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

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners Kenneth Tyler Scott and Clifton Powell respectfully request rehearing of this Court's June 10, 2013 order denying certiorari in this case, and ask that this Court hold the case pending a decision in *McCullen* v. *Coakley*, No. 12-1168, *cert. granted*, June 24, 2013. This Court has in recent years engaged in this very sort of procedure—granting a petition for rehearing following a denial of certiorari, and holding the formerly denied case pending the decision in a newly granted case. See Part I.

The grant of certiorari in *McCullen* constitutes the sort of "intervening circumstance[] of a substantial" (and potentially "controlling") "effect" contemplated by S. Ct. R. 44.2, for two reasons. First, the judgment below relied heavily on *Hill* v. *Colorado*, 530 U.S. 703 (2000). One issue in *McCullen* is whether *Hill* should be limited or overruled. See Part II.

Second, the judgment below involved a restriction imposed on only one set of speakers (critics of abortion). One issue in *McCullen* is whether such speaker discrimination should be seen as a form of viewpoint discrimination that violates the First Amendment. See Part III.

Thus, if *McCullen* is decided in favor of the anti-abortion speakers, that decision could justify granting Scott's and Powell's petition, and vacating and remanding the decision below ("GVR'ing") for further consideration in light of *McCullen*. A pro-speaker ruling in *McCullen* may well constitute an "intervening development[]" "reveal[ing] a reasonable probability" that the decision in Scott's and Powell's case "rests upon a premise that the lower court would reject if given the opportunity for further considera-

tion." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996).[1] Holding this case, by holding the decision on this petition for rehearing until *McCullen* is decided, would protect this Court's jurisdiction to issue such a GVR. (It would also protect this Court's jurisdiction to grant the case outright following the *McCullen* decision, if this Court concludes that the combination of the reasoning in the *McCullen* decision and the reasoning given in Scott's and Powell's certiorari petition makes this case certworthy.)

I. Holding This Petition Pending This Court's Consideration of *McCullen* v. *Coakley* Is Consistent with This Court's Practice

In past cases, this Court has done what petitioners in this case ask: held the petition for rehearing until a later case was decided, and then GVR'd in light of that later case. See, *e.g.*, *Melson* v. *Allen*, 130 S. Ct. 3491 (2010); *Hawkins* v. *United States*, 543 U.S. 1097 (2005); *Lauersen* v. *United States*, 543 U.S. 1097 (2005); *Rideout* v. *United States*, 543 U.S. 1116 (2005); *Jimenez-Velasco* v. *United States*, 543 U.S. 1116 (2005); *Epps* v. *United States*, 543 U.S. 1116 (2005); *Van Alstyne* v. *United States*, 543 U.S. 1116 (2005); *Carbajal-Martinez* v. *United States*, 543 U.S.

[1] Alternatively, in the formulation used by Justice Scalia's dissent in *Lawrence*, a pro-speaker decision in *McCullen* may constitute "an intervening event (ordinarily a postjudgment decision of this Court) [that] has cast doubt on the judgment rendered by a lower federal court or a state court concerning a *federal* question." *Stutson* v. *United States*, 516 U.S. 163, 180 (1996) (Scalia, J., dissenting in both *Stutson* and *Lawrence*).

1116 (2005); *McDonnell* v. *United States*, 543 U.S. 1116 (2005); *Pearson* v. *United States*, 543 U.S. 1116 (2005); *Salas* v. *United States*, 543 U.S. 1116 (2005); *Criston* v. *United States*, 543 U.S. 1117 (2005); *Campbell* v. *United States*, 543 U.S. 1116 (2005); *Valadez Soto* v. *United States*, 543 U.S. 1117 (2005); *Newsome* v. *United States*, 543 U.S. 1116 (2005); *Leverson* v. *Conway*, 472 U.S. 1014 (1985); *Simmons* v. *Sea-Land Services, Inc.*, 462 U.S. 1114 (1983); *Florida* v. *Rodriguez*, 461 U.S. 940 (1983); *Harris* v. *Reederei*, 451 U.S. 965 (1981). In each of these cases, certiorari had initially been denied, but a petition for rehearing was then granted; in each, the petition for certiorari was eventually granted, with the case being vacated and remanded in light of a new precedent. And though the typical petition for rehearing is decided within a few weeks, all the petitions in these cases were held pending another case for over six months. In some cases, such as *Harris* v. *Reederei*, the petitions were held for more than a year and a half—as long as it took for the later case to be decided.

This practice reflects practicality. Just as a "timely petition for rehearing * * * operates to suspend the finality" of a court judgment generally, *Hibbs* v. *Winn*, 542 U.S. 88, 98 (2004) (quoting *Missouri* v. *Jenkins*, 495 U.S. 33, 46 (1990)), so a timely petition for rehearing operates to suspend the finality of this Court's judgment. And if, during the time the judgment in one case (such as Scott's and Powell's) is not yet final, this Court agrees to hear a second case that might affect the outcome of the first

(such as *McCullen*), it makes sense to hold the first case pending the decision in the second. Indeed, this is what the Court often does, when it holds petitions for certiorari pending the decisions in cases that raise related legal questions.

Moreover, holds of one case pending decision in another often take place even when the two cases involve somewhat different issues. Indeed, such a hold appears to be taking place now with *Elmbrook School Dist.* v. *Doe*, No. 12-755 (last docket entry May 13, 2013), which seems to be being held pending the decision in the recently granted *Town of Greece* v. *Galloway*, No. 12-696, *cert. granted*, May 20, 2013.

Elmbrook involves a school district renting a church as a convenient space to hold a public high school graduation ceremony. *Town of Greece* involves a city council inviting local clergy to give prayers before council meetings. These are two different Establishment Clause issues, and it is possible that *Town of Greece* will be decided in a way that does not affect *Elmbrook*. But it is also possible that *Town of Greece* will be decided in a way that does "reveal[] a reasonable probability," *Lawrence*, 516 U.S. at 167, that the result in *Elmbrook* should change—and this possibility is presumably why this Court is holding *Elmbrook*.

Likewise, just to offer one other example, *Hill* itself had been held and then GVR'd in 1997, see 519 U.S. 1145 (1997), in light of *Schenck* v. *Pro-Choice Network of Western N.Y.*, 519 U.S. 357 (1997). Yet

Hill and *Schenck* were quite different abortion protest cases.

Schenck involved a preliminary injunction. *Hill* involved a state statute. The *Schenck* injunction created a floating zone of silence around patients, which required speakers to leave or stop speaking when patients walked by. The *Hill* statute allowed a speaker to stand still and keep speaking while patients walked very near the speaker.

When *Hill* returned to this Court following the remand, a majority of this Court noted these differences as "two important distinctions [identified by the lower court] between this case and *Schenck*." *Hill*, 530 U.S. at 713. And the majority ultimately concluded that the *Hill* statute "does not suffer from the failings that compelled us to reject the 'floating buffer zone' in *Schenck*." *Hill*, 530 U.S. at 726.

Nonetheless, at the time of the hold it must have appeared that the decision in one anti-abortion speech case (*Schenck*) might possibly affect the outcome in the other anti-abortion speech case (*Hill*). As will be argued below, the decision in *McCullen* might likewise affect the outcome of this case.

II. The Judgment Below Relied on *Hill* v. *Colorado*, Which the Decision in *McCullen* May Overrule or Limit

One question that is at issue in *McCullen* is "whether *Hill* should be limited or overruled." Petition for Certiorari, *McCullen* v. *Coakley*, at i. And the

judgment against Scott and Powell relied heavily on *Hill*.

First, the 2008 opinion in this litigation—which the opinion below expressly treated as law of the case[2]—relied extensively on *Hill*. It relied on *Hill* in upholding the disturbing-worship provision of the injunction. *Saint John's Church in the Wilderness* v. *Scott*, 194 P.3d 475, 483 (Colo. Ct. App. 2008). It relied on *Hill* in concluding that the injunction was justified by an interest in protecting "personal privacy." *Id.* at 485. And it relied on *Hill* in establishing the standard for which "manner" restrictions on speech are permissible. *Id.* at 488.

Second, the opinion below expressly cited *Hill* in upholding the "gruesome images" restriction. Pet. 25a. *Hill* reasoned that a leafletting restriction was constitutional because it left speakers free to leaflet outside the forbidden zone. 530 U.S. at 729-30. The opinion below relied on this in upholding the "gruesome images" restriction because that restriction left speakers able to speak elsewhere, or using other media:

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[2] The section of the opinion below labeled "Law of the Case" states, in its very first paragraph, "We decline defendants' invitation to revisit matters resolved in the trial court's initial order and upheld in *St. John's I* [*Saint John's Church in the Wilderness* v. *Scott*, 194 P.3d 475 (Colo. Ct. App. 2008)]." Pet. 5a-6a. Later, that section states, "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." Pet. 12a.

> This prohibition does not prevent [defendants Scott and Powell] from displaying their posters in other public space, even if children might see those posters. * * * 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).

Pet. 25a. (The lower court's citation to page 715 of *Hill* is inaccurate, but the parenthetical is correct: the discussion in *Hill* "upholding injunction as narrowly tailored in part because it allowed demonstrators to peacefully hand leaflets to persons approaching an abortion clinic" appeared at 530 U.S. at 729-30.) Similarly, *McCullen* v. *Coakley*, 571 F.3d 167 (1st Cir. 2009)—accepted as law of the case by *McCullen* v. *Coakley*, 708 F.3d 1, 6 (1st Cir. 2013)—upheld a restriction on anti-abortion speech on the ground that the restriction "places no burden at all on the plaintiffs' activities [including displaying signs] outside the 35-foot buffer zone," and that "the plaintiffs may stand on the sidewalk and offer either literature or spoken advice to pedestrians." 571 F.3d at 180.

Justice Kennedy's dissent in *Hill*, on the other hand, took a different view from the opinion below and from *McCullen*, concluding that even content-neutral restrictions on "the time honored method of leafletting and the display of signs" were unconstitu-

tional. 530 U.S. at 780, 788 (Kennedy, J., dissenting); see also *id.* at 789 (noting that the constitutionally protected speech may "contain a picture of an unborn child, a picture the speaker thinks vital to the message"). If *Hill* is overruled or limited in *McCullen*, and this Court adopts the view of Justice Kennedy's dissent, then *a fortiori* content-based restrictions—such as the one in this case—would be unconstitutional as well.

III. The Judgment Below Upheld an Injunction "Restrict[ing] Speakers on One Side of the Debate: Those Who Protest Abortions," a Restriction That the Decision in *McCullen* May Forbid

Justice Kennedy's dissent in *Hill* noted that, when a government action has as its "purpose and design" "restrict[ing] speakers on one side of the debate: those who protest abortions," such an action is "[v]iewpoint-based" and therefore an "invidious speech restriction[]." 530 U.S. at 768 (Kennedy, J., dissenting). If *Hill* is overruled, this Court may adopt Justice Kennedy's reasoning on this score.

In the process, this Court may clarify the scope of *Madsen* v. *Women's Health Center*, 512 U.S. 753 (1994). The state's brief opposing the *McCullen* petition argued that "[t]he finding below that the clinic employee exemption is viewpoint neutral on its face" "is consistent with *Madsen*, which held that an injunction that applied a buffer zone only against anti-abortion protesters, but not against clinic employees, agents, or anyone else, was not viewpoint based."

Brief in Opposition, *McCullen* v. *Coakley*, No. 12-1168, at 22. The grant of certiorari in *McCullen* suggests that this Court might be willing to limit the scope of this *Madsen* reasoning, and conclude that restrictions selectively targeting anti-abortion speakers are unconstitutionally viewpoint-based.

Indeed, this Court may reaffirm and strengthen the protection against speaker-based restrictions on abortion-related speech even if *Hill* is not overruled. The *McCullen* petition argues that *Hill* could be distinguished on the grounds that the law in *McCullen* selectively restricted speech by anti-abortion protesters but allowed speech by abortion clinic employees. Petition for Certiorari, *McCullen* v. *Coakley*, No. 12-1168, at 28-29. Such a distinction of *Hill* could mean that restrictions selectively targeting anti-abortion speakers would be seen as unconstitutionally viewpoint-based.

The injunction here likewise deliberately targets particular speakers—abortion protesters—for restriction, by focusing on images that are closely linked to the protesters' viewpoint. Pet. 5-12. This Court's decision in *McCullen* may therefore constitute an intervening development that justifies a GVR.

CONCLUSION

For these reasons, this Court should hold this case while *McCullen* v. *Coakley* is being considered, and then GVR in light of *McCullen*, if this Court's opinion in *McCullen* so warrants. In the alternative,

this Court should hold this case to consider whether the combination of the reasoning in the *McCullen* decision and the reasoning given in Scott's and Powell's certiorari petition justifies plenary consideration of this case.

Respectfully submitted.

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JULY 3, 2013

CERTIFICATE OF COUNSEL

As counsel of record for the petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in S. Ct. R. 44.2.

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JULY 3, 2013