Right to Rest in Peace: Missouri Prohibits Protesting at Funerals, The

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The Right to Rest in Peace: Missouri Prohibits Protesting at Funerals

Missouri Revised Statute 578.501

I. INTRODUCTION

The Westboro Baptist Church, led by Fred Phelps and based in Topeka, Kansas, has received national attention since the early 1990s, when members of this vehemently anti-homosexual group began actively protesting events involving prominent homosexual people. Eventually, these protests grew to include people who were even marginally supportive of homosexuality. While these protests incited outrage among various groups of people, no widespread effort was made to limit the group's ability to protest at such events. In 2005, however, the group expanded its targets to include military funerals, maintaining that God was killing soldiers in Iraq because of His displeasure with the United States' acceptance of homosexuality and as retribution for an attack on Westboro Baptist Church in 1995.2

Because of the strong negative public response to these protests, during the 2006 legislative session, state legislatures across the country began to consider legislation prohibiting or limiting picketing and protesting at funerals. In response, Westboro Baptist Church has asserted that it will challenge such laws as unconstitutional restrictions on the freedom of speech. On February 23, 2006, Missouri became one of the first states to pass this type of legislation into law. Currently, the Specialist Edward Lee Myer's Law, as the law is known, greatly prohibits protesting activities at funerals.3 This Note will explain this legislation and the surrounding legal context and discuss possible treatment of it upon a constitutional challenge.

II. MISSOURI REVISED STATUTE 578.501

In August 2005, members of Westboro Baptist Church protested at the funeral of Edward Lee Myers, a soldier killed in Iraq, with signs that read "God hates fags" and "thank God for dead soldiers."4 Charlie Shields, state senator from St. Joseph, Missouri, where Myers's funeral was held, subse-

2. At such protests, members carry signs that display such things as, "God Sent the IEDs," "Thank God for Dead Soldiers," "God is America's Terrorist," and "Fag Troops." See Westboro Baptist Church Home Page, http://www.godhatesfags.com (last visited Sept. 18, 2006).
quently introduced Senate Bill 578. Known as the Spc. Edward Lee Myers' Law, Senate Bill 578 created a misdemeanor offense for protesting "in front of or about" a funeral.

On January 24, 2006, the Senate, by a vote of 31-0, passed the bill and added an emergency clause, which made the bill immediately effective upon passage. On the need for an emergency clause, Representative Rucker from St. Joseph later said, "If the next military veteran who gives the ultimate sacrifice is in your neighborhood and the next protest is in your neighborhood, you're really going to wish we had the emergency clause." The House initially voted to include language limiting the prohibition to 300 feet surrounding a funeral, but on February 21, 2006, the House, by a vote of 139-17, passed the Senate version of the bill. On February 23, 2006, President Pro Tem Michael R. Gibbons, while serving as Acting Governor for Governor Matt Blunt, who was out of the state, approved Senate Bill 578, which then immediately took effect. Governor Blunt later held a ceremonial bill signing for Senate Bill 578 and stated,

I am pleased that family and friends of the deceased now have this protection from unruly and disrespectful protests during their time of mourning. . . . This law preserves the right to free speech for protestors and mourners who peacefully assemble to pay their last respects to their loved ones. I commend the Missouri General Assembly for their prompt action on this bill that honors traditional Missouri values.

As passed, Senate Bill 578 states:

It shall be unlawful for any person to engage in picketing or other protest activities in front of or about any church, cemetery, or funeral establishment . . . within one hour prior to the commencement of any funeral, and until one hour following the cessation of

5. Rivoli, supra note 4, at B4.
9. Id.
any funeral. . . . Violation of this section is a class B misdemeanor, unless committed by a person who has previously pled guilty to or been found guilty of a violation of this section, in which case the violation is a class A misdemeanor. . . . Because immediate action is necessary to protect the emotional well-being of persons paying respects to the deceased, section A of this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and section A of this act shall be in full force and effect upon its passage and approval.¹³

When members of Westboro Baptist Church subsequently threatened to protest the Missouri funeral of Christopher L. Marion, another soldier killed in Iraq, Governor Blunt offered his support to law enforcement in enforcing the new law, stating, “Our military heroes deserve to be honored without interruption. Their families deserve to grieve in peace without distraction. Protestors with no regard for the law or for the families they hurt should be arrested and prosecuted . . . .”¹⁴

Westboro Baptist Church has clearly indicated that it will challenge potentially unconstitutional laws by stating such things as: “Your standard is ‘reasonable time, place and manner restriction.’ If you go one bit over that line we’re going to litigate, and request fees,” and “If you go too far, and prohibit our publishing efforts, we have the means, the evidence, the will, and the energy to take you to court.”¹⁵

In response to this potential for court challenge, Missouri lawmakers have indicated that they plan to pass a second measure this session to specifically prohibit protests within 300 feet of a funeral.¹⁶ Such legislation would represent a secondary position in the event that a constitutional challenge is successful.¹⁷

¹³. S.B. 578, 93rd Gen. Assem., 2d Sess. (Mo. 2006). Funeral is defined as “the ceremonies, processions and memorial services held in connection with the burial or cremation of the dead.” Id.
¹⁵. See Westboro Baptist Church Home Page, supra note 2.
¹⁶. First Amendment Center, supra note 8.
¹⁷. Id.
III. LEGAL BACKGROUND

A. Freedom of Speech

The First Amendment to the United States Constitution provides, "Congress shall make no law . . . abridging the freedom of speech . . . ."\(^{18}\) Despite this unequivocal language, the Supreme Court has interpreted the First Amendment to allow regulation of speech under certain circumstances, depending on the purpose of the regulation, and the location and content of the speech.

1. Content and Viewpoint Discrimination

In analyzing the constitutionality of speech regulations, the Supreme Court has specified that determining whether regulations are content- and/or viewpoint-based is a job for the courts.\(^{19}\) Content discrimination prohibits a complete area of speech, while viewpoint restriction prohibits only limited perspectives within an area of speech. Content- and viewpoint-based regulations are particularly disfavored because restricting speech due to its message disregards the essential right protected by the First Amendment — that individuals decide for themselves beliefs and ideas to express.\(^{20}\) Thus, content- and viewpoint-based regulation of fully favored speech receives the most exacting scrutiny.\(^{21}\) If a government regulation involving a public forum is content- or viewpoint-based and discriminates against fully favored speech, the government must demonstrate that "its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."\(^{22}\)

While judicial hostility towards content- and viewpoint-based regulations of speech is clear, identification of qualifying regulations is not always simple.\(^{23}\) Essentially, viewpoint discrimination exists when the government regulates speech based on the opinions, ideologies, or perspectives of the speaker.\(^{24}\) In order to guide courts in determining whether a regulation is content-based, the Supreme Court has stated:

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20. Id. at 642.
21. Id.
The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of regulated speech.  

The Supreme Court has further defined content based laws as those "that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed." The fact that a law has the incidental effect of primarily restricting speech of members of one side of an issue is not, in itself, sufficient to make it content- or viewpoint- based.

2. Forum Analysis

The government's ability to constitutionally regulate speech depends, in part, on the type of government property or forum at issue. The Supreme Court has recognized three types of fora: the traditional public forum, the public forum created by government designation, and the non-public forum.

a. The Traditional Public Forum

At one end of the spectrum is the traditional public forum, entitled to the highest level of protection. A public forum is a place "which by long tradition or by government fiat has been devoted to assembly and debate." Examples of public fora include public streets, sidewalks, and parks. The government may not constitutionally prohibit all speech within a public forum. A regulation that limits only when, where, or how public speech may occur, but not content, is called a time, place, and manner restriction. If a government regulation involving a public forum is a content-neutral time, place, and manner restriction, the government must demonstrate that the regu-
lation is “narrowly tailored to serve a significant government interest, and
leave[s] open ample alternative channels of communication.” However, the
Supreme Court has made clear that, to meet this requirement, the regulation
does not necessarily have to be the least restrictive or intrusive method of
accomplishing the government’s legitimate purpose, but instead must only
demonstrate that the interest would be achieved less effectively without the
regulation.

In *Frisby v. Schultz*, the Supreme Court discussed the government’s
ability to regulate speech in public fora. When abortion protestors picketed
on a public street outside the home of a doctor who performed abortions, the
town passed an ordinance prohibiting individuals from picketing outside the
residence of any individual in the town. A group of abortion protestors sued,
seeking declaratory and injunctive relief, alleging that the ordinance violated
the First Amendment. Ultimately, the Supreme Court upheld the ordinance
as a constitutionally valid time, place, and manner restriction on speech.

The Supreme Court began its analysis by characterizing the residential
streets subject to the ordinance as traditional public fora, thus invoking the
highest level of protection for speech. After finding the ordinance content-
neutral, the Supreme Court engaged in a limiting construction, interpreting
the ordinance as prohibiting only picketing focused on a single residence.
Thus, as interpreted, the ordinance did not prohibit general marching through-
out the neighborhood or up and down a specific block, and therefore, ample
alternative means for the speech existed. The Supreme Court found that the
town’s interest – protection of residential privacy — was significant, espe-
cially in light of the fact that the Court had previously emphasized that the
home is entitled to special protection and there is “no right to force speech
into the home of an unwilling listener.” After stating that “[t]he First
Amendment permits the government to prohibit offensive speech as intrusive
when the ‘captive’ audience cannot avoid the objectionable speech,” the Su-
preme Court found that a resident inside a picketed home is captive because
he or she is figuratively trapped within the home and has no way to avoid the
speech. The Supreme Court then found that the ordinance was narrowly
tailored, given the limited nature and scope of the ban.

37. *Id.* at 477.
38. *Id.*
39. *Id.* at 488.
40. *Id.* at 480-81.
41. *Id.* at 482.
42. *Id.* at 483-84.
43. *Id.* at 484-85.
44. *Id.* at 487.
45. *Id.* at 488.
In *Hill v. Colorado*, the Supreme Court further developed the constitutional guidelines for government regulation of speech in public fora. A Colorado statute prohibited speech-related activities, including knowingly approaching unwilling people for the purpose of protest, education, or counseling, within 100 feet of health care facilities. As in *Frisby*, a group of abortion protestors filed suit seeking a declaration that the statute was facially invalid, as well as an injunction against enforcement. The Supreme Court upheld the statute as a constitutionally valid time, place, and manner restriction of speech.

The Supreme Court first examined the respective interests at stake. As part of this analysis, the Court noted that there is a "significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication." As part of the right to be let alone, the unwilling audience has an interest in avoiding undesired communication, and the government has some ability to protect this interest, depending greatly on the location of the speech. The unwilling listener is entitled to the most protection in the home, but can also be protected in other "confrontational settings." Thus, a speaker's freedom of speech must be balanced against the listener's right "to be let alone." The Supreme Court concluded that the Colorado statute was designed to prohibit only speech aimed at unwilling listeners.

The Supreme Court then determined that the statute was a content-neutral time, place, and manner restriction because it applied to all speech within the specified area and was adopted to serve the state's neutral interest in protecting access and privacy. The Court expressly rejected the argument that the statute was viewpoint-based because its adoption was motivated by the protesting activities of members of one side of the abortion debate.

The Supreme Court next found that the statute was narrowly tailored to serve Colorado's legitimate interests. As part of the narrowly tailored analysis, the Court noted that an important factor is the place where the regulations apply. The government has special interest in regulating activity in some

47. Id. at 707.
48. Id. at 708.
49. Id. at 734.
50. Id. at 714-19.
51. Id. at 715-16.
52. Id. at 716-17.
53. Id. at 717.
54. Id. at 718.
55. Id.
56. Id. at 719-20.
57. Id. at 724.
58. Id. at 725-26.
59. Id. at 728.
public and private places, including schools, courthouses, polling places, health care facilities, and private homes. The government has a special interest in the areas surrounding health care facilities because people entering such facilities are often especially physically and emotionally vulnerable.

The Court then concluded that Colorado had “responded to its substantial and legitimate interest in protecting these persons from unwanted encounters, confrontations, and even assaults by enacting an exceedingly modest restriction on the speakers’ ability to approach.”

b. The Designated Public Forum

The second type of forum is the designated public forum. A designated public forum is “property that the State has opened for expressive activity by part or all of the public.” In order to create a designated public forum, the government must only aim to make the location “generally available” for speakers. Examples of designated public fora include state university facilities available for use by students and school board meetings open to the public. Content- and viewpoint-neutral regulations of speech in designated public fora which have been opened to all speech are subject to the same standard as those in traditional public fora. In contrast, the government may establish a limited designated forum and not allow all types of speech, but such restrictions must be viewpoint-neutral and reasonable in light of the purpose of the property.

c. The Non-Public Forum

The final type of forum is the non-public forum, composed of all remaining government fora. As opposed to the general access of designated public fora, the government grants only selective access to non-public fora. As stated by the Supreme Court,

[T]he government creates a designated public forum when it makes its property generally available to a certain class of speak-

60. Id.
61. Id. at 729.
62. Id.
64. Id.
66. Id. at 267-69.
68. Int'l Soc'y For Krishna Consciousness, Inc., 505 U.S. at 678.
ers . . . the government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, obtain permission, to use it.\textsuperscript{72}

This latter action by the government creates a non-public forum. Examples of non-public fora include a candidate debate sponsored by a state-owned public television broadcaster,\textsuperscript{73} sidewalks on postal property,\textsuperscript{74} and airport terminals.\textsuperscript{75} In order to survive a constitutional attack, a content- and viewpoint-neutral regulation of speech in a non-public forum must only be reasonable in light of the nature and purpose of the property.\textsuperscript{76}

3. Vagueness and Substantial Overbreadth

In addition to the above requirements, a government regulation of speech can also be unconstitutional because of vagueness or substantial overbreadth.

Essentially, "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."\textsuperscript{77} A primary purpose of the doctrine is to require statutes to give fair warning of what behavior will constitute a violation.\textsuperscript{78} Additionally, the Supreme Court has recognized that "the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine--the requirement that a legislature establish minimal guidelines to govern law enforcement.'"\textsuperscript{79} Thus, the vagueness doctrine ensures that law enforcement officers are not able to enforce criminal statutes based on "personal predilections."\textsuperscript{80} Finally, the vagueness doctrine serves to prevent chilling of First Amendment freedoms by causing citizens to restrain from engaging in constitutionally protected activity because of fear of punishment.\textsuperscript{81}

The substantial overbreadth doctrine represents an additional avenue for constitutional challenges of statutes regulating speech. In general, a litigant has standing only to raise his or her own constitutional rights, and not those

\begin{itemize}
\item \textsuperscript{72} \textit{Id.} (citation omitted).
\item \textsuperscript{73} \textit{Id.} at 669, 682.
\item \textsuperscript{74} \textit{U.S. v. Kokinda}, 497 U.S. 720, 730 (1990).
\item \textsuperscript{75} \textit{Int'l Soc'y for Krishna Consciousness, Inc.}, 505 U.S. at 686-87 (O'Connor, J., concurring).
\item \textsuperscript{76} \textit{Id.} at 687.
\item \textsuperscript{77} Kolender v. Lawson, 461 U.S. 352, 357 (1983).
\item \textsuperscript{78} Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).
\item \textsuperscript{79} \textit{Kolender}, 461 U.S. at 357-58 (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).
\item \textsuperscript{80} \textit{Id.} at 358.
\item \textsuperscript{81} \textit{Grayned}, 408 U.S. at 109.
\end{itemize}
However, the Supreme Court has recognized an exception to this general rule in cases dealing with "laws that are written so broadly that they may inhibit the constitutionally protected speech of third parties." The Supreme Court has further explained the substantial overbreadth doctrine by stating,

"Some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected. The Court has repeatedly held that such a statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before it. This exception from the general rule is predicated on a "judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.""

In order to successfully challenge a statute on substantial overbreadth grounds, a litigant must show that there is a "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." Demonstrating that some applications of the statute would be constitutionally impermissible is not adequate for a substantial overbreadth challenge.

**B. Treatment of Funeral Protesting by the Federal Government and Other States**

1. Kansas

Although the interest in prohibiting protest activities has only recently received significant national attention, the Kansas legislature, in 1992, passed the Kansas Funeral Picketing Act in an effort to eliminate funeral picketing by members of Westboro Baptist Church. The Act prohibits "any person . . . picketing before or about any cemetery, church or mortuary within one hour prior to, during and two hours following the commencement of a funeral."
Violation of the Act is classified as a class B person misdemeanor.\textsuperscript{90} The Act specifically states that,

The purposes of this section are to: (1) Protect the privacy of grieving families within one hour prior to, during and two hours following the commencement of funerals; and (2) preserve the peaceful character of cemeteries, mortuaries and churches within one hour prior to, during and two hours following the commencement of funerals.\textsuperscript{91}

After being charged with violations of the Kansas Funeral Picketing Act, members of Westboro Baptist Church, including Fred Phelps, sued Kansas District Attorney, Joan Hamilton, to have the state prosecutions declared unconstitutional and to enjoin all future prosecutions under the Act.\textsuperscript{92} In their facial challenge, the plaintiffs argued that the Act was overbroad because it prohibited some protected speech, unduly vague because it used “before,” “after,” and “about,” and not content-neutral because it specifically targeted members of Westboro Baptist Church.\textsuperscript{93} The District Court partially granted the plaintiffs’ summary judgment motion, ruling that the Act was unconstitutional because the terms “before” and “after a funeral” were vague.\textsuperscript{94} Because the Act’s vagueness was dispositive, the District Court did not consider the plaintiffs’ other constitutional arguments.\textsuperscript{95}

In response, the Kansas legislature amended the Act to include the language, “within one hour prior to, during and two hours following the commencement of a funeral.”\textsuperscript{96} Because of the amendment, the plaintiffs requested that the court modify its original order and address the other constitu-

\textsuperscript{90} Id. at 21-4015(f).
\textsuperscript{91} Id. at 21-4015(c). The Act contains explicit authorization for district courts to enjoin such prohibited conduct and award damages, including punitive awards and attorney fees, against anyone found guilty under the Act. \textit{Id.} at 21-4015(g). The Act additionally contains legislative findings:

(1) It is generally recognized that families have a substantial interest in organizing and attending funerals for deceased relatives; and (2) the interests of families in privately and peacefully mourning the loss of deceased relatives are violated when funerals are targeted for picketing and other public demonstrations; and (3) picketing of funerals causes emotional disturbance and distress to grieving families who participate in funerals; and (4) full opportunity exists under the terms and provisions of this section for the exercise of freedom of speech and other constitutional rights at times other than within one hour prior to, during and two hours following the commencement of funerals.

\textit{Id.} at 21-4015(b). Finally, the Act contains a language making the provisions of the Act severable, in the event any provision is held unconstitutional. \textit{Id.} at 21-4015(h).

\textsuperscript{93} Phelps v. Hamilton, 120 F.3d 1126, 1132 (10th Cir. 1997).
\textsuperscript{94} Phelps v. Hamilton, 122 F.3d 1309, 1313, 1315 (10th Cir. 1997).
\textsuperscript{95} Phelps, 120 F.3d at 1132.
\textsuperscript{96} Phelps, 122 F.3d at 1315.
tional issues.\textsuperscript{97} After denying this motion for modification, the District Court lifted a stay of the state criminal proceedings.\textsuperscript{98}

On appeal, the United States Court of Appeals for the Tenth Circuit upheld the District Court’s denial of plaintiffs’ motion to reconsider its order finding the Act unconstitutionally vague, stating that “the plaintiffs have not demonstrated any manifest error of law in the order or newly discovered evidence which indicates that that order should have been reopened.”\textsuperscript{99} Additionally, the Tenth Circuit upheld the District Court’s lifting of the stay of the state criminal proceedings.\textsuperscript{100}

During the most recent legislative session, the Kansas legislature considered amending the Kansas Funeral Picketing Act.\textsuperscript{101} Senate Bill 421, introduced on January 23, 2006, and passed by the Senate on February 23, 2006, would have amended the current Kansas Funeral Picketing Act and made it unlawful for anyone to picket or protest within 300 yards of any funeral.\textsuperscript{102} The prohibitions, which did not apply to public streets, public sidewalks, or other public places, would have applied one hour prior to, during, and two hours after a funeral.\textsuperscript{103} This violation would have been a class B person misdemeanor.\textsuperscript{104} Ultimately, the bill died in conference committee during May 2006.\textsuperscript{105}

\begin{itemize}
\item \textsuperscript{97} Id.
\item \textsuperscript{98} Id.
\item \textsuperscript{99} Id. at 1324.
\item \textsuperscript{100} Id. at 1325. In a subsequent action, the Tenth Circuit reversed the District Court’s denial of plaintiffs’ motion for attorney’s fees, finding that plaintiffs’ partial success was sufficient. \textit{Phelps}, 120 F.3d at 1133.
\item \textsuperscript{102} Id.
\item \textsuperscript{103} Id.
\item \textsuperscript{104} Id.
\item \textsuperscript{105} \textit{See} Kansas Legislature Bill Tracking, Full History on Bill 421, \textit{available at} http://www.kslegislature.org/legsrvbilltrack/searchBills.do?sessionid=88111E404CB837236521197770C9C2F9D.
\end{itemize}
2. Other States

In addition to Missouri, Indiana, Kentucky, Iowa, Ohio, South Dakota, Wisconsin, and Virginia all passed legislation during the


107. In Iowa, House File 2365, introduced on February 14, 2006, passed by the House on February 22, 2006, and passed by the Senate on March 7, 2006, adds a new section under disorderly conduct for actions taken at a funeral or memorial service. H.F. 2365, 81st Gen. Assem. (Iowa 2006), http://www.legis.state.ia.us/aspx/COOL-ICE/BySubject.htm. It prohibits a person, within 500 feet of a funeral or within 500 feet of a funeral procession, from making loud noise which causes unreasonable distress to attendees of a funeral, using abusive or threatening language which is likely to incite a violent reaction by another, or intentionally disturbing or disrupting a funeral. Id. This legislation was signed into law by the Iowa Governor on April 17, 2006. Id.


109. In Ohio, House Bill 484, introduced on January 24, 2006, amends current law, which prohibits picketing any funeral establishment or funeral procession within one hour prior to and during a funeral, to specifically prohibit such picketing and protest activities within 300 feet of any such establishment within one hour before, one hour after, and during any funeral. H.B. 484, 126th Gen. Assem., Reg. Sess. (Ohio 2006), http://www.legislature.state.oh.us/bills.cfm?ID=126_HB_484. A violation by a person is a misdemeanor of the third degree. Id. This legislation was passed by the Ohio House on May 10, 2006, passed by the Ohio Senate on May 23, 2006, signed into law by the Ohio Governor on May 26, 2006, and will be effective September 4, 2006. http://lsc.state.oh.us/coderev/houl26.nsf/House+Bill+Number/0484?OpenDocument.

110. In South Dakota, Senate Bill 156, introduced on January 20, 2006, passed by the Senate on February 1, 2006, and passed by the House and signed by the South Dakota governor on February 13, 2006, prohibits picketing at any funeral from one hour prior to the commencement to one hour after the completion of a funeral. S.B. 156, 81st Leg. Sess., (S.D. 2006), available at http://legis.state.sd.us/sessions/2006/bills/SB156enr.htm. See also http://legis.state.sd.us/sessions/2006/156.htm. A violation is a Class 2 misdemeanor,
2006 legislative session to prohibit specified protesting activities at funerals. Such laws vary from state to state, but most contain a distance restriction of 300 to 500 feet and a time restriction of one hour prior to any funeral until one hour after any funeral. Most of the laws make such protesting activities a misdemeanor offense, although subsequent violation can be a felony.

At least five other states, Illinois, Nebraska, Oklahoma, Vermont, and West Virginia considered legislation during the 2006 legislative session that would have placed limits on the ability to protest at funerals.

and the Act specifically authorizes the circuit court to enjoin such behavior against repeat offenders. S.D. S.B. 156. The Act contained an emergency clause and was effective immediately upon passage. Id.

111. On February 20, 2006, the Wisconsin governor approved Senate Bill 525, creating Wisconsin Act 114, which amends the Wisconsin Criminal Code to add a disorderly conduct provision for disruption of a funeral or memorial service or a funeral procession. Wis. Act 114, 2005 Legis. Sess. (2006), available at http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=241612&infobase=acts05.nfo&soffpage=Browse_Frame_Pg. The Act prohibits disorderly conduct within 500 feet of any entrance to a funeral for the 60 minutes preceding, during, and 60 minutes after a funeral or memorial service. Id. Further, during the same time frame, the Act prohibits blocking access to a funeral facility. Id. The Act additionally prohibits intentionally impeding vehicles in a funeral procession. Id. An initial violation is a Class A misdemeanor, and a subsequent violation is a Class I felony. Id.

112. Virginia House Bill 372, introduced on January 11, 2006, passed by the House on February 14, 2006, passed by the Senate on March 1, 2006, and approved by the Virginia Governor on March 30, 2006, amends the Code of Virginia disorderly conduct provision to create an offense for demonstrations at solemn ceremonies. H.B. 372, 2006 Reg. Sess. (Va. 2006), available at http://leg1.state.va.us/cgi-bin/legp504.exe?061+ful+HB372ER. A person will now be guilty of a Class 1 misdemeanor for intentionally or recklessly causing public inconvenience, annoyance, or alarm by disrupting a funeral or memorial service. Id.

113. See supra notes 106-112 and accompanying text.

114. See supra notes 106-112 and accompanying text.


3. Federal Law

On May 29, 2006, President Bush signed the “Respect for America’s Fallen Heroes Act” into law.120 This Act prohibits demonstrations on cemeteries controlled by the National Cemetery Administration or in Arlington National Cemetery, unless previously approved by the appropriate authority.121 Representative Rogers, the bill’s original sponsor, concluded his testimony in favor of the law by stating, “America has a responsibility to ensure that the families of our fallen heroes can grieve in peace and with dignity. It is a matter of ensuring both a sense of decency and civility.”122

Specifically, the Act contains a time limitation of sixty minutes before until sixty minutes after any funeral, memorial service, or other ceremony.123 Furthermore, a given demonstration is prohibited only if it occurs (1) within 150 feet of any entry to or exit from an affected cemetery or (2) within 300 feet of an affected cemetery and impedes entry to or exit from the cemetery.124 The Act’s definition of “demonstration” includes picketing, speech that is not part of a funeral, memorial service, or other ceremony, display of any type of flag or banner that is not part of a funeral, memorial service, or other ceremony, and distribution of any written material that is not part of a funeral, memorial service, or other ceremony.125 Violation of the law can result in a fine, imprisonment for not more than a year, or both.126

IV. COMMENT

If the Spc. Edward Lee Myer’s Law is enforced against members of the Westboro Baptist Church, as Governor Matt Blunt has suggested, it is clear that Westboro Baptist Church will challenge the law as an unconstitutional

121. 38 U.S.C. § 2413 (2000). The Act was sponsored by Representative Mike J. Rogers, in addition to 55 co-sponsors, and was supported by the American Legion – Department of Michigan, American Veterans, the Disabled American Veterans, the Fleet Reserve Association, Gold Star Wives of America, the Jewish War Veterans of the USA, the Military Order of the Purple Heart – Department of Michigan, the Veterans of Foreign Wars – Department of Michigan, the Vietnam Veterans of America, and We Care America. Testimony Before the H. Disability Assistance and Memorial Affairs Subcomm.: Legislative Hearing on Pending Bills, Including H.R. 5037 (Apr. 6, 2006) [hereinafter Legislative Hearing] (statement of Mike Rogers, Representative), available at http://veterans.house.gov/hearings/schedule109/apr06/4-6-06/MikeRogers.pdf.
122. Legislative Hearing, supra note 121.
124. Id.
125. Id.
126. Id. § 1387.
regulation of speech. In that event, the courts will need to decide if the law is a constitutionally permissible time, place, and manner restriction. This section will outline a potential analysis of section 578.501 under First Amendment law and examine the possible ramifications of the legislation.

A. Content- and Viewpoint-Neutrality

Given a constitutional challenge to section 578.501, a court will first determine whether the law is content- and viewpoint-neutral. Opponents of the legislation might argue that it is not content- and viewpoint-neutral because it was adopted as a direct result of disagreement with Westboro Baptist Church's message, its purpose is to restrict the speech of Westboro Baptist Church members, and it has a disproportionate effect on Westboro Baptist Church members because they are one of the only groups that protests at funerals. However, under current Supreme Court precedent, these arguments will likely not be accepted.

Instead, it is likely that a court will determine that this law is both content- and viewpoint-neutral for several reasons. First, the court will examine the Missouri legislature’s purpose in passing the legislation, given that governmental purpose is the principal inquiry in content- and viewpoint-neutrality determinations. Although the bill does not contain a clear statement of purpose, the section describing the emergency clause does state, "[b]ecause immediate action is necessary to protect the emotional well-being of persons paying respects to the deceased, section A of this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety." Thus, it appears that at least part of the legislature’s purpose was the protection of the emotional well-being of funeral attendees. This purpose appears to be content- and viewpoint-neutral and can be justified without reference to content or viewpoint. Absent an express statement by the Missouri government as to some more illicit content- or viewpoint-based purpose, a court is likely to refrain from speculating about possible legislative motives.

Second, the law does not discriminate in its text on the basis of either content or viewpoint. Instead the law states, "It shall be unlawful for any person to engage in picketing or other protest activities..." Facially, then, the law applies equally to all picketing and protesting within the proscribed locations and times, regardless of content or viewpoint. This language stands in sharp contrast to many of the Supreme Court cases holding that a statute is not content- or viewpoint-neutral because the text contained an explicit ex-

130. Mo. S.B. 578 (emphasis added).
emtion for certain kinds of speech.131 This law contains no such exemption and seemingly applies without regard to the speaker’s content or viewpoint.

Third, any argument that the law is content- or viewpoint-based because it was adopted as a direct result of the funeral protesting activities of Westboro Baptist Church will be rejected. In Hill v. Colorado, the Supreme Court explicitly stated that the fact that the law in that case had been passed as a direct result of protests by the anti-abortion plaintiffs did not, by itself, make the law viewpoint-based.132 As in Hill, the fact that the Missouri legislature was directly responding to the funeral protesting activities of Westboro Baptist Church in passing this legislation will not be enough to make the law viewpoint-based.

Finally, the fact that the law may have an incidental disproportionate effect on the members of Westboro Baptist Church because it is one of the only organizations in Missouri that actively protests at funerals is irrelevant in First Amendment analysis. The Supreme Court has explicitly held that such disproportionate effect, in itself, is not sufficient to render a law content- or viewpoint-based.133 Given this analysis, it is likely a court will find that section 578.501 is content- and viewpoint-neutral and thus, not subject to the strict scrutiny associated with content- and viewpoint-based regulations of speech.

B. Forum Analysis

In order to determine the applicable level of scrutiny, the court will next determine the government fora affected by section 578.501. Given the language of the statute, which prohibits protesting “in front of” or “about” a funeral establishment, it is not entirely clear what types of fora are directly affected by the law. However, it is likely that in most instances this language will prevent protesting on public streets and sidewalks. These types of areas are usually within close proximity to funeral establishments and probably represent the nearest areas available to protesters, unless the private owners of the churches, cemeteries, or funeral establishments consent to protesting on their property. As traditional public fora, public streets and sidewalks are entitled to the highest level of constitutional protection. Given this possibility of application to public streets and sidewalks, a court will likely treat the provision as regulating at least some speech in traditional public fora and will analyze the statute under the applicable traditional public fora standards. In any event, if section 578.501 is a constitutionally permissible regulation of speech in traditional public fora, it would also be so in both designated public fora and non-public fora. If the traditional public fora standards are applied, in order for section 578.501 to withstand constitutional attack, it will be nec-

ecessary for the government to show that the regulation: (1) serves a significant government interest, (2) is narrowly tailored, and (3) leaves open ample alternative channels of communication.\(^1\)

A court will likely find that the first element is met in this case. Unlike some of the bills in other states,\(^\text{135}\) the Missouri legislature did not specifically identify legislative findings or purposes within the text of the bill itself, other than in the section describing the emergency clause, which states "immediate action is necessary to protect the emotional well-being of persons paying respects to the deceased."\(^\text{136}\) While it is unfortunate, from the standpoint of judicial review, that the Missouri legislature was not explicit in detailing its purposes in passing section 578.501, this lack of explanation will not necessarily prevent a court from determining that the regulation serves a significant government interest.

Even if the sole interest asserted by the government in support of section 578.501's constitutional validity is protection of the emotional well-being of funeral attendees, a court could find this to be sufficiently significant. In *Hill v. Colorado*, the Supreme Court noted that there is an important difference between government regulation of speech to a willing audience and regulation of speech designed to protect an unwilling audience.\(^\text{137}\) The Court additionally stated that the government has some ability to protect unwilling listeners' right to be let alone, especially in confrontational settings, such as private homes.\(^\text{138}\) The Court expanded this category to include health care facilities because of the potential physical and emotional vulnerability of people entering such facilities.\(^\text{139}\) The regulation at issue here is designed to protect people from unwanted communications surrounding funerals. Funerals, like the health care facilities at issue in *Hill*, could certainly be viewed as confrontational, given the emotional vulnerability of attendees and potential traumatic nature of such events. Therefore, it seems that, under the Supreme Court's analysis in *Hill*, the Missouri government has a special interest in and ability to protect unwilling listeners' right to be let alone at funerals, and that section 578.501 effectuates this interest by prohibiting protesting for a limited time before, during, and after funerals.

In analyzing Missouri's interest in protecting the emotional well-being of funeral attendees, a court might additionally consider the effect such unwelcome speech has on its audience. The Supreme Court in *Frisby v. Schultz*

\(^{134}\) Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

\(^{135}\) The Kansas Funeral Picketing Act provides a good example of legislation that specifically identifies legislative findings and purposes within the text of the legislation. *See Kan. Stat. Ann.* § 21-4015 (1995). It specifically lists its purposes as protecting the privacy of grieving families and preserving the peaceful nature of cemeteries, mortuaries, and churches during times when funerals are held. *Id.*

\(^{136}\) S.B. 578, 93d Gen. Assem., 2d Sess. (Mo. 2006).

\(^{137}\) 530 U.S. 703, 715-16 (2000).

\(^{138}\) *Id.* at 716-17.

\(^{139}\) *Id.* at 729.
found that the government's interest in protection of residential privacy was sufficient, in part, because of the idea that people trapped inside their homes by protestors are essentially a captive audience. 140 Although section 578.501 deals with churches, cemeteries, and funeral establishments, as opposed to homes, this rationale might apply here. Like people trapped within their homes forced to listen to outside speech, funeral attendees are forced to listen to protests taking place outside. Once a person makes the decision to attend a picketed funeral, he or she has no opportunity to avoid speech by the picketers. The decision is simply to attend and hear the unwelcome speech or not attend and miss the opportunity to pay final respects to a loved one. This appears to be a classic captive audience problem, and given this consideration, a court will likely find that the government's interest in regulation is significant.

Likewise, the second criterion, narrow tailoring, is met in the current case for several reasons. First, the time period during which protesting activity is prohibited is relatively narrow and is directly related to the purpose of section 578.501. The legislation prohibits protesting "within one hour prior to the commencement of any funeral . . . until one hour following the cessation of any funeral." 141 Thus, it seems narrowly drawn to prohibit protesting in the affected areas only during the times necessary to serve the government's interest of protecting the emotional well-being of funeral attendees. Because funeral attendees often arrive early to help with preparation or privately pay their respects, and because some may stay after completion of the service to pay their respects or offer condolences, it was reasonable for the legislature to proscribe protesting within this time period.

Second, the punishment, a class B misdemeanor for a first-time offender and a class A misdemeanor for a repeat offender, seems narrowly tailored to provide the necessary deterrent effect without being overly harsh. The Missouri legislature could have opted for a lesser punishment, such as a hefty fine. However, given the legislature's desire to immediately eliminate this type of protest and Westboro Baptist Church's adamant dedication to continue protesting, a misdemeanor offense, with the possible punishment of imprisonment, seems necessary.

Third, the nature of funeral establishments might bolster the government's narrowly tailored argument. In Hill, the Court noted that an important factor in narrow tailoring analysis is the place where the regulations apply, because the government has a special interest in some public and private places, including health care facilities, due to the potential physical and emotional vulnerability of people entering such facilities. 142 As with health care facilities, people entering funeral establishments are particularly emotionally vulnerable. Thus, Hill's rationale might be extended to provide the govern-

ment with a special interest to regulate speech around places where funerals are commonly held. If so, the Missouri legislature responded to this interest in passing section 578.501.

Finally, it is important to note that the Supreme Court has made clear that, in order to meet the narrowly tailored prong, it is not necessary that a regulation be the least restrictive method of accomplishing the government's purpose, but only that the interest would be achieved less effectively without the regulation. Therefore, the fact that section 578.501 might not represent the least restrictive means of protecting the emotional well-being of funeral attendees is insufficient. It is sufficient that protection of the emotional well-being of funeral attendees would be greatly reduced without the regulation. Given this analysis, a court will likely find that section 578.501 is narrowly tailored to serve the government's legitimate purpose, thus meeting the second prong of the test.

The third and last element, ample alternative channels of communication, is probably met in this case, as well. In Frisby, the Supreme Court held that the statute left open ample alternative channels of communication because it only prohibited picketing in front of a single, targeted house. As interpreted by the Court, the statute did not therefore prohibit general marching throughout the neighborhood or streets. This general marching possibility provided the requisite ample alternative channel of communication for protestors.

In the present case, a court will not need to engage in such a limiting construction because the text itself shows that the regulation of speech is quite minimal – people are essentially prohibited solely from protesting around a place where a funeral is about to be held, is being held, or was just completed. The legislation does not prohibit all speech in the affected areas at all times, nor does it affect areas that are not near churches, cemeteries, or funeral establishments. Thus, would-be funeral protestors have every other area of the world open to speech available, other than the area immediately surrounding churches, cemeteries, and funeral establishments near times when funerals are conducted. If marching around the neighborhood was a sufficient alternative channel of communication in Frisby, the availability of these areas during times other than when funerals are being held should likewise constitute an alternative channel of communication. While such funeral protestors might maintain that these other areas are not as effective in communicating their message, alternative channels do exist for their speech, which is all that is required.

144. Frisby, 487 U.S. at 483-84.
145. Id.
146. Id.
147. See supra notes 29-62 and accompanying text.
C. Vagueness and Substantial Overbreadth

It appears that a court will have ample authority to find that section 578.501 is narrowly tailored to serve a significant government interest and leaves open ample alternative channels of communication, thus satisfying the test for regulations of speech in traditional public fora. In addition to this test, a court will also analyze the law’s vagueness in considering its constitutionality. Opponents of the regulation might argue that it is unconstitutionally vague because of the use of language such as “in front of or about,” instead of a specific distance restriction. It might be argued that such vague language does not provide adequate notice to would-be protestors as to the exact behavior that constitutes a violation and therefore, has the effect of chilling protected speech. In addition, opponents might argue that such vague language does not establish the guidelines necessary to govern law enforcement in application of the law, and thus allows the potential for discriminatory enforcement based on the personal predilections of individual officers.

In contrast, the government might maintain that section 578.501 is not unconstitutionally vague because it provides sufficient notice to would-be protestors and adequate guidelines to law enforcement to prevent arbitrary and discriminatory enforcement. Although the law does not contain a distance requirement, as many of the other statutes and proposed legislation in other states, it does contain a clear time frame of one hour prior to the commencement until one hour following the cessation of any funeral at the specified locations. This specification provides sufficient notice and guidelines to would-be protestors and law enforcement.

It is not clear how a court will decide this issue. In Phelps v. Hamilton, plaintiffs argued that the terms “before,” “after,” and “about” in the statute were unconstitutionally vague.148 The District Court agreed, finding the law unconstitutional because “before” and “after a funeral” were impermissibly vague.149 It appears that, despite plaintiffs’ argument that “about” was unconstitutionally vague as a distance specification, the District Court instead decided the issue solely on the basis of the vague time requirement. If in fact the District Court did not agree that “about” was unconstitutionally vague as a distance specification, this would support Missouri’s position. Section 578.501 contains an explicit time requirement of one hour prior to the commencement until one hour following the cessation of any funeral.150 The only possible vague part of the regulation is the distance requirement, which contains language similar to that challenged and not decided in Phelps. It therefore appears that the Missouri legislature addressed and corrected the vague part of the statute struck down in Phelps.

148. 120 F.3d 1126, 1132 (10th Cir. 1997).
149. Phelps v. Hamilton, 122 F.3d 1309, 1313, 1315 (10th Cir. 1997).
150. See S.B. 578, 93d Gen. Assem., 2d Sess (Mo. 2006).
If instead a court decided that “in front of or about” is unconstitutionally vague, the Missouri legislature has made clear that it intends to pass an additional bill limiting picketing and protesting within 300 feet of any church, cemetery, or funeral establishment within the applicable time frame. This language is sufficiently unambiguous, so if the original regulation is struck down on the basis of vagueness, it is clear that Missouri is prepared with an alternative. However, it is unclear how satisfactory this alternative would be, considering that the protestors at Edward Lee Myers’ funeral, which prompted this legislation, were more than 300 feet away.

Finally, in addition to the traditional public fora test and vagueness, section 578.501 might be challenged under the substantial overbreadth doctrine. Indeed, this argument was raised in Phelps, but it was not decided. Opponents might argue that, because the law does not contain an exact definition of picketing and protesting, it impermissibly prohibits some protected speech. Due to this lack of definition, the regulation will prohibit some speech that does not effectuate Missouri’s purpose of protecting the emotional well-being of funeral attendees, such as messages in support of soldiers.

This argument is unlikely to be successful, however. The Supreme Court has maintained that, in order to successfully demonstrate substantial overbreadth, a litigant must do more than merely show that some possible applications of the regulation would be constitutionally impermissible. Thus, while some applications of section 578.501 might not further Missouri’s purpose in passing the legislation, a greater showing than this is necessary. Instead, an opponent would have to demonstrate that the regulation will significantly compromise the rights of third parties. This burden cannot be met here.

In the event of a constitutional challenge to section 578.501, it is clear that a court will have authority to find it constitutionally permissible, given the requirements of the traditional public fora test, the vagueness doctrine, and the substantial overbreadth doctrine. And, even in the event that the law is struck down, the Missouri legislature has indicated that it is willing to adopt a secondary provision addressing any constitutional concerns that will continue to limit the ability to protest or picket at funerals within Missouri.

V. CONCLUSION

With the passage of Senate Bill 578, Missouri became one of the first states to affirmatively address and prohibit the recent military funeral protest-
ing activities of members of Westboro Baptist Church. When this law is enforced against these funeral protesting activities, it will probably be challenged as an unconstitutional regulation of freedom of speech. Given such a challenge, it is likely that a court, following Supreme Court precedent, will uphold the law as a valid regulation of speech. Moreover, if a court reaches the opposite conclusion, it is clear that the Missouri legislature is prepared with alternatives that will continue to limit the ability to protest at funerals within Missouri for the foreseeable future.

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