No. 13-3036

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SURVIVORS NETWORK OF THOSE ABUSED BY PRIESTS, INC., *et al.*,

Plaintiffs-Appellants,

v.

JENNIFER M. JOYCE, *et al.*,

Defendants-Appellees

On Appeal from the United States District Court
for the Eastern District Of Missouri

AMICUS CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

SUPPORTING APPELLANT'S REQUEST FOR REVERSAL

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December 9, 2013

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus respectfully states that it is a private, nonprofit corporation.

Amicus has no parent company, nor does any publicly held company own ten percent (10%) or more of amicus stock.

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CONSENT TO FILE

The parties to the appeal have no objection to the filing of this *amicus curiae* brief.

INTEREST OF THE *AMICUS CURIAE*[1]

The Thomas Jefferson Center for the Protection of Free Expression, located in Charlottesville, Virginia, is a nonprofit, nonpartisan organization devoted solely to the protection of free speech and free press. The Center has, since its opening in 1990, pursued that mission in various forms, including the filing of *amicus curiae* briefs in both state and federal courts involving a variety of free expression issues.

SUMMARY OF THE ARGUMENT

The House of Worship Protection Act, Missouri Revised Statutes § 574.035, severely constrains free speech about matters of intense public interest and concern in a traditional public forum. The statute applies only to expression that intentionally disrupts a church service. As a result, the statute is not a content-neutral time, place and manner restriction, but instead it is a content-based restriction on church-related protest speech. Furthermore, the statute's scienter

[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that the Thomas Jefferson Center for the Protection of Free Expression paid the expenses involved in filing this brief.

requirement makes the statute viewpoint-based as it criminalizes disruptive speech and expressive conduct if, and only if, the speaker intends to disrupt the solemnity of a worship service. In design and effect, this requirement inherently biases the law against those holding a viewpoint critical of a church.

Under strict scrutiny, this statute fails to have a sufficiently compelling interest to justify its content-based speech restriction. Missouri's interest in protecting unwilling listeners does not fall under any applicable exceptions to First Amendment protection recognized by the Supreme Court. The law is tellingly underinclusive because it prohibits only intentionally disruptive speech, but permits other kinds of speech disruptive to the solemnity of a worship service.

The statute applies to traditional public spaces such as parks, squares, and sidewalks, providing uniquely strong protections for religious speech and conduct while prohibiting constitutionally protected secular counter-speech. Accordingly, it violates both the Equal Protection Clause and Establishment Clause of our Constitution.

ARGUMENT

I. BY REQUIRING AN INTENT TO DISRUPT THE SOLEMNITY OF A WORSHIP SERVICE, THE STATUTE UNCONSTITUTIONALLY PROHIBITS SPEECH BASED ON ITS CONTENT AND THE VIEWPOINT OF THE SPEAKER.

The challenged statute applies only to certain messages, and the nature of the message itself dictates whether the expression is restricted. As it functions, the law creates a prohibition on speech that is ". . . dependent on . . . the degree to which the act of delivering it *intentionally disrupts* the solemnity of the [worship] service," *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 2013 U.S. Dist. LEXIS 56337, 36 (E.D. Mo. Apr. 19, 2013) (emphasis added). The statute is a regulation of specific content and even viewpoint, not just the time, place and manner of expression, and it implicates principles of free expression that compel a rigorous constitutional review. Under strict scrutiny, the law's inherent content bias, viewpoint bias, and inadequate purported justification collectively require that this Court find the statute unconstitutional.

A. By Prohibiting Only Expression that Intends to Disrupt, the Statute Focuses on the Content and Viewpoint of Speech

Missouri's House of Worship Protection Act makes it a crime to "[i]ntentionally and unreasonably disturb, interrupt, or disquiet any house of worship by using profane discourse, rude or indecent behavior, or making noise . . . so near it as to disturb the order and solemnity of the worship services." Mo. Rev.

Stat. § 574.035 (2012).[2] The act criminalizes expression in the form of actual speech (i.e., profane discourse), and in the form of expressive conduct (i.e., rude or indecent behavior). While many criminal statutes require intent as an element for conviction, the constitutionally significant difference in the statute here is that the requisite intent is inherently linked to a single content category: church protest speech. In *Neighborhood Enterprises v. City of St. Louis*, the Eighth Circuit reviewed a city zoning code's sign regulation. Exemptions built into the regulation's definition of "sign" required reviewing a sign's message to determine "whether the speech [was] subject to the restriction." 644 F.3d 728, 736 (8th Cir. 2011). Because a review of the sign's message was required, the Eighth Circuit held the regulation to be "impermissibly content-based." *Id*. In *Kirkeby v. Furness*, 92 F.3d 655 (8th Cir. 1996), the Eighth Circuit similarly held that a residential picketing ban was written in a way that created a content-based speech restriction. Because the statute partially defined picketing as an "inten[t] to convey a 'persuasive' message or to 'protest some action, attitude or belief,'" the Court found that the law prohibited only one category of content: intentional protest or persuasion. *Id.* at 659. As such, it was unconstitutional.

[2] "House of Worship" is broadly defined to include any "public or private place used for religious worship, religious instruction, or other religious purpose." Id.

The same defect is apparent in § 574.035. To determine if speech violates the statute, the government must examine the speaker's message. For example, if two groups were demonstrating in Latin outside of a Catholic Church, the actual meaning of their words would need to be understood before it could be determined whether they intended to disrupt the church, or were stating an affirmation of Catholic principles. Only the group with intent to disrupt would be subject to liability. Thus, the "regulation is based on the content of speech," and is not "applicable to all speech irrespective of content." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980) (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 209 (1975)). In prohibiting only speech and conduct that intends to disrupt worship, the statute applies solely to speakers expressing views contrary to those held by the people attending the church service. While enthusiastically shouting "this sermon is great!" may unreasonably disturb a church service, it strains credulity to say the truthful speaker of that phrase also intends to "disturb the order and solemnity of the worship services."

This House of Worship Protection Act silences and criminalizes non-church members who express a viewpoint unpopular within the church. Thus, the statute will have a chilling effect on those who hold viewpoints at odds with those of churchgoers.

B. As a Content-Based Speech Restriction, the Statute Fails Strict Scrutiny because the Asserted State Interests are Insufficient to Justify the Law's Scope.

It is well-established that "content-based restriction[s] on . . . speech in a public forum must be subjected to the most exacting scrutiny." *Boos. v. Barry*, 485 U.S. 312, 321(1988). This level of scrutiny requires a law to be "narrowly drawn to effectuate a compelling state interest." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). Missouri claims an interest in protecting the right to worship, and consequently the worshiper's right to avoid the prohibited speech. However, the Supreme Court has only upheld speech prohibitions for the protection of listeners in limited circumstances. As such, the state's asserted interest is not strong, let alone compelling, and the statute fails strict scrutiny review.

In *Consolidated Edison*, the Supreme Court stated, "to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that *substantial* privacy interests are being invaded in an essentially intolerable manner." 447 U.S. at 541 (emphasis added). The Court later declined to find that an interest "in protecting public figures from emotional distress [was] sufficient to deny First Amendment protection" to "patently offensive" speech and speech "intended to inflict emotional injury." *Hustler Magazine v. Falwell*, 485 U.S. 46,

50 (1988) (discussing the "First Amendment limitations upon a State's authority to protect its citizens from the intentional infliction of emotional distress.").

The Supreme Court has approved restrictions intended to protect unwilling listeners from unwanted speech only in limited circumstances. The Court found that "individuals are not required to welcome unwanted speech into their *own homes* and that the government may protect this freedom." *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988) (emphasis added). The *Frisby* Court upheld an ordinance prohibiting picketing before or about an individual's residence where, "the picketing is narrowly directed at the household, not the public," and "the devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt." *Id*. at 486. The Court has permitted speech restrictions where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Erznoznik v. Jacksonville*, 422 U.S. 205, 209 (1975) (citing *Lehman v. City of Shaker Heights*, 418 U. S. 298 (1974)).[3] In *Erznoznik*, however,

[3] See also, *Hill v. Colorado*, 530 U.S. 703, 717-18 (2000). The *Hill* Court found that states could protect an interest in an unwilling listener to have free passage going to and from work or medical facilities; however, the "restrictions imposed by the Colorado statute only apply to communications that interfere with *these* rights rather than those that involve willing listeners." *Id*. (emphasis added). The section of § 574.035 that protects access to houses of worship are not at issue. Instead, this challenge focuses on whether states can choose to protect the unwilling listener by

the Supreme Court struck down an ordinance prohibiting drive-in theaters from showing films containing nudity because on public streets individuals were neither captive nor were their privacy interests as strong as in their homes. *Erznoznik*, 422 U. S. at 212. Accordingly, the state could not justify the "censorship of otherwise protected speech on the basis of its content." *Id.*

Those gathered in a place for religious worship, instruction, or other religious purpose have a significantly reduced privacy interest than a person in their own home. When privacy interests are reduced, protecting listeners is only appropriate where the degree of captivity makes it difficult for the unwilling listener to avoid the speech. Here, § 574.035 aims to protect both religious adherents using church facilities *and* using public spaces without regard to whether they have a privacy interest at stake or are captive unwilling listeners. An unwilling listener can hardly be captive in any meaningful sense while on the public street or in a public park. Thus, the House of Worship Protection Act exceeds accepted speech prohibitions because it applies to all picketing or protest activities disruptive of worship services without any regard to whether the worshipers have a privacy interest at stake or are captive listeners.

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prohibiting speech during a worship service, when the right to access is not implicated.

Further, if lawmakers truly desired to protect religious exercise from noisy disturbances, than § 574.035 is woefully inadequate. *See, e.g., Carey v. Brown*, 447 U.S. 455, 465 (1980) (finding ban on picketing that exempted labor picketing underinclusive because the State's interest in protecting domestic tranquility was equally affected regardless of picketer's affiliation). In the present case, § 574.035 only prohibits speech that intentionally disrupts church services; however, many activities, such as protests directed at neighboring buildings, might also qualify as "unreasonable" disruptions. These other activities would not be covered under § 574.035, though, because they would not satisfy the scienter requirement. As a result, the act punishes speech that the First Amendment protects, while ignoring other conduct that leads to the same disruptive result.

Even content-neutral restrictions on speech in a public forum must be "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The Eighth Circuit has held that when speakers "wish to express an opinion about an individual to that individual and others, . . . allowing them to picket in the town square or even the next block does not satisfy the second . . . requirement of *Ward*." *Kirkeby*, 92 F.3d at 662 (striking

down residential picketing law that prevented protests directed at certain individuals near their home).

By imposing both temporal and spatial limits on expression near churches, the Missouri statute fails to leave open ample alternative channels of communication. Those who wish to protest outside a church or communicate to members of that church cannot truly communicate their desired message unless they are near the church. To prohibit them from doing so restricts their access to the only adequate channel for their message.

II. THE STATUTE VIOLATES BOTH THE EQUAL PROTECTION CLAUSE AND ESTABLISHMENT CLAUSE BY GRANTING PREFERENTIAL TREATMENT TO RELIGIOUS SPEECH IN PUBLIC FORUMS.

A. The Statute's Preferential Treatment of Religious Speech in Public Spaces Violates the Equal Protection Clause.

Where the state permits exceptions based on content or favors certain types of speech in a public area, the state violates the Equal Protection clause. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, the government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."). In *Mosley*, the Court addressed an ordinance prohibiting all picketing except

picketing on the subject of a school's labor-management dispute. *Id*. at 95. The Court noted that by specifically permitting some views but not others, the state was unconstitutionally attempting to pick and choose among the views it is willing to have discussed on its streets. *Id*. at 97-98.

Here, § 574.035 not only prefers the free speech and expression of religious adherents worshiping in a public space on its face, it also specifically criminalizes any intentional disruption of the order and solemnity of that worship service. The Act does not prohibit all intentionally disruptive speech in public places, merely that which disturbs the order and solemnity of religious speech. For example, intentionally interruptive noisemaking or profane discourse could freely disrupt a secular wedding held in a public park; however, that same behavior, if targeting a religious ceremony or worship service, would be criminal under the statute. Although the House of Worship Protection Act purports to target the disruptive effect of speech, its broad scope unconstitutionally provides greater protections for religious activities in public spaces than it does for non-religious activities.

B. The Statute's Preferential Treatment of Religious Speech in Public Spaces Violates the Establishment Clause.

When a statute raises an Establishment Clause question, courts should apply the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). To past the test, the law must (1) have a secular purpose; (2) have a "primary effect"

that "neither advances nor inhibits religion"; and (3) not foster an "excessive government entanglement with religion." *Id*. While states may regulate "the environment in the vicinity of schools, churches, hospitals and the like," it may not do so in a way that violates the Establishment Clause. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 120-21, (1982) (striking down a statute permitting churches to veto the issuance of a liquor license to nearby premises).

Missouri's House of Worship Protection Act lacks any cognizable secular purpose and not only has a primary effect that advances religion, but was designed to have that effect. The act solely criminalizes disrupting a house of worship, defined to include public places used for religious purpose. While protecting an individual's right to exercise their religious freedom from state interference might be a secular purpose, insulating such exercise from other citizen's speech is an inherently religious purpose. The Act censors constitutionally protected expression when it disrupts—and only when it disrupts—religious activity. By favoring the exercise of religious freedom over the exercise of First Amendment rights, § 574.035 has the principal effect of advancing religion. This manner of protecting religious exercise, criminalizing noise which intentionally disrupts religious activity in a public space, advances religion as a primary, not incidental, effect of the statute.

The House of Worship Protection Act specifically targets, protects, and advances religion in violation of the first two *Lemon* prongs. It requires the state to make judgments about whether the prohibited speech it deters intends to disrupt a religious service, and also what types of conduct are likely to disrupt the particular religious service targeted. Any law that permits individual government agents to identify and protect religious conduct from the speech of private actors cannot be reconciled with the First Amendment's required neutrality towards speech and religion.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges this Court to reverse the judgment below and remand the case for further proceedings.

Respectfully Submitted,

s/ J. Joshua Wheeler

Attorney for *Amicus Curiae*
Thomas Jefferson Center for the Protection of Free Expression
December 9, 2013

CERTIFICATE OF COMPLIANCE WITH RULE 32

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,789 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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s/ J. Joshua Wheeler

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December 11, 2013

Mr. John Joshua Wheeler
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RE: 13-3036 Survivors Network, et al v. Jennifer Joyce, et al

Dear Counsel:

The amicus curiae brief of the Thomas Jefferson Center for the Protection of Free Expression was received and filed on 12/11/13. Please complete and file an Appearance form, as the appearance submitted with the motion and brief was blank. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

Michael E. Gans
Clerk of Court

JPP

Enclosure(s)

cc: Mr. Thomas J. Brejcha
Mr. Grant R Doty
Mr. Clayton N. Hansen
Mr. John Andrew Hirth
Mr. Anthony E. Rothert
Mr. Eugene Volokh

District Court/Agency Case Number(s): 4:12-cv-01501-ERW