

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

**BRIEF *AMICI CURIAE* OF HISTORIANS
OF ART AND PHOTOGRAPHY
IN SUPPORT OF THE PETITIONERS**

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INTERESTS OF THE *AMICI*¹

The *amici* are professors of art history and visual culture in universities around the United States. They have a particularly keen interest in the preservation of free expression, especially through visual media.

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¹ No party's counsel authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to fund its preparation or submission. Both parties were given 10-day notice of intent to file this brief under Rule 37.2(a) and have provided written consent to its filing.

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SUMMARY OF THE ARGUMENT

Photographs, especially gruesome photographs, can speak with a power that text often cannot. Since the Civil War, people have used the photograph's ability to stir emotion and engender visceral understanding to provoke debate about some of the most important issues our nation has faced, namely, issues of war. Unsurprisingly, many of the most important war images have been "gruesome." Yet under the Colorado Court of Appeals' interpretation of the First Amendment, these photos would be subject to ban from public display precisely because they are evocative. Because the Colorado Court of Appeals' opinion presents a threat to an historically-grounded method of expression that lends itself naturally to vibrant debate, this Court should grant *certiorari* and reverse.

ARGUMENT

Saint John's Church in the Wilderness v. Scott, 2012 COA 72, 2012 WL 1435945 (Co. App. Ct. 2012), *cert denied sub nom. Scott v. Saint John's Church in the Wilderness*, 2013 WL 119791 (Jan. 7, 2013) is a case about government censorship of the expression of ideas, purportedly to protect children. The case

presents an issue of exceptional importance: whether gruesome pictures, which have historically had a profound effect on political debate in this country, may be banned by the government simply because a court finds that the message may upset some children. If allowed to stand, the Colorado court's interpretation of the First Amendment threatens to cut out a vital part of American political debate by limiting one of the most effective and compelling means of conveying messages on matters of extreme import. Historically, gruesome photographs have played a key role in influencing the great debates of the time, especially debates about war. Yet the most compelling photographs, those that had the greatest effect on debate, would be precisely those opened to censorship under the Colorado court's ruling. As such, granting review here would prevent the denuding of American political debate.

I. Gruesome Images Have Shifted the National Debate During Times of War

War is one of the most horrific features of the human experience. Unsurprisingly, then, debates surrounding war have often been colored by the dissemination of gruesome images. In three wars in particular—the Civil War, the Second World War, and the Vietnam War—gruesome images played a vital role in informing the national understanding of war and its costs. Under the Colorado Court of Appeals' understanding of the First Amendment, a person who wished to show the images that shaped the national debate about these wars could be enjoined from doing so if children were reasonably likely to be in the vicinity.

A. The Civil War

Although photography during the Civil War was still in its infancy—too nascent even to capture action shots of the battles themselves—the result nonetheless transformed American’s perception of war and the debate that surrounded it. Serena Covkin, *Photography and History: The American Civil War*, US HISTORY SCENE (Sept. 26, 2012), <http://www.ushistoryscene.com/uncategorized/civilwarphotography/>.

Several different photographers trailed the warpath capturing photo evidence of the realities of war, but two enjoy the most notoriety and historical importance: Matthew Brady and his assistant, Alexander Gardner. *See id.* The two worked together to photograph the war-torn landscape. *See id.* American society, for the first time, experienced the grisly realities of war in the public exhibits Brady opened in New York City and Gardner opened in Washington, D.C. Vaughn Wallace, *150 Years Later: Picturing the Bloody Battle of Antietam*, TIME LIGHTBOX (Sept. 17, 2012), <http://lightbox.time.com/2012/09/17/150-years-later-picturing-the-battle-of-antietam/>. Gardner’s photographs of the Battle of Antietam were the first ever photographs of an American battlefield on which the dead had yet to be buried. NAT’L PARKS SERV., *Historic Photographs by Alexander Gardner*, <http://www.nps.gov/anti/photosmultimedia/gardnerphotos.htm> (last visited Apr. 2, 2013).

Photographs like those from the Battle of Antietam transformed the public debate surrounding the Civil War and shattered long held ideals and perceptions. Alan Trachtenberg, *Albums of War: On*

Reading Civil War Photographs, 9 REPRESENTATIONS 1 (SPECIAL ISSUE), 2-12 (Winter, 1985). Victorian attitudes had romanticized war as a noble endeavor for a gentleman and the aristocracy. “Just as the Civil War modernized the economy, it modernized culture, even if its effects took time to manifest themselves. It eroded Victorian habits of feeling and sentimentality.” Covkin, *supra*.

The photographs offered something unattainable in written descriptions—a visceral, graphic representation of the gruesome truth of the Civil War. *See id.* “Photographic images became the connective tissue binding the home front to the combat zone.” *See id.* Imagery reflecting reality offers an immutability not found in written descriptions, and these images reflected the horrors of war that could not be sentimentalized and romanticized through the fluid motions of the author. *See id.*

The popularity and presence in the public of both Gardner and Brady’s photographs is evidenced by the wave of attention they carried in media and public at large. *See* BOB ZELLER, THE BLUE AND GRAY IN BLACK AND WHITE: A HISTORY OF CIVIL WAR PHOTOGRAPHY 2-4 (2005). *Harper’s Weekly* printed Gardner’s sketches and woodcut illustrations of the Antietam battlefields, fueling the demand for his work and bringing the depictions into the homes of Americans for the first time. Doug Perry, *Teaching with Documents: The Civil War as Photographed by Mathew Brady*, NAT’L ARCHIVES, <http://www.archives.gov/education/lessons/brady-photos/> (last visited Mar. 29, 2013). Large crowds gathered at the exhibitions in New York and

Washington, entranced by the images the two photographers captured from the war. *See* Wallace, *supra*.

The New York Times recorded the power these photographs had over their viewers. *See id.* *The Times* opined that it was as if the photographer “had brought the bodies and laid them in our dooryards and along the streets.” *See id.* Catalogues were made from which other galleries purchased copies of the photos for public display at their own locations across the country. *See id.* Public debate ensued discussing the harsh and brutal realities of war, but the photographs also stirred up something within the American public seeking a better understanding of the war and the death it brought. *See id.*

It is fair to say that the photos changed America’s understanding of the realities of the Civil War. *See* ZELLER, *supra* at xi. They left a distinct impression on their viewers that mere descriptions of the battles had not been able to conjure. *See* Covkin, *supra*. And they were gruesome, depicting battlefields full of corpses lying in contorted positions with exposed wounds. *See, e.g.,* Alexander Gardner, *Bloody Lane Carnage*, NAT’L PARKS SERV., http://www.nps.gov/common/uploads/photogallery/nc_r/park/anti/2473AA6F-1DD8-B71C-07E4B3233A117CAD/2473AA6F-1DD8-B71C-07E4B3233A117CAD-large.jpg (last visited Apr. 2, 2013). Yet under the Colorado Court of Appeals’ logic, these pictures could be banned from public places if a court believed that children were reasonably likely to be exposed to photos that might upset them—such as in public museums or articles available to the public.

B. The Second World War

Gruesome depictions of death also had a profound effect on American debate surrounding the Second World War. Initially, the federal government, through the Office of War Information, sharply curtailed Americans' access to pictures of dead soldiers. *See* GEORGE H. ROEDER, *THE CENSORED WAR: AMERICAN VISUAL EXPERIENCE DURING WORLD WAR TWO*, 8-10 (1993). The government feared that pictures of the war's true cost would undermine public support for the war, which the government perceived to be a particularly dangerous possibility when nearly a third of the American public supported a negotiated peace with Germany. *See id.* Starting in 1943, however, the government changed its tack: it was now worried that the American public, invigorated by recent victories, might begin to grow impatient with the war as it dragged on. *See id.* at 11. The Office of War Information released a number of photos that it had previously kept from the public in a classified "Chamber of Horrors," including particularly gruesome pictures of dead and mutilated soldiers. *See id.* at 10-12. Some of these photos, in turn, were published by the press. *See id.* at 14.

Soon the government itself began capitalizing directly on shocking photos. One poster exhorting American civilians to work harder featured a dead American soldier, slumped face down over a berm, his back flecked with what might be blood. The caption reads "This Happens Every 3 Minutes: Stay On the Job and *Get It Over.*" *See* U.S. ARMY SIGNAL CORPS., *A Dead American Soldier Shown Where He Fell* (1945) (emphasis in the original), *available at*

<http://cdn.calisphere.org/data/28722/73/bk0007s9773/files/bk0007s9773-FID4.jpg>. The government often used these photos to guard against war weariness among the civilian public, believing that display of the photos would discourage worker absenteeism and strikes. *See* ROEDER, *supra* at 15. The release of the photographs shifted the political debate in World War II America: Shaken from the exultant feeling of impending victory, Americans now realized the true cost of the war and thus came to understand that the war was far from over. *See id.* at 14.

The pictures also proved to be beneficial for the government in other ways. An organization involved in raising war bonds telegraphed the Office of War Information to “please rush air-mail gruesome photos of dead American soldiers for plant promotion Third War Loan.” *See id.* Presumably, if the writer of that telegram did not believe pictures to be more effective than text alone, he would not have been so vehement in his request of them.

The fact that gruesome photographs were evocative and politically salient during the Second World War is further reinforced by the government’s censorship priorities during that time. During the War, the government focused a large portion of its censorship efforts on pictures rather than text. *See id.* at 17. Perhaps recognizing that pictures could be evocative in a way that text could not, the government was significantly stricter in limiting battlefield images than it was in censoring similar text accounts. *See id.*

When the government speaks, it is not constrained by the limits of the First Amendment. *See Pleasant Grove City v. Summum*, 129 S. Ct.

1125, 1131 (2009). As such, the government could likely continue to print and display gruesome posters like the ones described above, despite the Colorado Court of Appeals' understanding of the First Amendment. But individuals could not: A court could enjoin them from displaying the same gruesome pictures in public so long as the court believed that children were likely to see the pictures and to become upset by them. This means that the government could continue to use the most salient images for its own purposes, while citizens, even when engaging in political speech in a traditional public forum, could be subject to censure for doing the same.

C. The Vietnam War

Disturbing images of graphic violence played a pivotal role in shaping public perception of the war in Vietnam. Several images that came to represent the horror of war in Southeast Asia were displayed to Americans of all ages in the pages of national newspapers and periodicals like *TIME Magazine* and *Newsweek*.

Among the first and most widely cited images was Malcolm Browne's photograph of the self-immolation of the Buddhist monk Thich Quang Duc, taken on June 11, 1963. *Diem Pleads for Calm After Torch Suicide*, L.A. TIMES, June 12, 1963, at 2, *image available at* <http://www.nydailynews.com/news/world/malcolm-browne-vietnam-war-correspondent-snapped-iconic-burning-monk-photo-dies-81-article-1.1145989>. The shocking image shows the elderly monk seated calmly in the lotus position while engulfed in flames. *Id.* Thich Quang Duc set himself

on fire in the center of a busy Saigon intersection to protest alleged repressive policies of the U.S.-backed Diem regime in South Vietnam. ANNETTE KUHN & KIRSTEN EMIKO MCALLISTER, *LOCATING MEMORY: PHOTOGRAPHIC ACTS* 211 (2006). The image appeared in newspapers around the world. *Id.* at 210. The photo, which won Browne a Pulitzer Prize, had a strong impact on the American public, dramatically raising questions about the nations alliance with the South Vietnamese and “set[ting] the stage for a reconsideration of the United States’ support for Diem.” *Id.* at 211.

Four years later, during the Tet offensive of 1968, Associated Press reporter Eddie Adams captured another image that became an iconic representation of the war to American viewers. This photograph showed South Vietnamese Brigadier General Nguyen Ngoc Loan pointing a gun at the head of a terrified Viet Cong prisoner moments before executing him. *Execution*, WASH. POST, Feb. 2, 1968, at 1, *image available at* <http://digitaljournalist.org/issue0309/lm12.html>. Like Browne’s photo, this image appeared shortly afterward in newspapers around the world, including on the front pages of the *Washington Post* and the *New York Times*. *See id.*; *Guerrilla Dies*, N.Y. TIMES, Feb. 2, 1968, at A1. As with Thich Quang Duc’s self-immolation, Adam’s photo served to raise doubts among the American people about the government’s alliance with the South Vietnamese. KUHN, *supra*, at 212. One historian, Alan Brinkley, said that, “[n]o single event did more to undermine support in the United States for the war.” *Id.*

On March 16, 1968, Army photographer Ron

Haeberle captured a series of horrifying images in the village of My Lai, where U.S. troops massacred hundreds of Vietnamese men, women, and children. Jo Ellen Corrigan, *Plain Dealer Exclusive in 1969: My Lai massacre photos by Ronald Haeberle*, PLAIN DEALER LIBRARY (last updated June 6, 2010), http://www.cleveland.com/plain-dealer-library/index.ssf/2009/11/plain_dealer_exclusive_my_lai_massacre_photos_by_ronald_haeberle.html. The photos included an image of a large pile of dead bodies, mostly women and children, lying in the middle of a dirt road. *Id.* Another photo showed the corpse of a small child lying next to a ditch that contained the body of an adult man. *Id.* These images were published in the November 20, 1968 edition of the Cleveland, Ohio newspaper *The Plain Dealer*. *Id.* The front page prominently displayed the image of the pile of dead villagers. *Id.* These images were subsequently picked up by news outlets around the world and greatly impacted the American discourse concerning the conflict, fueling anti-war sentiment for some and inspiring denials and pro-military backlash from others. Claude Cookman, *The My Lai Massacre Concretized in a Victim's Face*, 94 J. AM. HIST. 1 (2007), 154–62, <http://www.journalofamericanhistory.org/projects/americanfaces/cookman.html>.

Yet another jarring photograph is AP photographer Nick Ut's image of a young Vietnamese girl running naked from a napalm explosion that seriously burned her arms and back. Fox Butterfield, *South Vietnamese Drop Napalm on Own Troops*, N.Y. TIMES, June 9, 1972, at A9 (image on A1); for photo, see Richard Hartley-Parkinson, *My Vietnam War: Forty Years On, Photographer Who Took Iconic*

“Napalm Girl” Image Shares His Other Incredible Images, DAILY MAIL (U.K.), June 4, 2012, <http://www.dailymail.co.uk/news/article-2154400/Napalm-Girl-photographer-Nick-Ut-releases-work-Vietnam-war.html> (eighth photo in article). Like the other iconic images of the war, Ut’s photograph made the front pages of newspapers around the world and later appeared in *Life* and *Newsweek*. ROBERT HARIMAN & JOHN LOUIS LUCAITES, NO CAPTION NEEDED: ICONIC PHOTOGRAPHS, PUBLIC CULTURE, AND LIBERAL DEMOCRACY 173 (2007). The photo came to be one of the most recognizable images of the Vietnam conflict and, like the images that came before it, influenced public perception of the horrors of the war. *Id.*

Back on the home front, on May 4, 1970, Ohio National Guard troops opened fire on a group of students at Kent State University who had gathered to protest U.S. troop incursions into Cambodia. John Kifner, *4 Kent State Students Killed By Troops*, N.Y. TIMES, May 5, 1970, at A1, *available at* <http://www.nytimes.com/learning/general/onthisday/big/0504.html>. After the shooting, which left four students dead, student photographer John Filo captured an image of a young woman kneeling over the body of a dead student and screaming in despair. *Id.* That afternoon, the image appeared on the front page of the *New York Times*. *Id.* Outrage followed the publication of the story and led to national student protests that temporarily closed over 450 college campuses and inspired a demonstration at the White House of 75,000 and 100,000 protestors. Tim Stenovec, *Kent State University Shootings Anniversary: Pictures from Historic Day*, THE HUFFINGTON POST (last updated July 4, 2011),

http://www.huffingtonpost.com/2011/05/04/kent-state-university-shootings_n_857544.html#s273976.

As unabashedly gruesome images displayed in public, virtually every single one of the aforementioned pictures would be subject to government ban under the Colorado court's reasoning. Newspapers are displayed prominently in newsstands, grocery stores, libraries, and book stores. These are all places that children frequent, and so in all of these places a parent could sue to enjoin continued display of these pictures.

Some of the abovementioned photos also had lives beyond display in newspapers. Ron Haeberle's most memorable photo, of a number of Vietnamese men, women, and children who had been gunned down in a ditch at My Lai, soon found new life as an anti-war propaganda poster. See FRANCIS FRASCINA, ART, POLITICS, AND DISSENT: ASPECTS OF THE ART LEFT IN SIXTIES AMERICA 111-12 (1999). The poster, which displayed the photograph along with text stating, "Q. And babies? A. And babies," was carried by anti-war protestors at protests. See *id.* at 184, *image available at* http://www3.amherst.edu/magazine/issues/05winter/images/haeberle_brandt.jpg. Its use as a tool of protest spread around the world. See SPENCER C. TUCKER, THE ENCYCLOPEDIA OF THE VIETNAM WAR: A POLITICAL, SOCIAL, AND MILITARY HISTORY 68 (2d ed. 2011). To this day, it is remembered as one of the most effective anti-war propaganda posters in the history of the Vietnam War. See *id.* Under the Colorado court's formulation of the First Amendment, its display, especially as a poster at protests, could be banned.

D. Iraq

Photography has retained its great power to stir public debate in America's most recent armed conflicts. In April 2004, the television show *60 Minutes II* released to the public pictures of prisoners who had been severely mistreated at Abu Ghraib prison in Iraq. See *Chronology of Abu Ghraib*, Wash. Post, <http://www.washingtonpost.com/wp-srv/world/iraq/abughraib/timeline.html> (last updated Feb. 16, 2006). Those pictures, and others released by *The New Yorker* in May 2004, see Slide Show, *Abu Ghraib Pictures*, NEW YORKER, http://www.newyorker.com/archive/2004/05/03/slides_how_040503?slide=1 (last visited Apr. 1, 2013), sparked a national debate on the treatment of prisoners in the war on terrorism. See Arwa Damon et al., *Questions of Torture, Abuse Rooted in Bush-era Decisions*, <http://www.cnn.com/2009/US/05/19/detainee.abuse.overview/> (July 30, 2009). In the United States, the vast majority of Americans were appalled, and President Bush's approval rating, as well as approval for the Iraq War in general, fell precipitously. See Wayne Drash, *Abu Ghraib Photos Were 'Big Shock,' Undermined U.S. Ideals*, CNN, <http://www.cnn.com/2009/WORLD/meast/05/18/detainee.abuse.lookback/index.html> (May 20, 2009). *The Economist* neatly summarized the international fallout from the photographs when its May 6, 2004 edition featured—on its cover—the now-iconic photograph of a hooded Abu Ghraib prisoner with electrical wires attached to both of his hands, below a headline reading simply, “Rumsfeld, Resign.” See *Rumsfeld, Resign*, THE ECONOMIST, May 6, 2004, available at <http://www.economist.com/node/2647493>.

“The photos did what print could not do. They showed front and center what human rights groups had been saying for months: that the Bush administration [sic.] was abusing prisoners within U.S. custody.” See Damon, *supra*. Under the Colorado Court of Appeal’s ruling, however, it is likely that the photos would never have been broadcast. The photos are incontrovertibly gruesome. To say that they would be disturbing to children is an understatement. The Government would therefore have a compelling interest in blocking their dissemination if children were reasonably likely to see them. *60 Minutes II*, which broadcasts in the early evening, could have been enjoined from showing them.

E. Afghanistan

On August 9, 2010, *TIME Magazine* ran an incontrovertibly brutal picture as its front cover. The picture, of a young woman with her nose cut off, bore the title, “What Happens if We Leave Afghanistan,” pointedly without a question mark. See Magazine Cover, *TIME MAGAZINE*, Aug. 9, 2010, available at <http://www.time.com/time/covers/0,16641,20100809,00.html>. The cover sparked widespread and impassioned debate about the need for continuing the Afghan War and America’s reasons for doing so. See Rod Norland, *Portrait of Pain Ignites Debate Over Afghan War*, *N.Y. TIMES*, Aug. 4, 2010 at A6, available at <http://www.nytimes.com/2010/08/05/world/asia/05afghan.html>. Some viewed the cover as a reminder that humanitarian reasons for war might justify the Afghan War’s continued existence, while others spoke strongly against this view. See Michael Crowley, *What Happens if We Leave Afghanistan*,

Cont'd, TIME SWAMPLAND (Apr. 4, 2011), <http://swampland.time.com/2011/04/04/what-happens-if-we-leave-afghanistan-contd-2/>. The picture was alternately lauded and decried, but was undoubtedly effective in stirring public engagement with a question of extreme importance. See *Framing the Afghan Debate with a Magazine Cover*, N.Y. TIMES AT WAR BLOG, (Aug. 4, 2010), <http://atwar.blogs.nytimes.com/2010/08/04/framing-the-afghan-war-debate-with-a-magazine-cover/>.

Yet as a patently gruesome image, which was undoubtedly disturbing to many adults, let alone children, under the Colorado Court of Appeals' formulation of the First Amendment, the *TIME Magazine* cover would come under the ambit of the courts. A court could enjoin stores from displaying the cover if they reasonably believed that children might see it. This would provide stores a strong incentive not to display such images, which in turn would provide newspapers and magazines an incentive not to print them, or at least not to display them on the front cover. But the power of the *TIME Magazine* cover in stirring debate was related at least in part to its visibility: more people saw it and were shocked by it, so more people talked about it. To allow *Saint John's Church in the Wilderness* to stand, then, would be to impoverish American political debate.

II. The Colorado Court Reads into the First Amendment a Broad Government Power to Censor Political Speech

In *Saint John's Church in the Wilderness*, the Colorado Court of Appeals declared the protection of

children to be so compelling an interest that it could justify even a content-based ban on political speech in a traditional public forum. While acknowledging that it was banning the photographs because of their content, *see Saint John's Church in the Wilderness*, 2012 COA at ¶¶ 48-49, the court nevertheless held that the banning of the pictures was justified because it was narrowly tailored to effectuate a compelling government interest, *see id.* at ¶¶ 48-57.

To appreciate the breadth of the Colorado court's ruling, it is important to have a full picture of the context in which the petitioners' posters were displayed. The displaying of photographs qualifies as speech. *See Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2528 (1994) (injunction of "images observable" outside an abortion clinic violates the First Amendment). Here, the petitioners displayed their posters on the street, the "archetype of a traditional public forum, for the purposes of First Amendment protection of speech" which "time out of mind . . . ha[s] been used for public assembly and debate." *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011) (internal quotation marks and bracketing omitted). The photographs were not obscene. *See Brown v. Entertainment Merchants Assoc.*, 131 S. Ct. 2729, 2735 (2011). Nor was the speech targeted at an individual inside his home. *Cf. Frisby v. Schultz*, 108 S. Ct. 2495, 2501 (1988) (municipal ordinance against picketing in front of houses upheld). Nor does anything in the record paint the petitioners as repeat offenders of a pre-existing injunction, such that a subsequent injunction would have to be broader to curtail already illegal acts. *Cf. Madsen*, 114 S. Ct. at 2523-2524 (protestors' persistent violation of previous injunction justified a widening of

restrictions to encompass picketing in front of abortion clinic).

Rather, the petitioners' photographs were used for a political purpose, as the Colorado Court of Appeals acknowledged. *See Saint John's Church in the Wilderness*, 2012 COA at ¶ 46 (“[F]or many anti-abortion demonstrators, the gruesomeness of the images *is* the message, and necessary to express their viewpoint.”) (emphasis in the original). The injunction, then, was “a *content-based* restriction on *political speech* in a *public forum*,” *Boos v. Barry*, 108 S. Ct. 1157, 1164 (1988) (emphasis in the original), the type of speech for which restrictions “must be subjected to the most exacting scrutiny,” *id.* Yet because the speech was upsetting to children, *see Saint John's Church in the Wilderness*, 2012 COA at ¶¶ 50-51, and because the injunction was geographically limited in scope, *see id.* at ¶ 54, the Colorado court held that it passed even the strictest scrutiny.

Because the Colorado court finds the protection of children from upsetting speech to be compelling enough to justify banning political speech in a traditional public forum, *see id.* at ¶51, the court's reading of the First Amendment opens the door for the government to regulate a broad swath of speech, especially photographic speech. It is true that the injunction at issue in *Saint John's Church in the Wilderness* applies only to “large” photographs. *See id.* at ¶ 54. But there is no reason to think that a large photograph should have more of an emotional impact on a child than a small one. Indeed, the image, mentioned above, of terrified naked children running from a napalm explosion would likely have

been disturbing to a child no matter the size of the photo. Perhaps more importantly, the application of the First Amendment has never been held to be dependent on the size of the photo. Nor could it be. To be logically coherent, then, the principle established by the court below would have to apply to photographs displayed elsewhere, for example, on the front pages of newspapers or magazines.

Strangely, the Colorado court attempts to bolster the constitutionality of the injunction by stating that it only applies in a buffer zone around the church. *See id.* The court states that the petitioners may display their posters elsewhere, even if those posters are seen by children who then become upset. *See id.* But this logic makes the court's opinion worse, not better. An image that is harmful to a child inside a buffer zone cannot become less harmful simply because it has been walked a few feet beyond it. *See Brown v. Entertainment Merchants Assoc.*, 131 S. Ct. 2729, 2740 (California statute underinclusive when it made illegal the sale of "dangerous, mind-altering" video games to minors without parental consent, but permitted sale of the same with parental consent). Though the Court has previously upheld the constitutionality of certain buffer zones, in cases where the zones have been found constitutional, the Court has pointed to the zones' content-neutral nature as their saving grace. *See, e.g., Hill v. Colorado*, 120 S. Ct. 2480, 2494 (2000); *Schenck v. Pro-Choice Network of Western New York*, 117 S. Ct. 855, 863 (1997); *Madsen*, 114 S. Ct. at 2523. Here, the Colorado court acknowledges that it is targeting the petitioners' message based on its content. *Saint John's Church in the Wilderness*, 2012 COA at ¶ 44.

This makes the current case unlike those cases in which buffer zones have been upheld.

Thus, to avoid underinclusiveness, the precedent set by the Colorado Court of Appeals would have to apply everywhere that children were exposed to a gruesome image that upset them. *Cf. Brown*, 131 S. Ct. at 2740. Presumably, then, though the court stresses that the petitioners have a right to display their images elsewhere, the petitioners only have this right because nobody has yet sued them there. Under the core of the Colorado court's logic—that gruesome images are harmful to children and that the state has a compelling interest in protecting children from such speech—the petitioners' rights to display their posters would evaporate each time they are sued in a new place.

Because the ban in the case at bar works by judicial decree, it presents a unique danger to the First Amendment. *See Madsen*, 114 S. Ct. at 2524. For example, under the Colorado court's logic, a newspaper stand that was sued could be enjoined from selling newspapers with gruesome images (even if it were displaying those images for a political purpose), but the newspaper stand next to it, which has not yet been sued, could display those same images until the point that it, too, is dragged into court. The Colorado court's formulation of First Amendment jurisprudence allows courts to be the arbiters of taste under the guise of protecting children. This is too dangerous a precedent to let stand.

III. Conclusion

Our country has enjoyed vibrant political debate since its inception. Photographs, including—or perhaps especially—disturbing photographs, have been an essential part of that debate. From the Civil War to the Vietnam War and beyond, photographs of war have opened the public’s eyes to war’s horrors with a vibrancy that text descriptions cannot match. The Colorado Court of Appeals’ ruling, if allowed to stand, risks giving courts the power to ban the most salient political images of our time from the public discourse, under the guise of protecting children from distress.

Though the Colorado court attempts to cabin its decision in the facts of the case, the precedent its holding sets cannot be so restricted. At its heart, the Colorado court’s holding is this: If a message is deemed by a judge to be in poor taste, and children are reasonably likely to be part of the audience— as in any public forum – and the message is disturbing, then the state can ban the speaker from expressing the message to that general audience, and may instead force him or her to speak only to those who volunteer to listen. See *Saint John’s Church in the Wilderness*, 2012 COA at ¶¶ 44-55. To let this precedent stand would be disastrous for the First Amendment.

“No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed.” *Brown*, 131 S. Ct. at 2736 (internal citations omitted). This Court must not allow the Colorado precedent to stand.

The Court therefore should grant *certiorari* in this case and strike down the lower court's opinion.

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