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

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 5698 words.

s/ Rebecca R. Messall
Rebecca R. Messall

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

ARGUMENT

I. Summary

Plaintiffs assert a *First Amendment* right to worship outdoors in peace, which they claim outweighs Defendants' religious speech in a public forum on matters of public concern. They claim their right was violated because Defendants' protest was upsetting. Yet Plaintiffs were located: (1) *on the public sidewalk* going toward or away from the church services, (2) on the lawn for outdoor services *seventy-five yards*[1] *away* from Defendant Scott and even further from Defendant Powell who was across 14th Street[2] holding a sign, and (3) *on a public sidewalk for their procession.*

The record is awash with Plaintiffs' references to the content of the speech that upset them. Rev. Carlsen admitted that Defendants' message did not merely target Plaintiffs, but was directed to the public at large. The record is undisputed, that:

- Defendants broke no laws, cooperated with police, abided by Plaintiffs' sidewalk permit from the City; and that

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[1] Stringham, Trial Tr. vol. 15, 98.8-25, 99:1-4.

[2] Carlsen,. Trial T. vol. 11, 93:18-21.

- Denver police never warned defendants, let alone issued citations to them under the Denver municipal code prohibiting the disturbance of religious worship.

In light of the undisputed facts, it appears an unpopular message resulted in manifest injustice to Defendants and to Colorado's *First Amendment* law, all requiring *de novo* review and reversals of *St. John's I* and *the Order on Remand.*

Defendants reply below to each of Plaintiffs' points in roughly the same order as they are listed in the *Answer Brief.*

II. Defendants Did Not Waive Arguments as to the Constitutionality of the Buffer Zones

A. Defendants Did Challenge the Constitutionality of the Order on Remand, Including the Buffer Zones.

In the first section of the *Answer Brief,* Plaintiffs assert that Defendants failed to object to the restrictions in Zones 2, 3, 4, 5, and 6 and they, therefore, waived this objection. The Plaintiffs have misstated the Defendants' argument.

Importantly, *St. Johns I* considered the original injunction, without buffer zones (the "2006 Injunction").[3] *St John's I* employed the test for content-neutral

[3] Trial Tr. vol. 5: 1348-1350.

injunctions, i.e., restricting protected speech only as to time, place and manner.[4] This test inquires "whether the injunction burdens no more speech than necessary to serve the interests to be protected by the injunction."[5]

However, on remand in 2011, new language was added to the injunction which was *not* contained in the 2006 Injunction. This new language, therefore, was never reviewed in *St. Johns I.* Specifically, on remand the court inserted language restricting protected speech in terms of *content* by targeting (1) speech which causes people to get "physically upset," and (2) the exhibition of signs portraying aborted fetuses.

The 2006 Injunction was transformed into the new injunction which is decidedly content-based.[6] The test is now whether the *Order on Remand* "is narrowly tailored to serve a compelling state interest."[7]

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[4] *St. Johns Church in the Wilderness v. Scott*, 194 P.3d 475, 485 (Colo. App. 2008).

[5] *Id.*

[6] The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech without reference to the content of the regulated speech. *Madsen*, 512 U.S. 753, 763 (1994).

[7] *See Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 119 (1991)(where a regulation distinguishes speech based on content, the state must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end); *Perry*

Defendants do not attack the *Order on Remand* based upon whether it "burdens more speech than is necessary to serve the interests protected." Rather, their *Opening Brief* argues that the judgments and the *Order on Remand* as a whole and, therefore, all the newly added buffers zones contained therein, violate the *First Amendment* because they penalize protected speech based on its content.[8] The *Opening Brief* listed the remand court's repeated references in creating the buffer zones.[9] The *Order on Remand* is not "narrowly tailored to serve a compelling state interest," nor did the trial court make any findings which would satisfy that test.[10]

Nor can the *Order on Remand* ever meet the "compelling states interest" test because it restricts speech which is entitled to "special protection," as briefed,

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Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45 (1983)(For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end).

[8] *See Opening Brief*, pp. 35-47 (for argument that the Defendants' speech was protected under First Amendment), and pp. 35 (including note 250), 39-44 (for arguments that injunction is content-based).

[9] *See Opening Brief*, p. 40-41, note 268.

[10] Pursuant to the U.S. Supreme Court in *Perry* and *Simon and Schuster*, the burden of establishing that a regulation is narrowly tailored to serve a compelling state interest is on the state (in this case, the district court), and not the Defendants. *See* note 7, *supra*.

infra. Defendants are restricted from free speech in five different zones encompassing the public sidewalk around the church, as well as a significant portion of the public sidewalk across 14th Street.[11] Yet, Defendants' protesting activities took place only in Zones 5 and 6.

The rationale for the numerous zones was that if the Defendants were prevented from protesting in one zone, they would move to another: "It is highly probable that should Scott and Powell be enjoined from demonstrating in Zones 5 and 6, they would demonstrate in Zone 4;"[12] "if the defendants were enjoined from demonstrating in Zones 4, 5, 6 and the north half of Zone 3, it is probable they would demonstrate in the south half of Zone 3, which would be the closest they could then get to parishioners and the outside services;"[13] "if Defendants were enjoined from demonstrating in other zones, it is highly probably that they would demonstrate in Zone 2 to get as close to parishioners as possible."[14] These buffer zones are not "narrowly tailored,"[15] as the reasoning is circular, and the zones do

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[11] *See Order on Remand*, R. at 1818-1825; see graphic depicting property at issue and zones, R. at 1066.

[12] *Id.*, R. at 1822.

[13] *Id.*, R. at 1823-24.

[14] *Id.*, R. at 1824.

[15] This is especially true as the Supreme Court in *Madsen*, applying the

not meet a compelling state interest scrutiny.

Moreover, the restrictions in Zone 6 were based, in part, on the fact that Rev. Carlsen *chose* to stand between the protesters and people walking to the church from the parking lot as a "buffer."[16] The court stated that the permissible purpose served by the restrictions in Zone 6 was "the ability of St. John's to use its property as it chooses for worship services by having its clergy participate in the celebration of services rather than having to act as a buffer between defendants and parishioners."[17]

But Defendants cannot be blamed for the Rev. Carlsen's voluntary actions, especially where he could have asked another person to serve as a "buffer." This purpose of the injunction cannot be considered a "compelling state interest."

B. The Plaintiffs Improperly State the Standard of Review.

1. The Injunction Must be Reviewed *De Novo*.

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more lenient "burdens only as much speech as necessary" test to a content-neutral injunction, found that an injunction which restricted protesting activity on private property abutting the back and side of the clinic were unconstitutional as they burdened more speech than necessary to protect access to the clinic. *Madsen*, 512 U.S. at 771.

[16] *Id.*, R. at 1821.

[17] *Id.*, R. at 1822.

Plaintiffs claim that this Court should review the *Order on Remand* for abuse of discretion.[18] Plaintiffs are wrong, and they concede that questions of constitutional law are reviewed *de novo*.[19]

2. The Injunction Must be Narrowly Tailored to Serve a Compelling State Interest.

Plaintiffs claim that the buffer zones in the *Order on Remand* should "burden no more speech than necessary to serve a significant government interest."[20] This is incorrect, because the "narrowly tailored to serve a compelling state interest" test applies.

C. The *Opening Brief* Did Refer to the Applicable Standard of Review.

Plaintiffs claim that the Defendants failed to include a standard of review it the *Opening Brief*.[21] This is incorrect. On page 33 of the *Opening Brief*, Defendants state the standard of review is *de novo* for their third issue of appeal. Additionally, they state that the proper test to be applied is the "compelling state interest" test set forth in *Perry*.[22]

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18 *Answer Brief*, p. 12.
19 *See Answer Brief*, p. 12.
20 *Id.*
21 *Id.*
22 *See Opening Brief*, p. 33, and note 243.

III. The Court on Remand Acted Outside its Jurisdiction in Failing to Vacate, and Instead Modifying, the Injunction's Restriction on Entering the Church.

In the *Opening Brief*, Defendants asserted that the court on remand erred in failing to remove the restriction on entering the church property[23] as mandated by *St. John's 1*. In response, Plaintiffs argue that the court on remand *did* eliminate the restriction as written, and replaced it with a *modified* version which prevents entry onto church property "on days on which they engage in any conduct proscribed by this injunction."[24] But the court on remand did not have authority to modify, rather than vacate, as mandated by *St. John's I.*

The mandate of the Court of Appeals instructed the trial court as follows:

> … . The injunction order is vacated as to the restriction on Scott's and Powell's entry onto the Church's property; the case is remanded for specific findings and, if necessary, amendment of the injunction as to the place and manner restrictions on picketing and noise in each buffer zone; …[25]

Accordingly, the court on remand was to *vacate* the restriction on the Defendants' entry onto church property, and make findings, and amend the

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[23] Paragraph i of the *2006 Injunction* and paragraph 3i of *Order on Remand.*

[24] *Answer Brief, p. 18.*

[25] *St. John's I*, 194 P.3d at 489.

injunction as necessary, *as to the buffer zones*. Notably, the court in *St. John's I* did *not* remand for findings, or amendment of the injunction, as to *entry on the church property*.

Any judgment which exceeds that which is directed by a mandate is void.[26] Accordingly, because the court on remand failed to vacate paragraph i of the *2006 Injunction*, but instead modified it, the *Order on Remand's* paragraph 3i is void.

Nonetheless, Plaintiffs attempt to justify the trial court's error by arguing that the restriction is necessary to prevent Defendants from going inside the church in the event they otherwise might violate the injunction.[27] This argument is based on pure speculation. As stated by *St. John's I*, "there is no evidence that Scott and Powell entered the Church, or the Church's property, created private nuisance inside the Church, or conspired to do so."[28] Under these circumstances, certainly there can be no finding of *imminent danger* of irreparable harm as necessary to

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[26] *Pet, Inc. v. The Honorable Charles Goldberg*, 547 P.2d 943, 945 (Colo. App. 1975); *see also Britton v. Dowell,* 243 F.2d 434, 435 (10th Cir. 1957)(upon remand from an appellate court with a specific mandate, the trial court is limited to the imperative of the mandate and is without jurisdiction to vary or extend it).

[27] Again, the injunction is based on the assumption that if the Defendants are enjoined from protesting in one area, they will necessarily engage in the proscribed conduct in another.

[28] *St. John's I*, 194 P.3d at 481.

support injunctive relief.[29]

IV. The Opinions of the United States Supreme Court in *Snyder* and *Brown* Control this Case.

A. *St. John's I* is Not Law of the Case as to Issues It Did Not Address, and Which Were Not Before It.

Plaintiffs claim that the law of the case doctrine should be applied with respect to the Defendants argument that paragraph 3(ii) of the *Order on Remand* should be vacated.[30] However, the law of the case doctrine does not apply because those portions of the paragraph 3(ii) to which the Defendants object (namely, those provisions pertaining to the content of Defendants speech) were not before the court in *St. John's I*, but were added to the injunction by the court on remand.[31] As stated in *People v. Roybal*, the pronouncement of an appellate court *on an issue in*

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[29] *See Conway-Bogue Realty Investment Company v. Denver Bar Association*, 312 P.2d 998, 1004 (Colo. 1957)(it is a general rule that a court of equity will grant an injunction only where there is imminent danger of irreparable injury or damage); *see also Green v. Castle Concrete Company*, 509 P.2d 588, 591 (Colo. 1973)(refusing to grant injunctive relief based on speculation that activity may create a nuisance).

[30] *Answer Brief*, p. 16.

[31] *Compare* section 3(ii) of original injunction issued by the trial court on October 24, 2006 (*Permanent Injunction*, R. at 1696), to revised injunction entered by the trial court on remand (*Order on Remand*, R. at 1817).

a case presented to it becomes the law of the case.[32]

B. The Law of the Case Doctrine is Merely Discretionary and Need Not be Followed by this Court.

The law of the case doctrine as applied to a court's power to reconsider its own prior rulings is merely a "discretionary rule of practice,"[33] not mandatory. The court that makes a decision has the power to reconsider it, as long as the case remains within its jurisdiction.[34] The doctrine is more flexible in its application to reconsideration by the court making the decision, because there the only purpose of the doctrine is efficiency of disposition. [35]

C. The Decisions of the U.S. Supreme Court in *Brown* and *Snyder* Control the Legal Issues Presented in this Case on Restricting *First Amendment* Speech.

i. Brown v. Entertainment Merchants Association.

In *St. John's I,* the court found that the protection of children from "gruesome pictures" is a proper content-neutral purpose for the 2006 Injunction.[36] However, it is important to consider that in *St. John's I*, the court of appeals was

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[32] 672 P.2d 1003, 1005 (Colo. 1983).

[33] *People v. the District Court in and for the County of Arapahoe,* 666 P.2d 550 (Colo. 1983).

[34] *Roybal*, 672 P.2d at 1005, n. 5.

[35] *Id.*

[36] *St. John's I*, 194 P.3d at 484.

considering the 2006 Injunction which did *not* specifically prohibit pictures of dead bodies and aborted fetuses.[37] This is in sharp contrast to the *Order on Remand* which specifically prohibits the Defendants from "displaying large posters or similar displays depicting gruesome images of mutilated fetuses or dead bodies in a manner reasonably likely to be viewed by children under 12 years of age attending worship services and/or worship-related events at plaintiff church."[38] The *Order on Remand* restricts both subject matter (dead bodies) and a specific viewpoint (anti-abortion, i.e., aborted fetuses). Clearly it is not content-neutral,[39] and with no compelling state interest.

In *Brown v. Entertainment Merchants Association*,[40] decided subsequent to *St. John's I*, the United States Supreme Court found that the protection of children from violent images *is not a compelling state interest*.

ii. Snyder v. Phelps.

The United States Supreme Court in *Snyder v. Phelps*, also decided after *St.*

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[37] Notably, the injunction reviewed by *St. John's* did not make any reference to "gruesome" images, let alone dead bodies or aborted fetuses.

[38] *Order on Remand*, ¶ 3(ii)(b), R. at 1717.

[39] Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation. *Hill v. Colorado*, 530 P.3d 702, 723 (2000).

[40] 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011).

John's I, pronounced that speech in a public forum on matters of public concern is entitled to "special protection" under the *First Amendment* and "cannot be restricted simply because it is upsetting or arouses contempt."[41] However, the *Order on Remand* specifically restricts Defendants' speech which causes parishioners to get "physically upset."[42] *Snyder* reaffirmed the rule that the *First Amendment* is a *defense* to tort claims, such as nuisance and civil conspiracy, and not merely applicable in the context of government-promulgated law or regulation.

V. *St. John's I* Erred in Affirming Paragraphs 3(iii) and (iv) of the *Order On Remand* because these Paragraphs Lacked Any Supporting Allegations or Evidence to Enjoin Defendants from "Blocking Access" and "Violation Through Surrogates."

Standard of review. In addition to their *First Amendment* grounds which require *de novo* review, Defendants appealed the "clear error" that enjoined them from 'blocking access' and 'acting through surrogates' where (1) the trial court itself specifically found that the Defendants: "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 (emphasis added)."[43] (2) *St. John's I* conceded

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41 131 S.Ct. 1207, 1219 (2011).

42 *Order on Remand*, 3(ii)(a)(3), R. at 1817.

43 Findings, Trial Tr. vol. 19, 21:15-18.

that no evidence at trial supports the ruling and (3) neither of these acts were alleged in the *Amended Complaint*.

Most importantly, as upheld by *St. John's I*, these provisions of the *Order on Remand*, i.e., paragraphs 3(iii) and (iv), punished Defendants for their exercise of protected religious speech on matters of public concern in a public forum, despite the total lack of an evidentiary nexus to support paragraphs 3(iii) and (iv).

In their *Answer Brief*, Plaintiffs wrongly state: "Both of these rulings in *St. John's I* are . . .supported by overwhelming evidence in the record."[44] But the Court will note that Plaintiffs did not cite any actual supporting evidence. The trial court and *St. John's I's* found no supporting evidence. Plaintiffs' own witnesses, Rev. Carlsen, Dean Eaton, Canon Randall, Plaintiffs Thompson and Berbich, admitted this as well:

- Carlsen admitted that the protesters did not protest at any of the five main doors of the cathedral.[45] Carlsen did not file a formal complaint with the police concerning the protesters conduct.[46]
- Eaton admitted he did not see any protesters interfere with, block or impede any parishioners.[47]

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44 Answer Brief, p. 22.

45 Carlsen, Trial Tr. vol. 11, 12:20-25.

46 Carlsen, Trial Tr. vol. 10, 216:24 – 217:2.

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

- Carlsen admitted he never saw Powell block or interfere with the movement of the people walking across 14th St.,[48] and in fact, *he never witnessed any protesters impeding, or blocking or physically stepping in front of anyone.*[49]
- Carlsen also admitted that churchgoers had other alternate routes to enter the church other than the 14th St. entrance.[50]
- St. John's Canon Randall also admitted it was possible for parents and their children to enter on the other side of the building.[51]
- Dean Eaton had given parishioners the choice of going inside instead of going on the procession.[52]
- Plaintiff Berberich had no knowledge of any protester blocking or impeding access to St. John's.[53] *He had no knowledge of anyone who did not complete it.*[54]
- Plaintiff Thompson *did not notice anyone attempting to block the procession.*[55]

Accordingly, paragraphs 3(iii) and (iv) of the *Order on Remand* are wholly unsupported by the record. Relying on *Broncucia v. McGee*,[56] Plaintiffs would have this Court hold that that, even if the judgments and injunction in the *Order on*

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[48] 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.

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

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

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

[52] Eaton, Trial Tr. vol. 16, 185:4-11.

[53] Berberich, Trial Tr. vol. 13, 111:9-12.

[54] *Id*., 111:9-16.

[55] Thompson, Trial Tr. vol. 14, 157:1-5

[56] *Answer Brief, p.22, citing Broncucia v. McGee*, 475 P.2d 336, 337 (Colo. 1970).

Remand abridge the *First Amendment*, and even if two courts conceded that no evidence supports paragraphs 3(iii) and (iv), this Court's standard of review is merely "abuse of discretion," not *de novo* review, and not a review for "clear error."

However, *Broncucia* is inapplicable, because *Broncucia* was not a *First Amendment* case and *de novo* review was not even considered. Here, *St. John's I* conceded that no evidence [57] exists that Defendants "blocked access" to the church or "acted through surrogates" to do anything. Therefore, due to "clear error," under C.R.C.P. Rule 52(a), and due to the Defendants' *First Amendment* defenses here, *de novo* review and thereupon, reversal, are both required.[58]

Plaintiffs' argument that *St. John's* I is 'law of the case' is wrong.[59] The doctrine of 'law of the case' is improper in this appeal because of (1) the grave factual errors underlying paragraphs 3(iii) and (iv) of the *Order on Remand*, (2) the resulting manifest injustice to Defendants' religious speech in a public forum on

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[57] *See Answer Brief*, pp. 21-22, quoting from *St. John's I*, which itself did not delineate any facts from the record that Defendants had "blocked access" or "acted through surrogates," 194 P.3d at 481-482.

[58] *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)(the *First Amendment* requires independent review of the record).

[59] *See Answer Brief*, p. 21, *citing Vashone-Caruso v. Suthers*, 29 P. 3d 339, 343 (Colo. App. 2001).

matters of public concern, and (3) the new United States' Supreme Court's rulings on *First Amendment* law, giving "special protection" to speech in a public forum on matters of public concern, and protecting violent images even if they allegedly 'target children.'

A. Because the *First Amendment* Protects Offensive, Annoying and Upsetting Speech, Colorado's Common Law of Nuisance May not Trump Religious Speech in a Public Forum on Matters of Public Concern

An action such as this to punish 'upsetting' speech cannot be shoehorned to fit the conceptual framework of a case based on substantial and continual interference with the use real property by one landowner against another landowner. In those types of suits "the defendant's liability rests on a duty he owes as an occupier of land to *prevent conditions on his land,* particularly those he himself has created, from injuring others."[60]

Defendants might have appealed from a lack of evidence constituting the necessary elements of a common law nuisance because actually: (1) no *continual* interference with Plaintiffs' use of church property occurred (the alleged interference/upsetting speech was for two 10-minute processions in which

[60] *Allison v. Smith*, 695 P. 2d 791, 794 (Colo. App. 1984)(emphasis added).

Plaintiffs used *a public sidewalk),* and (2) and the alleged interference to Plaintiffs' land was not 'substantial in nature.'[61] "A legal 'nuisance' is thus predicated upon a *substantial invasion* of the plaintiff's property, which is "more than slight inconvenience or petty annoyance . . .[involving]. . . *real and appreciable interference* with the present *usability of a person's land*."[62]

Here, the alleged substantial invasion was not with the use of church property, but with *Plaintiffs' use of the public sidewalk* for two 10-minute processions, and with parishioners' use of *the public sidewalk* before and after services to get to and from their cars. Otherwise, Defendants were at least 75 yards away from the gathering on the church lawn. See footnote 1, *supra.*

But this appeal is based on the claim that Defendants' fundamental *First Amendment* religious speech in a public forum on matters of public concern cannot be neutered by a private action under state tort law. Here the civil judgments, including costs, and the injunctive relief in the *Order on Remand* relegate protected

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[61] *See Lowder v. Tina Marie Homes*. *Lowder v. Tina Marie Homes, Inc*., 601 P.2d 657, 658 (1979)(a non-*First Amendment* nuisance case where court found that wind-blown soil from defendants' property causing high drifts on plaintiffs' land over a 14-month period of time was 'substantial in nature').

[62] George E. Reeves, *Colorado Real Property Law*, p.851 (Bradford Publishing, Denver, CO 2005)(emphasis added).

speech to a time and place unacceptable to Defendants. Their speech is entitled to "special protection" under the rule of *Snyder*. The undisputed testimony and photos proved that Plaintiffs' outdoor worship activities were never physically impeded whatsoever. The Defendants' punishment is wholly based on Plaintiffs' claim that because they were made 'upset,' Defendants had 'interfered' with their outdoor worship, *on the public sidewalk,* and their use of the public sidewalk coming and going to church. Indeed, Plaintiffs cite no authority in Colorado law except *non-First Amendment* real estate disputes.[63]

However, "[t]he Free Speech Clause of the *First Amendment* can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress."[64] Under the *First Amendment*, the judgments and injunction against Defendants must all be reversed because Defendants' *religious speech was in a*

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[63] *See Answer Brief*, p. 22, *citing Pub. Serv. Co. v. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001)(*non-First Amendment* dispute in which plaintiff landowners complained that power lines on electric company's nearby easement emitted *continual* electromagnetic radiation and noise causing depreciation in their property value, loss of use and mental suffering) and *Lowder v. Tina Marie Homes, Inc*., 601 P.2d 657, 658 (1979)(non-*First Amendment* dispute in which plaintiff landowners complained that loose soil on defendants' property caused high dirt drifts to be deposited onto plaintiffs' land over a 14-month period of time).

[64] *Snyder*, 131 S. Ct. at 1215, *citing Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50-51 (1988).

public forum on matters of public concern. "Such speech cannot be restricted simply because it is upsetting or arouses contempt."[65]

"As in other First Amendment cases, the court is obligated "to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression."[66]

B. Without an Unlawful Overt Act, the Judgment for Civil Conspiracy Must be Reversed.

In reciting the elements of a civil conspiracy, the *Answer Brief* does not rely on *First Amendment* cases.[67] Defendants contend that *Snyder v. Phelps* controls this case. In *Snyder,* a jury found the demonstrators liable for an underlying tort together with a civil conspiracy to commit it. Mr. Snyder argued that even constitutionally protected speech could be penalized in tort because Snyder was a member of a captive audience at his son's funeral. [68] His argument was rejected as to the underlying torts and, the United State Supreme Court also ruled: " … we

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[65] *Id*. at 1219 (p.12).

[66] *Id*. at 1216, *citing Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499(1984)(*quoting New York Times v. Sullivan,* 376 U.S. 254, 284-286 (1964).

[67] *Answer Brief*, p. 27-28.

[68] 131 S. Ct. at 1219.

must likewise hold that Snyder cannot recover for civil conspiracy based on those torts."[69]

C. Plaintiffs Did Not Offer Proof of Irreparable Harm.

Plaintiffs' argument that the record supports a finding of irreparable harm is mistaken on three levels: (1) The *Order on Remand* and *St. John's I* are invalid under the *First Amendment*, and further by the lack of evidence in support of paragraphs 3(iii) and (iv), and the error in failing to vacate 3(i); (2) the proper standard of review is not 'sufficiency of the evidence,' but rather '*de novo* review;' (3) Plaintiffs both admitted there was no irreparable harm (i.e. Rev. Carlsen) and failed to testify whatsoever that irreparable harm would occur (i.e. Berbich, Thompson, Eaton and Randall). Defendants have already addressed the first and second points.

As to the third point, above, Plaintiffs' primary witness was Rev. Carlsen. He testified that he was unaware of any irreparable harm to St. John's cathedral if the injunction did not issue.[70] The *Answer Brief* does not refute Carlsen's admission. Instead, the *Answer Brief* reverts to the trial court's findings and the

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69 *Id*. at 1220.

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

erroneous 'sufficiency of the evidence' standard of review. No testimony from Plaintiff Thompson was quoted at all. But, even Plaintiff Berbich did not say he would suffer irreparable harm; just that he was "very disappointed." "Disappointment" is not a cognizable basis for injunctive relief or for a tort claim.[71]

D. The *First Amendment* Bars a Ruling that the Injunction Does Not Adversely Affect the Public Interest.

Plaintiffs' argument that the *Order on Remand* does not adversely affect the public interest is misplaced. The *Answer Brief* cites the trial court, which presumed that "upsetting" the parishioners was tantamount to "interfering" with Plaintiffs' outdoor worship. The *Answer Brief* quotes from the trial court that Defendants' speech "interfere[d] with religious services and the protection of children." [72] Defendants believe they have adequately briefed the factual and *First Amendment* error in upholding a finding of "interference" by reason of being 'upset,' and the error of "protecting children" from Defendants' speech.

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[71] *Compare*, *Coors Brewing v. Floyd*, 978 P. 2d 663 (Colo. 1999)(a claim for intentional infliction of emotional distress by outrageous conduct requires conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community).

[72] *Answer Brief*, p. 31.

The *Answer Brief* also contends that the *Order on Remand* is "consistent with public policy"[73] due to the existence of *Denver Ordinance § 38-90*, prohibiting disturbance of religious worship. However, the *Opening Brief* argued that the police officers' testimony, coupled with Plaintiffs' own admissions, that the Defendants *did not* violate *§ 38-90*, showed that: (1) the record therefore did not support the civil judgments, costs and *Order on Remand*, and (2) Plaintiffs had an adequate remedy at law, but did not pursue it. Plaintiffs' argument, moreover, would vest judges with the powers of police and prosecutors, to enforce by civil law what is only the discretionary authority of law enforcement.

The *Answer Brief* also refers to an erroneous finding by Judge McMullen which was not supported by the record, i.e., that Defendants had been previously cited "under this ordinance." First, the record contains no evidence that Defendant Powell had ever been "cited" at all. Second, the record contains no evidence that either of the Defendants were "cited under this ordinance [§38-90]." Third, even if the record contained evidence of a failed "citation" for protected *First Amendment* speech, such evidence was not admissible under C.R.E 404 "to show action in conformity therewith," absent a four-part inquiry which the trial court did not

[73] *Answer brief*, p. 32.

conduct.[74]

E. Plaintiffs Admitted That Their Right to Worship was Unimpeded; and the *First Amendment* Bars any Claims that the Defendants' Speech 'Upset' Plaintiffs or Children.

The *Answer Brief* relies nearly entirely[75] on a 'sufficiency of the evidence' standard of review. Defendants contend this Court must consider the evidence first-hand, especially the Plaintiffs' own judicial admissions. In the *Opening Brief*, Defendants demonstrated from the record that, in reality, Plaintiffs found the content and non-amplified volume of Defendants' protest to be upsetting, although they insinuated that Defendants *physically* restricted Plaintiffs' worship. The record shows that Plaintiffs' outdoor and indoor services were not physically restricted or impeded. If Defendants' speech disturbed the Plaintiffs' peace of mind, such is the purpose of the *First Amendment*, as was held in *Snyder v. Phelps*.

i. Because Plaintiffs' Right to Worship was not Impeded, No Government Interest Supports the *Order on Remand* and *St. John's I.*

The *First Amendment* protection enunciated in *Snyder* is a "special protection" for non-amplified, religious speech and posters in a public forum on

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[74] *See Kinney v. People*, 187 P.3d 548 (Colo. 2008), *citing People v. Spoto*, 795 P. 2d 1314, 1318 (Colo. 1980).

[75] *See Answer Brief*, Statement of Facts, pp. 3-10],

matters of public concern. Plaintiffs' choice to conduct their worship outdoors on the lawn and a public sidewalk does not magically vest them, or any court, with power to tell everyone who approaches to be worshipful too.

Plaintiffs mistakenly rely on *St. David's Episcopal Church v. Westboro Baptist Church. ("St. David's").*[76] By virtue of the rulings by the United States Supreme Court in *Snyder* and *Brown*, and by virtue of the fact that *St. David's* was not a Colorado opinion, *St. David's* has no precedential value to this case. Moreover, Plaintiffs merely cite to *dicta. St. David's* had no evidentiary record, and did not decide whether the protesters' speech was protected. Plaintiffs continue to argue that an exception exists to the *First Amendment* where children might see pictures of aborted fetuses. This argument is without merit under *Brown* and many other cases, as Defendants have adequately briefed.[77]

ii. The *Order on Remand* Fails because it is Based on Judgments Which Violate the *First Amendment* and it is Not Based on a Compelling State Interest.

The judgments for nuisance, civil conspiracy and costs fail because upsetting speech is protected by the *First Amendment.* Plaintiffs never offered expert

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[76] 921 P.2d. 821 (Ct. App. 1996).

[77] See *Opening Brief*, pp. 39-44.

medical or psychological testimony of actual harm to any children, merely hearsay testimony. Because the judgments fail under the *First Amendment*, the *Order on Remand* must also fail because it enforces the unconstitutional judgments.

Moreover, the *Order on Remand* took dramatic aim at the content of Defendants' speech. Absent a compelling state interest, the content of Defendants' speech may not be abridged by the *Order on Remand* and *St. John's I.*

While the *Answer Brief* argues that the *Order on Remand* is "carefully tailored to burden no more speech than necessary," it is in reality carefully tailored to prevent Defendants from upsetting Plaintiffs. The Plaintiffs' argument that Defendants may advance their message anywhere else begs the issue in this appeal, which is that Defendants were entitled to "special protection" under the *First Amendment* to speak in the manner, at the time, and at the locations where they spoke on Palm Sunday 2005.

CONCLUSION

The *First Amendment* prohibits this Court from upholding the judgments for nuisance, civil conspiracy, costs and the *Order on Remand's* broad injunction, all of which abridge Defendants' non-amplified, religious speech and posters in a public forum on matters of public concern. Nor can the Court uphold the

provisions of the *Order on Remand* which bar Defendants from "trespass," "physically blocking access," and "acting through surrogates." These provisions merely served as additional, though baseless, punishments to chill and penalize Defendants for the content of their protected speech.

Accordingly, Defendants pray that the Court will reverse the *Order on Remand* and *St. John's I*, and dismiss Plaintiffs' claims with prejudice.

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s/ Rebecca R. Messall
Rebecca R. Messall
Hackstaff Law Group, LLC
1601 Blake Street, Suite 310
Denver, Colorado 80202
303-534-4317
rm@hackstafflaw.com

Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify that on this 21st of November 2011, a true and correct copy of the **REPLY *BRIEF*** was filed via LexisNexis File and Serve or as indicated on the following:

Russell O. Stewart, Esq.
Marie E. Williams, Esq.
Faegre & Benson, LLP
1700 Lincoln Street, Ste. 3200
Denver, CO 80202

s/ Inga Dietzman