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 Joyce, *et. al.*,

Defendant-Appellee.

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

Motion for Leave to File Brief, and Brief of the Thomas More Society as *Amicus Curiae* in Support of Plaintiffs-Appellants

---

Thomas Brejcha
THOMAS MORE SOCIETY
19 S. LaSalle St.
Ste. 603
Chicago, IL 60603
(312) 782-1680
tbrejcha@thomasmoresociety.org

Eugene Volokh
UCLA SCHOOL OF LAW FIRST AMENDMENT AMICUS BRIEF CLINIC
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

MOTION

1. All parties have consented to the filing of the accompanied proposed *amicus* brief.

2. The Thomas More Society is a not-for-profit, national public interest law firm founded in 1977 that seeks to restore respect in law for life, marriage, and religious liberty. The Thomas More Society provides *pro bono* legal services in many different types of cases, including protecting the First Amendment rights of those who pray and counsel outside the nation's abortion facilities and ensuring the free expression of religion in the public square.

3. The Thomas More Society sharply disagrees with plaintiff SNAP's tactics, and much of plaintiff's message. Nonetheless, it believes that the statute that SNAP is challenging is indeed unconstitutionally content-based, and that the decision below jeopardized the rights of many speakers besides just SNAP. The arguments in this brief are aimed at broadly protecting the rights of speakers generally, and not just of plaintiff in particular.

4. Proposed *amicus* is not certain whether this motion is necessary, in light of Fed. R. App. 29(a) (emphasis added), "Any other amicus curiae may file a brief only by leave of court *or if the brief states that all parties have consented to its filing*." Nonetheless, the ECF instructions at https://media.ca8.uscourts.gov/cmecfDir/faq.pdf, ¶ 13, and the ECF layout that apparently provides only for filing of motions for leave to file an amicus brief and not for filing of the briefs alone, suggest that a motion is always required. Proposed *amicus* submits this motion, in case it is necessary.

5. Based on the above, proposed *amicus* moves this court to accept the *amicus curiae* brief submitted together with this motion.

Dated: Nov. 28, 2013

s/ Eugene Volokh

Attorney for Proposed *Amicus Curiae*
Thomas More Society

RULE 26.1 DISCLOSURE STATEMENT

Amicus curiae the Thomas More Society is a not-for-profit law firm, has no parent company, and no person or entity owns it or any part of it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTEREST OF *AMICUS CURIAE*[1]

The Thomas More Society is a not-for-profit, national public interest law firm founded in 1977 that seeks to restore respect in law for life, marriage, and religious liberty. The Thomas More Society provides *pro bono* legal services in many different types of cases, including protecting the First Amendment rights of those who pray and counsel outside the nation's abortion facilities and ensuring the free expression of religion in the public square.

The Thomas More Society sharply disagrees with plaintiff SNAP's tactics, and much of plaintiff's message. Nonetheless, it believes that the statute that SNAP is challenging is indeed unconstitutionally content-based.

All parties have consented to the filing of this brief.

---

[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 UCLA School of Law paid the expenses involved in filing this brief.

SUMMARY OF ARGUMENT

Missouri Revised Statutes § 574.035 (the Missouri House of Worship Protection Act), in relevant part, criminalizes behavior that

- "[i]ntentionally and unreasonably disturbs . . . or disquiets" a house of worship
- through "profane discourse [and] rude or indecent behavior"
- "so near [the house of worship] as to disturb the order and solemnity of the worship services."

(The statute also prohibits excessive noise and physical intrusion into the church, but *amicus* has no objection to those provisions.)

The Act is a content-based speech restriction. First, it singles out "profane discourse" for prohibition, thus defining the prohibited speech based on its "profane" content. Second, to the extent that "rude or indecent behavior" includes speech—such as "rude or indecent" words on signs or leaflets—that too is a content-based speech restriction.

And, third, though the statute only limits speech that "disturb[s] the order and solemnity of the worship services," speech outside a house of worship would have that effect (setting aside the noise prohibition) pre-

cisely when it is the *content* of the speech that disturbs worshippers. The Supreme Court has made clear that speech restrictions aimed at the disturbance caused by the content of speech are content-based.

The Act is also unconstitutionally vague. "Profane," "rude," and "indecent" are the sorts of terms that the Supreme Court has said are too subjective for First Amendment purposes. In the context of this statute, "unreasonably" is too subjective as well. Such vague terms fail to put people on notice of what speech is prohibited. And they leave police, prosecutors, and juries with broad discretion that could easily be used in viewpoint-discriminatory ways.

ARGUMENT

I. The Act Is a Content-Based Restriction on Protected Speech

The Act is a content-based restriction on speech, both because it explicitly specifies the content that is restricted and because it outlaws speech that disturbs or disquiets listeners as a result of its message.

A. The Act Explicitly Restricts Speech Based on Content by Restricting Profane Speech and Rude or Indecent Behavior

Restrictions on "profan[ity]," in the sense of vulgarity, are content-based. *Cohen v. California*, 403 U.S. 15 (1971), reversed a conviction for the public display of a profane word, noting that "the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed." *Id.* at 18. And the Supreme Court has made clear that it treats *Cohen* as involving a content-based restriction. *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010) (describing *Cohen* as involving punishment based on "the offensive content" of the speaker's profane message); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (citing *Cohen* in the discussion of the way "content-based speech restriction[s]" aimed at offensive speech are treated); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (holding that, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content," and citing *Cohen* as the first example supporting that proposition).

Alternatively, if "profane" is viewed as meaning "serving to debase or defile what is holy: irreverent," *Survivors Network of Those Abused by Priests v. Joyce*, 2013 WL 1703371 at *11 (E.D. Mo. Apr. 19, 2013), that too would be a content-based classification. Such a prohibition would be singling out speech based on its "debas[ing]," "defil[ing]," or "irreverent" content. *See City of Bellevue v. Lorang*, 992 P.2d 496, 501 (Wash. 2000) (rejecting the view that a ban on "profane" speech could be subject to lower scrutiny as a content-neutral restriction).

The Supreme Court has also held that a ban on "indecent" speech is content-based. *See Reno v. ACLU*, 521 U.S. 844, 868 (1997). To the extent that the Act bars "indecent" speech as a subset of "indecent behavior," the Act is therefore content-based as well. The "rigorous scrutiny" imposed on content-based speech restrictions is applied even when a law "may be described as directed at conduct," so long as "the conduct triggering coverage under the statute consists of communicating a message" and the law covers the speech "because of what [the] speech communicate[s]." *Holder*, 130 S. Ct. at 2724. And this is particularly so when the law applies to "communicating a message" "because of the of-

fensive content of [the speaker's] particular message," *id.*—for instance, when the law covers indecent speech under the rubric of "indecent behavior." Likewise, the ban on "rude" behavior, as applied to rude speech, is as content-based as the ban on profane or vulgar speech. *Cf. Cohen*, 403 U.S. at 15.

In concluding that the Act was content-neutral, the district court relied heavily on this Court's decision in *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 689 (8th Cir. 2012). *Phelps-Roper* held that a city ordinance regulating picketing at funerals was content-neutral because it targeted the time and location of speech without singling out any particular content. *Id.* at 689. Requiring that courts engage in a "cursory examination" of the content of speech to determine whether it was "protest," this Court held, did not make the statute content-based. *Id.* (internal quotation marks omitted).

But determining whether behavior is "protest" can be characterized as evaluating the relationship between a speaker and the speaker's intended target. Once the statute goes beyond determining whether this relationship exists and starts to evaluate the content of the protest, the

statute becomes impermissibly content-based. *See id.* (stressing that the ordinance in *Phelps-Roper* made "no reference to the content of the speech") (internal quotation marks omitted). And in this case, the Act regulates not protest generally, but rather protest that contains "profane," "rude," or "indecent" content.

The Act is therefore far more like the ordinance in *Neighborhood Enterprises, Inc. v. City of St. Louis*, which restricted the posting of signs but exempted the display of "national, state, religious, fraternal, professional, and civic symbols or crests." 644 F.3d 728, 739 (8th Cir. 2011). This Court viewed that ordinance as being content-based because the ordinance required courts to evaluate the content of displays to determine if they were restricted. *Id.* at 736-37. Here too, courts are required to evaluate the content of speech to determine if it contains the prohibited profanity, rudeness, or indecency. This makes the Act content-based.

B. The Act Is Content-Based Because It Restricts Behavior Based on the Behavior's Communicative Impact

The Act does not lose its content-based character simply because it also requires a showing—in addition to the showing of profane, rude, or

indecent content—that the speech near a house of worship "disturb[ed] the order and solemnity of the worship services." Mo. Rev. Stat. § 574.035 (2012). Indeed, this focus on the disturbing effects of the speech only makes the law doubly content-based.

Statutes that regulate speech on the grounds that the message communicated by the speech may disturb listeners are treated as content-based. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011); *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Cohen v. California*, 403 U.S. 15, 18 (1971); *Lewis v. Wilson*, 253 F.3d 1077, 1081-82 (8th Cir. 2001).

For instance, in *Snyder* the defendants were found to have inflicted emotional distress because their picket signs, displayed in a public forum on the occasion of the plaintiff's son's funeral, suggested that the son's death was God's righteous judgment (using messages such as "Thank God for Dead Soldiers"). *Id.* at 1213-14. This theory of liability focused not on the content of speech for its own sake, but rather on the disturbance and distress that the speech caused. Indeed, unlike the Act in this case, it appeared to be facially content-neutral and even speech-neutral. *Id.* at 1215, 1219. Nonetheless, the Court treated the verdict as

content-based: "The record confirms that any distress occasioned by [defendants'] picketing turned on the content and viewpoint of the message conveyed." *Id.* at 1219; *see also id.* at 1218 ("To the extent [other laws banning picketing near funerals] are content neutral, they raise very different questions from the tort verdict at issue in this case.").

Similarly, in *Cohen v. California*, the Supreme Court invalidated the defendant's conviction under a disturbing the peace statute. The statute was facially content-neutral and, like the tort in *Snyder*, focused on the harm caused by the behavior. *Cohen*, 403 U.S. at 16, 26. But because the disturbance was caused by the message on Cohen's jacket ("Fuck the Draft"), the Court reversed the conviction, and *Cohen* has since been seen as a case involving a content-based speech restriction. *See Holder*, 130 S. Ct. at 2724; *Playboy*, 529 U.S. at 813; *Mosley*, 408 U.S. 95.

Like the legal rules in *Cohen* and *Snyder*, the Act restricts speech based on whether the content of the speech disturbs listeners. The Act restricts behavior that "disturb[s]" or "disquiet[s]" "the order and solemnity" of worship services through profanity, rudeness, or indecency. Mo. Rev. Stat. § 574.035(3)(1) (2012). Once one sets aside the separate

prohibitions on noise and trespass, the "disturb[ance]" caused by speech outside the house of worship would generally stem from the disturbing, profane, rude, and indecent content of the speech.

To give just one class of examples, rude criticism of Muhammad on a sidewalk outside a mosque may well offend people on their way to worship, and thus disturb or disquiet the order and solemnity of the worship services through profanity or rudeness. The same would be so for rude criticism of the Pope outside a Catholic church, and likewise as to other religions. But offensive as such speech may be, it is the content of the speech that offends, and the Act as applied to such speech is therefore content-based.

II. The Act is Unconstitutionally Vague

Speech restrictions must give fair notice of conduct that is forbidden or required. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The Act does not give such fair notice.

The term "profane discourse" is ambiguous; the district court itself offered two separate definitions for it, "'serving to debase or defile what

is holy: irreverent,'" and "'obscene, vulgar.'" *Survivors Network*, 2013 WL 1703371 at *11. Some courts interpret "profane" using the former definition, *see, e.g.*, *Lorang*, 992 P.2d at 499-500, while others use the latter definition, *see, e.g.*, *Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972) (defining "profane" as "denoting certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance").

And the first definition, "serving to debase or defile what is holy: irreverent," would itself be unconstitutionally vague, even if it were clear that this was the definition being used. What is "holy," what is "irreverent," and what is "defil[ing]" of the holy are matters on which people famously disagree, largely because they disagree on the underlying religious questions. The Act thus does not give fair notice of what "profane discourse" means.

The Act also does not give fair notice of what "indecent" and "rude" mean. The Supreme Court in *Reno v. ACLU* concluded that, absent a

sufficient definition, "indecent" was so "vague" as to make the statute unconstitutionally overbroad. 521 U.S. at 871-72, 874. And the Act includes no such clarifying definition.

As to "rude" behavior, the district court defined that term as meaning "conduct that is 'offensive in manner or action: discourteous[.]'" *Survivors Network*, 2013 WL 1703371 at *11. Under this definition, "rude" is similar to the term "annoy," which the Supreme Court in *Coates v. City of Cincinnati* held was unconstitutionally vague. 402 U.S. 611, 612 n.1, 614 (1971). "Conduct that annoys some people does not annoy others," the Court held, and the ban on annoying conduct thus requires those subject to the law to "guess at its meaning." *Id.* at 614. Indeed, in *Waters v. Churchill*, 511 U.S. 661 (1994), the plurality opinion noted that, though public employers may restrict "rude" speech by their employees, such a ban would be "almost certainly too vague when applied to the public at large." *Id.* at 673.

Finally, the statute only bans "unreasonably" disturbing worship using profane discourse or indecent or rude behavior. Indeed, the district court stressed this as a supposed virtue of the statute. *Survivors Net-*

work, 2013 WL 1703371 at *10. This must mean that "reasonably" disturbing worship using such discourse or behavior would be permitted. But there is no common understanding about what forms of disturbance of worship using profanity, indecency, or rudeness are "reasonable."

And in the absence of a definition or such a common understanding, it seems likely that enforcers' judgments of reasonableness will turn on the nature of the worship service, and on whether profane or rude criticism of the worship services seems justified to the enforcers. Even well-intentioned prosecutors and jurors may, deliberately or subconsciously, feel that rude or profane speech outside a meeting of the Westboro Baptist Church—the "Thank God for Dead Soldiers" people from *Snyder*—is quite reasonable, while rude or profane speech outside a mainstream church, synagogue, or mosque is unreasonable. But understandable as this reaction might be, it would be unconstitutionally viewpoint-based, which is a risk that the void-for-vagueness doctrine seeks to prevent. *Fox Television Stations*, 132 S. Ct at 2317 (noting that vague laws impermissibly delegate basic policy matters to policemen, judges, and ju-

ries for resolution on a subjective and potentially viewpoint-discriminatory basis); *Grayned*, 408 U.S. at 108-09 (same).

As this Court held in *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2011), a "[speech] restriction [must] be specific enough that it does not delegate unbridled discretion to the government officials entrusted to enforce the regulation." The Act's references to "profane discourse," "rude or indecent behavior," and "unreasonably disturb[ing]" lack such specificity.

CONCLUSION

For the foregoing reasons, the Act is a content-based speech restriction subject to strict scrutiny, and is also unconstitutionally vague.

Respectfully Submitted,

s/ Eugene Volokh

Attorney for *Amicus Curiae*
Thomas More Society
Nov. 28, 2013

CERTIFICATE OF COMPLIANCE WITH RULE 32

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,493 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Century Schoolbook.

CERTIFICATE OF COMPLIANCE WITH CIR. RULE 28A(H)

This brief has been scanned for viruses and is virus-free.

s/ Eugene Volokh

Attorney for *Amicus Curiae*
Thomas More Society

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on Nov. 28, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Eugene Volokh

Attorney for *Amicus Curiae*
Thomas More Society