No. 12-1077

In the Supreme Court of the United States

KENNETH TYLER SCOTT, et al.,
Petitioners,

v.

SAINT JOHN'S CHURCH IN THE WILDERNESS, et al.,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Colorado

BRIEF OF CENTER FOR BIO-ETHICAL REFORM, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ROBERT JOSEPH MUISE
Counsel of Record
DAVID YERUSHALMI
AMERICAN FREEDOM LAW CENTER
P.O. BOX 131098
ANN ARBOR, MI 48113
(855) 835-2352
rmuise@americanfreedomlawcenter.org

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

The petition presents two important questions for review. *Amicus Curiae* Center for Bio-Ethical Reform, Inc., a nonprofit, social reform organization that makes extensive use of graphic images of abortion to promote its pro-life policy initiatives, urges this Court, *at a minimum*, to grant review on the first question presented as set forth below and reverse the decision of the Colorado Appellate Court—a decision squarely at odds with the First Amendment and this Court's precedent.

1. May the government restrict the display of "gruesome" material within political, moral, and religious advocacy in a traditional public forum, in order to protect the sensibilities of children?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

RULES

STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, *Amicus Curiae* Center for Bio-Ethical Reform, Inc. ("CBR") respectfully submits this brief in support of Petitioners.[1]

CBR was established in 1990 as a nonprofit, public policy and advocacy group to promote prenatal justice and the right to life for the unborn, the disabled, the infirm, the aged, and all vulnerable peoples through education and the development of innovative educational programs. One such educational program is the Reproductive Choice Campaign ("RCC").

The RCC consists of large, colorful pictures depicting graphic images of first-term aborted fetuses displayed on the sides of box-body style trucks that are owned by CBR and operated by CBR employees and volunteers. Above each picture is captioned the word "Choice." The purpose of this educational program is to expose as many people as possible to the reality of "Choice," a term that is at the heart of the abortion controversy. The RCC demonstrates to onlookers that "Choice" is the killing of innocent human life and not some sterile, innocuous term. CBR employees and

---

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. All parties have consented to the filing of this brief. CBR further states that no counsel for any party 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 CBR, its members, or its counsel made a monetary contribution to its preparation or submission.

volunteers drive these trucks along the streets and highways of major cities and towns throughout the United States.

Another educational program used by CBR is the Airborne Reproductive Choice Campaign ("ARCC"). The ARCC consists of large, colorful pictures depicting graphic images of first-term aborted fetuses displayed on banners towed behind aircraft. CBR hires individual pilots or companies that provide aerial advertising to fly CBR's pro-life aerial banners. CBR has flown its banners throughout the United States.

CBR also engages in an educational program called the Genocide Awareness Project ("GAP"), which is a traveling photo-mural exhibit that compares the contemporary genocide of abortion to historically recognized forms of genocide using graphic images to make the comparison. CBR's GAP display visits university campuses around the country to show as many students as possible what abortion actually does to unborn children and to get them to think about abortion in a broader historical context.

CBR strongly opposes the current administration's pro-abortion policies and has instituted an "Obama Awareness Campaign," which juxtaposes images and quotations of President Obama alongside images of aborted fetuses and aborted preborn children. CBR displays these graphic images on the sides of box-body style trucks driven by CBR employees and volunteers and on banners towed by aircraft throughout the United States, including at events in which President Obama is either attending or speaking.

Similar to Petitioners, CBR also displays its graphic abortion signs outside of churches to inform and mobilize Christian congregations to oppose abortion. There is a consensus of informed opinion within the pro-life movement that no anti-abortion strategy can succeed without widespread Christian condemnation of abortion. Consequently, the Colorado Appellate Court's ban on the display of "gruesome" images of abortion on public sidewalks surrounding churches poses an existential threat to CBR's public policy efforts.

By urging this Court to grant the petition and reverse the decision below, CBR seeks to protect its right to meaningfully participate in the public debate of an important political issue. The use of "gruesome" imagery is CBR's principal way to express its political message. Indeed, CBR's large photographs present a visual message that is rhetorically inexpressible. In short, this visual message *is* CBR's speech.

Methods of expression are not fungible. An effective way to remove an unpopular message from public discourse is to relegate the speaker to ineffective means of expressing his message. The First Amendment guarantees the right to influence the political process; it is not merely a right to catharsis. Consequently, it is the off-putting, unpopular, and, when necessary, "gruesome" message that requires the greatest protection and the greatest audience access.

The history of social reform is the history of graphic and horrifying images. Our collective conscience has been pricked by images of slaves who were tortured to death, African Americans who were beaten to their knees while trying to register to vote, Holocaust victims

who were burned alive, and little children who were suffering terrible abuses in American coal mines and factories, among numerous other examples. *See, e.g.,* Pet. at 8-11 (citing examples). These pictures are no less "gruesome" or traumatizing than abortion photographs, but this imagery was effectively used to convince the viewer that the victims were real people, fully entitled to rights of personhood. Consequently, this imagery persuaded the electorate that the injustices depicted were sufficiently egregious to warrant political action and, indeed, criminalization of the abusive behaviors.

In sum, it is impossible to change public policy without first changing public opinion. Unlike many civil rights activists, CBR does not enjoy the benefit of a sympathetic news media, eager to reveal the injustices against which it campaigns. As a result, it must resort to alternative forms of mass media (*i.e.*, displaying large "gruesome" images of abortion in public forums) to reach its audience, which will invariably include children.

ARGUMENT

I. BANNING THE DISPLAY OF "GRUESOME" IMAGES OF ABORTION IN A PUBLIC FORUM UNDERMINES OUR NATIONAL COMMITMENT THAT DEBATE ON PUBLIC ISSUES SHOULD BE UNINHIBITED, ROBUST, AND WIDE-OPEN.

Government efforts to censor graphic abortion imagery are not new to CBR. Fortunately, CBR has largely succeeded in thwarting such efforts to silence

its message. *See Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780, 790 (9th Cir. 2008); *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 824 (6th Cir. 2007). The Colorado Appellate Court's decision is yet another attempt at suppressing core political speech regarding abortion and thus directly conflicts with our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

It cannot be gainsaid that the First Amendment protects the use of pictures to publicly express a political message. *See, e.g., Hill v. Colo.*, 530 U.S. 703, 714-15 (2000) (recognizing that petitioners' "sign displays . . . are protected by the First Amendment"). Moreover, this Court "has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' '[S]peech concerning public affairs is more than self-expression; *it is the essence of self-government*.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citations omitted) (emphasis added).

Consequently, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). Indeed, the government may not "impose special prohibitions on those speakers who express views on disfavored subjects" or on the basis of "hostility—or favoritism—towards the underlying message expressed." *R.A.V. v. St. Paul*, 505 U.S. 377, 386-92 (1992); *see Police Dep't of the City of Chicago v.*

Mosley, 408 U.S. 92, 96 (1972) (holding that the government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express more controversial views).

In *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), this Court did not allow convictions to stand because the trial judge charged that the defendants' speech could be criminally punished "if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm." *Id*. at 3. In finding such a position unconstitutional, this Court famously stated,

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment. . . . There is no room under our Constitution for a more restrictive view.

Id. at 4.

The fact that "gruesome" images may actually offend some persons or create a visceral reaction in others does not lessen their constitutionally protected status; it enhances it. "The fact that society may find

speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's message that gives offense, that consequence is a reason for according it constitutional protection." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (editing marks and citations omitted); *Hill*, 530 U.S. at 715 & 710, n.7 ("The fact that the messages conveyed by [the signs, which included "bloody fetus signs,"] may be offensive to their recipient does not deprive them of constitutional protection.").

"[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975). In *Erznoznik*, this Court made it clear that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that [the government] thinks unsuitable for them." *Id*. at 213; *see also Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2735 (2011) (striking down California law prohibiting the sale or rental of "violent video games" to minors on First Amendment grounds and describing as "unprecedented and mistaken" the government's desire "to create a wholly new category of content-based regulation that is permissible only for speech directed at children").

This Court has held time and again that the mere fact that someone might take offense at the content of the message does not provide a basis for prohibiting the speech. As this Court recently stated in *Snyder v.*

Phelps, 131 S. Ct. 1207, 1219 (2011), "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. Indeed, *the point of all speech protection* . . . is to shield just those choices of content that in someone's eyes are misguided, or *even hurtful*." (citations and quotations omitted)(emphasis added); *Tx. v. Johnson*, 491 U.S. 397, 414 (1989) (same); *Street v. N.Y.*, 394 U.S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); *Edwards v. S.C.*, 372 U.S. 229, 237 (1963) ("The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views.").

And speech receives its greatest protection when it is expressed in a traditional public forum, as in this case. *Hague v. CIO*, 307 U.S. 496, 515 (1939) (stating that traditional public forums, such as streets, sidewalks, and parks, are places that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"); *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988) ("[O]ur decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a 'cliché,' but recognition that wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public. No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in

the public trust and are properly considered traditional public fora.") (internal quotations and citation omitted). Indeed, "the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. N.J.*, 308 U.S. 147, 163 (1939). Thus, in a public forum, the government's ability to restrict speech is sharply limited. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) ("[S]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.").

Furthermore, it is a clearly established principle of First Amendment jurisprudence that a listener's reaction—or, as in this case, a viewer's reaction—to speech is not a legitimate basis for regulation. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). "The First Amendment knows no heckler's veto." *Lewis v. Wilson,* 253 F.3d 1077, 1082 (8th Cir. 2001).

As the Ninth Circuit properly noted in *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780, 790 (9th Cir. 2008), there is no "minors" exception to the heckler's veto. *See also Reno v. ACLU*, 521 U.S. 844, 880 (1997) (holding that the prohibition on knowingly communicating indecent material to minors in Internet forums was invalid because it conferred "broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech who might simply log on and inform the would-be

discoursers that his 17-year-old-child . . . would be present").

And while restrictions on speech because of the "secondary effects" that the speech creates are sometimes permissible, an effect from speech is not secondary if it arises from its content. Consequently, "[t]he emotive impact of speech on its audience is not a 'secondary effect'" that permits regulation. *Boos v. Barry*, 485 U.S. 312, 321 (1988) (opinion of O'Connor, J.).

In the final analysis, rather than censoring the speaker as the Colorado Appellate Court improperly did below, the burden rests with the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Cohen v. Cal.*, 403 U.S. 15, 21 (1971). As this Court noted in *Cohen*, "[W]e cannot indulge the facile assumption that one can forbid particular words [or pictures, as in this case] without also running a substantial risk of suppressing ideas in the process. Indeed, government might soon seize upon the censorship of particular words [or pictures] as a convenient guise for banning the expression of unpopular views." *Id*. at 26.

In conclusion, banning abortion imagery from the public square because the government deems it "gruesome" is a pernicious form of censorship that suppresses ideas and thus directly conflicts with our profound, national commitment to the principle that debate on controversial public issues should be uninhibited, robust, and wide-open. Indeed, "gruesome" images of abortion convey a message that words are incapable of expressing—a message that

requires the full mantel of protection under the First Amendment.

CONCLUSION

For the foregoing reasons and for those stated so forcefully in Petitioners' Brief, the petition for a writ of certiorari should be granted and the decision of the Colorado Appellate Court reversed.

Respectfully submitted,

ROBERT JOSEPH MUISE
Counsel of Record
DAVID YERUSHALMI
American Freedom Law Center
P.O. Box 131098
Ann Arbor, Michigan 48113
(855) 835-2352
rmuise@americanfreedomlawcenter.org

Counsel for Amicus Curiae
Center for Bio-Ethical Reform, Inc.