No. 12-1077

In The Supreme Court of the United States

KENNETH TYLER SCOTT AND CLIFTON POWELL,

Petitioners,

v.

ST. 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 AMICUS CURIAE OF SALAM AL-MARAYATI, MICHAEL S. ARIENS, THOMAS C. BERG, ZACHARY R. CALO, ROBERT A. DESTRO, CARL H. ESBECK, MARIE FAILINGER, EDWARD MCGLYNN GAFFNEY, RICHARD W. GARNETT, DOUGLAS KMIEC, FAISAL KUTTY, MICHAEL PAULSEN, MICHAEL J. PERRY, RICHARD T. STITH, AND LYNN D. WARDLE IN SUPPORT OF PETITIONERS

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STATEMENT OF INTERESTS

Amici[1] include several leading thinkers about religion and politics in the United States. *Amici* are religiously diverse.

Most of the *amici* are professors of law. Their principal areas of teaching, research, and scholarship have been in jurisprudence, comparative law, and constitutional law, particularly the principles at the core of freedom of religion and freedom of expression secured in the First and Fourteenth Amendments to the U.S. Constitution.

All of the *amici* join this brief in their individual capacities. Each *amicus* is described with greater particularity in Appendix A.

[1] This brief is submitted in accordance with Rule 37 of this Court. Counsel of record for both parties received notice at least 10 days prior to the due date of the intention of the *amici* to file this brief. Both counsel consented to the filing of this brief and the consent letters (e-mails) have been filed with the Clerk of the Court with this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case deals with two of the most fundamental aspects of American constitutionalism, free exercise of religion and freedom of speech. Though distinct in the text of the First Amendment, they are conjoined in that text for good reason. The *overall goal* sought by the Founders at the outset was to preserve religious liberty and free speech to the fullest extent possible in a pluralistic society.

The Founders were clear not only about this central goal of the Constitution. They were equally clear about the overarching *structural means* chosen to achieve this goal: to deny the government routine power to prohibit various religious beliefs and practices and various political ideas and commitments that do not threaten societal well-being.

Thus the famous first five words of the First Amendment read: "Congress shall make no law. . . ." And the most frequently cited words of the Fourteenth Amendment are these: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

These legitimate means of achieving important constitutional ends should not be frustrated by judicial decrees such as those in this case, which needlessly impede both free exercise and free speech.

The path to achieving harmony among many different perspectives on religion and on the conjunction of law and morality in society has not always been straight or smooth. But the hope of James Madison, "Father of the Constitution," was also clear. Refusing to confer authority upon political leaders of the new Republic over competing political ideas, he thought, would also diminish the likelihood that any particular religious or ideological "faction" would ever control the minds and hearts and beliefs and practices of the People who ordain and establish the Constitution. *See, e.g.*, James Madison, *The Federalist Papers* Nos. 10 & 51 (1788). For Madison, heterogeneity of thought, including thought about politics and religious matters, is an essential attribute of a healthy society. Madison's hope for American pluralism should not be dashed by injunctions banning speech in one of the most obvious places where it should forever remain free: sidewalks and public parks. Doing so invites the reality or at least a reasonable suspicion of viewpoint discrimination, endorsement of one religious or political view over another which is a violation of both the Free Exercise Clause and the Free Speech Clause.

REASONS FOR GRANTING THE PETITION

We suggest additional reasons – related to both questions presented – for granting the Petition.

1. Content-Based Injunctions on Speech

The Colorado Court of Appeals acknowledged candidly that the "gruesome images" provision of the injunction is *content-based*. Pet. App. 18a-22a. The lower court also suggested that its prohibition of "gruesome images" was justified by virtue of this Court's repeated recognition of "the governmental interest in protecting children from harmful materials." Pet. App. 22a. But all of the cases cited by the lower court – *Reno v. ACLU*, 521 U.S. 844 (1997); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); and *Ginsberg v. New York*, 390 U.S. 629 (1968) – involved accessibility by minors to sexually themed speech, which is not at issue in this case. The related crime of "child pornography" – the *use* of minors in producing sexually themed speech – is likewise not at issue here.

It is, of course, not a crime to disagree with this Court's teaching in *Roe v. Wade,* 410 U.S. 113 (1973), or to do so by displaying an image of a fetus. In the context of those seeking to have a child, such images – taken by ultrasound in very early stages of human development – are not gruesome at all. Neither are the extraordinary images of an embryo inside a uterus published in *Life* magazine, Linnart Nilsson, "Drama of Life before Birth," *Life* (Apr. 30,

1965). *See* http://life.time.com/culture/drama-of-life-before-birth-landmark-work-five-decades-later/#1. The veracity of such images is not altered because of a desire to end a pregnancy before birth.

The lower court's purported justification of the ban of images of a fetus requires reflection on images in general, and on the care that courts should take when granting injunctions to ban people from seeing images that may lead them to fresh insights.

A. *Images as Protected Speech*. Images often relate to self-understanding. When we look at a mirror we see a reflection of ourselves that may provoke a sense of esteem or an awareness of change that comes with aging or an awareness of moral change that is desirable but has been postponed until the present moment's recognition of its necessity. We cherish images of our childhood and adolescence, if only to be aware of our development and growth since the time the image was taken.

Images also locate us in some communal context, such as the most immediate extension of ourselves, our parents and other family members in a place we call home, "the most important place in the world." Or a graduation photo may call to mind friendships formed decades ago. Or an image of a platoon in a foreign war – World War II, Korea, Vietnam, Afghanistan, or Iraq – may bring to mind poignant memories of comrades in military uniform, some of whom are long dead.

Bulgarian soldiers and police occupying Macedonia during World War II made a collection of nearly 1,200 images of the Jews of Bitola, a town in southern Macedonia. They thought their German allies required these photos for identifying the persons they soon rounded up, held for weeks in a smelly relocation center, and eventually deported on Bulgarian trains to the Nazi death camp at Treblinka in occupied Poland, where they were all murdered within hours of their arrival. To see these beautiful images seventy years later is to be reminded of the fragility of life, and to cherish each one of these lost souls. As anyone alive today reviews any of these pictures with care, we realize that these persons look just like us or like a family member. This act of insight enlarges our universe of concern. These images form the opening exhibit of the new Holocaust Memorial Center in Skopje, Macedonia. They are available for viewing at the on-line Photo Archive of the U.S. Holocaust Memorial Museum in Washington, D.C.[2]

As the Petition illustrates in its discussion of images of the Shoah, lynchings, and the wars in Vietnam and Afghanistan, Pet. 8-12, the capacity of images to evoke powerful feelings wordlessly makes them an important tool for education.

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[2] To see any of these images, go to www.ushmm.org. At right top of that page at the SEARCH button, insert words: "photo archive Bitola," and you will find 1,220 matches for this entry.

Petitioners were undoubtedly aware of the pedagogical value of images when they carefully selected images of a fetus for inclusion in the demonstration on the sidewalk used by Respondents. The lower court first banned, and then rationalized the banning by characterizing all these images as "gruesome."

Such characterization is an ill-disguised content-based judgment that slouches toward viewpoint discrimination. The shock value of an image resides not in its ugliness, but in its capacity to awaken awareness that may lead to fresh insight, which may lead to critical reflection or reassessment of prior judgments that no longer satisfactorily account for the new insight or higher viewpoint of any person seeking understanding. *See* generally, Bernard J.F. Lonergan, *Insight: A Study of Human Understanding* (Philosophical Library 1957).

Considerations such as these lead *amici* to conclude that speech is not less worthy of protection because it is expressed primarily through images. Powerful images may provoke disturbing questions. Disturbing questions may bring on critical reflection. Critical reflection may yield intellectual conversion, a change of mind and heart.

Everyone on all spectrums of political thought in America agrees that the government may promote its own ideas, but most emphatically may not prohibit anyone from changing one's own mind. And the possibility of such change about politics is clearly the "core meaning of the First Amendment."

The Court should grant the Petition because this case offers a clear opportunity to bring its teaching on injunctions in *Madsen* up to date with what is now known about the power of images. As Petitioners noted correctly, "pictures . . . convey messages in ways that words cannot equal." Pet. 8.

B. *Adoption of Serious Scrutiny to Avoid Risk of Prohibiting Thought on Controversial Themes*. Irrespective of our views on the legality and morality of abortion, all *amici* agree that in our constitutional order neither the federal government nor any of the several States may censor the exhibition of pictures the government deems ugly or "gruesome," or prohibit ideas it deems controversial, without a showing of a narrowly tailored means to achieve a compelling governmental interest. There was no such showing in this case.

The injunctions approved by the lower court in this case illustrate that injunctions "carry greater risks of censorship and discriminatory application than do general ordinances." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 764 (1994). The opinion of the Court in *Madsen* did not require strict scrutiny before the grant of injunctive relief. Justice Scalia urged in his separate opinion that the Court adopt this requirement because injunctions can easily morph from content-based regulation into clearly prohibited viewpoint discrimination. *Id.* at 792-93 (Scalia, J., concurring in part and dissenting in part). Regardless of what one thinks of Justice Scalia's

proposal in *Madsen*, this injunction is unconstitutional because it is admittedly content-based and without a persuasive justification.

As noted in the Petition, moreover, several of the justices dissenting from denial of certiorari in the interim between *Madsen* and today have noted that the problem of apparent neglect of judicial evenhandedness with respect to supporters and critics of the Nation's abortion policies is not rare, but recurrent. Pet. 5-7.

The Petition also shows clearly that the conflict among federal courts of appeals and state courts of final resort on the identical federal question presented in this case is a serious, ongoing conflict. Pet. 12-21. The recurrent character of this conflict and the Court's general practice – reflected in Rule 10, Rules of the Supreme Court – suggests that the time has come for the Court to exercise its supervisory role with respect to the federal courts and its role of giving clear guidance to state courts facing the same issue over and over again for several years.

2. The Concern About Disruption of Prayer

A. *Viewed as a Matter of Civility*. Most Americans observe various religious customs and practices, including participation in religious worship services. All the *amici* are deeply protective of the right of all religious communities to conduct their worship inside their synagogues, churches, mosques, or other places

of assembly for their congregations without interference by outsiders.

In December of 1989, and again ten years later on December 12, 1999, ACT UP famously protested against the teaching of the Catholic Church on use of condoms. They did so with posters containing vivid images of victims of AIDS, and slogans such as "CURB YOUR DOGMA" and "CONDOMS NOT COFFINS." *See* http://www.actupny.org/YELL/stop church99.html. Cardinal John O'Connor took the view that the protesters were free to share their message on Fifth Avenue to anyone who wanted to listen, but were not welcome inside St. Patrick's Cathedral during the celebration of Mass. This line-drawing – grounded both in the law of public fora and in the law of trespass – seems eminently sensible to *amici*. And we are confident that the Court will be attentive to the needs of religious communities for protection against disruption of their worship services, if the Court decides to grant plenary review in this matter.

If the conduct involved in this case were examined as a matter of civility or courtesy, *amici* can readily see why the Respondent Church sought injunctive relief in this matter. Or if it comes down to counsels of prudence about whether it is advisable for opponents of a particular religious community's teaching to disrupt that community while it is at prayer, *amici* are inclined to urge that other means of communicating may sometimes be more effective.

B. *Viewed as Free Exercise of Religion and of Speech by Religious Believers*. But this is not a case for Miss Manners. It is about structural constitutional limits on judges sworn by their oath of office to uphold and defend the U.S. Constitution, including the First Amendment Religion Clause and Free Speech Clause.

A very high percentage of Americans describe religion as playing an especially important role in their lives, Pew Global Attitudes Project, "Among Wealthy Nations . . . U.S. Stands Alone in its Embrace of Religion" (Dec. 19, 2002). They attend their places of worship more often than do citizens of other developed nations. *See, e.g.,* Robert Booth Fowler, Allen D. Hertzke, Laura R. Olson and Kevin R. Den Dulk, *Religion & Politics in America* 28-29 (3d ed. 2010).

As noted above in the Summary of Argument, these achievements did not come to pass by giving to legislatures power to define in statutes and ordinances "true religion" or "right thinking" on controversial matters, or by giving to bureaucrats the power to do so by administrative edicts or decrees, or by ceding to sheriffs and prosecutors the power to coerce conscience and stifle critical thinking through discriminatory enforcement of the law "with an evil eye and an uneven hand," *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

Neither did religion come to have so strong a role in public life by allowing judges to issue injunctions

that effectively select the subjects that religious communities or nonreligious political organizations may and may not freely address, or that identify the age of those with whom they may and may not share their convictions. The injunctions in this case do both. Because they are injunctions, they are not easy to challenge. Pet. 30-31. *See*, *e.g.*, *United Mine Workers v. Bagwell*, 512 U.S. 821, 831-32 (1994); *Shuttlesworth v. City of Birmingham,* 394 U.S. 147 (1969); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965); *Shuttlesworth v. City of Birmingham,* 373 U.S. 262 (1962).

We noted above that religious communities are surely free to conduct their rituals inside their own houses of worship without disruption by outsiders.

They are equally free to carry their message to the general community in various ways of participating in political life. *See, e.g.,* John T. Noonan, Jr. & Edward M. Gaffney, Jr., *Religious Freedom: History, Cases and Other Materials on the Interaction of Religion And Government* (Foundation Press, 3d ed. 2011) (chapter 20, "Political Participation," collecting materials describing many ways in which religious communities in America have shaped public life, with cases discussing this activity as protected under the First Amendment).

One of the ways that religious groups have freely exercised their religious convictions that relate to public life is to "worship with their feet," carrying their message into the public square by organizing

and taking part in rallies, demonstrations, and marches. For example, Dr. Martin Luther King, Jr., organized the famous march from Selma to Montgomery to galvanize support for the Voting Rights Act of 1965. His colleague in the Southern Christian Leadership Conference, Rev. Fred Shuttlesworth, both organized these marches – often to coincide with the observances of Holy Week on the Christian calendar – and he dealt with all the legal obstacles to the success of this protected activity. *See Shuttlesworth I, II,* and *III, supra.*

César Chávez also employed processions – including a famous long march up the Central Valley from Delano to Sacramento – to protest the meager wages and deplorable working conditions of agricultural workers in California at the time of the Grape Strike and Boycott in 1966. *See* John Gregory Dunne, *Delano: The Story of the California Grape Strike* (Farrar, 1976); Dorothy Day, "On Pilgrimage – September 1973," *The Catholic Worker* (Sept. 1973), 1, 2, 6. http://www.catholicworker.org/dorothyday/Reprint2.cfm?TextID=533.

When a religious (or nonreligious) community takes to the streets, however, it cannot claim to monopolize this ancient public forum that for centuries – literally going back to the Via Sacra in the Roman Forum – has been regarded in Roman law and certainly in American constitutional law as equally open to all.

This Court even deemed the sidewalks of a company town to be open to the efforts of Jehovah's Witnesses to spread their Gospel. *Marsh v. Alabama*, 326 U.S. 501 (1946). But that does not mean that critics of the Witnesses may be banned from the same sidewalks.

Dr. King and César Chávez used public marches and processions as part of their work of advancing civil rights. So has NOW and many other organizations committed to gender justice in America. And so do the people who gather in Washington each year on the anniversary of *Roe v. Wade* to protest that decision as a statement of national policy. All of these Americans must be welcome in the public square, with or without their posters and images. So must their critics and opponents. None should be excluded, without the serious reasons that the judiciary must explain after applying rigorous standards or "strict scrutiny" to claims about the need to restrict protected speech.

Amici note, moreover, that in this instance the "demonstration involved no violence, trespass, physical obstruction, or criminal conduct." Pet. 3-4. "Nor were petitioners cited for violating any noise ordinance, though police were present and watching." Pet. 4. On the contrary, the Respondent Church chose to conduct a portion of its Palm Sunday service outside the church in the most classic public forum – a sidewalk.

The injunctions issued by the state court in this case are candidly and openly acknowledged as content-based regulations. Pet. App. 18a-22a. The lower court expressly asserted that its ban of powerful images was justified by a need to protect the minds of the young, which it described as a "compelling interest." Pet. App. 24a.

Since a significant size of the adolescent population is becoming pregnant, moreover, it makes little sense to ban images relating to the reality of pregnancy. It makes even less sense to suggest that the injunctions are legitimate on the view that this Court requires special protection of minors. This Court's concern for minors may not be read in such a wooden way. For example, the Court did not teach that such paternalism was required in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (sustaining capacity of a minor to make up his mind about the morality of the Vietnam War). *See also Brown v. Entertainment Merchants Ass'n,* 131 S.Ct. 2729 (2011); *Reno v. ACLU*, 521 U.S. 844 (1997).

To repeat the major point of constitutional law overlooked by the state court in this case, the classic public fora – sidewalks and parks – must be equally available to the expression of the views espoused by Petitioners and Respondents.

Under these circumstances, the Court should grant the Petition and dissolve the injunctions.

CONCLUSION

For the reasons stated above and in the Petition, the Court should grant the Petition.

Respectfully submitted,

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APPENDIX A

Particular Statements of Interests of Amici Curiae

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Michael Ariens is a Professor at St. Mary's University School of Law in San Antonio, Texas. He teaches in the areas of American Legal History, Church and State, Constitutional Law, Evidence, and Professional Responsibility. He is the co-author, with Robert Destro, of *Religious Liberty in a Pluralistic Society* (Carolina Academic Press, 2nd edition 2002).

Thomas C. Berg is the James L. Oberstar Professor of Law and Public Policy at the University of St. Thomas, and was founding co-director of the Terrence J. Murphy Institute for Catholic Thought, Law, and Public Policy. He has published numerous articles on the conjunction of law and religion, and is co-author with Michael McConnell and John Garvey of *Religion and the Constitution*, a casebook published by Aspen Publishing (3rd ed.).

Zachary R. Calo is Associate Professor of Law and Michael and Dianne Swygert Research Fellow at Valparaiso University School of Law. He has published numerous articles on the conjunction of law and religion and serves on the Editorial Board of the *European Journal of Law and Religion*, and the Editorial Board of the *Journal of Christian Legal Thought*.

Robert A. Destro is Professor of Law and Director of the Interdisciplinary Program in Law & Religion at The Catholic University of America. He served as a commissioner on the United States Commission on Civil Rights, and led the commission's discussions in the areas of discrimination on the basis of disability, national origin and religion. He served as general counsel to the Catholic League for Religious and Civil Rights. He is the co-author, with Michael S. Ariens, of *Religious Liberty in a Pluralistic Society* (2nd ed. 2002).

Carl H. Esbeck is the R.B. Price Professor and Isabelle Wade & Paul C. Lyda Professor of Law at the University of Missouri. He has published widely in the area of religious liberty and church-state relations, and has promoted the modern recognition of the establishment clause not as a right, but as a structural limit on the government's authority in specifically religious matters.

Marie Failinger is Professor of Law at Hamline University School of Law, and the editor-in-chief of the internationally renowned *Journal of Law and Religion*. She has also served church-related

organizations such as the online Journal of Lutheran Ethics, Church Innovations Institute and Lutheran Innovations.

Edward McGlynn Gaffney is Professor of Law at Valparaiso University. He is a co-founder of the Council on Religion and Law, and served for twenty-five years on the editorial board of its scholarly publication, *The Journal of Law and Religion*. With Judge John T. Noonan, he is the co-author of *Religious Freedom: History, Cases and Other Materials on the Interaction of Religion And Government* (3d ed. 2011).

Richard W. Garnett is Associate Dean for Faculty Research and Professor of Law at Notre Dame Law School. He teaches and writes about the freedoms of speech, association, and religion. His current research project *is Understanding the Separation of Church and State*, to be published by Cambridge University Press. He is the founding director of the Program in Church, State, and Society, an interdisciplinary project that focuses on the role of religious institutions, communities, and authorities in the social order.

Douglas Kmiec is the Caruso Family Chair in Constitutional Law at Pepperdine University. He is an influential Roman Catholic scholar, served as Assistant Attorney General for the Office of Legal Counsel in the Reagan administration, and as the Ambassador of the United States to Malta in the Obama administration. His latest book is *Lift Up Your Hearts: A True Story of Loving Your Enemies, Tragically Killing Your Friends, And the Life That Remains* (2012).

Faisal Kutty is an Assistant Professor of Law at Valparaiso University and Adjunct Professor of Law at Osgoode Hall Law School, York University (Canada). He is widely regarded as one of the most thoughtful commentators on the inclusion of Islam within the pluralism of American and Canadian society. His areas of research include religion and law, Islamic law, comparative law and international law.

Michael Paulsen is Distinguished University Chair and Professor of Law at the University of St. Thomas. His area of academic expertise is Constitutional Interpretation. He has served as staff counsel for the Center for Law & Religious Freedom in Washington, D.C. One of his recent articles is "The Priority of God: A Theory of Religious Liberty," 39 *Pepperdine L. Rev.* 1159 (2013).

Michael J. Perry is the Woodruff Professor of Law at Emory University. He specializes in the area of American constitutional law and theory; law, morality, and religion, with an emphasis on the role of religiously based morality in the law and politics of liberal democracy; and human rights theory. Perry is the author of over 60 articles and essays and 11 books, including *Love and Power: The Role of Religion and Morality in American Politics* (Oxford, 1991), and *The Idea of Human Rights* (Oxford, 1998).

Richard T. Stith is Professor of Law at Valparaiso University, where he was named the first Swygert Research Fellow in recognition of his extensive scholarship. He is the first U.S. professor to be designated

by the European Commission to teach a Jean Monnet Module (on the law of the European Union). He has been a speaker at national, state, and international right-to-life gatherings and has presented pro-life testimony by invitation before the U.S. Senate Subcommittee on the Constitution and to state and foreign legislative committees.

Lynn D. Wardle is Bruce C. Hafen Professor of Law and an expert in family law. Wardle served as President of the International Society for Family Law (ISFL) from 2000-2002. He is coauthor of *Fundamental Principles of Family Law* (2002), and principal editor of a four-volume treatise, *Contemporary Family Law: Principles, Policy, and Practices* (1988).