No. 12-

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 a Writ of Certiorari to the Colorado Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the government restrict the display of "gruesome" material within political, moral, and religious advocacy in a traditional public forum, in order to protect the sensibilities of children? There is a conflict on this question among state courts of last resort and federal circuit courts.

2. The injunction in the case below also contained separate provisions that (unlike the "gruesome images" provision) were facially content-neutral. But the tort judgments on which the injunction was based expressly relied in part on the supposedly harmful content of defendants' speech. Should such provisions of an injunction be subjected to strict scrutiny?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Kenneth Tyler Scott and Clifton Powell, respectfully petition for a writ of certiorari to review the judgment of the Colorado Court of Appeals.

OPINIONS BELOW

The Colorado Court of Appeals decision, App. A, has not yet been printed in the *Pacific Reports*, but is available on WESTLAW and LEXIS at 2012 COA 72. The Colorado Supreme Court decision denying review, App. B, is unreported. The trial court order, App. C, is unreported.

JURISDICTION

The Colorado Supreme Court denied review on January 7, 2013. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides,

> Congress shall make no law * * * abridging the freedom of speech.

The Fourteenth Amendment provides,

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT

A. Petitioners' Conduct

On Palm Sunday, March 20, 2005, Kenneth Tyler Scott and Clifton Powell led a demonstration outside Saint John's Church in the Wilderness against what they see as the evils of abortion. They had likewise demonstrated on prior Palm Sundays, continuing a tradition begun by a former St. John's parishioner, who thought that on Palm Sunday and Easter demonstrators had a chance to reach parishioners who might not go to church on other days.[1]

Scott believed that the church was "a politically correct Church" that had "go[ne] astray from the original teachings of the Bible," and had made common cause with liberal political figures (including "ex-President Bill Clinton") who had allegedly at times visited the church.[2] Scott disapproved of the "Episcopal Church position of supporting abortion" and specifically of the pro-abortion-rights position of the Colorado Episcopal priest Rev. Nina Churchman.[3]

The demonstration took place during the Church's outdoor services. *Saint John's Church in Wilderness* v. *Scott*, 194 P.3d 475, 478 (Colo. Ct. App. 2008) [hereinafter *Saint John's I*]. Scott, Powell, and other protesters carried signs displaying, among other things, pictures of aborted fetuses. *Id.* The signs were about 3½ feet by 4½ feet. App. 25a n.12. The demonstration involved no violence, trespass, physi-

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[1] 17 App. Rec. 17:25-18:3, 25:7-19.

[2] 1 App. Rec. 84-85, ¶¶ 9-11.

[3] 1 App. Rec. 151, ¶ 1; *see also* 2 App. Rec. 296, ¶ 3.

cal obstruction, or criminal conduct. 194 P.3d at 481, 484. Nor were petitioners cited for violating any noise ordinance, though police were present and watching.[4]

Parishioners were bothered by the sound of Scott's and Powell's speech, which could be heard and seen from the outdoor activity at the church, though there was no evidence that the speech disturbed worship within the church itself.[5] About 200 children took part in the outdoor services and could have seen the signs. App. 23a. Some parents withdrew their children from church activities because of concern over the demonstration. App. 15a n.10.

Because of these and other complaints from parishioners, the Church filed suit, alleging private nuisance and civil conspiracy to commit private nuisance, and sought an injunction barring future protests.

B. The Injunction

The Colorado District Court, after a bench trial, found defendants liable for private nuisance and civil conspiracy and issued an injunction prohibiting certain behavior by Scott and Powell. Defendants ap-

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[4] 24 App. Rec. 163:1-12.

[5] "There is no evidence that Scott and Powell entered the Church, or the Church's property, created a private nuisance inside the Church, or conspired to do so." *Saint John's I*, 194 P.3d at 481. Plaintiff Charles Thompson testified that he could not hear the protesters indoors when the doors were closed. 14 App. Rec. 123:19-23, 132:10-18. Rev. Stephen Carlsen testified that he could hear the protesters indoors only while he was "entering and going through the doors." 9 App. Rec. 182:3-9.

pealed, and the Court of Appeals reversed in part and remanded. *Saint John's I*, 194 P.3d 475.

The District Court entered revised judgments and issued a modified injunction. *See* App. C. The judgments, on which the injunction was founded, rested in large part on defendants' display of the fetus photographs, and the reactions of parishioners to those photographs. *See* p. 32, *infra*.

Defendants appealed again, and the court of appeals modified the injunction still further. As the case now stands, the injunction has two main provisions. Both provisions apply Sundays from 7 am to 1 pm. Both also apply at other times from half an hour before the start of a religious event to half an hour after the end of a religious event. App. 32a, ¶¶ 3(ii)-(iii). Both apply to a zone extending around the whole block on which the church is located, and also covering portions of a neighboring block and the opposite side of the street. *Saint John's I*, 194 P.3d at 486. The first provision (the "gruesome images" provision) prohibits Scott and Powell 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.

App. 5a. The second provision (the "disturbing worship" provision) prohibits Scott and Powell from

> 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; * * * and (4) deter parishioners from participating in worship services and/or worship-related events on plaintiff church's property.

Id.

The Court of Appeals acknowledged that the "gruesome images" provision of the injunction is content-based, App. 18a, but held that this provision was still justified because it was "narrowly tailored" to the "compelling government interest" in "protecting children from exposure to certain images of aborted fetuses and dead bodies." App. 24a. The Court of Appeals followed the conclusion in *Saint John's I* that the "disturbing worship" provision was content-neutral and was consistent with the First Amendment rules governing content-neutral injunctions. App. 11a-12a. The Court of Appeals also struck down a separate provision (subsection 3 of the original injunction) that barred speech that causes parishioners "to become physically upset"; that provision is no longer part of the case and is not otherwise discussed in this petition. App. 16a.

Scott and Powell petitioned the Colorado Supreme Court for certiorari. That court refused to hear the case, over the dissent of Justice Allison Eid and Chief Justice Michael Bender.

REASONS FOR GRANTING THE PETITION

I. The "Gruesome Images" Provision Restricts Speech That Is Central to Petitioners' Message

This Court has been dealing with restrictions on pro-life speech for about 20 years. *See Hill* v. *Colora-*

do, 530 U.S. 703 (2000); *Cloer* v. *Gynecology Clinic, Inc.*, 528 U.S. 1099 (2000) (Scalia, J., joined by Thomas, J., dissenting from the denial of certiorari); *Lawson* v. *Murray*, 525 U.S. 955 (1998) (Scalia, J., concurring in the denial of certiorari); *Williams* v. *Planned Parenthood Shasta-Diablo, Inc.*, 520 U.S. 1133 (1997) (Scalia, J., joined by Kennedy & Thomas, JJ., dissenting from the denial of certiorari); *Schenck* v. *Pro-Choice Network of Western N.Y.*, 519 U.S. 357 (1997); *Lawson* v. *Murray*, 515 U.S. 1110 (1995) (Scalia, J., concurring in the denial of certiorari); *Winfield* v. *Kaplan*, 512 U.S. 1253 (1994) (Scalia, J., joined by Kennedy & Thomas, JJ., dissenting from the denial of certiorari); *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753 (1994). Just this Term, this Court granted certiorari and summarily reversed in *Lefemine* v. *Wideman*, 133 S. Ct. 9, 10 (2012) (*per curiam*), which involved a fee dispute arising from a challenge to such a restriction. Lower courts have been dealing with such restrictions for nearly 40 years.[6]

Such restrictions have sometimes been evaluated under relatively modest levels of First Amendment scrutiny. Some of the cases, for instance, have concluded—often controversially—that the restrictions were content-neutral, and were thus subject only to

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[6] For some of the earliest cases, see *Commonwealth* v. *Jarboe*, 12 Pa. D. & C.3d 554, 561 (Ct. Com. Pl. 1979) (reversing disorderly conduct conviction for displaying poster showing aborted fetuses); *O.B.G.Y.N. Ass'ns* v. *Birthright of Brooklyn & Queens, Inc.*, 407 N.Y.S.2d 903, 906 (App. Div. 1978) (reversing injunction provision that barred words "murder" and "kill" on anti-abortion placards); *Bolles* v. *People*, 541 P.2d 80, 85 (Colo. 1975) (striking down harassment statute used to prosecute defendant for mass-mailing brochure depicting aborted fetuses).

intermediate scrutiny. *See, e.g.*, *Hill*, 530 U.S. at 719-25; *Madsen*, 512 U.S. at 763-68. Other cases have arisen in nonpublic fora, where the government has broad power to restrict speech. *See, e.g.*, *Center for Bio-Ethical Reform, Inc.* v. *City & County of Honolulu*, 455 F.3d 910, 920 (9th Cir. 2006).

But the restriction on "gruesome images" does not fall into any of these zones of lesser First Amendment protection. Rather, the restriction is frankly content-based, as the court below acknowledged. App. 18a. It applies to a quintessential traditional public forum, a public sidewalk. And it does not enjoy the support of a single Supreme Court precedent involving political speech on any other subject. "[T]his wolf comes as a wolf."[7]

Moreover, the restriction targets content that petitioners see as critical to their underlying message. In *Cohen* v. *California*, 403 U.S. 15, 26 (1971), this Court stressed that a content-based restriction on certain words—even vulgarities—risked interfering with the expression of ideas. In *Texas* v. *Johnson*, 491 U.S. 397, 416 & n.11 (1989), this Court held that free speech protection "is not dependent on the particular mode in which one chooses to express an idea," partly because "messages conveyed without use" of certain visual imagery may be less forceful than "those conveyed with it." And this conclusion is even more applicable to a content-based restriction on the display of photographs of aborted fetuses, pictures that convey messages in ways that words cannot equal.

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[7] *Morrison* v. *Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

Even some pro-abortion-rights commentators acknowledge that much of the public support for abortions stems from the natural human reaction, "out of sight, out of mind." For instance, Professor Laurence Tribe writes,

> Many [people], who can readily envision the woman and her body, who cry out for her right to control her destiny, barely envision the fetus within that woman and do not imagine as real the life it might have been allowed to lead. For them, the life of the fetus becomes an * * * invisible abstraction.

LAURENCE TRIBE, ABORTION: THE CLASH OF ABSOLUTES 5 (1980).[8] A born baby is visible, and leaves a visible body if it is killed. Fetuses are invisible while they are developing in the womb, and they are generally disposed of quickly after an abortion, so they remain unseen even then.

Petitioners believe that the way to portray what they see as the brutality and inhumanity of abortion—and the personhood of the fetus—is to show exactly what the abortion produces. Words, especially words on a sign glimpsed by a passerby, cannot effectively capture that. A photograph can.

Photographs of lynching victims showed the evil of lynching in a way that words could not. "[O]ne

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[8] Professor Tribe also argues that some on the pro-life side "barely see the woman who carries [the fetus] and her human plight." *Id.* Petitioners disagree, and they support people's right to display photographs of women who need abortions, or photographs of women who died as a result of illegal abortions.

horrific apparition after another makes visceral what one dares not imagine."[9]

Likewise, such photographs affected public opinion in a way that words could not. Emmett Till's mother, reacting to her son's lynching in 1955, displayed her son's body in a glass-topped casket "so mourners could see her son's ghastly injuries. Photographs of Till's body in the coffin published in *Jet Magazine* became powerful images of the civil rights movement."[10] As Till's cousin would later say, "[N]o one would have believed it if they didn't see the picture or didn't see the casket. * * * [W]e was always as a people, African Americans, was fighting for our civil rights, but now we had the whole nation behind us."[11]

Photographs of Holocaust victims similarly helped show the evil of Nazism in ways words could not easily convey. In the words of playwright Arthur Miller,

> [During World War II,] it was by no means an uncommon remark that we had been maneuvered into this war by powerful Jews who secretly controlled the Federal Government.

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[9] Mary Thomas, *Art Review: 'Without Sanctuary' Digs Deeply into Painful Issues of Inhumanity*, PITTSBURGH POST-GAZETTE, Sept. 29, 2001.

[10] *No Rest for Lynching Victim Who Sparked Civil Rights Movement*, DAILY MAIL (UK), July 14, 2009.

[11] Abby Callard, *Emmett Till's Casket Goes to the Smithsonian*, SMITHSONIAN, Nov. 2009. In the 1800s, racists used photographs of lynchings to intimidate blacks, but by the 1910s anti-lynching activists began to use such photographs to mobilize public opinion against lynching. ASHRAF H.A. RUSHDY, THE END OF AMERICAN LYNCHING 62-69 (2012).

> Not until Allied troops had broken into the German concentration camps and the newspapers published photographs of the mounds of emaciated and sometimes partially burned bodies was Nazism really disgraced among decent people and our own casualties justified.[12]

Photographs of those who died or were gruesomely injured during the Vietnam War likewise affected public opinion in a way words could not. "[P]ictures of victims—of a Buddhist monk immolating himself, of a napalmed Vietnamese girl running in terror along a highway, and * * * of a terrorist being shot by a general—helped turn public opinion against the war."[13]

More recently, *Time* magazine displayed on its cover (which would have been visible on newsstands to many children) a portrait of a woman who had had her nose cut off by the Taliban for escaping her abusive in-laws; the cover bore the caption, "What Happens If We Leave Afghanistan." Cover, TIME, July 29, 2010. The editor explained that he chose to print the image, despite the fact that it "will be seen by children, who will undoubtedly find it distressing," because,

> [T]he image is a window into the reality of what is happening—and what can happen—in a war that affects and involves all of us. I

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[12] Arthur Miller, *The Face in the Mirror: Anti-Semitism Then and Now*, N.Y. TIMES, Oct. 14, 1984.

[13] Jefferson Hunter, *Disturbing Images of Men in Combat*, NEWSDAY, Mar. 5, 1989, at 23 (reviewing SUSAN MOELLER, PHOTOGRAPHY AND THE AMERICAN EXPERIENCE OF COMBAT (1989)).

> would rather confront readers with the Taliban's treatment of women than ignore it. I would rather people know that reality as they make up their minds about what the U.S. and its allies should do in Afghanistan.

Richard Stengel, *The Plight of Afghan Women: A Disturbing Picture*, TIME, July 29, 2010. Petitioners likewise want to show people a window into the reality of what is happening in what they see as a holocaust that affects and involves all of us. They likewise would rather confront readers with America's treatment of fetuses than ignore it. And they would rather people know that reality as they make up their minds about what Americans should do with regard to abortion.

The restriction thus censors petitioners' speech to the many adults whom petitioners are trying to reach. But it also restricts minors' ability to see—in its most convincing form—political, moral, and religious speech that is directly relevant to their lives. Regrettably, many American girls are getting pregnant, and participating in the making of decisions about abortion, even in their early teens.[14] (The boys who impregnate the girls may play a role in making these decisions, too.) Moreover, some of these girls

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[14] In 2006, for instance, over 6,000 abortions were performed on girls age 14 or younger in the U.S. GUTTMACHER INSTITUTE, U.S. TEENAGE PREGNANCIES, BIRTHS AND ABORTIONS 10, tbl.2.4 (2010), http://www.guttmacher.org/pubs/USTPtrends.pdf. Assuming the great majority of these involved 14-year-old girls rather than younger ones, this means that about 0.25% of 14-year-old-girls had an abortion that year. And a 14-year-old girl recently went to court to restrain her family from forcing her to get an abortion. *Texas Suit over Forced Abortion Threat Resolved, Attorney Says*, CNN, Jan. 18, 2012.

and boys may be making decisions about whether to have sex based partly on the ready availability of abortion.

And decisions about abortion and sex, which can influence the entire path of the girls' and boys' future lives, are themselves inevitably influenced by what those children have learned in the years before that decision. As Judge Posner has noted, children below voting age "must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise." *American Amusement Machine Ass'n* v. *Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001). Likewise, children must be allowed the freedom to form their moral, religious, and political views about abortion on the basis of uncensored speech before they reach the age when they have to decide whether to have an abortion.

II. Court Decisions Conflict on Whether Disturbing Visual or Verbal Imagery May Be Banned from Public Spaces to Shield Children

A. For First Amendment Protection: Sixth and Ninth Circuits, as Well as the Implications of This Court's Own Precedents

Lower courts sharply disagree on whether the government may impose content-based restrictions on disturbing visual or verbal political imagery in order to shield children. Some courts have refused to allow such restrictions. Such speech, they have acknowledged, is fully protected even when some view-

ers—including children—may be offended or disturbed by it.

Thus, the Sixth Circuit stated that the First Amendment fully protects displays of aborted fetuses, even when children may be disturbed by such displays. In *Center for Bio-Ethical Reform, Inc.* v. *City of Springboro*, 477 F.3d 807, 813, 816 (6th Cir. 2007), police officers stopped and detained for three hours anti-abortion protesters whose truck was covered with pictures of aborted fetuses. Plaintiffs stated that the police exhorted one of the protesters to "find a different method" because "[c]hildren see those, what about children seeing those, don't you think children shouldn't see those." *Id.* at 817.

The Sixth Circuit held this detention unconstitutional, and concluded that the police officers were not covered by qualified immunity. "[A] reasonable officer, when faced with the circumstances of this case, would have known that detaining Plaintiffs *because of* their speech would violate their clearly established First Amendment rights." *Id.* at 824.

The Ninth Circuit reached the same result. In *Center for Bio-Ethical Reform, Inc.* v. *Los Angeles County Sheriff Dept.*, 533 F.3d 780 (9th Cir. 2008), an anti-abortion protester drove by a middle school in a truck covered with large photos of aborted fetuses. *Id.* at 785. Some students became distressed, while others discussed throwing rocks at the truck. *Id.*

Several sheriff's deputies then ordered the protester to leave the area, citing a California statute that forbids "interfer[ing] with" or "disrupt[ing]" school activities. *Id.* at 786, 791. But the Ninth Circuit construed the statute not to include the protest-

er's behavior, because it would be "an unprecedented departure from bedrock First Amendment principles to allow the government to restrict speech based on listener reaction simply because the listeners are children." *Id.* at 790.

These cases are consistent with this Court's precedents. Though sexually-themed speech has long been seen as less protected for minors than other speech is, *see Brown* v. *Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2735-36 (2011); *Ginsberg* v. *New York*, 390 U. S. 629 (1968), this Court has nonetheless held that even images that many might see as unsuitable for minors—large, full-color, moving depictions of nudity on a drive-in screen—may be publicly displayed where minors can see them. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975). Even such obtrusive images are constitutionally protected unless the nudity is so pornographic and lacking in serious value that it fits within the "obscene-as-to-minors" exception set forth by *Ginsberg*. *A fortiori*, speech that has serious political, moral, and religious value for minors and that is not sexually themed must be at least as constitutionally protected—even where children can see it—as is nudity on drive-in screens.

Likewise, in *Brown*, this Court specifically rejected a call to carve out a special First Amendment rule for speech to children. The government in that case sought to uphold a ban on the distribution of violent video games to children, by analogy to limits on the distribution of sexually themed material to children. *Brown*, 131 S. Ct. at 2734. This Court, though, struck the ban down.

The government's attempt to "create a wholly new category of content-based regulation that is per-

missible only for speech directed at children," this Court held, was "unprecedented and mistaken." *Id.* at 2735. "'[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.'" *Id.* (quoting *Erznoznik*, 422 U.S. at 212-13).

And the government's "legitimate power to protect children from harm" "does not include a free-floating power to restrict the ideas to which children may be exposed." *Id.* at 2736. "'Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.'" *Id.* (quoting *Erznoznik*, 422 U.S. at 213-14). Again, *a fortiori*, what is true for violent video games must be at least as true for "images" that directly bear on political, moral, and religious debate, even when the government believes those images are "unsuitable" for minors.

The Colorado Court of Appeals decision below relied on this Court's decisions in *Reno* v. *ACLU*, 521 U.S. 844, 875 (1997), *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989), and *Ginsberg*, 390 U.S. at 638—all of which involved sexually themed speech—in upholding the content-based ban on the display of "gruesome images." App. 22a. But such reliance was unsound, given the holding in *Brown* that precedents related to sexually themed speech cannot be carried over to other speech.

Indeed, Chief Justice Bender dissented from the Colorado Supreme Court's denial of certiorari in this case, even though he had voted with the majority to

uphold the speech restriction in the case that became *Hill* v. *Colorado*. *Hill* v. *Thomas*, 973 P.2d 1246 (Colo. 1999), *aff'd sub nom. Hill* v. *Colorado*, 530 U.S. 703 (2000). Chief Justice Bender thus apparently recognized that, even to one who believes that assertedly content-neutral restrictions on speech outside medical facilities are constitutional, content-based restrictions on pro-life speech should be a different matter.

B. For Allowing Restrictions: The Eighth Circuit, the Washington Supreme Court, the Wyoming Supreme Court, and the Decision in This Case

On the other hand, the Eighth Circuit and the Washington Supreme Court have stated that restricting allegedly disturbing anti-abortion messages in order to shield children is constitutional. The Colorado Court of Appeals held the same in this case, in a decision that the Colorado Supreme Court refused to review despite the dissent of Justice Allison Eid and Chief Justice Michael Bender. And the Wyoming Supreme Court likewise suggested that similar restrictions could be permissible.

In *Olmer* v. *City of Lincoln*, 192 F.3d 1176, 1180 (8th Cir. 1999), *overruled in part as to a different matter by Phelps-Roper* v. *City of Manchester*, 697 F.3d 678, 692 (8th Cir. 2012) (en banc), the Eighth Circuit stated that the government had a compelling interest in protecting young children from "frightening images," such as "a picture of a dead body." *See also Frye* v. *Kansas City Missouri Police Dep't*, 375 F.3d 785, 792 (8th Cir. 2004) (repeating this statement). *Olmer* was overruled in part in the *Phelps-Roper* decision, but only in the direction of allowing

more speech restrictions. *Olmer* suggested that content-neutral restrictions on picketing at nonresidential locations (including churches) are generally unconstitutional, unless images supposedly harmful to children are present. 192 F.3d at 1182. *Phelps-Roper* concluded that such content-neutral restrictions are permissible, at least near funerals. 697 F.3d at 692.

The Washington Supreme Court likewise held that pro-life picketers' speech could be subject to content-based restrictions aimed at protecting children from supposed disturbance. *Bering* v. *SHARE*, 721 P.2d 918, 935-36 (1986). The case involved an injunction against abortion protesters "referring, in oral statements while at the picket site, to physicians or patients, staff, or clients as 'murdering' or 'murderers,' 'killing' or 'killers'; or to children or babies as being 'killed' or 'murdered' by anyone in the Medical Building." *Id.* at 924.

The court held that there was a compelling interest in protecting children from such speech, based on a trial court finding that "use of such words had 'inflicted trauma upon the children overhearing such references.'" *Id.* at 933. The injunction, the court held, could stand as long as the lower court narrowed the injunction to ban the language only in the presence of children, with age 12 as the suggested cutoff. *Id.* at 936.

The Wyoming Supreme Court likewise held that the constitutionality of an injunction against the use of "disturbing images of aborted and dismembered fetuses" should turn on whether the government could present "evidence concerning the injury or potential injury to children from viewing the images." *Operation Save America* v. *City of Jackson*, 275 P.3d 438, 461 (Wyo. 2012). The court held that the injunc-

tion entered by the lower court lacked an adequate evidentiary foundation. *Id.* But the court's reasoning means that future such injunctions against political speech might well be constitutional, if a trial court is persuaded that the speech might inflict "potential injury" on child viewers.

Indeed, the Colorado Court of Appeals decision below cited *Operation Save America*, *Olmer*, and *Bering* as support for the constitutionality of the injunction against displaying "gruesome images." App. 23a. The decision below now joins those other cases as a precedent for allowing content-based restrictions on pro-life speech that uses allegedly disturbing words or graphics.

And the Colorado Supreme Court essentially gave its blessing to the Court of Appeals' decision. Over the objections of Justice Allison Eid and Chief Justice Michael Bender, the court denied certiorari, deliberately leaving the lower court's decision and its reasoning to stand as Colorado law. App. B.

C. The Issue Has Arisen in Many Other Courts as Well

Whether the First Amendment allows the government to restrict words and images that are allegedly "disturbing" to children has arisen in many other cases as well.

These are trial court cases, and thus do not count towards the split as such. But they are cited here to show how pro-life speech is often targeted for such content-based restrictions, in the absence of squarely controlling authority from this Court. To give just a few examples:

1. In *Wilkerson* v. *Scott*, 1999 WL 34994617, ¶ (f) (Cal. Super. Ct. June 11, 1999), the trial court enjoined "[g]iving photographs / posters / visual depictions of aborted fetuses to anyone under the age of 16 years old."

2. In *Tatton* v. *City of Cuyahoga Falls*, 116 F. Supp. 2d 928, 934 (N.D. Ohio 2000), a police officer ordered a protester to stop displaying "a graphic and disturbing photograph of an aborted fetus in the presence of children," because of the perceived danger of criminal attack on the protester. The court concluded that, in light of Tatton's having "continued to inflame the crowd by holding his sign in a manner that allowed children and others to see the photograph," "the Court cannot say that a reasonable officer would have concluded that Tatton had a First Amendment right to continue protesting." *Id.*

3. In *Trewhella* v. *City of Lake Geneva*, the city's counterclaim accused plaintiffs of "exposing minor children to harmful material," and sought an injunction barring plaintiffs "from distributing harmful material," in the form of leaflets with pictures of aborted fetuses. Defendants' Answer to Plaintiffs' Verified Complaint, *Trewhella* v. *City of Lake Geneva*, No. 01-c-329, at 13-14 (E.D. Wis. Apr. 17, 2001). Defendants later agreed to dismiss the counterclaim. *Trewhella* v. *City of Lake Geneva*, 249 F. Supp. 2d 1057, 1070 (E.D. Wis. 2003).

4. In *World Wide St. Preachers' Fellowship* v. *City of Owensboro*, 342 F. Supp. 2d 634, 636 (W.D. Ky. 2004), the court enjoined the police from suppressing a protester's poster that showed an aborted fetus. The police officer had cited the protester and confiscated the poster because he was concerned

about "the exposure of young children to such a photo."

5. Likewise, in *Lefemine* v. *Davis*, 732 F. Supp. 2d 614, 624 (D.S.C. 2010), *aff'd sub nom. Lefemine* v. *Wideman*, 672 F.3d 292 (4th Cir. 2012), *vacated on other grounds*, 133 S. Ct. 9 (2012) (*per curiam*), the district court held that police acted unconstitutionally in barring display of photographs of aborted fetuses where children were present.

Government officials have also often tried to restrict disturbing images or words without specifically relying on the presence of children. Several cases have held unconstitutional such attempts to restrict the display of aborted fetuses. *E.g.*, *United States* v. *Marcavage*, 609 F.3d 264, 283 (3d Cir. 2010); *Swagler* v. *Sheridan*, 837 F. Supp. 2d 509, 517, 527-29 (D. Md. 2011); *Hanzo* v. *DeParrie*, 953 P.2d 1130, 1134, 1135, 1141 (Or. Ct. App. 1998). Two other cases have held unconstitutional government attempts to restrict the use of words such as "the killing place" and "murder" outside abortion clinics. *Cannon* v. *City & County of Denver*, 998 F.2d 867, 874 (10th Cir. 1993); *Lewis* v. *City of Tulsa*, 775 P.2d 821, 823 (Okla. 1989).

Yet 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.

D. This Court Should Resolve This Issue to Give Guidance to the Lower Courts

The Sixth and Ninth Circuits are thus on one side, together with this Court's precedents in *Erznoz-*

nik and *Brown*. The Eighth Circuit, the Washington Supreme Court, the Wyoming Supreme Court, and the Colorado Supreme Court appear to be on the other. Many other cases have had to consider the issue, and many more are likely to consider it in the future. This Court ought to step in and resolve this disagreement, and decide whether political advocacy in front of a large audience that contains both adults and children can be restricted because of a fear that some children will be disturbed by it.

III. The Question Presented by This Case Affects More Than Just Pro-Life Advocacy

A. The Logic of This Case, and of Other Cases Like It, Affects Many Areas of Moral, Political, and Religious Debate

Important as the abortion debate may be by itself, the implications of the decision below and of other similar cases go far beyond that debate. Gruesome images often reflect gruesome deeds. One powerful way of opening people's eyes to what the speaker sees as cruelty is by showing them pictures of the results of that cruelty—pictures that are often gruesome.

Thus, photographs of lynchings, which would surely be covered by the injunction's reference to "gruesome images * * * of dead bodies," bring home to viewers the vileness of the crime.[15] Depictions of the dead and near dead from Nazi concentration camps made vivid what was otherwise hard to fully grasp.[16] Images of those butchered in a war crime, or

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[15] *See* p. 8, *supra*.

[16] *See id*.

even killed in "ordinary" war, can be powerful calls for justice or for peace.[17]

Photographs of the horribly ill can illustrate what a speaker thinks is shameful lack of funding for treatment, prevention, or research.[18] Animal rights activists show gruesome images of animals to illustrate what they see as the inhumanity of factory farming, or of keeping animals for meat altogether.[19] A photograph of a woman who has bled to death from an illegal abortion could be used to argue for keeping abortion legal.[20] And such images may also carry a dual condemnation: They can condemn both the action that has lead to the gruesome results, and those institutions—such as churches—that (in the speaker's view) should have helped fight the action but remained silent or even supported it.

Many viewers might disagree with the claim that these images are evidence of evil actions. Many might think, for instance, that the deaths depicted by the images are the result of reproductive freedom, just and necessary war, sensible medical funding de-

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[17] *See* p. 9, *supra*.

[18] Thus, in 1991 protesters seeking more funding for AIDS research went to Kennebunkport, Maine, where then-President George H.W. Bush had a summer home, "and tied leaflets imprinted with photographs of AIDS victims to the trees, filling the town with the faces of the dead." Dudley Clendinen, *Going to Extremes*, OUT, June 2001, at 120.

[19] *See, e.g.*, *Showing Animals Respect & Kindness* v. *City of West Hollywood*, 166 Cal. App. 4th 815, 818 (2008) (discussing use of such imagery by animal rights activists).

[20] Barbara Vancheri, *Moving Story of a Botched Abortion*, PITTSBURGH POST-GAZETTE, Nov. 6, 1995, at C6 (describing *Ms.* magazine's publication of such a photograph in April 1973).

cisions, or the permissible consumption of animals. But whether or not these images persuade the viewer, the First Amendment protects people's rights to try to use such images to persuade.

Nor will the scope of the decision below be materially diminished by the requirement that the images be "gruesome" or that they "caused or could cause psychological harm," App. 23a. "Gruesome" is an imprecise term, at least as imprecise as "contemptuous[]" or "annoying," both of which this Court has found to be unconstitutionally vague.[21]

The court's attempt to clarify the term—by relying on the dictionary definition, "inspiring horror or repulsion; fearful, grisly, hideous," App. 26a—hardly helps. The definition can easily be read by hostile judges, juries, and prosecutors to cover many depictions of death and injury. And this is especially likely to happen if the government actors disapprove of the message that the depictions are being used to convey, and thus have a deliberate or subconscious inclination to find an excuse to suppress that message.

Likewise, what "causes or could cause psychological harm" cannot be defined with anything close to scientific certainty, and decisionmakers can easily set the bar quite low for speech of which they disapprove. Consider, in this very case, the findings that the Court of Appeals saw as sufficient to show "psychological harm":

- Parents were concerned about the effect the posters had upon their children;

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[21] *Smith* v. *Goguen*, 415 U.S. 566, 572-73 (1974); *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971).

> • The posters' gruesome images were highly disturbing to children in the congregation apart from any message they intended to convey;
>
> • The priest's seven-year-old daughter buried her face in her hymnal as she passed defendants' posters and remained upset about the images several days later.

App. 23a. (Indeed, the trial court never found that such disturbance rose to the level of actual or likely psychological harm, App. C, and no expert evidence on the subject was introduced; "caused or could cause psychological harm" was the Court of Appeals' characterization.)

One can sympathize with *parents'* desire to shield their children from speech that the children might find disturbing. But if the government can use *the force of law* to suppress any speech that a court may find concerns parents, that is in the court's view "highly disturbing to children," and that leads at least one child to avert her eyes and be "upset," then the government would have broad power over public speech. And that is especially so for speech that can be rightly upsetting because it depicts what speakers believe is murder, whether of fetuses, lynching victims, war casualties, or farm animals.

Photographs, of course, are not syllogisms. Photographs of awful things attempt to awaken viewers' consciences with an appeal to humans' most basic moral and emotional reactions. The photographs are not rationalistic debate. They would not be at home in a university economics or philosophy department.

Yet how many people's opinions about abortion, animal rights, or even pacifism stem entirely from

rationalistic debate? Much of what we believe comes not just from logic but from experience—from what we have seen, and from the visceral moral reactions that this seeing has aroused. Photographs, even of gruesome things, are unparalleled in their ability to make us see things that we otherwise might have ignored.

This Court, of course, has stressed that the Constitution protects not just "the cognitive content" of speech, but also "that emotive function which, practically speaking, may often be the more important element of the overall message." *Cohen* v. *California*, 403 U.S. at 26. Sound as that analysis was as to the vulgarity in *Cohen*, it is doubly sound as to pictures intended to trouble the conscience and inspire radical rethinking of beliefs.

The reasoning of the decisions that uphold bans on "gruesome images," or gruesome words such as "killer" and "murderer," thus cannot just be limited to pro-life advocacy. Just as there is "no indication—either in the text of the Constitution or in [this Court's] cases interpreting it—that a separate juridical category exists for the American flag alone," *Texas* v. *Johnson*, 491 U.S. at 417, so there is no indication that a separate juridical category exists for photographs of aborted fetuses.

Indeed, the reasoning of such decisions is not even limited to photographs. This Court has not distinguished verbal and visual expression, even as to obscenity, where such a distinction might be most plausible. *See Kaplan* v. *California*, 413 U.S. 115, 119 (1973). And *Bering*, one of the cases on which the opinion below relied, barred the spoken use of the words "killer" and "murderer" where children are present. Those words, the court reasoned, "inflict[]

trauma upon the children overhearing such references" and thus constitute "physical and psychological abuse" of the children in the audience. 721 P.2d at 933, 935. If decisions such as the one below are allowed to stand, they would offer a further precedent for restrictions on other supposedly traumatizing verbal arguments.

This Court has long noted the danger that restrictions on some speech could serve as a potent precedent for restrictions on much more speech. One important reason for this Court's decision in *Cohen* was that upholding a ban on a particular vulgarity would leave "no readily ascertainable general principle" for rejecting broader bans. 403 U.S. at 25. Likewise, in *Texas* v. *Johnson*, this Court noted that allowing bans on flag burning "would be to enter territory having no discernible or defensible boundaries." 491 U.S. at 417. And in *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 55 (1988), this Court pointed to the lack of any "principled standard to separate" the scurrilous attack in that case from a much broader range of political debate.

As this petition has argued, allowing content-based restrictions on "gruesome" images or supposedly "trauma"-inducing words in a traditional public forum would likewise jeopardize a wide range of speech. Unless courts impose an unprincipled and blatantly viewpoint-based limitation on such precedents, the precedents would allow the suppression of political speech on many topics. "[T]he First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 641 (1943).

B. The Logic of This Case, and of Other Cases Like It, Would Justify Restrictions in Many Places

Content-based restrictions on supposedly "gruesome" political, religious, and moral advocacy are presumptively unconstitutional even if they are limited to a narrow physical area. *See, e.g.*, *Boos* v. *Barry*, 485 U.S. 312 (1988). But in any event, the logic of this case, and of others like it, would justify restrictions in a broad range of places.

Children under 12 are present in many locations. They often come with their families to parks. They accompany their parents to go shopping. Their parents take them to fairs, outside which protesters might be speaking. Their parents drive them down streets, from which they can see protesters on sidewalks.[22] If the decision below is allowed to stand, speech in all these places could be restricted.

Of course, parks are traditional public fora, but so are sidewalks. If a content-based restriction on political speech on sidewalks is upheld because of the supposedly compelling interest in shielding children, a content-based restriction on political speech in parks would be upheld on the same grounds.

Nor can such content-based restrictions be sufficiently narrowed on the grounds that churches and church attendees somehow deserve special protection from speech that attendees or their children may find disturbing. The decision below defined the sup-

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[22] *See, e.g.*, *Frye*, 375 F.3d at 788 (involving protesters who were displaying photographs of aborted fetuses while "assembled at the intersection of two heavily trafficked roads" near "a grocery store," "shopping centers," and "a strip mall").

posedly compelling interest in this case as shielding children, not shielding churches or worshippers. App. 24a. Two of the cases it relied on did not deal with speech near churches. *Bering*, 721 P.2d at 924; *Operation Save America*, 275 P.3d at 442.

And religious institutions, like other institutions that play an important role in spreading ideas, are often fitting targets for criticism. Some people may believe that certain churches are not properly speaking out against evil, a failure that is especially harmful precisely because the church characterizes itself as a force for good in society. Some may believe that certain churches are harming society (or the world or the environment) by preaching against contraceptives or abortion.

Some may believe that certain churches are morally responsible for crimes committed by their ministers. Some may believe that certain churches are teaching dangerous theological doctrines. Nailing ninety-five theses to a church door might today be a technical trespass, but displaying signs containing those theses on a nearby sidewalk has to be constitutionally protected.

Perhaps because of this, this Court has never allowed any special restrictions on speech outside churches. Churches, to be sure, are places for constitutionally protected First Amendment activity. But so are political rallies, movie theaters, bookstores, or the headquarters of the NRA and the ACLU, yet protesters are free to express their disapproval of such events and places. Churches, bookstores, and advocacy groups are all equally protected from governmental suppression of their speech or worship. Yet those who want to protest outside churches, book-

stores, and advocacy groups are all equally protected by the First Amendment as well.

Indeed, providing special protection from criticism to places where people engage in religious expression would likely violate the Establishment Clause under this Court's precedents, just as providing special exemptions from taxes to religious publications has been held to violate the Establishment Clause. *See Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989) (lead opinion); *id.* at 26 (Blackmun, J., concurring in the judgment); *id.* at 25-26 (White, J., concurring in the judgment on freedom of expression grounds). Just as the government may not give special financial benefits to "writings promulgating the teaching of the faith," *id.* at 14, so the government may not set up special criticism-free zones outside events that promulgate the teaching of the faith.

IV. The Content of Petitioners' Speech Was Improperly Used as Part of the Basis for the Entire Injunction, Including the "Disturbing Worship" Prohibition

The "disturbing worship" prohibition in the injunction is also unconstitutional, because it was impermissibly based on the content of petitioners' past speech.

A. The Burden Created by the "Disturbing Worship" Prohibition

Petitioners have no desire to disturb worship through loud noise. They seek to affect people's behavior by persuasion. And they have indeed not been found guilty of violating any content-neutral noise ordinances, or any content-neutral injunctions. *See* p. 2, *supra.*

But petitioners do want to set aside the "disturbing worship" injunctive provision, because it singles out petitioners for a substantial burden on their speech. Alleged violations of this injunction can lead to criminal contempt penalties, without the protections generally offered in criminal cases. For example, there is no jury trial in contempt cases if the defendant is facing a jail sentence of six months or less, *People* v. *Shell*, 148 P.3d 162, 176 (Colo. 2006); COLO. R. CIV. PROC. 107(d)(1), even though Colorado law guarantees a jury trial even for petty offenses, COLO. REV. STAT. § 16-10-101.

The potential penalty for violating an injunction also appears to be considerably higher than the normal criminal penalty for unreasonable noise, and this higher penalty can create a chilling effect even on innocent prospective defendants. Contempt sentences of up to six months have been reported in Colorado. *E.g.*, *People* v. *Hanks*, 967 P.2d 144, 145 (Colo. 1998). But petitioners' research uncovered no reported Colorado cases in which any similarly long jail sentence (or any jail sentence at all) was imposed for disorderly conduct, which is how Colorado law covers "mak[ing] unreasonable noise." COLO. REV. STAT. §§ 18-9-106(1)(c), (3)(a); *see, e.g.*, *People* v. *Reaves*, 943 P.2d 460, 462 (Colo. 1997) (mentioning a probation-only sentence for disorderly conduct).

Perhaps most importantly, the contempt process is initiated and the contempt judgment rendered by the same judge who had issued the injunction, with the judge thus acting as prosecutor, lawmaker, and adjudicator. Because of this, "the contempt power * * * uniquely is liable to abuse." *See UMW* v. *Bagwell*, 512 U.S. 821, 831-32 (1994) (internal quotation marks omitted). In the normal criminal case, by con-

trast, the defendant gets the benefit of the separation of powers, in which the decision whether to prosecute is made by the executive, the law being applied has been enacted by the legislature, and the judiciary is limited to a reactive role.

B. The "Disturbing Worship" Provision Is Unconstitutionally Based in Part on the Content of Petitioners' Speech

For the reasons discussed in the preceding subpart, injunctions against speech are rightly seen as posing First Amendment concerns, even when the injunctions are limited to loud noises that disturb behavior *inside* buildings. *Madsen*, 512 U.S. at 765, 772-73. *A fortiori*, the same is true in cases such as this one, where petitioners' speech was found only to have disturbed outdoor conduct, *see* p. 3 & n.5, *supra*.

And a critical First Amendment constraint on such injunctions against speech is that they can avoid strict scrutiny only if they are *justified without reference to content, id.* 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 protesters'] expression, * * * but because of their prior unlawful conduct.'" 519 U.S. at 374 n.6.

But in this case, the trial court's judgment was not based on the protesters' "prior unlawful conduct," in the sense of criminal conduct—there were no findings of such conduct. The judgment was not based on any trespass or blockage of entrances by the defend-

ants, or even on any disturbance of worship within the church buildings. "There is no evidence that Scott and Powell entered the Church, or the Church's property, created a private nuisance inside the Church, or conspired to do so." *Saint John's I*, 194 P.3d at 481. "[T]here is no evidence that Scott and Powell impeded anyone's access to the Church entrances or parking areas." *Id.*

Instead, the trial court's findings show that the injunction was based in large part on the content of petitioners' speech, and the offensiveness of that content to the parishioners and their children. Thus, the court repeatedly cited the display of aborted fetuses as being part of the basis for its judgment. App. 34a-42a, ¶¶ 7, 9, 10, 13, 15, 20, 22, 23.

The court also noted, as part of the basis for its judgment, that Scott "yelled that these children, referring to the fetus in the poster, will never get to sing in the choir." App. 34a, ¶ 7. The court noted that "Scott yelled to parishioners that Reverend Carlsen was leading them to hell." *Id.* The court noted that Powell "told [parishioners] that the St. John's clergy were lying to them and urged them not to attend services." App. 37a, ¶ 13.

And part of the court's expressly stated purpose in entering the injunction was to prevent the exposure of parishioners to offensive images. App. 36a, 38a, 40a, ¶¶ 10, 15, 20. The neutral-sounding phrase "disturb parishioners' ability to worship," *Id.* at 32a, ¶ 3(ii), is thus rooted in factual findings that part of what supposedly disturbed parishioners' worship was the content of Scott and Powell's speech.

Yet "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County* v.

Nationalist Movement, 505 U.S. 123, 134 (1992). "'[T]he emotive impact of speech on its audience is not a 'secondary effect' unrelated to the content of the expression itself.'" *Texas* v. *Johnson*, 491 U.S. at 412; *see also R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 394 (1992) (expressing the same view). Nor does this inquiry differ when the concern is about the impact of the speech on children. *Reno* v. *ACLU*, 521 U.S. at 867-68; *see also Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 574 (2001); *United States* v. *Playboy Entertainment Group*, 529 U.S. 803, 815 (2000).

This Court's decision in *Madsen* noted that injunctions "carry greater risks of censorship and discriminatory application than do general ordinances." 512 U.S. at 764. Indeed, the *Madsen* dissenters would have required strict scrutiny of all injunctions, precisely because injunctions pose such a risk of content discrimination. *Id.* at 792-93 (Scalia, J., concurring in part and dissenting in part).

But here there is no need to speculate about *risk* of content discrimination. The trial judge himself expressly explained that the content of defendants' speech was part of the foundation for the tort judgment (for nuisance and civil conspiracy) on which the injunction was based. And that explanation extended to the facially content-neutral part of the injunction as well as the facially content-based part.

The "disturbing worship" portion of the injunction is thus similar to the injunction in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971). That injunction, like the "disturbing worship" portion of the injunction in this case, was facially content-neutral—it generally barred defendants "from passing out pamphlets, leaflets or literature of any kind, and from picketing." *Id.* at 417. But, as in this case,

the injunction was based on what the speakers had said and were likely to continue saying.

This Court treated the injunction in *Keefe* as a quintessential prior restraint, and has never suggested that it fits within the *Madsen* exception for content-neutral injunctions. Indeed, in *Bolger* v. *Youngs Drug Products*, 463 U.S. 60, 71 & n.23 (1983), this Court cited *Keefe* as an example of the rule that "offensiveness" is not a justification for restricting speech, thus recognizing that *Keefe* was a case about restrictions on speech based on its offensive content. The same is true in this case, with regard to the "disturbing worship" portion of the injunction as well as the "gruesome images" portion.

If a court were to rest a similar judgment solely on the non-content-related aspects of demonstrators' speech—such as the demonstrators' unamplified voices sounding loud to those who participated in the outdoor church procession—the case would be different. This Court has never decided when unamplified voices in a public forum can be restricted on the grounds that their sounds interfere with outdoor activity (as opposed to activity inside people's homes, medical facilities, or businesses[23]). But at least such

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[23] *Cf. Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (upholding content-neutral ban on soundtrucks that carry amplifiers); *Madsen*, 512 U.S. at 772 (upholding injunction against sounds audible "'*inside* the [c]linic,'" and stating that "[i]f *overamplified loudspeakers* assault the citizenry, government may turn them down" (emphases added)); *Schenck*, 519 U.S. at 376 n.8 (emphasizing that, in *Madsen*, "patients *while inside the clinic* heard the chanting and shouting of the protesters and suffered increased health risks as a result" (emphasis in original)); *Cloer*, 528 U.S. at 1099 (Scalia, J., joined by Thomas, J., dissenting from denial of certiorari) (concluding that an injunction limiting noise "is

a restriction would not rest on the content of the speech.

This case, though, does not involve an ordinance or injunction that is justified without reference to content. Instead, the tort judgments underlying the injunction expressly and repeatedly rely in part on the content of petitioners' speech, as well as relying in part on the volume of the speech.

Even if the volume is not constitutionally protected against a content-neutral restriction, judgments based on a combination of protected content and unprotected volume must be judged under strict scrutiny. *See NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 915-18 (1982) (holding that, because "much of petitioners' conduct was constitutionally protected," courts were limited in their ability to "impose [tort] liability for elements * * * that were not so protected"). Yet the Colorado courts did not apply such scrutiny.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

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unconstitutionally broad insofar as it * * * prohibits any noise that can be heard inside the clinic during any of its business hours"); *Medlin* v. *Palmer*, 874 F.2d 1085, 1090 (5th Cir. 1989) (upholding content-neutral noise ordinance, as applied to pro-life speech, partly because "[i]t does not prohibit unamplified speech"); *City of Beaufort* v. *Baker*, 432 S.E.2d 470 (S.C. 1993) (splitting 3-2 on the question whether a restriction on unamplified speech audible in a public forum was unconstitutional).

Respectfully submitted.

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MARCH 4, 2013

APPENDIX

APPENDIX A—THE DECISION OF THE COLORADO COURT OF APPEALS

2012 COA 72

COLORADO COURT OF APPEALS

Court of Appeals No. 11CA0508
City and County of Denver District Court
No. 05CV2290
Honorable John N. McMullen, Judge

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

v.

KENNETH TYLER SCOTT AND CLIFTON POWELL,
Defendants-Appellants.

ORDER AFFIRMED AND CASE REMANDED WITH DIRECTIONS

Division IV

Opinion by JUDGE WEBB

FURMAN and BOORAS, JJ., concur

Announced April 26, 2012

Faegre Baker Daniels LLP, Russell O. Stewart, Denver, Colorado, for Plaintiffs-Appellees

Hackstaff Law Group, LLC, Rebecca Messall, Denver, Colorado, for Defendants-Appellants

¶1 This appeal follows the remand ordered in *St. John's in the Wilderness v. Scott*, 194 P.3d 475 (Colo. App. 2008) (*St. John's I*), which contains a detailed description of the evidence and procedural history. Because no new evidence was introduced on remand,[1] this opinion provides only limited background. The order on remand restricting demonstrations in six buffer zones around the Church is modified and, as modified, affirmed.

I. Introduction

¶2 Following the initial bench trial, the court resolved claims for private nuisance and conspiracy to commit private nuisance brought by plaintiffs, St. John's Church in the Wilderness and two parishioners, Charles I. Thompson and Charles W. Berberich, against defendants, Kenneth Tyler Scott and Clifton Powell. Defendants had demonstrated their opposition to abortion and homosexuality on the public street and sidewalk across the street from the Church, during an outdoor Palm Sunday service that began on Church property, by shouting and carrying signs, some of which included images of aborted fetuses.

¶3 As relevant here, the court's factual findings included: Scott's voice was so loud that it substantially interfered with the outdoor services;[2] the vol-

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[1] Defendants' motion to present additional evidence was denied on the ground that the evidence they sought to introduce pertained only to enforcement of the injunction and did not address whether its terms burdened no more speech than necessary in the six buffer zones. They do not appeal this ruling.

[2] Contrary to defendants' assertion that plaintiffs must take the public forum as they find it, including demonstrators, here the trial court found that defendants' protest interfered with ser-

ume and nature of the demonstration, together with the graphic and gory nature of defendants' posters, caused several of those attending services to show "crying, trembling, fear, and anger"; children present were frightened by defendants' posters; and because of defendants' actions, 85 to 100 parishioners declined to participate in a second outdoor service.

¶4 The court issued a permanent injunction prohibiting defendants from engaging in the following acts:

> (i) At all times on all days, from entering the premises and property of St. John's Cathedral.
>
> (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 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 the public right-of-way shown on [the checkered portions a map of the Church and its surroundings; *see St. John's I*, 194 P.3d at 486].
>
> (iii) 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 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 equip-

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vices on Church property well before parishioners used the public sidewalk for a procession into the cathedral.

> ment or other sounds in areas [in checkered portion of map of the Church and its surroundings; *see id.*].
>
> (iv) 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.
>
> (v) At all times on all days, from encouraging, inciting, or securing other persons to commit any of the prohibited acts listed herein.

¶5 Following a lengthy discussion of government restrictions on "communicative activity" that occurred "[i]n public forums," *St. John's I*, 194 P.3d at 482-85, the division affirmed the judgments against defendants, and affirmed the injunction in part, vacated it in part, and remanded for further findings. It concluded that the threshold requirements for imposing injunctive relief had been met and that sufficient findings supported the prohibitions against obstructing access to the Church, violating the injunction through surrogates, and the time restrictions on defendants' picketing and noise-making. However, because the record did not show that defendants' "mere presence" on Church property would cause irreparable harm, it vacated the prohibition against defendants' entry onto Church premises and property "at all times on all days." Finally, it concluded that further findings were necessary to determine whether the restrictions on action in the buffer zones burdened no more speech than necessary to serve a significant government interest.

¶6 On remand, the trial court modified the injunction as follows:

> • In paragraph 3(i), the prohibition on defendants' entry onto Church premises or property "at all times on all days" (originally paragraph i) was deleted and replaced with a prohibition against entry "*on days on which [defendants] engage in any conduct proscribed by this injunction*."
>
> • Paragraphs (ii) and (iii), proscribing focused picketing and noise-making, were deleted and replaced with a new paragraph 3(ii), prohibiting defendants 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.

(Emphasis added.) The three italicized phrases are the primary thrust of defendants' current appeal.

II. Law of the Case

¶7 Defendants first contend *St. John's I* wrongly abridged their

First Amendment rights, and because controlling law has changed since *St. John's I* was decided, this division need not follow it as law of the case. We decline defendants' invitation to revisit matters resolved in the trial court's initial order and upheld in *St. John's I*.

A. The Law of the Case Doctrine

¶8 "Conclusions of an appellate court on issues presented to it as well as rulings logically necessary to sustain such conclusions become the law of the case." *Super Valu Stores, Inc. v. Dist. Court*, 906 P.2d 72, 78-79 (Colo. 1995). The law of the case doctrine protects parties from relitigating settled issues, on the grounds that courts generally "refuse to reopen what has been decided." *People ex rel. Gallagher v. Dist. Court*, 666 P.2d 550, 553 (Colo. 1983) (internal quotation marks and citation omitted). It recognizes that "litigation must end somewhere." *People v. Roybal*, 672 P.2d 1003, 1005 n.6 (Colo. 1983) (internal quotation marks and citation omitted).

¶9 In proceedings on remand, a trial court must follow the pronouncements of the appellate court. *Kuhn v. State*, 897 P.2d 792, 795 (Colo. 1995). In a later appeal, however, when the decision in question issued from the same appellate court, a different division of that court may exercise its discretion and decline to apply the law of the case doctrine, but only "if it determines that the previous decision is no longer sound because of changed conditions or law, or legal or factual error, or if the prior decision would result in manifest injustice."[3] *Vashone-Caruso v.*

[3] In their reply brief, defendants raise factual error and manifest injustice as grounds for this division to decline to follow the law of the case. However, we will not consider arguments raised

Suthers, 29 P.3d 339, 342 (Colo. App. 2001); *see Mitchell v. Ryder*, 104 P.3d 316, 343 (Colo. App. 2004).

B. Analysis

1. Change in Controlling Law

¶10 Defendants argue that *Snyder v. Phelps*, ___ U.S. ___, 131 S. Ct. 1207 (2011), and *Brown v. Entertainment Merchants Ass'n*, ___ U.S. ___, 131 S. Ct. 2729 (2011), changed the controlling law in this case. Because these cases follow established precedent, they do not warrant reexamining *St. John's I*.[4]

a. *Snyder v. Phelps*

¶11 *Snyder* held that demonstrators' speech at the funeral of a military service member was protected by the First Amendment from state tort liability in an action brought by the deceased's father. At the funeral, the demonstrators carried signs with statements such as "God Hates the USA/Thank God for 9/11," "Thank God for Dead Soldiers," "God Hates Fags," and "America is Doomed." 131 S. Ct. at 1214. They stood on public land, behind a temporary fence, approximately 1,000 feet from the church where the funeral was held and separated from the church by several buildings. *Id.* For about thirty minutes before the service began, they sang hymns and recited Bible verses while holding their signs, but "did not yell or use profanity." *Id.* Although the funeral procession

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for the first time in a reply brief. *People* v. *Czemerynski*, 786 P.2d 1100, 1107 (Colo.1990).

[4] *St. John's I*, 194 P.3d at 482–83, 485–88, relies heavily on *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). *Snyder*, —— U.S. at ——, 131 S.Ct. at 1218, cites but does not limit *Madsen*.

passed within 200 to 300 feet of the demonstrators, the father could see only the tops of their signs, and could not read what was written on them. *Id.*

¶12 The Supreme Court reviewed the court of appeals' decision setting aside a jury verdict in the father's favor for intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. It concluded that the speech "was at a public place on a matter of public concern," and "is entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt." *Id.* at 1219. Therefore, it held that the speech would not support liability for intentional infliction of emotional distress, where the protest had not interfered with the funeral. *Id.* at 1220. And because the protest was well away from the funeral, neither could liability for intrusion upon seclusion be upheld. *Id.*

¶13 *Snyder*'s statement that speech cannot be sanctioned merely for offending its listeners follows existing precedent. *See*, *e.g.*, *Cohen v. California*, 403 U.S. 15, 21 (1971); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975). Indeed, defendants describe *Snyder* as "emphasiz[ing] fundamental law," and cite a Supreme Court case from 1992[5] for the principle that "the *First Amendment* has always protected speech that 'upsets' listeners." In concluding that speech on matters of public concern is "at the heart of the First Amendment's protection" and "is entitled to special protection," *Snyder* cites with ap-

[5] *Forsyth Cnty.* v. *Nationalist Movement*, 505 U.S. 123, 134–35, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992).

proval cases from 1985 and 1983. 131 S. Ct. at 1215.[6] And in its conclusion that speech on matters of public concern in a public place "cannot be restricted simply because it is upsetting or arouses contempt," the Court cites additional prior precedent.[7] Thus, while we are bound by the Court's formulation of First Amendment law, *Snyder* did not announce a new analysis applicable to the trial court's initial injunction or the order on remand.[8]

¶14 Moreover, the facts in *Snyder* distinguish it from the present case. Unlike the trial court's find-

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[6] *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 758–759, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (opinion of Powell, J.); *Connick* v. *Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

[7] *Texas* v. *Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *Hurley* v. *Irish–American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995); *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 510, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984); *Boos* v. *Barry*, 485 U.S. 312, 322, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988).

[8] See Erwin Chemerinsky, *Not A Free Speech Court*, 53 Ariz. L. Rev. 723, 723–24 (2011) ("The case is important because the Court reaffirmed one of the most basic principles of the First Amendment: speech cannot be punished, or speakers held liable, just because the speech is offensive, even deeply offensive."); Alan Brownstein & Vikram David Amar, *Afterthoughts on Snyder* v. *Phelps*, 2011 Cardozo L. Rev. de novo 43, 43 (2011) ("From a scholarly and professional perspective, the United States Supreme Court's decision in *Snyder* v. *Phelps* added little to the development of free speech doctrine.... Given the clear consensus of the Justices that an intentional infliction of emotional distress ... claim and damage award, on the facts of this case, violated the free speech clause of the First Amendment, one can only wonder why the Court thought it appropriate to grant review in this matter in the first place.").

ings here, the demonstration "did not in itself disrupt that funeral." *Id.* at 1220. In further contrast to the case before us, the demonstrators in *Snyder* did not shout, they were located 1,000 feet from the funeral, and their signs could not be read from the funeral procession. *Compare id. with St. John's I*, 194 P.3d at 478. Therefore, the similarities between *Snyder* and this case — protest at a religious service, signs that could offend, and underlying state tort claims — do not make *Snyder* dispositive.

b. *Brown v. Entertainment Merchants Ass'n*

¶15 Likewise, *Brown* reaffirmed longstanding First Amendment doctrine. In striking a California law prohibiting the sale or rental of "violent video games" to minors, the Court explained that while states may proscribe selling obscene materials to minors, "violence is not part of the obscenity that the Constitution permits to be regulated." *Brown*, 131 S. Ct. at 2735. Rather, "'[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.'" *Id.* at 2736 (quoting *Erznoznik*, 422 U.S. at 213-14). The Court also cited *Winters v. New York*, 333 U.S. 507, 519 (1948) (striking a law banning the collection of violent stories as a form of obscenity). Therefore, *Brown* did not redraw the historic line between obscenity and other categories of speech.

¶16 Rather, in *Brown* the state sought to prevent children from buying violent video games out of concern that such games "cause minors to act aggressively," presumably by desensitizing them to the effects of violence. ___ U.S. at ___, 131 S. Ct. at 2739 (emphasis omitted). The legislation failed constitu-

tional scrutiny in part because the Court concluded that California had provided no compelling evidence the games had such an effect. *Id.*

¶17 Here, different psychological harm is at issue. The trial court found that "[t]he posters were highly disturbing to . . . children," *St. John's I*, 194 P.3d at 484, which defendants do not challenge. Thus, defendants' reliance on *Brown* to argue that First Amendment protection of violent video games now requires that we reconsider the role which protecting children played in the trial court is misplaced.

2. Applying Law of the Case

¶18 *St. John's I*, 194 P.3d at 481-82, expressly addressed the following arguments that defendants raise again:

> 1. The trial court erred by enjoining defendants from "impeding, blocking, inhibiting or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot" and from "encouraging, inciting, or securing other persons to commit any of the prohibited acts listed herein."
>
> 2. The trial court erred in finding that defendants' religious speech in a traditional public forum constituted a private nuisance, the basis of a conspiracy to commit private nuisance, and the basis for a permanent injunction.

¶19 We have rejected defendants' assertions that *St. John's I* did not apply First Amendment law and that a change in this law relieves us of the law of the

case doctrine. To the extent that we have discretion to revisit these issues, as another division of the same court, we decline to do so because we consider *St. John's I* both thorough and well reasoned. *See Buckley Powder Co. v. State*, 70 P.3d 547, 557 (Colo. App. 2002) (declining to deviate from the law of the case established in another division's decision where no change in controlling law).

¶20 However, treating *St. John's I* as the law of the case does not limit our review of four issues:

¶21 First, whether the trial court's further findings concerning the place and manner restrictions on defendants' speech — prohibiting them from demonstrating in any of the buffer zones around the church, by focused picketing, congregating, patrolling, demonstrating, or shouting, yelling, or using bullhorns, auto horns, or sound amplification — burden no more speech than necessary to serve the interests protected by the injunction.

¶22 Second, whether the trial court followed the mandate in *St. John's I* that because plaintiffs did not prove irreparable harm would result unless defendants were prohibited from entering the Church's premises or property on all days at all times, the prohibition against such entry must be vacated.

¶23 Third, whether the restriction on speech "reasonably calculated to . . . cause parishioners to become physically upset," wording not in the initial injunction, impermissibly burdens defendants' First Amendment rights.

¶24 Fourth, whether the prohibition against "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," also added to the injunction on remand, is content-neutral, and if not, whether it is narrowly tailored to serve a compelling state interest.

¶25 We decline to address the first issue because the Opening Brief makes no specific arguments against the trial court's further findings on the buffer zones.[9] *Leef v. Burlington Northern & Santa Fe Ry. Co.*, 49 P.3d 1196, 1197 (Colo. App. 2002) (appellate court would not consider claim raised at trial where plaintiff did not address the issue in his appellate briefs). The next section of this opinion addresses whether the trial court complied with the remand instructions. The last section deals with the two new prohibitions added on remand.

III. Compliance with the Remand Instructions

¶26 Defendants contend the trial court failed to obey the following direction in *St. John's I*:

> There is no evidence that [defendants] entered the Church, or the Church's property, created a private nuisance inside the Church, or conspired to do so. Nor is there evidence that their *mere presence* on Church property injures the Church, the named parishioners, other parishioners, or children. Therefore we conclude that the Church has not proved that irreparable harm will result unless [defendants] are

[9] According to the Reply Brief, defendants do not attack the order on remand "based on whether it 'burdens more speech than is necessary to serve the interests protected.' " Rather they challenge the order, including the buffer zones, "because they penalize protected speech based on its content."

> prohibited, on all days and at all times, from entering the Church's premises or property.

St. John's I, 194 P.3d at 481 (emphasis in original). However, they do not challenge this part of the remand order on First Amendment grounds.

¶27 "When an appellate court remands a case with specific directions to enter a particular judgment or to pursue a prescribed course, a trial court has no discretion except to comply with such directions." *Musgrave v. Indus. Claim Appeals Office*, 762 P.2d 686, 687-88 (Colo. App. 1988). We review a trial court's compliance with prior appellate rulings de novo. *Hardesty v. Pino*, 222 P.3d 336, 339 (Colo. App. 2009).

¶28 On remand, the trial court removed "at all times on all days" and added "on days on which they engage in any conduct proscribed by this injunction." Thus, the original prohibition was vacated. And for the following reasons, we conclude that the court did not abuse its discretion with this new language. *Hunter v. Mansell*, 240 P.3d 469, 477 (Colo. App. 2010) ("The entry or denial of injunctive relief is a discretionary decision of the trial court that will not be disturbed on appeal absent an abuse of that discretion.").

¶29 While *St. John's I* recognized that plaintiffs had failed to prove defendants' "mere presence" caused irreparable harm, the division noted record support for the trial court's finding that recurrence of defendants' protests would "irreparably harm and interfere with the named parishioners' ability to worship at the Church and the Church's ability to use its property for worship services." 194 P.3d at 480-81. Hence, defendants' entry into the church on days

when they had engaged in prohibited conduct would allow them to defeat the purpose of the injunction if they brought their demonstration into the Church itself.

¶30 Further, if defendants engaged in proscribed activities, ceased those activities, and entered the Church on the same day, their presence would also interfere with parishioners' ability to worship because of legitimate fear over what defendants might do. The trial court's "same day" limitation on defendants entering the Church implicitly recognized parishioners' legitimate and ongoing fear of defendants.[10] *See Thomas v. Bove*, 687 P.2d 534, 536 (Colo. App. 1984) (upholding trial court's implicit findings where they had support in the record).

¶31 Therefore, we decline to disturb this part of the injunction.

IV. The Two New Prohibitions

¶32 Defendants contend the new prohibitions against speech that causes parishioners "to become physically upset" and carrying posters "depicting gruesome images of mutilated fetuses or dead bodies" impermissibly restrict their First Amendment rights. Because defendants challenge these prohibitions on different grounds, we consider them separately.

A. Standard of Review

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[10] In its order on remand, the trial court found that one parishioner "felt threatened and abused" by defendants' conduct outside of the church. Other parishioners withdrew their children from church activities to protect them from defendants' conduct.

¶33 Whether an injunction violates a constitutional right is a question of law to be reviewed de novo. *Evans v. Romer*, 854 P.2d 1270, 1274-75 (Colo. 1993). However, we defer "to the factual judgment of the trial court," absent an abuse of discretion. *Dallman v. Ritter*, 225 P.3d 610, 620-21 (Colo. 2010).

B. Speech Causing Parishioners to Become Physically Upset

¶34 Defendants argue that because "the First Amendment has always protected speech which 'upsets' listeners," enjoining speech which causes parishioners to become physically upset is unconstitutional. We decline to address this argument. Nevertheless, for the following reasons, we vacate this part of the injunction. *See May Dep't Stores Co. v. State ex rel. Woodard*, 863 P.2d 967, 980 (Colo. 1993) (an appellate court can "approve or limit the injunctive remedy").

¶35 First, at oral arguments, plaintiffs conceded that the prohibition on defendants' conduct "reasonably calculated to . . . cause parishioners to become physically upset" covers little if any conduct not already prohibited as "disturb[ing] parishioners' ability to worship" or "interfer[ing] with the plaintiff church's ability to use its property for worship services." *See PBM Products, LLC v. Mead Johnson & Co.*, 639 F.3d 111, 128 (4th Cir. 2011) ("It is well established that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.").

¶36 Second, in some circumstances, the right of free speech must be "accommodat[ed]" or "reconcil[ed] . . . with another right fundamental in our constellation of rights." *Hill v. Thomas*, 973 P.2d

1246, 1252 (Colo. 1999) (citing *Bursom v. Freeman*, 504 U.S. 191, 210 (1992)), *aff'd sub nom. Hill v. Colorado*, 530 U.S. 703 (2000). The Supreme Court has recognized that the government may restrict speech on "'a showing that substantial privacy interests are being invaded in an essentially intolerable manner.'" *Snyder*, ___ U.S. at ___, 131 S. Ct. at 1220 (citing *Erznoznik*, 422 U.S. at 210-11; *Cohen*, 403 U.S. at 21). Such interests exist in and around one's home, *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988), and in the right to access medical counseling and treatment. *Hill v. Thomas*, 973 P.2d at 1253. However, the Court has not addressed whether, as relevant here, that interest extends to parishioners' right to worship and a church's right to use its property for worship. *St. John's I*, 194 P.3d at 484-85.

¶37 Third, plaintiffs have not cited, nor have we found, any First Amendment case dealing with a restriction on conduct because it is physically upsetting. This lack of precedent leaves us uninformed whether such a restriction protects only the reaction of a reasonable person. And even if so limited, the restriction would still have to be reconciled with the general principle that disagreement with the content of a message usually cannot trump the exercise of First Amendment rights. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."); *see also Snyder* ___ U.S. at ___, 131 S. Ct. at 1219-20 (noting that "there is no indication that the picketing in any way interfered with the funeral service itself" and "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").

¶38 Under these circumstances, "the principle of judicial restraint requires us to 'avoid reaching constitutional questions in advance of the necessity of deciding them.'" *Developmental Pathways v. Ritter*, 178 P.3d 524, 535 (Colo. 2008) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988)). Therefore, we vacate the "cause parishioners to become physically upset" restriction because, as plaintiffs conceded, prohibiting "shouting or yelling . . . in a manner reasonably calculated to . . . disrupt parishioners' ability to worship" and the Church's "ability to use its property for worship services" adequately protects plaintiffs' interests.

C. Gruesome Images

¶39 Defendants argue that the new prohibition against using "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" is content-based, and therefore subject to strict scrutiny. We agree. However, we recognize the presence of a compelling governmental interest in protecting children from disturbing images, and we further conclude that the prohibition is narrowly tailored. Therefore, we decline to modify this part of the injunction.

1. The Prohibition Is Content-Based

¶40 We agree with *St. John's I*[11] that a content-neutral restriction of speech imposed by injunction

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[11] Because this prohibition was added to the injunction on remand, the content-neutrality issues it raises were not before the division in *St. John's I*. We read the portion of that opinion

must "'burden no more speech than necessary to serve a significant government interest.'" 194 P.3d at 482 (quoting *Madsen*, 512 U.S. at 765). In contrast, the government may regulate speech based on its content only where the restriction survives strict scrutiny, which requires that it be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *St. John's I*, 194 P.3d at 482 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

¶41 Content-neutrality turns on whether government restrictions of expressive activity are "justified without reference to the content of the regulated speech." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). "The government's purpose is the controlling consideration," and "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

¶42 For example, in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986), the Court upheld a zoning ordinance limiting the location of adult movie theaters. Although the ordinance treated adult theaters differently from other kinds of theaters, it did not intend to restrict adult films, but to alleviate the secondary effects of such theaters on the community, namely "to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of ur-

addressing content-neutrality as general background, not part of its holding, and therefore reach our own conclusions on the language now before us.

ban life." *Id.* at 48 (internal quotation marks, brackets, and citation omitted). In the Court's view, the city permissibly chose "to treat certain movie theaters differently because they have markedly different effects upon their surroundings." *Id.* at 49.

¶43 However, the Court later held that because "the emotive impact of speech on its audience is not a 'secondary effect'" but a primary effect, limiting the psychological impact of speech is a content-based purpose. *Boos v. Barry*, 485 U.S. 312, 321 (1988) (striking a statute intended to protect the dignity of foreign diplomatic personnel by preventing display of signs critical of a foreign government within 500 feet of its embassy). Distinguishing *Renton*, the *Boos* majority explained that if the city's purpose in passing the zoning ordinance had been "to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate." *Id.* Because the the ordinance at issue in *Boos* was "justified *only* by reference to the content of" the protestors' signs and the effect that content would have on foreign dignitaries, it required analysis as a content-based restriction. *Id.* (emphasis in original); *see also Madsen*, 512 U.S. at 773 (striking portion of injunction banning "images observable to . . . patients inside the Clinic" on the ground that "the only plausible reason a patient would be bothered by 'images observable' inside the clinic would be if the patient found the expression contained in such images disagreeable").

¶44 We have found no case, nor have plaintiffs cited any, distinguishing between the psychological impact on adults and that on children in determining whether a restriction is content-neutral. *Cf. Ctr. for*

Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff Dep't, 533 F.3d 780, 790 (9th Cir. 2008) ("There is . . . no precedent for a 'minors' exception to the prohibition on banning speech because of listeners' reaction to its content."). Thus, because under *Boos* the children's distress here at seeing defendants' posters would be a primary effect of defendants' speech, we conclude that any restriction solely to prevent this distress is content-based.

¶45 This conclusion conforms to lower federal court decisions that have similarly recognized posters showing aborted fetuses as protected speech and restrictions on such signs to prevent an audience's distress as content-based. *See*, *e.g.*, *United States v. Marcavage*, 609 F.3d 264, 283 (3d Cir. 2010) (striking government restrictions imposed because visitors to historical site were upset by anti-abortion demonstrator's posters); *Ctr. for Bio-Ethical Reform*, 533 F.3d at 787 (statute proscribing disruption of school unconstitutional as applied to anti-abortion protestor because disruption arose from students' distress at seeing demonstrator's posters); *see also Operation Save America v. City of Jackson*, ¶¶ 71- 73 (ban on displaying images of aborted fetuses was content-based restriction).

¶46 And even if images of dismembered fetuses constitute a "visual assault," *Hill*, 530 U.S. at 716, for many anti-abortion demonstrators the gruesomeness of the images *is* the message, and necessary to express their viewpoint. *See Marcavage*, 609 F.3d at 283 ("[T]he images [of aborted fetuses] are jarring, their shock value unmistakable. Presumably, that was the point."); *Becker v. F.C.C.*, 95 F.3d 75, 81 (D.C. Cir. 1996) ("In many instances, of course, it will be impossible to separate the message from the im-

age, when the point of the [message] is to call attention to the perceived horrors of a particular issue."); *Grove v. City of York*, 342 F. Supp. 2d 291, 303 (M.D. Pa. 2004) ("Here, there is no doubt that those signs displaying pictures of aborted fetuses were essential to Plaintiffs' message . . . which . . . was intended to shock the public's conscious [sic] through the 'display of human carnage.'").

¶47 Therefore, we further conclude that the prohibition against defendants' use of "large posters or similar displays depicting gruesome images of mutilated fetuses or dead bodies" must satisfy strict scrutiny based on a compelling interest and a narrowly tailored restriction.

2. The Prohibition Is Justified by a Compelling Government Interest

¶48 The Supreme Court has "repeatedly recognized the governmental interest in protecting children from harmful materials." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 875 (1997). For example, in upholding a law preventing the sale of "girlie" magazines to children under seventeen, the Court said "we have recognized that even where there is an invasion of protected freedoms, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (internal quotation marks and citation omitted). And in *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989), the Court identified the government's interest in "protecting the physical and psychological well-being of minors" as "compelling."

¶49 Lower federal courts have concluded that exposure to graphic images can cause such psycho-

logical harm. *Olmer v. City of Lincoln*, 192 F.3d 1176, 1180 (8th Cir. 1999) (concluding the government has a compelling interest in "protecting very young children from frightening images"); *cf. Lefemine v. Davis*, 732 F. Supp. 2d 614, 623 (D.S.C. 2010) (striking ban on anti-abortion protesters' graphic posters because while "the court agrees that protecting children may be a compelling interest," the ban was not narrowly tailored), *aff'd sub nom. Lefemine v. Wideman*, ___ F.3d ___ (5th Cir. No. 10-1905, Mar. 5, 2012); *see also Operation Save America*, 2012 WY 51, ¶¶76-78; ("The need to protect the psychological well being of children has been recognized as a compelling government interest."); *Bering v. SHARE*, 721 P.2d 918, 935 (Wash. 1986) (upholding permanent injunction prohibiting anti-abortion protesters from using the words "murder," "kill," and their derivatives because state has "compelling interest in avoiding subjection of children to the physical and psychological abuse inflicted by the picketers' speech").

¶50 Here, the trial court made the following findings that defendants' posters caused or could cause psychological harm to the approximately 200 children who took part in the procession and were exposed to defendants' posters:

> • Parents were concerned about the effect the posters had upon their children;
>
> • The posters' gruesome images were highly disturbing to children in the congregation apart from any message they intended to convey;
>
> • The priest's seven-year-old daughter buried her face in her hymnal as she passed de-

fendants' posters and remained upset about the images several days later.

Defendants do not challenge these findings.

¶51 Therefore, we also conclude that the government's compelling interest in protecting children from exposure to certain images of aborted fetuses and dead bodies supports this part of the injunction.

3. The Prohibition Is Narrowly Tailored

¶52 For a content-based speech restriction to satisfy the second strict scrutiny prong, "the curtailment of free speech must be actually necessary to the solution." *Brown*, ___ U.S. at ___, 131 S. Ct. at 2738. Hence, we must "ask whether the challenged regulation is the least restrictive means among available, effective alternatives." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004). Here, we conclude that it is.

¶53 Blanket bans on signs with images of aborted fetuses have not survived the narrow tailoring requirement. *See, e.g.*, *World Wide Street Preachers' Fellowship v. City of Owensboro*, 342 F. Supp. 2d 634, 641 (W.D. Ky. 2004) (citing anti-abortion protestors for disorderly conduct after they displayed signs at a street concert and a park was not narrowly tailored to interest of protecting children because it left protestors no options for exercising right to free speech); *Lefemine*, 732 F. Supp. 2d at 624 (requiring anti-abortion protestors to remove signs entirely or be cited for breach of the peace not narrowly tailored to state interest of preventing children from seeing signs from the main road); *cf. Frye v. Kansas City Missouri Police Dep't*, 375 F.3d 785, 792 (8th Cir. 2004) (government restriction allowing demonstrators to display signs further from a busy road nar-

rowly tailored to serve compelling interest in public safety).

¶54 Here, however, no such blanket ban has been imposed. Defendants are prohibited only from displaying "large"[12] posters "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," from one half-hour before to one half-hour after religious events, within the buffer zones described in *St. John's I*. This prohibition does not prevent them from displaying their posters in other public space, even if children might see those posters. Nor do defendants suggest that they would be subject to citations for disorderly conduct or breach of the peace merely by displaying their posters in the buffer zones at other times. The injunction also does not prevent them from having leaflets available with similar images for distribution to interested listeners. *See Hill*, 530 U.S. at 715 (upholding injunction as narrowly tailored in part because it allowed demonstrators to peacefully hand leaflets to persons approaching an abortion clinic).

¶55 Moreover, identifying the prohibited content as "gruesome images of mutilated fetuses" is the least restrictive means available to protect young children who are attending worship services. *Cf. Olmer v. Lincoln*, 23 F. Supp. 2d 1091, 1102 (D. Neb. 1998) ("[T]he defendants' argument — we cannot effectively ban gruesome pictures that frighten children without banning a great deal of other speech —

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[12] Defendants do not argue that the injunction must be more specific as to the size of the posters that are restricted. According to the trial court's findings, the posters were approximately three-and-a-half by four-and-a-half feet.

is not accurate."), *aff'd,* 192 F.3d 1176 (8th Cir. 1999). "Gruesome" means "inspiring horror or repulsion; fearful, grisly, hideous." *Webster's Third New International Dictionary* 1005 (1986). Defendants cite no case, nor have we found one, holding the term to be overbroad. To the contrary, it reasonably describes the kind of image likely to cause young children psychological harm. Nor do defendants suggest any comparable term that would allow them to display images less likely to frighten children.

¶56 Although the restriction on images of "dead bodies" presents a closer question, we conclude that this phrase is also narrowly tailored. Not all images of dead bodies are inherently frightening to children. (For instance, a picture of a corpse laid out for a funeral would look like someone sleeping.) However, "gruesome" also modifies "dead bodies." While defendants correctly note that the crucifixion itself depicts a dead body, they do not point to any evidence in the record that the Palm Sunday services involved graphic images or representations of the crucifixion that were inherently gruesome. *See Pasquale v. Ohio Power Co.*, 418 S.E.2d 738, 752 (W. Va. 1992) ("[T]here is no blood or gruesome wound pictured."); *cf. State v. Barber*, 206 P.3d 1223, 1237 (Utah Ct. App. 2009) (determining gruesomeness of photographic evidence includes "whether the photograph is in color" and "whether it is an enlargement or close-up shot").

¶57 Therefore, we decline to disturb the phrase "gruesome images of aborted fetuses or dead bodies" in the remand injunction.

¶58 As modified, the order on remand is affirmed.

JUDGE FURMAN and JUDGE BOORAS concur.

APPENDIX B—THE COLORADO SUPREME COURT DENIAL OF REVIEW

SUPREME COURT OF
THE STATE OF COLORADO

January 7, 2013

No. 12SC658
Court of Appeals
Case No. 11CA508

Petitioners:
KENNETH TYLER SCOTT
and CLIFTON POWELL,

v.

Respondents:
SAINT JOHN'S CHURCH IN the WILDERNESS,
Charles I. Thompson, and Charles W. Berberich,

OPINION

Petition for Writ of Certiorari DENIED. EN BANC.

JUSTICE RICE does not participate.

CHIEF JUSTICE BENDER and JUSTICE EID would grant as to the following issues:

Whether the court of appeals erred under *Snyder*, *Brown*, and *Flores* in creating new exceptions to the First Amendment to restrict protests at religious events — punishing non-obscene posters

and unamplified voices under the law of real property nuisance and civil conspiracy, and with an injunction against trespass and loud voices — where counter-demonstrators remained on public property, did not trespass or impede access, spoke on matters of public concern and complied with city ordinances.

Whether the court of appeals erred twice under *New York Times* and *Bose* by failing to consider the First Amendment as a defense to the tort judgments and by failing to perform an independent review of the record.

APPENDIX C—THE DISTRICT COURT ORDER

DISTRICT COURT

CITY AND COUNTY OF DENVER

1437 Bannock Street, Denver. CO 80202

Plaintiffs: SAINT JOHN'S CHURCH IN THE WILDERNESS et al.

Defendants: KENNETH TYLER SCOTT AND CLIFTON POWELL

Filing Date: Jan. 27, 2011.

Case Number(s): 05CV2290

Division/Courtroom: 2

Order on Remand

1. THE COURT, having considered the briefs and arguments of the parties, the court record and the law, makes findings below regarding place restrictions in the Permanent Injunction entered in this case (the Injunction) as expressly directed by the Court of Appeals on remand in *Saint John's Church in the Wilderness v. Kenneth Scott and Clifton Powell*. 194 P.3d 475 (Colo. App. 2008). The court concludes that modification of the manner restrictions, which as to the issues on remand are inseparably tied to the place restrictions, is also within the scope of the remand. The court modifies the Injunction as to both, consistent with its findings on remand.

Modification of Manner Restrictions

2. The Court of Appeals opinion does not expressly state whether modification of the manner restrictions in the Injunction is within the scope of the remand. Upon being asked to submit their positions on that issue, plaintiffs contended that modification was within the scope of remand. See PLAINTIFFS' RESPONSE TO THE COURT'S ORDER DATED DECEMBER 28, 2010. Defendants impliedly took the same position by arguing that the manner restrictions were unwarranted and unconstitutional and should be vacated on remand, The court is satisfied that to fully address the issues on remand, it is necessary to address the manner restrictions as well as the place restrictions. The court further concludes that modification of the manner restrictions is appropriate to give greater context to the place restrictions and to give clearer notice of the conduct prohibited by the Injunction.

3. C.R.C.P. Rule 65 (d) requires that an injunction describe in reasonable detail the act or acts sought to be restrained. The description must be sufficiently precise to enable the restrained party to conform that party's conduct to the requirements of the injunction. *Colorado Springs Board of Realtors v. Slate*, 780 P.2d 494 (Colo. 1989). However, in determining whether the notice of proscribed conduct is sufficient, the language of the injunction must be interpreted in light of the record which discloses the kind of conduct sought to be enjoined. See *Continental Baking Co. v. Katz*, 439 P.2d 889 (Cal. 1968). Guided by these principles, the court modifies the manner restrictions as follows:

> Defendants, Clifford Powell and Kenneth Scott are PERMANENTLY ENJOINED from en-

gaging in the following acts in areas highlighted in yellow in Exhibit 1 as modified by this order.

(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.

Additional Findings of Fact and Conclusions of Law as to the Six Buffer Zones

4. The court repeats some of its findings made at the conclusion of the trial in this matter on October 10, 2006, putting those findings into the framework required by the remand. The court also incorporates its findings made on October 6, 2005 in their entirety. To the extent that those findings are inconsistent with the findings in this order, the latter prevail.

5. The remand directs the court to make findings addressing five separate issues for each of the six buffer zones delineated in the Injunction. It will not, however, be necessary to make findings regarding Zone 1 and that portion of Zone 6 on the west side of Clarkson Street running north from the corner of 14th Avenue. As to those areas, plaintiff has conceded that the Injunction burdens more speech than is necessary to serve the interests protected by the Injunction. The court modifies the Injunction to delete Zone 1 and that portion of Zone 6 on Clarkson Street north of 14th Avenue. The court first makes findings for Zone 5 which is the only zone in which defendant, Kenneth Tyler Scott (Scott), demonstrated on Palm Sunday, 2005. Zone 5 is also the area most directly and adversely affected by Scott's conduct, although his conduct had substantial adverse effects in Zones 6 and 3 also.

6. **Zone 5: Location.** For substantially all of the four-hour demonstration on Palm Sunday, 2005, Scott stood on the top of a van parked on the south side of 14th Avenue near the corner of 14th Avenue

and Clarkson Street. The van was situated in Zone 5. Scott located himself as close as he could to the outdoor services and the ensuing processions without violating the parade permit. During the demonstration, Scott's wife, Jo Scott, and another protester, Mary Ellen, were on the hood of defendant Clifton Powell's (Powell) car that was parked immediately behind the van. Powell demonstrated directly across 14th Avenue from Scott in Zone 6 during the entire protest.

7. **Zone 5: Conduct.** During each of the outdoor services on the east lawn and during the processions to the main door of the church after each service, Scott stood on top of the van yelling and sometimes screaming at parishioners and clergy. It appeared to Corporal Stringham that Scott was intentionally trying to drown out the east lawn services. Scott displayed a large 3' x 4' poster of a mutilated fetus. Among other things, Scott yelled to parishioners that Reverend Carlsen was leading them to hell. In close proximity to children in the procession Scott yelled that these children, referring to the fetus in the poster, will never get to sing in a choir. He also displayed the fetus poster in such a way that children going by in the procession had to avert their eyes not to see it. When there was no service or procession going on, Scott directed his shouting to parishioners coming to and from services using the main entrance to the church on 14th Avenue, approximately one half block away.

8. During the Palm Sunday, 2005 demonstration, Powell was located only in Zone 6. His conduct, however, affected people in Zone 5 as described below.

9. **Zone 5: Effect of Defendants' Conduct.** Whatever Scott's motivation—and the court does not

question the sincerity of his beliefs—his voice was so loud that it substantially interfered with both of the outdoor east lawn services which took place about a third of a block from his location. Following each service there was a procession from the east lawn north on Clarkson and then west on 14th Avenue to the main door of the church. The procession passed within 10 to 20 feet of Scott. Scott's voice was so loud that it drowned out the singing of the choir during each procession. Reverend Carlsen's seven-year-old daughter, who was in the procession, buried her face in her hymnal to avoid looking at the large mutilated fetus poster displayed by Scott. She was still affected by Scott's yelling and the poster several days later. Scott's yelling and display of the fetus poster caused adults in the processions to become visibly upset, fearful and angry: Plaintiff, Charles Berberich, elected to forego participation in the outside service and procession in order to avoid what he described as verbal abuse. He felt threatened and abused by the violence of Scott's speech when Scott was yelling at the top of his lungs. Mr. Berberich's daughter kept her four-and-one-half-year-old son from participating in the outdoor service and the procession to protect him from Scott's shouting and the gory fetus poster he displayed. She planned to keep her son out of the annual Easter egg hunt the following week for the same reason. Detective Olin, who was called as a witness by the defendants, 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.

10. **Zone 5: Permissible Purposes Served by the Injunction.** The permissible governmental interests served by the place and manner restrictions as modified above are: a) the protection of St. John's parishioners' ability to worship; b) St. John's ability to use its property for worship services; c) protection of children from being exposed to large, gruesome depictions of mutilated fetuses and dead bodies; d) the privacy of places of worship to the extent that it includes a degree of tranquility appropriate for religious worship; and e) the privacy interests of parishioners in not being yelled and screamed at to a degree constituting verbal abuse.

11. **Zone 5: Burden on Defendants' Speech.** Maintaining the place and manner restrictions in Zone 5 would not burden more speech than necessary to serve the interests protected by the Injunction. Defendants could still conduct their demonstration in the western most 30 feet of the south side of 14th Avenue at the corner of Washington Street, and in that portion of the east side of Clarkson Street immediately south of Zone 4. Considering that from his location in Zone 5 Scott was loud enough to substantially interfere with the services on the east lawn, it is highly likely that from the 14th Avenue location Scott could be heard clearly in all of Zone 5. He could also be seen clearly in all of Zone 5 as could his mutilated fetus poster. In addition, he would be in close proximity to the route parishioners take from the main parking lot north of 14th Avenue to the main entry to the church. If Scott wanted to be heard by parishioners attending services on the east lawn, he could conduct his demonstration from the point im-

mediately to the south of Zone 4 on the east side of Clarkson Street. From that location he could clearly be heard and he and his poster could clearly be seen by people attending outside services on the east lawn. In both locations any parishioners who wanted to converse with Scott, receive handouts, or learn more about his message, would have ready access to him.

12. **Zone 6: Location.** As stated above, that portion of Zone 6 on Clarkson Street north of 14th Avenue has been eliminated without objection by plaintiffs. Scott was not located in Zone 6 during the demonstration but his conduct in Zone 5 adversely affected parishioners crossing 14th Avenue from Zone 6 to the main door of the church as described above. Powell stationed himself in Zone 6 across the street from Scott during the entire demonstration.

13. **Zone 6: Conduct.** From his location in Zone 6 Powell engaged parishioners going to and from St. John's from the church's main parking lot to the north across 14th Avenue. On Palm Sunday 2005, approximately 400 to 500 parishioners used that lot. Because of traffic on 14th Avenue, parishioners sometimes had to wait to cross 14th Avenue. Powell was approximately 12 to 20 feet from parishioners as they either waited, or started across 14th Avenue to the main door of the church. Powell directed his comments at parishioners in a voice described as loud, angry and confrontational. Among other things, he told them that the St. John's clergy were lying to them and urged them not to attend services. Powell also displayed a large poster showing a mutilated fetus. The court does not specifically recall testimony that parishioners crossing 14th Avenue from the main parking lot included families with children, but

given the number of people using the lot and the number of children, approximately 200, who attended services that day, it is highly probable that families with children did use that route. Corporal Stringham testified that parents were shielding their children's eyes from posters.

14. **Zone 6: Effect of Defendants' Conduct.** Powell's conduct in Zone 6 caused people to become visibly upset, fearful and angry. Some were crying and trembling. This prompted Reverend Carlsen to remain outside the church to act as a buffer between Powell and the parishioners. As a result, Reverend Carlsen was unable to concelebrate either the 9:00 a.m. or the 11:15 a.m. worship service inside the church.

15. **Permissible Purposes Served by the Injunction.** Permissible purposes served by the Injunction in Zone 6 are: a) protection of children from being exposed to gruesome depictions of mutilated fetuses; b) the privacy interest of parishioners in not been yelled at to an extent that it caused some to be fearful and to cry or tremble; and c) the ability of St. John's to use its property as it chooses for worship services by having its clergy participate in the celebration of services rather than having to act as a buffer between defendants and parishioners.

16. **Zone 6: Burden On Defendants' Speech.** The place and manner restrictions in the Injunction do not burden more speech than necessary in Zone 6 to serve the interests above. As with the findings regarding Zone 5, Scott and Powell could be seen and heard clearly and could convey their message unimpaired to people in Zone 6 from the northwest corner of 14th Avenue and Washington Street adjacent to Zone 6.

17. **Zoned 4: Location.** As stated above, Scott and Powell demonstrated in Zones 5 and 6 respectively. Neither demonstrated in Zone 4 on Palm Sunday 2005. It's the court's recollection that there were protesters who were part of defendants' group in Zone 4, but that they were not loud enough to interfere with either the services on the east lawn or the processions. In any case, it is highly probable that should Scott and Powell be enjoined from demonstrating in Zones 5 and 6, they would demonstrate in Zone 4. The evidence as a whole shows that Scott and Powell were totally committed to getting out their message in a high impact manner. Scott got as close to east lawn services and to the processions as he could without violating the parade permit. Detective Olin testified that Scott was cooperative but went right up to the edge of not being legal, and that in his opinion the point of the demonstration by both defendants was to deter people from going to St. John's.

18. **Zone 4: Conduct.** Zone 4 is directly across Clarkson Street from the east lawn where the Palm Sunday services were held and where numerous other outdoor services or events are held throughout the year. These include services and/or processions on Maunday Thursday, All Souls Day, St. John's feast day, an Easter egg hunt for children after Easter services, and after-service social gatherings in the summer. For reasons stated above, it is highly likely that should Scott and Powell be enjoined from demonstrating in Zones 5 and 6, they would demonstrate in Zone 4 to get as close to parishioners as possible and would engage in substantially the same intentionally disruptive and intimidating conduct as they did in Zones 5 and 6.

19. **Zone 4: Effect of Defendants' Conduct.** Given the proximity of Zone 4 to the east lawn, it is highly probable that Scott's and Powell's conduct would have the same disrupting and intimidating effect as it did when they demonstrated in Zones 5 and 6.

20. **Zone 4: Permissible Purposes Served by the Injunction.** The permissible governmental interests that would be served by the Injunction in Zone 4 are essentially the same interests protected by enjoining the demonstration in Zones 5 and 6. That is: a) protection of St. John's parishioners' ability to worship; b) St. John's ability to use its property for worship services; c) protection of children from being exposed to large gruesome depictions of mutilated fetuses and dead bodies; d) the privacy of places of worship to the extent that it includes a degree of tranquility appropriate for religious worship; and e) the privacy interest of the parishioners in not being yelled and screamed at to the extent of experiencing fear, intimidation, crying and trembling.

21. **Zone 4: Burden on Defendants' Speech.** Maintaining the Injunction in Zone 4 would not burden more of the defendants' speech than necessary to serve the above interests. Defendants could still demonstrate on the east side of Clarkson Street immediately south of Zone 4 and could still be seen and heard clearly by parishioners participating in services or events on the east lawn as well as by parishioners using the west side of Clarkson Street going to and from either the main door of the church or entrances on the east side of the church.

22. **Zone Three.** As to the north approximately one half of Zone 3, the court makes the same findings as it did with regard to Zone 4 as to each of the 5 is-

sues addressed above. As to the south half Zone 3, the court makes the same findings as it did for Zone 4 as to location and conduct. That is, if the defendants were enjoined from demonstrating in Zones 4, 5, 6 and the north half of Zone 3, it is probable that they would demonstrate in the south half of Zone 3, which would be the closest they could then get to parishioners and the outside services. Given their apparent intent to deter parishioners from attending St. John's, it is also probable that they would engage in substantially the same form of disruptive, intimidating conduct as they did in Zones 5 and 6. The effect of defendants' conduct in the south half of Zone 3 would, however, likely be different. At the midpoint of Zone 3 it is highly probable that Scott's voice would be loud enough to have the same disruptive effect on east lawn services as did his conduct in Zone 5. At points in Zone 3 close to 13th Avenue, he would probably be too distant to disrupt east lawn services. However, parishioners, particularly those parking in the lot behind Morey Junior High School, use the west side of Clarkson Street as a route to and from either a side door or the front entrance to the church. Defendants would share the same sidewalk as these parishioners. It is highly probable that the conduct of each of the defendants in the south half of Zone 3 would have the same effect on parishioners as it did in Zones 5 and 6. That is, it would cause some to experience fear, anger, intimidation, crying and trembling. In such case, the Injunction would be necessary to permit St. John's to use its property for worship services, to protect children from being exposed to gruesome depictions of mutilated fetuses, and to protect the privacy interest of parishioners in not being yelled or screamed at to a degree constituting verbal abuse. Enjoining the defendants from demon-

strating in the south half of Zone 3 would not burden more speech than necessary to serve the above interests because the defendants could be seen and heard clearly from the west side of Clarkson Street south of Zone 4.

23. **Zone 2.** As a buffer zone, Zone 2 is similar to Zone 3. The west lawn, which is adjacent to the north half of Zone 2, is used for services and events, although less frequently than the east lawn. In the south half of Zone 2 there is a parking lot behind the church which is used by parishioners attending services. Parishioners use Zone 2 as a route going to and from church using either doors on the west side of the church or the main door on 14th Avenue. Findings regarding Zone 2 are substantially the same as for Zone 3. In summary, defendants demonstrated in Zone 2 on Palm Sunday 2004, but not on Palm Sunday 2005. However, if defendants were enjoined from demonstrating in other zones, it is highly probable that they would demonstrate in Zone 2 to get as close to parishioners as possible. Defendants' conduct in 2004 was similar to that on Palm Sunday 2005, and it had a similar effect. Some parishioners were described as red with anger and ashen with fear. The place and manner restrictions in Zone 2 would serve to protect the personal privacy of parishioners including not being subject to verbal abuse and intimidation, protection of children from exposure to gruesome depictions of mutilated fetuses, and the church's unimpaired ability to use its property for worship services. The place and manner restrictions in Zone 2 would not burden the defendants' speech more than necessary to serve the above interests because the defendants could conduct their demonstration along the west side of Washington Street. From that location they would be clearly audible, visible

and accessible to parishioners using Zone 2 going to and from church services and/or attending services on the west lawn.

DATED THIS 27TH DAY OF JANUARY, 2011

BY THE COURT:

s/

John McMullen, Senior Judge