

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 OF AMICUS CURIAE FLOYD ABRAMS,
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INTEREST OF *AMICI CURIAE*

Amici curiae are professors of constitutional law who share an interest in the proper interpretation and application of the First Amendment to the United States Constitution.¹ Because the decision by the Colorado Court of Appeals threatens to undermine fundamental First Amendment protections, *amici* support the petition for a writ of certiorari.

ARGUMENT

The decision of the Colorado Court of Appeals, which upholds a content-based restriction on political speech in a public place, is fundamentally incompatible with this Court's understanding of the First Amendment. It should not be allowed to stand.

The decision below found constitutional an injunction prohibiting petitioners, who were engaged in an anti-abortion demonstration in a public park across the street from a church, from "displaying

¹ *Amici* are identified on the cover of this brief and in the Appendix. Pursuant to Supreme Court Rule 37, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice, at least 10 days in advance, of *amici*'s intent to file this brief, as reflected in emails showing their consent submitted to the Clerk.

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.”² Petition at 5a (emphasis omitted).

Although the state court acknowledged that the restriction is content-based and is therefore permissible, if at all, only if necessary to further “a compelling interest,” the court upheld the injunction because it protects “children from disturbing images,” Petition at 18a.

The Constitution does not permit the government to restrict speech because it offends or disturbs others. As this Court made clear more than sixty years ago in *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949), the government cannot constitutionally restrict speech because it “induces a condition of unrest,” “stirs people to anger,” or has “profound unsettling effects.” The First Amendment protects those who burn American flags or crosses as a form of protest, just as it protects those who display them with pride. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Texas v. Johnson*, 491 U.S. 397, 408-10 (1989). “Any restriction on expressive activity

² Although the petition presents two questions, Petition at i, this brief addresses only the first one.

because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) (citations omitted).

Indeed, this Court has repeatedly and consistently rejected content-based restrictions of offensive and disturbing speech in public places. *See, e.g., Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011) (reversing jury verdict on claims by father of dead marine stemming from church’s emotionally disturbing anti-gay demonstration near marine’s funeral); *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753 (1994) (invalidating an injunction prohibiting anti-abortion demonstrators from showing images of aborted fetuses near an abortion clinic); *R.A.V.*, 505 U.S. 377 (1992) (striking down statute banning display of a burning cross, swastika, or other symbol that would “arouse[] anger, alarm or resentment in others”); *Texas v. Johnson*, 491 U.S. 397 (overturning conviction of individual who burned American flag as part of protest); *Smith v. Collin*, 436 U.S. 953 (1978) (refusing to stay march by Nazi Party members carrying swastika flags in the predominately Jewish suburb of Skokie, Illinois); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (holding invalid ordinance prohibiting showing of films containing nudity by drive-in theater when visible to children); *Cohen v. California*, 403 U.S. 15

(1971) (reversing conviction of individual wearing a jacket in a courthouse bearing the words “Fuck the Draft”); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (reversing conviction for “highly offen[sive]” speech publicly attacking the Roman Catholic Church).

Thus, this Court has long cautioned against precisely what the Colorado Court of Appeals has done in this case—restrict speech because its content is thought to be disturbing or offensive to others.

The Colorado Court of Appeals tried to distinguish this case on the ground that the government here is attempting to shield *minors* from offensive and disturbing expression. But this Court has long held that “[s]peech within the rights of adults to hear may not be silenced ... in an attempt to shield children from it.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 252 (2002). Indeed, “the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.” *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (quoting *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 74–75 (1983)). See also *Sable Commc’n of Cal., Inc. v. FCC*, 492 U.S. 115, 130-31 (1989) (striking down a ban on “dial-a-porn” messages that had “the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear”); *Erznoznik* 422 U.S. at 212-13 (invalidating an ordinance prohibiting showing of films containing nudity by drive-in theaters when visible to children); *Butler v. State of Mich.*, 352 U.S.

380, 381 (1957) (invalidating a law barring distribution of indecent publications because of their tendency to “incite minors to violent or depraved or immoral acts,” stating that the government cannot constitutionally “reduce the adult population ... to reading only what is fit for children.”).

The sole exception to this principle is *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), in which the Court upheld an order of the Federal Communications Commission finding George Carlin’s 12-minute monologue “Filthy Words” indecent. The Court emphasized that the speech was broadcast over the airwaves, a heavily regulated medium, and intruded into the privacy of the home. Those unique considerations are absent in this case.

Moreover, as this Court made clear in *Erznoznik*, 422 U.S. at 212-13, even apart from preserving the First Amendment rights of adults, speech that is otherwise protected for minors “cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” *Id.* at 213-14. More recently, in *Brown v. Ent. Merch. Ass’n*, 131 S. Ct. 2729 (2011), the Court held that the government cannot constitutionally prohibit minors from purchasing or playing “violent video games,” because the government does not have “a free-floating power to restrict the ideas to which children may be exposed.” *Id.* at 2736.

The Court has allowed the government to restrict speech in public to protect the sensibilities of children only when the speech is not entitled to full First Amendment protection, as with material that is obscene for children and commercial advertising. *See, e.g., Ginsberg v. New York*, 390 U.S. 629 (1968); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (striking down restriction on cigarette advertising but recognizing interest in preventing underage tobacco use). But in this situation, the Colorado court restrained speech aimed at contributing to a vigorous public debate about a profoundly important and controversial political issue. It restricted that speech not in a private place, like the home, not in a regulated medium, like broadcasting, but on public streets, parks and sidewalks, which “time out of mind ... have been used for public assembly and debate.” *Snyder*, 131 S. Ct. at 1218 (quotation marks, citation omitted).

The decision below represents a startling and dangerous departure from fundamental First Amendment doctrine. Although it is easy to understand the impetus underlying the injunction, the First Amendment does not permit the government to restrict fully-protected expression in a public place in order to shield children from unsettling images. If this injunction is allowed to stand, its rationale would know no bounds. The government could also censor brutal images of war, of the Holocaust, of real-world murder scenes, of

natural disasters, and of man-made tragedies. That is not permissible even on television, let alone in a public place. Such a doctrine would be unthinkable in a society dedicated to robust, wide-open, informed, passionate and intelligent public discourse.

CONCLUSION

As this Court has emphasized, “[t]he history of the law of free expression is one of vindication in cases involving speech that many citizens find shabby, offensive, or even ugly.” *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803 (2000). The Court of Appeals’ decision violates this basic proposition and more than a half century of this Court’s rulings. For these reasons, the Court should grant the petition.

Respectfully submitted,

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