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Comments

THE BAND FROM HELL: AN EXAMINATION OF SUICIDE ON STAGE AS EXPRESSIVE CONDUCT UNDER THE FIRST AMENDMENT

I. INTRODUCTION

Hell on Earth is a hard-rock band unlike many others. This small band, originating in South Florida, has gained considerable notoriety for their wild stage antics.\(^1\) In addition to the usual loud music and screaming fans, Hell on Earth has engaged in outrageous concert stunts including wrestling in chocolate syrup, sodomizing skinned calves, and drinking concoctions of blended rats.\(^2\) Their latest enterprise shocked not only South Florida, but concert-goers and politicians everywhere.\(^3\) On October 4, 2003, Hell on Earth was scheduled to perform in St. Petersburg, Florida, where they planned to feature a live suicide onstage.\(^4\)

William ("Billy") Tourtelot, Hell on Earth's leader, told reporters that a terminally-ill man would be committing suicide onstage.\(^5\) The band hoped that the public suicide of a terminally-ill person


\(^{2}\) See Painless, supra note 1 (describing stunts at Hell on Earth concerts).


\(^{4}\) See Fight Concert, supra note 1 (noting band intended to present onstage suicide in support of euthanasia); see also New Law Passed to Block Concert Suicide, at http://entertainment.msn.com/news/article.aspx?news=135666 (Sept. 29, 2003) [hereinafter New Law] (quoting one council member who raised possibility that suicide may simply be publicity stunt, but still wanting to exercise caution).

\(^{5}\) See Gina Vivinetto, Band promotes 'onstage suicide' Series, ST. PETERSBURG TIMES: S. PINELLAS ED., Sept. 17, 2003 [hereinafter Band Promotes] (noting it was uncertain whether Tourtelot's announcement was merely publicity stunt and local police did not yet know how to respond to situation), available at http://pqasb.pqarchiver.com/sptimes/results.html?QryTxt=hell+On+Earth.
would raise awareness of right-to-die issues. The goal of Hell on Earth was frustrated, however, when one of the owners of the venue canceled the performance. In addition, Florida has a statute prohibiting assisted self-murder and the St. Petersburg City Council acted to make certain that the concert and suicide would not take place. On September 29, 2003, the council met and discussed passing an emergency ordinance. The ordinance would make it illegal to conduct a suicide for entertainment or commercial purposes, and to host, promote, or sell tickets for that event. On October 2, 2003, Circuit Judge John C. Lenderman issued an order banning the assisted suicide.

6. See New Law, supra note 4 (discussing intent of concert suicide). In an e-mail, the band’s leader, Billy Tourtelot, reportedly wrote, “[t]his show is far more than a typical Hell On Earth performance, . . . This is about standing up for what you believe in, and I am a strong supporter of physician-assisted suicide.” Id. On the Hell on Earth website, Tourtelot stated that he intended to go forward with the suicide to honor the oath he gave to his terminally-ill friend, a member of the Euthanasia Society. See Hell on Earth, at http://www.hellonearth.net (last visited Nov. 2, 2004) [hereinafter Hell Website] (describing Tourtelot’s intention behind featuring live, onstage suicide). Despite the band’s right-to-die platform, national right-to-die organizations have denounced Hell on Earth’s plan. See Tom Zucco & Carrie Johnson, Good family name bears Hell on Earth, St. Petersburg Times: S. Pinellas Ed., Oct. 4, 2003 [hereinafter Good Family] (noting band’s lack of support from right-to-die organizations), available at http://pqasb.pqarchiver.com/sptimes/results.html?QryText=hell+On+Earth.

7. See Fight Concert, supra note 1 (indicating part-owner was warned by St. Petersburg police that crowd could get out of control); see also Carrie Johnson, Suicide concert is a no show, St. Petersburg Times: S. Pinellas Ed., Oct. 5, 2003 [hereinafter No Show] (noting part-owner Dave Hundley canceled show on September 24, 2003), available at http://pqasb.pqarchiver.com/sptimes/results.html?QryText=hell+On+Earth.


The intrepid Tourtelot did not let the ruling deter him from his objective; the band announced that it would proceed with its mission.\textsuperscript{12} Hell on Earth claimed that the concert and suicide would take place at two different undisclosed locations in St. Petersburg and would be broadcast via the band's website.\textsuperscript{13} On October 5, 2003, the band informed the Associated Press that the concert had taken place the previous evening at one of the secret locations, but the band did not know if the suicide of the terminally-ill patient had taken place at the other location.\textsuperscript{14} Fans who tried to access the Hell on Earth website were directed to an alternate website, which stated that the performance and suicide were going to be shown sometime that week.\textsuperscript{15}

The city ordinance appeared to have prevented the planned suicide, as there was no evidence that the suicide actually took place.\textsuperscript{16} Neither the concert nor the suicide was broadcast on the Internet, and the police did not receive any calls for a suicide.\textsuperscript{17} Nevertheless, at least one additional venue has canceled a Hell on

\begin{itemize}
\item \textsuperscript{12} See Plan is On, supra note 8 (reporting band intended to go forward with concert and suicide).
\item \textsuperscript{13} See Good Family, supra note 6 (discussing Hell on Earth's intention to carry out suicide); see also Hell Website, supra note 6 (posting on band's website declared concert would go on despite lack of venue).
\item \textsuperscript{14} See No Show, supra note 7 (stating suicide concert was "a dud"). Radio host, Shane Bugbee, maintained that he had possession of a video of the Hell on Earth performance, and he claimed that it showed a sickly-looking man committing suicide through "some sort of asphyxiation." See Robert Farley, Radio host proclaims he has suicide video, ST. PETERSBURG TIMES: S. PINELLAS ED., Oct. 6, 2003 (describing video), available at http://pqasb.pqarchiver.com/sptimes/results.html?QryTxt=hell+On+Earth. Bugbee admitted he did not know whether the suicide was authentic or staged, but planned to make the video available to the public. See id.
\item \textsuperscript{15} See No Show, supra note 7 (noting band's website announced suicide to take place at later date). The band's website was inaccessible for most of Saturday, October 4, 2003; the company that provided the band's Internet service had closed the site because of too many hits. See id. The site was available again that evening at 8:30 p.m., an hour after the concert was scheduled to begin. See id. A note on the website directed fans to another website: "www.evilnow.com." See id. The link stated that the concert and suicide would be broadcast sometime that week, but provided no other details. See id.
\item \textsuperscript{16} See Michael Sandler, County moves to ban public suicides, ST. PETERSBURG TIMES: STATE ED., Oct. 18, 2003 [hereinafter Ban Suicides] (noting after St. Petersburg City Council passed emergency act outlawing suicide for commercial purposes, Pinellas County passed similar ordinance outlawing all public suicides), available at http://pqasb.pqarchiver.com/sptimes/results.html?QryTxt=hell+On+Earth.
\item \textsuperscript{17} See No Show, supra note 7 ("Police, who had been on alert for the suicide concert, said late Saturday [October 4, 2003] that nothing had happened, as far as they could tell.")
\end{itemize}
Earth show due to liability concerns if a suicide were to occur during the show.18

The actions of the St. Petersburg City Council were bold and arguably commendable in an effort to prevent a suicide for entertainment purposes.19 Hell on Earth, however, argued that the government acted solely to prevent it from promoting its support of physician-assisted suicide.20 If the band’s actions constituted expressive conduct under the First Amendment, the government may have violated Hell on Earth’s right to free speech as guaranteed by the United States Constitution.21

This Comment focuses on the association of suicide on stage and the First Amendment.22 Part II discusses categories of governmental regulations, unprotected speech, and speech protected by the First Amendment.23 Part III raises the various issues concerning Hell on Earth’s conduct under First Amendment jurisprudence.24 Finally, Part IV concludes this discussion of suicide on stage and First Amendment rights.25

18. See Michael Van Sickler, Band feels bite of controversy, St. Peters- burg TIMES: LATE TAMPA ED., Oct. 12, 2003 [hereinafter Band Feels Bite] (noting Hell on Earth was scheduled to play at Brass Mug bar in Tampa, but bar owner canceled show after authorities warned her she could be liable if anything illegal happened), available at http://pqasb.pqarchiver.com/sptimes/results.html?QryTxt= hell+On+Earth. The owner of the Brass Mug reported that she received at least ten phone calls warning her that the terminally-ill patient did exist and the suicide would take place at her bar, if the show went on as planned. See id.

19. See New Law, supra note 4 (discussing band’s plan to feature onstage suicide). Despite the absence of the Internet concert and suicide, city council member Bill Foster said the city’s efforts were not wasted because it now has an ordinance to prevent a similar event. See No Show, supra note 7 (noting city council member planned to ask state legislators to pass law to protect other cities).

20. See Band Feels Bite, supra note 18 (noting Hell on Earth’s belief that government was “watching” them). The band’s leader, Billy Tourtelot, said the cancellation at the Brass Mug was further proof that government officials did not want him to promote his support for physician-assisted suicide, stating, “[t]he government won’t let us play anywhere.” Id.


22. For a discussion of First Amendment jurisprudence, see infra notes 26-45 and accompanying text.

23. For a discussion of government regulations and both protected and unprotected speech under the First Amendment, see infra notes 30-74 and accompanying text.

24. For a discussion on the potential aspects of how Hell on Earth’s conduct could implicate the First Amendment, see infra notes 76-167 and accompanying text.

25. For a discussion of suicide on stage and First Amendment Rights, see infra notes 166-88 and accompanying text.
II. THE FIRST AMENDMENT

The First Amendment to the United States Constitution protects individuals from governmental interference in the areas of religion, assembly, press and speech.26 At the very heart of the First Amendment is the requirement that the government cannot restrict expression because of "its message, its ideas, its subject matter, or its content."27 Nevertheless, this broad protection of free speech is not absolute.28 The government may lawfully regulate unprotected speech as well as protected speech under certain circumstances.29

A. Tiered Scrutiny

When the government imposes regulations that burden protected speech, the regulations are subject to a comprehensive framework of tiered scrutiny.30 Three main tests have evolved to determine when governmental action is constitutional.31 The test most deferential to the government is the rational basis test.32 This test applies to governmental actions involving neither a fundamental interest nor a suspect class and is generally applied to social or

26. The First Amendment provides: "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." U.S. CONST. amend. I. The First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. See U.S. CONST. amend. XIV; see also Gitlow v. New York, 268 U.S. 652, 666 (1925) (noting First Amendment applies to state and local governments through Fourteenth Amendment).

27. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) (holding city's content-based restrictions on picketing were unconstitutional).

28. See e.g., Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) (noting "the right of free speech is not absolute at all times and under all circumstances").

29. See e.g., id. at 572 (allowing states to ban use of fighting words because government's interests in peace and order outweigh any social value of such speech). Fighting words are, "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id. A live, onstage suicide, although an action rather than words, could fit within this definition because of the physical injury to the suicide victim and potential breach of peace among the audience members.


31. See Cleburne, 470 U.S. at 440-41 (outlining tests and application to constitutional issues).

32. See id. at 440 (noting general rule that legislation is presumed valid and will be sustained if classification drawn by statute is rationally related to legitimate state interest).
economic legislation. The general rule is that legislation is presumed valid and only requires a showing that the statutory classification is rationally related to a legitimate governmental purpose.

The most exacting scrutiny is afforded to classifications involving a fundamental right or a suspect class, such as race or national origin. This strict scrutiny test demands that the government demonstrate a compelling interest with means narrowly tailored to achieve that objective. Under this test, there is a strong presumption that the classification is invalid, and it will often be struck down.

Classifications falling between the two extremes, such as gender or illegitimacy, trigger intermediate scrutiny. This test requires that the statutory classification be substantially related to an important governmental objective.

33. See id. (stating government is allowed wide latitude when social or economic legislation is at issue). A fundamental interest involves rights recognized by the courts that must be free from unfettered governmental interference. See e.g., Bowen v. Gilliard, 483 U.S. 587, 613 (1987) (noting fundamental interest in continuation of parental care and support). A suspect class includes those individuals that have historically been subjected to discrimination. See id. at 602-03 (citing Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313-14 (1976)) (noting group not suspect class if “they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless”).


35. See e.g., Loving v. Virginia, 388 U.S. 1, 8 (1967) (applying strict scrutiny to Virginia’s miscegenation statute outlawing interracial marriage); see also Cleburne, 473 U.S. at 440 (“These factors [race, alienage, national origin] are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy . . . ”).

36. See Cleburne, 473 U.S. at 440 (noting strict scrutiny requires compelling state interest with means suitably tailored to achieve that interest).


39. See e.g., Clark v. Jeter, 486 U.S. 456, 461 (1988) (holding Pennsylvania’s six-year statute of limitations for paternity actions unconstitutional because not substantially related to state’s proffered interest of avoiding litigation of stale or fraudulent claims).
The level of scrutiny required depends on the type of regulation at issue.40 The government may legitimately seek to impose conduct-based legislation, and it generally has wide latitude in implementing such regulations.41 For regulations that are purely conduct-based, the government is subject only to a rational basis review.42 Government regulations that are viewpoint based are subject to the most exacting scrutiny and must satisfy the difficult strict scrutiny standard.43 It is presumably unconstitutional for the government to burden speech solely because of its content.44 The government can impose a content-neutral regulation involving a nonpublic forum, so long as the regulation has a reasonable relationship to a legitimate regulatory purpose.45

40. See e.g., City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 440-41 (2002) (explaining content-based regulations are subject to strict scrutiny and content-neutral regulations are subject to intermediate scrutiny).

41. See Cleburne, 473 U.S. at 440 (noting government’s wide latitude in regulating areas of social and economic legislation).

42. See Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 84 (2000) (noting rational basis review is deferential to government and will not be overturned unless regulation is so unrelated to any legitimate purpose).

43. See Hill v. Colorado, 530 U.S. 703, 735 (2000) (Souter, J., concurring) (explaining that content-based statutes are subject to strict scrutiny because they place weight of government behind disparagement or suppression of some messages). “The right to express unpopular views does not necessarily immunize a speaker from liability for resorting to otherwise impermissible behavior meant to shock members of the speaker’s audience . . . .” Id. at 735-36.


45. Public forums include those areas that have historically been open to speech-related activities, such as sidewalks, streets, and public parks. See Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (explaining public fora include places held in trust for use of public, such as streets and parks, whose use, “from ancient times, [has] been a part of the privileges, immunities, rights, and liberties of citizens”). A designated public forum encompasses those areas that have been opened to the public, but have not historically been open to speech-related activities, such as school rooms for after-hours instruction. See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) (noting designated public forum exists when government has intentionally selected place or means of communication, and speakers cannot be excluded without compelling governmental interest). Nonpublic forums include most public property, and the government can freely regulate speech as long as the regulations are reasonably related to a legitimate government purpose and are viewpoint neutral. See id. at 806. Regardless of the forum, the government is prohibited from regulating speech based on viewpoint. See id. The State Theater in St. Petersburg, Florida, is a nonpublic forum, as it is a privately owned venue. See Fight Concert, supra note 1 (noting owner of venue canceled performance).
B. Unprotected Speech

Not all speech is automatically protected by the First Amendment.\textsuperscript{46} There are five categories of speech that remain unprotected by the First Amendment.\textsuperscript{47} First, speech that is likely to incite imminent lawless action is unprotected.\textsuperscript{48} This is speech that encourages imminent lawless action and such action is likely to result from the speech.\textsuperscript{49} Second, the government may lawfully proscribe "fighting words," or those words that, when addressed to an ordinary citizen, are inherently likely to provoke immediate physical retaliation.\textsuperscript{50} Third, the government may properly regulate obscenity.\textsuperscript{51} The Supreme Court has defined obscenity as material that deals with sex in a manner appealing to the prurient interest, portrays sex in a patently offensive way, and does not have serious literary, artistic, political, or scientific value.\textsuperscript{52} Fourth, the government may prohibit speech that is defamatory.\textsuperscript{53} Finally, the government may prohibit speech that constitutes false advertising.\textsuperscript{54}

\textsuperscript{46} See e.g., Miller v. California, 413 U.S. 15, 36-37 (1973) (holding obscenity is not protected speech and can be regulated by states).

\textsuperscript{47} See R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) ("[T]hese areas of speech [obscenity, defamation, fighting words] can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content . . . .") (emphasis in original). For a discussion on how First Amendment protection is not absolute, see supra notes 28-29 and accompanying text.

\textsuperscript{48} See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

\textsuperscript{49} See id. (holding incitement to lawless action properly proscribable under First Amendment).

\textsuperscript{50} See Chaplinsky v. New Hampshire, 315 U.S. 568, 572-73 (describing fighting words as consisting of face-to-face verbal insults that are likely to provoke violence or which by their very utterance inflict injury). For a discussion on how onstage suicide could fit the definition of fighting words, see supra note 29 and accompanying text.

\textsuperscript{51} See Miller, 413 U.S. at 23-24 (holding obscene materials properly subject to government regulation). Government regulation of obscenity is limited to those works involving sexual conduct, as specifically defined by state law, which "do not have serious literary, artistic, political, or scientific value." See id. at 24.

\textsuperscript{52} See e.g., Roth v. United States, 354 U.S. 476, 487 (1957) (holding prohibition of obscene mailings properly proscribable under First Amendment).

\textsuperscript{53} See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 301-02 (1964) (Goldberg, J., concurring) ("The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.").

Even if the speech is unprotected because it falls into one of the five categories, the Supreme Court is less likely to uphold the regulation if it is a prior restraint.\(^55\) A prior restraint is a regulation that prevents communication from ever reaching the public, such as an injunction or a licensing system.\(^56\) Such a restraint requires strict scrutiny, must fit within a narrow exception to the prohibition against prior restraints, and must contain procedural safeguards that limit the danger of suppressing constitutionally protected speech.\(^57\) Generally, a court will uphold a prior restraint if some special harm would otherwise result.\(^58\)

C. Protected Speech

Speech not falling into one of the categories of unprotected speech is protected under the First Amendment.\(^59\) The Supreme Court has afforded First Amendment protection to several categories of speech, including advertising,\(^60\) political speech,\(^61\) and entertainment.\(^62\)

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56. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.").

57. See Southeastern, 420 U.S. at 558-59 (noting validity of exceptions cannot be evaluated in absence of appropriate and necessary procedural safeguards).

58. The Supreme Court has explained that the harm needs to be especially significant when a prior restraint is involved. See Schenck v. United States, 249 U.S. 47, 52 (1919) (prohibiting anti-war speech in times of conflict). "The question in every case is whether the words used . . . create a clear and present danger . . . that Congress has a right to prevent." Id. But see N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (refusing to enjoin publication of The Pentagon Papers on basis that publication would have adverse effect on Vietnam War).


61. See Republican Party v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) ("The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose.").

In addition to actual speech, the First Amendment protects conduct that is undertaken to communicate an idea.63 This type of communication is "expressive conduct," and if it has a sufficient communicative element, it may be protected by the First Amendment.64 To determine if speech constitutes expressive conduct, it must intend to convey a specific message, and that message must have a strong likelihood to be understood by those who view it.65 The protection afforded this category of speech is not absolute, however, and must satisfy the intermediate scrutiny standard.66

Even speech that is classified as unprotected may still be protected if the regulation at issue is viewpoint-based, as the Supreme Court will not tolerate restrictions in statutes that are designed to punish particular viewpoints.67 In R.A.V. v. City of St. Paul,68 defendant R.A.V. was charged under the St. Paul Bias-Motivated Crime Ordinance for allegedly burning a cross on an African-American

bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

63. See United States v. O'Brien, 391 U.S. 367, 377-78 (1968) (holding government's important interest in facilitating effective functioning of draft system outweighed defendant's right to burn draft card); see also J. William David, Comment, Is Pennsylvania's Stalking Law Constitutional?, 56 U. PITT. L. Rev. 205, 210 (1994) (noting First Amendment protects conduct having "sufficient 'communicative element' ").

64. See Johnson, 491 U.S. at 403 (noting expressive conduct may implicate First Amendment). In Texas v. Johnson, the defendant was convicted of the desecration of a venerated object for burning the United States flag. See id. at 400. The court of criminal appeals recognized that the defendant was engaging in expressive activity protected by the First Amendment. See id. The Supreme Court agreed and overturned the conviction, holding that "[t]he State's interest in preventing breaches of the peace does not support his conviction because Johnson's conduct did not threaten to disturb the peace." Id. at 420. The Court further held that the state's interest in preserving the flag as a symbol of nationhood and national unity did not justify Johnson's criminal conviction for engaging in political expression. See id.

65. See id. at 404 (noting Court has held certain conduct can be sufficiently imbued with communicative elements to fall within scope of First Amendment); see also Spence v. Washington, 418 U.S. 405, 410 (1974) (defining expressive conduct). For example, the Supreme Court has recognized the expressive nature of students wearing armbands to protest American military involvement in Vietnam. See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969) (holding First Amendment protects wearing armbands). The Court has also recognized protected expression in a sit-in by African-Americans in a "whites only" area to protest segregation. See Brown v. Louisiana, 383 U.S. 131, 141 (1966) (recognizing First Amendment can protect demonstrations).

66. See O'Brien, 391 U.S. at 376 ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").


family’s lawn.\(^{69}\) The ordinance prohibited the display of a symbol which one knows or has reason to know “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”\(^{70}\) The Supreme Court held that the ordinance was facially unconstitutional because it imposed special prohibitions on those speakers who expressed views on certain disfavored subjects, including race, color, creed, religion, or gender.\(^{71}\) The Court further held that even a narrowly-tailored statute is invalid when it goes beyond mere content, to actual viewpoint discrimination.\(^{72}\) This holds true even when there is a compelling state interest at stake.\(^{73}\) Therefore, although fighting words are generally considered unprotected under the First Amendment, the Court in R.A.V. held that even unprotected speech can be protected if the statute was designed specifically to punish a certain viewpoint.\(^{74}\)

### III. Analysis

There are myriad levels of speech and conduct through which Hell on Earth has implicated the First Amendment.\(^{75}\) First, Hell on Earth declared their support of physician-assisted suicide through press announcements and postings on their website.\(^{76}\) This speech is merely an assertion of personal opinion.\(^{77}\) It is not directed at any particular person, and it is unlikely to result in immediate phys-

\(^{69}\) See id. at 380 (noting statute proscribed certain fighting words that insult or provoke violence on basis of race, color, creed, religion, or gender).

\(^{70}\) See id. The ordinance stated:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

\(^{71}\) See id. at 391 (noting in practice ordinance goes beyond mere content discrimination, to actual viewpoint discrimination).

\(^{72}\) See id. at 395 (noting statute is impermissibly content oriented and not essential to compelling state interest).

\(^{73}\) See R.A.V., 505 U.S. at 395 (explaining danger of censorship outweighs protection of community member's human rights).

\(^{74}\) See id. at 391 (holding state may not proscribe fighting words only for conveying particular message).

\(^{75}\) For a discussion on Hell on Earth's speech and conduct that may implicate the First Amendment, see infra notes 76-91 and accompanying text.

\(^{76}\) See Judge Intervenes, supra note 10 (noting Hell on Earth posted message on website in support of euthanasia).

\(^{77}\) See Fight Concerti, supra note 1 (noting band supported euthanasia).
ical retaliation. Therefore, this speech falls under the complete protection of the First Amendment, and the government will fail in any attempt to prohibit this speech.

Second, Hell on Earth used the promise of an onstage suicide to advertise and promote their concert. Advertising is considered "commercial speech" and is protected by the First Amendment. In order to fall outside the protection of the First Amendment, commercial speech must do "no more than propose a commercial transaction" and be removed from any "exposition of ideas" and from "truth, science, morality, and arts in general." It is doubtful that the government could prevent this commercial speech, as it is sufficiently intertwined with the band's viewpoint on euthanasia to render it more than a mere commercial transaction.

Third, while the concert was actually taking place, it can be assumed that Hell on Earth introduced the suicide with a message. The band's message would presumably be in support of assisted suicide, as they billed the concert as an effort to raise awareness for right-to-die issues. Because the communication expresses a particular viewpoint, the government would be unable to regulate that speech.

78. See Alan E. Brownstein, Regulating Hate Speech at Public Universities: Are First Amendment Values Functionally Incompatible with Equal Protection Principles?, 39 BUFF. L. REV. 1, 20 n.84 (1991) (noting fighting words doctrine "applies only to those situations in which the victim of hate speech is likely to respond violently to the speaker's verbal assault"). In addition, Hell on Earth's announcement in support of assisted suicide does not fall into any other category of unprotected speech. See supra notes 46-58 and accompanying text (discussing unprotected speech).

79. See Cantwell v. Connecticut, 310 U.S. 296, 309 (1940) (holding speech is protected under First Amendment unless it provokes violence).

80. See Band Promotes, supra note 5 (noting Hell on Earth sent e-mail press releases describing planned onstage suicide of terminally-ill patient).


82. Id. at 762 (citations omitted) (noting high standard of removing commercial speech from First Amendment protection).

83. See Hell Website, supra note 6 ("I am a strong supporter of physician-assisted suicide.").

84. See New Law, supra note 4 (describing intent to raise awareness for euthanasia). An onstage suicide without an introductory message would not inform the audience of the band's goal, and therefore, would not raise awareness of assisted suicide and right-to-die issues.

85. See Plan is On, supra note 8 (reporting suicide was effort to raise awareness of dying with dignity).

86. This message would not fall under any category of unprotected speech. See supra notes 46-58 and accompanying text (discussing classifications of unprotected speech). Therefore, if the government chose to prohibit this speech, it would be doing so based only on the viewpoint of the band, and such regulation is
Fourth and finally, the more complicated analysis turns on the role of Hell on Earth and the actual suicide. This is the conduct that the St. Petersburg City Council sought to prevent when it enacted the emergency ordinance. While it is unclear whether Hell on Earth physically assisted the individual in committing the suicide, they provided the opportunity and a forum for the suicide to occur. In addition to providing the means and availability, the act was likely presented in conjunction with a pro-euthanasia message, as Hell on Earth wanted to make "back-street suicides a thing of the past." The resulting "suicide conduct" requires a more detailed examination of First Amendment jurisprudence to determine if the St. Petersburg City Council acted appropriately in passing the emergency ordinance.

A. Hell on Earth’s Suicide Concert as Unprotected Speech

In order to determine whether Hell on Earth’s suicide concert constitutes speech within the meaning of the First Amendment, it is necessary to first establish whether it falls under any of the five cate-

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87. Reports stated that Hell on Earth planned to host the suicide during a concert, and the band gave no indication that anyone other than the terminally-ill person would perpetrate the suicide. See Plan is On, supra note 8 (noting band stated terminally-ill person would commit suicide).

88. See New Law, supra note 4 (noting St. Petersburg City Council unanimously approved emergency ordinance making it illegal to conduct suicide for commercial or entertainment purposes).

89. See id. (stating suicide would take place at Hell on Earth concert). That the band provided the means for the suicide to occur is likely sufficient to constitute "assisting" a suicide under the Florida statute prohibiting assisted suicide. See Fla. Stat. Ann. § 782.08 (West 2004) (stating in pertinent part: "Every person deliberately assisting another in the commission of self-murder shall be guilty of manslaughter, a felony of the second degree"). The criminal nature of the conduct does not destroy its First Amendment protection. See James Allon Garland, Breaking the Enigma Code: Why the Law Has Failed to Recognize Sex as Expressive Conduct Under the First Amendment, and Why Sex Between Men Proves That It Should, 12 Law & Sexuality 159, 198 (2003) (noting Supreme Court has not adopted view that traditionally criminalized conduct is not protected by First Amendment).

90. Band Promotes, supra note 5 (noting Hell on Earth sent e-mail press release describing suicide of terminally-ill person as "platform to help make back-street suicides a thing of the past").

91. For a discussion on the application of the First Amendment to the St. Petersburg City Council's actions, see infra notes 168-88 and accompanying text.
gories of unprotected speech. If it does, it is outside the scope of the First Amendment.

First, it is unlikely that the government in St. Petersburg could classify the actions of Hell on Earth as unprotected incitement to lawless action. In a similar arena, singer Ozzy Osbourne was sued when a listener committed suicide after listening to Osbourne’s song “Suicide Solution.” Plaintiffs argued that Osbourne’s song constituted an exception to protected speech because the lyrics encouraged suicide among its listeners. The court disagreed, noting there was no indication that Osbourne’s music was intended to produce acts of suicide, either imminent or remote. Here, Hell on Earth was attempting to raise awareness for a person’s right to die; therefore, it is unlikely that a court would find the band’s conduct was directed at any person in particular.

Second, Hell on Earth’s actions are unlikely to be considered fighting words, as they did not result in immediate physical retaliation. The fighting words doctrine has been applied very strictly and is only applicable if the audience is likely to immediately seek retribution. In Osbourne, the court held that Osbourne’s song “Suicide Solution” did not constitute fighting words, explaining

92. For a discussion on the categories of unprotected speech, see supra notes 46-58 and accompanying text.
94. See Noto v. United States, 367 U.S. 290, 297-98 (1961) (holding speech protected by First Amendment even if it advocates illegal activity, as long as it remains abstract advocacy and does not incite imminent violence); see also Watts v. United States, 394 U.S. 705, 707 (1969) (holding threats that imply action at uncertain and future remote times are not true threats and are therefore protected under First Amendment).
95. See Waller v. Osbourne, 763 F. Supp. 1144, 1146 n.2 (M.D. Ga. 1991) (alleging lyrics “[g]et the gun and try it . . . Shoot, shoot, shoot” fell outside First Amendment protection as incitement to lawless action).
96. See id. at 1148-50 (arguing subliminal messages in music incited suicide).
97. See id. at 1151 (holding defendants’ music was not directed toward any particular person or group of persons, and there was no evidence that defendants’ music was intended to produce acts of suicide, or likely to cause imminent acts of suicide) (emphasis in original).
98. See id. (noting abstract presentation of moral propriety or even moral necessity of suicide is distinct from indicating to people that they should commit suicide and encouraging them to take such action).
99. See Cohen v. California, 403 U.S. 15, 20 (1971) (holding “Fuck the Draft” jacket did not constitute fighting words, as message was not directed to any particular person).
100. One scholar has theorized that the fighting words doctrine has lost its vitality, noting that over fifty years have passed since the Chaplinsky decision, and the Supreme Court has yet to affirm another conviction for use of fighting words. See Thomas A. Schweitzer, Hate Speech on Campus and the First Amendment: Can They...
that the lyrics only discussed suicide in a philosophical sense.\textsuperscript{101} Similarly, the actions of Hell on Earth were not likely to result in retaliation, as the audience would likely perceive the suicide conduct as a message in support of euthanasia, not as a personal threat.\textsuperscript{102}

Third, the Hell on Earth concert involved no obscenity because there was nothing sexual about the suicide.\textsuperscript{103} Finally, the speech involved neither defamation nor false advertising.\textsuperscript{104} Therefore, because the actions do not fall into one of the unprotected categories of speech, Hell on Earth's conduct must be considered either pure action or actions containing an expressive component.\textsuperscript{105}

To escape application of the First Amendment completely, the St. Petersburg City Council would have to argue that the actions of Hell on Earth were merely conduct, containing no expressive component.\textsuperscript{106} It would be necessary for the government to divorce the conduct from the message conveyed in order to render it outside the purview of the First Amendment.\textsuperscript{107} This result is unlikely, however, as Hell on Earth made palpable their views in support of assisted suicide.\textsuperscript{108} If, however, a court determines that the suicide conduct constitutes expressive conduct, it may be entitled to First Amendment protection.\textsuperscript{109}

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\textsuperscript{101} See Osbourne, 763 F. Supp. at 1151 (holding song advocated suicide in philosophical sense as potential option in certain circumstances).
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\textsuperscript{102} See Band Promotes, supra note 5 (noting Hell on Earth promoted concert to support euthanasia).
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\textsuperscript{103} See Miller v. California, 413 U.S. 15, 23 (1973) (holding obscenity outside First Amendment protection).
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\textsuperscript{105} See United States v. O'Brien, 391 U.S. 367, 376 (1968) (noting First Amendment protects symbolic or expressive conduct as well as actual speech).
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\textsuperscript{106} See id. (noting that not all conduct labeled "speech" is within purview of First Amendment).
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\textsuperscript{107} See David Cole & William N. Eskridge, Jr., From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct, 29 HARV. C.R.-C.L. L. REV. 319, 325 (1994) ("If one engages in conduct without any intent to communicate, or if nobody would understand one's action as communicating anything, there is nothing for the First Amendment to protect.").
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\textsuperscript{108} See Fight Concert, supra note 1 (noting concert is intended as statement in support of euthanasia).
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\textsuperscript{109} See Cole & Eskridge, supra note 107, at 323-24 (recognizing conduct containing sufficient communicative element properly regarded as speech within meaning of First Amendment).
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B. Hell on Earth’s Suicide Concert as Expressive Conduct

To determine if conduct is expressive and afforded First Amendment protection, there must be intent to convey a particular message, and the likelihood must be great that the message would be understood by those who viewed it.110 In Cohen v. California,111 the Supreme Court explained the concept of expressive conduct.112 Defendant Cohen was convicted of breaching the peace when he walked through a courthouse corridor wearing a jacket with the words “Fuck the Draft.”113 The Court overturned the defendant’s conviction, holding that the state may not make a simple public display of an expletive a criminal offense.114 The Court reasoned that such a message was within the protection of the First Amendment because it was “expressive conduct,” or conduct conveying a particular viewpoint.115

Here, the presentation of a terminally-ill patient committing suicide onstage is also expressive conduct.116 It almost certainly conveys a particular message regarding euthanasia, and it is likely that the audience will understand it as such, particularly if the event is preceded by an explanation or announcement.117 Therefore, the conduct of Hell on Earth is sufficiently expressive in nature so as to fall within the purview of the First Amendment.118

Because the conduct falls within the ambit of the First Amendment, it is next necessary to determine whether the St. Petersburg City Council was engaging in a content-neutral, conduct-based, or

110. See Texas v. Johnson, 491 U.S. 397, 404 (1989) (noting conduct is sufficiently expressive if message is particular and likely to be understood by audience); see also Cole & Eskridge, supra note 107, at 325 (“[T]he threshold inquiry in any expressive conduct case is whether the plaintiff’s conduct was intended to communicate a message, or whether it would be understood by others as communicative.”).
112. See id. at 18 (noting state lacked power to punish Cohen for underlying content of message).
113. See id. at 16 (noting defendant convicted because statute prohibited breach of peace through offensive conduct).
114. See id. at 18 (holding defendant’s conduct constitutionally protected unless there was showing of intent to incite disobedience or disruption of draft).
115. See id. at 21 (noting unwilling viewers can avert their eyes).
116. See Cohen, 409 U.S. at 22 (recognizing expressive conduct does not actually have to involve spoken word).
117. The band’s website explained their right-to-die platform and any fan would likely understand that the onstage suicide was in support of euthanasia. See Hell Website, supra note 6 (“I am a strong supporter of physician-assisted suicide.”).
118. See Texas v. Johnson, 491 U.S. 397, 404 (1989) (recognizing conduct, if sufficiently intertwined with communicative elements, is protected by First Amendment).
viewpoint-based regulation when it passed the emergency ordinance, in order to assess the level of scrutiny required.\textsuperscript{119} Here, Hell on Earth would argue that the government restricted its speech purely because of the message conveyed, and therefore, the regulation is an impermissible viewpoint-based restriction.\textsuperscript{120} The government, on the other hand, would argue that this is a permissible conduct-based regulation.\textsuperscript{121}

C. Hell on Earth’s Suicide Concert Under Strict Scrutiny

Content-based restrictions are generally prohibited, except in the area of obscenity.\textsuperscript{122} The suicide concert does not qualify as obscenity, and the government is therefore unable to restrict speech simply because they wish to protect the public.\textsuperscript{123} As stated in \textit{R.A.V.}, however, content-based regulations can be constitutional, so long as they satisfy the strict scrutiny test.\textsuperscript{124} Under this standard, a law will be upheld only if it is necessary to achieve a compelling government interest.\textsuperscript{125} The band here would argue that this is an unconstitutional content-based restriction because it is impairing the expressive character of the concert and the suicide conduct.\textsuperscript{126}

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  \item \textsuperscript{119} See e.g., Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641-42 (1994) (discussing levels of scrutiny).
  \item \textsuperscript{120} Laws aimed at the communicative impact of speech are considered to be content-based. See David, supra note 63, at 214 (noting when expression is restricted because of communicative impact of message, state is impermissibly focusing on content of message).
  \item \textsuperscript{121} This case is unlikely to be considered a content-neutral “time, place, and manner” regulation because these regulations include situations where the government most likely is regulating conduct and not speech, and any subsequent effect on speech is incidental. See e.g., City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 434 (2002) (noting typical time, place, and manner regulations are generally zoning ordinances, with no relationship to type of speech involved).
  \item \textsuperscript{122} See Roth v. United States, 354 U.S. 476, 481 (1957) (noting Supreme Court had always assumed that obscenity was unprotected under First Amendment).
  \item \textsuperscript{123} See Adam M. Kanzer, \textit{Misfit Power, The First Amendment and the Public Forum: Is There Room in America for the Grateful Dead?}, 25 COLUM. J.L. & SOC. PROBS. 521, 560 (1992) (noting thin line between permissible content-neutral regulations of secondary effects and impermissible content-based regulations).
  \item \textsuperscript{125} See R.A.V., 505 U.S. at 395 (noting application of strict scrutiny test to facially content-based statutes).
  \item \textsuperscript{126} See e.g., Alameda, 535 U.S. at 434 (noting content-based regulations subject to strict scrutiny). The Court in Alameda concluded that if a regulation was content based, it would be considered presumptively invalid. Id.
\end{itemize}
The St. Petersburg City Council, on the other hand, would argue that even if they are infringing on the band's free speech, they have done so for a compelling interest and in the least restrictive manner possible.127

Under a strict scrutiny analysis, it is questionable whether the city council permissibly restricted the actions of Hell on Earth.128 Saving the life of a terminally-ill patient is likely a compelling governmental interest.129 If, however, the city council prohibited the speech so as to prevent potential copycat suicides, a court may not find the interest compelling.130 Indeed, the Seventh Circuit has held that it is unlawful to ban speech simply because it is effective.131 In American Bookseller’s Association v. Hudnut,132 Judge Easterbook argued that even if pornography as expression caused rape, it was unlawful to prohibit that speech because it may persuade people to commit violent sexual crimes.133 In addition, the pornography was not advocating rape or violent crimes; the rape was a secondary effect, which is generally a permissible arena for government regulation.134 Similarly, Hell on Earth is not advocating suicide, but only presenting the suicide conduct to raise awareness for right-to-die issues.135 Any copycat suicide would require mental intermedation, and suppression of speech for this reason is impermissible.136

127. See R.A.V., 505 U.S. at 395 (recognizing that ordinance could survive attack if necessary to achieve compelling state interest).

128. In order to satisfy strict scrutiny, the governmental interest must be compelling with means narrowly tailored to achieve that end. See id. at 395 (describing strict scrutiny analysis).


130. See Am. Booksellers Ass’n, Inc. v. Hudnut, 771 F.2d 323, 329 (7th Cir. 1985) (holding any adverse effects of pornography as speech require mental intermedation and are within First Amendment protection).

131. See id. ("[T]his simply demonstrates the power of pornography as speech.").

132. 771 F.2d 323 (7th Cir. 1985).

133. See id. (noting it is unlawful to ban speech simply because it is effective).

134. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986) (approving zoning ordinance that singles out theaters showing sexually explicit movies based on concern for secondary effects). While regulations based on a concern of secondary effects are permissible, the government may not pass regulations that have the effect of restricting speech if the rationale of that regulation is to suppress that particular speech. See Shiffrin, supra note 93, at 1135 (discussing tension between Court’s approach to incendiary speech and its approach to regulation of secondary effects).

135. See New Law, supra note 4 (describing intent to raise awareness for euthanasia).

136. See Hudnut, 771 F.2d at 329 (noting requirement of mental intermedation brings speech within domain of First Amendment).
If the government satisfies the compelling state interest standard, the means employed must also be narrowly tailored to achieve that end.137 The St. Petersburg City Council passed the emergency ordinance to prevent the onstage suicide.138 In doing so, they did prevent that suicide at that particular venue, but they also may have prevented other protected speech.139 The regulation makes it a crime to "conduct a suicide for commercial or entertainment purposes and to host, promote and sell tickets for such an event."140 This city council ordinance is not narrowly tailored, because as written, a variety of conduct could potentially be made criminal.141 For example, the ordinance encompasses all suicides for commercial or entertainment purposes, including those that are staged or portrayed in movies.142 Therefore, under a strict scrutiny analysis, Hell on Earth would likely succeed.143 If a court determines that the city ordinance is not a regulation of content, but rather a regulation of expressive conduct, the court would have to apply the test of intermediate scrutiny.144

137. See Hill v. Colorado, 530 U.S. 703, 728 (2000) (explaining statute is narrowly tailored if it does not burden more speech than necessary).

138. See New Law, supra note 4 (reporting city council wanted to prevent suicide).

139. See id. (discussing ordinance). The ordinance makes it illegal to conduct a suicide for entertainment or commercial purposes, and to host, promote, or sell tickets for that event. See id. While this prevents the suicide at the Hell on Earth concert, it also prohibits simulated suicide, such as in movies, which is protected under the First Amendment. See Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) (noting motion picture entertainment is protected by First Amendment).

140. New Law, supra note 4 (describing purpose of ordinance).

141. See id. (noting city ordinance makes it illegal to conduct suicide for commercial or entertainment purposes, and to host, promote and sell tickets for such an event).

142. See id. (discussing ordinance).

143. The narrowly tailored component may also implicate the First Amendment overbreadth doctrine. See Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (elucidating overbreadth doctrine as regulation that punishes substantial amount of protected free speech judged in relation to statute's plainly legitimate sweep). Such a regulation is unconstitutional under the First Amendment. See id. at 615; see also Bd. of Airport Comm'r's of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 577 (1987) (holding airport authority rule that bans "all First Amendment activities" within "central terminal area" is invalid as being substantially overbroad).

D. Hell on Earth's Suicide Concert Under Intermediate Scrutiny

Most likely, the actions of the St. Petersburg City Council will be analyzed under an intermediate standard. The city council would argue that their regulation is content-neutral, as it is not aimed at the particular idea of euthanasia, but instead seeks to prevent a public suicide. For a law to be treated as content-neutral, the governmental interest behind the law must be unrelated to the suppression of free expression. The test that has been developed for intermediate scrutiny analysis is the O'Brien test.

Under O'Brien, a court will uphold a conduct regulation if: (1) the regulation is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to suppression of speech; and (4) the incidental burden on speech is no greater than

145. See City of Erie v. Pap's A.M., 529 U.S. 277, 313 (2000) (noting intermediate scrutiny requires regulating government to make some demonstration of evidentiary basis for harm it claims to flow from expressive activity and for alleviation expected from restriction imposed).


147. See Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997) (noting content-neutral regulation will be sustained under First Amendment if it advances important governmental interests unrelated to suppression of free speech and does not burden substantially more speech than necessary to further those interests).

148. See United States v. O'Brien, 391 U.S. 367, 377 (1968) (describing elements that justify government regulation). O'Brien was convicted when he burned his draft card on the steps of the South Boston Courthouse in the presence of a sizable crowd. See id. at 369. He claimed that his conviction was contrary to the First Amendment because his act was "symbolic speech," or expressive conduct. See id. at 376. The Supreme Court rejected his contention that symbolic speech is entitled to full First Amendment protection, saying:

[Even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . .] [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 376-77 (footnotes omitted).
necesary.\textsuperscript{149} If, however, the regulation seeks only to prohibit the communicative impact of the conduct and has no regulatory interest, the \textit{O'Brien} test will not be satisfied.\textsuperscript{150} If the governmental interest is related to the suppression of free expression, strict scrutiny is required unless the speech is in an unprotected category.\textsuperscript{151}

There is no question that the first prong is satisfied because the ordinance was enacted by the city council, and it is within their power to enact ordinances that protect the tranquility of the community.\textsuperscript{152} Under the second prong, the city council need only demonstrate an "important" governmental interest; this is a lower threshold than "compelling" as was applied in the strict scrutiny analysis.\textsuperscript{153} Because preventing the death of an individual is a compelling government interest, it follows that it is also an important governmental interest.\textsuperscript{154} The third prong requires that the governmental interest be unrelated to the suppression of speech.\textsuperscript{155} Here, the ordinance does not mention any message that might accompany the suicide; rather it prohibits the act of suicide, regardless of the reason.\textsuperscript{156} Therefore, the government interest is unrelated to the suppression of speech because the ordinance is attempting to prevent deaths through suicide.\textsuperscript{157} Finally, the \textit{O'Brien} test requires that the burden on speech be no greater than

\textsuperscript{149} See id. at 377 (describing prongs); see also Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567 (1991) (using \textit{O'Brien} test to hold Indiana's public indecency statute unconstitutional).


\textsuperscript{151} For a discussion on unprotected speech, see supra notes 46-58 and accompanying text.

\textsuperscript{152} See Ginsburg v. New York, 390 U.S. 629, 636 (1968) (noting it is within police power of state to protect health, safety, welfare, and morals of community).


\textsuperscript{154} The Supreme Court has found several interests to be "important" within the meaning of the \textit{O'Brien} test. See Thompson v. W. States Med. Ctr., 535 U.S. 357, 369 (2002) (holding preservation of FDA's drug approval process is important governmental interest); see also City of Erie v. Pap's A.M., 529 U.S. 277, 296 (2000) (holding ordinance furthered important government interests of regulating conduct through public nudity ban and combating harmful secondary effects associated with nude dancing).

\textsuperscript{155} See Pap's A.M., 529 U.S. at 289 (discussing "less stringent" \textit{O'Brien} standard of intermediate scrutiny).

\textsuperscript{156} See New Law, supra note 4 (recognizing council wanted to prevent suicide at concert).

\textsuperscript{157} See id. (quoting council member who wanted to exercise caution and prevent suicide).
necessary to achieve the end.\textsuperscript{158} This prong encompasses a balancing test, whereby the government's interests and the individual's freedom of expression are weighed.\textsuperscript{159}

In order for the government to satisfy the fourth prong of \textit{O'Brien}, it must demonstrate that the harm is real, not just speculative, and that the regulation will in fact alleviate the harm in a direct and material way.\textsuperscript{160} Here, the city council proceeded after hearing that a suicide would take place at the Hell on Earth concert.\textsuperscript{161} Knowing that Hell on Earth was famous for its wild concert stunts, the city council could reasonably have believed the suicide would actually take place.\textsuperscript{162} The emergency ordinance would alleviate the potential suicide directly, by making it unlawful to present a suicide.\textsuperscript{163} Under the fourth prong, the government must still demonstrate that the remedy adopted does not burden substantially more speech than is necessary.\textsuperscript{164} While there may be some burden on constitutionally protected speech, the regulation must still be upheld if the burden is only incidental.\textsuperscript{165} The city council could demonstrate that they did what they needed to do in order to

\textsuperscript{158} See Pap's A.M., 529 U.S. at 301 (requiring restriction be no greater than necessary to further city's interest).

\textsuperscript{159} See David, supra note 63, at 228 (stating balance includes extent to which communicative activity is inhibited and values, interests, or rights served by enforcing inhibition).

\textsuperscript{160} See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (quoting Quincy Cable T.V., Inc. v. FCC, 768 F.2d 1434, 1455 (D.C. Cir. 1985)) (emphasizing when government regulates speech to redress past harms or prevent future harms, it must do more than "posit the existence of the disease sought to be cured").

\textsuperscript{161} The city council acted after hearing about the concert, but before the suicide actually took place. See New Law, supra note 4 (discussing emergency ordinance). Occasionally, courts may classify such actions as an unlawful prior restraint. See R.A.V. v. City of St. Paul, 505 U.S. 377, 430 (1992) (Stevens, J., concurring) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)) ("[A]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."). Despite the unpopularity of prior restraints, they will be upheld if some special harm would otherwise result. See id. at 430-31. Here, the death of an individual would be considered a "special harm" and this prior restraint is unlikely to run afoul of the First Amendment. See id. (recognizing that lighting fire near ammunition dump is sufficiently special to justify restriction).

\textsuperscript{162} See New Law, supra note 4 (noting concern for potential adverse consequences).

\textsuperscript{163} See id. (noting city ordinance made it unlawful to conduct suicide for commercial or entertainment purposes).


prevent a public suicide, and any proscription on constitutionally protected speech is minimal.\textsuperscript{166} Under the \textit{O'Brien} standard of intermediate scrutiny, the government would likely prevail.\textsuperscript{167}

IV. Conclusion

The suicide conduct of Hell on Earth was sufficiently mixed with communicative elements so as to come within the purview of the First Amendment.\textsuperscript{168} The action of presenting a suicide was intertwined with the band's viewpoint on euthanasia and the right-to-die with dignity.\textsuperscript{169} As such, the band's conduct constituted expressive conduct within the meaning of the First Amendment.\textsuperscript{170} Following First Amendment analysis, the city council must then demonstrate that its actions were not based on suppressing the particular viewpoint of the band.\textsuperscript{171} If, however, the actions of the St. Petersburg City Council were undertaken to prevent the promulgation of Hell on Earth's support of euthanasia, the city council would have to satisfy the stringent strict scrutiny analysis.\textsuperscript{172} Under this analysis, the government is unlikely to succeed; even though preventing deaths may be a compelling government interest, the means are not narrowly tailored to achieve that end.\textsuperscript{173}

The more appropriate standard of review, however, is intermediate scrutiny.\textsuperscript{174} Although the communication of right-to-die issues is within the protection of the First Amendment, the government has a substantial interest in preventing public suicide

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\item \textsuperscript{166} See \textit{New Law}, supra note 4 (reporting city council's belief that ordinance would prevent suicide).
\item \textsuperscript{167} For a discussion on intermediate scrutiny, see supra notes 145-66 and accompanying text.
\item \textsuperscript{168} See Spence v. Washington, 418 U.S. 405, 409 (noting conduct containing communicative elements may constitute expressive conduct within meaning of First Amendment).
\item \textsuperscript{169} See \textit{New Law}, supra note 4 ("This is about standing up for what you believe in, and I am a strong supporter of physician-assisted suicide.").
\item \textsuperscript{170} See Cohen v. California, 403 U.S. 15, 20 (1971) (holding expressive conduct protected by First Amendment).
\item \textsuperscript{171} See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (noting government is prohibited from regulating based on viewpoint).
\item \textsuperscript{172} For a discussion on strict scrutiny, see supra notes 122-44 and accompanying text.
\item \textsuperscript{174} See United States v. O'Brien, 391 U.S. 367, 377 (1968) (noting regulation unrelated to expression calls for intermediate standard of review for noncommunicative conduct).
\end{itemize}
and combating any secondary effects. Indeed, the Supreme Court has held that a content-based ordinance may be converted into a content-neutral regulation provided that the ordinance is justified by a desire to eliminate a "secondary harm." Certainly, combating public suicide and the resulting effects is a harm unrelated to the suppression of free expression. Further, the city council banned all suicide for public or entertainment purposes, regardless of the reason involved. This indicates that the city council was motivated by a desire to save the life of the individual and combat adverse secondary effects, rather than suppressing Hell on Earth's views regarding euthanasia.

Following the enactment of the city ordinance, Pinellas County, Florida, approved a similar ordinance. The county's ordinance is less problematic than that enacted by the St. Petersburg City Council. This regulation is drawn more narrowly, as it prohibits only public suicides, rather than suicides for any entertainment purpose. In addition, a bill has been introduced by Florida State Senator Les Miller that would make it illegal to advertise, perform, or sell tickets to a show featuring "self-murder." This statute is also narrowly tailored, as it makes an exception for acts of "simulated self-murder" such as in plays or movies, as long as the audience is informed that no actual suicide is planned.

To combat any potential problems, the St. Petersburg City Council should amend the ordinance to reflect the ordinance writ-

175. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-49 (1986) (discussing secondary effects doctrine). In Playtime Theatres, the Supreme Court noted that the ordinance at issue did not fit neatly into a "content-based" or "content-neutral" category. See id. at 47. Instead, the Court noted that while the ordinance on its face appeared to regulate the content of the speech, it was nevertheless more similar to a content-neutral regulation because the predominate concern was to deal with the secondary effects of the speech at issue. See id. at 47-48.


178. See New Law, supra note 4 (recognizing council wanted to prevent suicide at concert).

179. See id. (reporting impetus behind ordinance was to save life).

180. See Ban Suicides, supra note 16 (noting county enacted ordinance over concern for secondary effects).

181. See id. (noting ordinance banned all public suicide, as well as promotion of public suicide).

182. See id. (describing county ordinance).

183. Bill Targets Suicide for Show, supra note 3 (describing proposed bill).

184. See id. (noting informed consent would only be required if it was small forum and ambiguity existed as to authenticity of suicide).
ten by the county because the county ordinance is sufficiently tailored so as to not burden speech any more than necessary. Nevertheless, as written, the city ordinance could likely survive a constitutional challenge under the O'Brien standard of intermediate scrutiny, particularly on the basis that it was combating adverse secondary effects.

In the end, the St. Petersburg City Council was justified in its actions because it could reasonably believe that a suicide would have taken place at the Hell on Earth concert. More importantly, Hell on Earth was still able to communicate its views on euthanasia through their website, and a human life was spared.

Elizabeth Cameron

187. See New Law, supra note 4 (describing past concert stunts).
188. See Hell Website, supra note 6 (continuing to advocate physician assisted suicide through postings on website).