UNWANTED SPEECH AND THE STATE'S INTEREST IN PROTECTING RELIGIOUS FREE EXERCISE: DRAWING FIRST AMENDMENT LINES IN OLMER V. CITY OF LINCOLN

INTRODUCTION

The First Amendment of the United States Constitution reads in full, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."1 Within the First Amendment there are three clauses, two of which address the subject of religion.2 The first, known as the establishment clause, prohibits government sponsorship of religion.3 The second, known as the free exercise clause, forbids the government from imposing burdens on, or denying benefits to, any person because of his religious beliefs.4 The First Amendment's third clause protects freedom of speech by prohibiting government action that abridges any person's freedom of expression.5 The amendment's plain language makes clear that freedom of speech may never be abridged.6 However, the First Amendment does not protect speech itself from abridgement; rather, it protects the freedom of speech.7 The difficulty comes in determining the scope of that freedom.8

In applying the above speech guarantees, the United States Supreme Court uses as its standard a balance of conflicting interests.9 In so doing, the Supreme Court sharply distinguishes between regulations that restrict the content of speech and those regulations that neutrally restrict the time, place, or manner of expression.10 Re-

1. U.S. CONST. amend. I.
3. ROTUNDA & NOWAK, supra note 2, at §§ 21.1, 21.3.
4. Id. at §§ 21.1, 21.6.
7. CURRIE, supra note 6, at 74.
8. Id.
9. Id. at 75-76.
10. Id. at 76.
cently, in Olmer v. City of Lincoln, the United States Court of Appeals for the Eighth Circuit found unconstitutional a Lincoln, Nebraska, city ordinance that restricted "focused picketing" of religious premises during scheduled religious activities. The Eighth Circuit found that the ordinance was not narrowly tailored to serve any significant government interest. As such, the ordinance did not meet the requirements of the First Amendment for regulations of content-neutral speech on a public forum. Though the court found that the City of Lincoln ("City") maintained a significant interest in protecting children from frightening images, the Eighth Circuit questioned the extent of the City's interest in protecting its citizens' rights to freely exercise their religion. Ultimately, the court concluded that the ordinance was not narrowly tailored to serve either of these interests and, as such, was unconstitutional.

This Note will first review the facts and holding of Olmer. This Note will then review prior cases in which the United States Supreme Court and other courts have evaluated constitutional challenges to restrictions on expression. Finally, this Note will examine the Eighth Circuit's decision in Olmer and will (1) agree with the court's assessment that the ordinance was unconstitutional on its face because it was not narrowly tailored; and (2) criticize the court for limiting the extent to which the City could protect its citizens' rights to freely exercise their religion.

FACTS AND HOLDING

Dr. Winston Crabb is an obstetrician/gynecologist in Lincoln, Nebraska. As a part of his medical practice, Dr. Crabb has performed abortions. Dr. Crabb was also a deacon and elder at Westminster Presbyterian Church ("Westminster") in Lincoln. In 1997, members of the local anti-abortion group, Rescue the Heartland, began picketing outside Westminster during Sunday morning worship services to protest Dr. Crabb's abortion practice and his eligibility as a church

11. Olmer v. City of Lincoln, 192 F.3d 1176, 1178, 1182 (8th Cir. 1999).
12. Olmer v. City of Lincoln, 192 F.3d 1176, 1178, 1182 (8th Cir. 1999).
13. Olmer, 192 F.3d at 1180, 1182.
14. Id. at 1179-80 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).
15. Id. at 1180.
16. Id. at 1182.
17. See infra notes 20-125 and accompanying text.
18. See infra notes 137-390 and accompanying text.
19. See infra notes 391-543 and accompanying text.
20. Olmer v. City of Lincoln, 192 F.3d 1176, 1182 (8th Cir. 1999) (Bright, J. dissenting).
21. Olmer, 192 F.3d at 1182 (Bright, J. dissenting).
22. Id. at 1178.
elder. The protests occurred in the Westminster parking lot as well as at the entrances and exits of the Westminster church building. Those protesting carried signs reading, "Winston Crabb, Abortionist and Elder," "1 Corinthians 5:13," "Dr. Crabb is Unfit to be an Elder," "Jesus Loves the Little Children," and "Life." Additionally, a Westminster associate pastor testified that "five-to six-foot images of decapitations and mutilations are held in [parishioners'] faces, placed against their family vehicles, and directed at them at a close range . . . " Noting that the picketers did not limit themselves to visual expression, he continued, "statements about [fetuses] being murdered, killed and butchered by a member of their church . . . are shouted at them as they enter the church building."

According to testimony, Westminster members have undergone emotional distress as a result of the picketing. The effects of the picketing were especially hard on young children. One nine-year-old Westminster child testified "this lady stuck a bloody baby picture right in my face and she was about two to three feet away." The child also stated, "my tummy was queasy and it was horrifying," and "I have had some bad times in my life, but that time was the worst ever." Westminster members and clergy testified that, after having five-to six-foot signs thrust at them as they entered or exited the church, children experienced nightmares and had difficulty with sleeping. Some members went to dramatic lengths to avoid the demonstrators. One church member testified, "our six-year-old

23. Olmer v. City of Lincoln, 23 F. Supp. 2d 1091, 1096-1097 (D. Neb. 1998), aff'd, 192 F.3d 1176 (8th Cir. 1999). Protests testified that they believed abortion was wrong and that Dr. Crabb's appointment as a deacon and elder violated Biblical requirements. Olmer, 23 F. Supp. 2d at 1096, 1097 (citing the affidavits of plaintiffs John Kelly, Theresa Lane and Michelle Mann ¶¶ 2-4). See also Julia McCord, Pickets at the Door: Anti-Abortion Demonstrations at Westminster Presbyterian Church in Lincoln Present a Dilemma for Members, OMAHA WORLD HERALD, July 19, 1997 at 59 SF (noting that the protests started in 1997 and occurred during Sunday morning worship services).

24. Olmer, 192 F.3d at 1182 (Bright, J. dissenting).

25. Id. at 1178.

26. Id. at 1182-83 (Bright, J. dissenting) (alterations in original) (citations omitted).

27. Id. at 1183 (Bright, J. dissenting) (second alteration in original) (citations omitted).

28. Id. (Bright, J. dissenting).

29. Id. (Bright, J. dissenting). Judge Bright included in his version of the facts the testimony of a psychologist who testified "the images on the poster are truly the images of nightmares . . . . As an expert in anxiety, I have little doubt that the experience of attending church at Westminster is highly stressful." Id. (Bright, J. dissenting) (citations omitted).

30. Olmer, 192 F.3d at 1183 (Bright, J. dissenting) (alteration in original) (citation omitted).

31. Id. (Bright, J. dissenting) (citation omitted).

32. Olmer, 23 F. Supp. 2d at 1097.

33. Olmer, 192 F.3d at 1183 (Bright, J. dissenting).
niece was forced to ride on the floorboard of her car for protection while arriving for the service.\textsuperscript{34} Other members have avoided the picketers by leaving the church altogether.\textsuperscript{35}

The church objected to the demonstrations and eventually gained the attention of Lincoln's City Council.\textsuperscript{36} On September 14, 1998, the Lincoln City Council passed an ordinance restricting focused picketing of religious premises during scheduled religious activities.\textsuperscript{37} Lincoln Mayor Mike Johanns vetoed the ordinance two days later, but the Council voted to override his veto on September 21, 1998.\textsuperscript{38} The ordinance was codified as Section 9.20.090 of the Lincoln Municipal Code ("the ordinance").\textsuperscript{39}

\begin{itemize}
\item \textsuperscript{34} Id. (Bright, J. dissenting) (citation omitted).
\item \textsuperscript{35} \textit{Olmer}, 23 F. Supp. 2d at 1097. At the time the original case was heard in 1998, fifteen families had left Westminster because of the picketing. \textit{Id.} Most of these families had young children. \textit{Id.}
\item \textsuperscript{36} \textit{Olmer}, 192 F.3d at 1178.
\item \textsuperscript{37} \textit{Olmer}, 192 F.3d at 1178 (noting that the ordinance restricted focused picketing of religious premises during scheduled religious activities); \textit{Olmer}, 23 F. Supp. at 1096 (citing Lincoln, Neb., Ordinance 17413 (Sept. 21, 1998) (repealed 1999)) (noting that the ordinance was passed on September 14, 1998).
\item \textsuperscript{38} \textit{Olmer}, 23 F. Supp. 2d at 1095. Mike Johanns is currently serving as the governor of Nebraska. \textit{Johanns, Vilsack to Attend Seminar for New Governors, Omaha World Herald, November 11, 1998 at 28.}
\item \textsuperscript{39} \textit{Olmer}, 192 F.3d at 1178. Section 9.20.090 provides in pertinent part:
\begin{enumerate}
\item 9.20.090 Disturbing the Peace by Focused Picketing at Religious Premises
\item (a) Definitions. As used in this ordinance, the following terms shall have the meanings here set forth:
\begin{enumerate}
\item The term "religious premises" shall mean "the property on which is situated any synagogue, mosque, temple, shrine, church or other structure regularly used for the exercise of religious beliefs, whether or not those religious beliefs include recognition of a God or other supreme being";
\item The term "scheduled religious activity" shall mean "an assembly of five or more persons for religious worship, wedding, funeral, memorial service, other sacramental ceremony, religious schooling or religious pageant at a religious organization's premises, when the time, duration and place of the assembly is made known to the public, either by a notice published at least once within 30 days but not less than 3 days before the day of the scheduled activity in a legal newspaper of general circulation in the city or in the alternative by posting the information in a reasonably conspicuous manner on the exterior premises for at least 3 days prior to and on the day of the scheduled activity.
\item The term "focused picketing" shall mean "the act of one or more persons stationing herself, himself or themselves outside religious premises on the exterior grounds, or on the sidewalks, streets or other part of the right of way in the immediate vicinity of religious premises, or moving in a repeated manner past or around religious premises, while displaying a banner, placard, sign or other demonstrative material as a part of their expressive conduct." The term "focused picketing" shall not include distribution of leaflets or literature.
\item (b) It shall be deemed an unlawful disturbance of the peace for any person intentionally or knowingly to engage in focused picketing of a scheduled religious activity at any time within the period from one-half hour before to one-half hour after the scheduled activity, at any place (1) on the religious organization's exterior premises, including its parking lots; or (2) on the portion of the right of way including any sidewalk on the same side of the street and adjoining the boundary of the religious premises, including its parking lots; or (3) on the portion of the right of way adjoining the boundary of the religious premises
\end{enumerate}
\end{enumerate}}
The ordinance defined “focused picketing” as
[T]he act of one or more persons stationing herself, himself or themselves outside religious premises on the exterior grounds, or on the sidewalks, streets or other part of the right of way in the immediate vicinity of religious premises, or moving in a repeated manner past or around religious premises, while displaying a banner, placard, sign or other demonstrative material as part of their expressive conduct.\(^{40}\)

The definition of focused picketing did not include the distribution of literature or pamphlets.\(^{41}\) The ordinance defined “religious premises” as “the property on which is situated any synagogue, mosque, temple, shrine, church or other structure regularly used for the exercise of religious beliefs, whether or not those religious beliefs include recognition of a God or other supreme being . . . .”\(^{42}\) The definition of “scheduled religious activity” provided that scheduled religious activities included only those events where five or more individuals gathered together at a religious organization’s premises for, \textit{inter alia}, worship, religious schooling, religious pageants or religious ceremonies.\(^{43}\) To qualify as a scheduled religious activity, the ordinance required that the time, duration, and place of each scheduled activity was imparted to the public by either a published notice in a legal newspaper or by an open posting of the information on the exterior of the religious premises.\(^{44}\)

\(^{41}\) \textit{Id.}
\(^{42}\) \textit{Id.} (quoting \textsc{Lincoln, Neb. Municipal Code} § 09.20.090(a)(1) (1998) (repealed 1999)).
\(^{43}\) \textit{Id.} (quoting \textsc{Lincoln, Neb. Municipal Code} § 09.20.090(a)(2) (1998) (repealed 1999)). Listed religious ceremonies included: “religious worship, wedding[s], funeral[s], memorial service[s], or any other sacramental ceremony[ies].” \textit{Id.}
\(^{44}\) \textit{Olmer}, 23 F. Supp. 2d at 1095 (quoting \textsc{Lincoln, Neb. Municipal Code} § 09.20.090(a)(2) (1998) (repealed 1999)). This provision of the ordinance also required that the notice for each scheduled activity be given at least three days in advance of the activity’s scheduled time. \textit{Id.} Additionally, if the notice was published in a newspaper, it could not be given more than 30 days in advance. \textit{Id.}
The ordinance also contained a section on the legislative intent of the Lincoln City Council.\(^4\) The City Council's stated intent was to "protect and secure several significant and compelling interests of the City."\(^5\) The City's listed interests included general public order; protection of the health, safety, and welfare of the citizens of Lincoln, especially children; and protection of the freedoms of expression, assembly, association, and religion.\(^6\) The City Council specifically noted their findings that, without a proper time and space buffer zone, focused picketing endangered and eradicated individual freedom of religion.\(^7\) The ordinance also detailed the manner in which focused picketing injured individual freedom of religion.\(^8\) The ordinance specified that infants and young children were especially vulnerable to focused picketing, as many of them react with anxiety, fear, and unhappiness along with other emotional disturbances when exposed to picketing in close proximity.\(^9\) Those families with young children who were forced to pass through the picketing in order to enter or exit their religious activities were the picketers' captive audience from the time of their entrance to the time of their departure.\(^10\) The City noted that the inevitable choice between foregoing their religious activity or risking injury and pain to their children amounted to "a substantial and intolerable burden on their personal religious freedom."\(^11\)

The City Council passed the ordinance on September 21, 1998.\(^12\) Two days later, Marilyn Olmer, John Kelly, Theresa Lane, and Michelle Mann ("the picketers") filed suit against the City of Lincoln, the City Attorney, and the Chief of Police in the United States District Court for the District of Nebraska, asking the court to declare the ordinance unconstitutional.\(^13\) The district court issued a temporary restraining order on September 30, 1998, preventing the enforcement of the ordinance.\(^14\) Although the court originally scheduled the order to be effective for only ten days, the parties mutually agreed to extend its

46. \textit{Id.} (quoting \textit{LINCOLN, NEB. MUNICIPAL CODE} § 09.20.090(1)(a) (1998) (repealed 1999)).
47. \textit{Id.} at 1095-96.
49. \textit{Id.} (quoting \textit{LINCOLN, NEB. MUNICIPAL CODE} § 09.20.090(2)(e) (1998) (repealed 1999)).
50. \textit{Id.}
51. \textit{Id.}
52. \textit{Id.}
53. \textit{Id.} at 1178.
54. \textit{Olmer}, 192 F.3d at 1184 (Bright, J. dissenting) (discussing the filing of the suit); \textit{Olmer}, 23 F. Supp. 2d at 1176 (stating the party names and court).
effective date until the court granted or denied the plaintiffs' request for preliminary injunction.\(^{56}\)

United States District Judge Richard G. Kopf granted the preliminary injunction on November 4, 1998.\(^{57}\) Judge Kopf applied the preliminary injunction standards required by the United States Court of Appeals for the Eighth Circuit for district courts in the Eighth Circuit.\(^{58}\) The applicable standard considered "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest."\(^{59}\) Judge Kopf noted that the factors must be considered and weighed together to determine if the balance leaned toward granting the injunction.\(^{60}\)

Judge Kopf looked first at the probability that the picketers would succeed on the merits of their suit.\(^{61}\) In order to analyze this factor, he discussed regulation of speech on a public forum.\(^{62}\) States can regulate content-neutral speech on a public forum by regulating the time, place, and manner of expression.\(^{63}\) The United States Supreme Court's established test for time, place, and manner regulations of speech ("the Perry test") requires that the regulation be content-neutral, leave open ample alternative methods of communication, and be narrowly tailored to further a significant government interest.\(^{64}\)

Judge Kopf continued his discussion of this factor with analysis of the content neutrality of the ordinance.\(^{65}\) The judge noted that the chief question for a court in determining if a regulation of expressive activity is content-neutral is whether the government enacted the speech regulation because it disagrees with a message being conveyed.\(^{66}\) The purpose of the government in enacting the regulation is

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56. Id. at 1096.
57. Id. at 1091, 1108.
58. Id. at 1097-1104
59. Id. 1098-1104 (quoting Dataphase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981)).
60. Id. (quoting United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1179 (8th Cir. 1998)).
61. Id. at 1098.
63. Id. at 1098 (quoting Perry, 460 U.S. at 45).
65. Olmer, 23 F. Supp. 2d. at 1098.
66. Id. at 1098 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).
the controlling question.\textsuperscript{67} If the regulation has purposes that are not related to the content of speech, it is deemed neutral.\textsuperscript{68} The regulation is neutral even if it results in an incidental effect on certain messages and speakers but not others.\textsuperscript{69} The district court assumed the ordinance to be content-neutral on its face and by its purpose.\textsuperscript{70} Judge Kopf noted, however, that the City Council's purpose in enacting the ordinance was only superficially unrelated to any content displayed in focused picketing activities.\textsuperscript{71}

Judge Kopf next analyzed the Lincoln City Council's purported government interests.\textsuperscript{72} As noted above, the ordinance's legislative intent section detailed several "significant" interests the City Council maintained for enacting the ordinance.\textsuperscript{73} Despite the varied list, the court ruled that the sole interest the City sought to serve by enacting the ordinance was protecting young children from viewing extremely graphic and disturbing images.\textsuperscript{74} The district court reasoned that the City's interest in protecting young children from such images was "constitutionally important."\textsuperscript{75} In fact, counsel for the picketers conceded that protecting children qualified as a significant government interest.\textsuperscript{76}

The district court then analyzed whether the ordinance was narrowly tailored to serve the significant government interest of protecting children.\textsuperscript{77} The focus of the district court's analysis was on whether the ordinance "target[ed] and eliminate[d]... more than the exact source of the 'evil' it [sought] to remedy."\textsuperscript{78} Judge Kopf found that the ordinance failed this test in two ways.\textsuperscript{79} First, it banned speech that was essentially harmless to young children but possibly significant for adults, while not preventing speech that could terrorize

\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 1098-99.
\textsuperscript{71} Id. Judge Kopf commented on evidence before the court regarding Westminster's petition of the city council and noted that "a plausible argument can be made that the ordinance's facial content-neutrality is but a pretext for siding with a large and influential church to the detriment of a few protestors who seek to express a contrary religious point of view." Id. at 1099.
\textsuperscript{72} Olmer, 23 F. Supp. 2d at 1099-1100.
\textsuperscript{73} See supra notes 45-52 and accompanying text.
\textsuperscript{74} Olmer, 23 F. Supp. 2d at 1099.
\textsuperscript{75} Id. at 1100 (citing Reno v. ACLU, 521 U.S. 844, 875 (1997); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)). In a footnote, Judge Kopf noted that he did not agree that there was a legitimate government interest in protecting children from "the mere presence of persons carrying signs on the sidewalk" when there was nothing gruesome about the images on the signs. Id. at 1100 n.9.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 1101 (quoting Frisby, 487 U.S. at 485 (citation omitted)).
\textsuperscript{78} Id. at 1101.
Second, the ban affected not only those people who found speech during "scheduled religious activities" unwanted but also affected willing listeners. The district court did not analyze whether the ordinance met the final Perry requirement, that a regulation of time, place, and manner provide ample alternative methods of communication. Judge Kopf refrained from analyzing this factor because he had already determined that the ordinance could not meet constitutional muster since it was not narrowly tailored. He instead passed over this Perry requirement and concluded that the picketers were likely to succeed on the merits of their First Amendment case.

After determining that the picketers were likely to succeed on the merits of their case, the district court addressed the possibility of irreparable harm to the picketers should a preliminary injunction be denied. Judge Kopf quoted the United States Supreme Court, writing, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." As he had already determined that enforcing the ordinance would violate the picketers' First Amendment free speech rights, Judge Kopf reasoned that, if a preliminary injunction enjoining enforcement of the ordinance were not granted, the picketers would suffer irreparable harm.

The district court next found that the only injury the City would suffer upon issuance of a preliminary injunction was the loss of an opportunity to charge violators of the ordinance during the time that the court considered a permanent injunction. The district court determined that, on balance, when weighed against the irreparable harm likely to be suffered by the picketers if the court failed to grant an injunction, the City's potential injury was minimal. The district court also noted that the public interest in preventing violation of the picketer's free speech rights outweighed the public interest in allowing families to attend their place of worship without fear of the effect focused picketing could have on their children.
After analyzing all of the above factors for preliminary injunction, Judge Kopf determined that the balance of the factors weighed in favor of granting a preliminary injunction.  The district court concluded that the picketers were likely to succeed in their free speech claim, that the potential damage to the City was minimal when balanced against the irreparable harm the picketers would suffer if denied their free speech rights, and that the public interest favored protecting those free speech rights. As such, the district court ordered a preliminary injunction enjoining the City from enforcing the ordinance.

The City appealed the district court ruling to the United States Court of Appeals for the Eighth Circuit. Circuit Judge Richard S. Arnold, writing for the majority, agreed with District Judge Kopf that the ordinance was unconstitutional and upheld the district court’s granting of the preliminary injunction. The Eighth Circuit based its initial opinion on much of the same reasoning of District Judge Kopf supporting the district court’s order. The appellate panel then further addressed whether or not the City maintained a legitimate interest in protecting its citizens’ rights to freely exercise their religion.

In beginning its analysis, the Eighth Circuit admitted that, in the abstract, the interest the City maintained in preserving a citizen’s right to freely exercise his religion was substantial and important. The bulk of the court’s analysis came in its discussion of past Eighth Circuit precedent involving speech on religious premises. In an earlier case, the Eighth Circuit drew a distinction between events where individuals entered churches without permission or actually interrupted services with their speech, and the right to communicate peacefully on public property. In that case, the Eighth Circuit stated that the fact that the opinions may offend the parishioners did not remove them from the First Amendment’s protection.

The panel next discussed the City’s claim that protecting churches from focused picketing was correlative to the United States

91. Id. at 1108.
92. Id.
93. Id.
94. Olmer, 192 F.3d at 1176, 1178.
95. Id. at 1178, 1182.
96. Id. at 1178, 1180. See Olmer, 23 F. Supp. 2d at 1098-1104 (stating the district court’s reasoning for the order).
97. Olmer, 192 F.3d at 1180-82.
98. Id. at 1180.
99. Id. at 1180-82 (discussing Action v. Gannon, 450 F.2d 1227, 1229, 1233 (8th Cir. 1971) which determined that members of a racial action group could not enter a church and disrupt church services).
100. Id. at 1181.
101. Id. (quoting Action, 450 F.2d at 1232).
Supreme Court's upholding of an ordinance that prohibited focused picketing in front of a particular residence. Judge Arnold noted the uniqueness of an individual's home and the need to afford the home a higher level of constitutional protection than other locations. The Eighth Circuit was unwilling to afford "other locations, even churches" the same level of protected privacy. The court concluded, "lines have to be drawn, and we choose to draw the line in such a way as to give the maximum possible protection to speech, which is protected by the express words of the Constitution." Judge Myron H. Bright strongly dissented, arguing that there was a substantial government interest in protecting those attending religious observances at the facility of their choice from unwanted speech. Judge Bright also argued that the Lincoln ordinance was narrowly tailored to serve this substantial interest. After discussing Eighth Circuit precedent and the alternative methods of communication available to picketers, Judge Bright ultimately concluded that the ordinance was constitutional.

Judge Bright's dissent focused on the correlation he found between the protection of residential privacy and the protection of the rights of individuals to attend religious activities without substantial interference. Judge Bright described the relationship as "strikingly similar." He reasoned that the nation's history, as evidenced by the Declaration of Independence and the protection of the freedom to worship in the First Amendment, demonstrated that "the fundamental right to worship is as important as the right to privacy within the home." In addition, he argued that the description of the residential home as "the last citadel of the tired, the weary, and the sick" was equally applicable to houses of worship. Judge Bright reasoned that houses of worship, no matter what their form (e.g., church, mosque or synagogue), are places of rest and replenishment. Houses of worship are sacred places where people find well-being and tranquility.

102. Id. at 1181-82 (citing Frisby, 487 U.S. at 476, 486, 488).
103. Id. at 1182 (quoting Frisby, 487 U.S. at 484).
104. Id.
105. Id.
106. Id. at 1182, 1188 (Bright, J. dissenting).
107. Id. at 1187 (Bright, J. dissenting).
108. Id. at 1187-88 (Bright, J. dissenting).
109. Id. at 1184-85 (Bright, J. dissenting).
110. Id. at 1185 (Bright, J. dissenting).
111. Id. (Bright, J. dissenting).
112. Id. (Bright, J. dissenting) (quoting Gregory v. Chicago, 394 U.S. 111, 125 (1969) (Black, J. concurring)).
113. Id. at 1185 (Bright, J. dissenting).
114. Id. (Bright, J. dissenting).
Judge Bright opined that, for churchgoers such as those at Westminster, the church-going experience was not at all tranquil. Such churchgoers were thereby put in the position of choosing between attending their church of choice and enduring the demonstration, or staying home and giving up their right to worship.

Judge Bright’s dissent also discussed whether the ordinance was narrowly tailored. Judge Bright noted that the way the Lincoln ordinance restricted picketing was very limited. Because of the limited time periods the ordinance covered, the ability of picketers to leaflet, and the ability of the picketers to demonstrate freely across the street provided they caused no interference with the religious activity, Judge Bright determined that the ordinance was narrowly tailored. In addition, he noted that the ordinance only banned large demonstrative materials, while allowing all other forms of communication and speech.

Judge Bright also addressed the majority’s conclusion that the ordinance was overbroad because it restricted all picketing, no matter what the signs communicated, thus rendering the ordinance not narrowly tailored to the protection of young children. Judge Bright disagreed with the majority’s argument that characterized the opposition of the adult churchgoers’ to the demonstrations as only a mere disagreement with the picketers’ message or a simple dislike of the signs. Instead, he argued that the record showed that the adults involved were affected by much more than disapproval of a sign. Judge Bright noted that in order for adults to attend their chosen church they must view graphic images of mutilations and decapitations and listen to heckling and jeering shouts. Judge Bright stated that the messages conveyed by the picketers were intended to cause both adults and children psychological distress, and that such speech was not constitutionally protected.

115. Id. (Bright, J. dissenting).
116. Id. (Bright, J. dissenting).
117. Id. at 1186-87 (Bright, J. dissenting).
118. Id. at 1186 (Bright, J. dissenting).
119. Id. (Bright, J. dissenting).
120. Id. (Bright, J. dissenting). Judge Bright also stated, “[t]he ordinance target[ed] only those places and forms of communication that [we]re likely to have a coercive effect on the churchgoer — the placards that are held up to the faces of all the churchgoers, rested upon family vehicles, and targeted at the parishioners, at a very close range, as they enter and exit the church.” Id. (Bright, J. dissenting).
121. Olmer, 192 F.3d at 1186-87 (Bright, J. dissenting).
122. Id. at 1187 (Bright, J. dissenting).
123. Id. at 1186 (Bright, J. dissenting).
124. Id. at 1187 (Bright, J. dissenting).
125. Id. (Bright, J. dissenting) (citing Frisby, 487 U.S. at 498 (Stevens, J. dissenting)).
BACKGROUND

A. The First Amendment

The First Amendment to the United States Constitution protects against, *inter alia*, government interference with freedom of speech and free exercise of religion. The free exercise clause, which forbids Congress from making any law that prohibits the free exercise of religion, is one of two provisions in the First Amendment that address religion. The historical record of the framers' intent in drafting the religion clauses is ambiguous. Review of history demonstrates, however, that the free exercise clause was designed, at the very least, to assure freedom of conscience by prohibiting any sort of compulsion in belief.

Freedom of speech has been noted as one of the paramount rights of Western democracy. Justice Cardozo described it as "the matrix, the indispensable condition of nearly every other form of freedom." Freedom of speech is not, however, an absolute right. In applying the amendment's free speech guarantees, the United States Supreme Court uses as its standard a balance of conflicting interests. In so doing, the Supreme Court sharply distinguishes between regulations that restrict the content of speech and those regulations that neutrally restrict the time, place, or manner of expression. Those regulations that restrict the content of speech are examined under "the most exacting scrutiny" and are found valid only if they are necessary to meet a compelling state interest and are narrowly tailored to that end. The government can regulate the time, place, or manner of speech if the regulation is content-neutral, leaves open ample alternative methods of communication and is narrowly tailored to meet a significant government interest.

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129. Id., supra note 128, at § 14.3.
130. Id., supra note 128, at § 14.3.
131. Id. (quoting Palko v. Connecticut, 302 U.S. 319, 327 (1937)).
132. Id. at § 20.7 (quoting Konigsberg v. State Bar of California, 366 U.S. 36, 49-51(1961)).
134. Id., supra note 133, at 76.
135. Id., supra note 128, at § 12.3.
136. ID., supra note 127, at § 20.47.
B. DISTINCTION IN FORUM

In Perry Education Ass'n v. Perry Local Educators' Ass'n,\(^{137}\) the United States Supreme Court explained the tests for government regulations of speech on a public forum.\(^{138}\) In Perry, the Perry Local Educators' Association ("PLEA") sued the Perry Education Association ("PEA") and members of the school board of Perry Township ("school board") seeking injunctive and declaratory relief in the United States District Court for the Southern District of Indiana.\(^{139}\) Both PEA and PLEA were organizations that represented teachers in the Perry Township School District.\(^{140}\) In 1977, PEA was certified under Indiana law as the exclusive representative for the Perry Township teachers.\(^{141}\) Prior to this certification, both PEA and PLEA were allowed equal access to the school district interschool mail system.\(^{142}\) Following PEA's certification, the school district and PEA negotiated a contract that allowed PEA exclusive access to the interschool mail delivery system.\(^{143}\) The contract provided that no other organization with a primary purpose of representing school district employees in dealings with their employer would be allowed access to the mail system.\(^{144}\) PLEA contended in their complaint that the preferential access to the mail system that PEA was awarded violated the Equal Protection Clause and the First Amendment.\(^{145}\)

The district court granted PEA's motion for summary judgment.\(^{146}\) The district court applied rational basis scrutiny and found that the policy was rationally related to the school district's goal of maintaining labor peace.\(^{147}\) PLEA appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit, again arguing that the exclusive-access policy violated the First Amendment and Equal Protection Clause.\(^{148}\) The Seventh Circuit reversed the district court's opinion, holding that opening the interschool mail system to PEA while denying access to PLEA violated both the First Amendment and the Equal Protection Clause.\(^{149}\) The Sev-
enth Circuit noted that PEA had duties that PLEA did not have. However, the Seventh Circuit reasoned that, absent an independent reason to explain why it was undesirable to afford equal mail system access to other labor groups or individual teachers, PEA's special duties did not justify the school district opening the mail system to PEA alone. PEA appealed the Seventh Circuit's judgment to the United States Supreme Court, which denied appellate jurisdiction but granted a writ of certiorari to examine whether denying access to PLEA violated the First Amendment.

The Supreme Court reversed the decision of the Seventh Circuit, upholding the exclusive-access policy as constitutional. Justice Byron R. White, writing for the majority, reasoned that the interschool mail system did not constitute a public forum because the school district had not opened its interschool mail system up for the general public's indiscriminate use. Therefore, the Court reasoned, the school district did not have a constitutional obligation to let any group use the mail system. The Court noted that implicit in the idea of a nonpublic forum was the ability to limit access based on speaker identity and subject matter.

Before determining whether the interschool mail system was not a public forum, the Court discussed three categories of public forums and the constitutional requirements for regulating speech on each type of forum. The first type of forum included public property that had not been designated nor was considered traditionally a public forum. Regarding this type of forum, the Court noted that a state was no different than a private property owner who may preserve property under his control for the use for which it was lawfully dedicated. The Court stated that a second type of public forum included locations such as streets and parks which have been "immemorially held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." The Court also recognized a
third type of forum — public property that the government had opened to the public as a location for expressive activity.\textsuperscript{161}

In its description, the Court defined the tests used to establish the constitutionality of regulations that restrict speech on public forums.\textsuperscript{162} If the public property is not a public forum because it is neither the traditional type of public forum nor designated a public forum, the test is whether the regulation is consistent with the government's legitimate interest in preserving it for its designated use.\textsuperscript{163} Additionally, the Court stated that:

In these quintessential public forums, the government may not prohibit all communicative activity. 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. . . . The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.\textsuperscript{164}

The Court noted that these standards are also used to determine the constitutionality of regulations of speech on public property that the government has designated as a location for expressive activity.\textsuperscript{165}

The Court determined that the interschool mail system at issue in \textit{Perry} was not a public forum.\textsuperscript{166} Therefore, the Court tested the school district's restriction by determining if the restriction was consistent with the district's legitimate interest in the preservation of the property for the use that the property was lawfully dedicated to.\textsuperscript{167} The Court found the requisite consistency and determined that the policy was constitutional.\textsuperscript{168}

C. \textsc{Regulating the Time, Place, and Manner of Speech}

In \textit{Members of the City Council of Los Angeles v. Taxpayers for Vincent},\textsuperscript{169} the United States Supreme Court reversed the United States Court of Appeals for the Ninth Circuit's decision in \textit{Perry}.
States Court of Appeals for the Ninth Circuit's conclusion that a section of the Los Angeles Municipal Code that prohibited posting signs on public property was unconstitutional.\textsuperscript{170} In \textit{Vincent}, a group of supporters of Los Angeles City Council candidate Roland Vincent, known as Taxpayers for Vincent (“Taxpayers”) and the Candidates’ Outdoor Graphics Service (“COGS”), sued the City of Los Angeles, the Director of the Los Angeles Bureau of Street Maintenance and members of the Los Angeles City Council (collectively “Los Angeles”) in the United States District Court for the Central District of California seeking an injunction enjoining enforcement of Los Angeles Municipal Code section 28.04.\textsuperscript{171} Los Angeles Municipal Code section 28.04 banned the posting of any signs on public property.\textsuperscript{172} Taxpayers had contracted with COGS to create and distribute political signs containing Vincent’s name.\textsuperscript{173} As part of their contract, COGS created large cardboard signs reading “Roland Vincent — City Council.”\textsuperscript{174} COGS attached these signs to utility poles by hanging them over the cross-wires that supported the utility poles and stapling them together.\textsuperscript{175} The city’s Bureau of Street Maintenance (“Bureau”), acting with the authority provided in section 28.04, regularly removed all posters on utility poles and other similar objects that the ordinance covered.\textsuperscript{176} During one week in March 1979, the weekly removal report showed that 1207 signs were removed from public property.\textsuperscript{177} Of those 1207 signs, the Bureau noted that forty-eight were “Roland Vincent” signs.\textsuperscript{178}

The district court granted Los Angeles’ motion for summary judgment and concluded that the ordinance was constitutional.\textsuperscript{179} The district court reasoned that the Bureau removed illegally posted polit-

\textsuperscript{170} Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 791, 795, 817 (1984) (stating that the Court of Appeals was reversed); Taxpayers for Vincent v. Members of the City Council of Los Angeles, 682 F.2d 847, 847 (9th Cir. 1982) (stating that the Ninth Circuit decided the case), \textit{prob. juris. noted}, 459 U.S. 1199 (1983), and rev’d, 466 U.S. 789 (1984).

\textsuperscript{171} \textit{Vincent}, 466 U.S. at 791-93.

\textsuperscript{172} Id. at 791.

\textsuperscript{173} Id. at 792.

\textsuperscript{174} Id. at 792-93.

\textsuperscript{175} Id.

\textsuperscript{176} Id. at 793. The pertinent part of section 28.04 reads: “[a]ny hand-bill or sign found posted, or otherwise affixed upon any public property contrary to the provisions of this section may be removed by the Police Department of the Department of Public Works. The person responsible for any such illegal posting shall be liable for the cost incurred in the removal thereof . . . .” \textit{Id.} at 792 n.1 (quoting \textit{Los Angeles, Cal. Municipal Code} § 28.04 (c) (19—)).

\textsuperscript{177} \textit{Vincent}, 466 U.S. at 793.

\textsuperscript{178} Id.

\textsuperscript{179} Id.
cal and nonpolitical signs "without regard to their content." The district court further found that the illegally posted signs were a visual blight. Additionally, the district court reasoned that putting signs on city poles created potential safety and traffic hazards. The district court concluded that the Los Angeles prohibition did not keep COGS or Taxpayers from participating in free speech on public places, as they were still able, among other things, to picket, distribute handbills and to post signs on their automobiles. Ultimately, the district court called the economic and esthetic interest of Los Angeles in improving the city's beauty legitimate and compelling and determined that the code provision was a reasonable time, place, and manner regulation of expression.

On appeal, the United States Court of Appeals for the Ninth Circuit rejected some of the district court's conclusions of law. The Ninth Circuit reversed the district court's opinion, reasoning that Los Angeles had not made "a sufficient showing that its asserted interests . . . were substantial" and that the regulation was facially unconstitutional. The court reasoned that the Los Angeles ordinance was "presumptively unconstitutional" because of the significant First Amendment interests involved. Though the court recognized that Los Angeles had advanced three independent justifications for the regulations, it concluded that none of those interests were sufficient. The Ninth Circuit held that Los Angeles had failed to sufficiently show that its interests in preventing visual clutter and esthetics were substantial. The court also rejected Los Angeles' interest in reducing traffic hazards. Ultimately, the Ninth Circuit concluded that Los Angeles had not justified the need for a total ban. Los Angeles appealed the Ninth Circuit's ruling to the United States Supreme Court.

The Supreme Court reversed the decision of the Ninth Circuit Court of Appeals, holding that substantial interests justified the Los

180. Id. at 794.
181. Id.
182. Id.
183. Id. at 794-95.
184. Id. at 795.
185. Id. (stating that the Circuit Court rejected some of the district court's conclusions of law); Vincent, 682 F.2d at 847 (stating that the Ninth Circuit decided the case).
186. Vincent, 466 U.S. at 795-796 (discussing the Ninth Circuit Court's reasoning); Vincent, 682 F.2d at 853 (stating that the Ninth Circuit reversed the district court).
188. Id.
189. Id.
190. Id.
191. Id. at 796.
192. Id.
Angeles ordinance and that it was constitutional as applied to the Taxpayers and COGS.\footnote{193}{Id. at 815, 817.} Justice John Paul Stevens, writing for the majority, restricted the Court's analysis to the ordinance's constitutionality as applied to Taxpayers and COGS.\footnote{194}{Id. at 791, 803. The Court wrote the Taxpayers "have simply failed to demonstrate a realistic danger that the ordinance will significantly compromise recognized First Amendment protections of individuals not before the Court. It would therefore be inappropriate in this case to entertain an overbreadth challenge to the ordinance." Id. at 802.} The Court noted that it was clear from their earliest decisions regarding freedom of speech "that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest."\footnote{195}{Vincent, 466 U.S. at 804 (citing Schenck v. United States, 249 U.S. 47, 52 (1919)).} Justice Stevens, recognizing the importance of maintaining the city's appearance, explained "the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property constitutes a significant substantive evil within the City's power to prohibit."\footnote{196}{Id. at 807.}

The Supreme Court then addressed whether the ordinance was narrowly tailored to serve such an interest.\footnote{197}{Id. at 808.} The Court found that the evil Los Angeles was trying to prevent — visual blight — was not just a by-product of the sign posting activity but rather was created by the form of expression itself.\footnote{198}{Id. at 810.} As such, the Court concluded that the ordinance affected no more speech than was necessary to achieve its purpose.\footnote{199}{Id.} The Court also addressed whether the Los Angeles ordinance left open ample alternative modes of communication.\footnote{200}{Id. at 812.} The Court noted that the Los Angeles ordinance did not prevent anyone from speaking or distributing literature at any of the places where the posting of signs was prohibited.\footnote{201}{Id.} Justice Stevens acknowledged that the district court's findings showed that there were ample alternative channels of communication available in Los Angeles and that nothing in the findings showed that Taxpayers' ability to effectively communicate was being threatened.\footnote{202}{Id.} Justice William J. Brennan, Jr., joined by Justices Thurgood Marshall and Harry A. Blackmun dissented, reasoning that Los Angeles had not demonstrated that its interest in eradicating "visual clutter" justified its restriction on Taxpayers' ability to communicate.\footnote{203}{Id. at 818 (Brennan, J. dissenting).}
In Ward v. Rock Against Racism,204 the United States Supreme Court found that a municipal park regulation restricting sound amplification in a Central Park concert bandshell was a valid place and manner regulation under the First Amendment.205 In Ward, the antiracist group Rock Against Racism ("RAR") sued the city of New York, its mayor, and various parks and police department officials (collectively "Ward") in the United States District Court for the Southern District of New York asking the court to strike down the amplification restrictions as facially invalid.206 In New York's Central Park there was a stage structure and amphitheater known as the Naumberg Acoustic Bandshell.207 Annually, from 1979 to 1986, RAR sponsored a program of rock music and speeches at the bandshell.208 The city received several complaints from park users and area residents regarding excessive sound amplification at RAR's concerts.209 RAR was not always cooperative when city officials requested that their volume be reduced.210 In fact, at one concert, the city police cut off the power to RAR's sound system.211 Eventually, the New York City Parks Department developed guidelines for the bandshell.212 The guidelines included provisions requiring all events to use the high quality sound equipment and sound technician provided by the city.213 After receipt of a preliminary injunction against enforcement of the provisions, RAR held a concert using its own sound technician.214 After the concert, RAR amended its complaint to ask for damages and a judgment declaring the guidelines facially invalid.215

The district court found for Ward, upholding the amplification guideline.216 The district court applied the Supreme Court's three-part test for determining the constitutionality of a time, place or manner regulation of protected speech.217 In application of that test, the

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207. Id. at 784.
208. Id. at 784-85.
209. Id. at 785.
210. Id.
211. Id.
212. Id.
213. Id. at 787 & n.2.
214. Id. at 787-88.
215. Id. at 788.
216. Id.
217. Id. at 789.
court found the regulation valid.\textsuperscript{218} The district court concluded that the New York sound guidelines were constitutional because they did not intrude upon any protected right.\textsuperscript{219} Further, the court found that New York had a legitimate governmental interest in the control of excessive sound and that the guideline in question was narrowly tailored to serve that interest.\textsuperscript{220}

RAR appealed the decision of the district court to the United States Court of Appeals for the Second Circuit.\textsuperscript{221} RAR argued that the sound guideline impermissibly impeded on its protected interest in controlling the sound mix at its concerts and that the amplification limitations allowed New York to discriminate against different event sponsors by changing the volume allowed.\textsuperscript{222} The Second Circuit reversed the district court's opinion regarding the guideline requiring sponsors to use New York's sound equipment and technician and affirmed the part of the district court's judgment sustaining New York's right to limit the volume of performances at the bandshell.\textsuperscript{223} The Second Circuit reasoned that the method of a regulation "must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation."\textsuperscript{224} The court found that the equipment and technician provisions were not the least intrusive means to regulate volume.\textsuperscript{225} Ward filed a petition for a writ of certiorari with the United States Supreme Court, which granted certiorari to consider the First Amendment questions involved and to clarify the correct standard for time, place or manner regulations of protected speech.\textsuperscript{226}

The Supreme Court reversed the decision of the United States Court of Appeals for the Second Circuit, determining that, under the First Amendment, the amplification guideline was a valid regulation of the manner and place of expression.\textsuperscript{227} Justice Anthony M. Kennedy, writing for the majority, reasoned that the guideline was content-neutral because it was justified without reference to content.\textsuperscript{228}

\textsuperscript{218} Id.
\textsuperscript{219} Ward, 658 F. Supp. at 1353.
\textsuperscript{220} Id. at 1352-1353.
\textsuperscript{222} Ward, 848 F.2d at 370-71.
\textsuperscript{223} Id. at 372.
\textsuperscript{224} Id. at 370 (citing United States v. Albertini, 472 U.S. 675, 688-89 (1985); United States v. O'Brien, 391 U.S. 367, 377 (1968); Legi-Tech Services, Inc. v. Keiper, 766 F.2d 728, 735 (2d Cir. 1985)).
\textsuperscript{225} Id. at 371. For example, the court found that the city could have limited the volume to certain decibel levels or installed a volume-limiting device. Id.
\textsuperscript{226} Ward, 491 U.S. at 784, 789.
\textsuperscript{227} Id. at 803.
\textsuperscript{228} Id. at 784, 791-92.
Justice Kennedy stated, "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." He noted that if a regulation served purposes that were unrelated to the content, it was deemed neutral.

The Court determined that the guideline was narrowly tailored to achieve a significant governmental interest. Justice Kennedy reasoned that New York had both a significant interest in protecting citizens from excessive noise and a significant interest in ensuring sufficient sound amplification at park events. The Court reaffirmed that regulations of the time, place, and manner of speech have to be narrowly tailored to protect the government's interest but that a regulation did not have to be the least restrictive means of doing so. The Court stated that a regulation was narrowly tailored if the regulation promoted "a substantial government interest that would be achieved less effectively absent the regulation." The Court determined that New York's interests would not be served as well without the sound-amplification guideline and that, as such, the guideline satisfied the narrowly tailored requirement. The Court also noted that the guideline left open ample alternative methods of communication. Accordingly, since the guideline met all of the requirements for a time, place, and manner regulation of speech, the Court declared that it was proper under the First Amendment.

In Heffron v. International Society for Krishna Consciousness, Inc., the United States Supreme Court determined that a Minnesota State Fair rule restricting the sale of literature within the grounds of the Minnesota State Fair did not unnecessarily limit First Amendment rights. In Heffron, the International Society for Krishna Consciousness ("ISKCON") and Joseph Beca, the head of an ISKCON temple in Minneapolis, sued several Minnesota officials, seeking declaratory judgment and injunctive relief in Ramsey County Court.
District Court.\textsuperscript{240} Every year, the Minnesota Agricultural Society ("MAS") operated a State Fair in St. Paul, Minnesota ("Fair").\textsuperscript{241} As part of its authority over the government of the fairgrounds, MAS created Minnesota State Fair Rule 6.05.\textsuperscript{242} Rule 6.05 required any person or group to sell, exhibit or distribute literature from only fixed locations on the fairgrounds during the Fair.\textsuperscript{243} Rule 6.05 did not prevent any group from walking around the fairgrounds and maintaining face-to-face communication with fair patrons.\textsuperscript{244} However, any exhibitor's sales or fund solicitation had to take place at a booth rented from MAS.\textsuperscript{245} Such booth space was rented on a nondiscriminatory, first-come, first-served basis.\textsuperscript{246}

ISKCON was an international religious society that followed the Krishna religion.\textsuperscript{247} One of ISKCON's religious rituals was a practice called Sankirtan, which called its members to go to public places to solicit donations and sell religious literature.\textsuperscript{248} To perform Sankirtan, ISKCON members approached members of the public and gave them flowers or small flags.\textsuperscript{249} ISKCON's challenge to Rule 6.05 asserted that enforcement of the rule would suppress their practice of Sankirtan.\textsuperscript{250}

The trial court granted the state officials' motion for summary judgment.\textsuperscript{251} The trial court reasoned that because of the high number of exhibitors participating in the State Fair, some form of time, place, and manner regulation was required if each exhibitor's free speech rights was going to be protected.\textsuperscript{252} Therefore, the court prohibited ISKCON from distributing things such as flowers, flags, books, artifacts, or incense and from participating in sales or soliciting monetary donations within the fairgrounds except from an MAS booth.\textsuperscript{253}

ISKCON appealed the decision of the trial court to the Minnesota Supreme Court, arguing that Rule 6.05 was not a reasonable place
and manner regulation. The Minnesota Supreme Court reversed the trial court's opinion, determining that, as applied to ISKCON, Rule 6.05 unconstitutionally restricted the practice of Sankirtan and that the State's interests could be preserved by means that were less restrictive of ISKCON's First Amendment rights. The state officials filed a petition for a writ of certiorari with the United States Supreme Court, which granted certiorari to consider the constitutional issues involved and to solve the conflicting results reached by various lower courts in similar cases.

The United States Supreme Court reversed the decision of the Minnesota Supreme Court, determining that Rule 6.05 did not needlessly limit the First Amendment free speech right to reach willing listeners. Justice Byron R. White, writing for the majority, stated that, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." Justice White reasoned that as long as the restrictions were reasonable, the activities of ISKCON were subject to time, place, and manner restrictions. Because Rule 6.05 applied evenly to anyone who wished to distribute or sell materials, it satisfied the time, place, and manner requirement that a restriction not be based on content. The Court also noted that the rule served a significant government interest because it was justified by the State's need to maintain the movement of the Fair crowd in an orderly fashion. The Court reasoned that the combination of the large crowds the Fair attracted and the small size of the fairgrounds made the State's interest in controlling the orderly movement of the crowd a substantial interest. The Court disagreed with the Minnesota Supreme Court that the rule was unnecessary because the State had less restrictive means of preventing the threat posed by ISKCON. The Court reasoned that despite the effects of Rule 6.05, sufficient alternative channels of speech were available for the expression of ISKCON's protected speech. The Court was unwilling to say that the rule did not provide organizations adequate means to sell or solicit within the fair-

254. *Hoffman*, 299 N.W.2d at 79, 82-83.
255. *Hoffman*, 452 U.S. at 646.
256. *Id.*
257. *Id.* at 655-56 (quoting *Civics v. Cooper*, 336 U.S. 77, 87 (1949)).
259. *Id.* at 647.
260. *Id.* at 648-49.
261. *Id.* at 649-50.
262. *Id.* at 650.
263. *Id.* at 654.
264. *Id.*
Accordingly, the Court determined that the rule did not needlessly limit the First Amendment free speech right to reach willing listeners.  

D. PROTECTING THE INTERESTS OF CHILDREN

In Sable Communications of California, Inc. v. FCC, the United States Supreme Court held that a ban on indecent interstate telephone messages did not survive constitutional examination. In Sable, Sable Communications, Inc. ("Sable") sued the Federal Communications Commission and the Justice Department (collectively "the FCC") seeking declaratory and injunctive relief in the United States District Court for the Central District of California. Sable offered prerecorded sexually oriented telephone messages (known as "dial-a-porn") through the telephone network of Pacific Bell. Anyone who called the recorded message was charged a special fee. The fee was then divided between Pacific Bell and Sable. In 1988 Congress amended section 223(b) of the Communications Act of 1934. The amendments provided an outright ban on obscene as well as indecent commercial interstate telephone messages. Sable filed suit against the FCC seeking an injunction preventing the FCC from initiating any action or proceeding under section 223(b). Sable also sought a judgment declaring the provisions of section 223(b) unconstitutional.

The district court issued a preliminary injunction prohibiting enforcement of the portion of section 223(b) that banned indecent speech. The preliminary injunction did not, however, enjoin enforcement against those communications found to be obscene. The district court reasoned that although "the government unquestionably ha[d] a legitimate interest in . . . protecting children from exposure to indecent dial-a-porn messages . . .," section 223(b) was not narrowly
tailored to protect such an interest.\textsuperscript{279} The district court called the outright ban on indecent speech "contrary to the First Amendment."\textsuperscript{280} However, the district court determined that the First Amendment did not protect obscene speech.\textsuperscript{281}

Sable appealed the decision of the district court to the United States Court of Appeals for the Ninth Circuit and the FCC filed an appeal to the United States Supreme Court.\textsuperscript{282} The Ninth Circuit dismissed Sable's appeal, reasoning that the FCC's direct appeal to the United States Supreme Court had effectively transferred Sable's appeal to the Supreme Court.\textsuperscript{283} The United States Supreme Court noted probable jurisdiction and took the case to determine the constitutionality of section 223(b).\textsuperscript{284}

The Supreme Court affirmed the decision of the district court, holding that section 223(b) could not survive constitutional scrutiny.\textsuperscript{285} Justice Byron R. White, writing for the majority, reasoned that the government maintained a compelling interest in protecting the well-being of children.\textsuperscript{286} This interest, explained the Court, extended to protecting minors from materials, which by adult standards, were not obscene.\textsuperscript{287} The Court noted that the government could serve this interest but must do so with a regulation that was narrowly drawn so as to not unnecessarily hinder First Amendment freedoms.\textsuperscript{288} Though the FCC argued that nothing less than a total ban could prevent minors from getting access to the dial-a-porn messages, the Court found the argument unpersuasive.\textsuperscript{289} The Court noted there were alternatives to the total ban, such as credit card or access code requirements.\textsuperscript{290} Accordingly, the Court affirmed the district court's injunction and stated that the ban on indecent speech could not survive constitutional scrutiny.\textsuperscript{291}

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\textsuperscript{279} Sable, 692 F. Supp. at 1209.
\textsuperscript{280} Id. (citation omitted).
\textsuperscript{281} Id. at 1209 (citing Miller v. California, 413 U.S. 15 (1973)).
\textsuperscript{282} Sable, 492 U.S. at 119 n.2.
\textsuperscript{283} Id.
\textsuperscript{284} Id. at 117, 119.
\textsuperscript{285} Id. at 131.
\textsuperscript{286} Id. at 117, 126. Accord Reno v. ACLU, 521 U.S. 844, 875 (1997) (stating "[i]t is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials." (citations omitted)).
\textsuperscript{287} Sable, 492 U.S. at 126 (citing Ginsberg v. New York, 390 U.S. 629, 639-40 (1968)).
\textsuperscript{288} Id. at 126 (quoting Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980) (citations omitted)).
\textsuperscript{289} Id. at 128.
\textsuperscript{290} Id.
\textsuperscript{291} Id. at 117, 131.
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E. Protecting the Unwilling Listener

In *Frisby v. Schultz*, the United States Supreme Court found that a town ordinance banning all picketing before or around a private residence was a valid restriction of speech on a public forum. In *Frisby*, Sandra C. Schultz and Robert C. Braun sued the town of Brookfield, Wisconsin, three members of its town board, the Brookfield Chief of Police, and the town attorney (collectively, "the town") in the United States District Court for the Eastern District of Wisconsin seeking declaratory and injunctive relief. Schultz and Braun were two individuals who strongly opposed abortion and wanted to picket on the public street in front of the home of a Brookfield doctor who was known to perform abortions in neighboring towns. In May 1985, the Brookfield Town Board enacted an ordinance to restrict residential picketing. The ordinance read, in pertinent part: "It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Prior to the enactment of the ordinance, during April and May of 1985, Schultz and Braun had picketed outside the doctor's residence with groups varying in size from eleven to over forty individuals. Though the picketing generated numerous complaints and substantial controversy, it was orderly and peaceful in nature.

The district court granted a preliminary injunction, concluding that the Brookfield ordinance was unlikely to be found constitutional. The district court interpreted the ordinance as banning "all picketing in residential neighborhoods." As such, the district court reasoned that the ordinance was therefore not narrowly tailored to meet Brookfield's stated important government interest and would likely fail the test for a constitutionally valid time, place, and manner regulation of public speech.

The town appealed the decision of the district court to the United States Court of Appeals for the Seventh Circuit. The Seventh Cir-
cuit affirmed the district court's opinion with an equally divided vote after a rehearing en banc. The town appealed directly to the United States Supreme Court attempting to invoke the Court's mandatory appellate jurisdiction. Frisby and Braun argued that there was no jurisdiction because of the lack of finality. However, due to the substantial importance of the question presented, the Court dismissed the appeal and treated the jurisdictional statement by the town like a petition for certiorari.

The Supreme Court reversed the decision of the United States Court of Appeals for the Seventh Circuit, concluding that the ordinance was narrowly tailored to fit the substantial government interest of protecting residential privacy. Justice Sandra Day O'Connor, writing for the majority, reasoned that the town had a substantial interest in regulating speech directed primarily at individuals who were "presumptively unwilling to receive it." The Court reasoned that because of the nature of an individual's residence, the individual is left with no way to avoid unwanted speech. Justice O'Connor noted that under the First Amendment the government is permitted to ban objectionable speech when those the speech is directed at cannot avoid it. The Court interpreted the Brookfield ordinance narrowly, construing it as preventing picketing at a single targeted residence or dwelling and not in residential areas as a whole. As such, the Court reasoned that the narrow scope of this interest made the ordinance narrowly tailored to the government's interest.

Justice William J. Brennan, Jr., joined by Justice Thurgood Marshall, dissented, reasoning that the Brookfield ordinance banned more speech than was needed to achieve the government's substantial interest. Justice Brennan expressed concern that the ordinance did not meet the standards set by the Court in Vincent for determining when a regulation was narrowly tailored. Justice John Paul Ste-
vens also dissented, reasoning that by its plain language, the ordinance effected communications directed at not only unwilling listeners but also those directed at willing and indifferent listeners.\footnote{316} Justice Stevens argued that the ordinance was overbroad because it banned not only the speech invading residential privacy but also other constitutionally-protected communications.\footnote{317}

In \textit{Hill v. Colorado},\footnote{318} the United States Supreme Court affirmed the Colorado Supreme Court's upholding of a 1993 Colorado statute regulating speech-related activity inside a radius of one hundred feet from the entrance of a health care facility.\footnote{319} The Colorado statute made it unlawful for an individual to "knowingly approach" within an eight foot circle of another individual, without that individual's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person . . . ."\footnote{320} In \textit{Hill}, Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr. ("the sidewalk counselors") filed a complaint against the State of Colorado, the Attorney General of Colorado and the City of Lakewood, Colorado (collectively "Colorado") in the District Court for Jefferson County, Colorado seeking a declaration that the statute was invalid on its face and an injunction enjoining its enforcement.\footnote{321} The sidewalk counselors claimed that prior to the statute's enactment, they had conducted "sidewalk counseling" on the sidewalks and public ways within one hundred feet of health care facilities that perform abortions.\footnote{322} Their complaint alleged that the Colorado statute violated their right to freedom of speech as protected by the First Amendment of the United States Constitution.\footnote{315}

\footnote{316} \textit{Frisby}, 487 U.S. at 496-97 (Stevens, J. dissenting).
\footnote{317} \textit{Id.} at 499 (Stevens, J. dissenting).
\footnote{318} 120 S. Ct. 2480 (2000).
\footnote{319} \textit{Hill v. Colorado}, 120 S. Ct. 2480, 2484, 2491, 2499 (2000).
\footnote{322} \textit{Id.}, 120 S. Ct. at 2485. The sidewalk counselors testified that "sidewalk counseling" consisted of attempts "to educate, counsel, persuade, or inform passersby about abortion and abortion alternatives by means of verbal or written speech, including conversation and/or display of signs and/or distribution of literature." \textit{Id.} They also stated that these counseling activities often entailed coming within eight feet of individuals. \textit{Id.}
stitution. The complaint claimed that the Colorado statute was a content-based regulation of speech that was not supported by any compelling state interest. Additionally, the complaint alleged that the Colorado statute was overbroad.

The district court granted Colorado's motion for summary judgment. The district court found that the sidewalk counselors were raising a facial challenge to the statute. While the district court agreed with the sidewalk counselors that their activities took place in a "quintessential" public forum, it held that the statute imposed permissible content-neutral time, place, and manner restrictions on speech. The district court also reasoned that the statute provided ample alternative modes of communication. The district court found that the statute did not apply to only certain viewpoints but rather applied to every viewpoint. Finally, the district court concluded that the "free zone" the statute created was narrowly tailored.

The sidewalk counselors appealed the decision of the district court to the Colorado Court of Appeals, arguing that the district court's grant of summary judgment was in error because the district court determined that the statute was not in violation of their First Amendment rights. The sidewalk counselors again argued that the statute was an improper content-based restriction. The Colorado Court of Appeals affirmed the grant of summary judgment with reasoning similar to that of the district court. The Supreme Court of Colorado denied review, prompting the sidewalk counselors to petition for certiorari from the United States Supreme Court. In light of Schenck v. Pro-Choice Network of Western New York, a case which the United States Supreme Court decided while the Hill petition was pending,

323. Hill, 120 S. Ct. at 2485.
324. Id.
325. Hill, 911 P.2d at 673.
326. Hill, 120 S. Ct. at 2486.
327. Id.
328. Id.
329. Id. The ample alternatives were evidenced by the fact that the leaflets and signs were visible at an eight-foot distance and speech could be heard from eight feet away. Id.
330. Hill, 120 S. Ct. at 2486.
331. Id.
332. Hill, 911 P.2d at 670, 672.
333. Id. at 673.
334. Hill, 120 S. Ct. at 2487. The Court of Appeals specifically noted "that out of 60,000 patients who obtained services at one of the clinics only seven percent were there to consider abortions. Nevertheless, all the patients were subjected to the same treatment by protestors." Hill, 911 P.2d at 672.
335. Hill, 120 S. Ct. at 2487.
the Court vacated the Colorado Court of Appeals' judgment and remanded the case back to the Colorado Court of Appeals for further consideration.\footnote{Hill, 120 S. Ct. at 2487.} The Colorado Court of Appeals reinstated its prior judgment on remand.\footnote{Hill, 120 S. Ct. at 2487.} The Court of Appeals noted that in Schenck the United States Supreme Court had "expressly declined to hold that a valid governmental interest in ensuring ingress and egress to a medical clinic may never be sufficient to justify a zone of separation between individuals entering and leaving the premises and protestors."\footnote{Hill v. City of Lakewood, 949 P.2d 107, 109 (Colo. Ct. App. 1997), aff'd, Hill v. Thomas, 973 P.2d 1246 (Colo.), cert. granted, Hill v. Colorado, 527 U.S. 1068 (1999), and aff'd 120 S. Ct. 2480 (2000).} The Court of Appeals determined that under the Ward standard for determining content-neutrality, where a fifteen-foot buffer could preclude protestors from expression of their views from a conversational distance, the shorter eight-foot buffer was adequate to protect such speech.\footnote{Hill v. Thomas, 973 P.2d 1246, 1259 (Colo.), cert. granted, Hill v. Colorado, 527 U.S. 1068 (1999), and aff'd 120 S. Ct. 2480 (2000). The sidewalk counselors filed a petition for a writ of certiorari with the Colorado Supreme Court, which granted certiorari.\footnote{Hill, 120 S. Ct. at 2487 (citing Ward, 491 U.S. at 785).} The Colorado Supreme Court affirmed the decision of the Colorado Court of Appeals, holding that the statute was a proper content-neutral time, place, and manner restriction on speech.\footnote{Id. at 1254-55.} The Colorado Supreme Court's opinion was principally resolved by distinguishing Schenck.\footnote{Id. at 1255.} Specifically, the court drew a distinction between the Schenck regulation, which took the form of a preliminary injunction, and the Colorado statutory provision.\footnote{Id. (citing Madsen v. Women's Health Center, Inc., 512 U.S. 753, 763-64 (1994)).} The court argued that the Schenck provision involved a judicially created remedy created solely for the particular parties before the court and the Colorado provision was a statute "crafted by a coordinate branch of government," the Colorado General Assembly.\footnote{Id. at 1254-55.} As such, the court found that the statutory provision, which was intended for a general application to all citizens, was entitled to more deference than the injunction in Schenck.\footnote{Id.} Therefore, the court chose not to rely on Schenck.\footnote{Id. at 1255.}
timately, the Colorado Supreme Court held that the statute was a properly drawn content-neutral regulation of speech that was narrowly tailored to serve a substantial state interest and provided ample alternative modes of communication. The sidewalk counselors again filed a petition for certiorari with the United States Supreme Court, which granted certiorari to consider if the statute provided an acceptable balance of the interests of unwilling listeners and the constitutional protection afforded law-abiding speakers.

The United States Supreme Court affirmed the Colorado Supreme Court's decision to uphold the Colorado statute. Justice John Paul Stevens, writing for the majority, reasoned that the statute met the test established in Ward for a proper content-neutral time, place, and manner restriction on free speech. The Court also reasoned that the statute applied to all who protest and all who counsel and not just to abortion demonstrators. The Court noted that the fact that the statute applied equally to all viewpoints further supported its determination that the statute was content-neutral. The Court also determined that the ordinance was narrowly tailored to serve the substantial state interests of protecting the ability to access health care facilities and preventing patient trauma that may arise from confrontational protests. In addition, the Court noted that the ordinance allowed ample alternative forms of communication because the eight-foot restriction on physical approach allowed enough room to communicate a message. The Court noted that individuals could still use their voices as well as signs and pictures to convey their messages. The Court further noted that such expressions could cross the eight-foot zone with ease.

Justice Antonin Scalia, joined by Justice Clarence Thomas dissented, reasoning that the Colorado statute was a content-based regulation of speech. Justice Scalia argued that the regulation determined who can approach another individual outside a health care facility by considering whether their approach was for purposes

348. Id. at 1259.
349. Hill, 120 S. Ct. at 2488.
350. Id. at 2487-88, 2499.
351. Id. at 2484, 2488, 2491, 2497-99. The Court also determined that the statute was neither overbroad nor vague and that it did not impose an unconstitutional prior restraint on speech. Id. at 2497-99.
352. Hill, 120 S. Ct. at 2494.
353. Id. at 2491.
354. Id. at 2489, 2496.
355. Id. at 2496.
356. Id.
357. Id.
358. Id. at 2503, 2505 (Scalia, J. dissenting).
of protest, counsel, or education.\textsuperscript{359} If the individual's purpose was not for protest, counsel or education, they could still approach and speak to the passerby.\textsuperscript{360} Justice Scalia argued that this distinction did not resemble a total prohibition on picketing.\textsuperscript{361} Justice Scalia noted that because the statute was a content-based regulation, it must survive constitutional analysis under "strict scrutiny" to be upheld.\textsuperscript{362} "Strict scrutiny" requires that the statute be narrowly tailored to protect a "compelling" state interest.\textsuperscript{363} Justice Scalia opined, however, that the more strict analysis was not necessary since the statute could not even withstand the lesser scrutiny.\textsuperscript{364} Justice Anthony M. Kennedy filed a separate dissent, noting that "Colorado's statute was a textbook example of a law which was content based."\textsuperscript{365}

In \textit{St. David's Episcopal Church v. Westboro Baptist Church, Inc.},\textsuperscript{366} the Court of Appeals of Kansas found that the protection of the privacy of an individual's place of worship is a legitimate government interest.\textsuperscript{367} In \textit{St. David's}, St. David's Episcopal Church ("St. David's") sued Westboro Baptist Church ("Westboro") in the Shawnee District Court in Shawnee County, Kansas, seeking an injunction enjoining Westboro from participating in focused picketing within a certain distance from St. David's property, during the time period from shortly before to shortly after any religious event held at St. David's.\textsuperscript{368} In March 1992, Westboro began demonstrating and picketing on all four corners of the intersection at Seventeenth and Gage streets in Topeka.\textsuperscript{369} St. David's house of worship was located at the northwest corner of the Seventeenth and Gage Street intersection.\textsuperscript{370} St. David's filed suit against Westboro in 1994, alleging that

\begin{itemize}
\item \textsuperscript{359} Id. (Scalia, J. dissenting).
\item \textsuperscript{360} Id. at 2505 (Scalia, J. dissenting).
\item \textsuperscript{361} Id. (Scalia, J. dissenting).
\item \textsuperscript{362} Id. at 2507 (Scalia, J. dissenting).
\item \textsuperscript{363} Id. (Scalia, J. dissenting) (citing United States v. Playboy Entertainment Group, 120 S. Ct. 1878, 1886 (2000); \textit{Perry}, 460 U.S. at 45). Justice Scalia noted that the "compelling" state interest was a different standard than the "significant" state interest required for time, place or manner regulations. \textsuperscript{Id. (Scalia, J. dissenting).} Justice Scalia described the "significant" state interest standard as "the less demanding scrutiny we apply to truly content-neutral regulations of speech in a traditional public forum." \textsuperscript{Id. at 2507 (Scalia, J. dissenting).}
\item \textsuperscript{364} \textit{Hill}, 120 S. Ct. at 2507 (Scalia, J. dissenting).
\item \textsuperscript{365} Id. at 2615 (Kennedy, J. dissenting). Justice Kennedy stated, "[i]n my view, Justice Scalia's First Amendment analysis is correct and mandates outright reversal." \textsuperscript{Id. (Kennedy, J. dissenting).}
\item \textsuperscript{366} 921 P.2d 821 (Kan. Ct. App. 1996).
\item \textsuperscript{367} \textit{St. David's Episcopal Church v. Westboro Baptist Church, Inc.}, 921 P.2d 821, 830 (Kan. Ct. App. 1996).
\item \textsuperscript{368} \textit{St. David's}, 921 P.2d at 821, 824.
\item \textsuperscript{369} Id. at 824.
\item \textsuperscript{370} Id.
\end{itemize}
Westboro's picketing and demonstration activities intentionally interfered with St. David's use and enjoyment of their private property.\textsuperscript{371}

The district court granted St. David's request for a temporary restraining order pending a hearing regarding a preliminary injunction.\textsuperscript{372} The temporary restraining order prevented Westboro from engaging in focused picketing of St. David's on public property within certain distances from each side of the church property.\textsuperscript{373} Westboro was restricted during the time from one-half hour before to one-half hour after religious activities.\textsuperscript{374}

Westboro appealed the decision of the district court to the Kansas Court of Appeals, contending, \textit{inter alia}, that the trial court had erred in issuing injunctive relief.\textsuperscript{375} Westboro argued that the restraint on its picketing activities was in violation of its First Amendment rights.\textsuperscript{376} The Kansas Court of Appeals determined that the trial court had not abused its discretion when it issued the temporary injunction.\textsuperscript{377} The court reasoned that the four prerequisites for a temporary injunction were met and that Westboro had not proven abuse of discretion.\textsuperscript{378}

The Kansas Court of Appeals first addressed the likelihood that St. David's would succeed on the merits of its claim.\textsuperscript{379} The court determined that Westboro's activities caused substantial, intentional and unreasonable interference with St. David's use and enjoyment of its property.\textsuperscript{380} The court next determined that the injuries being suffered by St. David's were irreparable and that St. David's could not recover calculable money damages that would constitute a complete and adequate remedy.\textsuperscript{381}

\textsuperscript{371} \textit{Id.} at 824, 827, 829 (citing Williams v. Amoco Production Co., 734 P.2d 1113, 1124-25 (Kan. 1987) (defining the requirements for a cause of action in private nuisance in Kansas)).  
\textsuperscript{372} \textit{Id.} at 825.  
\textsuperscript{373} \textit{Id.} The temporary restraining order defined "focused picketing" as "driving, standing, sitting or walking at a deliberately slow speed or walking repeatedly past or around [St. David's]... while carrying a banner, placard, or sign." \textit{Id.}  
\textsuperscript{374} \textit{St. David's}, 921 P.2d at 825. The temporary restraining order defined a religious event as "any scheduled worship service... and any wedding, funeral, memorial service for the dead, or the observation of other sacraments, rituals, or celebrations which are announced by a sign posted within ten feet of the St. David's sign on 17th Street which announces its ordinary services." \textit{Id.}  
\textsuperscript{375} \textit{St. David's}, 921 P.2d at 826-27.  
\textsuperscript{376} \textit{Id.} at 829.  
\textsuperscript{377} \textit{Id.} at 833.  
\textsuperscript{378} \textit{Id.}  
\textsuperscript{379} \textit{Id.} at 827.  
\textsuperscript{380} \textit{Id.} at 829.  
\textsuperscript{381} \textit{Id.} (quoting Wichita Wire, Inc. v. Lenox, 726 P.2d 287, 292 (Kan. Ct. App. 1986)).
The court then examined whether the threatened injury to Westboro outweighed the damage suffered by St. David's. The court analyzed Westboro's potential injury by examining whether the injunction was content-neutral and narrowly tailored to serve a significant government interest. The court determined that the injunction was content-neutral because its express purpose was to prevent possible violence and the trial court expressly stated that it was not ruling on content at that time. Next, the court stated that the injunction served several strong government interests including ensuring public safety, protecting property rights, and protecting the right to worship. In addition, the court concluded that the government had an interest in protecting property that houses a place of worship, stating that "the right of free exercise would be a hollow one if the government could not step in to safeguard that right from unreasonable interference from another private party.

The court did not determine whether the buffer zones provided by the temporary restraining order were narrowly tailored because it reasoned that it lacked sufficient facts to determine what size buffer zone would be narrowly tailored yet serve its purpose. The court instead directed the trial court on remand to make findings as to the appropriateness of the distances it ultimately imposed. The court completed its analysis with an examination of the public interest involved. The court concluded that, the public's interest was "better served when the freedom to speak is not completely unfettered."

**ANALYSIS**

In *Olmer v. City of Lincoln*, the United States Court of Appeals for the Eighth Circuit declared a Lincoln, Nebraska, ordinance banning focused picketing of religious premises during scheduled religious activities unconstitutional on its face. In *Olmer*, Westminster Presbyterian Church ("Westminster"), in Lincoln, Nebraska, was the...
target of picketing activities because one of their church elders was a
doctor who performed abortions.\textsuperscript{393} In 1998, the City of Lincoln ("the
City") enacted an ordinance, which banned focused picketing of all re-
ligious premises from one-half hour before to one-half hour after
scheduled religious activity.\textsuperscript{394} Subsequently, four individuals who
participated in the picketing of Westminster (collectively "the picket-
ers") filed suit asking that the ordinance be declared unconstitu-
tional.\textsuperscript{395} The United States District Court for the District of
Nebraska concluded that the picketers were likely to succeed on the
merits of their action and granted a preliminary injunction.\textsuperscript{396} The
United States Court of Appeals for the Eighth Circuit upheld the dis-
trict court's grant of preliminary injunction.\textsuperscript{397} The Eighth Circuit
applied the test for content-neutral time, place, and manner restrictions
of speech on a public forum as defined in \textit{Perry Education Ass'n v. Perry Local
Educators' Ass'n},\textsuperscript{398} and determined that the ordinance
did not meet the test's requirement that a regulation be narrowly tai-
lored to serve a significant governmental interest.\textsuperscript{399} As part of its
analysis, the Court found that the City maintained a significant gov-
ernmental interest in protecting children from frightening images but
the court questioned the extent of the City's interest in protecting its
citizens' rights to freely exercise their religion.\textsuperscript{400}

The United States Court of Appeals for the Eighth Circuit in
\textit{Olmer} properly found that the Lincoln ordinance was facially inva-
lid.\textsuperscript{401} The Eighth Circuit's decision was correct because the Lincoln
ordinance not a valid time, place, and manner regulation of free
speech on a public forum.\textsuperscript{402} The Eighth Circuit correctly reasoned
that even though the ordinance was content-neutral, it was not nar-
rowly tailored to meet a significant state interest.\textsuperscript{403} However, the
court's assertion, in dictum, that the City did not have a significant
interest in the protection of a citizen's right to free exercise improperly
placed one long established First Amendment right ahead of an-

\begin{footnotes}
393. \textit{Olmer}, 192 F.3d at 1182 (Bright, J. dissenting).
394. \textit{Id.} at 1178.
395. \textit{Id.} at 1183-84 (Bright, J. dissenting).
397. \textit{Id.} at 1178.
399. \textit{Id.} at 1180 (quoting \textit{Perry Educ. Ass'n v. Perry Local Educators' Ass'n}, 460 U.S. 37, 45 (1983)).
400. \textit{Id.} at 1180.
401. See infra notes 406-89 and accompanying text.
402. See infra notes 406-89 and accompanying text.
403. See infra notes 406-89 and accompanying text. The Eighth Circuit did not de-
terminate whether the ordinance left open ample alternative channels of communication.
\textit{Olmer}, 192 F.3d at 1178-82.
\end{footnotes}
other.\textsuperscript{404} Finally, the Lincoln City Council could reasonably draft the ordinance in a manner that would be constitutionally narrowly tailored to serve this significant interest.\textsuperscript{405}

A. **Time, Place, and Manner Regulation — The Perry Test**

In *Olmer*, the United States Court of Appeals for the Eighth Circuit correctly decided that the Lincoln ordinance was facially invalid.\textsuperscript{406} Specifically, the Court correctly held that the Lincoln ordinance failed the three-pronged test for speech on a public forum defined in *Perry* because it was not narrowly tailored to serve a significant governmental interest.\textsuperscript{407} In *Perry*, the United States Supreme Court examined a provision in a teacher's union bargaining agreement that provided preferential access to an interschool mail system in order to determine if it violated the First Amendment.\textsuperscript{408} In making their determination, the Court defined the appropriate tests for determining the constitutionality of both content-based and content-neutral regulations of speech on a public forum.\textsuperscript{409} As stated in *Perry*, the test for a content-based restriction of speech on a public forum was whether the regulation was narrowly drawn to serve a compelling state end.\textsuperscript{410} Alternatively, a state could regulate the time, place, and manner of speech if the regulation (1) was content-neutral; (2) left open ample alternative methods of communication; and (3) was narrowly tailored further a substantial government interest.\textsuperscript{411}

1. **The Ordinance Was Content-Neutral**

Because the City Council's intentions in enacting the ordinance did not espouse or disagree with any particular message, the Eighth

\textsuperscript{404} See infra notes 490-533 and accompanying text.

\textsuperscript{405} See infra notes 534-43 and accompanying text.

\textsuperscript{406} See infra notes 407-89 and accompanying text.

\textsuperscript{407} See infra notes 462-89 and accompanying text.


\textsuperscript{409} Id. at 45.

\textsuperscript{410} Id. (citing Carey v. Brown, 447 U.S. 455, 461-62 (1980)).

Circuit correctly assumed the ordinance was content-neutral. The chief inquiry in establishing content neutrality was whether the City enacted a speech regulation because of conflict with a message the speech conveyed. If a regulation served purposes that were unrelated to the content of any expression, it was deemed content-neutral. As the United States Supreme Court noted in Hill v. Colorado, "government regulation of expressive activity is 'content-neutral' if it is justified without reference to the content of regulated speech."

Several cases demonstrate the Supreme Court’s consistent application of these ideals. For example, in Hill, the Colorado statute in question restricted speech activities within one hundred feet of the entrances of health care facilities when that speech activity involved approaching another individual without their consent “for the purpose of passing a handbill to, displaying a sign to, or engaging in oral protest, education, or counseling . . .” The Court found the statute content-neutral, inter alia, because Colorado’s interests in protecting access to health care facilities and the privacy of health care patients were not related to the content of the protestors’ speech. In addition, the Court found that not only did the plain language of the statute make no reference to content, the restrictions of the statute applied evenly to all demonstrators, no matter the viewpoint. Similarly, in Ward, the United States Supreme Court characterized a New York City park guideline that required all music events at a Central Park bandshell to use the city’s sound equipment and technician as content-neutral. The Ward Court noted that the main justification for the bandshell sound guidelines were New York City’s interest in controlling noise levels in order to avoid unnecessary intrusion into not only residential areas but also other more sedate areas of the park. The Court noted that this guideline justification was unrelated to con-

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412. See infra notes 413-32 and accompanying text. The Olmer court did not rule on the issue of content-neutrality, instead the court assumed the ordinance to be content-neutral. Olmer, 192 F.3d at 1184 n.2 (Bright, J. dissenting).
413. Ward, 491 U.S. at 791. Accord Hill, 120 S. Ct. at 2491 (finding a Colorado statute restricting sidewalk counselors outside the entrances to health care facilities content-neutral); Madsen v. Women’s Health Center, 512 U.S. 753, 767, 763 (1994) (upholding an injunction that restricted speech outside an abortion clinic).
414. Ward, 491 U.S. at 791.
415. 120 S. Ct. 2480 (2000).
416. Hill, 120 S. Ct. at 2491.
417. See infra notes 418-26 and accompanying text.
418. Hill, 120 S. Ct. at 2484 (quoting COLORADO REV. STAT. § 18-9-122(3) (1999)).
419. Hill, 120 S. Ct. at 2491.
420. Id. at 2491.
421. Ward, 491 U.S. at 787 n.2, 792.
422. Id. at 792.
Similar to the regulations in *Hill* and *Ward*, which served purposes unrelated to content, the Lincoln ordinance was also passed for purposes unrelated to the content of speech. One of the Lincoln City Council's stated purposes was to "preserve the peace at religious premises." As the district court acknowledged, the Council's purpose was, at least superficially, not related to any expressive content.

In addition, the plain language of the Lincoln ordinance made it content-neutral. The Court in *Hill* wrote that the Colorado statute passed the content-neutrality test for several independent reasons, including whether the regulation was passed "because of disagreement with the message" the speech conveyed. The Court found evidence that the statute met this independent consideration in the plain language of the statute, which applied the restrictions to all demonstrators equally, regardless of viewpoint and without making reference to content. Similar to the statute in *Hill*, the language of the Lincoln ordinance restricted all "focused picketing" without regard to the message being conveyed. Applying the reasoning in *Hill*, the fact that the plain language of the Lincoln ordinance applied to all demonstrators equally indicates that the ordinance was not enacted because of disagreement with any message and was thereby content-neutral.

In light of the above findings in *Hill* and *Ward*, the *Olmer* Court correctly assumed the ordinance was content-neutral.

2. The Ordinance Provided Ample Alternative Methods of Communication

The Lincoln ordinance was also sufficient to pass the second prong of the *Perry* test, the requirement that a regulation leave open

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423. *Id.*
424. Compare *Hill*, 120 S. Ct. at 2491 (stating that the regulation's purpose of protecting access to health care facilities was unrelated to content), and *Ward*, 491 U.S. at 792 (stating that the park regulation's purpose of controlling amplified noise was unrelated to content), with *Olmer*, 192 F.3d at 1180 (reporting that the Lincoln ordinance was passed with the purpose of protecting children from frightening images).
425. *Olmer*, 192 F.3d at 1178 (quoting *LINCOLN, NEB. MUNICIPAL CODE* § 90.20.090(1)(a) (1998) (repealed 1999)).
427. *See infra* notes 428-32 and accompanying text.
428. *Hill*, 120 S. Ct. at 2491.
429. *Id.*
430. Compare *Hill*, 120 S. Ct. at 2491 (finding that the Colorado statute affected all demonstrators without regard to viewpoint), with *Olmer*, 23 F. Supp. 2d at 1098 (writing that the Lincoln ordinance banned "all focused picketing regardless of the apparent message").
431. *See supra* notes 427-30 and accompanying text.
432. *See supra* notes 413-31 and accompanying text.
ample alternative channels of communication. In Members of the City Council of Los Angeles v. Taxpayers for Vincent, the Supreme Court noted that "the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places." However, the Court stressed that a restriction on speech activity could be invalid if the alternative methods of communication were insufficient. The Olmer majority did not address whether the ordinance provided alternative methods of communication. However, Circuit Judge Myron H. Bright assessed this prong of the test in his dissent and determined that there were numerous alternative methods of communication available to those wishing to picket religious premises in Lincoln.

The Court in Frisby v. Schultz addressed the alternative methods question briefly in its analysis of a town ordinance banning picketing of a residence. The Court in Frisby interpreted the scope of the picketing ordinance before it narrowly, ruling that it applied only to the picketing of a single residence. As such, the Court determined that the ordinance allowed for several alternative methods of expression. Included in the examples given by the Court was the fact that protestors were not banned from "general marching through residential neighborhoods, or even walking a route in front of an entire block of houses." Similar to the protestors in Frisby, the picketers in Olmer were allowed to protest wherever they wished outside of the "limited areas" defined by the ordinance. The picketers in Olmer were also free to picket within the limited areas during times outside those proscribed in the ordinance.

Similarly, in Heffron v. International Society for Krishna Consciousness, Inc., the Supreme Court found that a rule promulgated

\[\text{\textsuperscript{433}}\] See infra notes 434-61 and accompanying text.
\[\text{\textsuperscript{436}}\] Vincent, 466 U.S. at 812.
\[\text{\textsuperscript{437}}\] Olmer, 192 F.3d at 1178-1182.
\[\text{\textsuperscript{438}}\] Olmer, 192 F. 3d at 1187 (Bright, J. dissenting).
\[\text{\textsuperscript{440}}\] 487 U.S. 474, 482 (1988).
\[\text{\textsuperscript{441}}\] Frisby v. Schultz, 487 U.S. at 482-83.
\[\text{\textsuperscript{442}}\] Id. at 483-84.
\[\text{\textsuperscript{443}}\] Id. at 483.
\[\text{\textsuperscript{444}}\] Compare Frisby, 497 U.S. at 483 (noting protestors were banned from picketing a single residence but could go door-to-door or march along residential streets), with Olmer, 192 F.3d at 1187 (Bright, J. dissenting) (noting picketers were only banned from a limited area but were able to picket freely across the street).
\[\text{\textsuperscript{445}}\] Olmer, 192 F.3d at 1187 (Bright, J. dissenting).
\[\text{\textsuperscript{446}}\] 452 U.S. 640 (1981).
by the Minnesota Agricultural Society ("MAS") requiring anyone selling literature within the Minnesota State Fairgrounds to do so from within a fixed location, provided ample alternative forums of communication.\textsuperscript{447} The Court recognized that the MAS rule did not deny access to the fairgrounds.\textsuperscript{448} The Court noted that, while within the fairgrounds, an organization could "mingle with the crowd and orally propagate their views."\textsuperscript{449} The Court further noted that "[the organization] may also arrange for a booth and distribute and sell literature and solicit funds from that location on the fairgrounds itself."\textsuperscript{450} Like the MAS rule in \textit{Heffron}, the Lincoln ordinance did not deny any group or individual access to the specified forum.\textsuperscript{451} In fact, the Lincoln ordinance specifically provided for alternative methods of communication on the religious premises by specifying that the ordinance did not apply to the passing of leaflets or literature.\textsuperscript{452}

More recently in \textit{Hill}, the Supreme Court affirmed the Colorado Supreme Court's upholding of a restriction on "sidewalk counseling" that established an eight-foot buffer zone around individuals outside the entrances to health care facilities.\textsuperscript{453} In so doing, the Court stated that the eight-foot buffer allowed demonstrators ample ability to impart messages through speech.\textsuperscript{454} The Court reasoned that demonstrators could easily stand with leaflets on the sidewalks without approaching those entering the clinic.\textsuperscript{455} The Court also recognized that the eight-foot gap was small enough that both audio and visual communications could cross with ease.\textsuperscript{456}

Like the restrictions in \textit{Frisby}, \textit{Heffron} and \textit{Hill}, the Lincoln ordinance left open ample alternative methods of communication by restricting only a discrete form of expression.\textsuperscript{457} As in \textit{Hill}, even though

\textsuperscript{448} \textit{Heffron}, 452 U.S. at 655.
\textsuperscript{449} \textit{Id.}
\textsuperscript{450} \textit{Id.}
\textsuperscript{451} \textit{Compare Heffron}, 452 U.S. at 643-44, 655 (noting groups were not denied access to the State Fair forum but literature sales and fund solicitation were restricted), \textit{with Olmer}, 192 F.3d at 1186-87 (Bright, J. dissenting) (noting picketers were not denied access to the religious premises forum but type of speech was restricted).
\textsuperscript{452} \textit{Olmer}, 192 F.3d at 192 (quoting \textit{LINCOLN, NEB. MUNICIPAL CODE § 2(a)(3)} (1998) (repealed 1999)).
\textsuperscript{453} \textit{Hill}, 120 S. Ct. at 2484-85, 2487-88, 2499.
\textsuperscript{454} \textit{Id.} at 2496.
\textsuperscript{455} \textit{Id.} at 2496-97.
\textsuperscript{456} \textit{Id.} at 2496.
\textsuperscript{457} \textit{Compare Hill}, 120 S. Ct. at 2496 (restricting sidewalk counselors from approaching another individual within eight feet but allowing visual and oral communication outside the eight-foot buffer and the 100 foot boundary around the health care facility), \textit{Frisby}, 487 U.S. at 483 (banning picketers only at a specific residence but not in neighborhoods generally), and \textit{Heffron}, 452 U.S. at 655 (restricting groups only from the sale of literature without a permit without restricting other oral communication and
they were prohibited from communicating in some ways, the picketers in *Olmer* could still express themselves through oral communications directly with the religious attendees or could cross the street and hold up signs easily visible from a distance.\(^{458}\) As well, similar to the Krishnas in *Heffron*, the Lincoln ordinance did not restrict the picketers from the speech forum; rather, the ordinance allowed for the distribution of literature on the religious premises.\(^{459}\) And finally, comparable to *Frisby*, the Lincoln ordinance in no way prevented focused picketing of areas outside the specified religious premises; the picketers were free to protest across the street or in any other area not limited by the ordinance.\(^{460}\) In light of these above findings, the ordinance in *Olmer* satisfied the second prong in the *Perry* test.\(^{461}\)

3. The Ordinance Was Not Narrowly Tailored to Serve a Significant Governmental Interest

a. Significant Governmental Interest

The *Olmer* court correctly recognized a significant governmental interest in the protection of the psychological well-being of young children.\(^{462}\) The United States Supreme Court has acknowledged that there is a compelling interest in protecting the psychological and physical well-being of children.\(^{463}\) The Court requires a compelling state interest when examining a regulation under "strict scrutiny."\(^{464}\) Content-neutral, time, place, and manner regulations that leave open ample alternative channels of communication, however, apply a lesser

\(^{458}\) Compare *Hill*, 120 S. Ct. at 2496 (stating that ample modes of communication were open even with the eight foot buffer in tact), with *Olmer*, 192 F.3d at 1187 (Bright, J. dissenting) (stating that even though signs were prohibited, ample modes of communication remained available).

\(^{459}\) Compare *Heffron*, 452 U.S. at 655 (permitting Krishnas on the fairgrounds and permitting oral communication within the fairgrounds), with *Olmer*, 192 F.3d at 1179 (permitting picketers on property surrounding religious institutions allowing them to distribute literature while there).

\(^{460}\) Compare *Frisby*, 487 U.S. at 483 (banning only picketing outside a single residence while allowing general picketing of a neighborhood), with *Olmer*, 192 F.3d at 1187 (Bright, J. dissenting) (banning only picketing in limited areas while allowing picketing across the street).

\(^{461}\) See supra notes 434-60 and accompanying text.

\(^{462}\) See infra notes 463-75 and accompanying text.


\(^{464}\) *Madsen*, 512 U.S. at 790-91 (Scalia, J. dissenting) (citing *Perry*, 460 U.S. at 45).
standard of review that requires merely a significant government interest.465

In Reno v. ACLU,466 the United States Supreme Court noted that the Court had repeatedly recognized the State interest in protecting minors from harmful materials.467 For example, in Sable Communications of California, Inc. v. FCC,468 the United States Supreme Court provided "that there is a compelling interest in protecting the physical and psychological well-being of minors."469 The City of Lincoln named several interests it maintained in enacting the ordinance.470 These interests included the safety, health and welfare of Lincoln's citizens, especially its children.471 In its assessment of Lincoln's significant interests, the Eighth Circuit found that the City's interest in protecting children from frightening images was constitutionally important.472 In fact, the picketers in Olmer conceded that the interest in protecting children qualified as compelling.473 The Eighth Circuit called the City's interest in protecting children from frightening images "significant," "compelling," and "legitimate."474 Because the United States Supreme Court, in Sable, recognized the protection of the psychological well-being of children as a compelling interest, the Olmer court correctly found Lincoln's interest in protecting the psychological interests of young children "significant."475

b. Narrowly Tailored

The court in Olmer properly concluded that the Lincoln ordinance could not satisfy the last prong of the Perry test because the ordinance was not narrowly tailored to achieve the City Council's significant interest.476 In prohibiting all picketing with banners, signs and placards, the Lincoln ordinance banned more speech than was necessary to serve its significant interests and was thereby not narrowly tai-

465. Id.
470. See infra note 471 and accompanying text.
472. Id. at 1180 (quoting Olmer, 23 F. Supp. 2d at 1100).
473. Olmer, 23 F. Supp. 2d at 1100.
474. Olmer, 192 F.2d at 1180.
475. Compare Sable, 492 U.S. at 126 (writing, "[w]e have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors"), with Olmer, 192 F.3d at 1180 (describing the interest in protecting children from frightening images, defined by the district court as "the psychological interest of young children," as "significant" and "compelling").
476. See infra notes 477-89 and accompanying text.
The Court in *Ward* stated that the element of narrow tailoring was met if the significant interest that the regulation promoted "would be achieved less effectively absent the regulation." The Court went on to explain that the State could not regulate speech in such a way that a substantial part of the burden on expression did not serve the advancement of its goals. The means chosen must not be substantially broader than was essential to achieve the State's interest. As defined in *Frisby*, a regulation was narrowly tailored if it targeted and eliminated "no more than the exact source of the 'evil' it [sought] to remedy."

By its plain language, the Lincoln ordinance violated the rules promulgated in *Ward* and *Frisby*. The ordinance banned all "focused picketing," which as defined in the ordinance included any and all picketing with the use of a banner, sign or placard. The ordinance's provisions affected banner and sign messages no matter how innocuous the message would be to a child, yet did not ban a protestor's ability to hand a child a pamphlet containing graphic photos of an aborted fetus. For example, a Sunday school teacher wishing to stand outside a church during a scheduled religious activity while holding a sign advertising the church's summer bible school would be banned from doing so. The significant interest of the City acknowledged by the Court was the protection of young children. As noted above, the ordinance banned speech that was not harmful to children. Applying the rules in *Frisby* and *Ward*, the Lincoln ordinance was substantially broader and eliminated more speech than was necessary to achieve Lincoln's goal of protecting the psychological well-being of children. As such, in light of *Frisby* and *Ward*, the

477. See infra notes 478-89 and accompanying text.
479. *Id.* at 799-800 (citing *Frisby*, 487 U.S. at 485).
480. *Id.* at 800.
481. *Frisby*, 487 U.S. at 485 (citing *Vincent*, 466 U.S. at 808-10).
482. See infra notes 483-88 and accompanying text.
485. Compare *Frisby*, 487 U.S. at 496-99 (Stevens, J. dissenting) (noting that the Brookfield total ban on picketing outside a particular residence covered more speech than necessary because it made it unlawful for a fifth grader to hold up a get-well sign outside the home of a sick teammate), with *Olmer*, 23 F. Supp. 2d at 1101 (Bright, J. dissenting) (noting that the Lincoln ordinance would ban holding up a sign reading, "Please Follow the Lord's Teachings" regardless of the fact that such a sign would not frighten children).
486. See supra notes 472-74 and accompanying text.
487. See supra notes 484-85 and accompanying text.
488. Compare *Ward*, 491 U.S. at 800 (noting that the means chosen must not be significantly broader than required to achieve the government's goal), and *Frisby*, 487
Olmer court was correct in concluding that the ordinance was not narrowly tailored to serve a significant interest.\footnote{489}

B. Protecting Unwilling Listeners and the Right of Free Exercise

The City of Lincoln, in its legislative intent section, named the protection of its citizens' religious rights as one of the significant interests they maintained in passing the ordinance.\footnote{490} The majority in \textit{Olmer} did not determine that Lincoln had a significant interest in the protection of its citizens' rights to freely exercise their religion.\footnote{491} However, Judge Bright, in his dissent, criticized the majority and found such an interest to be significant.\footnote{492} For the reasons demonstrated below, the \textit{Olmer} majority was in error when it questioned the extent of the City's interest in protecting its citizens' rights to freely exercise their religion.\footnote{493}

The dissent was not the only authority to recognize the significance of a state's interest in protecting the right to free religious exercise.\footnote{494} The Kansas Court of Appeals also examined the interest in \textit{St. David's Episcopal Church v. Westboro Baptist Church, Inc.},\footnote{495} which was factually very similar to \textit{Olmer}.\footnote{496} In both cases, a church was the subject of focused picketing during their worship services.\footnote{497} In \textit{St. David's}, the Kansas Court of Appeals found an important state interest in protecting the privacy of a citizen's place of worship.\footnote{498} The Kansas Court of Appeals noted that this interest did not "flow directly from the right of free exercise of religion found in the First Amendment . . . ."\footnote{499} Instead, the court applied recent United States Supreme Court reasoning which found significant governmental inter-

\footnotesize{U.S. at 485 (citing \textit{Vincent}, 466 U.S. at 808-10) (establishing that a regulation must not ban more than was necessary to eliminate the evil sought to be remedied), \textit{with Olmer}, 192 F.3d at 1180 (stating that the ordinance was much broader than was necessary to achieve Lincoln's interest in protecting children because it banned signs no matter what they said or depicted even if they were directed only at adults).
\footnote{489} \textit{See supra} notes 455-66 and accompanying text.
\footnote{490} \textit{Olmer}, 192 F.3d at 1178 (quoting \textit{LINCOLN, NEB. MUNICIPAL CODE} § 90.20.090(1)(a) (1998) (repealed 1999)).
\footnote{491} \textit{Id.} at 1180, 1182.
\footnote{492} \textit{Id.} at 1186, 1188 (Bright, J. dissenting).
\footnote{493} \textit{See infra} notes 494-533 and accompanying text.
\footnote{494} \textit{See infra} note 495 and accompanying text.
\footnote{496} \textit{See infra} note 497 and accompanying text.
\footnote{497} \textit{See infra} note 497 and accompanying text.
\footnote{499} \textit{St. David's}, 921 P.2d at 830.
\footnote{Id.}
ests in residential and clinical privacy to protecting one's privacy in a place of worship. Akin to Judge Bright's dissent, the Kansas Court of Appeals found that the right to freely worship was analogous to the residential privacy recognized in *Frisby*. Ultimately, Judge Bright and the Kansas Court of Appeals came to the same conclusion — that there was a significant governmental interest in the protection of a citizen's right to worship.

The Supreme Court has often recognized the substantial interests that States have in "controlling the activity around certain public and private places." Because the protection of religious exercise is analogous to the interests established in these cases, the *Olmer* majority improperly questioned the extent of the City's interest in protecting such an interest. For example, in *Frisby*, the Supreme Court found a significant governmental interest in the protection of residential privacy. The Court in *Frisby* found a significant government interest in the protection of residential privacy in part because the home is "the last citadel of the tired, the weary, and the sick . . . ." The Court called the interest "of the highest order." Likewise, as the *Olmer* dissent noted, mosques, synagogues and churches are sacred places where individuals seek rest and replenishment. The *Olmer* majority viewed the private residences protected under *Frisby* as "unique" and stated that allowing the same level of privacy to other locations, even churches, would permit the government to ban too much speech. However, in his dissent, Judge Bright referred to *Frisby* as the precedent upon which to decide this question.

One of the crucial aspects of residential privacy is protecting the unwilling listener. Although in most locations it is expected that

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500. *Id.* at 830-31.
501. Compare *St. David's*, 921 P.2d at 830 (quoting the trial court's statement that "one's place of worship would place a close second to one's residence when it comes to the right to worship and communicate with the maker of one's choice in a tranquil, private and serene environment"); *with Olmer*, 192 F.3d at 1185 (Bright, J. dissenting) (stating "[t]he government's interest in preserving the right of churchgoers to attend religious services free from substantial interference is strikingly similar to the interest in preserving the privacy of the home").
502. See supra note 501 and accompanying text.
503. *Hill*, 120 S. Ct. at 2496.
504. See infra notes 505-33 and accompanying text.
505. *Frisby*, 487 U.S. at 484.
506. *Frisby*, 487 U.S. at 484 (quoting Gregory v. Chicago, 394 U.S. 111, 125 (Black, J. concurring)).
507. *Id.* at 484 (quoting *Carey* v. *Brown*, 447 U.S. 455, 471 (1980)).
508. *Olmer*, 192 F.3d at 1185 (Bright, J. dissenting).
509. *Id.* at 1180. Circuit Judge Richard Arnold wrote for the majority, "[w]e recognize that lines have to be drawn, and we choose to draw the line in such a way as to give the maximum possible protection to speech . . . ." *Id.*
510. *Olmer*, 192 F.3d at 1184 (Bright, J. dissenting).
511. *Frisby*, 487 U.S. at 484.
people will avoid speech they do not wish to hear, a person’s home is different.\textsuperscript{512} The Court in \textit{Frisby} determined that unwilling listeners may be protected in their homes because individuals are captive in their homes and cannot avoid the speech they do not wish to hear.\textsuperscript{513} As such, the Court reiterated that the government may protect an individual’s right to be free from unwanted speech in her own home.\textsuperscript{514} This principle is analogous to religious privacy.\textsuperscript{515} In order for worshipers at Westminster to attend their church home, they could not avoid the unwanted and coercive speech of the picketers.\textsuperscript{516} The principal of the unwilling listener was implicated there.\textsuperscript{517} Westminster members were captive listeners in that they could either choose to endure the speech or forego their right to worship as they choose.\textsuperscript{518} Whenever they chose to exercise their right to attend Westminster, they could not avoid the unwanted speech.\textsuperscript{519} The principles involved in protecting residential privacy in \textit{Frisby} are analogous to protecting religious free exercise.\textsuperscript{520}

Similarly, the \textit{Hill} Court found a significant interest in protecting those entering health care facilities from unwanted speech.\textsuperscript{521} In \textit{Hill}, the Court wrote that its cases “have repeatedly recognized the interest of unwilling listeners in situations where ‘the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.’”\textsuperscript{522} Similar to those entering a health care facility, those entering or exiting their religious institution are held captive to the unwanted speech around them.\textsuperscript{523} In order to enter their chosen religious home, Westminster members must either endure intrusive or coercive messages or forgo their right to worship at their chosen venue.\textsuperscript{524} The First Amendment assures all citizens the right to exer-

\textsuperscript{512} \textit{Id.}
\textsuperscript{513} \textit{Id.} at 484-85.
\textsuperscript{514} \textit{Id.}
\textsuperscript{515} \textit{See infra} notes 516-20 and accompanying text.
\textsuperscript{516} \textit{Olmer}, 192 F.3d at 1185 (Bright, J. dissenting).
\textsuperscript{517} \textit{Id.} (Bright, J. dissenting).
\textsuperscript{518} \textit{Id.} at 1185-86 (Bright, J. dissenting).
\textsuperscript{519} \textit{Id.} (Bright, J. dissenting).
\textsuperscript{520} \textit{Compare Frisby}, 487 U.S. at 484 (recognizing that a home deserved special protection because a resident was captive within and cannot avoid the unwanted speech outside without forgoing a right of residential privacy), \textit{with Olmer}, 192 F.3d at 1184-86 (Bright, J. dissenting) (demonstrating that in order to attend services and participate in religious free exercise as they choose, worshipers were unwilling listeners and could not avoid the unwanted speech without forfeiting their right to worship).
\textsuperscript{521} \textit{Hill}, 120 S. Ct. at 2496.
\textsuperscript{523} \textit{Olmer}, 192 F.3d at 1185-86 (Bright, J. dissenting).
\textsuperscript{524} \textit{Id.} (Bright, J. dissenting).
cise their religion freely without government interference.\textsuperscript{525} As the Kansas Court of Appeals noted, this right is surely hollow if the government cannot "step in to safeguard [this right] from unreasonable interference from another private party."\textsuperscript{526} Without any regulation, in order to avoid exposure to the unwanted speech in \textit{Olmer}, a Westminster member would have to forgo their right to worship without interference.\textsuperscript{527} As the Court in \textit{Hill} noted regarding clinical privacy, the First Amendment did not require that health care patients undertake "Herculean" efforts to avoid the onslaught of political protests.\textsuperscript{528}

By analogy, the significant interests expressed in \textit{Frisby}, and \textit{Hill} demonstrate that the \textit{Olmer} court improperly questioned the extent of the City's interest in protecting its citizens' rights to freely exercise their religion.\textsuperscript{529} As demonstrated above, the protection of free religious exercise is analogous to the protection of residential privacy in \textit{Frisby} because many of the key elements mentioned in the \textit{Frisby} reasoning regarding the unwilling listener and unwanted speech are apparent in \textit{Olmer}.\textsuperscript{530} Additionally, the same principle of the captive unwilling listener was applied in \textit{Hill} to establish a significant interest in the protection of unhindered access to health care facilities.\textsuperscript{531} As such, the protection of unhindered access to health care facilities is also analogous to the protection of religious free exercise.\textsuperscript{532} As demonstrated above by analogy with the interests expressed in \textit{Frisby} and \textit{Hill} and the decision in \textit{St. David's}, the Eighth Circuit ignored the significant governmental interest in the protection and the right of free exercise in their review of the Lincoln ordinance.\textsuperscript{533}

C. DRAFTING THE LINCOLN ORDINANCE CONSTITUTIONALLY

In light of the United States Supreme Court's decision in \textit{Hill}, the Lincoln City Council could use the \textit{Hill} model to redraft the Lincoln ordinance constitutionally to be narrowly tailored to its significant interest in protecting religious free exercise.\textsuperscript{534} The United States Supreme Court determined that the regulation at issue in \textit{Hill} was narrowly tailored to serve the substantial state interest of protecting

\textsuperscript{525} St. David's, 921 P.2d at 830. The First Amendment of the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. Const. amend. I (emphasis added).
\textsuperscript{526} St. David's, 921 P.2d at 830.
\textsuperscript{527} See supra note 524 and accompanying text.
\textsuperscript{528} Hill, 120 S. Ct. at 2489 (quoting \textit{Madsen}, 512 U.S. at 772-73).
\textsuperscript{529} See supra notes 494-528 and accompanying text.
\textsuperscript{530} See supra notes 501-20 and accompanying text.
\textsuperscript{531} Hill, 120 S. Ct. at 2489.
\textsuperscript{532} See supra notes 521-28 and accompanying text.
\textsuperscript{533} See supra notes 494-532 and accompanying text.
\textsuperscript{534} See infra notes 535-43 and accompanying text.
the ability to access health care facilities. The Colorado regulation made it unlawful for an individual to "knowingly approach" within an eight-foot circle of another individual, without that individual's consent. The eight-foot circle applied only when the individuals were within one hundred feet from the entrance to a healthcare facility. As demonstrated earlier in this Note, the interest that Colorado maintained in protecting the ability to access health care facilities is correlative to the significant interest Lincoln maintained in protecting the rights of its citizens' religious free exercise. The Colorado statute was drafted differently than the Lincoln ordinance in that the Colorado statute was formatted to prevent activities such as oral protest, education, counseling, or leaflet passing instead of "focused picketing." The Supreme Court determined that the Colorado regulation was narrowly tailored to serve Colorado's significant interests. Because the interests in Hill and Olmer are correlative, the Lincoln City Council could draft an ordinance that is constitutional by following the buffer-zone model in Hill. To follow Hill, the Lincoln City Council would draft its ordinance to make it unlawful for one individual to approach within eight feet of another individual without their consent for purposes of oral protest, education, counseling, or leaflet passing when within one hundred feet of a building used for religious purposes. To make the ordinance more narrowly tailored to its interest, the Lincoln City Council could follow its previous model and ban such activities only during "scheduled religious activities."

535. Hill, 120 S. Ct. at 2489, 2496.
537. Hill, 120 S. Ct. at 2484.
538. See supra notes 494-529 and accompanying text.
539. Compare Hill, 120 S. Ct. at 2484 (stating that the Colorado statute made it unlawful to knowingly approach an individual within an eight-foot radius "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person . . . "), with Olmer, 192 F.3d at 1179 (stating that the Lincoln ordinance restricted "focused picketing," defined as, "the act of one or more persons stationing herself, himself . . . or moving in a repeated manner past or around religious premises, while displaying a banner, placard, sign or other demonstrative materials as part of their expressive conduct.").
540. Hill, 120 S. Ct. at 2494.
541. See supra notes 535-40 and accompanying text.
542. See Hill, 120 S. Ct. at 2484-85 n.1 (stating that the Colorado statute read "[n]o person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility."); Olmer, 192 F.3d at 1178 (noting that the Lincoln ordinance sought to protect religious premises).
543. See supra notes 37-43, 476-89, 534-42 and accompanying text.
CONCLUSION

In Olmer v. City of Lincoln,\textsuperscript{544} the United States Court of Appeals for the Eighth Circuit declared a Lincoln, Nebraska ordinance banning focused picketing of religious premises during scheduled religious activities unconstitutional on its face.\textsuperscript{545} In doing so, the Eighth Circuit determined that the Lincoln ordinance failed the three-pronged test discussed in Perry Education Ass'n v. Perry Local Educators' Ass'n,\textsuperscript{546} for time, place, and manner regulations of speech on a public forum.\textsuperscript{547} Specifically, the Eighth Circuit determined that, although Lincoln maintained a significant interest in protecting children from frightening images, the ordinance was not narrowly tailored to serve such an interest.\textsuperscript{548} During its discussion, the Eighth Circuit also questioned the extent of Lincoln's interest in the protection of its citizens' rights to freely exercise their religion.\textsuperscript{549}

In determining if the ordinance was constitutional under the Perry test, the Eighth Circuit properly determined that the Lincoln ordinance was unconstitutional.\textsuperscript{550} The Eighth Circuit's decision was correct because the Lincoln ordinance was not narrowly tailored to meet a significant state interest.\textsuperscript{551} Although the Olmer majority did not address whether the ordinance left open ample alternative channels of communication, Judge Myron H. Bright correctly opined such in his dissent.\textsuperscript{552} Furthermore, the majority correctly reasoned that the ordinance was content-neutral and that it was not narrowly tailored to meet a significant government interest.\textsuperscript{553} However, the Eighth Circuit's limits on the extent of the City's interest in protecting its citizens' rights to freely exercise their religion improperly placed one First Amendment right ahead of another.\textsuperscript{554}

Our nation has long recognized the importance of the religious freedom of its citizens. The drafters of the Constitution placed the rights pertaining to religion first among those listed in the Bill of Rights. One of those Constitutional provisions is the right to be free from congressional interference with the free exercise of religion. Freedom of speech stands side by side with the religious freedoms in the First Amendment. The United States Supreme Court has further

\textsuperscript{544} 192 F.3d 1176 (8th Cir. 1999).
\textsuperscript{545} Olmer v. City of Lincoln, 192 F.3d 1176, 1182 (8th Cir. 1999).
\textsuperscript{546} 460 U.S. 37 (1983).
\textsuperscript{547} See supra notes 61-97 and accompanying text.
\textsuperscript{548} Olmer, 192 F.3d at 1180.
\textsuperscript{549} Id.
\textsuperscript{550} See supra notes 406-89 and accompanying text.
\textsuperscript{551} See supra notes 476-89 and accompanying text.
\textsuperscript{552} See supra notes 433-61 and accompanying text.
\textsuperscript{553} See supra notes 412-32, 462-89 and accompanying text.
\textsuperscript{554} See supra notes 490-533 and accompanying text.
defined all of these First Amendment rights throughout its individual rights jurisprudence by establishing tests and balances for examining the actions of the government concerning religion and speech.

Picketing has become a significant form of free speech.\textsuperscript{555} It is a form the Supreme Court has both defended and denied. In Lincoln, Nebraska, anti-abortion protestors moved their picketing activities from the once frequently contested areas around clinics and residences to Lincoln’s churches. In doing so, they presented the City of Lincoln with the question of where First Amendment lines can be drawn. Walking the line between speech and privacy is a precarious endeavor. When protestors picket churches, the interests of the members of the religious institutions and the protestors’ rights to free speech must be balanced. As noted above, these are both long-recognized Constitutional rights.

The City of Lincoln attempted to define the line by establishing a content-neutral time, place, and manner restriction on picketing outside religious premises. The Eighth Circuit declared the Lincoln ordinance unconstitutional because it was not narrowly tailored. However, in so doing, they also addressed the question of whether the rights of Lincoln’s citizens to freely exercise their religion were significant enough to justify the City’s restrictions on free speech. The Supreme Court has recognized significant interests in the protection of health care privacy and residential privacy. These privacy rights are not constitutionally enumerated rights. They instead fall under the penumbra of the “right to privacy” established in the Fourteenth Amendment. Notably, these interests are similar to the state’s interest in protecting religious free exercise. If the government can prevent an individual from interfering with a citizen’s right to residential privacy — a right established by penumbra — why can it not prevent an individual from interfering with one’s right to freely exercise their religion? This interest is significant. The Bill of Rights established a citizen’s right to be free from congressional interference with the exercise of religion. However, this right is hollow if the government does not have the ability to protect the right from outrageous interference by a private party.\textsuperscript{556}

The key finding in Olmer was the court’s determination that the ordinance was not narrowly tailored. This would likely still ring true if the court had recognized the additional significant interest. The ordinance covered more speech than was necessary to preserve either significant interest because it banned all picketing with signs and


\textsuperscript{556} See supra note 386 and accompanying text.
banners regardless of the message involved. Ultimately, the ordinance's total ban affected even signs reading "Go Cornhuskers" or "Get Well Pastor Mike." Arguably, these messages and signs did not disturb the interest of any citizen in freely exercising his religion. As such, the findings of the Eighth Circuit regarding such an interest made little difference to the constitutionality of the Lincoln ordinance. Regardless, the Eighth Circuit's improper findings have discounted the possibility that another city at another time could apply such an interest when attempting to protect the rights of its citizens.

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