No. 12-1077

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

REPLY BRIEF

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REPLY BRIEF FOR PETITIONERS

This is a case about a content-based injunction restricting political and religious speech in a traditional public forum—the display of "gruesome images" of aborted fetuses on a public sidewalk or street.

The court below held the "gruesome images" restriction was content-based. Nonetheless, the court upheld the restriction under strict scrutiny, relying solely on the government interest in shielding children from psychological harm. Pet. 18a. Lower court decisions conflict on whether this interest justifies content-based restrictions on "gruesome" images and words. Pet. 12-18.

Respondents do not dispute that the decisions conflict on this question. Indeed, respondents do not cite any of the cases involved in the conflict, except the case below and another case that they cite for a different proposition.

Instead, respondents disagree with the court below, and with all the courts that have considered the question, by claiming that a restriction on "gruesome images" is content-neutral. BIO 2, 29, 33, 34. Respondents heavily rely on cases upholding content-neutral restrictions aimed at shielding religious services from disruption, BIO 19-29—a different government interest than the one relied on by the court below. And respondents ignore the firm distinction this Court has drawn between speech in a traditional public forum and speech on an objecting owner's private property. BIO 33, 34.

Respondents' brief and the opinion below are ships passing in the night. Respondents' arguments were not advanced by the opinion, or were rejected

outright. The opinion's arguments are either unaddressed or rejected by the respondents.

Respondents' arguments thus do nothing to dispel the lower court conflict that the petition identified, or diminish the importance of the issue involved in the conflict. This Court should grant certiorari to resolve this conflict.

I. Restrictions on Displaying "Gruesome Images" of Aborted Fetuses Are Content-Based

Respondents' argument rests on the claim that the injunction—including the "gruesome images" restriction—is "Content Neutral," BIO 29; see also BIO 2, 33, 34. This is contrary to (1) the opinion below, (2) other opinions considering such restrictions, and (3) this Court's content discrimination doctrine.

First, the court below held that "The Prohibition [on Gruesome Images] Is Content-Based," Pet. 18a (section heading), discussing this in detail, Pet. 18a-22a. Respondents never respond to that discussion.

Second, other cases considering whether restrictions on displaying aborted fetuses are content-based unanimously hold that they are. *Center for Bio-Ethical Reform, Inc.* v. *Los Angeles County Sheriff Dept.*, 533 F.3d 780 (9th Cir. 2008); *United States* v. *Marcavage*, 609 F.3d 264, 283 (3d Cir. 2010); *Operation Save America* v. *City of Jackson*, 275 P.3d 438, 461 (Wyo. 2012). Respondents never cite or respond to these cases.

Third, this Court's cases show that restrictions on images with a particular content that upset people because of that content are content-based. "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County* v. *Nationalist*

Movement, 505 U.S. 123, 134 (1992); *Texas* v. *Johnson*, 491 U.S. 397, 412 (1989); Pet. 33 (citing more cases).

Again, respondents never cite or respond to these cases; and the three cases they cite in their content-neutrality argument, BIO 29-34, do not support their argument. One is *Saint John's Church in the Wilderness* v. *Scott*, 194 P.3d 475, 478 (Colo. Ct. App. 2008) [hereinafter *Saint John's Church I*], which did not discuss the "gruesome images" provision (because that provision was not then part of the injunction, Pet. 5a). Another is the decision below, which held that the "gruesome images" provision is content-based. And another is *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753 (1994), which struck down a restriction on "images observable" from inside a clinic but expressly did "not decide whether the 'images observable' * * * provision[was] content based," *id.* at 774 n.6. Since the provision in *Madsen* applied to all "images observable," that case *a fortiori* does not support the view that a restriction focused on "gruesome images" would be content-neutral.

Petitioners seem to be arguing—unsupported by precedent—that, though the injunction specifically restricts certain "gruesome images," it is content-neutral because the trial judge's purpose was to protect children, parishioners, and the church from the *consequences* of the restricted speech. Pet. 30-31, 34. But the injunction's focus on "gruesome images" reflects the trial court's conclusion that those consequences flow from the *content* of the speech. And when government action restricts a particular category of speech because of consequences that supposedly flow from the offensive, disturbing, or other-

wise harmful content of the speech, the action is treated as content-based.

This Court's decision in *Boos* v. *Barry*, 485 U.S. 312 (1988)—relied on below, Pet. 21a—is instructive. In *Boos*, the government restricted hostile demonstrations near foreign embassies, and argued the restriction was content-neutral. The restriction was intended to "shield diplomats from speech that offends their dignity," *id.* at 320, and that could therefore alienate foreign governments and lead to violence against our diplomats abroad. *Finzer* v. *Barry*, 798 F.2d 1450, 1456, 1460-61 (D.C. Cir. 1986), *rev'd sub nom. Boos*, 485 U.S. 312; *Boos*, 485 U.S. at 323-24 (noting that protecting foreign diplomats can help protect our diplomats); *id.* at 338-39 (Rehnquist, C.J., dissenting) (endorsing the *Finzer* reasoning). Yet because the injury to foreign relations and to diplomats' dignity stemmed from "[t]he emotive impact of speech on its audience," *id.* at 321, the restriction on hostile demonstrations was seen as content-based.

Likewise, a requirement that demonstrators pay a permit fee partly based on the likely controversy aroused by the demonstration—and thus the demonstration's security costs—is content-based. *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 134 (1992). The desire to recoup the security costs that are a consequence of the demonstration is not itself a censorious motive. But having the fee turn on listeners' hostile reaction to the speech makes the law content-based, because "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Id.*

Similarly, restrictions on cigarette advertising or pornography that is accessible to children may be motivated by the physical and psychological consequences of such speech. But because it is the content

of the speech that helps bring about the consequences, such restrictions are treated as content-based. *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 574 (2001); *United States* v. *Playboy Entertainment Group*, 529 U.S. 803, 815 (2000); *Reno* v. *ACLU*, 521 U.S. 844, 867-68 (1997).

The same analysis applies here. Whatever the ultimate goal of the injunction, the alleged harm to the parishioners, their children, or the church caused by the images of aborted fetuses stems from "[t]he emotive impact of speech on its audience." *Boos*, 485 U.S. at 321. And because such an impact "is not a 'secondary effect,'" a restriction justified with reference to that impact "must be considered content-based." *Id.*

Finally, as discussed at Pet. 29-34, the trial court partly relied on the content of petitioners' speech in concluding that the speech supposedly constituted a nuisance and a disturbance. The underlying judgment, as well as the injunction based on it, is therefore "justified with[] reference to content" and must be treated as content-based. Pet. 31.

II. The Opinion Below Rests on the Interest in Shielding Children from "Gruesome Images," an Interest Applicable Far Beyond Church Protests

The opinion below justified the content-based speech restriction by relying solely on the "interest in protecting children from disturbing images." Pet. 18a; see also Pet. 22a-24a. The section titled "The Prohibition Is Justified by a Compelling Government Interest" neither mentions another interest nor describes this interest as limited to children going to religious services. Pet. 22a-24a.

Respondents claim that the question "whether the government may restrict the display of gruesome materials to very young children in traditional public fora, * * * was never advanced, litigated, or decided by the courts below." BIO 10; see also BIO 2. Yet the opinion below decided precisely this question. See Pet. 24a ("[T]he government's compelling interest in protecting children from exposure to certain images of aborted fetuses and dead bodies supports this part of the injunction."); see also Pet. 18a, 22a-23a. And petitioners raised the First Amendment throughout the litigation, see, *e.g.*, Pet. 5a-6a, 11a (noting petitioners' arguments); *Saint John's Church I*, 194 P.3d at 480 (same), and challenged the reasoning of the decision below once it was handed down, see Pet. for Writ of Cert. 8-12 (Colo. Aug. 29, 2012) (petition to the Colorado Supreme Court).

Nor was the logic of the opinion below limited to the supposed harm caused to children by exposure to gruesome material around churches. Indeed, the opinion relies, Pet. 23a, on three non-church-related cases that endorsed restricting speech to shield children from gruesome material: *Operation Save America*, 275 P.3d 438; *Bering* v. *SHARE*, 721 P.2d 918, 935-36 (Wash. 1986); and *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 opinion does mention, in its narrow tailoring discussion, that the injunction applies only to speech around the church, but this is simply part of the court's explanation for why the injunction is not very broad. Pet. 25a. The precedential force of the court's compelling interest discussion, which is focused solely on shielding children, would equally justify future speech restrictions in other places.

As the petition demonstrates, there is a conflict among appellate courts on whether the interest in shielding children indeed justifies content-based speech restrictions on displaying "gruesome" political speech. See Pet. 12-18 (discussing six such cases). Yet respondents do not discuss or even cite any of the cases that are in conflict on this, see BIO iii-v, except one, *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); and when respondents discuss *Olmer*, they discuss a different part of *Olmer*, not the part discussing restrictions on speech aimed at shielding minors.

Instead, respondents cite eleven cases, BIO 19-29, involving *content-neutral* restrictions on speech (or restrictions on constitutionally unprotected threats), justified by a different interest—the "interest in protecting citizens' right to worship," BIO 22; see also BIO 24. Unlike the decision below, none of these cases focused on children. Seven cases involved restrictions on intrusion into a church itself. *Action* v. *Gannon*, 450 F.2d 1227 (8th Cir. 1971) (en banc); *Riley* v. *District of Columbia*, 283 A.2d 819 (D.C. 1971); *Hill* v. *State*, 381 So. 2d 206 (Ala. Crim. App. 1979); *Church of Jesus Christ of Latter-Day Saints* v. *Wallace*, 573 P.2d 1285 (Utah 1978); *People* v. *Morrisey*, 614 N.Y.S.2d 686 (Crim. Ct. 1994), *aff'd as modified*, *People* v. *McDaniel*, 661 N.Y.S.2d 904 (App. 1997); *People* v. *King*, 561 N.Y.S.2d 395 (Crim. Ct. 1990); *Central Presbyterian Church* v. *Black Liberation Front*, 303 F. Supp. 894 (E.D. Mo. 1969). Such restrictions simply apply content-neutral trespass principles, or in a few instances restrict constitutionally unprotected threats, *Action*, 450 F.2d at

1238 n.17; *Central Presybterian Church*, 303 F. Supp. at 902 .

Three more cases endorsed some *content-neutral* restrictions on speech outside *funerals*, not religious services generally. *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1218 (2011); *Phelps-Roper* v. *City of Manchester*, 697 F.3d 678, 690, 692 (8th Cir. 2012) (en banc); *Phelps-Roper* v. *Strickland*, 539 F.3d 356, 361, 364-65 (6th Cir. 2008). And even the one case allowing a broader restriction on demonstrations outside a church, *St. David's Episcopal Church* v. *Westboro Baptist Church, Inc.*, 921 P.2d 821, 829 (Kan. App. 1996), stressed that the restriction was content-neutral.

None of these eleven cases involved a content-based restriction on political or religious speech in a traditional public forum. And none was cited by the court below in its discussion of why the injunction passed strict scrutiny, Pet. 22a-26a, with one exception: *Olmer*, cited for the proposition that "the government has a compelling interest in 'protecting very young children from frightening images,'" Pet. 23a, an aspect of *Olmer* different from the one respondents discuss, BIO 24-25.

Respondents argue that church services are entitled to protection against disruption. BIO 19. So they are, just as other activities are. Protesters may not disrupt any institution by trespassing on its property. *Hudgens* v. *NLRB*, 424 U.S. 507, 515, 520-21 (1976). Content-neutral restrictions on speech outside institutions may also prevent disruption through excessive noise or traffic blockage. *Kovacs* v. *Cooper*, 336 U.S. 77 (1949). But no institution is entitled to protection from the supposed "disruption" that flows from the content of critical or offensive speech outside it. See*, e.g.*, *Boos*, 485 U.S. at 321 (in-

validating content-based restriction on hostile speech outside an embassy); *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92 (1972) (likewise, outside a school).

The court below relied on the interest in shielding children from gruesome material, and set a precedent related to this interest. The disagreement among lower courts centers on whether this interest can justify content-based restrictions on political and religious speech. The separate interest in protecting *worship services* (rather than children) using *content-neutral* restrictions is not relevant here.

III. Respondents' Argument Rests on a Misunderstanding of Public Forum Doctrine

This Court's precedents sharply distinguish speech on private property (whether a church, store, or factory), which can be restrained by the property owner, from speech on sidewalks outside that property. *Hudgens*, 424 U.S. at 515, 520-21. Respondents' argument misses this distinction.

Respondents argue that "[t]he effect of Petitioners' manner of protesting, by waving gruesome posters a few feet from [outdoor] religious ceremonies conducted on private property, is little different than if the Petitioners had entered the Church and hung their posters from the communion rail." BIO 34. But speech in a traditional public forum, even "a few feet" from an outdoor activity, radically differs for First Amendment purposes from speech on another's "private property." When property owners conduct activity on open parts of their property next to traditional public fora, they must accept the possibility that visitors will see speech displayed by people who are in those neighboring fora—whether anti-abortion

protesters, anti-fur protesters, anti-globalization protesters, labor protesters, or anyone else.

Likewise, respondents claim that striking down the "gruesome images" provision "would permit the Petitioners to enter the Church during worship and silently display their photographs of dismembered body parts next to the pulpit and altar." BIO 33. But a private property owner may eject people who display *anything* the owner dislikes, without violating the First Amendment. Likewise, an injunction enforcing such an ejection would pose no First Amendment problem. Yet the owner's right to restrict speech on its property does not entail a right to demand content-based restrictions in an adjacent public forum.

Petitioners are objecting to *content-based* restrictions imposed on speech in traditional *public* fora. Respondents respond by wrongly claiming that a restriction on "gruesome images" is *content-neutral*, and by unsoundly analogizing speech on a sidewalk to speech on *private* property. This Court's precedents stand against respondents' argument.

IV. Respondents' Allegations at BIO 3-10 Do Not Affect the Legal Issues in This Case

Petitioners will not reply in detail to all of respondents' claims at BIO 3-10, which do not affect the legal issues in this case. Some go without saying, such as that the church grounds themselves are "private, not public, property." BIO 3. Some in effect restate the trial court's conclusions, fully quoted at Pet. 30a-43a, that respondents' conduct constituted a nuisance; but, as discussed at Pet. 31-35, those conclusions rest partly on the disturbing content of respondents' speech.

Some are legally irrelevant: The March 20, 2005 parade permit let the church exclude others from adjacent sidewalks, BIO 3, but petitioners did not violate the permit, Pet. 34a, ¶ 6, and the injunction covers days when no exclusive permit applies. The details of the "outdoor services" mentioned at Pet. 2, such as their "reenact[ment of] Jesus' entrance into Jerusalem," BIO 3, are not legally significant. That "there was no testimony at trial from the Plaintiffs regarding their views concerning homosexuality or abortion," BIO 6, is likewise not legally significant.

The 2004 citation for violation of Denver Rev. Mun. Code § 38-90 (2012), BIO 5, was an accusation, not a conviction; Rev. Carlsen testified (without objection) that he had heard the case "was dismissed," 2 Tr. 10/2/2006, at 217-19. And despite the passage block-quoted at BIO 10, the judge never made a finding of criminal conduct by respondents in 2005. The "findings regarding the Defendants' conduct" began two pages later, Tr. 10/10/2006, at 14; and the statement, "I don't agree with [petitioners'] assessment that there was no basis for issuing a citation for disturbing worship services as they had done in 2004," *id.* at 12, at most suggests that there may have been probable cause for a citation, not that a crime had been proved.

Petitioners' counsel apologizes to the Court, however, for a mistake he made at Pet. 4. The decision below describes the 2011 trial court order as "restricting demonstrations in six buffer zones," Pet. 2a, and as altering only the conduct restricted by the 2006 order, not the zones in which the restriction applied, Pet. 25a (describing the "gruesome images" restriction as applying "within the buffer zones described in *St. John's I*"); Pet. 4a-5a. But on further

review, counsel recognizes that the Jan. 27 order deleted one zone and contracted another. Pet. 33a, ¶ 5.

The "gruesome images" restriction thus applies only to zones 2-5 and to that part of zone 6 facing the church (see App. A). Instead of "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," Pet. 4, the petition should have said, "a zone extending around 80% of the block on which the church is located, and also covering portions of the opposite sides of two streets." Counsel regrets the error, and hopes this clarifies the matter.

CONCLUSION

For these reasons and those given in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX—MAP OF ZONES MENTIONED IN THE INJUNCTION, COPIED FROM *SAINT JOHN'S CHURCH I*, 194 P.3D AT 486