

**In The  
Supreme Court of the United States**

—◆—  
KENNETH TYLER SCOTT  
AND CLIFTON POWELL,

*Petitioners,*

v.

SAINT JOHN'S CHURCH IN THE  
WILDERNESS, CHARLES I. THOMPSON,  
AND CHARLES W. BERBERICH,

*Respondents.*

—◆—  
**On Petition For Writ Of Certiorari  
To The Colorado Court Of Appeals**

—◆—  
**BRIEF IN OPPOSITION**

—◆—  
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## **CORPORATE DISCLOSURE STATEMENT**

Saint John's Church in the Wilderness is a Colorado non-profit corporation and as such, has no parent corporation nor does any publicly-held corporation own more than ten percent of its stock.

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## INTRODUCTION

The Petitioners present several interesting hypothetical questions of First Amendment law. But those questions were never pleaded, litigated, or decided by the courts below. The trial in this case concerned Petitioners' premeditated attempts to disrupt Plaintiffs' worship services conducted on private church property. The trial judge noted that

Detective Olin, who was called as a witness by the defendants [Scott and Powell], observed the entire demonstration and was of the opinion based on his observations that the whole point of the demonstration was to deter people from going to St. John's Church. The evidence as a whole shows that the manner in which Scott and Powell demonstrated was far more consistent with upsetting and intimidating parishioners and deterring them from participating at St. John's than with trying to get parishioners to receive their message.

Pet. App. at 35a-35b.

The petition for writ of certiorari should be denied. The parishioners of Saint John's Church in the Wilderness (the "Church") have no interest in suppressing Petitioners' message; they simply want to pray and worship in peace. The petition for certiorari contains an impressive collection of free speech precedents. But *none* of the cases Petitioners cite arose in the context of intentional interference with religious worship.

The fundamental finding of fact made by the trial judge was that Petitioners Scott and Powell, by screaming and waving gruesome posters 10 to 20 feet from parishioners, ***intentionally interfered*** with members of the Church participating in Palm Sunday prayer service on private Church property. The Petitioners fail to acknowledge, much less respond to, the trial judge's finding that Petitioners executed a premeditated plan to disrupt Plaintiffs' Palm Sunday worship services in 2005 (as the Petitioners had done in 2004), and that Petitioners will do so again unless enjoined by court order.

The trial judge carefully evaluated the extent to which Petitioners' past conduct interfered with the Plaintiffs' worship services, and fashioned narrow, content-neutral time, place, and manner restrictions in the Injunction that burdened no more of Petitioners' speech than necessary to protect the Plaintiffs' ability to worship free from harassment and interference on the Church's private property.

There is no split of authority or other compelling reason to warrant this Court's review. Every court that has considered the issue, from the founding of our Republic through *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), has declined to find that the First Amendment protects protestors intent on harassing and disrupting religious services. The logic of the Colorado courts' opinions – that one's religious worship may not be disturbed by others anxious to preach a different religious or social philosophy – comports with the holdings of all other state and



lower federal courts that have ever considered the issue.

Against this backdrop, the petition distinguishes itself most for the portions of the record that it fails to disclose, all of which support the inexorable logic and rationale of the trial judge who heard the evidence. Namely, the petition

- Never discloses that the Church owns the property located at 1350 Washington Street in Denver, which is private, not public, property. Trial Court's 10/10/06 Findings at 2:4-10; 23:2-5.<sup>1</sup>
- Never discloses that in March 2005 the Church had a parade permit entitling it to exclude all others from sidewalks along 14th Avenue and Clarkson Street adjacent to the Church during the Palm Sunday worship services. *Id.* at 6:7-21.
- Never discloses that on Palm Sundays members of the Church reenact Jesus' entrance into Jerusalem, by engaging in prayer and Bible readings on the lawn adjacent to the Church, and then process onto the sidewalks into the Church through main doors on 14th Avenue. *Id.* at 7:2-7; 8:12-22.
- Never discloses that Petitioner Scott stood on a van parked on the street, 10 to 20 feet from

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<sup>1</sup> The trial judge's October 10, 2006 oral findings of fact and conclusions of law are referred to as the "Findings."

the procession, screaming anti-homosexual and anti-abortion remarks at parishioners who were attempting to pray and re-enact Jesus' entry into Jerusalem. *Id.* at 15:8-22.

- Never discloses that while standing atop his van and screaming, Petitioner Scott waved large, gruesome pictures of dismembered human fetuses above the parishioners while they processed on the sidewalk. *Id.* at 9:7-18.
- Never discloses that the trial judge found that Mr. Scott's conduct "substantially interfered with" the parishioners' ability to participate in Palm Sunday worship services. *Id.* at 15:11-22; Order Re: Pls.' Mot. for Summ. J. (Sept. 26, 2006).<sup>2</sup>
- Never discloses that the trial judge found that "Mr. Powell interfered with the worship of a substantial number of parishioners . . . [and] his conduct was either intentional or knowing." Findings at 23:6-11.
- Never discloses that the trial judge found that the Plaintiffs would suffer irreparable harm unless the injunction issued, because their worship services would be disturbed and the Church would be unable to use its property for worship services: "I would find that irreparable harm would result if an injunction were not issued. The irreparable

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<sup>2</sup> The trial judge's September 26, 2006 Order re: Plaintiffs' Motion For Summary Judgment is referred to as "Summ. J. Order."

harm is the interference with St. John's members including the individual Plaintiff's ability to worship without interference at St. John's Cathedral and St. John's use of its property for worship services." *Id.* at 24:22-25:3.

- Never discloses that the trial judge found that, unless enjoined, Petitioners would interfere with Plaintiffs' worship services in the future. *Id.* at 25:4-17.
- Never discloses that the Petitioners had previously been cited for violation of Denver Revised Municipal Code § 38-90 (2012), which provides that "[i]t shall be unlawful for any person to disquiet or disturb any congregation or assembly for religious worship by making a noise or by rude or indecent behavior or profane discourse within the place of worship of such congregation or assembly during religious services, or so near the same as to disturb the order or solemnity of such meeting."<sup>3</sup> *See id.* at 12:17-22.

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<sup>3</sup> Laws similar to the Denver ordinance prohibiting disruption of religious worship are commonplace. *See, e.g.*, Cal. Penal Code § 302(a) (West 2008) (providing for a fine of up to \$1,000 for anyone who "intentionally disturbs or disquiets any assemblage of people meeting for religious worship at a tax-exempt place of worship"); N.Y. Penal Law § 240.21 (Consol. 2011) (providing that anyone "who makes unreasonable noise or disturbance" within 100 feet of a religious service is guilty of aggravated disorderly conduct); N.C. Gen. Stat. § 14-288.4(a)(7) (2012) (stating that anyone who "engages in conduct which disturbs the peace or order at any religious service" commits unlawful disorderly

(Continued on following page)

- Never discloses that the trial judge believed that the police had ample grounds in 2005 to cite the Petitioners for violation of Denver Revised Municipal Code § 38-90. *Id.*
- Never discloses that there was no testimony at trial from the Plaintiffs regarding their views concerning homosexuality or abortion.<sup>4</sup> *Id.* at 14:17-24.
- Never discloses the trial court's finding that the posters were displayed in such a manner and location on the Petitioners' van that the congregation could not pray and participate meaningfully in the Palm Sunday service without being forced to view gruesome images. *Id.* at 5:14-20.
- Never discusses the implications of the essential limiting provisions of the Injunction, which prohibits the display of gruesome images **only** on Church property or in the

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conduct). Plaintiffs are aware of no successful First Amendment challenges to this type of legislation. *See also Survivors Network of Those Abused by Priests, Inc. v. Joyce*, No. 4:12CV1501 ERW, 2012 WL 4481210, at \*8 (E.D. Mo. Sept. 28, 2012) (citing other ordinances).

<sup>4</sup> The petition for certiorari highlights that "Bill Clinton" and other "liberal political figures" have been guests of the Church. Pet. at 2. As the Episcopal Cathedral for the Diocese of Colorado, people holding a wide variety of political views visit and attend worship and other services at the Church. On April 19, 2002, funeral services for Justice Byron White were held at the Church. <http://www.c-spanvideo.org/program/169683-1> (visited April 17, 2013). The motto of the Church is "Welcoming and Inclusive of All." <http://sjcathedral.org/> (visited April 17, 2013).

buffer zone, and then ***only when*** children under 12 years of age are “attending worship services and/or worship related events at the plaintiff church.” Pet. App. at 5a.

- Never discloses that paragraph 3(i) of the Injunction permits the Petitioners to enter the Church at any time they are not engaged in “conduct proscribed by this injunction,” *id.*, and that by removing the restriction on gruesome posters, the Petitioners could display their gruesome photographs on Church property during worship, funeral, and other services.

The petition is also noteworthy for what it gets wrong, and often significantly wrong. Namely, the Petitioners

- Misstate that the Injunction extends “around the whole block on which the church is located.” Pet. at 4. *Pace*, the trial judge, in response to the mandate in *St. John’s I*, modified the injunction “to delete Zone 1 and that portion of Zone 6 on Clarkson Street north of 14th Avenue.” Pet. App. at 33a; *see also St. John’s Church in the Wilderness v. Scott*, 194 P.3d 475, 486 (Colo. App. 2008), *cert. denied*, 2009 Colo. Lexis 832 (2009) (“*St. John’s I*”) (reproducing a color copy of the map included as Exhibit 1 to the injunction and showing the six zones identified by the Colorado Court of Appeals).
- Wrongly state that the Injunction covers “the opposite side of the street” (presumably

referring to 14th Avenue). Pet. at 4. *Pace*, the Injunction permits the Petitioners, at all times and on all days, to scream and wave posters on a portion of the north side of 14th Avenue across from the Church, from which the Petitioners would be clearly visible from the main Church entrance. Pet. App. at 36a, ¶11; *St. John's I*, 194 P.3d at 486 (map of church and surrounding streets).

- Erroneously suggest that the Injunction applies only to “a quintessential traditional public forum, a public sidewalk.” Pet. at 7. *Pace*, the Injunction prevents the Petitioners – while shouting or yelling or displaying gruesome images – from “entering upon the property or premises of the [P]laintiffs, St. John’s Church in the Wilderness” as well as the buffer zone adjacent to the Plaintiffs’ private property while it is being used to conduct outdoor worship ceremonies. Pet. App. at 32a.
- Facilely state that they “have no desire to disturb worship through loud noise.” Pet. at 29. *Pace*, the trial judge found that “Scott, standing on a minivan adjacent to Fourteenth Avenue in front of the church and no more than 20 feet from the procession, screamed anti-abortion and anti-homosexual remarks at the parishioners as they prepared to enter the church. . . . Scott’s conduct substantially interfered with their ability to participate in Palm Sunday worship

services.” Summ. J. Order ¶ 2(e)-(f); Pet. App. at 35a-35b.<sup>5</sup>

- Rewrite the record by claiming that “the trial judge himself expressly explained that the content of defendant’s speech was part of the foundation for the tort judgment on which the injunction was based.” Pet. at 33. *Pace*, the trial judge explained that the finding and conclusion of a private nuisance was based on the Petitioners’ conduct in deliberately interfering with the Plaintiffs’ worship service, not the content of any speech, and described the Injunction as content neutral. Findings at 27:25-28:10.
- Misstate that “the trial court’s judgment was not based on the Defendants’ ‘prior unlawful conduct’ in the sense of criminal conduct – there were no findings of such conduct.” Pet. at 31. *Pace*, the trial judge found that Petitioners’ conduct constituted a substantial, unreasonable interference with the Church and congregation’s enjoyment of private property and was in violation of Colorado’s private

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<sup>5</sup> Indeed, the record suggests that the Petitioners seek to conduct their protests **only** if they are able to disturb the Plaintiffs’ worship services. The Injunction allows the Petitioners to protest on a portion of the north side of 14th Avenue, where they can be seen by parishioners but are less able to interfere with outdoor services. Petitioners have never accepted the invitation to protest on the north side of 14th Avenue, but instead maintain that they have the right to scream and wave gruesome photographs in locations and during specific times that they know will disrupt Plaintiffs’ worship services.

nuisance and civil conspiracy law. Findings at 23:1-13; Summ. J. Order ¶ 4; *St. John's I*, 194 P.3d at 480. The trial judge also concluded that the police had grounds to pursue criminal charges against the Petitioners:

Corporal Stringham testified that the Defendants' conduct was borderline criminal in that he was forwarding the videos he took to the intelligence bureau to determine if any criminal charges would be filed. . . . I don't agree with their assessment that there was no basis for issuing a citation for disturbing worship services as they had done in 2004.

Findings at 12:11-22.

- Misstate that the "logic of this case . . . would justify restrictions in a broad range of places." Pet. at 27. *Pace*, the logic of the Colorado courts' decisions extends **only** to conduct during religious services, and then **only** in locations where the Petitioners' had intentionally interfered with Plaintiffs' worship services in the past. Pet. App. at 32a.

The first issue framed by the Petitioners, whether the government may restrict the display of gruesome materials to very young children in traditional public fora, is interesting, but was never advanced, litigated, or decided by the courts below. The second issue, whether the prohibition in the Injunction against disturbing worship is unconstitutional, is based on the false premise that the Petitioners were restrained because of their views or philosophy. The Petitioners



were restrained solely because their conduct caused disturbances in 2004 and 2005 that unreasonably interfered with Plaintiffs' ability to participate in worship services at the Church.



### **COUNTERSTATEMENT OF THE CASE**

On Palm Sunday, 2005, the St. John's in the Wilderness Episcopal Church's congregation gathered to celebrate an outdoor liturgy followed by a procession into the Church. Findings at 8:12-22. The trial judge found "that as a part of the Episcopalian liturgy for Holy Week they attempt to follow the footsteps of Jesus. The Palm Sunday procession is intended to reenact Jesus' entry into Jerusalem, and it's common among Episcopalian churches to have that type of procession." *Id.* at 7:2-7. The trial judge found that an outdoor liturgy and procession was a traditional element of Palm Sunday celebration in the Episcopal tradition:

The Palm Sunday liturgy is set forth in Exhibit 8 and contains indoor and outdoor services. The outdoor service starts with a gathering on what's called the east lawn which has been shown in several exhibits. And there the service starts with prayers and the blessing of the palms and then the procession starts along Clarkson around – up to the corner of 14th and along 14th Avenue to the main doors of the church. The outdoor procession included among other things the

singing of hymns by the adult choir, the children's choir, and the congregation during the procession.

*Id.* at 8:12-22. Approximately 300 people participated in each of the 9:00 a.m. and 11:15 a.m. processions, which spread onto the sidewalk and led up to the doors of the Cathedral. *Id.* at 7:13-14. The Petitioners parked cars in front of the Cathedral before 7:00 a.m. Then, positioning themselves on top of cars parked in the street "probably about 20 feet from the people in the procession," *id.* at 9:23-24, the Petitioners began screaming anti-homosexual and anti-abortion remarks at the Church members who were attempting to participate in the services:

From the time the congregation gathered on the east lawn for prayers and the blessing of the palms, Kenneth Scott spoke in an extremely loud voice which has been variously described as yelling, shouting, screaming, but in any event, vocalized in an extremely loud voice. . . . I would find that his voice was so loud . . . during the procession that it substantially interfered with the service.

*Id.* at 15:11-22. An experienced police officer who had observed many protests and witnessed the Palm Sunday protest testified, "Mr. Scott has the loudest voice he's ever heard among all . . . protesters. . . ." *Id.* at 14:8-11.

While screaming at parishioners who were trying to pray and sing hymns, the Petitioners waved large, distracting posters no more than 10 to 20 feet from

the parishioners. *Id.* at 15:8-22; *see* 9:13-18. The trial judge found that the Petitioners intentionally targeted graphic images at the children attending the outdoor worship services, thereby forcing parishioners to choose between foregoing the traditional Palm Sunday ceremony, or running a gauntlet of gruesome images displayed a few yards from the prayer ceremony:

I would find that on March 19, 2005, as shown in Exhibit 13, Jo Scott appeared on the “Tapestry of Life” television program and said among other things that, We’re gonna be at St. John’s Sunday picketing, we’re gonna take . . . big posters of aborted babies and we’re going to bring them out and make them look at them because they have children there with them.

*Id.* at 4:9-17. The trial judge found that “these posters were highly disturbing to both adults and children in the congregation because of the gruesomeness or gori-ness of the posters apart from any message intended to be conveyed.” *Id.* at 5:24-6:3. Testimony at trial established that the congregation praying outdoors and participating in the procession could not avoid the images “short of closing their eyes,” making reasonable participation in the worship service impossible. *Id.* at 5:14-19. As a result of the Petitioners’ intentionally disruptive conduct, members of the Church were deprived of the opportunity to celebrate Palm Sunday in the Episcopal tradition:

I would also find that after the announcement of the 11:15 procession was made inside the church, 85 to 100 people stayed inside. Mr. Berberich, a Plaintiff, testified he stayed inside because he did not want to subject himself to in his terms the abuse of the protesters that he'd experienced in 2004 . . . I think it is reasonable to infer that he was not the only one who stayed inside the church and declined or opted not to participate in the procession because they did not want to subject themselves to the Defendants.

I would find that Mr. Thompson's grandson was kept out of the procession so that he would not have to be exposed to the comments of the protesters, the loudness of the protest and particularly the posters of mutilated fetuses.

*Id.* at 18:19-19:9. The trial judge concluded that the Petitioners – by screaming and waving graphic and disturbing posters a few feet from the worship services – intentionally prevented church members from participating in the traditional Episcopalian liturgy, ceremony, and prayer. *Id.* at 23:6-11; Pet. App. at 35a-35b; Summ. J. Order. ¶¶ 2, 4.

The trial judge found that the Petitioners had demonstrated at St. John's Cathedral during Holy Week in previous years, and had been cited for disturbing worship services at St. John's in 2004. *Id.* at 3:8-13, 12:17-22. The trial judge found that the Petitioners' conduct was sufficient for the police to have issued a citation for disturbing worship services in

2005, as well. *Id.* at 12:17-22. Finally, the trial judge found that the Petitioners had planned and acted together to engage in conduct intended to disrupt the worship service, *id.* at 24:2-8, and that they would do so again if not enjoined. *Id.* at 25:4-17.

The Church sought relief in state court from the Petitioners' harassment, and filed a complaint alleging claims of private nuisance and civil conspiracy. On September 21, 2006, the trial judge granted summary judgment in favor of the Church on the claim that Petitioner Scott caused a private nuisance by interfering on Palm Sunday 2005 with the Church's use of its property for worship and prayer. *See generally* Summ. J. Order. The trial judge then conducted a bench trial from October 2, 2006 through October 6, 2006, and on October 10, 2006, found that Petitioner Powell also created a private nuisance and that Scott and Powell conspired to create a private nuisance to interfere with the Plaintiffs' intended use of their property. Findings at 1:10-12; 23:6-13; 24:2-8. The trial judge on October 10, 2006 also issued a permanent injunction, which enjoined Scott and Powell

1. At all times on all days, from entering the premises and property of St. John's Cathedral.

2. During worship and preparation for worship, from a period beginning one-half hour before and ending one-half hour after a religious event or series of religious events, including but not limited to worship services on Sundays between the hours of 7:00 a.m.

and 1:00 p.m., from focused picketing, congregating, patrolling, demonstrating, or entering that portion of public right-of-way shown on Exhibit 1 attached hereto and incorporated by this reference.

3. During worship and preparation for worship, from a period beginning one-half hour before and ending one-half hour after a religious event or series of religious events, including but not limited to worship services on Sundays between the hours of 7:00 a.m. and 1:00 p.m., from whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds in areas highlighted in yellow on Exhibit 1.

4. At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot owned by St. John's Cathedral.

5. At all times on all days, from encouraging, inciting, or securing other persons to commit any of the prohibited acts listed herein.

Permanent Injunction (Oct. 24, 2006, *nunc pro tunc*, October 10, 2006). Petitioners Scott and Powell appealed. The Colorado Court of Appeals in *St. John's I* affirmed the tort judgments, but as to the injunctive relief: (1) vacated the prohibition against entry by Petitioners onto Church property; (2) upheld the prohibition against obstructing access to the Church;

(3) upheld the time limitations on the Petitioners' demonstrations; and (4) remanded for additional findings regarding place and manner restrictions in each of six discrete portions of the buffer zone. *St. John's I* concluded that the Injunction's restrictions on speech were content neutral. *St. John's I*, 194 P.3d at 483 ("we determine that the restrictions imposed here are content-neutral.").

Following remand, the trial judge conducted a full-day evidentiary hearing, issued additional findings and conclusions, and modified the permanent injunction, which as now written enjoins the Petitioners

- (i) On days on which they engage in any conduct proscribed by this injunction, from entering upon the property or premises of plaintiffs, St. John's Church of the Wilderness.
- (ii) During worship and preparation for worship, from a period beginning one-half hour before and ending one-half hour after a religious event or series of religious events, including but not limited to worship service on Sundays between the hours of 7:00 a.m. and 1:00 p.m. from: (a) shouting or yelling at or using any noise amplification device(s) in a manner reasonably calculated to: (1) disturb parishioners' ability to worship; (2) interfere with the plaintiff church's ability to use its property for worship services and/or worship related events; (3) [cause parishioners to become physically upset]; and (4) deter parishioners from participating in worship services

and/or worship-related events on plaintiff church's property; and (b) displaying large posters or similar displays depicting gruesome images of mutilated fetuses or dead bodies in a manner reasonably likely to be viewed by children under 12 years of age attending worship services and/or worship-related events at plaintiff church.

- (iii) At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot owned by Saint John's cathedral.
- (iv) At all times on all days, from encouraging, inciting, or securing other persons to commit any of the prohibited acts listed herein.

Pet. App. at 32a-33a. The modified injunction will hereafter be referred to as the "Injunction." Petitioners appealed again, and the Colorado Court of Appeals again affirmed (except as to subsection ii(a)(3) of the injunction, which the Colorado Court of Appeals vacated), *St. John's Church in the Wilderness v. Scott*, 296 P.3d 273 (Colo. App. 2012) ("*St. John's II*"), from which the Petitioners now seek review.





## REASONS FOR DENYING THE WRIT

### I. No Conflict Exists Among State or Federal Courts, Which Without Exception Have Recognized that One's Religious Worship May Not Be Disturbed by Others Anxious to Preach a Different Religious or Social Philosophy

There are many reported decisions discussing the intentional disruption of worship and other religious services. All are consistent with this Court's teachings that one's religious worship may not be disturbed by others anxious to preach a different religious or social philosophy. Petitioners have not, and cannot, cite a case holding otherwise.

#### A. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011)

In *Snyder* this Court held that the First Amendment protects demonstrators from tort liability for engaging in protected speech where they "stayed well away from the memorial service" and did not "in any way interfere[] with the funeral service itself." *Id.* at 1220. This Court noted that there are limited situations where the location of targeted picketing may be regulated consistent with free speech principles.

We have identified a few limited situations where the location of the targeted picketing can be regulated under provisions that the Court has determined to be content neutral. In *Frisby*, for example, we upheld a ban on

such picketing “before or about” a particular residence. . . . In *Madsen* . . . we approved an injunction requiring a buffer zone between protestors and an abortion clinic entrance. . . . The facts here are obviously quite different, both with respect to the activity being regulated and the means of restricting those activities.

*Id.* at 1218 (citations omitted). The critical fact in *Snyder* was, of course, that the Phelps family ***did not interfere*** with the plaintiffs’ funeral ceremony:

The picketing was conducted under police supervision some 1,000 feet from the church, out of the sight of those at the church. The protest was not unruly; there was no shouting, profanity, or violence.

The record confirms that any distress occasioned by Westboro’s picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself.

*Id.* at 1218-19.

In contrast, this case falls squarely within the type of activity that this Court suggested was ***not*** entitled to First Amendment protection – the Petitioners’ intentional interference with the Plaintiffs’ Palm Sunday service itself. The findings of the trial judge, after hearing five days of testimony, that Petitioners Scott and Powell intentionally and knowingly disrupted and interfered with the religious ceremonies of the

Church and its parishioners, is entirely consistent with the rationale and logic of *Snyder*.

*Snyder*, in turn, is consistent with this Court's teachings in *Kovacs v. Cooper*, 336 U.S. 77, 86 (1949), and other cases concluding that one's religious worship and prayer may not be disturbed by others anxious to preach a different religious or social philosophy. See also *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 776 (1994) ("The freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights.").

**B. *St. David's Episcopal Church v. Westboro Baptist Church, Inc.*, 921 P.2d 821 (Kan. App. 1996), *cert. denied*, 519 U.S. 1090 (1997)**

In *St. David's*, the plaintiff sought an injunction against Westboro Baptist Church to stop the Phelps family from engaging in focused picketing and waving posters outside St. David's Episcopal Church during scheduled worship sessions, weddings, funerals, and other religious ceremonies. *Id.* at 824. The trial court entered an order prohibiting Phelps family members from picketing within 36 feet of the church property to the east, west, and north, and within 215 feet of church property on the south, starting one-half hour before and ending one-half hour after religious events. *Id.* at 825. After the trial court amended its order to cover focused picketing "with or without

banner[s], placard[s], or sign[s],” *id.* at 825-26, Westboro appealed.

The Kansas Court of Appeals agreed with the trial court’s conclusion that the government has a significant interest in protecting citizens’ right to worship:

[T]he First Amendment to the United States Constitution and Section 7 of the Bill of Rights of the Kansas Constitution . . . safeguard the free exercise of religion from governmental interference. However, the right of free exercise would be a hollow one if the government could not step in to safeguard that right from ***unreasonable interference from another private party***. In discussing the time, place, and manner restrictions that may be placed upon free speech, the United States Supreme Court has noted that “religious worship may not be disturbed by those anxious to preach the doctrine of atheism.” *Kovacs v. Cooper*, 336 U.S. 77 (1949). More broadly stated to apply here, ***one’s religious worship may not be unduly disturbed by another anxious to preach a different religious or social philosophy***.

*Id.* at 830 (emphases added); *see also Adderley v. Florida*, 385 U.S. 39, 47-48 (1966) (It is simply not true that people who want to “propagandize protests or views have a constitutional right to do so whenever and however and wherever they please”).

**C. *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) (en banc)**

In *Action*, the defendants entered a St. Louis Roman Catholic Cathedral parish during Sunday services, read “notices and demands,” then left. The next Sunday several defendants approached the lectern during service and asked for permission to speak, which was denied. Two weeks later, the defendants entered the cathedral and sat down at the rail where services were to be held, interfering with communion. The church sought relief in federal district court, which granted an injunction, concluding

that a permanent injunction should issue because defendants will continue to disrupt, interrupt and disturb the worship services and meetings of the Cathedral parish of the Diocese of St. Louis, and will deprive the plaintiffs and parishioners of the said parish of their Constitutional and civil rights to exercise freedom of religion, freedom of speech, freedom of assembly and the same right, as enjoyed by other citizens of the United States, to hold and use the parish property for religious purposes unless restrained by order of this Court and that irreparable injury, loss and damage will result to plaintiffs and parishioners of the Cathedral parish.

*Id.* at 1230-31. The Eighth Circuit affirmed the injunction, holding that one’s religious worship may not be disturbed by others anxious to preach a different religious or social philosophy.

**D. *Olmer v. City of Lincoln*, 192 F.3d 1176 (8th Cir. 1999), *overruled in part by*, *Phelps-Roper v. City of Manchester, Missouri*, 697 F.3d 678 (8th Cir. 2012) (en banc)**

*In Olmer*, the plaintiffs protested in the vicinity of Westminster Presbyterian Church in Lincoln, Nebraska. In response, the city council enacted an ordinance prohibiting all speech on public sidewalks next to the church. In holding that the ordinance was overbroad, the Eighth Circuit made clear that a narrowly-drawn ordinance protecting services of worship would pose no First Amendment problems:

The City also claims that it has a legitimate interest in preserving the right of its citizens to exercise their religion freely. Such an interest, in the abstract, is undoubtedly substantial and important. If, for example, anti-abortion protesters were to attempt to enter a church without permission, ***or to interrupt church services with their own speech***, the city could doubtless prosecute them under a general trespass or disturbing-the-peace provision, or, if necessary, adopt a more specific prohibition directed against disturbing or interrupting services of worship.

*Id.* at 1180 (emphasis added). The injunction entered by the Colorado trial judge is far narrower than the *Olmer* ordinance, as it applies only to Petitioners who have a demonstrated history of disturbing worship services on private property, and vow to do so in the

future – only during times of prayer, and only at locations where the screaming and poster waving would interfere with Plaintiffs’ religious worship. The *Olmer* decision is consistent with *Action’s* holding that one’s religious worship may not be disturbed by others anxious to preach a different religious or social philosophy.

**E. *Phelps-Roper v. City of Manchester, Missouri*, 697 F.3d 678 (8th Cir. 2012) (en banc)**

In *City of Manchester*, the Eighth Circuit recently rejected a facial challenge to an ordinance limiting the time and place of picketing and other protest activities at funeral and burial services. Overruling the part of *Olmer* that found no governmental interest in protecting unwilling listeners in non-residential settings, the court observed that “[i]t is unreasonable to expect a family or friend of the deceased to reschedule or forego attending the funeral so as to avoid offensive picketing.” *Id.* at 693.

**F. *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008)**

In *Strickland*, the Sixth Circuit upheld against a facial challenge an ordinance restricting picketing or other protest activities within 300 feet of a funeral or burial services, noting that “funeral attendees [cannot] simply ‘avert their eyes’ to avoid exposure to disruptive speech at a funeral or burial service. *The*

*mere presence of a protestor is sufficient to inflict harm.*” *Id.* at 366 (emphasis added).

**G. *Riley v. District of Columbia*, 283 A.2d 819 (D.C. 1971)**

In *Riley*, the District of Columbia Court of Appeals affirmed the defendant’s conviction under a local ordinance for disturbing religious services at the Shrine of the Most Blessed Sacrament. During the offertory the defendant followed the ushers down the aisle, passing out leaflets accusing members of the clergy of the parish of following racist policies. The court observed that “it is clear that one may not exercise claimed First Amendment rights at any place or at any time . . . nor do so at the expense of constitutional rights of another.” *Id.* at 824 (citations omitted).

**H. *Hill v. State*, 381 So. 2d 206 (Ala. Crim. App. 1979)**

In *Hill*, the defendant was convicted of violating a city ordinance making it a misdemeanor to willfully interrupt or disturb any assemblage of people meeting for religious worship. In rejecting the defendant’s contention that he was engaged in free speech protected by the First Amendment, the court observed that the “First Amendment affords defendant no protection in what he was doing; it affords members and visitors of the church concerned freedom and security against what he was doing.” *Id.* at 211.



**I. *Church of Jesus Christ of Latter-Day Saints v. Wallace*, 573 P.2d 1285 (Utah 1978)**

In *Wallace*, the defendant walked down a church aisle during services announcing “Make way for the Lord” and when confronted, responded “don’t touch the Lord.” In upholding a permanent injunction prohibiting the defendant from future interruptions of the church’s religious services, the court observed that the First Amendment “could not be interpreted to endow a religious fanatic with a constitutional right to disturb or break up the saying of Mass in the cathedral.” *Id.* at 1287.

**J. *People v. Morrissey*, 614 N.Y.S.2d 686, (N.Y. Crim. Ct. 1994), *aff’d as modified*, *People v. McDaniel*, 661 N.Y.S.2d 904 (N.Y. App. 1997)**

In *Morrissey*, the defendants were charged with the crime of disturbance of a religious service. The New York City Criminal Court denied the defendants’ motion to dismiss based on the First Amendment, concluding that “[t]he court finds that conduct proscribed by the challenged statute is not intended to punish the exercise of religion but is rather intended to protect the rights of persons to exercise their own religious beliefs without impermissible interference.” *Id.* at 690.

**K. *People v. King*, 561 N.Y.S.2d 395 (N.Y. Crim. Ct. 1990)**

In *King*, the defendants were charged with disturbing worship services at St. Patrick's Cathedral during a Mass conducted by Archbishop John Cardinal O'Connor. Quashing a subpoena served by the defendants seeking the testimony of the Archbishop, the court observed that his testimony was irrelevant, because "the issue here is whether the alleged actions of the defendants caused a disturbance which interfered with the ability to celebrate the Mass of those gathered at the Cathedral for that purpose." *Id.* at 397.

**L. *Central Presbyterian Church v. Black Liberation Front*, 303 F. Supp. 894 (E.D. Mo. 1969)**

In *Central Presbyterian*, the defendants acted willfully to harass and disturb the members of the church in their worship services, and the court found that unless restrained the defendants would "continue to harass, disturb and oppress the plaintiffs." *Id.* at 901. The defendants' conduct, as noted by the court, was "reprehensible" and "if condoned, will lead to a breakdown in this society." *Id.*

It is simply not true that persons wishing to propagandize their views have a constitutional right to do so whenever and however and wherever they please. The consistent logic of all of these decisions is that one's religious worship may not be disturbed by others anxious to preach a different religious or

social philosophy. There is no split of authority on this issue that would warrant the Court's review of this case.

## **II. The Trial Judge's Tort Judgments and the Injunctive Relief Are Content Neutral**

The Petitioners' statement that "the tort judgments underlying the Injunction expressly and repeatedly rely in part on the content of petitioners' speech," Pet. at 35, is not supported by the record. The threshold consideration governing whether an injunction is content neutral is, of course, the government's purpose. *Madsen*, 512 U.S. at 763. The trial judge found that the Petitioners had engaged in a repeated pattern of prior unlawful conduct, including Palm Sunday 2004 when Petitioners were cited by Denver police for disturbing worship services at the Church. After hearing evidence, the trial court concluded that the Petitioners acted unlawfully and committed the tort of private nuisance by interfering with the Plaintiffs' 2005 Palm Sunday worship services. Commenting on Petitioner Scott's conduct, the trial judge found that

As a result of Scott's conduct as described above, Canon Carlson, who was leading the procession, as well as numerous parishioners including children, became visibly upset to the point where Scott's conduct substantially

interfered with their ability to participate in Palm Sunday worship services.

Summ. J. Order ¶ 2(f). The trial judge concluded that injunctive relief was necessary in order to prevent future disturbances of Plaintiffs' worship services.<sup>6</sup>

The trial judge made clear that his purpose in entering the Injunction was to “promote the significant if not compelling governmental interest o[f] protecting the Plaintiffs' right to the free exercise of their religion, the protection of children, and St. John's right to use its property for the purpose of conducting religious services.” Findings at 28:5-10. Nothing in the record suggests that any part of the trial

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<sup>6</sup> Respondents agree with the Petitioners' statement on page 31 of the petition that

[A] critical First Amendment constraint on . . . injunctions against speech is that they can avoid strict scrutiny only if they are justified without reference to content, [*Madsen*, 512 U.S.] at 762-63. Thus this Court noted in *Madsen* that “the injunction was issued not because of the content of petitioners' expression, as was the case in *New York Times Co.* and *Vance*, but because of their prior unlawful conduct.” *Id.* at 763 n.2. Likewise, in *Schenck*, this Court held that, “[a]s in *Madsen*, . . . ‘the injunction was issued not because of the content of [the protestors'] expression, . . . but because of their prior unlawful conduct.’” 519 U.S. at 374 n.6.

(second emphasis added). Consistent with this reasoning, the trial judge here entered the Injunction because of the Petitioners' prior unlawful conduct – engaging in activities intended to disturb the Church's worship services in 2004 and 2005.

judge's purpose was to mute anti-homosexual or anti-abortion messages.<sup>7</sup>

Applying the *Madsen* standard, the trial judge crafted limited time, place, and manner restrictions to protect these substantial interests, which require Petitioners to remain on the northwest side of 14th Avenue (in full view of the main Church entrance) during worship services. The narrowly-designed limitations on the Petitioners' activities burden no more speech than necessary, while still allowing the Plaintiffs to use their property for its intended prayer and other religious purposes. The Injunction's purpose is demonstrated by its express terms, which limit the restrictions to times when the Plaintiffs are conducting religious worship services.

*St. John's I* concluded that the three alternative grounds for the Injunction relied upon by the trial judge – the ability to worship, protection of children, and personal privacy – were all content-neutral purposes. *St. John's I*, 194 P.3d at 484 (“we first consider the purposes for the injunction as detailed by the court and conclude that they are content-neutral.”). *St. John's II* did not revisit the *St. John's I* conclusions concerning content neutrality (“We decline defendants’ invitation to revisit matters resolved in

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<sup>7</sup> There was no testimony at trial from the individual Plaintiffs concerning their views on homosexuality, women's rights, or abortion, and the trial judge never disclosed his personal views on homosexuality, women's rights, or abortion.

the trial court's initial order and upheld in *St. John's I.*"). Pet. App. at 6a. The discussion in *St. John's II* concerning content neutrality is limited to one of the three substantial government interests justifying the Injunction – the psychological harm to children under 12 years of age who are attending worship services. *St. John's II* upheld the Injunction on this ground as well, for the reason that the government has a compelling interest in protecting very young children from deliberate visual assault while they are engaged in worship and prayer. But Petitioners' suggestion that *St. John's II* holds that the government has a compelling interest in protecting very young children from visual assault in traditional public fora is not accurate. By its express terms the trial judge's order enjoins the display of gruesome photographs on or immediately adjacent to Church property **only** when very young children are participating in worship services.

The Injunction permits the Petitioners to confront very young children with gruesome posters in the vicinity of the Church at all times and on all days except during religious worship. Pet. App. at 32a. And, during religious worship, the Injunction permits the Petitioners to confront very young children with their gruesome posters from across 14th Avenue – in full view of the children entering and exiting the main doors of the Cathedral. *Id.* at 36a-37a. The Petitioners are free to scream whatever remarks they please at very young children during worship services from the north side of 14th Avenue and other

non-buffer zones. *Id.* at 32a. The Petitioners may scream whatever remarks they please in the buffer zone when no worship services are occurring. *Id.* And the Injunction does not prevent the Petitioners from confronting very young children with gruesome posters in traditional fora like parks, shopping malls, and fairs. *See id.*

The Injunction requiring the Petitioners with posters to remain on the north side of 14th Avenue during worship services is justified by two grounds never discussed or contested by Petitioners: “the significant if not compelling governmental interest of protecting the Plaintiffs’ right to the free exercise of religion . . . and St. John’s right to use its property for the purpose of conducting religious services.” Findings at 27:25-28:10. Either alone is sufficient, consistent with First Amendment precedent, to support the issuance of the Injunction as it now exists.

The necessity and the content neutrality of the Injunction’s gruesome images provision is demonstrated by the operation of all provisions of the Injunction in concert. The Injunction permits the Petitioners to freely enter the Church except “on days on which [defendants] engage in any conduct proscribed by this injunction.” Pet. App. at 32a. Removing the posters from the proscribed conduct would permit the Petitioners to enter the Church during worship and silently display their photographs of dismembered body parts next to the pulpit and altar. That conduct would force parishioners to choose between closing their eyes during the service or

avoiding worship service entirely, profoundly disturbing the solemnity of the proceedings, and would be plainly disturbing and unreasonable.

For the Church and its members, the east lawn of the property was their place of worship on Palm Sunday 2005. The effect of Petitioners' manner of protesting, by waving gruesome posters a few feet from religious ceremonies conducted on private property, is little different than if the Petitioners had entered the Church and hung their posters from the communion rail. The disruption of the Plaintiffs' worship service is the same, and forces parishioners to either close their eyes during the service or cancel their worship plans and go home without observing Palm Sunday. That is not a burden on religious practice this Court has ever countenanced, or a burden that has ever been allowed by any lower court faced with issues created when persons attempt (however sincerely motivated) to disrupt others' religious ceremonies in order to preach their own religious or social philosophy. Because the Injunction is predicated upon plainly content-neutral principles – the prevention of unreasonable interference with the use and enjoyment of private property for worship services – there is no reason for this Court's review.



### **III. The Constitutionality of Restrictions on the Display of Gruesome Posters in Traditional Public Fora to Very Young Children Not Actively Participating in Religious Worship Services Was Never Raised, Litigated, or Decided by the Courts Below**

The Injunction entered by the trial judge prohibits the Petitioners from

Displaying large posters or similar displays depicting gruesome images of mutilated fetuses or dead bodies in a manner reasonably likely to be viewed by children under 12 years of age ***attending worship services and/or worship related events at plaintiff church.***

Pet. App. at 32a (emphasis added). The Plaintiffs never sought, and the courts below never granted, restrictions on the Petitioners' activities other than with respect to conduct occurring immediately before, during, and after worship services. The Plaintiffs never sought to limit Petitioners' activities except on the Church premises and in areas immediately adjacent to the Plaintiffs' property where prayer and worship services are conducted. The Plaintiffs never requested, and the parties never litigated, any restriction on the Petitioners' conduct when religious events were not occurring in the Church.

The first issue framed by Petitioners – whether the government can restrict the display of gruesome images to the very young in traditional public fora – was thus never presented to or decided by the trial

judge or the Colorado Court of Appeals. The trial judge found that the display of photographs of gruesome images disturbed very young children while they were attempting to worship on Church property. Pet. App. at 34a ¶ 7. The Injunction, similarly, is limited to restricting Petitioners from screaming and waving gruesome photographs at children under 12 years of age while very young children are “attending worship services and/or worship related events at plaintiff church.” Pet. App. at 32a.

The Petitioners misread the Injunction by suggesting it has any application outside of the context of religious worship. For example, the Petitioners assert that “if the Colorado Court of Appeals decision is allowed to stand, many such otherwise clearly unconstitutional restrictions will likely be recast in the future as attempts to shield children, since there will be children present in many public places.” Pet. at 20. But the holdings of the Colorado courts are limited to protecting children *attending worship services* on private property, from unreasonable disturbance and interference. The trial judge and court of appeals based their rulings upon the tort of private nuisance, which requires proof of unreasonable interference with the use and enjoyment of private property. *See St. John’s I*, 194 P.3d at 479; *Pub. Serv. Co. v. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001). The Colorado courts’ rulings simply do not, by their express terms or implication, curtail any activities taking place in traditional public fora.

A fundamental error in the petition is the repeated, and mistaken, assertion that the restrictions on gruesome photographs was imposed simply because they are “highly disturbing to children” as a general proposition. That is simply not so. The restrictions on the display of gruesome photographs was imposed because the Petitioners’ conduct disturbed and interfered with young children’s participation in Palm Sunday *worship and prayer services*. The proof of the trial judge’s purpose, of course, is that the terms of the Injunction prevent the Petitioners from waving gruesome photographs *only* while very young children are “attending worship services and/or worship related events at plaintiff church.” Pet. App. at 32a.

The issues framed by the Petitioners were never litigated below. And no matter how interesting the issues framed by the Petitioners might appear in the abstract, this case does not present the factual or procedural record on which they could be addressed.



## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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