618 [1984])

These rights, although fundamental, are not absolute and can be restricted like other First Amendment rights, to achieve a significant state interest, provided that the least obtrusive means are used. *Cox v Louisiana* (379 US 536 [1965]); *People v Radich* (26 NY2d 114 [1970]). If the focus of this case were a content-neutral, generally applicable statute, its constitutionality would be assessed under the standard set out in *Ward v Rock Against Racism* (491 US 781, 791 [1989]) – that is, whether, given the existence of a traditional public forum, any time, place and manner regulations were “narrowly tailored to serve a significant governmental interest.” However, the focus of this case is not CPL § 530.13, but the constitutionality of an order issued pursuant to that statute that is, in effect, an injunction against Petitioners’ exercise of their First Amendment Rights.

Accordingly, a useful analysis can be found in those Supreme Court cases examining the constitutionality of injunctions issued to restrain protestors at abortion clinics. As the Court observed in *Madsen v Women’s Health Center, Inc.* (512 US 753 [1994]), the differences between a generally applicable statute and an injunction “tailored by a trial judge to afford more precise relief than a statute” require a “somewhat more stringent application of general First Amendment principles in this context.” The test, the Court concluded is “whether the challenged provisions ... burden no more speech than necessary to serve a significant government interest.” *Id.* at 764-765.

(13)

Applying this standard, the Supreme Court in *Schenck v Pro-Choice Network of Western New York* (519 US 357 [1997]) held that governmental interests in ensuring public safety and order, promoting the free flow of traffic, protecting property rights, and protecting women's freedom to access pregnancy-related services were sufficiently significant to justify appropriately tailored preliminary injunctions. The Court concluded that "floating" buffer zones requiring protestors to stay 15 feet from people and vehicles entering the clinics violated the First Amendment by burdening more speech than was necessary to serve those interests because they prevented the protestors from communicating their message, but imposing fixed buffer zones requiring protestors to remain 15 feet from clinic doorways, driveways, and driveway entrances was necessary to ensure access to the clinic. Earlier, in *Madsen*, the Court had concluded that the imposition of a 36-foot buffer zone around clinic entrances was constitutionally acceptable, as it permitted the protestors to communicate their message from a normal conversational distance but a 300-foot no-approach zone and a 300-foot buffer zone around staff residences were unnecessarily burdensome to the protestors' First Amendment rights.

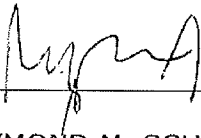
The Temporary Orders of Protection here, insofar as they direct Petitioners simply to "stay away" from "the business of Earl A. Evans" and "the place of employment of Earl A. Evans" – assuming that these terms are intended to refer to Hancock Field—impermissibly restrict and burden the exercise of Petitioners' constitutional right to assemble in a public forum and exercise their First Amendment rights.

(14)

Accordingly, this Court should determine that enforcement the Temporary Orders of Protection at issue here should be prohibited to the extent that they direct the Petitioners to stay away from the business and place of employment of Earl A. Evans, and should direct Respondents to modify the Orders accordingly.

Dated: Ithaca, New York  
February 22, 2013

Respectfully submitted,



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RAYMOND M. SCHLATHER, ESQ.  
Attorney for Petitioners

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