

GILPEN COMBINE COURTS, JUSTICE CENTER,  
GILPEN DISTRICT COURT, STATE OF COLORADO  
2960 Dory Hill Road, Golden, Co. 80403  
303-582-5522

WARREN MARTIN HERN

Plaintiff,

v.

KENNETH TYER SCOTT,

Defendant.

Pro Se

Judge Frederic Rodgers

Civil Case No.: 95-C-132

Courtroom No. 1

**MOTION REQUESTING HEARING TO REVIEW  
HOW EXCESSIVE A ONE MILE RADUIS IS AND  
VERIFY SOME RELIEF FROM THE RESTRAINING ORDER**

COMES NOW the Defendant KENNETH TYLER SCOTT, Pro Se, Ambassador of the **LORD JESUS CHRIST** for the unborn children that are being murder through abortion, is now requesting a hearing to review the Permanent Restraining Order Pursuant to C.R.C.P. 365 for the following reasons:

1. The defendant has had difficultly finding and getting any quality jobs with this Permanent Restraining Order recorded upon his Commercial Colorado Drivers license by Warren Martin Hern.
2. The defendant has only been able to get low paying construction jobs that sometimes have conflict with the one mile radius at times. Employers are not inclined to hire the defendant. The defendants past two employers have at times deliveries that can be in that area of Boulder Abortion Clinic. The restraining order makes it difficult for the defendant to accomplish Daily tasks required by employers.
  - a. The previous employer was a commercial fencing company that delivered metal fencing, pipe and wood pickets sometimes to residential and commercial areas near by the area.

- b. The current company sometimes hauls asphalt to resurface streets for another company Lafarge in the Boulder area (sometimes near Boulder Valley Hospital) and another company at times has removed metal from the Boulder Crossroads Mall for recycling.
  - c. This defendant could lose a job if he was to refuse to go to them or even worse found in contempt of court of this Permanent Restraining Order with possible jail time or fines or both.
3. It is unreasonable to force the defendant not to use the Boulder Pearl Street Mall facilities, where sometimes family and friends want to eat or shop together.
4. This has also taken away many of the guaranteed rights of a United States citizen for simply expressing disagreements with anything the defendant feels is morally wrong in our society.
  - a. The defendant can't go to a College or a University where debates are taking place when Warren Hern and others are speaking to the public.
  - b. The defendant has had difficulty even having the right to speak on Colorado House bills and Senate bills covering legislation against abortion and related material, because Warren Hern is at the Denver Capitol building at the same time. The defendant found out from a Detective Tom Fischer that Warren Hern wanted Mr. Scott arrested on the spot, but it did causing the defendant to have to leave, after he finding out that Warren Hern was there. The first Amendment is being denied and other constitutional rights have been taken away from the defendant, because of this Permanent Retraining Order is so broad.

### **BACKGROUND AND FACTS**

1. Plaintiff Warren Martin Hern had the Defendant Served with a Notice to Appear in Gilpen County Court about a Temporary Restraining and at the very same time Plaintiff had the Defendant taken into custody of the Boulder Police and taken to Boulder Valley Hospital to be evaluated for a mental illness.
2. Based upon Warren Hern's statements to the Boulder Police and the Boulder Valley Hospital the Medical Department, the medical department in Boulder Valley Hospital place Mr. Scott in an ambulance to be taken to Fort Logan Mental Health Center.
3. This all took place within one hour.
4. Warren Hern lied to Fort Logan Mental Health in order to have Mr. Scott institutionized. Hern used an article from the Westward magazine and an employee of Planned Parenthood who was a private detective Michael Newell that lied to what the defendants life was about, to procure Mr. Scotts detainment.

5. Both Planned Parenthood and Warren Hern had vested interests in seeing Mr. Scott Detained.
6. The defendant was forced to stay 41 days in Fort Logan Mental Health Center without showing anything wrong with the defendant. Defendant refused to take any recommended medical prescriptions. The prescriptions when tested after Mr. Scott was released, revealed it would have been gravely harmful if ingested. The Pharmacist said it would have been akin to a chemical lobotomy.
7. The defendant was served by Warren Hern's private detective Michael Newell to show up for the Permanent Restraining Order hearing in Gilpen County District Court to this Judge Frederic Rogers on January 2, 1996, while the defendant was detained at Fort Logan Mental Health Center. Mr. Newell and Warren Hern's lawyer knew there would be no way for the defendant to appear to defend himself.
8. The defendant had an attorney at the time Mr. John Fogerty Winston that requested before the hearing took place to have a continuance, because the defendant was held in Fort Logan Mental Health Center per Warren Hern's request. This court denied the continuance without the defendant to have a fair hearing. This lacked the Fifth and Fourteenth Amendments to DUE PROCESS TO THE LAW under the United States Constitution.
9. The defendant requested to get copies of all court proceedings through his Attorney and nothing was given to the defendant's Attorney or the defendant.
10. The defendant had sought help in the early 1990s for depression when going through a divorce. This was found out by Warren Hern's private investigator, which used that information to get Boulder Valley Hospital to send the defendant to Fort Logan Mental Health Center. Then the private investigator and Warren Hern had influenced the courts by accreting that the defendant was dangerous to himself and possible to Warren Hern.
11. The defendant became a Born Again Christian after the divorce in 1990 and wanted a ministry to be part of. Then after seeking God's direction, the defendant was called to speak out against abortion. The defendant paid for an abortion in the late 1970's and realized it was wrong and that he had killed his own child. The defendant felt called to speak out and protest against abortion from 1991 to the current time. The defendant has been forgiven through accepting JESUS CHRIST as his personal Savior and this gift is to be shared in the defendant's belief, then and still now.
12. The Defendant gave a New Bible to a staff friend of Warren Hern's, who gave it to Warren Hern, who then gave it to the Boulder Police Department as if it was an evil thing done by the defendant.
13. The defendant also read Bible verses outside of Warren Hern's Boulder Abortion Clinic. One Bible verse from Romans 6:23 says, "For the wages of sin is death, but

the gift of God is eternal life in JESUS CHRIST our LORD”. Warren Hern twisted this statement to the court and the defendant didn’t have a chance to respond at the Temporary or Permanent Restraining Hearings. The statement also included we are all going to die someday and no one is promised tomorrow according to God. We could die within this next year, including Warren Hern and including this Judge to hear this Motion.

14. The defendant was protesting against abortion to save babies, but the defendant was also pleading with Warren Hern and his staff to Repent, because God forgives if we Repent. The defendant also quoted Peter II 3:9, “ the Lord is not slack concerning His promise, but is long suffering toward us, not willing that any should perish (to go to Hell) but that all should come to repentance. The defendant was trying to witness to Warren Hern that God can forgive even him if he Repents and stops killing the innocent babies. This did cause several of Warren Hern’s staff members to quit and that was another reason why Warren Hern was angry with the defendant. Plus there were woman that changed their mines and kept their babies and Warren Hern didn’t like that either.
15. The defendant was in a Pentecostal Church at this time and was taught that one could speak in tongues for God to answer some prayers. The defendant tried at the time to rebuke a Boulder Detective in tongues, who was trying to use his power to run the defendant off in front of Boulder Abortion Clinic, the defendant did this to stop it from being an argument and the Detective did leave at the time. The defendant doesn’t think we are in the Dispensation of person’s speaking in tongues now after studying the Bible further. This was an additional problem when talking to Doctors at Fort Logan Mental Health Center and this was also used against the defendant in Gilpen District Court when Mr. Scott couldn’t attend the hearings.
16. The defendant was using the First Amendment to the United States Constitution and now this Permanent Restraining Order has been used as a guise by Warren Hern to eliminate Free Speech anywhere in this country by him within a mile for the defendant.
17. The defendant did go to the area of the weekend house of Warren Hern on Chipmunk Lane in Gilpen County and placed a cross in the ground and a sign on a telephone pole near what was thought to be Warren Hern’s property. The defendant didn’t think this was illegal. The defendant has not gone back there and won’t ever go within a mile of that location ever again. The defendant doesn’t think that the Gilpen County Court House is within that mile and that would be the only exception to the Courthouse.
18. The defendant has never written any threatening letters to Warren Hern.
19. The defendant was leaving from picketing one day and went around the block to the street to south or back of Boulder Abortion Clinic when Warren Hern just happened to pull out in front of the defendant. The defendant didn’t preplan this happen stance,

but the defendant did follow the same direction to the Pearl Street Mall, but it was not a threatening manner and didn't continue after a block and half. The defendant does not intend to ever follow a vehicle that Warren Hern is know to be in, from this day forward.

20. The defendant did blow a rams horn (Shophar) in front of the Boulder Abortion Clinic twice (thinking it would be legal, a type Jewish Old Testament type warning to Repent). The defendant did get jail time for that (A Loud and Unusual Noise Law), but accepted that as the price for civil rights disobedience, as like a protester of the 1960's.
21. The defendant has not sought or been forced to get any medical treatment, since Warren Hern had the defendant put into Fort Logan Mental Health.
22. The Colorado University Professor Ward Churchill has not been denied any of his rights to Freedom of Speech when he does promotes violence and the defendant promotes non-violence and follows the Bible and Gospel of JESUS CHRIST.

### **THE PERMANENT RESTRAINING ORDER VIOLATES THE FIRST AMENDMENT AND THE COLORADO CONSTITUTION**

#### **1. Mr. Scott's First Amendment Rights are clearly implicated.**

The defendant has at all times, tried to engaged in the lawful exercise of their First Amendment Free Speech rights in a quintessential public forum. As such, the public sidewalks, including those near Alpine Street, and Alpine Street itself are quintessential, traditional public fora.

Thus, there should be no question that Mr. Scott was engaged in speech and expressive activities which, in turn, implicate his First Amendment rights and that his speech and other expressive activities, including targeted picketing, street Evangelism, street preaching, hymn singing, and sharing the Gospel of Christ on these occasion constituted First Amendment speech and is constitutional protected. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (in the flag salute case, the Supreme Court held that First Amendment "speech" rights include a broad range of expressive acts, not just words; such rights include spoken and written words, display of symbols, expressive conduct, and the right not to speak).

It is important to note that, in addition to and independent of the protections of the First Amendment of the United States Constitution, Article II, Section 10 of the Colorado Constitution, "is a source of enhanced protection of individual rights that is independent of and supplemental to the protections provided by the United States Constitution."

Speech that is popular or pleasant has little need for constitutional protection. *City of Houston v. Hill*, 482 U.S. 451, 462 n. 11 (1987). The true test of the right to free speech, under the First Amendment to the United States Constitution and its counterpart in the Colorado

Constitution, is the strength of the protection that right affords to speech that is unpopular, unpleasant, disturbing, or even despised. *See, e.g., United States v. Eichman*, 469 U.S. 310 (1990) (flag burning). Even “loud” and “boisterous . . . harangue[s]” is constitutionally protected speech, especially when they occur in a traditional public forum such as the Pearl Street Mall. *See Edwards v. South Carolina*, 372 U.S. 229, 233 (1963). *See also Furr v. Town of Swansea*, 594 F. Supp. 1543, 1546 (D.S.C. 1984) (“preaching the Gospel of the Lord Jesus Christ . . . on the streets of Swansea, South Carolina” is constitutionally protected speech under the First Amendment).

Admittedly, anti-abortion statements, coupled with graphic, but real, pictures of aborted babies, and statements invite dispute. Such speech is nevertheless protected from government infringement. *Terminiello v. Chicago*, 337 U.S. 1 (1949) (convictions were not allowed to stand because the trial judge charged that speech of defendants could be punished as a breach of the peace ‘if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm’). In finding the position of the trial judge in *Terminiello* unconstitutional, the Supreme Court noted that

[a] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment. . . . There is no room under our Constitution for a more restrictive view.

*Id.* at 4-5.

Moreover, there is no constitutional right to be free from insults. Shielding public figures such as Warren Hern from such insults is not a compelling government interest. *Texas v. Johnson*, 491 U.S. 397, 408-09 (1971).

“Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.” *Roe v. Wade*, 410 U.S. 113, 116 (1973). *See also Forsythe County v. Nationalist Movement*, 505 U.S. 123, 124 (1992) (“In this case, with its emotional overtones, we must decide whether the free speech guarantees of the First . . . Amendment [] are violated .”).

Thus, the fact that Mr. Scott’s First Amendment speech may offend or may even have offended Warren Hern and perhaps others at Boulder Abortion Clinic does not lessen its constitutionally protected status and this matter must be determined independent of the controversy over Mr. Scott’s beliefs out of which it arises. “The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.” *Hill v. Colorado*, 120 S.Ct. 2480 (2000) (fact that messages conveyed by communications may be offensive to their recipients does not deprive them of constitutional

protection; right to free speech includes right to attempt to persuade others to change their views, and may not be curtailed simply because speaker's message may be offensive to his audience); Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105 (1991); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

The exertion of social pressure to effect personal change, when conducted by means of peaceful expression, represents core First Amendment activity. *See, e.g., NAACP v. Claiborn Hardware Co.*, 458 U.S. 886 (1982) (speech does not lose its protected character simply because it may embarrass others or coerce them into action); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (literature distribution in neighborhood in campaign against a real estate broker engaged in 'blockbusting' protected free speech).

Accordingly, this Court must address the present case independent of the controversy out of which it arises.

## **2. The Constitution shields the exertion of social pressure by means of peaceful expressive activities.**

The exertion of social pressure to effect personal change, when conducted by means of peaceful expression, represents core First Amendment activity. *See, e.g., NAACP v. Claiborn Hardware Co.*, 458 U.S. 886 (1982) (speech does not lose its protected character simply because it may embarrass others or coerce them into action); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (literature distribution in neighborhood in campaign against a real estate broker engaged in 'blockbusting' protected free speech).

Plaintiffs' Permanent Restraining Order is aimed at regulating Mr. Scott's First Amendment speech activities in a traditional public forum, *i.e.*, Pearl Street Mall and the public sidewalks or any other political setting of the City of Boulder or the City and County of Denver or any place in the State of Colorado or any where in the United States, where Warren Hern may be speaking. The constitutionally protected status of such expression in a public forum is uniformly recognized. *See, e.g., International Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Cantwell v. Connecticut, 310 U.S. 296 (1940).

## **3. Communication in a traditional public forum receives strong Constitutional protection.**

Pearl Street Mall is within a mile radius of the Boulder Abortion Clinic and many public sidewalks of the City and County of Boulder, State of Colorado, where Mr. Scott has to work possibly or wishes to eat or speak are traditional public fora. The Supreme Court has been clear that a traditional public forum occupies "a special position in terms of First Amendment protection" and "the government's ability to restrict expressive activities [in it] 'is very limited.'" Boos, 485 U.S. at 318 (quoting United States v. Grace, 461 U.S. at 171, 180 (1983)).

Public streets and sidewalks represent traditional public fora for purposes of free speech. *See Frisby*, 487 U.S. at 480-81. Regulation of speech activity in public fora is "subject to the

highest scrutiny.” *ISKCON v. Lee*, 505 U.S. 672, 678 (1992); accord *United States v. Kokinda*, 497 U.S. 720, 726 (1990) (plurality opinion). A traditional public forum is “defined by the objective characteristics of the property, such as whether, by long tradition or by government fiat, the property has been devoted to assembly and debate.” *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 677 (1998). The status of a place as a traditional public forum is not dependent upon the will of the government; traditional public forums are “open for expressive activity regardless of the government’s intent.” *Id.*

Public parks, streets, and sidewalks “have immemorially been 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.” *Hague v. CIO*, 307 U.S. 496, 515 (1939). See also *Faustin v. City and County of Denver, Colorado*, 268 F.3d 942, 949-950 (10<sup>th</sup> Cir. 2001) (sidewalk on suspended highway overpass was a traditional public forum).

In a traditional public forum, speakers enjoy the highest level of constitutional protection, and “almost unfettered access.” *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 679 (1998).

“Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.” *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985).

Moreover, “the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals. Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. . . . As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.” *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 641-43 (1994).

As such, Broadway Street and the public sidewalks of the City and County of Boulder, State of Colorado, where Mr. Scott was speaking in the past has occupy “a special position in terms of First Amendment protection” and “the government’s ability to restrict expressive activities ‘is very limited.’” *Boos*, 485 U.S. at 318 (quoting *United States v. Grace*, 461 U.S. at 171, 180 (1983)).

Restrictions on expressive activities on Broadway Street and the public sidewalks of the City and County of Boulder, State of Colorado, where Mr. Scott was speaking in the past are therefore unconstitutional unless such restrictions can satisfy the “stringent standards” governing “restrictions on speech in traditional public fora.” See *Frisby*, 487 U.S. at 481.

#### **4. The Permanent Restraining Order entered by this Court is unconstitutional.**

“There are two quite different ways in which a statute or ordinance may be considered invalid ‘on its face’ – either because it is unconstitutional in every conceivable application, or

because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally ‘overbroad.’ *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 7896 (1984).

Where a defendant’s conduct encompasses communication efforts, to prevent a statute from being unconstitutionally vague and overbroad, “noise” must be construed to encompass loud communication only when the communication presents a clear and present danger of violence or the communication is intended merely as a guise to disturb persons. *People v. Fitzgerald*, 573 P.2d 100 (Colo. 1978).

The Permanent Restraining Order entered by this Court is unconstitutional on both of the above-noted grounds. This Permanent Restraining Order is fatally overbroad, thus infringing on well-established First Amendment rights. The Permanent Restraining Order also seeks to prohibit such a broad range of protected conduct that it is unconstitutionally ‘overbroad’.

**a. The Permanent Restraining Order is unconstitutional on its face.**

The Permanent Restraining Order must be subjected to “exacting judicial scrutiny in order that freedom of expression may have the ‘breathing space to survive’ which it requires.” *Hansen v. People*, 548 P.2d 1278, 1280 (Colo. 1976). The Permanent Restraining Order is facially defective because it sweeps within its coverage a substantial amount of expressive activities that are protected by the guarantees of the First Amendment. See *Thornhill*, 310 U.S. at 97; *Hansen v. People* at 1281 (“the prohibitory legislation must be precisely and narrowly drawn to proscribe only *unprotected* speech.” (emphasis in original)).

**b. The Permanent Restraining Order is unconstitutionally overbroad.**

A statute is unconstitutionally overbroad when, in addition to limiting activities that may be constitutionally forbidden, it also sweeps within its coverage expressive activities that are protected by the guarantees of the First Amendment. *Aguilar v. People*, 886 P.2d 725 (Colo. 1994); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

In a facial overbreadth challenge, “a court’s first task is to ascertain whether the enactment reaches a substantial amount of constitutionally protected conduct. *Boos*, 485 U.S. at 329 (citing *City of Houston*, 482 U.S. at 458-59; *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)). In making this evaluation, a court considers “the actual text of the statute as well as any limiting constructions that have been developed.” *Boos*, 485 U.S. at 329 (citing *Kolender v. Lawson*, 461 U.S. 352, 355 (1983); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 494, n. 5).

“A statute is facially overbroad in the free speech context if it substantially infringes upon or impairs constitutionally protected speech while proscribing speech which is not constitutionally protected. . . . The doctrine has been consistently applied in the free speech context because courts recognize the preferred status bestowed upon the right to free speech by our constitutions.” *Hansen v. People*, at 1280.

The Permanent Restraining Order reaches an outrageously expansive amount of constitutionally protected conduct. Indeed, it is difficult to imagine any speech unreached by the draconian sweep of the Permanent Restraining Order. It is written so broadly that it restricts free speech rights of **ONE MILE** that the Court should have no interest in regulating.

The reach of the Permanent Restraining Order extends to such important First Amendment activities as political lectures, discussions, campaigns, and public press conferences convened in the City of Boulder and City of Denver even the State Capitol on Abortion bills to the Senate and House Meetings open to the Public to speak at.

**5. The Permanent Restraining Order infringes a substantial amount of constitutionally protected conduct.**

A statute is unconstitutionally overbroad when, in addition to limiting activities that may be constitutionally forbidden, it also sweeps within its coverage expressive activities that are protected by the guarantees of the First Amendment. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Here, the Permanent Restraining Order is unconstitutional in its effect on Mr. Scott, (as well as others not specifically before the Court, because it has frighten most protesters from going there.) When a realistic danger exists that a statute or ordinance “will significantly compromise recognized First Amendment protections of parties not before the court, it must be declared unconstitutionally overbroad. *Taxpayers for Vincent*, 466 U.S. at 801.

If a law is written so broadly that it restricts free speech rights of third parties, it falls within the “substantial overbreadth” doctrine. *Id.* at 798-800; *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). To the extent an ordinance seeks to define and regulate conduct that is the legitimate object of government regulation, it must not do so “by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.” *NAACP v. Alabama*, 377 U.S. 288, 307 (1964).

Any objections to the foregoing applications on the grounds that it was not the intention of the Court that the Permanent Restraining Order which it entered would be applied in such a manner are irrelevant to the present challenge. The Permanent Restraining Order is facially defective because it sweeps within its coverage a substantial amount of expressive activities that are protected by the guarantees of the First Amendment. See *Thornhill*, 310 U.S. at 97.

**6. The Permanent Restraining Order is not a constitutionally permissible time, place, and manner restriction.**

In the sensitive realm of First Amendment rights, the presumption of constitutionality usually accorded legislative decision does not apply. See *Hickory Fire Fighters Ass’n v. City of Hickory, N.C.*, 656 F.2d 917, 923 (4<sup>th</sup> Cir. 1981); *Blasecki v. City of Durham, N.C.*, 456 F.2d 87, 91 (4<sup>th</sup> Cir), *cert. denied*, 409 U.S. 912 (1972). In order for a time place, and manner restriction on expressive activity in a public forum to pass constitutional muster, the restriction must (1) be content-neutral; (2) serve a significant governmental interest; (3) be narrowly tailored to serve that interest; and (4) leave open ample alternative channels of communication. Moreover, the government bears the burden of demonstrating that its enactment meets these requirements. See

*Davenport v. City of Alexandria, Va.*, 710 F.2d 148, 152 n. 8 (4<sup>th</sup> Cir. 1983) (a governmental entity must always be prepared to come forward with a strong factual justification for its action). The statute is fatally defective in at least three of the above-noted requirements.

**7. The restrictions in the Permanent Restraining Order do not serve a compelling governmental interest.**

Certainly, the authorities have an interest in protecting the safety and welfare of its citizens, including preventing violence. The government can adopt regulations that assure such interests since the First Amendment protects only “peaceful” expression. *See, e.g., Thornhill*, 310 U.S. at 102 (holding that the First Amendment protects only “peaceful” picketing).

Here, however, there has been absolutely no threat of violence; all activities, though deemed loud Warren Hern, were peaceful. Moreover, the Permanent Restraining Order is not specifically aimed at redressing violence, disorder, or obstruction. In fact, it limits the conduct and expression of a peaceful speaker on the public streets who are not violent, disorderly, or obstructing access to Boulder Abortion Clinic, public buildings, public sidewalks, or streets. Thus, the Permanent Restraining Order is unconstitutionally overbroad because it does not serve to keep law and order by depriving citizens of their rights).

In *Thornhill*, the Supreme Court struck down a picketing ordinance with similar defects in *Thornhill* on the ground that it “does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of speech or of the press.” *Id.* 310 U.S. at 987.

Without more, the mere presence of an individual picketing on a public sidewalk, or elsewhere, does not suggest violence, disorder, or obstruction. There is simply no significant governmental interest in curtailing the speech of such persons. *Thornhill*, 310 U.S. at 105. *See also Edwards*, 372 U.S. at 236-7; *Davis v. Francois*, 395 F.2d 730 (5<sup>th</sup> Cir. 1968) (ordinance prohibiting more than two persons without indicating that any more would necessarily cause riots, block the streets, sidewalks, or entrances from picketing in front of a restaurant, a place of business, or a public building invalidated).

Because the Permanent Restraining Order “does not aim specifically at evils within the allowable area of control . . . but sweeps within its ambit other activities that constitute an exercise of First Amendment rights,” it is overbroad. *Thornhill*, 310 U.S. 97. *See also Beckerman v. City of Tupelo, Miss.*, 664 F.2d 502, 507 (5<sup>th</sup> Cir. 1981).

**8. The Permanent Restraining Order is not narrowly tailored.**

In order to regulate speech constitutionally, a statute must be narrowly drawn so as not to infringe on protected speech. *Grayned*, 408 U.S. at 116-17. *See also Village of Schaumburg*, 444 U.S. at 637. “Only by requiring these narrowing drawn and precise enactments that aim at specific conduct can courts produce a reasonable reconciliation of the minority’s right to protest, and the majority’s right to peace and order.” *Davis*, 395 F.2d at 736. Even if the Court, in entering the Permanent Restraining Order, had articulated a substantial governmental interest

aimed at “specific evils” addressed and sought to be corrected, the Permanent Restraining Order is not drawn with narrow specificity and, thus, is more restrictive than necessary to serve any legitimate governmental interest.

The Permanent Restraining Order is an impermissible time, place, and manner regulation because it is not narrowly tailored to prohibit specific evils or to serve any substantial governmental interest. It prohibits a form of speech on certain specified public ways without reference to any potential for violence. The peaceful picketing by the defendant can be cited and arrested if he exercises their free speech rights without the slightest blocking of any passageway and without threatening any degree of coercion or violence. In short, defendant can be arrested where there is no mass gathering or picketing, no attempts to obstruct, no rioting, no violence, no disruption, no disorder, no coercion – indeed, nothing but communication. The restrictions apply regardless of the time of day the picketing occurs.

As such, the Permanent Restraining Order arbitrarily and unnecessarily infringes upon “the interests of the community and that of the individual in freedom of discussion and matters of public concern.” *Thornhill*, 310 U.S. at 105. Consequently, the Permanent Restraining Order entered by the Court unduly infringes on protected freedom by allowing punishment for the fair exercise of First Amendment rights. See *Edwards*, 372 U.S. at 235-36.

**9. The Permanent Restraining Order Does Not Leave Open Ample Alternative Avenues of Communication.**

A statute purporting to be a content-neutral time, place, and manner regulation may “not unreasonably limit alternative avenues of communication.” *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). The Permanent Restraining Order in question does precisely that. It is manifestly unreasonable to prohibit virtually all “physical action, verbal utterance, or any other means” of expressive activity in a traditional public forum. Requiring Mr. Scott to stay 1 mile away from any place Warren Hern is does not provide a viable avenue for expressive activities.

**10. The Permanent Restraining Order is unconstitutionally vague and amounts to a prior restraint on protected speech.**

An unduly vague statute is one that does not meet the constitutionally mandated level of notice to citizens and guidance for law enforcement personnel. In that a violation of the Permanent Restraining Order may result in the imposition of criminal penalties, it must be reviewed under vagueness standards applicable to criminal or quasi-criminal laws. The Supreme Court has articulated the applicable standards:

The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. . . . Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine ‘is not actual notice, but the other principle element of the doctrine – the requirement that a legislature establish

minimal guidelines to govern law enforcement.’ *Smith*, 415 U.S. at 574. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit ‘a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.’ *Id.* at 575.

*Kolender*, 461 U.S. at 357-58. “The vice of vagueness is particularly pronounced when expression is sought to be subjected to licensing.” *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 683 (1968).

The reach of the Permanent Restraining Order is so broad that it forbids acts in terms “so vague that men of common intelligence must necessarily guess at its meaning and differ in its application.” *Smith v. Goguen*, 415 U.S. 566, 577 (1974) (quoting *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926)).

Clearly, the Permanent Restraining Order is susceptible of arbitrary enforcement. See *Smith v. Goguen*, 415 U.S. at 574. Thus, it is unconstitutionally vague and capable of arbitrary and discriminatory enforcement.

Equally clear, the Permanent Restraining Order results in the punishment of constitutionally protected free speech. As such, the Permanent Restraining Order amounts to a prior restraint upon Mr. Scott’s rights of freedom of speech guaranteed by both the United States Constitution and the Colorado Constitution. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992). There is a heavy presumption against the validity of a prior restraint. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

**11. The Permanent Restraining Order, to the extent that it is based upon expressive conduct, cannot be predicated upon the fact that the hearer takes offense at the speaker’s message.**

According to Warren Hern, he and perhaps others associated with Boulder Abortion Clinic were offended by the message communicated by Mr. Scott and those with him.

The underlying purpose of the First Amendment’s protection of speech is, by design, intended to protect discourse on topics, which tend to incite emotions. That is, the public interest is best served by the robust exchange of ideas on important topics of political, social and moral concern. See, e.g., *Stromberg v. California*, 283 U.S. 359, 369 (1931). The United States Supreme Court has therefore recognized that the mere fact that someone takes offense at a message cannot be used as the basis to subvert the protections provided by the First Amendment.

When a statute attempts to punish “spoken words,” it can only withstand constitutional scrutiny if the speech, which the rule regulates, is not protected by the First Amendment. *Lewis v. City of New Orleans*, 415 U.S. 130, 134 (1974).<sup>1</sup> Indeed, the Court has routinely rejected as

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There are generally only five categories of speech which have been deemed to be outside of the protections of the First Amendment. They are: (1) words which by their very utterance tend to incite an immediate breach of the peace (also referred to as “fighting words”);

facially invalid “disturbing the peace” or similar ordinances which were susceptible of application to protected speech. *See id.* at 134; *Cohen v. California*, 403 U.S. 15 (1971); *Terminiello v. Chicago*, 337 U.S. 1 (1949); and *Gooding v. Wilson*, 405 U.S. 518 (1972). The Court recently reaffirmed this principle in *Texas v. Johnson*, 491 U.S. 397 (1989), a prosecution brought under a Texas state statute which prohibited burning the American flag.

The State’s position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. [footnote omitted]. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal “function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”

*Id.* at 408-09 (emphasis added).

There can be no principled dispute that the Permanent Restraining Order cannot be based upon the fact that a speaker’s message upsets the hearer, so long as that message is comprised of protected speech. *Bolger v. Youngs*, 463 U.S. 60, 71 (rejecting argument that alleged offensiveness could justify suppression of protected speech).

The fact that the recipient of a speaker’s message is “annoyed,” “embarrassed,” or “discomforted” cannot stand as the basis for a criminal charge of disorderly conduct. *Johnson*, 491 U.S. at 408-09. Indeed, speech that causes such a reaction is precisely the type of communicative activity that the free speech protections of the First Amendment is intended to protect.

Therefore, access to the public streets and sidewalks around Boulder Abortion Clinic, all of which are public fora, must be guarded and protected diligently. Encroachment upon the right to be on this public forum must be weighed carefully and not lightly considered or permitted. Government is not constitutionally entitled to remove disfavored speakers from these types of public fora because of the effect of a speaker’s message.

In *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) the petitioner was convicted for violation of a city ordinance which prohibited any parade, procession or other public demonstration without first securing a permit from the City commission. This challenged, and subsequently stricken ordinance, required the commission to issue permits "unless in its

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(2) obscenity; (3) defamation; (4) false or misleading commercial speech; and (5) child pornography. *See generally*, D. Farber & J. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219, 1228-29 (1984). *Accord Hansen v. People*, 548 P.2d 1278 (Colo. 1976). Quite clearly, none of Mr. Scott’s speech qualifies for one of these categories.

judgment the public welfare, peace, safety, health, decency, good order, morals or convention requires that it be refused." *Shuttlesworth*, 394 U.S. at 149-50.

The Supreme Court, in flatly rejecting the standards and guidelines for permits, stated:

There can be no doubt that the Birmingham ordinance, as it was written, conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade' 'procession', or 'demonstration' on the city's streets or public ways. For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience.' This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.

*Id.* at 150-151 (footnote omitted).

In *Coates v. Cincinnati*, 402 U.S. 611 (1971), the Court upheld a First Amendment challenge to a statute which made it unlawful for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . .

"The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct. And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens."

*Id.* at 615-616 (footnote omitted).

The fundamental right of Defendant to be in this public forum and to speak out on topics of public and social concern is clearly protected by the First Amendment of the United States Constitution and its counterpart in the Colorado Constitution.

**12. The Permanent Restraining Order amounts to viewpoint discrimination and/or a prior restraint on free speech.**

The Permanent Restraining Order applies only to Defendant Kenneth Tyler Scott. As such, the Permanent Restraining Order clearly attempts to stop all speech, speech which involves targeted picketing, street Evangelism, street preaching, hymn singing, sharing the Gospel of

Christ, and sharing the sincerely held religious convictions that abortion are contrary to God's moral law and thus wrong. Allowing restriction of such messages, even though Warren Hern finds those messages disagreeable, invites the most serious kind of constitutional harm. Such conduct amounts to viewpoint discrimination and/or a prior restraint on constitutionally-protected free speech. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 567 (7<sup>th</sup> Cir. 2001) (when government officials deny access to a forum "in a manner that discriminated against a speaker based on his viewpoint," it is guilty of "discrimination that is impermissible regardless of forum status."); *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 676, 682 (1998) (debate between political candidates on public television; the "requirement of neutrality" means that the government "cannot grant or deny access . . . on the basis of whether it agrees with a [speaker's] views.")

WHEREFORE, for the foregoing reasons, Mr. Scott respectfully states as aforesaid, at all times relevant herein, he was engaged in expressive conduct in a public forum all of which is constitutionally protected. Mr. Scott's speech on a public sidewalk or at a Boulder Mall, any Mall or at Colorado University if Warren Hern were to come when the defendant was there at the same time is unquestionably protected by the First Amendment as it did not constitute fighting words. Nor is there any evidence that Mr. Scott engaged in threatening conduct. The entry of the Permanent Restraining Order has violated Mr. Scott's due process rights and amount to both a prior restraint and viewpoint discrimination on constitutionally-protected free speech in all Public Forums.

Dated this \_\_\_ day of \_\_\_\_\_, 2005.

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KENNETH TYLER SCOTT  
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Westminster, Colorado 80035-1685  
303-550-8170

CERTIFICATE OF SERVICE

After speaking with the Gilpen District County Court clerk it was recommended to mail, Motion to the Judge to Review and see if he would allow a hearing to be set.

Copy sent to: GILPEN COMBINE COURTS, JUSTICE CENTER,  
Attention: Judge Frederic Rodgers  
GILPEN DISTRICT COURT, STATE OF COLORADO  
2960 Dory Hill Road, Golden, Co. 80403  
303-582-5522

Copy sent to: Attorney Howard Bittman,  
1406 Pearl Street, Suite # 200  
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303-443-2281