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| COURT OF APPEALS, STATE OF COLORADO<br>101 W. Colfax Avenue, #800<br>D*en*ver, Colorado 80203<br>303-837-3785<br><br>Appeal from District Court of Denver County<br>Case No. 2005CV2290, Div. 269<br>Honorable John McMullen<br><br>ST. JOHN'S CHURCH IN THE WILDERNESS; CHARLES I. THOMPSON; CHARLES W. BERBERICH.<br><br>Plaintiffs-Appellees.<br><br>vs.<br><br>KENNETH TYLER SCOTT and CLIFTON POWELL<br><br>Defendants-Appellants.<br><br>*Attorney for Defendants-Appellants:*<br>Rebecca R. Messall, Reg. No. 16567<br>Hackstaff Law Group, LLC<br>1601 Blake Street, Suite 310<br>Denver, Colorado 80202<br>Telephone: 303-534-4317<br>Email: rm@hackstafflaw.com | **COURT USE ONLY**<br><br>Case Number: 11CA508 |
| **OPENING BRIEF** | |

**Submitted on September 6, 2011**

**C.A.R. 32(f)**
**CERTIFICATE OF COMPLIANCE**

The undersigned certifies that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

It contains 9491 words.

The brief complies with C.A.R. 28(k)

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

*s/ Rebecca R. Messall*
Rebecca R. Messall

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## I. INTRODUCTION

This case involves a demonstration on public property against a Christian church by fellow Christians. Powell and Scott call people to repentance through peaceful witness on public sidewalks. They carry signs, hand out literature, preach, read the Bible, and engage in one-on-one dialogue. The sincerity of their beliefs and their commitment to non-violence is uncontroverted. Their messages, which are welcome to some people, offend others. They do not preach to the choir, or simply call in to radio talk shows or write letters to the editor. They evangelize outdoors, in the public square.

## II. STATEMENT OF ISSUES

A. The trial court erred in failing to vacate its prohibition against Powell's and Scott's entry onto and presence on St. John's property.

B. The trial court and *St. John's I* erred by enjoining acts which all Plaintiffs admitted that Powell and Scott did not commit, and which the *Amended Complaint* did not allege they committed.

C. The trial court and *St. John's I* erred in abridging non-amplified religious speech in a traditional public forum as being a nuisance, as being the basis of a civil conspiracy and as the basis for a permanent injunction.

## III. STATEMENT OF THE CASE

On March 20, 2005, the St. John's clergy knew that protesters were present as early as 7:30 a.m. Nevertheless, at 9 a.m. and 11:15 a.m., for two 10-minute processions, the clergy intentionally caused parishioners to pass directly in front of some of the demonstrators. The small group included Ken Scott who, with police authorization, spoke from atop a legally parked car in the public street next to the public sidewalk. Despite the clergy's conscious decision to parade the parishioners close by the demonstrators, and despite the fact that everyone finished the procession unimpeded, Plaintiffs claimed it was the demonstrators who had "interfered" with the church's procession because some people, including children, had become upset.

But Plaintiffs' witnesses made judicial admissions which refuted their claims. By way of example, the church's primary witness, Rev. Carlsen, admitted that the protesters did not block or impede the parishioners and that by "interference" he actually meant that the demonstrators were reading the Bible out loud and singing, and that by "physically intruding" on the worship he actually meant the "physical act" of preaching loudly. Plaintiffs could not recall any "yelling" by Clifton Powell. Importantly, police were present during the entire

demonstration, made no arrests, issued no warnings, videotaped everything and destroyed the tapes for lack of any wrongdoing. The police and Plaintiffs' witnesses agreed that the demonstrators cooperated with police.

From start to finish, the record shows that the Plaintiffs' motive was to suppress posters they found disturbing and the protesters' words, set forth in the *Amended Complaint* and in affidavits. The ironic reason for suing the demonstrators was to "protect children."

Scott and Powell, *pro se* defendants, asserted their right to freedom of speech from the beginning. Nevertheless, judgment entered against them for private nuisance, "conspiracy to commit private nuisance," and for permanent injunction. It relegated them to court-approved "times" when churchgoers would not be present, and a court-approved "place" on an inconspicuous side street, where traffic on busy 14th St. would be unlikely to view or hear them. Moreover, the court enjoined Powell and Scott for acts never alleged in the pleadings and directly refuted by the Plaintiffs' judicial admissions and other testimony. Under two 2011 decisions by the United States Supreme Court, the trial court's *Order on Remand* in this case must be vacated, and the opinion in the first appeal of the case must be reversed.

## A. PROCEDURAL HISTORY

On Friday, March 25, 2005, the church and two members sued Ken and Jo Scott, and unnamed persons, for injunctive relief on tort theories of private nuisance and conspiracy to create private nuisance.[1] Clifton Powell was not originally a named defendant. Late that afternoon, the trial court held a hearing on the record.[2] Ken Scott was neither served nor present to assert defenses nor to assert his spousal privilege.[3] That evening, the court entered a temporary restraining order against the Scotts,[4] who were not personally served until March 28th and 31st.[5]

On April 1, 2005, the Plaintiffs moved for preliminary injunction."[6] Three days later, the trial court held a hearing. Ken Scott, *pro se,* appeared, asserted his *First Amendment* rights, and objected to insufficient notice.[7] The court overruled Scott's objection to insufficient notice[8] and refused to hear his *First Amendment*

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1 *Compl. for Temp. and Perm. Inj. Relief*, R. at 1-69.
2 TRO Hr'g Tr. vol. 20.
3 C.R.S. § 13-90-107(1)(a) (2005).
4 *TRO*., R. 67-68.
5 *Waiver of Serv. of Summons and Compl. by Def. Jo Scott*, R. 79-80.
6 *Mot. for Prelim. Inj*., R. 110-12.
7 TRO Hr'g Tr. vol. 21, 7:12-24.
8 *Id*., 9:1-4.

claims.[9] The Scotts stipulated that, until April 9, 2006, they would not demonstrate at St. John's.[10]

An *Amended Complaint* added Clifton Powell and other defendants.[11] In January 2006, Powell was permitted to oppose the TRO. [12] A *Preliminary Injunction*[13] was entered, based in part on Powell's hearing, in part on the TRO hearing for which neither Ken Scott nor Clifton Powell had been present.

*Ken Scott's Motion for Judgment on the Pleadings*[14] was denied. The court ruled that the "allegations of incitement to violence are not necessary" in view of Plaintiffs' claim that Defendants' "interference . . . would be offensive or cause inconvenience or annoyance . . ."[15]

The court partially granted Plaintiffs' *Motion for Summary Judgment*, but did not make it a final order,[16] entering judgment only against Ken Scott and only

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9 *Id*., 8:14-22.
10 *Stip*., R. 137-40.
11 *Am. Compl*., R. 208-15.
12 Powell, Prelim. Inj. Tr. vol. 23, 1-47:18, 106-112:19.
13 *Prelim. Inj. Order*, R. 509-11.
14 *Order Re: Mot. to Dismiss on Juris. Grounds or, in Altern., for J. on Pld'gs*, at 535-37.
15 R. 536, ¶ 6.
16 Scott, Trial Tr. vol. 17, 113:4-10.

on the tort claim of private nuisance.[17] The trial court's key findings were that: Powell, Scott and others "by prior agreement" protested "what they believed to be St. John's position on abortion and homosexuality;"[18] "Defendants complied with the parade permit;"[19] Scott "screamed anti-abortion and anti-homosexual remarks at the parishioners . . . and also displayed large posters of aborted fetuses;"[20] Some people became "visibly upset;"[21] and as a result, Scott "substantially interfered with their ability to participate in Palm Sunday worship services."[22]

After a bench trial, October 3, 4, 5 and 6, 2006, the trial court made verbal findings and conclusions on the record,[23] incorporating them into a written judgment[24] for "private nuisance and conspiracy to commit private nuisance," and made "as a permanent injunction, the *Preliminary Injunction* entered on February

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17 *Order Re: Pl.'s Mot. for Summ. J.*, R. 1320-22.
18 *Id.*, R. 1321, ¶ c.
19 *Id.*, R. ¶ d.
20 *Id.*, R. ¶ e.
21 *Id.*, R. ¶ f.
22 *Id.*
23 Findings, Trial. Tr. vol. 8, 1-34.
24 *Order Re: Entry of J.*, R. 1343.

13, 2006."[25] Costs in the amount of $5,583.47 were assessed jointly and severally against Powell and Scott.[26] Powell and Scott appealed.

In *St. John's I*,[27] a three judge panel of the Court of Appeals affirmed the judgments, but as to the permanent injunction order, affirmed in part, vacated in part, and remanded the case with directions.[28] The Colorado Supreme Court denied[29] Powell and Scott's *Petition for Writ of Certiorari.*

After remand, Defendants sought to present evidence of improper enforcement of the injunction on *First Amendment* grounds.[30] Their motion was denied, as outside the scope of the remand.[31]

The trial court permitted further legal argument, but not additional evidence.[32] In briefs, Scott and Powell continued to assert *First Amendment* defenses.[33] The trial court issued its *Order on Remand*, January 27, 2011**.**

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25 *Id*.

26 *Order Re: Pl.'s Verified Bill of Costs*, R. 1380.

27 *St. John's Church in the Wilderness v. Scott*, 19 P. 3d 475 (Colo. App. 2008) ("*St. John's I*").

28 *Mandate*, R. 1639-77.

29 *Order of Court,* R. 1637-38.

30 *Def.s' Mot. to Present Add'l Evid. on Remand*, R. 1710.

31 *Order Re: Mot. to Present Add'l Evid. on Remand*, R. 1721-22.

32 *Id*., R. 1722, ¶ 5.

33 *Id*., R. 1710-12.

## B. STATEMENT OF FACTS

For more than two decades, Scott and Powell have evangelized publicly with different groups of fellow-Christians at many locations for many audiences.[34] Their work is not mere political protest, since they evangelize their Bible-based faith.[35]

St. John's church, near downtown Denver at 1313 Clarkson St,[36] is a monumental stone structure, with an elevated front entry accessed by stone stairs and a ramp leading up from the sidewalk on 14th St. to its massive entrance.[37] The church owns the entire city block, consisting of the church building, driveways, parking spaces, adjoining buildings and two generous, elevated lawns lying on the east and west sides of the church building.[38] Five different doors give entry into the church from different sides.[39] The front entrance on 14th St. is not the only access.[40]

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34 Scott Dep. 86:10 -14, 193:3-17 (Dec. 19, 2005).

35 Scott Dep. 39:10-21, 19:19-23, 171:7-11; Powell Dep. 26:7-10, 22:8-15, and 22:8-15 (Dec. 19, 2005).

36 Pl.s' Ex. 1.

37 Def.s' Ex. VV, L, M and O.

38 Pl.s' Ex. 25.

39 Carlsen, Trial Tr. vol. 11, 12:13-20.

40 Carlsen, Prelim. Inj. Hr'g Tr. vol. 24, 158:7-10.

People park on both sides of 14th St., on the streets encircling the church or in nearby parking lots.[41] One lot is across from the front of the church on the north side of 14th St., a busy east-bound thoroughfare.[42]

In the mid-1990's,[43] Oakley McEachren, a St. John's parishioner and life-long Episcopalian,[44] began informing St. John's clergy and other parishioners on the issue of abortion.[45] He viewed abortion as the "burning issue of our times."[46] Every Sunday for several years, he protested. [47] McEachren felt that Palm Sunday and Easter yielded the largest, and least informed audiences who needed to hear his message.[48] McEachren testified he told Scott and others he was speaking out against abortion at St. John's, and Scott told McEachren he would support him on that.[49] McEachren recalled once that Scott brought a graphic poster and the priests

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41 Parking occurs on the south side of 14th St., except in front of the church's steps on Sundays. Carlsen, Trial Tr. vol. 10, 251:12-14; *Id*., vol. 11, 3:1-6, 4:7-19. Parking also exists in the church's lot on the north side of 14th St., and in the Morley Middle School parking lot. *Id*., 116:18 – 117:12-16.

42 Carlsen, Trial Tr. vol. 10, 251:12-14.

43 McEachren, Trial Tr. vol. 17, 32:13-22.

44 *Id*., 9:3-5.

45 *Id*., 15:14-16, 20-23, 10:10-16.

46 *Id*., 10:17-18.

47 *Id*., 10:19-25, 11:6.

48 *Id*., 25: 7-19.

49 *Id*., 18:1-7.

tried to block parishioners from seeing it.[50] They called the police and had McEachren and Scott arrested and charged with disturbing a church service, but the charge was dropped.[51]

For more than ten years prior to March 2005, even though McEachren joined another church in 1999,[52] a few demonstrators continued to gather at St. John's on Palm Sunday and Easter to communicate their message to St. John's and the passing public.[53] For the four years McEachren protested on Palm Sundays,[54] the outdoor processions were always on church property, never on the sidewalk.[55]

After the 2004 Palm Sunday demonstration, St. John's clergy again filed charges against Scott and another man again without success.[56]

The clergy decided in late 2004[57] that, for the 2005 Palm Sunday events, they would reserve the public sidewalk and hold the procession where the

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50 *Id*., 11:8-16, 12:2-6.
51 *Id*., 12:5-6.
52 *Id*., 9:15-19.
53 Carlsen, Trial Tr. vol. 10, 127:2-13.
54 McEachren, Trial Tr. vol. 17, 19:1-7.
55 *Id*., 21:2-14, 40:21 – 41:4
56 Carlsen, Trial Tr. vol. 10, 218:4-9, 219:7-21; Eaton, Trial Tr. vol. 16, 169:3-17.
57 Carlsen, Trial Tr. vol. 10, 238:1-5; Ex. 14 (street occupancy permit for Mar. 20, 2005).

demonstrators ordinarily stood.[58] Street occupancy permits are not the same as a parade permit, which would be issued by the Denver police.[59] The church obtained a 'street occupancy permit' from the City Engineers Office to reserve its use of the sidewalk,[60] but did not inform the demonstrators about it ahead of Palm Sunday 2005.[61] Although required by the permit to block off the sidewalk to the public,[62] the church did not do so.[63] Its main witness, Rev. Carlsen, admitted that nothing informed the public of the 2005 permit.[64]

On Palm Sunday 2005, St. John's held two outdoor processions, one at the 9 a.m. and one at the 11:15 a.m. service.[65] No outdoor procession is held for the 7:30 a.m. service because the people are more elderly and less mobile.[66] According to Carlsen, each procession took about 10 minutes from start to finish.[67]

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58 Carlsen, Trial Tr. vol. 17, 99:12-19.
59 Zimmerman, Trial Tr. vol. 17, 67:1-13.
60 Pl.s' Ex. 15.
61 Carlsen, Trial Tr. vol. 10, 229:8-23; Zimmerman, Trial Tr. vol. 17, 69:22 – 70:6.
62 Carlsen Trial Tr Vol. 10, 232:6-19.
63 *Id*., 228:22-25.
64 *Id*., 230:21-25.
65 *Id*., 126:10-11.
66 *Id*., 126:12-14.
67 Carlsen, Trial Tr. vol. 11, 18:14-17.

The procession, symbolic of Jesus' entry into Jerusalem, began outside, made a circuit, then entered the church through the main doors.[68] Carlsen estimated that perhaps 1,100 people attended the services that Palm Sunday.[69] Plaintiff Thompson estimated that 300-400 people attended the 11:15 a.m. outdoor service.[70] Carlsen believed there were seven (7) protesters,[71] some on the sidewalk on the other side of 14th St., and at least three were standing on top of cars parked on 14th St.,[72] holding signs and carrying Bibles.[73]

Plaintiff Berberich testified that 2005 was the first time the procession used the public sidewalk,[74] as did Scott[75] and Powell.[76] Powell said that, after the demonstrators were told they could not use the public sidewalk, the idea of using their cars was an impromptu response, and the police had no problem with the idea.[77]

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68 Carlsen, Trial Tr. vol. 10, 125:10-20.
69 *Id*., 137:7-8.
70 Thompson, Trial Tr. vol. 14, 125:22 – 126:2.
71 Carlsen, Trial Tr. vol. 10, 128:4-6.
72 *Id*., 141:16-24.
73 *Id*., 144:12-14.
74 Thompson, Trial Tr. vol. 14, 147:24 – 148:1.
75 Scott Dep. 113:4-8.
76 Powell, Trial Tr. vol. 12, 243:9-20.
77 *Id*., 251:9-21.

PERMIT COMPLIANCE. The demonstrators started arriving at approximately 7:15 a.m.[78] The clergy expected them,[79] and had sent an e-mail to parishioners.[80] Carlsen saw the protesters as early as the 7:30 a.m. services, preaching and singing.[81] Police knew in advance of the demonstration.[82] Less than 5 minutes after he arrived,[83] Cpl. Stringham was approached by a St. John's lawyer who showed him a sidewalk permit.[84] Scott did give Stringham a document asserting the *First Amendment*,[85] and from that point on, the protesters were always cooperative.[86] Det. Olin said that once the protesters were instructed about the permit, they complied with all parts of it.[87]

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78 Carlsen Trial Tr. Vol.10, 153:18 – 154:3.
79 Carlsen, Trial Tr. vol. 10, 197:3-9, 138:14-21.
80 *Id*., 197:24-25; Pl.s' Ex. 18 (e-mail).
81 Carlsen, Trial Tr. vol. 12, 142:20 – 143:1.
82 Stringham, Trial Tr. vol. 15, 16:19.
83 *Id*., 39:23 – 40:3.
84 *Id*., 27:20 – 28:4, Pl.s' Ex. 14.
85 *Id*., 38:17 – 39:6, Def.s' Ex. A.
86 *Id*., 39: 16-22.
87 Olin, Trial Tr. vol. 16, 216:12-20, 238:9-14.

PROTESTS ON PUBLIC PROPERTY. Stringham testified that Scott asked permission to stand on the car.[88] Olin said the protesters were on public property at all times,[89] and that they did not need police permission to stand on their cars.[90]

DEFENDANTS' NON-VIOLENCE. Carlsen was not afraid at all about violence by the protesters.[91] Olin testified the protesters did not use profanity or gestures,[92] and that no harsh words were spoken, that the tone was peaceful, if tense.[93] Olin said there was no violence,[94] and no arrests.[95] He has never had past concerns about the Scotts and violence.[96] Stringham saw no threats by the protesters to the parishioners.[97] Stringham said all of the protesters simply stood in an area and never approached anyone going to a church service.[98] He said the protesters did not follow people going to church, nor restrict anyone's freedom of

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88 Stringham, Trial Tr. vol. 15, 58:10-22, 59:10-17.
89 Olin, Trial Tr. vol. 16, 216:1-3.
90 *Id*., 217:6-9.
91 Carlsen, Trial Tr. vol. 10, 148:23-25.
92 Olin, Trial Tr. vol. 16, 215:23-25, 231:13.
93 *Id*., 220:3-7.
94 *Id*., 220:10-11.
95 *Id*., 224:15-18.
96 *Id*., 230:8-10.
97 Stringham, Trial Tr. vol. 15, 50:10-12.
98 *Id*., 51:2-5.

movement.[99] Stringham said the protesters did not go into the parking areas.[100] Stringham said that at no time did he need to prevent a confrontation.[101]

Carlsen admitted that the police took no action and did not cite or arrest anyone.[102] He authenticated the Defendants' photos showing a peaceful event.[103] Carlsen saw the police using a video camera.[104] He said the police did not have to do anything, as no one broke the law.[105] Carlsen and Eaton admitted there was no physical altercation between the congregation and the protesters.[106] The police destroyed their video.[107] The police did not issue any tickets.[108]

Scott opposes violence.[109] He uses non-violent preaching as his way to tell people to repent, and that if they do, God will forgive them.[110] He believes it is

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99 *Id*., 73:2-9.
100 *Id*., 86:16-21.
101 *Id*., 73:16-s17.
102 Carlsen, Prelim. Inj. Hr'g Tr. vol. 24, 163:1-12.
103 Def.s' Ex. MM, NN and OO; Carlsen, Prelim. Inj. Hr'g Tr. vol. 24, 169:22-25 – 170:15.
104 Carlsen, Prelim. Inj. Hr'g Tr. vol. 24, 171:16-20, 25 – 172:2.
105 *Id*., 172:19 – 173:9.
106 *Id*., 173:19-22; Eaton, Trial Tr. vol. 16, 200:14-16.
107 Stringham, Trial Tr. vol. 15, 44:5-11; Carlsen, Prelim. Inj. Hr'g Tr. vol. 24, 189:19.
108 Scott Dep. 190:24 – 191:6; Stringham, Trial Tr. vol. 16, 143:8-17.
109 Scott Dep. 44:5-15 – 45:1, 70:1-10.
110 *Id*. 51:20-24.

wrong to physically hurt someone.[111] He believes he is an ambassador of Jesus Christ, according to the Bible.[112] Scott's pastor, Rev. Enyart, who has protested many times with Scott and Powell,[113] said neither of them have ever promoted violence at any protest whatsoever.[114] And Stringham testified that no one from St. John's complained to him about any violence.[115]

NO PHYSICAL BLOCKING, IMPEDING. Carlsen admitted that the protesters did not protest at any of the five main doors of the cathedral.[116] Carlsen did not file a formal complaint with the police concerning the protesters conduct.[117] Olin testified that no parishioners were diverted from their intended path of walking during the procession.[118] Olin said the protesters did not at any time try to cause problems for people walking in any direction to or from the church.[119] Olin

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111 *Id*. 52:21 – 53:2.
112 *Id*. 50:22-25.
113 Enyart, Trial Tr. vol. 18, 116:10-12.
114 *Id*., 124:8-11.
115 Stringham, Trial Tr. vol. 15, 69:15-20.
116 Carlsen, Trial Tr. vol. 11, 12:20-25.
117 Carlsen, Trial Tr. vol. 10, 216:24 – 217:2.
118 Olin, Trial Tr. vol. 16, 229:22-25.
119 *Id*., 238:9-14.

authenticated Defendants' photo, *Exhibit L*, as showing the people walking unimpeded that day.[120]

Eaton admitted he did not see any protesters interfere with, block or impede any parishioners.[121] Likewise, Carlsen admitted he never saw Powell block or interfere with the movement of the people walking across 14th St.,[122] and in fact, he never witnessed *any* protesters impeding, or blocking or physically stepping in front of anyone.[123] Carlsen also admitted that churchgoers had other alternate routes to enter the church other than the 14th St. entrance.[124] St. John's Canon Randall also admitted it was possible for parents and their children to enter on the other side of the building.[125] Eaton had given parishioners the choice of going inside instead of going on the procession.[126] Plaintiff Berberich had no knowledge of any protester blocking or impeding access to St. John's.[127] He had no knowledge

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120 *Id*., 239:18 – 240:15; Def.s' Ex. L.

121 Eaton, Trial Tr. vol. 16, 200:17-23.

122 Carlsen, Prelim. Inj. Hr'g Tr. vol. 24, 155:11-17; Carlsen, Trial Tr. vol. 11, 46:10-14; Def.s' Ex. R and V.

123 Carlsen, Prelim. Inj. Hr'g Tr. vol. 24, 155:18-21; Carlsen, Trial Tr. vol. 11, 63:23 – 64:2.

124 Carlsen, Prelim. Inj. Hr'g Tr. vol. 24, 158:7-10.

125 Randall, Trial Tr. vol. 16, 292:8-18, 295:17 – 296:4.

126 Eaton, Trial Tr. vol. 16, 185:4-11.

127 Berberich, Trial Tr. vol. 13, 111:9-12.

of anyone who did not complete it.[128] Plaintiff Thompson did not notice anyone attempting to block the procession.[129] The trial court found that the protestors "did not engage in any physical violence or attempt to physically block people from moving about or follow people to or from their cars or otherwise."[130]

However, according to Carlsen, the protesters were physically "interfering" with the worship service outside by reading the Bible and singing.[131] He says "preaching" is a physical act.[132] He said that when he said, "physically intruding," he means "shouting."[133]

VOLUME OF PROTESTERS. Carlsen did not recall the "volume" used by the protesters, only their "tone."[134] He admitted that the presiding clergy used a microphone for the beginning of the outdoor procession on the east side of the cathedral.[135] Carlsen could not hear the protesters once he closed the doors to the

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128 *Id*., 111:9-16.
129 Thompson, Trial Tr. vol. 14, 157:1-5
130 Findings, Trial Tr. vol. 19, 21:15-18.
131 Carlsen, Trial Tr. vol. 11, 64:3-14, 69:9-23.
132 *Id*., 69:15-17.
133 *Id*., 69:11-14.
134 Carlsen, Trial Tr. vol. 10, 196:12-21.
135 Carlsen, Prelim. Inj. Hr'g Tr. vol. 24, 159:2-15.

cathedral, and did not hear them at all indoors during the 9 a.m. service.[136] Plaintiff Thompson was not aware of *any* noise by the protesters upon his arrival for the service, because the cathedral's doors were closed between the services,[137] and he *could not* hear the protesters when the doors were closed.[138] Plaintiff Berberich attended the 11:15 a.m. service but he did not participate in the outdoor procession.[139] He only heard a distant noise when he walked toward the cathedral.[140] Berberich said he was not aware of anyone who left the church due to the protesters.[141] The noise declined rapidly when the cathedral doors were closed.[142] Walking back to his car afterwards, he could not hear any noise.[143]

No one had a decibel meter that day, including the police.[144] Stringham testified that the protesters had no amplifying equipment.[145] He testified that Ken

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136 Carlsen, Trial Tr. vol. 10, 181:10-16.
137 Thompson, Trial Tr. vol. 14, 123:19-23.
138 *Id*., 132:10-15.
139 Berberich, Trial Tr. vol. 13, 71:8-10.
140 *Id*., 66:16-23.
141 *Id*., 107:1-3.
142 *Id*., 75:20 – 76:3.
143 *Id*., 69:3-5.
144 Scott, Prelim. Inj. Tr. vol. 23, 108:8-14.
145 Stringham, Trial Tr. vol. 15, 67:17-21.

Scott was the loud one,[146] Olin said that even so, he could still hear the person leading the sermon.[147]

Carlsen testified he could not hear the protesters during the 9 a.m. and 11:15 a.m. services,[148] but only as he was entering and going through the doors.[149] Stringham said Scott was by far the loudest, but mainly when people were a long distance away.[150] Stringham has been to many protests such as anti-war, immigration, etc.,[151] and says that people raise their voices at protests.[152] He has seen other protests that were loud and boisterous.[153] Sound amplifying is restricted.[154] Like Olin, Stringham testified that he himself could clearly hear the priests that day.[155] Stringham received no complaints that day that the priests could not be heard.[156] Stringham said the protesters left after the start of the 11 o'clock

146 Olin, Trial Tr. vol. 16, 243:19-22.
147 *Id*., 230:1-3.
148 Carlsen, Trial Tr. vol. 10, 181:10-13.
149 *Id*., 182:3-9.
150 Stringham, Trial Tr. vol. 15, 74:7 – 75:2.
151 Stringham, Trial Tr. vol. 15, 76:24 - 77:2.
152 *Id*., 77:6-8.
153 *Id*., 80:6-9.
154 *Id*., 80:10-15.
155 *Id*., 103:17-18.
156 *Id*., 115:13-16.

service.[157] Scott said the police never advised the demonstrators that they were disturbing the worship service at any time.[158]

NO EVIDENCE OF POWELL'S VOLUME. Carlsen admitted he could not remember hearing Powell "yelling" at all.[159] He did not recall saying otherwise.[160] Carlsen did not know what Powell was saying.[161] He said the cement area around Powell allowed parishioners to keep about 30 feet from Powell.[162]

Plaintiff Berberich could not identify any voices belonging to the protesters,[163] and could not identify which protesters were in the front of the church.[164] Olin did not recall Powell at the protest at all.[165] Stringham testified that Powell did not talk louder than in a speaking voice, that he did not see Powell talking to anyone that day, and that nothing caused him to talk to Powell about any

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157 *Id*., 56:3-4.
158 Scott Dep. 190:16-23.
159 Carlsen, Trial Tr. vol. 10, 155:11-14.
160 Carlsen, Trial Tr. vol. 11, 94:19 – 95:2.
161 Carlsen, Trial Tr. vol. 10, 183:12 – 184:9.
162 Carlsen, Trial Tr. vol. 11, 40:25 – 41:5.
163 Berberich, Trial Tr. vol. 13, 111:17-20.
164 *Id*., 112:21, 111:17 – 12:5.
165 Olin, Trial Tr. vol. 16, 242:6 – 243:4.

issues whatsoever.[166] Scott did not recall hearing Powell's voice during the protest.[167]

However, Carlsen opined that by holding a graphic sign on the other side of 14th St., Powell was being "disruptive."[168]

MESSAGES TO PUBLIC AT AT LARGE. Carlsen admitted that the protesters' messages were not simply directed to parishioners because oncoming traffic on 14th St. would have seen the protesters signs.[169] Scott testified the protesters' messages were not restricted just to St. John's, but to the public in general who drove or passed by them on the streets and sidewalks.[170] He said at no time was his protest targeting just one person, but was a 360 degree protest that included all people in the City and County of Denver.[171]

MESSAGES WERE RELIGIOUS IN CONTENT. Plaintiffs judicially admitted to religious content of Defendants message.[172] Carlsen admitted that the

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166 Stringham, Trial Tr. vol. 15, 68:1-12.
167 Scott, Trial, Tr. vol. 23, 106:22 – 107:8-9.
168 Carlsen, Trial Tr. vol. 11, 93:18-21.
169 *Id*., 28:25 – 29:8.
170 Scott Dep. 191:7-19.
171 Powell, Prelim. Inj. Hr'g Tr. vol. 23, 139:10-15.
172 *Motion in Limine*, R. 1067 ¶ 12

protesters held signs and Bibles while on the cars.[173] He admitted hearing Scott saying "repent" and "tough love."[174] He might have heard him telling gays to repent.[175] Plaintiff Berberich had no knowledge of any fighting words by the protesters or words inciting riot.[176] Stringham recalled the protesters took turns reading from the Bible from atop the car.[177] He believed they were communicating a message to the people of St. John's through preaching and Bible verses.[178] The one word he heard more than any other was "repent."[179]

Scott testified that the pamphlets the protesters offered were very important as Gospel tracts so that people can understand the meaning of what Jesus dying on the cross and what the procession really means.[180] The literature includes information for women who are pregnant thinking about abortion, information for

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173 Carlsen, Trial Tr. vol. 10, 144:6-14.
174 Carlsen, Trial Tr. vol. 11, 106:10-11.
175 *Id*., 105:21 – 106:6.
176 Berberich, Trial Tr. vol. 13, 110:12-18.
177 Stringham, Trial Tr. vol. 15, 60:22 – 61:5.
178 *Id*., 61:13-20.
179 *Id*., 112:23 – 113:7.
180 Scott, Trial Tr. vol. 23, 111:20-24.

people with questions about homosexuality, intending to try to lead people to Jesus Christ so they can spend eternity in heaven.[181]

The demonstrators displayed posters with Bible verses,"[182] for example, "God said, before I formed you in the womb I knew you,"[183] and other religious messages,[184] They displayed posters showing the results of abortion, including one baby known as Baby Malachi.[185]

The demonstrators offered religious literature to passers-by, such as a brochure entitled "Jesus Loves the Little Children."[186] Another brochure is called "Life or Death."[187] Another brochure educated on breast cancer.[188] They also offered religious tracts,[189] and an informational brochure."[190]

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181 *Id*., 111:24 – 112:16.

182 *Proposed TMO*, R. 1206, ¶ 14.

183 Def.s' Ex. BBB.

184 Def.s' Ex. QQ; *Proposed TMO*, R. 1206, ¶ 14.

185 Pl.s' Ex. 10; see also Pl.s' Ex. 9.

186 Def.s' Ex. KKK#1 (contains points against abortion, photo of an aborted baby, and an essay comparing silence about abortion to silence during in Germany about the Holocaust).

187 Def.s' Ex. KKK#2 (compared photos of normal human embryo/fetal development and photos of babies who had been killed through suction abortion at different ages).

188 Def.s' Ex. KKK#3.

189 Def.s' Ex. KKK# 4 & 5.

190 Def.s' Ex. KKK#6 (containing quotes attributed to Planned Parenthood,

Plaintiff Thompson recalled that the protesters had a small cross with a baby crucified on it.[191] Thompson did not understand the symbolism of it, and just thought it was very offensive.[192] He conceded that he might also find offensive a cross with a symbolic picture of Jesus, with the blood, crucified on the cross.[193]

NO EVIDENCE OF IRREPARABLE HARM. Carlsen was unaware of any irreparable harm to St. John's cathedral if the injunction did not issue.[194] None of Plaintiffs' other witnesses contradicted Rev. Carlsen's testimony.

IMPROPER SUPPRESSION OF CONTENT. In the *Amended Complaint*,[195] Plaintiffs complained of "signs depicting graphic pictures of dismembered aborted human fetuses"; signs containing "derogatory statement about homosexuals"; a "Cross . . . with a child's doll nailed to it"; that the protesters were "verbally harassing" people by shouting "Perverts and homos will all go to hell;"[196] that protesters made "comments" against the pastors";[197] that people feared the

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facts on its tax funding and photographs).

191 Thompson, Trial Tr. vol. 14, 150:4-7.

192 *Id*., 150:8-13.

193 *Id*., 151:6-23.

194 Carlsen, Trial Tr. vol. 12, 160:2-17.

195 *Am. Compl.*, R. at 210, ¶ 13.

196 *Id*., ¶ 15.

197 *Id*., 211, ¶ 19.

protesters would "traumatize or harm their children;"[198] that several children were "upset," by the "tone."[199]

In support of their *Motion for Temporary Restraining Order,*[200] Plaintiffs attached photos showing the effects of abortion on unborn babies.[201] Plaintiffs' offered an affiant who complained of "derogatory statements about homosexuals," and "abortion images," and a "hateful and angry tone."[202] Another affiant objected to posters she had seen in a prior year of "aborted fetuses" and "gruesome signs."[203] Another affiant complained of "signs, including signs depicting graphic pictures of dismembered and aborted human fetuses and signs with derogatory statements about homosexuals."[204] Carlsen's affidavit complained of "signs depicting graphic pictures of dismembered and aborted human fetuses" and sign containing "derogatory statements about homosexuals" and "a Cross, approximately three feet in height, with a child's doll nailed to it."[205]

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198 *Id*., ¶ 20.
199 *Id*., ¶ 21.
200 R. 11, et. seq.
201 R. 33-35.
202 *Mot. for Temp. Restraining Order*, Aff. of Merritt-LeSatz, R. 46, ¶¶ 3-5.
203 *Id*., Aff. of Marilyn Munsterman, R. 52, ¶¶ 6 and 9.
204 *Id*., Aff. of Carolyn T. McCormick, R. 55, ¶ 5.
205 *Id*., Aff. of Rev. Canon Stephen E. Carlsen, R. 29, ¶ 5.

At one hearing, St. John's counsel stated the need for the TRO was based on a concern that Defendants' protest was a "targeted focus on children."[206] He asserted, "We're here to protect children."[207] He argued, "We're seeking a safety zone for our kids and for our part -- member and attendees . . . it's necessary to protect our children and to protect our right to free practice of religion."[208]

Carlsen testified that the law suit was to "protect our children from --- being scared when they go to church. That was the overwhelming reason,"[209] . . . to keep the kids safe . . ."[210] Eaton testified the protesters were "displaying pictures that [parishioners] are not prepared to see nor prepared for their children to see . . ."[211] Carlsen testified that the posters made him and others angry because of their "graphic nature" which he found "disturbing" as "really ugly, gory pictures."[212] He likened the posters to sexual pornography.[213]

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206 Ball, TRO Hr'g Tr. vol. 20, 5:9-13.
207 *Id.,* 6:22.
208 *Id.,* 149:15-18.
209 Carlsen, Trial Tr. vol. 10, 209:4-6.
210 *Id*., 212:9-12.
211 Eaton, Trial Tr. vol. 16, 211:5-9.
212 Carlsen, Trial Tr. vol. 12, 170:16-22.
213 *Id*., 170:23 – 171:1.

Plaintiff Berberich feels obscenity is more defined by violence than nudity such as a baby shown ripped apart versus the beauty of a nude 4 or 5 or 6 year old.[214] Plaintiff Berberich testified that he finds the poster of Baby Malachi to be obscene.[215] Berberich admitted he had no knowledge of the content of the defendants' messages in 2005 except "by hearsay after the event."[216] Berberich did not participate in the 2005 outdoor procession.[217]

## V. ARGUMENT

A. The trial court erred in failing to vacate its prohibition against Powell's and Scott's entry onto and presence on St. John's property.

1. Standard of Review and Preservation. The standard of review is both *de novo*,[218] inasmuch as the trial court did not have discretion[219] to ignore the

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214 Berberich, Trial Tr. vol. 13, 92:14-21.

215 *Id*., 85:1-17, referring to Def.'s Ex. 10.

216 *Id*., 115:8-12.

217 *Id*., 71:8-10.

218 *See Salve Regina College v. Russell, 499 U.S. 225, 238, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991)* ("[w]hen *de novo* review is compelled, no form of appellate deference is acceptable").

219 *Musgrave v. Indus. Clm. App. Office,* 762 P.2d 686, 687 (Colo. App. (1988)).

mandate of *St. John's I*, and clearly erroneous for lack of competent evidence.[220] These points are preserved by this direct appeal.[221]

2. Failure to Follow the Directive by *St. John's I*. The prior panel of the Court of Appeals examined the injunction's provision prohibiting Scott and Powell "from entering the church's property, obstructing access to the church, and entering and obstructing access through surrogates."[222] Finding no evidence of irreparable harm, this court ordered that "the prohibition against entry must be vacated."[223]

The trial court failed to follow this court's directive in *St. John's I*. "When an appellate court remands a case with specific directions to enter a particular judgment or to pursue a prescribed course, a trial court has no discretion except to comply with such directions. . ."[224]

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220 *Quintana v. City of Westminster*, 56 P.3d 1193, 1186 (Colo. App. 2002) quoting *United States v. Unites States Gypsum Co*., 333 U.S. 364, 395 (1948).

221 *See also,* R. 470, raising Plaintiffs' judicial admissions in *Scott's Motion to Dismiss on Jurisdictional Grounds or, in the Alternative for Judgment on the Pleadings.*

222 194 P. 3d at 481.

223 *Id*.

224 *Musgrave v. Indus. Clm. App. Office,* 762 P.2d 686, 687 (Colo. App. 1988).

3. Prohibition was Clearly Erroneous. In addition, because this appeal arises out of Powell and Scott's religious speech in a public forum, a *de novo* review is required, or in other words, an independent review of the evidence in the record.[225] *De novo* review shows the prohibition was clearly erroneous for lack of evidence. Olin testified that at all times Powell and Scott were on public property.[226] Carlsen himself only identified the location of protesters as being on the sidewalk on the other side of 14th St., and on top of cars parked on 14th St.,[227] holding signs and carrying Bibles.[228] The *Amended Complaint* [229] and *Trial Management Order* admitted to the protesters' location: they "positioned themselves on top of the cars in front of the Cathedral and across the street from the Cathedral on the sidewalk.[230]

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225 *Bose Corp. v. Consumers Union of United States,* 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984) (appellate courts may not delegate protection of First Amendment to lower courts); *Evans v. Romer*, 854 P.2d 1270, 1274 (Colo. 1993); *Reddick v. Craig,* 719 P.2d 340, 342 (Colo. App. 1985); *Amer. Atheists v. Duncan*, 637 F.3d 1095, 1116 (10th Cir. 2010).

226 Olin, Trial Tr. vol. 16, 216:1-3.

227 Carlsen, Trial Tr., 141:16-21.

228 *Id.,* 144:12-14.

229 *Am. Compl*., R. 272, ¶ 14.

230 *Trial Mgmt. Order*, R. 1206, ¶¶ 9-12.

Judicial admissions are binding on Plaintiffs. "A judicial admission is a formal, deliberate declaration which a party or his attorney makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or of facts about which there is no real dispute . . . . Judicial admissions are conclusive on the party making them."[231]

For the reasons set forth above, Powell and Scott request the Court to reverse ¶ 3(i) of the *Order of Remand.*

B. The trial court and *St. John's I* erred by enjoining acts which all Plaintiffs judicially admitted that Powell and Scott did not commit, and which the *Amended Complaint* did not allege they committed, and which the trial court found they did not commit.

1. Standard of Review and Preservation. The standard of review is one of clear error.[232] This point was raised in *Defendants' Brief on Remand*.[233]

2. Admissions. Carlsen admitted he never saw Powell block or interfere with the movement of the people walking across 14th St.,[234] and in fact, he never

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231 *Kempter v. Hurd,* 713 P.2d 1274, 1279 (1986) (citations omitted).

232 *Quintana v. City of Westminster*, 56 P.3d 1193, 1186 (Colo. App. 2002) quoting *United States v. Unites States Gypsum Co*., 333 U.S. 364, 395 (1948).

233 R. 1744 ("peaceful at all times"), 1746 ("on public sidewalk or street without dispute").

witnessed *any* protesters impeding, or blocking or physically stepping in front of anyone on March 20, 2005.[235] Berberich, Thompson, Eaton testified similarly.[236] Judicial admissions are binding on the Plaintiffs, as briefed above.

3. No Allegation, No Evidence. Parroted Language. Despite the lack of any allegation in the *Amended Complaint*, despite Plaintiffs' admissions and the uncontroverted record, the *Order on Remand* improperly, in paragraph 3(iii) and (iv)[237] enjoined Powell and Scott from "blocking, impeding, inhibiting or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot . . .and from "encouraging, inciting, or securing other persons to commit any of the prohibited acts listed herein."

The language used in the *Order of Remand* parrots the identical language of the Plaintiffs' Prayer for Relief[238] in both their *Amended Complaint* (although no factual allegations supported the Prayer), and in Plaintiffs' "Relief Sought" portion

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234 Carlsen, Prelim. Inj. Hr'g Tr. vol. 24, 155:11-17; Carlsen, Trial Tr. vol. 11, 46:10-14; Def.s' Ex. R and V.

235 Carlsen, Prelim. Inj. Hr'g Tr. vol. 24, 155:18-21; Carlsen, Trial Tr. vol. 11, 63:23 – 64:2.

236 *See* Statement of Facts, *supra*, "No Physical Blocking, Impeding."

237 *Order on Remand*, R. 1817.

238 *Am. Compl.*, Prayer for Relief, R. 276, ¶A (ii) and (v).

of the *Trial Management Order*.[239] The trial court simply adopted the verbatim Plaintiffs' language. If a trial court adopts "the adverse claimant's proposed finding of fact and conclusions of law verbatim, [the reviewing court] will scrutinize them more critically than if they were produced by the trial court itself."[240] Here, any factual determination in support of the *Order on Remand* was clearly erroneous[241] in view of Plaintiffs' binding judicial admissions.

Accordingly, based on clear error by the trial court and *St. John's I*, Powell and Scott ask this court to reverse the *Order of Remand,* paragraphs 3(iii) and (iv).

C. The trial court and *St. John's I* erred in abridging non-amplified religious speech in a traditional public forum as being a nuisance, as being the basis of a civil conspiracy and as the basis for a permanent injunction.

1. Standard of Review and Preservation. All questions of Constitutional law are independently reviewed *de novo,*[242] here for a compelling state interest.[243]

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239 *Proposed Trial Management Order*, R. 1207, V., ¶ 1(iv)-(v).

240 Ogden, Ralph, *Colorado Appellate Advocacy Deskbook*, §6.3 (Bradford Publishing Co., Denver), *citing Trask v. Nozisko,* 134 P.2d 544, 549 (Colo. App. 2006)

241 *Id., citing Quintana v. City of Westminster,* 56 P.3d 1193 (Colo. App. 2002), *quoting United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)

242 *Bose Corp. v. Consumers Union of United States,* 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984); *Evans v. Romer*, 854 P.2d 1270, 1274 (Colo. 1993);

Powell and Scott preserved this issue for appeal by asserting the *First Amendment* throughout this case.[244]

2. <u>*St. John's I* is Not the Law of the Case</u>. Two intervening decisions by the United States Supreme Court require reversal of the trial court's *Order on Remand* and the previous decision in *St. John's I.* This case is not controlled by *Scott I* as the 'law of the case,'[245] by virtue of decisions in *Snyder v. Phelps*[246] and

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*Reddick v. Craig,* 719 P.2d 340 (Colo. App. 1985).

[243] Perry Educ'n Ass'n v. Perry Local Ed. Ass'n, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983).

[244] Def.s' Ex. A *Mot. to Dismiss*; *TRO Hr'g Tr.* vol. 21, 7:12-25; *Answer to Compl*., R. 151-69; *Answer* to *Am. Compl.*, R. 295-301; *Answer to Mot. for Summ. J*., R. 1032-57; *Answer to Mo. for Summ. J*., R. 1108-91; *Mot. for J. on the Pleadings*, R. 464-80; *Reply*, R. 516-34; *TMO*, R. 1197-1209*; Opening Statement* Trial Tr. vol. 9, 86:15-24, 87-88, 90:4-22; *Opening Statement* Trial Tr. vol. 9, 96:6-11, 99:13-25, 100-06; *Closing* Statement Trial Tr. vol. 18, 193:17-18; *Closing Statement* Trial Tr. vol. 18, 159-73; *Not. of Appeal*, R. at 1370-71; *Suppl. Not. of Appeal*, R. 1398-1401; *Opening Br*., R. 1443-66; *Appellant-Def.'s Opening Br*., R. 1467-96; *Appellant-Def.'s Reply to Answer Br*., R. 1508-26; *Reply Br*., R. 1527-40; *Pet. for Writ of Cert*., R. 1541-59; *Pet. for Writ of Cert*., R. 1597-1613; *Reply to Resp't's Opp'n to Writ of Cert*., R. 1614-27; *Reply in Supp. of Pet. for Writ of Cert*., R. 1628-36; *Def.s' Mot. to Pres. Add'l Evid. on Remand*, R. 1710-13; *Def.s' Resp. to Pl.s' Resp. of Mot. to Pres. Add'l Evid. on Remand*, R. 1718-20; *Def.s' Br. on Remand*, R. 1742-56; *Def.s' Br. After Oral Argument Hr'g on Remand*, R. 1775-98; *Def.s' Br. After Dist. Ct. Judge's Req. Parties Position of Scope of Remand*, R. 1800-10; *Not. of Appeal*, R. 1826-40; Hr'g on Remand Tr., Nov. 18, 2010, p. 56 *et seq*., on CD.

[245] *Vashone-Caruso v. Suthers,* 29 P.3d 339, 342-43 (Colo. App. 2001).

[246] 131 S. Ct. 1207 (Mar. 2, 2011).

*Brown v. Entm't Merch. Ass'n*.[247] Where, between the first and second appeals, Supreme Court decisions are handed down which change the law, the 'law of the case' doctrine is inappropriate.[248]

3. Speech that Upsets People is Protected. The *Snyder* case held that a state tort judgment may not trump the *First Amendment,* even where the audience is upset by the speech. Erroneously, the previous decisions violate the *Snyder* holding. In paragraph 3(ii)(a)(3),[249] the *Order on Remand* prohibits Powell and Scott from causing "parishioners to become physically upset." Notably, *Snyder* involved a funeral protest at a Catholic church. But the *First Amendment* has always protected speech that 'upsets' listeners,[250] even in the context of a protest at an Episcopal church like St. John's.

4. No Obscenity, Incitement or Fighting Words. Plaintiffs never alleged, never proved, and the trial court never found that either Scott's or Powell's speech was obscene, incitement to riot or fighting words. *Snyder* emphasized fundamental

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247 131 S. Ct. 2729; 180 L. Ed. 2d 708 (2011).

248 *Giampapa v. Am. Family Mut. Ins. Co.,* 64 P. 3d 230 (Colo. 2003).

249 *Order on Remand*, R. 1816-25.

250 *Forsyth v. Nationalist Movement*, 505 U.S. 123, 134-135, 112 S. Ct. 2395, 2403, 120 L.Ed. 2d 101 (1992) ("listeners' reaction to speech is not a content-neutral basis for regulation").

law which applies here as well: ""From 1791 to the present, . . .the *First Amend*ment has 'permitted restriction upon the content of speech in a few limited areas,' and has *never 'included a freedom to disregard these traditional limitations*.""[251]

The prior decisions in this case disregarded traditional limits on restricting free speech. This disregard is fatal to Plaintiff's injunction and to the judgments for nuisance and 'conspiracy to commit nuisance,' since they were based on the same allegations of "offensive" volume, tone and content.

5. Non-Amplified Speech is Protected. Plaintiffs' testimony refutes their own claims of nuisance, and thus of conspiracy. As to Powell and Scott's volume, Plaintiff Berberich could not identify *any* voices belonging to the protesters,[252] and could not even identify which protesters were in the front of the church.[253] Carlsen did not recall the protesters' "volume," only their "tone."[254] And Plaintiff Thompson was not aware of *any* noise by the protesters upon his arrival[255] or during the services inside as he *could not* hear the protesters when the doors were

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251 *Entm't,* 131 S. Ct. 2729, 2733, 180 L. Ed. 2d 708, 715 (emphasis added).
252 Berberich, Trial Tr. vol. 13, 111:17-20.
253 *Id*., 112:21-23.
254 Carlsen, Trial Tr. vol. 10, 196:12-21.
255 Thompson, Trial Tr. vol. 14, 123:16-23.

closed.[256] Again, Plaintiffs cannot now refute their own judicial admissions seen in this independent *de novo* review.

Moreover, Scott said the police never advised the demonstrators that they were disturbing the worship at any time.[257] Stringham testified that the *protesters had no amplifying equipment*.[258]

Peaceful protest is precisely what the *First Amendment,* and the *Colorado Constitution's Second Amendment*, are intended to protect. [259]

6. Religious Speech is Protected. Plaintiffs judicially admitted that Defendants engaged in religious speech: "Plaintiffs do not dispute that the message Defendants intend to deliver during their protests is a religious one, based on sincerely held religious beliefs."[260] As such, their speech is unquestionably protected by the *First Amendment*. Defendants cannot be punished for a conspiracy to commit a legal act through legal means.[261]

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256 *Id*., 132:10-15.
257 Scott Dep. 190:16-23.
258 Stringham, Trial Tr. vol. 15, 67:17-21.
259 *Flores v. Denver,* 122 Colo. 71, 78 (Colo. 1950)
260 *Plaintiffs' Motion in Limine*, R. 352.
261 *See McGlasson v. Barger,* 163 Colo. 438, 431 P.2d 778, 780 (Colo. 1967).

7. Plaintiffs Say: Preaching is Interference; Holding a Sign is Disruptive. Carlsen testified that by holding a graphic sign on the other side of 14th St., Powell was being "disruptive."[262] Carlsen also testified that in contending that the protesters were physically "interfering" with the worship service outside by reading the Bible and singing,[263] he meant "preaching" as being a physical act.[264] He said the protesters were "physically intruding," meaning they were "shouting."[265]

By Carlsen's own testimony, any alleged "disruption" and "interference" of the service was protected speech in a public forum in the form of "preaching" and "holding a poster." St. John's clergy made a conscious decision to lead parishioners in front of the protesters knowing they were on their cars preaching, holding signs and reading from the Bible. It cannot be said that Powell, holding a sign on the far side of 14th street, and Scott, reading the Bible in the public right of way with police authorization, interfered with their worship or use of church property, except in the most elastic use of the words. Certainly, Plaintiffs could

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262 Carlsen, Trial Tr. vol. 11, 93:18-21.
263 *Id.,* 64:10-14.
264 *Id*., 69:15-21.
265 *Id*., 69:11-14.

have avoided the protesters if they had wanted to. "Noise," as a restriction on speech, is only permitted when it presents a clear and present danger of violence, *or only when the communication is intended merely as a guise to disturb persons.*[266] The record does not support a finding that Powell and Scott were merely creating "noise" only as a guise to disturb Plaintiffs,[267] because for about 10 years, the protesters had been communicating the same religious messages to St. John's.

8. Violent Imagery is Protected Speech. In *Brown*, the Supreme Court held that violent images are protected speech, even if minors are the intended audience. In this case, the *Order on Remand* violates the *Brown* holding because in paragraph 3(ii)(b), it prohibits Powell and Scott from "displaying large posters or similar displays depicting gruesome images of mutilated fetuses or dead bodies in a manner reasonable likely to viewed by children under 12 years of age attending worship services and/or worship-related events at plaintiff church." Ironically, this prohibition against displaying "dead bodies" would prohibit the image of Christ on

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266 *People v. Fitzgerald,* 573, P.2d 100 (Colo. 1978).

267 *See supra*, Statement of Facts, "Religious Content."

a Crucifix, or President Kennedy lying in the Rotunda, but only of course, as to Powell and Scott.

The *Order on Remand* is inextricably based upon Defendants' *posters* and the *content* of their speech. The Plaintiffs did not show that, if had Ken Scott loudly sung *with* the St. John's choir and held flower posters from atop the car, the Plaintiffs would have still sued. Rather, they explicitly alleged in the *Amended Complaint* that Defendants' words, posters and volume were offensive during the two ten-minute processions. Throughout the *Order on Remand*, the trial court invoked *the content* of the posters and *the content of the demonstrators' words,* particularly in the findings for the buffer zones.[268] For example in ¶7 the Court

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[268] *Order on Remand*, R. at 1816-25; ¶9 ("large mutilated fetus poster displayed by Scott," and "yelling and display of fetus poster caused adults . . . to become visibly upset, fearful and angry," and "gory fetus poster he displayed"), ¶10 ("protection of children from being exposed to large, gruesome depictions of mutilated fetuses and dead bodies"), ¶11 ("he and his poster"), ¶ 13 ("Powell also displayed a large poster showing a mutilated fetus" . . ." highly probable that families with children did use that route" . . . parents were shielding their children's eyes from posters"), ¶14 ("Powell's conduct caused people to become visibly upset, fearful and angry"), ¶15 ("Permissible purposes . . . protection of children from being exposed to gruesome depictions of mutilated fetuses," "parishioners . . . yelled at"), ¶20 ("protection of children from being exposed to large gruesome depictions of mutilated fetuses and dead bodies"), ¶22 ("protect children from being exposed to gruesome depictions of mutilated fetuses, and to protect the privacy interest of parishioners in not being yelled or screamed at . . ."),

used the following references: "poster of mutilated fetus;" Carlsen was "leading them to hell" said "in close proximity to children;" and "referring to the fetus poster" and "displayed the fetus poster," such that "children . . . had to avert their eyes."

In *Brown,* Justice Scalia emphasized that violent imagery is not a new category of unprotected speech. He said the disputed violent-video statute in the *Brown* case attempted to create a "wholly new category of content-based regulation that is permissible only for speech directed at children." That is unprecedented and mistaken . . . "Speech 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 a legislative body thinks unsuitable for them."[269] The same reasoning applies in this case.

Scalia referred to violent books, fairy tales and comic books as examples of materials already unbarred to children. He did not expound upon today's cultural saturation with violent imagery at public libraries, in magazines at grocery stores, in television ads for violent movies, on 24-hour news channels, in newspaper

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¶23 ("Protection of children from . . . depictions of . . . mutilated fetuses").

[269] *Brown*, 131 S. Ct. at 2735-36, 180 L. Ed. at 717.

photos, in movie advertising, on DVDs, on the internet, on handheld mobile devices, in music lyrics and videos, and in television dramas depicting every conceivable gore and horror, real or fictional. Indeed, the attempt by the trial court to protect St. John's children from seeing, twice a year for a few minutes, posters of abortion's effects on the unborn, is not just an invalid regulation of content, and a quaint but implausible notion that it protects children from violent imagery. The *Order on Remand* impermissibly singles out Powell and Scott to restrict their message, while an entire establishment of commercial media takes for granted a *First Amendment* right to expose children to violent images in news and entertainment, 24 hours a day, even on religious holidays.

The Constitution allows no double standard for pro-life protesters. Defendants' posters are unquestionably protected speech. "Courts . . . have universally recognized that pro-life signs bearing images of aborted fetuses constitute protected speech."[270] The Court of Appeals in *St. John's I* incorrectly

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[270] *Swagler v. Sheridan*, 2011 U.S. Dist., LEXIS 74840 at *36 (D. Md. July 12, 2011), *citing Swagler v. Neighoff*, 398 F. App'x 872, 881 (4th Cir. 2010) (characterizing plaintiff's activity as "pure speech"); *United States v. Marcavage,* 609 F.3d 264, 283 (3d Cir. 2010); *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles County. Sheriff Dep't*, 533 F. 3d 780, 787 (9th Cir. 2008); *Ctr. for Bio-Ethical Reform v. City of Springboro*, 477 F.3d 807, 821-22 (6th Cir. 2007); *See also*,

cited *F.C.C. v. Becker*[271] as authority to protect children from pro-life images.[272] This is wrong. *Becker* in fact held that F.C.C. regulations did not permit a broadcaster to restrict such images.

As to St. John's claim to a competing *First Amendment* interest, in *Olmer v. City of Lincoln*,[273] the Eighth Circuit affirmed the facial invalidity of a city ordinance which language the *Order on Remand* in this case seems to parrot. The Lincoln ordinance restricted picketing of churches "thirty minutes before, during and thirty minutes after any scheduled religious activity."[274] Moreover, the ordinance sought to go "beyond the church building and church property . . . to forbid peaceful communication on property belonging to the public, even though the communication may be completely truthful, and even though there is absolutely no physical interference with access to the church."[275] Here, the trial court went "beyond the church building and church property," by punishing Defendants for their photos and speech indisputably shown and spoken in a public

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*R.A.V. v. City of St. Paul, Minn.* 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (government may not favor a viewpoint).

271 95 F. 3d 75 (U.S. App. D.C. 1996).

272 194 P.3d at 484.

273 192 F.3d 1176 (8th Cir. 1999).

274 *Id.* at 1178

275 *Id.* at 1179.

forum in compliance with St. John's own sidewalk permit, and under the watchful eye of Denver police.

9. *Madsen* is Improper on the Facts of this Case. Based on the cases cited above, Defendants ask the Court to reverse *St. John's* I and the trial court's judgments for nuisance and conspiracy, together with the *Order on Remand*. Paragraphs 3(ii)(a)(3) and 3(ii)(b) are substantively invalid, but more significantly, the *Order on Remand* is premised on unconstitutional judgments of nuisance and conspiracy to commit nuisance.

a. Judicial Admission: No Irreparable Harm.Carlsen was unaware of any irreparable harm to St. John's if the injunction did not issue.[276] None of Plaintiffs' other witnesses contradicted Carlsen's testimony. Accordingly, based on Carlsen's judicial admission, in this case there is no evidence of irreparable harm from Plaintiffs two 10-minutes encounters with the demonstrators.

b. Adequate Remedy at Law. The record shows that Plaintiffs could have requested a parade permit from the Denver police to reserve 14th St. itself.[277] Moreover, the *Denver Revised Municipal Code*, Sec. 36-1(b) specifically addresses

[276] Carlsen, Trial Tr. vol. 12, 160:2-17.
[277] Zimmerman, Trial Tr. vol. 70:11 – 71:3.

loud human voices. In short, the Plaintiffs have simple and adequate remedies at law to either reserve the streets surrounding the church by applying to the police department, or to file a complaint under the Denver noise ordinance. They did neither one in this case.

c. *Madsen's* Facts are Inapplicable. The trial court and *St. John's I* relied heavily on *Madsen v. Women's Health Center,*[278] involving an action by plaintiff-doctors to amend a previous injunction against demonstrations at an abortion clinic. The doctors claimed that, despite an existing injunction, the demonstrators were impeding access and 'physically abusing' persons entering and leaving, and that loudspeakers and bullhorns posed health risks to women during surgical procedures and recuperation, as well as when women delayed appointments due to the presence of demonstrators.[279] The demonstrators in *Madsen* "studiously refrained" from challenging the factual findings of the trial court.[280] The *Madsen* trial court was concerned with the "free flow of traffic," "residential privacy" and "medical "privacy" and "physical well-being of the patient."[281]

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278 512 U.S. 753, 114 S. Ct. 2516, 129 L.Ed. 2d 593 (1994)
279 512 U.S. at 758-759, 114 S. Ct. at 2521.
280 512 U.S. at 769, 114 S. Ct. at 2527.
281 512 U.S. at 768, 114 S. Ct. at 2526.

Obviously, none of the *Madsen* facts are present here. Plaintiffs tendered no medical evidence of harm to children or adults arising from Defendant's expressive conduct.

In *Madsen,* Justice Rehnquist noted that the speech restrictions ordered by the Florida state court's amended injunction were "incidental," because the demonstrators had "repeatedly violated the court's original order."[282] This unique fact in *Madsen* permitted a lesser standard of review than the "heightened scrutiny set forth in *Perry Ed. Assn* . . . ."[283] and thus *Madsen* allowed an injunction tested by burdening "no more speech than necessary to serve a significant government interest,"[284] but Madsen's facts were unique and its lesser scrutiny is too lax[285] for across-the-board *First Amendment* cases. Moreover, the recently-decided *Snyder* and *Brown* cases further prevent *Madsen's* application to this case. In fact, the

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[282] 512 U.S. at 763, 114 S. Ct. at 2523-2534.

[283] 460 U.S. at 45, 103 S. Ct. at 954-955.

[284] 512 U.S. at 765, 114 S.Ct at 2525.

[285] In a later case, *Cloer v. Gynecology Clinic, Inc*., 528 U.S. at 1099, 120 S. Ct. 862, 145 L. Ed. 2d 708 (2000), Justice Scalia dissented in the Court's denial of a petition for *writ of certiorari* to review a decision by the South Carolina Supreme Court. The latter upheld an injunction against clinic protesters on "a novel civil-conspiracy doctrine that places routine law First Amendment activity under threat of financial liability, and probably under threat of injunction throughout the State of South Carolina." 528 U.S. at 1101-02, 120 S. Ct. at 864, 145 L.Ed. 2d at 710.

portion of the amended injunction in *Madsen* prohibiting "images observable to . . .patients inside the clinic"[286] was struck down.[287] *Madsen's* amended injunction did *not* single out abortion photos, as does *St. John's I* and the *Order on Remand.* Beyond abridging Defendants' pro-life posters and preaching, the 'buffer zones" in this case abridge Defendants' freedom to choose where and when to display their Bible posters, leaflet their religious materials and preach their religious beliefs.

## CONCLUSION

In sum, the trial court's *Order on Remand* and *St. John's I* have unconstitutionally abridged "offensive" religious speech, "violent" imagery, preaching and leafleting in a public forum which according to the *Snyder* and *Brown* decisions and the authorities cited herein, are protected speech.

WHEREFORE, on these grounds, Powell and Scott pray that the Court of Appeals will reverse *St. John I* and the trial court's *Order on Remand.*

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[286] 512 U.S. at 760, 114 S. Ct. at 2522

[287] 512 U.S. at 774, 776, 114 St. Ct. at 2529, 2530.

Respectfully submitted this 6th day of September 2011.

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## CERTIFICATE OF SERVICE

I certify that on this 6th of September 2011, a true and correct copy of the ***OPENING BRIEF*** was filed via LexisNexis File and Serve or as indicated on the following:

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